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# Masson v. New Yorker Magazine: Actual Malice and Direct Quotations--The Constitutional Right to Lie

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## *Masson v. New Yorker Magazine*:<sup>1</sup> Actual Malice and Direct Quotations—The Constitutional Right to Lie.

The use of quotation marks is generally not controversial. Most people understand their significance. Statements in quotation marks not only convey to the reader the speaker's thoughts, they also convey the speaker's exact words. This understanding is not only commonplace, it is entirely consistent with common journalistic practice.<sup>2</sup>

In a recent decision, however, the Ninth Circuit Court of Appeals has set forth a different understanding which changes the meaning of quotation marks. According to the court, as long as words are the rational interpretation of a speaker's actual words, they too may be placed in quotation marks.<sup>3</sup> This decision raises the question—what remains of the quotation mark?

In *Masson v. New Yorker Magazine*, the Ninth Circuit declined to infer actual malice from evidence showing that quoted statements did not contain the plaintiff's exact words. The court held that as long as the statement within quotation marks either (1) represented a rational interpretation of ambiguous remarks, or (2) did not alter the substantive content of unambiguous remarks actually made, the court would not infer actual malice.<sup>4</sup> This decision sparked a debate among members of the media about the proper use of quotations and has some commentators speculating that the decision provides the media with a constitutional right to lie.<sup>5</sup>

This Comment reviews the Ninth Circuit's decision, including the case law on which its holding depends. Part I of this Comment presents the relevant facts and holdings in *Masson*. Part II briefly discusses the defamation cause of action and the Supreme Court decisions relevant to *Masson*. Part III analyzes the Ninth Circuit's decision and specifically, the test the court applies. Part III also reviews the case law on which the court depends and suggests that these cases do not support the Ninth

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1 881 F.2d 1452 (9th Cir. 1989), *aff'g* 686 F. Supp. 1396 (N.D. Cal. 1987).

2 See H. GOODWIN, *GROPING FOR ETHICS IN JOURNALISM* 171 (1983) ("Quotation marks are supposed to say to the reader, '[w]hat's inside here are the exact words of whoever is being quoted. Verbatim.'"); B. HENDERSON, *HOW TO BULLET-PROOF YOUR MANUSCRIPT* 60 (1986) ("When you put quotation marks on either side of a statement, it is sacrosanct. These words and the meaning of them belong not to [the writer] but to the person who is quoted."). Note that practicing journalists also subscribe to a selective use of quotation marks. See *infra* note 5.

3 *Masson*, 881 F.2d at 1456.

4 *Id.*

5 See, e.g., Warren, *To tell the truth, Has the court given journalists a right to lie?*, Chicago Tribune, Aug. 30, 1989, § C (Tempo), at 1, col. 1 ("To invoke the right to deliberately distort what someone else has said is to assert the right to lie in print."); Henry, *The Right to Fake Quotes: A Journalist's Legal Victory Raises Questions About Ethics*, TIME, Aug. 21, 1989, at 49 (quoting Bill Monroe, editor for the Washington Journalism Review: "I don't see how any journalist can be happy with a judge condoning tampering with specific quotes."); Rosenstiel, *Wide Respect For Sanctity Of The Spoken Word; Most Newspapers Have Strict Rules On Quotes*, Los Angeles Times, Aug. 5, 1989, § 1, at 29, col. 1 (quoting Jane Chusmir, editor of the Miami Herald: "We believe if it is in quotes it should be what the person said." Also quoting Shelby Coffee, editor of the Los Angeles Times: "When we use quote marks, what's inside those quote marks should be what the person said.").

Circuit's holding in *Masson*. This discussion also asserts that the court improperly expanded the definition of actual malice with implications for, and potentially adverse effects on, future defamation cases. Moreover, Part III suggests that technological advances and current journalistic practice render the court's decision inappropriate. Part IV of the Comment recommends a more effective approach to evaluating actual malice in cases of erroneous quotation and discusses the potential advantages of such an approach. Lastly, Part V concludes that the Ninth Circuit's decision is incorrect and should be overturned.

### I. *Masson v. New Yorker Magazine*

In 1981, Jeffrey Masson was fired from his position as Projects Director for the Sigmund Freud Archives.<sup>6</sup> Janet Malcolm, an independent journalist, interviewed Masson in 1982 about the controversy surrounding his tenure at the Archives.<sup>7</sup> A series of interviews spanning many months led to an article published in two successive issues of *The New Yorker* magazine<sup>8</sup> and subsequently served as the basis for a book written by Malcolm and published by Alfred Knopf, Inc. titled *In the Freud Archives*.<sup>9</sup>

Masson sued Malcolm, *The New Yorker*, and Alfred Knopf, Inc., claiming that the article repeatedly misquoted him and that it portrayed him as "egotistical, vain and lacking in personal honesty and moral integrity."<sup>10</sup> Specifically, Masson alleged that Malcolm fabricated numerous statements that the article attributed directly to him.<sup>11</sup> Masson sued Malcolm and the other defendants for defamation and invasion of privacy.<sup>12</sup> The district court granted partial summary judgment for all defendants as to four of Masson's allegations on August 19, 1986,<sup>13</sup> and summary judgment as to the remaining eight allegations on August 17, 1987.<sup>14</sup>

6 Brief for Appellant at 4, *Masson v. New Yorker Magazine*, 881 F.2d 1452 (9th Cir. 1989) (Nos. 87-2665; 87-2700) [hereinafter Brief for Appellant]. Masson accepted the position in 1980. *Id.* From 1975 to 1980 he was a full professor of Sanskrit and Indian Studies at the University of Toronto. *Id.* He trained in psychoanalysis from 1970 to 1978 when he graduated as a psychoanalyst. *Id.*

7 *Id.* at 5. See also Brief for Appellees at 4, *Masson v. New Yorker Magazine*, 881 F.2d 1452 (9th Cir. 1989) (Nos. 87-2665, 87-2700). The controversy related to Masson's claims that he had located in the Archives evidence to support his contention that Freud abandoned his Seduction Theory which linked adult psychological trauma to childhood sexual abuse. Masson claimed that his discoveries were suppressed by Anna Freud and Kurt Eissler, the other Directors of the Archives. Brief for Appellant, *supra* note 6, at 4.

8 Malcolm, *Annals of Scholarship: Trouble in the Archives*, THE NEW YORKER, Dec. 5, 1983 (Part I) and Malcolm, *Annals of Scholarship: Trouble in the Archives*, THE NEW YORKER, Dec. 12, 1983 (Part II).

9 See J. MALCOLM, IN THE FREUD ARCHIVES (1984).

10 *Masson v. New Yorker Magazine*, 686 F. Supp. 1396, 1397 (N.D. Cal. 1987), *aff'd*, 881 F.2d 1452 (9th Cir. 1989).

11 *Id.* at 1397.

12 The district court noted that Masson agreed that the malice standard for privacy is the same as for defamation. *Id.* at 1407 & n.7. As such, neither the district court nor the Ninth Circuit addressed this cause of action in their opinions. See also *Masson*, 881 F.2d at 1463.

13 *Masson*, 686 F. Supp. at 1397 & n.2. In his fourth amended complaint, Masson identified 12 quotations that he alleged were libelous. The district court granted summary judgment as to four of them. *Id.* at 1397.

14 *Id.*

On appeal, the Ninth Circuit reviewed the allegedly defamatory passages to determine whether a jury could find actual malice solely from evidence demonstrating that the quotations were fabricated. The Ninth Circuit reviewed *de novo* the trial court's grant of summary judgment,<sup>15</sup> and by applying principles of law adopted from other circuits, the court affirmed the district court's grant.<sup>16</sup>

## II. Defamation and the Actual Malice Standard

Defamation is a cause of action stemming from injury to a person's reputation. The term defamation refers to either the libel<sup>17</sup> or slander<sup>18</sup> cause of action. Although libel and slander developed as independent causes of action with origins rooted in the English common law,<sup>19</sup> the Supreme Court decision in *New York Times v. Sullivan*<sup>20</sup> merged the two actions as far as their constitutional requirements are concerned. Since the dispute in *Masson* centered around a magazine article, the appropriate cause of action was libel.

To recover on an action for libel, a plaintiff must establish a prima facie case demonstrating that a defendant (1) published (2) a defamatory statement about the plaintiff (3) that is false and (4) with the proper intent to publish the defamation.<sup>21</sup> The common law component of libel that has undergone the most change as a result of *Sullivan* is that of intent. The Court has replaced the concept of intent with the term actual

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

16 *Id.* at 1464.

17 Libel is a "method of defamation expressed by print, writing, pictures or signs." BLACK'S LAW DICTIONARY 824 (5th ed. 1979).

18 Slander is a "method of defamation expressed by oral expression or transitory gestures." *Id.* at 1244.

19 W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER & KEETON ON THE LAW OF TORTS 772 (5th ed. 1984) [hereinafter PROSSER]. In England, defamation did not constitute a common law cause of action until the 16th century. *Id.* Previously, such actions fell under the jurisdiction of seigniorial, and then later, ecclesiastical courts. *Id.* These courts regarded slander as a sin, with punishment of penance. W. PROSSER, J. WADE & V. SCHWARTZ, CASES AND MATERIALS ON TORTS 853 (8th ed. 1988) [hereinafter CASEBOOK]. As these courts faded in influence, the common law courts began to assume jurisdiction over slander as a tort action. *Id.* The basis for this jurisdiction was the presence of temporal harm separate from the spiritual harm. *Id.*

Beginning in the 17th century, the Court of Star Chamber began independently to punish the crime of political libel. PROSSER, *supra*, at 772. Its objective was to suppress political sedition that had grown popular with the advent of printing. *Id.* The action subsequently expanded to include non-political libel and tort damages were permitted, possibly as a substitute for dueling, which had been outlawed. CASEBOOK, *supra*, at 854.

