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Masson v. New Yorker Magazine, Inc.: Permission for Journalists to “Quote What I Mean, Not What I Say”

I. INTRODUCTION

“Write what I mean, not what I say!” was the exhortation Lyndon Johnson gave reporters on numerous occasions during the course of his presidency.¹ How pleased the former President would have been to learn that on June 20, 1991, the Supreme Court of the United States gave news reporters permission to do just that.² In *Masson v. New Yorker Magazine, Inc.*,³ the Court held that a reporter's deliberate alteration of a public figure's statement does not constitute actual malice⁴ unless the alteration materially changes the meaning of the speaker's actual words.⁵ However, in so ruling, the Court refused to accept the Ninth Circuit rule that allowed publishers to misquote a public plaintiff as long as the altered quote was a “rational interpretation” of the speaker's ambiguous statements.⁶

Masson arose out of a series of interviews that Janet Malcolm, a writer for *The New Yorker*, conducted with Jeffrey Masson, a noted psychoanalyst and projects director of the Sigmund Freud Archives.⁷ When *The New Yorker* published Malcolm's article, Masson claimed that Malcolm's use of quotation marks attributed to him certain words and statements that he had never said.⁸ He contended that these inaccura-

1. Slade Metcalf, *He Said, She Said: 'Get It on Tape or Go to Trial' Is the Message from a Recent Supreme Court Decision on Reformatting Quotes*, FOLIO: THE MAG. FOR MAG. MGMT., Sept. 1, 1991, at 108.

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

3. 111 S. Ct. 2419 (1991).

4. For the meaning of “actual malice,” see *infra* notes 87-95 and accompanying text.

5. *Masson*, 111 S. Ct. at 2433. The Court held that “[a] deliberate alteration of the words uttered by a plaintiff does not equate with knowledge of falsity . . . unless the alteration results in a material change in the meaning conveyed by the statement.” *Id.*

6. *Masson v. New Yorker Magazine, Inc.*, 881 F.2d 1452, 1456 (9th Cir. 1989). The Court of Appeals for the Ninth Circuit held that “[m]alice 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 made by a public figure.” *Id.*

7. *Masson*, 111 S. Ct. at 2424.

8. *Id.* at 2425-28. See *infra* notes 171-93 and accompanying text (describing six

cies damaged his reputation amongst his professional peers and the general public.⁹ Malcolm, however, argued that by reporting her interpretation of the Masson interviews, she simply represented a journalist exercising her right to report the news, inform the public, and write creatively, yet honestly, without judges, lawyers, and the courts blocking her efforts.¹⁰

As the *Masson* case moved through the federal court system, the arguments on both sides illustrated the inherent tension between two fundamental interests that conflict in many defamation suits. On the one hand, there is the plaintiff's right to redress for any damage that false publications inflict on his reputation.¹¹ On the other hand, there is the media's right to inform society, and society's right to be informed, of public issues in order to create an environment conducive to "uninhibited, robust and wide-open" debate and discussion, free from the constant threat of a lawsuit.¹² *Masson* is more than a case about false quotations. It is the latest chapter, and the Court's most recent ruling, on how to balance these two competing interests.

This Note begins by analyzing the establishment and historical development of the Court's actual malice standard. Part II describes both the majority and dissenting opinions in *Masson*. Part III analyzes the decision and explains why the majority's standard for false quotations is superior to the standards proposed by the dissent, the petitioner, and the Ninth Circuit Court of Appeals. Finally, this Note describes and analyzes the possible impacts of *Masson* in the areas of journalism, law, and academics.

quotes that Masson claimed were false and defamatory).

9. *Masson*, 111 S. Ct. at 2425. "[Masson] emerges gradually, as . . . mean-spirited, self-serving, full of braggadocio, impossibly arrogant and, in the end, a self-destructive fool." *Id.* (quoting Coles, *Freudianism Confronts Its Malcontents*, BOSTON GLOBE, May 27, 1984, at 58, 60).

10. Although no majority of the Supreme Court has ever held that the "Press Clause" contained in the First Amendment gives the media greater First Amendment protection than members of the general public, Justice Stewart consistently found that the Press Clause created "a fourth institution outside the government as an additional check on the three official branches." LOCKHART ET AL., CONSTITUTIONAL LAW—CASES—COMMENTS—QUESTIONS 1008 (5th ed. 1980). However, "some 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).

11. See *infra* notes 159-61 and accompanying text.

12. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (requiring public officials to prove actual malice to support their defamation actions).

II. HISTORICAL BACKGROUND

A. *The Common Law*

Upon the establishment of the American colonies, the British settlers created a legal system based on English common law principles.¹³ The English common law defined libel as “[any] publication that ‘robs a good man of his good name, which ought to be more precious to him than his life.’”¹⁴ Any publisher or disseminator accused of making a libelous statement was strictly liable if the alleged victim’s “good name” had been damaged—truth was no defense.¹⁵ Any publication criticizing a government official was, by its very nature, considered criminally libelous.¹⁶

However, as the American colonies grew into a country, the appreciation for freedom of speech and freedom of the press developed. Truth soon became an affirmative defense for one accused of libel.¹⁷ For the first time, in 1735, a defendant in a libel case effectively used truth as a

13. CLIFTON O. LAWHORNE, *THE SUPREME COURT AND LIBEL* xv (1981) [hereinafter LAWHORNE, LIBEL]; see also CLIFTON O. LAWHORNE, *DEFAMATION AND PUBLIC OFFICIALS* 1-13 (1971) [hereinafter LAWHORNE, DEFAMATION].

14. LAWHORNE, LIBEL, *supra* note 13, at xv (quoting CASEDE LIBELLIS FAMOSIS, 5 COKE REPORTS 125A, 125B (1606)). English common law considered an individual’s “good name” and reputation to be of the utmost importance. Reputation determined one’s status in society, which determined one’s self-esteem, ability to make social contacts, and ability to make a living. A personal insult was something to die and kill over. See W. WAT HOPKINS, *ACTUAL MALICE* 1-5 (1989); Michael D. Osteen, Note, *Fabricated Quotations—Facts or Falsehoods?* *Masson v. New Yorker Magazine*, 27 SAN DIEGO L. REV. 247, 247 (1990) (describing how in less civilized times injury to reputation was often resolved by the barrel of a gun instead of a trial in a courtroom).

15. HOPKINS, *supra* note 14, at 1. See also LAWHORNE, LIBEL, *supra* note 13, at xv; W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 113, at 809-10 (5th ed. 1984) (stating that libel and slander were strict liability torts at common law); Kay L. Reamey, Note, *TORTS-Defamation-Private Figure Plaintiff Must Show Not Only Fault as to Falsity but also Falsity Itself to Recover Damages for Defamatory Statements Made by Media Defendants on Matters of Public Concern*, 18 ST. MARY’S L.J. 581, 584-86 (1986) (discussing the early development of common law libel).

16. LAWHORNE, LIBEL, *supra* note 13, at xv-xvi. Judges, not juries, used to set the punishment for one found guilty of libel. Often this punishment was as severe as death. *Id.* at xvi.

17. HOPKINS, *supra* note 14, at 1. If the plaintiff could show that the published statements were defamatory, falsity was presumed. *Id.*

defense.¹⁸

When the Bill of Rights was ratified in 1791, the American press was as free to criticize its government as any had been in history.¹⁹ The young American government had attempted to use laws such as the Sedition Law of 1798²⁰ to stifle journalistic criticism of government officials and activities. Despite these efforts, the American press, throughout the late eighteenth and early nineteenth centuries, was free to publish statements regarding government officials, as long as the statements were true.²¹

In the last quarter of the nineteenth century, many state courts began to accept the publisher's belief in the truth of his statement as a defense to a public official's libel action.²² Statements concerning a public official's acts or conduct could not be considered libelous, even if false, if the publisher believed, without malice, that the statements were

18. NORMAN L. ROSENBERG, *PROTECTING THE BEST MEN* 35-40 (1986). The case involved the publisher of the *New-York Weekly Journal*, John Peter Zenger, who published criticisms of the New York governor, William Cosby. Although the jury found that Zenger had published the criticisms, it found Zenger not guilty of libel because the published statements were true, notwithstanding the judge's instructions that truth could not be used as a defense. *Id.* at 35. Despite the fact that the British crown did not consider this case binding, it nevertheless had precedential value in the American colonies. Just six years later, the publisher of the *Boston Evening Post*, Thomas Fleet, escaped a libel charge by producing five witnesses who testified that the criticisms he had published about Robert Walpole, the British Prime Minister, were in fact true. LAWHORNE, *LIBEL*, *supra* note 13, at xvi-xvii.

19. LAWHORNE, *DEFAMATION*, *supra* note 13, at 39.

20. The Sedition Law of 1798 stated:

If any person shall write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, or . . . Congress . . . or the president . . . with intent to defame the said government or either house of . . . Congress, or the said President, or to bring them . . . into contempt or disrepute, or to excite against them . . . the hatred of the good people of the United States, or to stir up sedition within the United States . . . then such person, being thereof convicted . . . shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years.

LAWHORNE, *LIBEL* *supra* note 13, at 2.

21. LAWHORNE, *DEFAMATION*, *supra* note 13, at 82. In a majority of states at the beginning of the nineteenth century, truth was a defense in a libel action. The standard for truth at this time was best set out in an 1807 Tennessee case in which the court stated: "Let his talents, his virtues and such vices as are likely to affect his public character be freely discussed, but no falsehoods be propagated." *Id.* (citing *Brewer v. Weekley*, 5 Am. Dec. 656, 658 (Tenn. 1807)).

22. LAWHORNE, *LIBEL*, *supra* note 13, at 7. Twenty-five of the twenty-eight states at that time had some type of privilege for those who published false comments concerning public officials, where the publisher honestly believed that the statements were true at the time of publication. See LAWHORNE, *DEFAMATION*, *supra* note 13, at 87-110.

true at the time of publication.²³ Even though a majority of states at the turn of the century had some privilege of this type, the exact nature of the privilege differed from jurisdiction to jurisdiction.²⁴ In three states, no privilege existed at all.²⁵

In 1925, the Supreme Court made the First Amendment applicable to the states through the Due Process Clause of the Fourteenth Amendment.²⁶ Initially, however, the Supreme Court did not provide First Amendment protection to statements that were defamatory under state law.²⁷ Therefore, throughout the first half of this century, no uniformity existed among the states for determining when a publisher was privileged in communicating untrue statements concerning the activities of a public official.²⁸ It was not until 1964, in *New York Times v. Sullivan*,²⁹ that the Supreme Court determined when this privilege existed and to whom it applied.

B. Creation of the Actual Malice Standard

In *New York Times v. Sullivan*,³⁰ the Supreme Court held for the

23. LAWHORNE, DEFAMATION, *supra* note 13, at 108. Lack of malice could be shown where the publisher had a good faith belief that the statements were true, and where evidence showed that the publisher had "proper cause" for believing that the statements were true. *Id.*

24. LAWHORNE, LIBEL, *supra* note 13, at 7-8. Some states allowed this privilege only when the publication was one of comment and criticism, not when the publication misstated fact. Other states allowed the privilege for statements addressing the public official's activities but not for statements attacking the official's character or motives. *Id.* at 7.

25. The three states were Tennessee, Missouri, and Indiana. LAWHORNE, DEFAMATION, *supra* note 13, at 109.

26. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925). Justice Sanford wrote: "For the present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." *Id.* at 666.

27. See *Roth v. United States* 354 U.S. 476, 483 (1957) (stating that "libelous utterances are not within the area of constitutionally protected speech"); *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952) (providing no First Amendment protection to libelous statements which defamed groups of individuals); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (including libelous statements in list of certain types of speech not deserving of First Amendment protection).

28. See LAWHORNE, LIBEL, *supra* note 13, at 15-25.

29. 376 U.S. 254 (1964).

30. 376 U.S. 254 (1964).

first time that the First Amendment could limit state defamation laws.³¹ On March 29, 1960, *The New York Times* ran a full-page advertisement entitled "Heed Their Rising Voices."³² The advertisement discussed the civil rights movement in the South and called on individuals to assist southern blacks in their struggle for equality.³³

The Commissioner of Public Affairs for Montgomery Alabama, L.B. Sullivan, who supervised the police and fire departments, claimed that two paragraphs in the advertisement had defamed him.³⁴ Although the advertisements never mentioned Sullivan by name, they did describe how the Montgomery police allegedly harassed peaceful civil rights demonstrators, including Dr. Martin Luther King.³⁵ Sullivan argued that despite not being explicitly mentioned in the advertisements, he was implicitly libeled because he had supervised police activities at the time of the alleged harassment.³⁶ An Alabama jury agreed with Sullivan and awarded him the full amount of damages he had requested.³⁷ The Ala-

31. *Id.* at 264.

32. *Id.* at 256. The advertisement was written and signed by the Committee to Defend Martin Luther King and the Struggle for Freedom in the South. *Id.* at 257.

33. *Id.* at 256. The advertisement began by stating: "As the whole world knows by now, thousands of [s]outhern Negro students are engaged in widespread non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U.S. Constitution and the Bill of Rights." *Id.*

34. *Id.*

35. *Id.* The advertisement contained ten paragraphs. Sullivan complained of the third and a portion of the sixth paragraphs. The third paragraph stated:

In Montgomery, Alabama, after students sang "My Country, 'Tis of Thee" on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission.

Id. at 257. The sixth paragraph stated:

Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home, almost killing his wife and child. They have assaulted his person. They have arrested him seven times—for "speeding," "loitering," and similar "offenses." And now they have charged him with "perjury"—a *felony* under which they could imprison him for *ten years*.

Id. at 257-58 (emphasis in original).

36. *Id.* at 258. Suit was actually brought against *The New York Times* and four Alabama clergymen who endorsed the advertisement. *Id.* at 256. The four clergymen were Reverend Ralph D. Abernathy, Reverend S.S. Seay, Reverend Fred L. Shuttlesworth, and Reverend J.E. Lowery. See HOPKINS, *supra* note 14, at 12.

37. *New York Times*, 376 U.S. at 256. Alabama libel law did allow truth as a defense in a libel action. *Id.* at 262. However, because it was an affirmative defense, the defendant bore the burden of proof. *Id.* at 267. No privilege existed for a publisher who reasonably believed the statements were true; however, a reasonable belief

bama Supreme Court affirmed the decision.³⁸

A unanimous United States Supreme Court, however, reversed. The writ of certiorari was the first in history for a state civil libel suit.³⁹ The Supreme Court held that although Alabama libel law recognized truth as an affirmative defense in a defamation cause of action, truth alone did not provide sufficient First Amendment protection to critics of public officials.⁴⁰ Because the Court viewed this case as one involving criticism of the government and not simply an individual, the Court considered Alabama's libel law to be a threat to free, open, and robust political debate.⁴¹ If a person who challenges a public official's conduct must guarantee the accuracy and truth of every assertion made concerning such conduct, self-censorship would increase and free debate would decline.⁴²

In *New York Times v. Sullivan*,⁴³ therefore, the Supreme Court did more than reverse an Alabama libel decision. It articulated a formal rule that required actual malice in order for people who comment on public officials to be guilty of libel.⁴⁴

The constitutional guarantees require, we think, a federal rule that prohibits a

in the truth of the statements could be used to mitigate punitive damages. *Id.* at 267.

Some of the statements printed in paragraphs three and six of the advertisement were false: (i) students had been expelled for demanding lunch-counter service at the Montgomery County Courthouse, not for demonstrating on the Capitol steps; (ii) only a majority of the student body protested the expulsions; (iii) the police never padlocked the dining hall door, and (iv) Martin Luther King had been arrested only four times, not seven. *Id.* at 258-59. These misstatements, together with Alabama's libel law, resulted in a \$500,000 judgment—at that time the largest judgment in Alabama's history. See LAWHORNE, LIBEL, *supra* note 13, at 28.

38. *New York Times*, 376 U.S. at 263-64.

39. See LAWHORNE, LIBEL, *supra* note 13, at 28. The Alabama State Supreme Court claimed that the U.S. Supreme Court did not have jurisdiction to hear the present case because it was a private lawsuit and "[t]he Fourteenth Amendment is directed against State action not private action." *New York Times*, 376 U.S. at 265. However, the Supreme Court made it clear that because the Alabama courts used a state rule of law to render a libel judgment, state action was involved. *Id.*

40. *New York Times*, 376 U.S. at 278-79. The Court reasoned that the lesson taught by the Sedition Act, that the defense of truth in a libel suit was insufficient to protect free debate and discussion, still held true. *Id.* at 276-77.

41. *Id.* at 279.

42. *Id.* The Court stated: "A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—lends to comparable self censorship." *Id.*

43. 376 U.S. 254 (1964).

44. *Id.* at 279-80.

public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.⁴⁵

Applying this standard, the Supreme Court found that even though *The New York Times* may have been negligent in not fully investigating the validity of the advertisement's assertions, it did not recklessly or intentionally publish false statements.⁴⁶ Therefore, no actual malice was present.⁴⁷

C. To Whom Does the Actual Malice Standard Apply?

1. Public Figures/Public Interest

In its 1964 *New York Times* decision, the Supreme Court limited its new actual malice "privilege" to statements about the bureaucratic conduct of public officials.⁴⁸ Soon after, however, the Supreme Court expanded the list of plaintiffs who must prove actual malice.⁴⁹ In 1966, the

45. *Id.* Three Justices, Arthur Goldberg, Hugo Black, and William O. Douglas, concurred in the judgment, arguing that the rule should not be conditional. *Id.* at 293-305 (Goldberg, Black, and Douglas, JJ., concurring). Goldberg and Black both stressed the absolute right to question government. *Id.* at 293-305 (Goldberg and Black, JJ., concurring).

46. *Id.* at 287-88. In making this conclusion, the Court made it clear that reckless disregard of the truth requires proof that the publisher acted with a level of care lower than negligence. See LAWHORNE, LIBEL *supra* note 13, at 32-33.

47. The Supreme Court could have decided *New York Times v. Sullivan* on other grounds. For instance, the allegedly libelous statements concerning the Montgomery police department were arguably not statements "of and concerning" the respondent. *New York Times*, 376 U.S. at 288. The Court could have held that criticisms of governmental operations are not to be considered criticisms of the individual or individuals responsible for those operations. *Id.* at 292.

For further discussion on *New York Times*, see generally HOPKINS, *supra* note 14, at 24-47 (examining both the questions and answers *New York Times* addressed); ROSENBERG, *supra* note 18, at 243-55 (describing the effect that *New York Times* had on libel law).

48. *New York Times*, 376 U.S. at 279. But the Court refused to define the term "public official." The Court stated: "We have no occasion here to determine how far down into the lower ranks of government employees the 'public official' designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included." *Id.* at 283 n.23.

49. See *infra* notes 50-76 and accompanying text. The Supreme Court also has held that actual malice is required not only in civil actions involving public plaintiffs, but also to impose criminal sanctions on the publisher. See *Garrison v. Louisiana*, 379 U.S. 64 (1964) (convicting New Orleans district attorney Jim Garrison of criminal libel when he accused eight district court judges in New Orleans of being lazy, inefficient, and taking long vacations). Cf. *Ashton v. Kentucky*, 384 U.S. 195, 201 (1966) (holding Kentucky's broad criminal libel statute unconstitutional).

Supreme Court held that in defamation suits, public officials includes governmental employees whom the public believes possess substantial responsibility to effect and control governmental issues.⁵⁰ That same year, the Court declared that individuals involved in union disputes are also public officials for purposes of a defamation action. Therefore, these plaintiffs must show knowledge of falsity or reckless disregard on the part of the publisher before they can recover.⁵¹

A year later, in the companion cases of *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*,⁵² the Supreme Court extended the *New York Times* actual knowledge or reckless disregard of the truth test still further to include public figures. Butts was the athletic director at the University of Georgia when he sued over an article accusing him of conspiring to fix a college football game between the University of Georgia and the University of Alabama.⁵³ Walker was a retired United States ar-

50. *Rosenblatt v. Barr*, 383 U.S. 75, 85 (1966). *Rosenblatt* involved a newspaper column about a ski resort in New Hampshire. Three county commissioners had previously appointed Barr to supervise the resort. *Id.* at 78. The column suggested that Barr had been embezzling money from the ski resort. *Id.* at 78-79. The Court held that government employees who appear to the public to have substantial control over governmental affairs and who are in a position to invite public scrutiny are deemed public officials even though they have never been elected. *Id.* at 86-89. The Court, however, remanded the case for a determination of whether Barr came within this definition. *Id.* at 87-88.

51. *Linn v. United Plant Guard Workers of America Local 114*, 383 U.S. 53, 56 (1966). In *Linn*, the petitioner was a detective agency official who filed a defamation suit against a union that claimed the petitioner had lied and robbed some of his employees. *Id.* The Court held that during union organizing campaigns, those involved in the union-employer negotiations would have to show either actual knowledge or reckless disregard for truth when the statements concerned the negotiations. *Id.* at 65.

Also, in 1971, the Court expanded the meaning of the term "official conduct" as it was used in *New York Times* to mean any conduct "which might touch on an official's fitness for office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 274 (1971).

52. 388 U.S. 130 (1967). The Court brought the two cases together to decide whether a public figure who is not a public official must prove actual malice in a libel action. *Id.* at 134.