This evolution has caused slander and libel to develop as distinct doctrines with special rules unique to each. This remained true even after the decline of the Star Chamber when the common law courts assumed jurisdiction over both causes of action. While the causes of action remained separate, the term defamation is commonly used to refer to either tort.

The proliferation of libel and slander actions in England and the general support for free speech and press in the United States resulted in these causes of action being disfavored by the courts. PROSSER, *supra*, at 772. In the United States, the Supreme Court permanently altered the development of both doctrines in 1964 when it constitutionalized the area of defamation with regard to the protection guaranteed by the first amendment in *New York Times v. Sullivan*, 376 U.S. 254, 270, 279-80 (1964) (discussing the constitutional need for the actual malice standard).

20 376 U.S. 254 (1964).

21 PROSSER, *supra* note 19, at 802. See note 90 for a discussion of plaintiff's burden of proving falsity.

malice.<sup>22</sup> Trying to determine exactly what constitutes actual malice has been much litigated and was an important issue in *Masson*.

### A. Intent—The Actual Malice Standard

Citing the need for uninhibited, robust debate on public issues, the Supreme Court extended the constitutional protection of free speech and press to libelous statements in *Sullivan*.<sup>23</sup> In that case, the Court held that for a public official<sup>24</sup> to recover damages for a defamatory falsehood, he must prove that the statement was made with "actual malice."<sup>25</sup> Actual malice does not refer to any ill-will or bad motive but rather to a certain level of awareness as to whether the statement was false.<sup>26</sup> The Supreme Court has never completely defined actual malice<sup>27</sup> but has held that it includes situations where a defendant has falsely published a statement with either a "high degree of awareness of . . . probable falsity"<sup>28</sup> or "serious doubts as to the truth [or falsity of the] publication."<sup>29</sup> This definition is vague and has sparked much litigation regarding what constitutes actual malice. The *Masson* court noted that the Supreme Court has never addressed whether a court may infer actual malice solely from evidence that defamatory statements presented in quotation marks are not the exact words of the speaker.<sup>30</sup>

### B. Actual Malice and Summary Judgment

The concept of actual malice raises a separate issue in the context of summary judgment. The issue involves the constraints under which a judge operates when evaluating a defendant's motion for summary judgment in defamation actions. The Supreme Court responded to criticism that traditional summary judgment procedures<sup>31</sup> were inconsistent with

<sup>22</sup> *Sullivan*, 376 U.S. at 279-80.

<sup>23</sup> *Id.*

<sup>24</sup> *Sullivan* dealt with a public official defendant and statements made in reference to his official capacity. The Supreme Court subsequently extended the actual malice standard to public figure plaintiffs. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342-45 (1974) (extends application of the *Sullivan* standard to public figures but not to private individuals). *Masson* admitted that he was a public figure and that he was required to prove *Malcolm* was "motivated by actual malice." *Masson v. New Yorker Magazine*, 881 F.2d 1452, 1453 (9th Cir. 1989).

<sup>25</sup> *Sullivan*, 376 U.S. at 279-80. The Court defined actual malice as "knowledge that it was false or with reckless disregard of whether it was false or not." *Id.*

<sup>26</sup> See *infra* note 83 noting this distinction between actual malice and ill-will.

<sup>27</sup> See *Harte-Hanks Comm., Inc. v. Connaughton*, 109 S. Ct. 2678, 2685 (1989) ("the concept of 'reckless disregard' 'cannot be fully encompassed in one infallible definition.'") (citing *St. Amant v. Thompson*, 390 U.S. 727, 730 (1968)).

<sup>28</sup> *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964) (discussing the *Sullivan* standard).

<sup>29</sup> *St. Amant*, 390 U.S. at 731.

<sup>30</sup> *Masson v. New Yorker Magazine*, 881 F.2d 1452, 1454 (9th Cir. 1989). Note at the outset that an affirmative answer to this question would not lead to a finding of actual malice for every accidental or insignificant misquotation. To satisfy the *Sullivan* standard for actual malice, the evidence must indicate that any misquotation was a result of intentional or reckless disregard of falsity. See *infra* note 90 and accompanying text for a further illustration of this point.

<sup>31</sup> Traditional summary judgment doctrine provides that the party moving for summary judgment must set forth "specific facts showing that there is no genuine issue of material fact at trial." FED. R. CIV. P. 56(c). Critics argued that it was inconsistent with the first amendment to require a defendant on a summary judgment motion to disprove the existence of actual malice when the plaintiff would bear a heavy burden to establish its existence at trial. For further discussion of actual malice in the context of summary judgment, see *infra* note 32.

the aims of the first amendment.<sup>32</sup> In *Anderson v. Liberty Lobby*<sup>33</sup> the Court held that, for purposes of summary judgment, a trial judge must bear in mind the heightened burden of proof that a plaintiff bears at trial.<sup>34</sup> Specifically, the Court instructed judges to consider whether a plaintiff's evidence could support a reasonable jury finding that the plaintiff had shown actual malice with convincing clarity.<sup>35</sup>

Even after *Liberty Lobby*, however, the judge's role remains unclear. In dictum, the *Liberty Lobby* Court told judges to "bear in mind" the actual quantum and quality of proof offered.<sup>36</sup> At the same time, the Court admonished judges not to make credibility determinations, weigh evidence or draw legitimate inferences from the evidence.<sup>37</sup> Such confusion over exactly how a judge is to bear in mind the heightened burden of proof when deciding a motion for summary judgment has led lower courts to apply *Liberty Lobby* inconsistently and has led to the faulty decision in *Masson*.<sup>38</sup>

32 Some judges and commentators believe that in matters affecting the first amendment, summary proceedings are essential because even the pendency of a libel action inhibits free speech. See, e.g., Matheson, *Procedure In Public Person Defamation Cases: The Impact of the First Amendment*, 66 TEX. L. REV. 215, 285 (1987) (citing Thompson v. Evening Star Newspaper Co., 394 F.2d 774, 776 (D.C. Cir.), cert. denied, 393 U.S. 884 (1968)).

Citing congestion in the federal courts and the prohibitive cost of litigation, judges have commonly granted defendants' motions for summary judgment in direct violation of established summary judgment doctrine. See Louis, *Summary Judgment and the Actual Malice Controversy in Constitutional Defamation Cases*, 57 S. CAL. L. REV. 707, 710 (1984) (citing a study showing that between 1976 and 1980, 75% of all motions for summary judgment made by defendants on the issue of actual malice were granted). This practice of preferring summary judgment in defamation cases became so prevalent that courts had begun to call this "the rule" in such cases. See, e.g., Hutchinson v. Proxmire, 431 F. Supp. 1311, 1330 (W.D. Wis. 1977) ("In making this [actual malice] determination, the granting of summary judgment may well be the 'rule' rather than the 'exception.'") (citations omitted). Rejecting this characterization of the law, Chief Justice Burger stated: "considering the nuances of the issues raised here, we are constrained to express some doubt about the so-called 'rule.' The proof of 'actual malice' calls a defendant's state of mind into question . . . and does not readily lend itself to summary disposition." Hutchinson v. Proxmire, 443 U.S. 111, 120 n.9 (1979).

Lower courts apparently did not heed Chief Justice Burger's warning and continued to grant summary judgment as often as before. See Matheson, *supra*, at 289-90 & n.430 (study showing that in the two years following Hutchinson, 1980-81, 83% of all defendants' summary judgment motions were granted, while between 1982 and 1984, 71% of such motions were granted).

In *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986), the Supreme Court failed to directly address whether the first amendment mandates liberal use of summary proceedings. The Court only vaguely referred to the Hutchinson dictum as "simply an acknowledgement of our general reluctance 'to grant special procedural protection to defendants in libel and defamation actions in addition to the constitutional protection embodied in the substantive laws.'" *Id.* at 256 n.7 (citing Calder v. Jones, 465 U.S. 783, 790-91 (1984)).

Granting certiorari in *Masson* would permit the Supreme Court to address the practice of preferential summary judgment in cases of defamation and would allow the Court to clarify its emerging doctrine of procedural neutrality. For a discussion of this doctrine, see Smolla, Dun & Bradstreet, Hepps and Liberty Lobby: *A New Analytic Primer on the Future Course of Defamation*, 75 GEO. L.J. 1519, 1531-35 (1987).

33 477 U.S. 242 (1986).

34 *Id.* at 254-55 ("a trial judge must bear in mind the actual quantum and quality of proof necessary to support liability under *New York Times*").

35 *Id.* at 252.

36 *Id.*

37 *Id.*

38 Compare *Masson*, (Ninth Circuit drew inferences and weighed credibility) with *Zerangue v. TSP Newspapers, Inc.*, 814 F.2d 1066, 1072 (5th Cir. 1987) (Fifth Circuit refused to draw inferences or weigh the credibility of the evidence when reviewing a defendant motion for summary judgment in a defamation action).