53. *Id.* at 135-37. Butts was particularly upset by an editor's note that followed the article:

Not since the Chicago White Sox threw the 1919 World Series has there been a sports story as shocking as this one Before the University of Georgia played the University of Alabama . . . Wally Butts . . . gave [the Alabama coach] . . . Georgia's plays, defensive patterns, [all the significant secrets of Georgia's football team.]

Id. at 136.

my general when he sued a number of newspapers carrying an *Associated Press* article that claimed he took part in an anti-integration riot at the University of Mississippi in 1962.⁵⁴

The Supreme Court held that both Butts and Walker were public figures.⁵⁵ The Court reasoned that both were in the public eye,⁵⁶ both were in a position to affect public policy determinations,⁵⁷ and both had access to channels of information that enabled them to assert counterarguments to the allegedly defamatory statements.⁵⁸ The Supreme Court stated that “the guarantees of speech and press are not exclusively the preserve of political expression;”⁵⁹ rather, the framers of the Constitution intended free press to also advance “truth, science, morality and the arts in general.”⁶⁰ Therefore, people who are in a position to influence public debate on issues of public interest, even though they are not public officials, must show actual knowledge or reckless disregard for the truth on the part of the publisher before they can recover for defamation.⁶¹ However, the Supreme Court in *Curtis Publishing* did not precisely define the term “public figure.” That definition was to come

54. *Id.* at 140-42. Actually, Walker had commanded army units which enforced integration at Central High School in Little Rock Arkansas in 1957. See LAWHORNE, LIBEL, *supra* note 13, at 51.

55. *Curtis Publishing*, 388 U.S. at 154-55. The public figure status was based on Butts’ “position alone” and Walker’s “purposeful activity amounting to a thrusting of his personality into the ‘vortex’ of an important public controversy.” *Id.* at 155.

56. *Id.* at 154-55. The Court’s rationale for extending the actual malice standard to public figures was summarized in Chief Justice Warren’s concurring opinion:

In many situations, policy determinations which traditionally were channeled through formal political institutions are now originated and implemented through a complex array of boards, committees, commissioners, corporations and associations, some only loosely connected with the Government. This blending of position and power has also accrued in the case of individuals so that many who do not hold public office at the moment are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.

Id. at 163-64 (Warren, C.J., concurring).

57. *Id.*

58. *Id.* at 155.

59. *Id.* at 147 (quoting *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967)).

60. *Id.* at 147 (citation omitted).

61. *Id.* at 154. Four Justices—Brennan, White, Black and Douglas—dissented. All nine justices agreed with the majority that the “actual knowledge or reckless disregard for the truth” standard should also be applied to public figures. *Id.* However, two dissenting justices questioned whether it was proper for the Court to reexamine questions of fact that the jury had already determined. *Id.* at 170-71 (Black and Douglas, JJ., dissenting). Two other justices disagreed with the majority over whether there should be a new trial at which the actual malice standard would be applied. *Id.* at 174 (Brennan and White, JJ., dissenting).

seven years later, in *Gertz v. Robert Welch, Inc.*⁶²

2. Private Figures/Public Interest

In 1971, a plurality of the Supreme Court held that the *New York Times* actual malice standard should apply to private figure plaintiffs when their activities are a matter of "public or general interest."⁶³ However, three years later, in *Gertz v. Robert Welch, Inc.*,⁶⁴ a majority of the Court held that the *New York Times* actual malice standard did not apply to private figure plaintiffs in lawsuits involving issues of public interest.⁶⁵

Gertz was a locally well-known attorney who represented a family whose son had been fatally shot by a Chicago policeman.⁶⁶ An article in the respondent's magazine alleged that the policeman's murder trial was

62. 418 U.S. 323 (1974).

63. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 31 (1971). *Rosenbloom* involved a distributor of nudist magazines who was arrested for selling obscene materials. *Id.* at 32. When the respondent reported the story on its newscast, it called the petitioner a "smut merchant" and indirectly referred to the petitioner as a "girlie-book peddler." *Id.* at 33-34. Eight justices took part in the decision, and each justice agreed that the Court could not hold a media defendant strictly liable for publishing false statements about a private figure which were of public or general interest. *Id.* at 64-65 (Harlan, J., dissenting). There was strong disagreement, however, over what level of protection the First Amendment gave the media in this type of situation. Justices Brennan and Blackmun and Chief Justice Warren held that courts should apply the actual malice standard in all defamation cases that deal with statements of public or general interest, regardless of whether the plaintiff is a public or private figure. *Id.* at 44. Justices White and Black concurred separately, with Justice Black arguing that the First Amendment allows no recovery against the media in a libel suit. *Id.* at 57 (Black, J., concurring). Justices Harlan, Marshall, and Stewart dissented. Justice Harlan believed that the actual malice standard should not apply in all defamation cases that involve issues of public or general interest because everything the media reports could be considered as such. *Id.* at 63 (Harlan, J., dissenting); see also *id.* at 79 (Marshall, J., dissenting). From 1971 to 1974, six federal appellate courts and seventeen states followed the plurality opinion. LAWHORNE, LIBEL, *supra* note 13, at 81.

The precedent for this plurality ruling came from the analogous false light invasion of privacy action. In 1967, the Court had held that in a suit for false light, the plaintiff, whether private or public, must show that the defendant published the report with either "knowledge of its falsity or in reckless disregard of the truth" if the report was one of "public interest." *Time, Inc. v. Hill*, 385 U.S. 374, 387-90 (1967).

64. 418 U.S. 323 (1974).

65. *Id.* at 347.

66. *Id.* at 325-27. The Chicago policeman, Richard Nuccio, had been convicted of second degree murder for killing the boy. *Id.* at 325.

part of a communist conspiracy to discredit the police department, and accused Gertz of being a "Communist-fronter."⁶⁷ Gertz filed suit, claiming that the article had injured his reputation.⁶⁸

The Supreme Court held that Gertz was not a public figure and, therefore, was not constitutionally required to show actual malice.⁶⁹ The Court reasoned that unlike public officials and public figures, private plaintiffs do not have immediate access to information mediums and, thus, are unable to rebut defamatory attacks.⁷⁰ In addition, they do not voluntarily thrust themselves into the public eye.⁷¹ As a result, the publisher does not warrant as high a level of constitutional protection as it

67. *Id.* at 325-26. The article's title was "FRAME-UP: Richard Nuccio And The War On Police." *Id.* at 326. Besides accusing Gertz of being a "Communist-fronter," the article also stated that he had been an official of the "Marxist League for Industrial Democracy, originally known as the Intercollegiate Socialist Society, which has advocated the violent seizure of our government." *Id.*

68. *Id.* at 327.

69. *Id.* at 351-53. Despite the fact that Gertz had served as an officer of local civic groups, had published several books and articles on legal subjects, and was well known in some circles, the Court did not consider him a public figure. *Id.* at 351-52. Furthermore, Gertz's former position on a housing committee did not qualify him as a public official. *Id.*

70. *Id.* at 344. The Court stated:

The first remedy of any victim of defamation is self-help—using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy.

Id.

71. *Id.* at 351. The Court reasoned that an individual can become a public figure in one of two ways. First, some individuals achieve such pervasive fame and notoriety that they become public figures in all contexts and situations. *Id.* Second, and "[m]ore commonly, an individual voluntarily injects himself . . . into a . . . public controversy and thereby becomes a public figure for a limited range of issues." *Id.*

Clearly, Gertz was not a public figure for all purposes. What name recognition he did possess was limited. *Id.* at 351-52. The Court also held that Gertz was not a public figure in the particular controversy which led to his defamation suit, since he took no part in the prosecution of Officer Nuccio, never discussed the case with the press, and only represented his private client. *Id.* at 352. Thus, Gertz did not "thrust himself into the vortex of this public issue." *Id.*

Several post-*Gertz* decisions have further defined who may be a public figure. See *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 159 (1979) (holding that a person subject to a twenty-one year investigation of Soviet intelligence activities was not a public figure); *Hutchinson v. Proxmire*, 443 U.S. 111, 135-36 (1979) (holding that a scientist who received an award for animal research was not a public figure); *Time, Inc. v. Firestone*, 424 U.S. 448 (1976) (holding that a wealthy socialite seeking a divorce was not a public figure for all purposes, nor was she a public figure for limited purposes).

would for statements about a public plaintiff.⁷²

Because the Constitution does not require actual malice in defamation suits involving private figures and public issues,⁷³ the Court allowed the states to set the standard at actual malice, or any lesser standard of fault other than strict liability.⁷⁴ While permitting recovery for private figure plaintiffs under a lower standard than actual malice, the *Gertz* court also limited that recovery to actual damages.⁷⁵ The Court held that a private plaintiff could not recover punitive or presumed damages without proof of actual malice.⁷⁶

3. Private Figure/Private Concern

*Dun & Bradstreet, Inc. v. Greenmoss Builders*⁷⁷ addressed the First Amendment limitations on a private figure's recovery for defamatory statements that are not a matter of public concern. The defendant was a credit reporting agency that falsely reported to a few subscribers that Greenmoss Builders was insolvent.⁷⁸ Greenmoss Builders received a jury verdict in its favor for \$50,000 in compensatory damages and \$300,000 in punitive damages.⁷⁹ The award for punitive damages seemed contrary to *Gertz* because the defendant lacked actual malice.⁸⁰ However, the Vermont Supreme Court upheld the damage award, finding that because the defendant was non-media, the *Gertz* punitive damages rule was inapplicable.⁸¹

72. *Gertz*, 418 U.S. at 343-47.

73. *Id.* at 347.

74. *Id.* After *Gertz*, most states adopted a negligence standard for defamation suits involving a private figure plaintiff and statements of public interest. See LAWHORNE, LIBEL, *supra* note 13, at 90. A few states adopted a gross negligence standard. *Id.* Two states, Indiana and Colorado, retained the actual knowledge or reckless disregard standard as in was applied in *Rosenbloom*. See *Walker v. Colorado Springs Sun, Inc.*, 538 P.2d 450 (Colo. 1974), *cert. denied*, 423 U.S. 1025 (1975); *Aafco Heating and Air Conditioning Co. v. Northwest Publications, Inc.*, 321 N.E.2d 580 (Ind. Ct. App. 1974), *cert. denied*, 424 U.S. 913 (1976).

75. *Id.* at 349-50. Actual damages include monetary damages, damage to one's reputation and standing in the community, personal humiliation, as well as mental anguish and suffering. *Id.* at 350.

76. *Id.* at 349-50.

77. 472 U.S. 749 (1985).

78. *Id.* at 751-53. Greenmoss Builders was never insolvent; it was one of its former employees who had filed for bankruptcy. *Id.* at 752.

79. *Id.* at 752.

80. See *supra* notes 75-76 and accompanying text.

81. *Dun & Bradstreet*, 472 U.S. at 752-53. According to the Vermont Supreme

The United States Supreme Court affirmed, but not because *Gertz* did not apply to non-media defendant cases.⁸² Rather, because the credit report contained no public issues, it was not a matter of public concern.⁸³ The Court reasoned that such matters are not essential for robust and vigorous debate on public issues.⁸⁴ A plurality of the Court concluded that “[p]ermitting recovery of presumed and punitive damages in defamation cases absent a showing of ‘actual malice’ does not violate the First Amendment when the defamatory statements do not involve matters of public concern.”⁸⁵ In so ruling, the Court raised the possibility that a private figure, who sues over statements not of public concern, may not even have to show ordinary negligence in order to recover.⁸⁶

D. Defining Actual Malice

In *New York Times*, the Supreme Court defined actual malice as publishing a statement with knowledge of its falsity or reckless disregard for its truth.⁸⁷ In *Garrison v. Louisiana*,⁸⁸ the Court shed some light on the ambiguous phrase “reckless disregard.” The Court held that to show reckless disregard, the defendant must have entertained a high degree of awareness of the statement’s falsity at the time it was published.⁸⁹ However, it was not until *St. Amant v. Thompson*⁹⁰ that the Court took a

Court, a credit reporting agency, “which [was] in the business of selling financial information to a limited number of subscribers,” was not a media defendant and, therefore, was not worthy of the same First Amendment protection given the defendant in *New York Times*. *Id.* at 753.

82. Justice Powell’s plurality opinion does not address the distinction between media and non-media defendants in defamation suits. However, five members of the *Dun & Bradstreet* Court specifically rejected the holding of the Vermont Supreme Court that the Constitution protects media defendants more than non-media defendants. *See id.* at 773 (White, J., concurring); *id.* at 781-82 (Brennan, J., dissenting) (Marshall, Blackmun, and Stevens joining in Brennan’s dissent); *see also* Sharon A. Mattingly, Note, *To Quote or Not to Quote: The Status of Misquoted Material in Defamation Law*, 43 VAND. L. REV. 1637, 1645 (1990).

83. *Dun & Bradstreet*, 472 U.S. at 761-63. The Court reasoned that the credit report was “solely in the individual interest of the speaker and its specific business audience.” *Id.* at 762. Furthermore, the report was made available to only five subscribers. *Id.*

84. *Id.* at 762.

85. *Id.* at 763.

86. *See id.* at 772-73 (White, J., concurring).

87. *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964).

88. 379 U.S. 64 (1964).

89. *Id.* at 74. *See also* Mattingly, *supra* note 82, at 1646. In 1967, the Court stated that proof of intentional distortion or reckless publication “despite the publisher’s awareness of probable falsity was essential to recovery by a public official.” *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 153 (1967).

90. 390 U.S. 727 (1968).

significant step in explaining how to apply the reckless disregard standard.

In *St. Amant*, the petitioner was a political candidate who, during a televised speech, read questions he had previously asked a third party and the answers the third party had given.⁹¹ The answers falsely charged the respondent with criminal conduct, and the respondent brought suit.⁹² The Supreme Court held that the petitioner's statements were not defamatory because the petitioner did not make the statements with reckless disregard for their validity.⁹³ The Supreme Court stated:

[R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.⁹⁴

Thus, the Court applied a subjective standard and found that because the petitioner did not, in fact, entertain serious doubts as to the truth of the statements, he lacked actual malice.⁹⁵

E. Truth and Opinion

1. Burden of Proof

The Supreme Court's application of the actual malice standard in *New York Times* and *Curtis Publishing* placed the burden of proving falsity on public plaintiffs.⁹⁶ In *Philadelphia Newspapers v. Hepps*,⁹⁷ the Court

91. *Id.* at 728-29.

92. *Id.* One answer in particular accused Thompson, a sheriff's deputy, of taking money from the president of a Teamsters Union in his efforts to secret union records. *Id.* at 728, 729 n.1.

93. *Id.* at 732-33. Nor had petitioner made the statement knowing it was false. *Id.*

94. *Id.* at 731.

95. *Id.* at 732-33. In *St. Amant*, the Court did provide guidance to future triers of fact as to when reckless disregard for truth has occurred:

Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.

Id. at 732.

96. *See Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *New York Times v.*

determined who carries the burden of proving falsity when the defamation suit involves a private plaintiff and statements of public concern. The Court reasoned that because true speech on matters of public concern should not be deterred, the common law presumption that defamatory speech is false does not apply when a private plaintiff sues a media defendant for statements concerning public issues.⁹⁸ Rather, the Constitution requires that the private plaintiff bear the burden for both fault and falsity.⁹⁹

2. The Meaning of Falsity

For the defense of truth to constitute a barrier to recovery, the statement in question need not be true in all aspects.¹⁰⁰ The statement need only be substantially true.¹⁰¹ Therefore, “[i]t is not necessary to establish the literal truth of the precise statement made. Slight inaccuracies of expression are immaterial provided that the defamatory charge is true in substance.”¹⁰² The test for determining falsity is “whether the statement produce[s] a different effect upon the reader than that which would be produced by the literal truth of the matter.”¹⁰³ Lower federal and state courts have consistently followed this view.¹⁰⁴

Sullivan, 376 U.S. 254 (1964); *see also* Mattingly, *supra* note 82, at 1648.

97. 475 U.S. 767 (1986). *Hepps* involved a series of newspaper articles linking Hepps, the principal stockholder of a corporation that franchised Thrifty stores, to organized crime. *Id.* at 769. The Pennsylvania courts required the private plaintiff to prove negligence or malice, but followed the common law view that a defamatory statement is presumed false unless the defendant shows otherwise. *Id.* at 770.

98. *Id.* at 776.

99. *Id.*

100. *See* RESTATEMENT (SECOND) OF TORTS § 581A cmt. f (1977); W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 116, at 842 (5th ed. 1984).

101. *See* W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 116, at 842 (5th ed. 1984).

102. RESTATEMENT (SECOND) OF TORTS § 581A cmt. f (1977).

103. Jonathon I. Lessner, Comment, *Masson v. New Yorker Magazine, Inc.: Sex, Woman, Fun, and Altered Quotations*, 45 U. MIAMI L. REV. 159, 164 (1990) (quoting *Gomba v. McLaughlin*, 504 P.2d 337, 338 (Colo. 1972) (citing *Wehling v. Columbia Broadcasting Sys.*, 721 F.2d 506 (5th Cir. 1983); *Goodrich v. Waterbury Republican-American Inc.*, 448 A.2d 1317 (Conn. 1982); *Bair v. Palm Beach Newspapers, Inc.*, 387 So. 2d 517 (Fla. Dist. Ct. App. 1980)).

104. *See, e.g.*, *Guccione v. Hustler Magazine, Inc.*, 800 F.2d 298 (2d Cir. 1986), *cert. denied*, 479 U.S. 1091 (1987); *Alioto v. Cowles Communications, Inc.*, 623 F.2d 616 (9th Cir. 1980), *cert. denied*, 449 U.S. 1102 (1981); *Bell v. Courier-Journal and Louisville Times Co.*, 402 S.W.2d 84 (Ky. 1966); *Ross v. Columbia Newspapers, Inc.*, 221 S.E.2d 770 (S.C. 1976).

3. Special Treatment for Opinion

In *Milkovich v. Lorain Journal Co.*,¹⁰⁵ the Supreme Court held that some statements of opinion receive no special protection from the First Amendment,¹⁰⁶ reasoning that only false statements of fact are actionable as defamation.¹⁰⁷ Therefore, before a plaintiff can recover for damage to her reputation from a false opinion, she must show not only that the opinion was false but that it stated or implied actual facts about her.¹⁰⁸ The rationale was that this rule would ensure "uninhibited, robust, and wide-open" debate on public issues and provide room for lack of "imaginative expression."¹⁰⁹

F. Procedural Issues

1. Scope of Discovery

New York Times and subsequent cases placed the heavy burden of showing culpability on the part of defendant publishers in defamation suits on both public and private plaintiffs.¹¹⁰ In 1979, the Court held in *Herbert v. Lando*¹¹¹ that discovery rules would assist, not hinder, the plaintiff in meeting this burden.¹¹² The case arose when former Army Colonel Anthony Herbert, who had gained national recognition in Vietnam by accusing his commanding officer of war crimes, claimed that a *60 Minutes* broadcast portrayed him as a liar by questioning the validity

105. 110 S. Ct. 2695 (1990). *Milkovich*, a former high school wrestling coach, sued the newspaper for defamation after one of its reporters accused him of lying under oath about an incident at a wrestling match. *Id.* at 2697-99. The trial, appellate, and supreme courts in Ohio all held that the accusation constituted opinion and, therefore, could not form the basis of a defamation suit. *Id.* at 2699-701. The U.S. Supreme Court reversed, holding that a reasonable fact finder could conclude that the allegedly defamatory statements contained factual assertions. *Id.* at 2707.

106. *Id.* at 2706.

107. *Id.* 2704-05.

108. *Id.* at 2704-07.

109. *Id.* at 2706; see also *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988) (holding that the First Amendment does provide protection for statements that cannot "reasonably [be] interpreted as stating actual facts"); *Greenbelt Coop. Publishing Ass'n v. Bresler*, 398 U.S. 6 (1970) (recognizing constitutional limitations on the type of speech that may be subject to state defamation laws).

110. See *supra* notes 43-95 and accompanying text.

111. 441 U.S. 153 (1979).

112. *Id.* at 169-70.

of Herbert's allegations.¹¹³ In his attempt to prove that the defendants broadcasted the program with knowledge of its falsity, Herbert questioned Lando, the producer and editor of the show, in pretrial depositions about his state of mind while preparing the program.¹¹⁴ Lando refused to answer, claiming that revealing such information would hinder the editorial process and have a chilling effect on news reporting.¹¹⁵

The Supreme Court concluded, in a six-to-three opinion written by Justice White, that because *New York Times* and its progeny requires the plaintiff to prove the publisher's state of mind at the time of publication, the plaintiff must be able to focus on the editorial process.¹¹⁶ Therefore, discovery devices, should provide access to this process so that the plaintiff can obtain evidence of the publisher's level of culpability.¹¹⁷

2. Summary Judgments

Federal Rule of Civil Procedure 56(c) provides that summary judgment is appropriate only when there is no genuine issue of material fact.¹¹⁸ In 1979, the Court stated that because proving actual malice requires exposing the defendant's state of mind, it is generally not appropriate to grant summary judgment in defamation suits.¹¹⁹ In *Anderson v. Liberty Lobby Inc.*,¹²⁰ however, the Court held that a public plaintiff must show by

113. *Id.* at 155-157. The *60 Minutes* program that Herbert complained of was broadcast on CBS and entitled "The Selling of Colonel Herbert." *Id.*

114. *Id.* at 157.