### III. The *Masson* Test for Actual Malice in Direct Quotation

The Ninth Circuit found no Supreme Court guidance for determining actual malice in cases of direct quotations. It also noted that the issue was one of first impression in the Ninth Circuit. Consequently, the court drew upon decisions from other circuits in outlining three principles for determining actual malice.<sup>39</sup> First, the court held that a factfinder may find malice from a fabricated quotation "when the language attributed to the plaintiff is wholly the product of the author's imagination."<sup>40</sup> Second, with respect to ambiguous statements, "malice will not be inferred from evidence showing that the quoted language does not contain the exact words used by the plaintiff provided that the fabricated quotations are . . . 'rational interpretations' of ambiguous remarks."<sup>41</sup> Third, with respect to unambiguous statements, "malice will not be inferred from evidence showing that the quoted language does not . . . 'alter the substantive content' of unambiguous remarks actually made."<sup>42</sup>

These three principles form the basis of the test the Ninth Circuit applied to the quotations in *Masson*. The Ninth Circuit's test for determining actual malice in instances of direct quotation is inappropriate for three reasons. First, the cases on which the test depends are of limited relevance. They do not directly address the issue present in *Masson*. Second, the test incorrectly expands the definition of actual malice beyond that provided by the Supreme Court. Lastly, technological advances and current journalistic practice render the sweeping protection offered defendants (primarily the media) unnecessary.

#### A. *Masson*: Case Law Support

Perhaps the most important reason why the *Masson* court's test ultimately proves faulty is that the court draws support from cases which are not applicable to the issue in *Masson*. The case cited by the Ninth Circuit that presents facts closest to those in *Masson* is *Carson v. Allied News Company*.<sup>43</sup> In *Carson*, a journalist wrote an article about the apparent dispute between entertainer Johnny Carson and the National Broadcasting Company (NBC) over moving Carson's television show, "The Tonight Show," from New York to Los Angeles.<sup>44</sup> The article included fabricated direct quotations.<sup>45</sup> The journalist based the story on a previously published article by another writer that contained incorrect facts.<sup>46</sup> The de-

39 *Masson*, 881 F.2d at 1453-56.

40 *Id.* at 1455-56 (citing *Carson v. Allied News Company*, 529 F.2d 206, 213 (7th Cir. 1976)).

41 *Id.* at 1456 (citing *Dunn v. Gannett N.Y. Newspaper, Inc.*, 833 F.2d 446, 452 (3d Cir. 1987)).

42 *Id.* (citing *Hotchner v. Castillo-Puche*, 551 F.2d 910, 914 (2d Cir. 1977)).

43 *Carson*, 529 F.2d at 210-12.

44 *Id.*

45 *Id.* at 212. The article reported the supposed struggle between Carson and NBC executives and contained "supposed quotations by Carson to the executives and their responses and reactions." *Id.* Carson testified that he personally had no conversations with executives regarding the show's move westward. *Id.*

46 *Id.* at 210. The previously published article offered speculation regarding Carson's motivations for moving the show to Los Angeles. Among the reasons, the article pointed to the fact that Carson had been dating Ms. Joanna Holland, who resided in Los Angeles. *Id.* In fact, Ms. Holland did not live anywhere in California. *Id.* at 211. This false fact became the entire focus of the defendant's article, published in the NATIONAL INSIDER. *Id.*

fendant-writer stated that the quotations used were actually the "logical extension of what must have gone on from the facts that I read from the [previously published] article."<sup>47</sup>

The Seventh Circuit affirmed the determination of actual malice and noted that by "fabricating and imagining 'facts', the defendant *necessarily* entertained serious doubts as to the truth of the statements."<sup>48</sup> This statement is significant because in concluding that a defendant who deliberately fabricates a quote necessarily does so with actual malice, *Carson* limits a judge's discretion to grant summary judgment for a defendant due to the absence of actual malice. This fact is crucial to the *Masson* court's limited application of *Carson*.

To avoid the inflexible result advocated in *Carson*, the *Masson* court distinguished *Carson* by limiting its application to cases where the language attributed to the plaintiff is "wholly the product of the author's imagination."<sup>49</sup> The Ninth Circuit failed to apply the *Carson* holding to the disputed quotes in *Masson* but did not explain why the words that *Masson* alleged he never spoke were not "wholly the product" of author Janet Malcolm's imagination.<sup>50</sup>

After limiting *Carson*'s application, the court constructed an analysis for actual malice that drew a distinction between alteration of ambiguous statements and unambiguous statements. While ambiguity is relevant to the issue of actual malice,<sup>51</sup> the *Masson* court's distinction as to falsified quotations is unjustified. The cases cited by the Ninth Circuit provide no support for such a distinction.

## 1. Direct Quotation from Unambiguous Statements

The *Masson* court interpreted the Second Circuit's opinion in *Hotchner v. Castillo-Puche*<sup>52</sup> as standing for the proposition that fictionalized quotations stemming from unambiguous statements may only constitute actual malice if they alter the substantive content of the statements.<sup>53</sup> *Hotchner* dealt with the English-language translation of a book about Er-

47 *Id.* at 212-13.

48 *Id.* at 213 (emphasis added). The court also noted that "[o]ne cannot fairly argue his good faith or avoid liability by claiming that he is relying on the reports of another if the latter's statements or observations are altered or taken out of context." *Id.* (citing *Goldwater v. Ginzburg*, 414 F.2d 324, 337 (2d Cir. 1969) (dealing with a defendant that added innuendos to some quoted statements and quoted other statements out of context)).

49 *Masson v. New Yorker Magazine*, 881 F.2d 1452, 1455-56 (9th Cir. 1989).

50 For example, *Masson* asserts that he did not make many of the statements attributed to him in the article. In one instance, the writer describes in great detail a conversation in which *Masson* refers to himself as an intellectual gigolo. *Id.* at 1456. See also *id.* at 1469 n.4 (Kozinski, J., dissenting). See *infra* notes 93-97 and accompanying text for a discussion of this disputed quote. The story places this conversation at the Chez Panisse restaurant in Berkeley, California. *Id.* at 1456. *Masson* asserts he never made this statement. *Id.* Malcolm denied that the quote was fabricated, but later conceded that the statement did not occur as the story portrayed, but rather occurred during a conversation with *Masson* in New York. *Id.* This appears to be an instance where both the words spoken in the quote and the quote's factual background were the product of the author's imagination.

51 See *infra* notes 66-81 and accompanying text for a discussion of ambiguity in the context of actual malice.

52 551 F.2d 910 (2d Cir. 1977).

53 *Masson*, 881 F.2d at 1454 (citing *Hotchner*, 551 F.2d at 914).



nèst Hemingway written by a Spanish writer who knew Hemingway. At issue were six unfavorable statements about Hotchner (a purported friend of Hemingway's) that the writer attributed to Hemingway.<sup>54</sup> In translating the book, the publisher, Doubleday & Co., decided to "tone down" one certain disparaging quotation contained in the original Spanish-language version.<sup>55</sup>

In determining whether actual malice existed in *Hotchner*, the Second Circuit initially focused on the original disparaging quotation contained in the Spanish-language version. It held that Doubleday did not entertain serious doubt as to the veracity of Castillo-Puche's original account of Hemingway's comments concerning Hotchner. Therefore, as to the original Spanish-language statement, Doubleday did not publish with actual malice.<sup>56</sup> The court conceded that Doubleday had altered the quotation but determined that the change did not "increase the defamatory impact or alter the substantive content" of the actual statement.<sup>57</sup>

In *Masson*, the Ninth Circuit interpreted this case as holding that changes to a quotation not altering the quote's substance are not made with actual malice.<sup>58</sup> The difficulty in trying to interpret the *Hotchner* opinion is that the court's dictum is ambiguous. The Second Circuit's main focus was whether Doubleday had reason to believe that the original, Spanish quote was published with actual malice. After deciding that Doubleday did not have such a reason to believe, the court dismissed the issue of the altered, English-language quote in one short paragraph. A better construction of *Hotchner* suggests that the Second Circuit declined to hold Doubleday liable for fabricating the quotation because the change was not defamatory.<sup>59</sup> The Second Circuit reasoned that if Doubleday could not be liable for publishing the original disparaging quotation it could not be liable for making the passage less offensive.<sup>60</sup> Specifically, the Second Circuit held that Doubleday would not be liable simply because it published a bowdlerized version of the actual statement.<sup>61</sup> The use of "bowdlerized"<sup>62</sup> in place of a word such as "altered" or "fabricated" indicates that the Second Circuit was limiting a writer's ability to change words in a quote to words not defamatory. Herein lies the two key distinctions between *Hotchner* and *Masson*. First, the disputed

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54 *Hotchner*, 551 F.2d at 912. Doubleday originally identified 11 statements they thought should be eliminated or toned down. As published, the English translation contained six passages that a jury ultimately found to have been published with actual malice. *Id.*

55 "As originally translated, Hemingway's words were: '[Hotchner is] dirty and a terrible asslicker. There's something phony about him. I wouldn't sleep in the same room with him.'" *Id.* at 914. The English-language translation phrased the quotation as Hemingway stating "I don't really trust him, though." *Id.* at 912.

56 *Id.* at 914. The issue regarding actual malice on the part of Doubleday & Co. was whether they recklessly disregarded the probability that the original Spanish version of the quote was false. The issue of whether Castillo-Puche reported the quotations with actual malice was largely moot because Castillo-Puche was dismissed from the suit for lack of personal jurisdiction. *Id.* at 912 n.4.

57 *Id.* at 914.