115. *Herbert v. Lando*, 568 F.2d 974, 977 (2d Cir. 1977).

116. *Herbert*, 441 U.S. at 160. The Court stated:

New York Times and its progeny made it essential to proving liability that the plaintiffs focus on the conduct and state of mind of the defendant. To be liable, the alleged defamer of public officials or of public figures must know or have reason to suspect that his publication is false. In other cases proof of some kind of fault, negligence perhaps, is essential to recovery. Inevitably, unless liability is to be completely foreclosed, the thoughts and editorial process of the alleged defamer would be open to examination.

Id. at 176.

117. *Id.* at 175-76.

118. FED. R. CIV. P. 56(c); see also Mattingly, *supra* note 82, at 1648.

119. *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9 (1979); see also Mattingly, *supra* note 82, at 1648.

120. 477 U.S. 242 (1986). This case arose when *Investigator Magazine* published two articles that portrayed respondent Willis Carto, the founder and treasurer of Liberty Lobby, Inc., as neo-Nazi, anti-Semitic, racist, and fascist. *Id.* at 244-45. Following discovery, Liberty Lobby moved for summary judgment, claiming that there was no evidence of actual malice because they had carefully researched the articles. *Id.* at 245. The district court agreed. *Id.* at 246. The court of appeal reversed, holding that Carto did not have to prove the possibility of actual malice by clear and convincing evidence at the summary judgment stage and that, therefore, the case should go to trial. *Id.* at 246-47. The Supreme Court reversed. *Id.* at 257.

clear and convincing evidence that a genuine issue of actual malice exists to defeat a motion for summary judgment.¹²¹ By so ruling, the Court increased the media defendant's chances of success at the summary judgment stage of the proceedings.¹²²

III. *MASSON V. NEW YORKER MAGAZINE, INC.*

A. *Factual Background*

Jeffrey Moussaieff Masson was a noted psychoanalyst and former professor of Indian Studies and Sanskrit at the University of Toronto.¹²³ In 1980, Dr. Kurt Eissler and Dr. Anna Freud hired Masson as projects director of the Sigmund Freud Archives, located near London at Maresfield Gardens.¹²⁴ By 1981, Masson had become disillusioned with Freudian psychology and, during his lecture before the Western New England Psychoanalytical Society in New Haven, Connecticut, criticized Sigmund Freud for abandoning his seduction theory simply to advance his own career.¹²⁵ Shortly thereafter, Masson was fired from his position as projects director of the Freud Archives.¹²⁶

The following year, Janet Malcolm, a writer for *The New Yorker* magazine, interviewed Masson for an article on Masson's relationship with the Archives.¹²⁷ *The New Yorker* published Malcolm's article, entitled *Annals of Scholarship: Trouble in the Archives*, as a two-part series in December 1983.¹²⁸ On November 29, 1984, Masson filed a diversity action for defamation and false light in the United States District Court for the Northern District of California.¹²⁹ Named as defendants in the complaint

121. *Id.* at 255-56.

122. The Supreme Court remanded the case to the trial court, but included some confusing recommendations. The Court suggested that the trial judge examine the quantity and quality of the evidence to determine if it meets the clear and convincing evidentiary standard, without weighing the evidence or determining its credibility. *Id.* at 254-55.

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

124. *Id.* Dr. Eissler was head of the Sigmund Freud Archives. Anna Freud, the daughter of Sigmund Freud, was a noted psychoanalyst. *Id.*

125. *Masson v. New Yorker Magazine, Inc.*, 881 F.2d 1452, 1453 (9th Cir. 1989). The seduction theory, one of Sigmund Freud's psychological hypotheses, maintained that childhood sexual abuse was the cause of certain types of mental illness. *Id.*

126. *Masson*, 111 S. Ct. at 2424.

127. *Id.*

128. *Id.* at 2424-25.

129. *Masson*, 881 F.2d at 1453. Masson admitted his public figure status at the

were Malcolm, *The New Yorker*, and Alfred A. Knopf Inc., who had published Malcolm's entire article as a book entitled *In the Freud Archives*.¹³⁰

Masson claimed that Malcolm had intentionally misquoted him¹³¹—that she had placed quotation marks around several passages in the article which contained words and phrases that he had never even uttered—words that portrayed him as a “mean-spirited, self-serving, . . . arrogant, self-destructive, fool.”¹³²

Of the twelve passages that Masson claimed were libelous, the district court found four to be substantially true and, therefore, issued a partial summary judgment for the defendants.¹³³ As for the remaining eight passages, the court held that they were either substantially true or were “one of a number of possible rational interpretations’ of a conversation or event that ‘bristled with ambiguities.’”¹³⁴ In August 1987, the court granted the defendant's motion for summary judgment, stating that “[n]o clear and convincing evidence exists that would justify a finding that the writer or the publishers entertained serious doubts about the truth of the disputed passages.”¹³⁵

The Court of Appeals for the Ninth Circuit affirmed.¹³⁶ The Ninth Circuit held that despite the fact that Malcolm deliberately altered quotations, these passages could not be considered defamatory because there was no showing of actual malice.¹³⁷ The court of appeals agreed with the district court that as long as the statements contained within quotation marks are a “rational interpretation” of the words actually spoken, the misquotation does not amount to actual malice.¹³⁸

beginning of the proceedings. *Id.*

130. *Masson*, 111 S. Ct. at 2425. Alfred A. Knopf published the book in 1984 even though he was aware of Masson's accusations that sections of the work were defamatory. *Id.*

131. *Id.* Masson had expressed concern during the editorial process that some of the passages in the article were inaccurate. Nancy Franklin, a fact-checker with *The New Yorker*, called Masson to confirm some of the facts in the article. Despite Masson's complaint of factual errors, and his request to review those passages in quotations, Franklin and *The New Yorker's* only response was a promise to get back to him. *Id.* at 2424-25.

132. *Id.* at 2425. See *infra* notes 171-93 for a comparison of Masson's actual words and Malcolm's quotations.

133. *Masson v. New Yorker Magazine, Inc.*, 686 F. Supp. 1396, 1397 (N.D. Cal. 1987). The four passages found to be true were not discussed further in the district court's opinion and, therefore, were not addressed on appeal.

134. *Id.* at 1399.

135. *Id.* at 1407.

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

137. *Id.* at 1464.

138. *Id.* at 1456. The court of appeals drew its rational interpretation standard primarily from two U.S. Supreme Court cases. The first was *Time, Inc. v. Pape*, 401

The lone dissenter, Judge Alex Kozinski, argued that intentional or reckless alteration of quotations should satisfy the actual malice requirement if the statements contained in quotation marks are defamatory, contain material inaccuracies, and purport to be a verbatim rendition of what was actually said.¹³⁹

B. *The Court's Decision*

1. The Majority Opinion

The Supreme Court reversed the district and appellate court decisions and, in so doing, rejected the rational interpretation test, replacing it with a test of their own.¹⁴⁰ According to the majority, evidence that the author placed quotation marks around words that the plaintiff did not actually speak is insufficient to prove actual malice.¹⁴¹ The speaker must also prove that the alteration resulted in a "material change in the mean-

U.S. 279 (1971). In *Pape*, a government report, which was designed to examine police brutality, disclosed alleged violations by the Chicago police of the Federal Civil Rights Acts. *Id.* at 280-83. In summarizing that section of the report, *Time* magazine failed to mention that the report only alleged police brutality and that it had not yet been proven. *Id.* at 282-83. *Pape*, a Chicago police officer, sued *Time* for libel. *Id.* The Court concluded that because the report was filled with ambiguities, no jury could find that *Time* acted with actual malice. *Id.* at 289-90. According to *Pape*, a plaintiff cannot establish actual malice where the allegedly defamatory article is a "rational interpretation" of an ambiguous document. *Id.* at 290.

The second case was *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984). *Bose* centered on an article that described the sound from the plaintiff's sound system as tending "to wander 'about the room.'" *Id.* at 494. *Bose* brought suit for product disparagement. *Id.* at 488. The Court held that the writer's choice of words did not constitute actual malice because they were a "rational interpretation" of an ambiguous event: the movement of sound. *Id.* at 512-13.

139. *Masson*, 881 F.2d at 1479-82 (Kozinski, J., dissenting). Judge Kozinski set forth a five-step inquiry for determining whether a showing of fabricated quotations is sufficient to avoid summary judgment on the question of actual malice. First, the plaintiff must show that the quotation purports to be a verbatim rendition of what the speaker actually said. *Id.* at 1479-80 (Kozinski, J., dissenting). Second, the court must determine if the quote is inaccurate. *Id.* at 1480 (Kozinski, J., dissenting). Third, the court must determine if the inaccuracies are material. *Id.* at 1480-81 (Kozinski, J., dissenting). Fourth, the court must then decide if the material inaccuracies are defamatory. *Id.* at 1481-82 (Kozinski, J., dissenting). Finally, the court must determine whether there is sufficient evidence for a jury to conclude that the misquotations resulted from actual malice. *Id.* at 1482.

140. *Masson v. New Yorker Magazine, Inc.*, 111 S. Ct. 2419, 2433 (1991).

141. *Id.*

ing.¹⁴²

Justice Kennedy began the majority opinion by recognizing that libel, under California law, is “a false and unprivileged publication by writing . . . which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation.”¹⁴³ The Court noted, however, that the First Amendment limits the application of all state libel laws.¹⁴⁴

The Court’s analysis then turned to the literary instrument around which the case centered: the quotation mark.¹⁴⁵ The purpose of quotations in a literary work is to “add authority to the statement and credibility to the author’s work,” thus allowing “the reader to form his or her own conclusions, and to assess the conclusions of the author, instead of relying entirely upon the author’s characterization of her subject.”¹⁴⁶ The majority identified two ways in which a fabricated quotation could harm a reputation.¹⁴⁷ First, a quotation can injure a reputation when “it attributes an untrue factual assertion to the speaker.”¹⁴⁸ Second, “regardless of the truth or falsity of the factual matters asserted within the quoted statement, the attribution may result in injury to reputation because the manner of expression or even the fact that the statement was made indicates a negative personal trait or an attitude the speaker does not hold.”¹⁴⁹ Although the Court identified situations where quotation marks might not represent a verbatim reproduction of the speaker’s exact words, it found that the present case did not fall within any of these categories.¹⁵⁰

Next, the Court determined what type of quotation alteration would

142. *Id.*

143. *Id.* at 2429 (quoting CAL. CIV. CODE § 45 (West 1982)). For a further explanation of libel law under section 45 of the California Civil Code, see *Baker v. Los Angeles Herald Examiner*, 721 P.2d 87, 90-91 (Cal. 1986); *Selleck v. Globe International*, 212 Cal. Rptr. 838, 839 (Cal. Ct. App. 1985); *Cameron v. Wernick*, 60 Cal. Rptr. 102 (Cal. Ct. App. 1967); *Kerby v. Hal Roach Studios*, 127 P.2d 577, 581 (Cal. Ct. App. 1942).