58 *Masson v. New Yorker Magazine*, 881 F.2d 1452, 1454 (9th Cir. 1989).

59 *See Hotchner*, 551 F.2d at 914.

60 *Id.*

61 *Id.*

62 Bowdlerize means "to remove matter considered indelicate or otherwise objectionable from [sic] by expurgation or alteration." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 262 (1986).

quotes in *Masson* are fundamentally different than those in *Hotchner*. In *Hotchner*, there was an actual quotation against which the court could first evaluate falsity and defamatory impact independently of the issue of actual malice. In *Masson*, many of the allegedly fabricated quotations sprung from the general tenor of actual statements or were composite statements drawn from numerous statements actually made.<sup>63</sup> Either way, the quotes in *Masson*, unlike those in *Hotchner*, provided no definitive starting point from which a court could measure falsity or defamatory impact. The second distinguishing factor is the nature of the quotes. In *Hotchner* the altered quote was undisputably less offensive than the actual quote. In *Masson*, this is not the case.<sup>64</sup> To read *Hotchner* as permitting a defendant to change a quotation and make it defamatory with impunity goes directly against the Second Circuit's holding.<sup>65</sup>

## 2. Direct Quotation from Ambiguous Statements

To determine whether altering ambiguous quotes constituted actual malice, the Ninth Circuit relied upon Supreme Court dictum found in *Time v. Pape*.<sup>66</sup> However, *Pape*'s facts limit its relevance to *Masson*. In *Pape*, the Court stated that lower courts should not infer malice where the disputed writing was "one of a number of possible rational interpretations of a document that bristled with ambiguities."<sup>67</sup> *Pape* dealt with the publication in *Time* magazine of excerpts from the United States Commission on Civil Rights' report on police brutality.<sup>68</sup> The report contained condensed summaries of individual cases of police brutality. A general introduction prefaced the individual case summaries by explaining that some case reports were factual while others were based solely on allegations contained in complaints.<sup>69</sup> One particular summary excerpted in the *Time* article was based solely upon allegations—as opposed to a combination of facts and allegations—but *Time* failed to point this out. The issue in *Pape* was whether, by failing to note that the brutality in question was only alleged, *Time* defamed the police officer mentioned in the report.<sup>70</sup> The Court declined to find malice because the report's general introduction was very ambiguous and it was not clear whether the individual summaries represented facts or mere allegations.<sup>71</sup>

63 See, e.g., *Masson v. New Yorker Magazine*, 881 F.2d 1452, 1458 (9th Cir. 1989).

64 See generally *id.* at 1456-62 (review of the disputed quotes).

65 Note also that *Hotchner* addressed a jury finding of malice, not a disposition by summary judgment.

66 401 U.S. 279 (1971).

67 *Id.* at 290. See also *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 512, 513 (1984) (no malice where the "adoption of the language chosen was 'one of a number of possible rational interpretations' of an event 'that bristled with ambiguities' and descriptive challenges for the writer.")

68 *Pape*, 401 U.S. at 280-81.

69 *Id.* at 286-87.

70 *Masson* contained similar allegations of misleading editing, however, these particular quotations were evaluated by the Ninth Circuit independently of the other quotations and not under the same test. See *Masson v. New Yorker Magazine*, 881 F.2d 1452, 1462 (9th Cir. 1989).

71 The general introduction to the individual reports of brutality stated:

To support its use of the *Pape* dictum to quotations,<sup>72</sup> the *Masson* court cited *Pape*'s similar application in *Dunn v. Gannett New York Newspapers*.<sup>73</sup> *Dunn* involved statements made by the mayor of Elizabeth, New Jersey, criticizing recent Hispanic immigrants for contributing to the city's litter problem.<sup>74</sup> A local Spanish-language newspaper reported the mayor's statement under a headline stating that the mayor called the city's Hispanics "cerdos."<sup>75</sup> The word *cerdos* was in quotation marks. The mayor argued that *cerdos* meant pigs and the quotation marks implied that he actually called the Hispanic community pigs.<sup>76</sup> In declining to find actual malice<sup>77</sup> the court noted there was no literal Spanish translation for the relatively new American words "litterbug," "litter," or "litterer."<sup>78</sup> Additionally, it noted that *cerdos* also refers to dirty or slovenly people and was a rational interpretation of the term litterbug.<sup>79</sup>

The context in which both the Supreme Court and the Third Circuit applied the *Pape* "rational interpretation" dictum suggests that it is relevant only when the inaccuracy surrounds some inherent ambiguity. Thus, the doctrine was correctly applied when a source document was inherently confusing (*Pape*), when language translation was complex (*Dunn*), and when attempting to describe the movement of sound (*Bose*).<sup>80</sup> In such cases, the inherent ambiguity prevents the writer from forming the requisite intent necessary for finding actual malice. However, in *Masson*, the Ninth Circuit offered no reasoning as to why direct quotations are inherently ambiguous. While all transmission of speech is subject to misinterpretation, *Pape* should be read as requiring something more to justify applying such a relaxed standard of accuracy. Courts seeking to extend *Pape* to new factual situations must explain why the particular speech in question is inherently ambiguous. The Ninth Circuit

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In the text of this chapter the Commission briefly describes the alleged facts in 11 typical cases of police brutality. They are presented in the belief that they contribute to an understanding of the problem. The allegations of misconduct are supported in several cases by criminal convictions or findings by impartial agencies; in others, by sworn testimony, affidavits from eyewitnesses, or by staff field investigations. In no case has the Commission determined conclusively whether the complaints or the officers were correct in their statements. This is the function of a court. The Commission is of the opinion, however, that the allegations appeared substantial enough to justify discussion in this study.

*Pape*, 401 U.S. at 287 (quoting 5 United States Commission on Civil Rights, *Justice* (1961)).

The Court found this introduction "extravagantly ambiguous" as to what level of credence should be placed on the condensed reports. *Id.*

<sup>72</sup> As additional support for *Pape*, the Ninth Circuit also cites *Bose Corp. v. Consumer's Union of the United States, Inc.*, 466 U.S. 485 (1984). The ambiguity in *Bose* related to the critical review of loudspeakers manufactured by the plaintiff. The dispute surrounded a metaphor that the reviewer used to describe the wandering of the sound emanating from the speakers. The Court determined that the movement of sound from loudspeakers was an ambiguous event and, based on *Pape*, the inaccuracy in the defendant's description was not sufficient to constitute actual malice. *Id.* at 512-13.

<sup>73</sup> 833 F.2d 446 (3d Cir. 1987).

<sup>74</sup> *Id.* at 448.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> The court held that the determination of actual malice would be based upon the Spanish word and not the English translation offered by the mayor. *Id.* at 452.

<sup>78</sup> *Id.* at 451.

<sup>79</sup> *Id.* at 451 n.2. The court also noted that in the Spanish language, quotation marks do not necessarily represent direct quotations. *Id.* at 451.

<sup>80</sup> See *supra* note 72 for a discussion of the facts in *Bose*.

offered no explanation as to why a magazine interview, conducted over an extended period of time, required such a relaxed standard of accuracy. Permitting a "rational interpretation" standard for direct quotation conflicts with the very purpose of quotation which is to present to the reader the writer's exact words.<sup>81</sup>

### 3. Case Law: Conclusion

By limiting the application of *Carson* and then creating a distinction between altering ambiguous and unambiguous quotations, the *Masson* court constructs a test with a suspect foundation that ultimately produces an incorrect result. The strained application of *Hotchner* and *Dunn*, where the courts declined to find actual malice, and the unexplained narrow interpretation of *Carson*, where malice was upheld, suggests that the Ninth Circuit crafted its test with an eye toward a desired outcome. The suggestion that the court created a test designed to facilitate the granting of summary judgment for defendants appears more plausible in light of the test's expanded definition of actual malice.

#### B. *Masson: Expansion of the Actual Malice Standard*

The second flaw in the *Masson* test is its expansion of the actual malice standard. The actual malice requirement raises the question of whether the defendant knowingly published a falsehood or recklessly disregarded the possibility of falsity.<sup>82</sup> The *Masson* court interpreted malice more broadly when evaluating direct quotations.

While the Supreme Court has defined actual malice in terms of the intent element,<sup>83</sup> the *Masson* court expands the definition of actual malice to include all of the main elements of the defamation cause of action.<sup>84</sup> For example, whether a quote is a "rational interpretation" of a statement or whether it "alters the substance" of the statement more accurately raises a question of falsity or defamatory impact—not whether the writer published the quotation with a particular intent or state of mind. Falsity is an independent element of defamation, not a sub-element of actual malice.<sup>85</sup> The Supreme Court has described the relationship between the elements of actual malice and falsity as one of practicality,<sup>86</sup> created because "evidence offered by plaintiffs on the publisher's fault in adequately investigating the truth of the published statements will gener-

<sup>81</sup> See *supra* note 2 for a discussion of the literary significance of the quotation mark.

<sup>82</sup> See *supra* note 25 and accompanying text for a discussion of the actual malice standard.

<sup>83</sup> See, e.g., *Harte-Hanks Comm., Inc. v. Connaughton*, 109 S. Ct. 2678, 2685 & n.7 (1989) (noting that actual malice is not to be confused with the concept of ill-will or bad motive. The Court suggests that in instructing juries, confusion could be avoided by substituting for the term actual malice a term such as "state of mind." (citing *Westmoreland v. CBS, Inc.*, 596 F. Supp. 1170, 1172-73 & n.1 (S.D.N.Y. 1984)).