144. *Masson*, 111 S. Ct. at 2429-30. See also *supra* notes 26-31 and accompanying text.

145. *Masson*, 111 S. Ct. at 2430-31.

146. *Id.* at 2430.

147. *Id.*

148. *Id.* An example would be a fabricated quotation of a public official admitting that he had been convicted of a crime. *Id.*

149. *Id.* A real-life example is *Time* quoting John Lennon as saying of the Beatles, “[W]e’re more popular than Jesus Christ now.” *Id.* (quoting *TIME*, Aug. 12, 1966, at 38). Regardless of the truth of Lennon’s statement, the fact that he made the remark potentially damaged his reputation. *Id.*

150. *Id.* at 2430-31. For instance, the conversation reported in quotation marks may be hypothetical, or the work may be a docudrama or historical fiction. *Id.*

constitute actual malice and falsity for purposes of a summary judgment motion.¹⁵¹ The majority rejected Masson's assertion that any alteration of a quotation aside from grammatical or syntactic corrections is dispositive in showing the elements of actual malice and falsity.¹⁵² A journalist will often take pages of notes in an interview and, out of necessity, attribute words to a speaker other than those actually uttered.¹⁵³ The court reasoned that it would be unreasonable to believe that any change beyond grammatical and syntactic corrections would equal actual malice due to the following factors: "the existence of both a speaker and a reporter; the translation between two media, speech and the printed word; the addition of punctuation; and the practical necessity to edit and make intelligible a speaker's perhaps rambling comments."¹⁵⁴

The Court also reasoned that throughout the historical development of libel law, statements have been considered false only if they were substantially false.¹⁵⁵ Minor inaccuracies in communications, no matter what the form, were not considered false, and hence, not defamatory.¹⁵⁶ "[A] statement is not considered false unless it 'would have a different effect on the mind of the reader from that which the pleaded truth would have produced.'"¹⁵⁷ A quoted statement that is slightly different from what the speaker said, but has not materially changed the meaning of what the speaker did in fact say, is not truly false; therefore, the alteration cannot be determinative in showing actual malice.¹⁵⁸

In addition, the Court stressed that the historical basis of a defamation cause of action was compensation for injury to one's reputation.¹⁵⁹ However, "[i]f an author alters a speaker's words but effects no material change in meaning, including any meaning conveyed by the manner of

151. *Id.* at 2431.

152. *Id.* Masson argued that anything more than grammatical and syntactical corrections within a quotation would do nothing to promote "open and robust debate." *Id.*

153. *Id.* at 2432.

154. *Id.*

155. *Id.* at 1232-33. See *supra* notes 100-04 and accompanying text.

156. *Masson*, 111 S. Ct. at 2432-33.

157. *Id.* (quoting ROBERT D. SACK, LIBEL, SLANDER, AND RELATED PROBLEMS 138 (1980)).

158. *Id.* at 2432-33. Although courts have traditionally recognized falsity and actual malice as separate elements in the tort of defamation, falsity must be proven before actual malice can be shown. Therefore, if the published statement is not substantially false, the publisher cannot be guilty of actual malice. See Jonathan I. Lessner, Comment, *Masson v. New Yorker Magazine, Inc.: "Sex, Women, Fun, and Altered Quotations,"* 45 U. MIAMI L. REV. 159, 163-65 (1990).

159. *Masson*, 111 S. Ct. at 2432. See *supra* notes 13-16 and accompanying text.

fact of expression, the speaker suffers no injury to reputation that is compensable as a defamation.¹⁶⁰ Therefore, because altered quotations that convey virtually the same meaning as the speaker's actual words are not truly false, the Court concluded "that a deliberate alteration of the words uttered by a plaintiff does not equate with [actual malice] unless the alteration results in a material change in the meaning conveyed by the statement."¹⁶¹

The Court rejected the Ninth Circuit's rational interpretation test,¹⁶² reasoning that although the First Amendment allows authors to "rationally interpret" an ambiguous source, that test does not apply when quotations are being reconstructed.¹⁶³ To allow journalists to place their own rational interpretation of someone else's words inside quotation marks would have the effect of "eliminating any method of distinguishing between the statements of the subject and the interpretation of the author [Such a standard] would diminish to a great degree the trustworthiness of the printed word, and eliminate the real meaning of quotations."¹⁶⁴

In examining the six quoted passages in question, the Court first applied its new test for determining actual malice.¹⁶⁵ The Court found sufficient evidence to create a jury question as to "whether Malcolm published the statements with knowledge or reckless disregard of the alterations."¹⁶⁶ The Court based its conclusion on the fact that Malcolm did not have a working deadline,¹⁶⁷ her conversations with Masson were taped (not written),¹⁶⁸ and Malcolm's assertion that the misquoted material in the article was not taped was inconsistent with the available evidence.¹⁶⁹

The Court then examined whether or not the published statements differed "materially in meaning from the tape recorded statements so as

160. *Masson*, 111 S. Ct. at 2432. The Court reasoned that in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), this fundamental principle of defamation law applied to communication labeled "opinion" and that, therefore, no exception should be made for altered quotations. *Masson*, 111 S. Ct. at 2432.

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

162. *Id.* at 2433-34.

163. *Id.* at 2434. The Court found that *Time, Inc. v. Pape*, 401 U.S. 279 (1971), and *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984), had no precedential effect on the present case. *Masson*, 111 S. Ct. at 2434.

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

165. *Id.* at 2435-37.

166. *Id.* at 2435.

167. *Id.* Malcolm was not working for a newspaper, and her story of Masson was not considered "hot news." *Id.*

168. *Id.*

169. *Id.* Malcolm had told her editor-in-chief that the quotations of Masson had come from her tape recorded interviews. *Id.*

to create an issue of fact for a jury as to falsity.¹⁷⁰ Following are the six quoted passages, Masson's actual words, and the Court's falsity analysis.

a. *"Sex, women, and fun."*

Malcolm quoted Masson's plans for occupying Maresfield Gardens after Freud's death:

It was a beautiful house, but it was dark and sombre and dead. Nothing ever went on there. I was the only person who ever came. I would have renovated it, opened it up, brought it to life. Maresfield Gardens would have been a center of scholarship, but it also would have been a place of sex, women, fun. It would have been like the change in the Wizard of Oz, from black-and-white into color.¹⁷¹

In reality, Masson had told Malcolm that "it [Maresfield Gardens] is an incredible storehouse. I mean, the library, Freud's library alone is priceless in terms of what it contains: all his books with his annotations in them; the Schreber case annotated, that kind of thing. It's fascinating."¹⁷² Earlier in the interview, Masson did mention his discussions with a London analyst:

I like him. So, and we got on very well. That was the first time we ever met and you know, it was buddy-buddy, and we were to stay with each other and [laughs] we were going to pass women on to each other, and we were going to have a great time together when I lived in the Freuds' house. We'd have great parties there and we were [laughs] . . . going to really, we were going to live it up.¹⁷³

The Court found that it could not conclude, as a matter of law, that Masson's remarks bore the same substantive meaning as the statements that Malcolm quoted.¹⁷⁴

b. *"It sounded better."*

Masson described to Malcolm why his grandfather had replaced the family name, Moussaieff, with Masson, and why he chose to adopt Moussaieff as his middle name. The article stated:

My father is a gem merchant who doesn't like to stay in any one place too long. His father was a gem merchant, too—a Bessarabian gem merchant, named Moussaieff, who went to Paris in the twenties and adopted the name Masson. My

170. *Id.*

171. *Id.* at 2426.

172. *Id.*

173. *Id.*

174. *Id.* at 2436.

parents named me Jeffrey Lloyd Masson, but in 1975 I decided to change my middle name to Moussaieff—it sounded better.¹⁷⁵

Masson had actually told Malcolm that his grandfather had changed the family name “to hide his Jewishness.”¹⁷⁶ He told her that he wanted to change his last name to Moussaieff because he “just liked it,” but that his wife objected and as a compromise he adopted his family’s original name as his middle name.¹⁷⁷

The Court held that any difference between “it sounded better” and “[I] just liked it” was immaterial and did not materially change the meaning of Masson’s actual words.¹⁷⁸

c. *“I don’t know why I put it in.”*

Masson described why he had previously criticized Freud for the alleged “sterility of psychoanalysis.” Malcolm quoted Masson as saying: “That remark about the sterility of psychoanalysis was something I tacked on at the last minute, and it was totally gratuitous. I don’t know why I put it in.”¹⁷⁹

In fact, Masson said that “the last sentence was [a] possibly gratuitously offensive way to end a paper to a group of analysts,” but that he did “not know why psychoanalysis is sterile today.”¹⁸⁰

The Court held that there were material differences here and that, therefore, Masson did have a cause of action as to this quoted passage.¹⁸¹

d. *“Greatest analyst who ever lived.”*

Malcolm quoted Masson as predicting that after the release of his book, the other members of his profession will say that “after Freud, he’s the greatest analyst who ever lived.”¹⁸²

Masson actually stated: “[F]or better or for worse, analysis stands or falls with me now; it’s me and Freud against the rest of the analytic world Not so, it’s me. It’s me alone.”¹⁸³ Later, Masson stated: “[I] could single-handedly bring down the business [of Freudian psycholo-

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* at 2426.

180. *Id.*

181. *Id.* at 2436.

182. *Id.* at 2427.

183. *Masson v. New Yorker Magazine, Inc.*, 881 F.2d 1452, 1459 (9th Cir. 1989).

gy].”¹⁸⁴

The Court held that there was a material difference in meaning from what was quoted and what was actually said.¹⁸⁵

e. “He had the wrong man.”

Malcolm quoted Masson as giving the following explanation of Eissler’s attempt to obtain a promise of confidentiality at the Archives board meeting where Masson’s employment was terminated:

[Eissler] was always putting moral pressure on me. “Do you want to poison Anna Freud’s last days? Have you no heart? You’re going to kill the poor old woman.” I said to him, “What have I done? You’re doing it. You’re firing me. What am I supposed to do—be grateful to you?” “You could be silent about it. You could swallow it. I know it is painful to you. But you could just live with it in silence.” “Why should I do that?” “Because it is the honorable thing to do.” Well, he had the wrong man.¹⁸⁶

Malcolm, however, had deleted part of Masson’s explanation. Masson argued that this caused the “wrong man” sentence to be used out of context.¹⁸⁷ Malcolm had left out the following:

You know, why should one do that? “Because it’s the honorable thing to do and you will save face. And who knows? If you never speak about it and you quietly and humbly accept your judgment, who knows that in a few years if we don’t bring you back?” Well, he had the wrong man.¹⁸⁸

The Court held that leaving out this portion of Masson’s explanation did not materially misrepresent Masson’s account of what happened.¹⁸⁹

f. “Intellectual gigolo.”