<sup>84</sup> See *supra* note 19 and accompanying text listing the elements of the libel cause of action.

<sup>85</sup> It is important to distinguish the element of falsity from that of actual malice. One may argue that the requirement of knowledge or reckless disregard of falsity creates within the element of actual malice a sub-element of falsity that requires evaluation that is independent of the writer's intent. Such a reading of actual malice finds little support in the Supreme Court. See, e.g., *Harte-Hanks*, 109 S. Ct. at 2684-86 (discussing actual malice solely in terms of a defendant's state of mind).

<sup>86</sup> *Philadelphia News, Inc. v. Hepps*, 475 U.S. 767, 778 (1985).

ally encompass evidence of the falsity of the matter asserted."<sup>87</sup> There is a distinct difference between evidence that overlaps between two elements and the view that one element necessarily encompasses the other. While this distinction may seem slight, *Masson* indicates that on summary judgment its effect is most dramatic.

The Ninth Circuit applied its test by starting from the premise that altering a quote is not necessarily *falsifying* a quote. As a result, the court defines a two-step actual malice analysis: whether the defendant altered the quote and whether the alteration is false (or defamatory).<sup>88</sup> *Liberty Lobby* requires that a judge bear in mind the heightened burden of proof regarding actual malice that the plaintiff will bear at trial.<sup>89</sup> However, the plaintiff bears no such heightened burden at trial regarding the element of falsity.<sup>90</sup> Combining the elements of malice and falsity under the umbrella of actual malice, as did the *Masson* court, has two detrimental implications: first, the heightened burden of proof for actual malice is improperly applied to the element of falsity; and second, as a result a court will perform more searching examination of the evidence regarding falsity on summary judgment than is otherwise required under the *Liberty Lobby* analysis.

87 *Id.* (citing Keeton, *Defamation and the Freedom of the Press*, 54 TEX. L. REV. 1221, 1236 (1976)).

88 See *infra* notes 98-101 and accompanying text for an example of the analysis the court applied to the quotes in *Masson*.

89 *Anderson v. Liberty Lobby*, 477 U.S. 242, 252 (1986).

90 It is well settled that a plaintiff must prove actual malice by a heightened burden of proof. *New York Times v. Sullivan*, 376 U.S. 254, 285-86 (1964) (convincing clarity); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974) (clear and convincing clarity). Some commentators advocate extending this standard to all elements of the defamation cause of action. See, e.g., S. HALPERN, *THE LAW OF DEFAMATION, PRIVACY, PUBLICITY AND "MORAL RIGHTS"* 382 (1988) (chart); Franklin & Bussell, *The Plaintiff's Burden In Defamation: Awareness and Falsity*, 25 WM. & MARY L. REV. 825, 863-65 (1984). The concern is that a standard of proof less than clear and convincing will lead to jury error and ultimately to self-censorship. This well-worn concern is, in this case, without merit. The infrequency with which defamation cases result in jury verdicts, see *supra*, note 32, and the existing clear and convincing standard for actual malice, render this concern insignificant. Also, the foundation on which this argument rests is dubious at best. See, e.g., *Firestone v. Time, Inc.* 460 F.2d 712, 722 (5th Cir. 1972) (Bell, J., concurring) (such a standard of proof was implicit in *New York Times*).

Proponents of this argument cannot look to the Supreme Court for support. The Court has noted that most of its past constitutional defamation decisions have addressed the issue of actual malice, not falsity. *Hepps*, 475 U.S. at 775. *Hepps*, however, addressed the question of whether the plaintiff or the defendant had the burden of proving truth or falsity of a defamatory statement. The case provided the Court an opportunity to articulate the requirements of the element of falsity. While *Hepps* dealt with a private plaintiff, the Court also stated that a "public-figure plaintiff must show the falsity of the statements at issue in order to prevail in a suit for defamation." *Id.* (citing *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964) (interpreting *Sullivan*) and *Herbert v. Lando*, 441 U.S. 153, 176 (1979)). In stating the law as to falsity, the Court placed the burden of proving falsity of a statement with the plaintiff. The Court was silent, however, as to any heightened burden that may exist. This is in noticeable contrast to the Court's recitation of the law as to the element of actual malice where the Court noted that a public-figure plaintiff must show actual malice with "convincing" or "clear and convincing" clarity. *Hepps*, 475 U.S. at 773. Recently, the Court explicitly declined to address this dispute. See *Harte-Hanks Comm. v. Connaughton*, 109 S. Ct. 2678, 2682 n.2 (1989) (noting the debate over which standard of proof applied to the issue of falsity and expressing no view on the issue).

Given the implications of *Liberty Lobby*, to read a heightened burden of proof into the element of falsity (and presumably into the element of defamatory impact) would result in expanded judicial review of the merits of defamation cases on summary judgment which would implicitly accomplish an objective that the Court has explicitly rejected. See *Calder v. Jones*, 465 U.S. 783, 790-91 (1984) (refusing to extend special procedural protection to defendants in libel and defamation suits). See also *Liberty Lobby*, 477 U.S. at 268-69 (Rehnquist, J., dissenting).

The Ninth Circuit's review of the disputed quotes in *Masson* demonstrates the flaw in its definition of actual malice. In its heightened review of the evidence of actual malice, the *Masson* court failed to examine the evidence offered as to the pivotal issue — whether Malcolm either knowingly or recklessly disregarded falsity.<sup>91</sup> The court focused solely on whether the quotations in question were false or defamatory. By doing so, the court drew inferences, made credibility determinations, and weighed evidence to Masson's detriment. The court violated the Supreme Court's admonition that judges draw all inferences in favor of the plaintiff-nonmoving party and not weigh the credibility of evidence.<sup>92</sup> The disputed "intellectual gigolo" quote from *Masson* illustrates this point. In the published article, Malcolm quoted Masson, regarding an affair with a graduate student, as stating:

She [the graduate student] said, '[w]ell it is very nice sleeping with you in your room, but you're the kind of person who should never leave the room — you're just a social embarrassment anywhere else, though you do fine in your own room.' *And, you know, in their way, if not in so many words, Eissler and Anna Freud told me the same thing. They like me well enough 'in my own room.'* *They loved to hear from me what creeps and dolts analysts are. I was like an intellectual gigolo — you get your pleasure from him, but you don't take him out in public.*<sup>93</sup>

Masson denies ever saying the italicized words.<sup>94</sup> The italicized words never appear in Malcolm's tape recordings.<sup>95</sup> They do appear in Malcolm's interview notes which Masson asserts are also fabricated.<sup>96</sup> As the *Masson* court noted, however, the following statement by Masson did appear on the tape recordings:

[Eissler and Anna Freud] felt, in a sense, I [Masson] was a private asset but a public liability. They like me when I was alone in their living room, and I could talk and chat and tell them the truth about things and they would tell me. But that I was, in a sense, much too junior within the hierarchy of analysis for these important training analysts to be caught dead with me.<sup>97</sup>

The court held that the quote did not alter the substantive content of the actual statement and noted that "[t]he descriptive term 'intellectual gigolo' as used in this context, simply means that Masson's views were privately entertaining, but publicly embarrassing to Freud and Eissler."<sup>98</sup>

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91 To illustrate, Malcolm tape-recorded most of what Masson said except some of his most damaging statements (including the intellectual gigolo comment). *Masson*, 881 F.2d at 1468 n.7 (Kozinski, J., dissenting). Also, Malcolm initially represented to her editor, and to the New York Times that she had every quote by Masson on tape. *Id.* Malcolm also claimed to have handwritten notes of the unrecorded statements but that they were destroyed. *Id.* All that she produced was a typed transcription of the notes. *Id.* While the dissent noted that a jury could have reasonably inferred malice from any of this evidence, the majority refused to address this evidence. *Id.*

92 See *infra* note 99.

93 *Masson v. New Yorker Magazine*, 881 F.2d 1452, 1456-57 (9th Cir. 1989).

94 *Id.* at 1457.

95 *Id.*

96 *Id.*

97 *Id.* (footnote omitted).

98 *Id.* (citing *Masson v. New Yorker Magazine* 686 F. Supp. 1396, 1400 (N.D. Cal. 1987)).

Drawing such an inference against Masson was clearly inappropriate.<sup>99</sup> The court also held the "intellectual gigolo" quote not defamatory based upon "a fair reading of the quotation."<sup>100</sup> This determination was also an inappropriate inference for the court to draw.<sup>101</sup>

99 See *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge."). See also *Adickes v. Kress & Co.*, 398 U.S. 144; 158-59 (1970) ("On summary judgment the inferences to be drawn from the underlying facts contained in [the moving party's] materials must be viewed in the light most favorable to the party opposing the motion.") (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

100 *Masson v. New Yorker Magazine*, 881 F.2d 1452, 1457 (9th Cir. 1989).

101 See *supra* note 99. Equally disturbing is the court's second basis for determining that the quote was not defamatory. Over a strong dissent, the *Masson* court adopts for the Ninth Circuit the controversial "incremental harm" branch of the "libel-proof" doctrine. *Id.* at 1457-58. But see *id.* at 1481-82 & n.21 (Kozinski, J., dissenting).

The libel-proof doctrine is a theory that, in defamation actions, certain plaintiffs are precluded from recovery as a matter of law by virtue of a particularly bad reputation. The doctrine is used to dismiss defamation actions upon summary judgment. The doctrine originated in an opinion in the Second Circuit in 1975. See *Cardillo v. Doubleday & Co., Inc.*, 518 F.2d 638, 639 (2d Cir. 1975). The incremental harm branch of the libel-proof doctrine focuses not on the plaintiff's bad reputation but rather on the alleged defamatory statements. The court determines whether the disputed quotes incrementally caused harm to the plaintiff's reputation, given the effect of the remainder of the article. See *Simmons Ford, Inc. v. Consumer's Union of the United States*, 516 F. Supp. 742, 750 (S.D.N.Y. 1981) ("portion of the article challenged by plaintiffs [] could not harm their reputations in any way beyond the harm already caused by the remainder of the article.").

By adopting both the theory and its corollary, the Ninth Circuit embraced a doctrine that is far from accepted as sound constitutional theory. The main assumption of the doctrine is that even were a libel-proof plaintiff able to demonstrate defamation with actual malice, they would only be entitled to nominal damages. See *Cardillo*, 518 F.2d at 639 (plaintiff was libel proof "by virtue of his life as a [sic] habitual criminal [that he would not] be able to recover anything other than nominal damages."). Courts applying the doctrine subscribe to the belief that the first amendment requires a defamation plaintiff to prove actual damages and precludes nominal damage awards. The Supreme Court has never addressed the constitutionality of the libel-proof doctrine, nor has it ever decided whether nominal damages are permitted under the first amendment. See PROSSER, *supra* note 29, at 845. Currently, the circuits are divided as to whether, and to what extent, the libel-proof doctrine should be applied to defamation actions. Even the Second Circuit, where the doctrine originated, has vacillated in its application of the doctrine. See *Cardillo*, 518 F.2d at 639 (libel proof by virtue of a life of habitual criminality); *Buckley v. Littell*, 539 F.2d 882, 889 (2d Cir. 1976) ("The doctrine of 'libel proof' defendants that our *Cardillo* case enunciated is a limited, narrow one, which we will leave confined to its basic factual context."); *Guccione v. Hustler Magazine*, 800 F.2d 298, 303 (2d Cir. 1986) (application of the libel proof doctrine extends beyond plaintiffs with criminal records); *Herbert v. Lando*, 781 F.2d 298, 311 & n.10 (2d Cir. 1986) (reciting the "incremental harm" branch of the doctrine articulated in *Simmons*, but specifically declining to adopt the theory). The D.C. Circuit has explicitly rejected both the doctrine and its corollary. See *Anderson v. Liberty Lobby*, 746 F.2d 1563, 1568 (D.C. Cir. 1984) (opinion by then-Judge Scalia rejecting the libel proof doctrine and specifically holding that the incremental harm branch of the theory is "fundamentally a bad idea, we are not prepared to assume that it is the law of the District of Columbia; nor is it part of the federal constitutional law."), *rev'd on other grounds*, 477 U.S. 242 (1985). Other circuits have avoided the question altogether. See *Marcone v. Penthouse Int'l. Magazine For Men*, 754 F.2d 1072, 1079 (3d Cir. 1985) (the court "cannot say as a matter of law that [the plaintiff] was libel proof"); *Schiavone Const. Co. v. Time, Inc.*, 847 F.2d 1069, 1081 (3d Cir. 1988) ("We will do what we did in *Marcone* and decline to rule on the libel proof plaintiff doctrine.").

The Ninth Circuit's application of the incremental harm corollary in *Masson* causes additional conflicts with other circuits. As the dissent in *Masson* notes, the incremental harm corollary originated in a district court and no federal appellate court had previously adopted it. *Masson*, 881 F.2d at 1482 (9th Cir. 1989) (Kozinski, J., dissenting). In fact, the Second Circuit in *Herbert v. Lando*, from which the *Masson* court drew support, declined to adopt the incremental harm corollary in a case involving multiple instances of defamation. *Herbert*, 781 F.2d at 311 & n.10. *Masson* also dealt with multiple allegations of defamation. Application of the libel proof doctrine has also been rejected in defamation cases on summary judgment. *Zerangue v. TSP Newspapers*, 814 F.2d 1066, 1074 (5th Cir. 1987) ("[S]ummary judgment is not an appropriate stage at which to resolve credibil-

The court's tinkering with the definition of actual malice can be viewed, in conjunction with its narrow reading of *Carson*, as an attempt to expand a judge's ability to grant summary judgment for media defendants. If the Ninth Circuit had held, as did the Second Circuit in *Carson*, that deliberate alteration of quotations necessarily constituted actual malice, a judge would have less discretion to grant summary judgment for defendants.<sup>102</sup> *Masson* illustrates this point.

*Masson* had submitted evidence that the quotes in dispute were deliberately altered.<sup>103</sup> For purposes of summary judgment, the court should have reviewed this evidence for a material issue of fact while drawing all inferences in favor of *Masson*.<sup>104</sup> Such evidence of deliberate alteration, combined with the assumption, for purposes of summary judgment, that *Masson* did not make the disputed statements, would require a court to determine that a material issue of fact regarding actual malice (knowledge or reckless disregard of falsity) did exist. By stating that a deliberately altered quote is not actionable unless the misquotation is also false, the *Masson* court created a second level of analysis in the actual malice test. It invites judges to grant summary judgment for lack of actual malice despite the fact that evidence may demonstrate that the defendant had knowledge of falsity or recklessly disregarded the probability of falsity.

As *Carson* suggests, there should be no distinction between altering a quote and falsifying a quote because direct quotation marks represent not only the speaker's message but his or her exact words. With respect to the actual malice element, when the defendant moves for summary judgment, it is proper for the court to consider only whether the falsification was accomplished with an intentional or reckless state of mind and whether plaintiff has offered sufficient evidence to permit a reasonable jury finding that actual malice did exist. If a material issue of fact exists as to the defendant's state of mind, the judge must deny the defendant's motion.

Another flaw in the *Masson* test is that it encourages courts to make factual determinations of falsity that transform the summary proceedings into "a full-blown paper trial on the merits." Justice Brennan predicted such an improper result in his dissent in *Liberty Lobby*.<sup>105</sup> The test also conflicts with the Supreme Court's apparent move toward procedural neutrality.<sup>106</sup> At a time when so many judges view summary judgment in

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ity questions. The trial court did not err in reserving the question of whether [plaintiffs] were libel proof for the jury.")

The libel-proof doctrine is another demonstration of courts' general hostility to defamation plaintiffs and provides yet another facet of defamation law that requires Supreme Court attention. For a good discussion of the libel-proof doctrine's shortcomings, see Note, *Libel Proof Plaintiffs — Rabble Without a Cause*, 67 B. U. L. REV. 993 (1987). But see Note, *Libel-Proof Plaintiff Doctrine*, 98 HARV. L. REV. 1909 (1985); Annotation, *Who is "Libel-Proof"*, 50 A.L.R. 4th 1257 (1986).

102 See *supra* notes 43-48 and accompanying text for a discussion of *Carson*.

103 See *supra* note 91 for a discussion of this evidence.

104 *Adickes v. Kress & Co.*, 398 U.S. 144, 158-59 (1970).

105 *Liberty Lobby*, 477 U.S. at 266-67 (Brennan, J., dissenting).

106 *Id.* at 256 n.7. See also *id.* at 257 n.1 (Brennan, J., dissenting). See *supra* note 32 for a discussion of procedural neutrality.



favor of defamation defendants as constitutionally required,<sup>107</sup> such discretion to make findings of fact as to falsity is likely to lead courts to grant summary judgment not upon the evidence in question but rather because a particular judge prefers summary judgment in defamation cases. The long term effects of the *Masson* court's test will include denying legitimately defamed plaintiffs access to the courts and virtually eliminating the significance of a quotation mark.

### C. *Change in Technology*

While the media has helped create some very well-known quotes in the past,<sup>108</sup> this practice need not be viewed as acceptable. More efficient methods of capturing information and the current move toward fictionalized news reporting support strict protection of the integrity of direct quotations.

Broad brush protection for journalists using direct quotations is not necessary in the current age of television and videotape and audiotape recording. For example, in less-sophisticated times, politicians did not have press secretaries and would commonly trust reporters to write statements for them.<sup>109</sup> Times have changed. Also, with only pen and paper at their disposal, immaterial inaccuracy by reporters in the past was arguably more understandable. Prior to *Sullivan*, the libel laws acted as the corresponding check on the media because there was no constitutional privilege for libelous speech. The negative reaction to the *Masson* decision by members of the print media suggests that current editorial practices reflect the increased precision with which stories may be reported and supports maintaining the strict use of direct quotations.<sup>110</sup>

The increased commercialization of the news media also indicates a need to protect the strict use of direct quotations. As news reporting becomes more profit-oriented, journalists are injecting more creativity

107 See *supra* note 32 for a discussion of this belief.

108 Los Angeles Times writer Thomas B. Rosenstiel offers this example:

Long-time former New York Times sportswriter Leonard Koppett recalls the real story about the day Leo Durocher allegedly said 'Nice guys finish last.'

A reporter sitting with Durocher before a game had asked him why he couldn't be nicer.

Durocher, who was managing the Dodgers, pointed across to Giant's manager Mel Ott. 'There's Mel Ott,' Durocher really said, Koppett was told later by the reporters there. 'He's a nice guy, and he's in last place.'