Malcolm’s article quoted Masson’s description of his relationship with Anna Freud and Eissler as follows:

Then I met a rather attractive older graduate student and I had an affair with her. One day, she took me to some art event, and she was sorry afterward. She said, “Well, it is very nice sleeping with you in your room, but you’re the kind of person who should never leave the room—you’re just a social embarrassment anywhere else, though you’re 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

184. *Id.*

185. *Masson v. New Yorker Magazine, Inc.*, 111 S. Ct. at 2437.

186. *Id.* at 2428.

187. *Id.*

188. *Id.*

189. *Id.* at 2437.

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.¹⁹⁰

The following is what Masson actually told Malcolm during a tape recorded interview:

They felt, in a sense, I was a private asset but a public liability They liked 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.¹⁹¹

The tape recordings did contain references to his graduate student friend; however, there was no evidence that Masson or his superiors ever referred to, or considered, Masson an “intellectual gigolo.”¹⁹² The Court held that quoting Masson as saying that his superiors treated him like an “intellectual gigolo” when in fact he had never used that term, presented a jury question as to whether the passage materially changed the meaning of what Masson actually said.¹⁹³

Having found that five of the six passages presented an issue of falsity,¹⁹⁴ the Court remanded the case to the court of appeals for further proceedings consistent with the Court’s opinion.¹⁹⁵

2. The Dissenting Opinion

Justice White, joined by Justice Scalia, dissented in part and concurred in part.¹⁹⁶ The dissent contended that Malcolm and the other defendants were not entitled to summary judgment on any of the six quotations under examination.¹⁹⁷ The dissent reasoned that the focus in the present case was not whether the alterations were defamatory or substantially true, but whether they were “knowingly or recklessly” altered.¹⁹⁸ It was the dissent’s view that any deliberate rewording of a quotation necessarily involves actual malice because the author is reporting a known falsity—the false attribution of spoken words.¹⁹⁹ Such rewording might not have any defamatory effect or might be substantially true; however,

190. *Id.* at 2425.

191. *Id.* at 2426.

192. *Id.* at 2425-26.

193. *Id.* at 2435-36.

194. *Id.* at 2435-37.

195. *Id.* at 2437.

196. *Id.*

197. *Id.* at 2437-39 (White, J., dissenting).

198. *Id.* at 2437-38 (White, J., dissenting).

199. *Id.* (White, J., dissenting). Justice White disagreed with the majority’s expansive view of falsity, stating that “the falsehood, apparently, must be substantial; the reporter may lie a little, but not too much.” *Id.* at 2438 (White, J., dissenting).

when an author knowingly attributes false words to a speaker, summary judgment should not be based on lack of malice.²⁰⁰ Moreover, simply because an interviewer took poor notes during an interview is no reason to give her license to reconstruct the speaker's words inside quotation marks.²⁰¹ Justice White believed that if a journalist is unsure of what a speaker actually said, she should not have the right to falsely attribute words to the speaker.²⁰² In such a situation, the journalist should paraphrase.²⁰³

IV. CASE ANALYSIS

In June 1991, when the Supreme Court decided *Masson v. New Yorker Magazine, Inc.*, the Court could have established at least three plausible standards for fabricated quotations in a defamation suit. The first was the rational interpretation standard which the Court of Appeals for the Ninth Circuit set forth.²⁰⁴ The second was the standard posited by the petitioner and Justice White's dissent in *Masson*, which provided that any deliberate alteration of a direct quotation beyond grammatical and word choice corrections is a per se showing of actual malice.²⁰⁵ The third standard, which the Court did adopt, was that any deliberate or reckless alteration of a quotation which "materially changes the meaning" of the speaker's particular words constitutes actual malice.²⁰⁶ Although arguments supported each of the three standards, only the one chosen by the

200. *Id.* (White, J., dissenting). The dissent claimed that the majority's standard for judging whether false quotations were libelous does not properly separate the distinct elements of a libel cause of action, the result being that the court decides issues that should have been left to the jury. Justice White stated:

For a court to ask whether a misquotation substantially alters the meaning of spoken words in a defamatory manner is a far different inquiry than whether reasonable jurors could find that the misquotation was different enough to be libelous. In the one case, the court is measuring the difference from its own point of view; in the other it is asking how the jury would or could view the erroneous attribution.

Id. (White, J., dissenting).

201. *Id.* at 2438-39. (White, J., dissenting). According to Justice White, when the interviewer tape records the interview, there is no basis for the majority's reasoning that misquotations are at times unavoidable. *Id.* (White, J., dissenting).

202. *Id.* (White, J., dissenting).

203. *Id.* (White, J., dissenting).

204. *See supra* notes 136-38 and accompanying text.

205. *See supra* notes 196-203 and accompanying text.

206. *See supra* notes 140-61 and accompanying text.

Supreme Court was truly consistent with the common law of libel, furthered the interests of *New York Times v. Sullivan*,²⁰⁷ and promoted journalistic credibility.

A. *Rejection of the Rational Interpretation Standard*

The Court of Appeals for the Ninth Circuit held that “[m]alice 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 made by the public figure.”²⁰⁸ The problem this standard creates is obvious: it allows journalists to fabricate quotations by interpreting what a public figure has said and then attributing that interpretation to the public figure.²⁰⁹ The words appearing on the printed page inside the quotation marks are not the speaker’s words or even his ideas, but are instead the statements of the story writer that express a rational interpretation of the speaker’s communication.²¹⁰ “If the speaker is thereby made to sound stupid or arrogant, evil or insincere, [this standard] denies him a remedy.”²¹¹ For example, the Ninth Circuit held that Malcolm’s quoting Masson as saying that he, after Sigmund Freud, “was the greatest analyst who ever lived,” did not necessarily prove actual malice because, even though Masson never made that statement in particular, the quote was a rational interpretation of Masson’s many boastful statements during the interview.²¹² One such statement was, “[I]t’s me and Freud against the rest of the analytical world Not so, it’s me. It’s me alone.”²¹³ However, immediately before this quote Masson made it clear that he was not professing to be a superior psychoanalyst; rather, he was referring to his position on many psychological issues that differed from most other analysts, including Sigmund Freud.²¹⁴

Justice Kennedy’s majority opinion accurately describes the potential harm from application of the rational interpretation test. “By eliminating

207. 376 U.S. 254 (1964).

208. *Masson v. New Yorker Magazine, Inc.*, 881 F.2d 1452, 1456 (9th Cir. 1989). The second half of the Ninth Circuit standard was, “or do not ‘alter the substantive content’ of unambiguous remarks actually made by the public figure.” *Id.*

209. *Id.* at 1464 (Kozinski, J., dissenting).

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

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

212. *Id.* at 1459 (Kozinski, J., dissenting).

213. *Id.* at 1467 (Kozinski, J., dissenting).

214. *Id.* (Kozinski, J., dissenting). Masson’s exact words were, “Talk to enough analysts and get them right down to those *concrete issues* and you watch how different it is from *my position*. It’s utterly the opposite and that’s finally what I realized, that I *hold a position* that no other analyst holds, including, alas, Freud.” *Id.* (Kozinski, J., dissenting) (emphasis in original).

any method of distinguishing between the statements of the subject and the interpretation of the author, we would diminish to a great degree the trustworthiness of the printed word, and eliminate the real meaning of quotations."²¹⁵ Upholding this standard would have undermined and threatened the outcome the *New York Times* Court hoped to promote by adopting the actual malice standard: "uninhibited, robust, and wide open debate" on public issues.²¹⁶ Because "[n]ewsworthy figures might become more wary of journalists, knowing that any comment could be transmuted and attributed to the subject, so long as some bounds of rational interpretation were not exceeded," many issues of public concern would not get proper media coverage, thereby limiting the public's access to needed information.²¹⁷ Clearly, if the public knew that the statements inside quotation marks were not the speaker's own words or ideas, but the media's rational interpretation of them, the public's confidence in the media as a fact-gathering and news-reporting institution would erode.²¹⁸

Not only is the rational interpretation standard inconsistent with the goals of *New York Times* and its progeny, but it also runs contrary to the general principles of libel law.²¹⁹ The basic premise of a libel cause of action, both at common law and at present, is that a person whose reputation has been damaged by substantially false assertions of fact deserves a remedy.²²⁰ The *New York Times* standard set constitutional limits on such recovery.²²¹ The rational interpretation standard, however, ignores these limitations. It also ignores the libel elements of substantial falsity and defamatory effect. Clearly, Malcolm's assertions that Masson said he was the "greatest analyst who ever lived" and that his superiors treated him like an "intellectual gigolo" damaged his reputation among his professional peers and the general public by making him look conceited and tactless.²²² Furthermore, because quotations purport to reflect the

215. *Masson v. New Yorker Magazine, Inc.*, 111 S. Ct. 2419, 2434 (1991).

216. *New York Times v. Sullivan*, 376 U.S. 254, 271 (1964).

217. *Id.* at 2434.

218. See *infra* notes 273-85 and accompanying text.

219. *Masson*, 111 S. Ct. at 2432.

220. *Id.* (citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)). See also *supra* notes 159-61 and accompanying text.

221. See *supra* notes 30-122 and accompanying text.

222. *Masson*, 111 S. Ct. at 2435-37. Robert Coles, a psychiatrist and a Harvard University professor, offered the following appraisal of Masson, based on Malcolm's article:

Masson the promising psychoanalytic scholar emerges gradually, as a grandi-

speaker's words verbatim, or very close to it,²²³ Malcolm's assertion that Masson uttered the statements within the quotations was substantially false.²²⁴ Malcolm not only altered the meaning of Masson's real words, but also the meaning conveyed by his manner of expression.²²⁵ The fact that the Ninth Circuit found no actual malice in applying the rational interpretation standard is a perfect example of that standard's deficiencies.²²⁶

Further evidence that the rational interpretation standard is unacceptable is that it fails to recognize professional journalistic standards for quotations. Although a deviation from professional journalistic standards is not dispositive in proving actual malice through "known falsity or reckless disregard for the truth," such deviation can be considered.²²⁷ The majority of journalists recognize that "[q]uotation marks mean literally that the words they enclose are exactly as the source gave them—verbatim."²²⁸ Furthermore, "[m]ost of the newspaper codes or canons tend to stress literal accuracy when quoting news sources."²²⁹ In

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

Masson v. New Yorker Magazine, Inc., 881 F.2d 1452, 1465 (9th Cir. 1989) (Kozinski, J., dissenting) (quoting Coles, *Freudianism and Its Malcontents*, BOSTON GLOBE, May 27, 1984, at 58, 60).