In print it became nice guys finish last, and Durocher, far from quibbling, adopted it. Rosenstiel, *Wide Respect For Sanctity Of The Spoken Word; Most Newspapers Have Strict Rules On Quotes*, Los Angeles Times, Aug. 5, 1989, § 1, at 29, col. 1.

109 *Id.*

110 See *supra* note 5 for a discussion of current editorial standards. See also *Masson v. New Yorker Magazine*, 881 F.2d 1452, 1485 (9th Cir. 1989) (Kozinski, J., dissenting) (noting the editorial policy of *The New Yorker* magazine requires verbatim quotation).

into their work. Composite depiction<sup>111</sup> and fictionalized re-creation of factual events<sup>112</sup> are examples of such creative reporting.

The advance of technology, which has made accurate recording of quotes easier, and the increased commercialization of the news industry, which causes a blurring of fact and fiction, demonstrate the tension between the ability to report more precisely and the motivation to embellish news reporting. This tension illustrates why the sweeping protection for falsified quotations, implied in the *Masson* test, is not only unnecessary but also ill-advised.

#### IV. An Alternative to *Masson*

Any test for actual malice must begin with consideration for the interest the test is designed to protect. While the interests protected by the first amendment are many, the historic concern over infringement on free speech has been one of governmental censorship and its resulting impact on the preservation of democracy.<sup>113</sup> From this base, the constitutional protection of libelous speech has moved beyond matters of political expression to matters of public interest.

Freedom of speech is not limitless, however, and the Supreme Court has recognized certain classes of speech that are unworthy of constitutional protection.<sup>114</sup> One such class of unprotected speech is the calculated falsehood.<sup>115</sup> While the Court's concern over falsehood is due in part to its detrimental effect on democracy,<sup>116</sup> fear of political subversion is only one reason for not extending first amendment protection to calculated falsehood. As early as 1947, the Commission on Freedom of the

111 One infamous example of composite depiction was *Jimmy's World: 8-Year-Old Heroin Addict Lives for a Fix*, the Pulitzer-prize winning story about an eight year old heroin addict published in the Washington Post. Amid pressure to provide specific information about Jimmy to District of Columbia social workers, the writer, Janet Cooke admitted that no such individual existed and that Jimmy was actually a composite of young addicts drawn from interviews with social workers. GOODWIN, *supra* note 2, at 161-64. See also *Masson*, 881 F.2d at 1477 n.15 (Kozinski, J., dissenting).

112 See, e.g., Goldman, *Blurred Lines: TV Network News is Making Re-Creation a Form of Recreation*, Wall St. J., Oct 30, 1989, § A, at 1, col. 1. This article discusses the format of the new CBS News program entitled "Saturday Night with Connie Chung" which planned to present a re-enactment of the suicide of activist Abbie Hoffman. The show presents a conversation between Hoffman and his brother shortly before his (Abbie's) death. The conversation in fact never took place. CBS pieced it together from prior interviews by CBS News. Goldman chides the program for "further blurring the distinction between fiction and reality in T.V. News." *Id.* See also Goldman, *NBC, Citing Viewer Confusion, to Halt Use of Re-Enactments in News Programs*, Wall St. J., Nov. 21, 1989, § B, at 6, col. 5.

113 See, e.g., *New York Times v. Sullivan*, 376 U.S. 254, 268-77 (1964) (discussing the Seditious Act of 1798).

114 See, e.g., *Roth v. United States*, 354 U.S. 476, 484 (1957) (obscenity); *Schenck v. United States*, 249 U.S. 47, 52 (1919) (advocacy of illegal conduct).

115 See *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964).

116 *Id.* The Court referred to Reisman, *Democracy and Defamation: Fair Game and Fair Comment I*, 42 COL. L. REV. 1085, 1088-1111 (1942) [hereinafter *Fair Comment I*]. Reisman authored a series of articles on the topic of democracy and defamation. See also Reisman, *Democracy and Defamation: Control of Group Libel*, 42 COL. L. REV. 727 (1942) and Reisman, *Defamation and Democracy: Fair Game and Fair Comment II*, 42 COL. L. REV. 1282 (1942).

In *Fair Comment I*, Reisman examined the development of libel doctrine in Europe prior to the outbreak of World War II. He noted that the Nazis effectively used defamation as a tool in their rise to power in Germany. *Fair Comment I*, *supra*, at 1090. They used libel trials as propaganda events and threatened their own opponents with libel suits as a means of intimidation. *Id.* at 1089.

Reisman also contends that the severity and impartiality with which England enforced its libel laws served to "check the rise of demagogic fascism" in that country. *Id.* at 1090.

Press recognized that the threat to free speech was increasingly non-governmental.<sup>117</sup> The Commission identified such factors as the economic interest of newspaper owners, the influence of advertisers, the interest in increased circulation and the public's craving for entertainment as threats to free speech.<sup>118</sup> News reporter Lyle Denniston has echoed these same concerns: "the power groupie, the fame-driven person runs through [the news] profession in great numbers. I don't think people respect truth very much: they respect theater and they respect excitement, but truth isn't a driving proposition anymore."<sup>119</sup>

The test for actual malice in direct quotation must be sufficiently firm to protect the individual from calculated falsehood and its underlying motivations while still providing for the interests of free speech.<sup>120</sup> A review of traditional actual malice doctrine indicates that it provides such protection, and that the *Masson* test, as articulated, is unnecessary.

### A. *Traditional Actual Malice Doctrine and Direct Quotations*

The principal deficiency in the *Masson* test is that it complicates and broadens the analysis of actual malice. Application of this test will further weaken the significance of direct quotation and further blur the distinction between fact and opinion. Perhaps most significantly, the court created a new test for a situation which did not warrant a new approach. Although direct quotation is a distinct style of speech; it does not require a special interpretation of actual malice. Accordingly, actual malice should be analyzed in the same manner whether or not the speech is a direct quote.

117 Berney, *Libel and the First Amendment - A New Constitutional Privilege*, 51 VA. L. REV. 1, 32 (1965) (one of the first commentaries to analyze the *Sullivan* decision).

118 *Id.* at 33.

119 GOODWIN, *supra* note 2, at 164 (quoting Lyle Denniston, United States Supreme Court reporter for the *Baltimore Sun*).

120 Ironically, *Masson* defendant, Janet Malcolm, has provided a vivid example of how prevalent this motivation may be in the journalism profession. While *Masson's* suit against Malcolm was still pending, Malcolm authored another article criticizing the same practice for which *Masson* was suing her. The article recounted the relationship between convicted murderer Dr. Jeffrey MacDonald and Joseph McGinniss, the author of the now-famous book *FATAL VISION* which recounts MacDonald's crimes. MacDonald had cooperated with McGinniss with the impression that the book would portray MacDonald sympathetically. Scardino, *Appeals Court Turns Down Suit Against Author*, *New York Times*, Aug. 5, 1989, § 1, at 26, col. 1. The book actually portrayed MacDonald as a brutal killer. *Id.* MacDonald sued McGinniss and the suit settled for \$325,000. *Id.* In writing about the MacDonald — McGinniss relationship, Malcolm astounded and amused the national media with an opening paragraph that had tremendous relevance to the accusations made by *Masson*:

Every journalist who is not too stupid or too full of himself to notice what is going on knows that what he does is morally indefensible. He is a kind of confidence man, preying on people's vanity, ignorance or loneliness, gaining their trust and betraying them without remorse. Like the credulous widow who wakes up one day to find the charming young man and all her savings gone, so the consenting subject of a piece of non-fiction writing learns - when the article or book appears - his hard lesson. Journalists justify their treachery in various ways according to their temperaments. The more pompous talk about freedom of speech and 'the public's right to know'; the least talented talk about art; the seemliest murmur about earning a living.

Malcolm, *Reflections: The Journalist and the Murderer (I - The Journalist)*, *THE NEW YORKER*, March 13, 1989, at 38.

### B. *The Masson Dissent: An Alternative Test*

The Second Circuit's analysis in *Carson* suggests that actual malice in direct quotations may be examined under traditional defamation principles. Judge Kozinski, dissenting in *Masson* advocated an approach consistent with *Carson*. The Judge offered a five-step inquiry into whether a fabricated quotation is actionable:

- (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?<sup>121</sup>

For Kozinski, a negative response to any one of these questions on a motion for summary judgment would prevent the case from going to a jury.<sup>122</sup>

This test essentially reflects the traditional analysis performed in cases of defamation: analysis of falsity, defamatory impact, and malicious intent. The only deviation is that the first three steps in this analysis address the question of whether the quotation is false. A proper analysis of falsity, however, is independent of the question of malice.<sup>123</sup>

While the *Masson* dissent would have the judge perform the entire five-step inquiry on summary judgment, the extent of a court's review would differ for each of the elements of defamation. *Liberty Lobby* mandates an expanded review of the plaintiff's evidence as to actual malice. The same level of review is not appropriate for the elements of falsity and defamatory impact. A judge should review these elements within the context of traditional summary judgment procedure. Under this procedure, the judge must first determine whether the defendant-moving party has met his initial burden of proving that there does not exist a genuine issue of material fact.<sup>124</sup> If the moving party meets this burden, then the judge must determine whether the plaintiff-nonmoving party has proven that such a question of material fact does exist.<sup>125</sup> A judge must perform such an analysis, however, while drawing all inferences in favor of the plaintiff-nonmoving party.<sup>126</sup> Such analysis would sufficiently protect the defendant's first amendment rights without establishing a system in which it would be virtually impossible for a plaintiff with a reasonable claim of defamation to prevail. Other circuits have also limited the impact of *Liberty Lobby* to the element of actual malice.<sup>127</sup>

<sup>121</sup> *Masson v. New Yorker Magazine*, 881 F.2d 1452, 1478 (9th Cir. 1989) (Kozinski, J., dissenting).

<sup>122</sup> *Id.*

<sup>123</sup> See *supra* note 85 and accompanying text for a discussion of the significance of this distinction.

<sup>124</sup> FED. R. CIV. P. 56(c).

<sup>125</sup> *Id.* at 56(e).

<sup>126</sup> See *supra* note 99.

<sup>127</sup> See, e.g., *Zerangue v. TSP Newspapers, Inc.*, 814 F.2d 1066, 1071 (5th Cir. 1987) (specifically noting that *Liberty Lobby* did not otherwise alter summary judgment procedure beyond the element of actual malice).

### C. *The Alternative Test and First Amendment Protection*

Whether or not the *Masson* dissent's test is appropriate will depend on whether it impermissibly chills speech or inhibits robust public debate.<sup>128</sup> Substantively, the test does not appreciably differ from traditional defamation principles established by the Supreme Court. Expanding the question of falsity into three parts does not lighten the plaintiff's burden of proving all elements of defamation. Unlike the test offered by the *Masson* majority, the dissent's test does not alter the definition of actual malice. The dissent's test does address the issue of falsity and defamatory impact but not as sub-elements of actual malice.

As for procedural first amendment concerns, the dissent's analysis does not provide defendants with additional procedural protection as the majority's test implicitly does.<sup>129</sup> Although the Supreme Court has yet to directly state whether the first amendment requires special procedure in matters of defamation,<sup>130</sup> in *Liberty Lobby*, the Court indicated that no special procedures are required.<sup>131</sup> The Court explicitly stated in *Liberty Lobby* that its holding applied beyond the law of defamation.<sup>132</sup> Consequently, the fact that the dissent's alternative analysis fails to offer the defendant additional procedural protection does not weaken its effectiveness. No such protection is presently constitutionally required.

Even if the dissent's alternative test appears sound, it might be insufficient if it effectively restricts speech by causing media self-censorship.<sup>133</sup> Such concern is not warranted due to the type of speech involved in *Masson* — direct quotation. The dissent's test affects neither the content nor the frequency of speech but rather only the manner in which the speech is presented.

If a writer has reason to doubt a statement's accuracy, there are other ways to present it. First, the writer could use partial quotations. Also the writer could paraphrase the statement and not use quotation marks. Both alternative presentations signal to the reader the presence of editorial judgment. The enhanced credibility inherent in direct quotations is a function of the quotation's accuracy. The absence of accuracy restricts the writer's right to the credibility gained by using direct quotations.<sup>134</sup> Such use of direct quotation should be reserved for those instances when the requisite accuracy can be assured. This will not affect

128 See *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

129 See *supra* note 102 and accompanying text.

130 See *supra* note 32 and accompanying text.

131 *Anderson v. Liberty Lobby*, 477 U.S. 242, 256 n.7 (1986).

132 *Id.* at 254. See *id.* at 257 n.1 (Brennan, J., dissenting).

133 *Sullivan*, 376 U.S. at 279.

134 The *Masson* dissent offered a good example of the added credibility due to direct quotations. In reviewing the book *IN THE FREUD ARCHIVES*, a psychiatrist from Harvard University wrote:

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

*Masson v. New Yorker Magazine*, 881 F.2d 1452, 1465 (9th Cir. 1989) (Kozinski, J., dissenting) (citing Coles, *Freudianism and [sic] its Malcontents*, Boston Globe, May 27, 1984, § (Book Review), at 58, 60, col. 2 (emphasis added) (*Freudianism Confronts its Malcontents*)).

the substance or the frequency of speech, just the form in which it is presented. While a writer has a right to free speech, he does not necessarily possess the right to the most effective form of speech.<sup>135</sup>

One additional concern is whether the alternative test will inhibit the typically frenetic task of gathering and disseminating news to the public. It will not. In such cases, sufficient protection for media defendants is inherent in the heightened burden of proof regarding actual malice. To be actionable, defamation of a public figure must be either intentional or reckless.<sup>136</sup> A court will determine the existence of actual malice in light of relevant factors such as the time constraint of publication.<sup>137</sup> This factor, known as the "hot news" exception, indicates that the necessity for rapid dissemination is a factor in determining whether a defendant's actions will be elevated to the level of recklessness required for finding actual malice.<sup>138</sup> Because the ability to verify quotations is already relevant in determining actual malice, the dissent's alternative analysis does nothing to diminish this protection already afforded defendants in defamation actions.

### C. *Alternative Test: Conclusion*

The *Masson* dissent's analysis is simple and applies traditional defamation principles within the framework of conventional summary judgment procedures. It will not create a chilling effect on the first amendment. In fact, the converse is true: the complexity and subjectivity inherent in the majority's test needlessly complicates the area of constitutional defamation. The lenient standard that the Ninth Circuit advocates for use of direct quotations will cause tremendous imprecision in the communication of information. To hold writers to a "rational interpretation" standard for direct quotation may cause public officials and public figures to avoid making statements and giving interviews, thereby effectively chilling the robust, uninhibited debate that the first amendment is designed to protect. As Professor Keeton points out,

<sup>135</sup> Admittedly, the form in which speech is presented is protected under the first amendment. *See Texas v. Johnson*, 109 S. Ct. 2533 (1989) (the act of burning an American flag is expressive conduct within protection of the first amendment). The Supreme Court has explicitly stated, however, that such protection does not extend "the right to communicate one's views at all times and places or in any manner that may be desired." *Heffron v. Int'l. Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981). The constitutionality of a restriction on a form of speech will most likely depend upon the existence of alternative modes of communication. *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 812 (1984). Accordingly, to restrict the use of direct quotations to instances where accuracy can be assured does not impermissibly burden the first amendment right to free speech due to the existence of alternative modes of communication such as partial quotation and paraphrasing.

<sup>136</sup> The same standard may not apply to private plaintiffs suing on a private matter. *See Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 n.7 (1985).

<sup>137</sup> In deciding *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*, 388 U.S. 130 (1967) (combined opinion), the Supreme Court addressed the relevance of time constraints on publication. In upholding the finding of malice in *Butts* but not in *Walker*, four members of the Court focused on the immediacy of dissemination as a factor in determining actual malice. *Id.* at 156-59.

<sup>138</sup> *Id.* at 158-59. *See also Carson v. Allied News Co.*, 529 F.2d 206, 211 (2d Cir. 1976) ("the [previously published] article appeared on February 28, 1972, and the NATIONAL INSIDER article on April 9, 1972, almost six weeks later. The 'facts' allegedly relied on by the defendant from the [previously published] article were not 'hot news.'") (footnote omitted).

neither the values protecting free speech nor those protecting one's reputation are advanced in a system requiring a large number of difficult decisions.<sup>139</sup> The subjectivity with which a judge determines falsity and actual malice under the *Masson* court's test will provide little predictability to potential future litigants. Moreover, it will not help reduce the proliferation of expensive litigation unless judges display an open preference for dismissing such suits through summary proceedings. This would be an unjustified procedure brought on by a flawed test. In the already vague area of constitutional defamation, an approach such as that offered in Judge Kozinski's dissent in *Masson* appears more prudent than that offered by the *Masson* majority.

## V. Conclusion

Defamation continues to be a very confusing area of constitutional law. The most significant flaw in the *Masson* decision is that the Ninth Circuit needlessly adds to this confusion. The court began by noting that the Supreme Court had never specifically addressed the issue of direct quotation. It then applied cases with minimal relevance to the issues in *Masson*. The court took these holdings and crafted a test for actual malice that deviated from principles of defamation and summary judgment established by the Supreme Court. The resulting test is ambiguous, complex, and biased in favor of defendants.

In noticeable contrast to the *Masson* court's test, the *Masson* dissent's test is no test at all. Rather, it applies existing defamation principles under standard summary judgment procedures. Such an approach is simple, fundamentally sound and sufficiently protects the first amendment. Its application will simplify and expedite defamation litigation.

The Ninth Circuit's controversial decision and Judge Kozinski's thorough dissent indicate that *Masson* would, through further appellate review, provide an opportunity to definitively answer many questions that currently exist in the area of defamation. On February 15, 1990 the Ninth Circuit denied *Masson*'s petition for rehearing.<sup>140</sup> *Masson* is likely to petition the Supreme Court for *certiorari*. The Court should not decline the opportunity to grant *certiorari* in *Masson* and to overturn the Ninth Circuit's holding. In doing so, the Court must provide the circuits with much needed guidance in understanding *Liberty Lobby* and the way in which defamation cases should be reviewed on summary judgment. Such guidance will help prevent the forced application of legal principles and opportunistic interpretation of case law that led to the erroneous decision in *Masson*.

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<sup>139</sup> Keeton, *Defamation and Freedom of the Press*, 54 TEX. L. REV. 1221, 1224 (1976).

<sup>140</sup> Judges Alarcon and Hall voted to deny rehearing. *Masson v. New Yorker Magazine*, Nos. 87-2665, 87-2700 (9th Cir. February 15, 1990) (LEXIS, Genfed library, App file). The full court was advised of the suggestion for rehearing *en banc*. *Id.* No judge requested a vote for rehearing the matter *en banc*. *Id.*