223. *Masson*, 111 S. Ct. at 2430-31. Quotation marks around a passage are not always intended to indicate that the passage reproduces the speaker's words verbatim. *Id.* at 2430. If quotations are used in a docudrama or a piece of historical fiction, then they are generally not intended to be "the actual statements of the speaker to whom they are attributed." *Id.* However, Malcolm's article did not indicate that the quotations were used for anything but actual reproductions of Masson's exact statements. *Id.*

224. *Id.* at 2435-37.

225. *Id.* For example, not only did Masson never state in substance that he was "the greatest analyst who ever lived," but also the tone of such a statement makes Masson sound "arrogant and unprofessional." *Id.* at 2437.

226. *Masson*, 881 F.2d at 1456-59.

227. *Harte-Hanks Comm. v. Connaughton*, 109 S. Ct. 2678 (1989). In *Harte-Hanks*, the respondent was an unsuccessful challenger for a municipal judge position in Hamilton, Ohio. He sued a local newspaper after it ran a story during the election which stated that he had used "dirty tricks" and had offered members of a grand jury a trip to Florida in appreciation for their role in indicting his opponent's Director of Court Services for bribery. *Id.* at 2692. The Court held that the fact that the newspaper's story was "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by reasonable publishers," does not in itself constitute a "known falsity or reckless disregard for the truth." *Id.* at 2685.

228. *Masson*, 881 F.2d at 1474. (Kozinski, J., dissenting) (quoting M.V. CHARNLEY & B. CHARNLEY, REPORTING 248 (4th ed. 1979)).

229. JOHN L. HULTENG, THE MESSENGER'S MOTIVES: ETHICAL PROBLEMS IN THE NEWS

fact, William Shawn, editor-in-chief of *The New Yorker* at the time Malcolm's article was published, stated that "[t]he *New Yorker* 'ideal is a verbatim quote.'²³⁰

Reporters have recognized, however, that unless they have at their disposal a trial transcript, a tape recording, or a prepared manuscript, it is very difficult to reproduce exactly what a speaker said.²³¹ And most journalists recognize the need to "clean up quotes" by correcting grammar and word usage mistakes.²³² Many journalists, but certainly not all, believe that a reporter should be allowed to alter a quotation by rewording the speaker's assertions in order to fit the journalist's needs.²³³ However, the authorities uniformly agree that an altered quotation must truthfully portray the speaker's message, keeping the meaning of the statements intact.²³⁴

No reporter has the right to manipulate the words of others so as to convey impressions that are distortions of the spirit of those words. You may misplace a comma or substitute one adjective for another and still not alter the thrust of a quote or paraphrase. But you have no license to violate the source's intent by changing the meaning of what he said, no matter what motivation or temptation.²³⁵

However, by constitutionally allowing a journalist to rationally interpret what a speaker said and then to place that interpretation within quotation marks, the journalist is allowed to change the meaning, violate the intent, and distort the spirit of the speaker's communication.²³⁶ Such a standard conflicts with the professional standards of journalism, the rationale of *New York Times*, and the common law of libel.

MEDIA 70 (1976).

230. *Masson*, 881 F.2d at 1474. (Kozinski, J., dissenting) (quoting Lipman, 'At the *New Yorker*, Editor and a Writer Differ on the Facts,' WALL ST. J., June 18, 1984, at 1).

231. HULTENG, *supra* note 229, at 70.

232. *Id.* at 71; *see also Masson*, 881 F.2d at 1474 (Kozinski, J., dissenting) (quoting J. OLEN, ETHICS IN JOURNALISM 100 (1988)) ("Not to clean up quotes is to make intelligent speakers look stupid and stupid speakers look stupider."); DOUGLAS A. ANDERSON & BRUCE D. ITULE, WRITING THE NEWS 72 (1988) ("Generally, most editors allow reporters to clean up grammar or to take out profanities in direct quotes.").

233. *Masson*, 881 F.2d at 1475 (Kozinski, J., dissenting).

234. HULTENG, *supra* note 229, at 71.

235. *Id.*

236. *See supra* notes 208-14 and accompanying text.

B. Rejection of the Dissent's Standard

Justice White's dissent in *Masson*, while unclear as to whether it would allow grammar and word usage corrections,²³⁷ concluded that any deliberate or reckless alteration of a quotation is determinative in proving actual malice.²³⁸ This standard coincides with professional journalistic standards, but contradicts common law defamation principles.²³⁹ The majority opinion correctly pointed out that "[t]he common law of libel takes but one approach to the question of falsity regardless of the form of the communication."²⁴⁰ Minor inaccuracies in a factual statement are overlooked and the focus of the inquiry is whether the statement is substantially true.²⁴¹ In establishing substantial truth, "it is not necessary to establish the literal truth of the precise statement made. Slight inaccuracies of expression are immaterial provided that the defamatory charge is true in substance."²⁴²

In *Milkovich v. Lorain Journal Co.*,²⁴³ the Court refused "to create a wholesale defamation exemption for anything that might be labeled 'opinion.'"²⁴⁴ Thus, if a statement is labeled an opinion and contains false assertions of fact, that statement should be scrutinized under the principles of common law libel, including the traditional test for falsity.²⁴⁵

In *Masson*, the majority reasoned that the test for falsity is no different when quotations are used.²⁴⁶ The Court rejected "any special test of falsity for quotations, including one which would draw a line at correction of grammar and syntax."²⁴⁷ A statement is not substantially false "unless it 'would have a different effect on the mind of the reader from that which the pleaded truth would have produced.'"²⁴⁸ Under the dissent's standard, minor cosmetic changes in a quotation, such as grammar and

237. *Masson v. New Yorker Magazine, Inc.*, 111 S. Ct. 2419, 2437-39 (1991) (White, J., dissenting).

238. *Id.* at 2438 (White, J., dissenting). For Justices White and Scalia, the fact that Malcolm placed in quotes certain things she knew Masson did not say is, by any definition of the term, a "knowing falsehood." *Id.* at 2437-38 (White, J., dissenting).

239. *See id.* at 2431-33. *See supra* notes 159-61 and accompanying text.

240. *Masson*, 111 S. Ct. at 2432. *See supra* notes 100-04 and accompanying text.

241. *Id.* at 2433.

242. RESTATEMENT (SECOND) OF TORTS § 581A cmt. f (1977).

243. 110 S. Ct. 2695 (1990).

244. *Id.* at 2705.

245. *Id.*

246. *Masson v. New Yorker Magazine, Inc.*, 111 S. Ct. 2419, 2432-33 (1991).

247. *Id.* at 2432.

248. *Id.* at 2433. (quoting R. SACK, LIBEL, SLANDER, AND RELATED PROBLEMS 138 (1980)).

syntax corrections, may or may not be actionable.²⁴⁹ However, any deliberate alteration of a quotation beyond cosmetic corrections, such as rewording, would definitely constitute actual malice, even though this conclusion ignores the common law principle of substantial falsity.²⁵⁰ If, for example, a speaker tells a reporter "I killed him," but is quoted as saying "I murdered him," the dissent would find this to be a deliberate alteration constituting actual malice on the part of the reporter.²⁵¹ However, if the speaker deliberately killed his victim, the reporter's alteration of the quotation would still be substantially true under a common law defamation analysis.²⁵² The dissent's standard is simply not in line with the common law view of substantial falsity and, therefore, was properly rejected by the majority of the Court.

Justice White's dissent is also contrary to the *New York Times* rationale. The central theme of the *New York Times* line of cases was the Court's desire to give journalists and other non-fiction writers protection from libel suits based on honest and inadvertent mistakes when writing about public plaintiffs and matters of public concern.²⁵³ This provides "breathing space" for journalists who report on important public issues, and discourages "self-censorship."²⁵⁴ When the press has the peace of mind of knowing that a lawsuit does not await after every factual mistake printed, it will be aggressive in providing the public with the information needed for "uninhibited, robust, and wide open" debate.²⁵⁵ A rule permitting a defamation action for every intentional misquotation of a public plaintiff, no matter how minor, is inconsistent with the rationale of *New York Times*.

Writers and reporters face practical dilemmas in capturing a speaker's

249. *Id.* at 2437-39 (White, J., dissenting).

250. *Id.* (White, J., dissenting).

251. See Lessner, *supra* note 103, at 195. Justice White recognized that some intentional alterations may properly be summarily adjudicated. For example, if Malcolm wrote that Masson wore contact lenses when in fact he said nothing about his eyes, or if Malcolm wrote that Masson was spoiled as a child by his parents when in fact Masson had said he had been spoiled by his mother, then the court might grant a summary judgment because the statements were not defamatory. *Masson*, 111 S. Ct. at 2438 (White, J., dissenting). But summary judgment was not proper in this case, argued the dissent, because Malcolm's alterations did constitute actual malice. *Id.* (White, J., dissenting).

252. Lessner, *supra* note 103, at 195. See *supra* notes 100-04 and accompanying text for the meaning of substantial falsity.

253. See *supra* notes 30-95 and accompanying text.

254. *New York Times v. Sullivan*, 376 U.S. 254, 272-79 (1964).

255. *Id.* at 270.

exact words.²⁵⁶ Rigorous deadlines, the need to take notes quickly during an interview, and orators speaking from a distance contribute to the difficulty of quoting someone verbatim.²⁵⁷ To hold journalists to the dissent's standard would force them to stand in front of a judge every time a quotee with a grudge or a selective memory felt like suing.²⁵⁸ The result would be numerous lawsuits concerning word accuracy and a forced transformation of journalistic standards and practices.²⁵⁹ Courts, lawyers, and judges would limit journalistic and media flexibility in the use of quotations, even though the altered quotations might have resulted from a simple mistake and not an intentional misquotation.²⁶⁰ The First Amendment's protection of the "practice of journalism" would therefore be weakened.²⁶¹

C. *Acceptance of the Majority's Standard*

The Supreme Court in *Masson* held that "a deliberate alteration of the words uttered by a plaintiff does not equate with knowledge of falsity . . . unless the alteration results in a material change in the meaning conveyed by the statement."²⁶² By developing a standard that asks whether the writer's quotation materially changed the meaning of the speaker's actual statement, the Court established a standard that, unlike its two counterparts previously discussed, is in line with the common law principles of defamation and with the goals of *New York Times*.²⁶³

Since the late half of the sixteenth century, "the tort action for defamation has existed to redress injury to the plaintiff's reputation by a state-

256. See *Masson v. New Yorker Magazine, Inc.*, 881 F.2d 1452, 1474 (9th Cir. 1989) (Kozinski, J., dissenting); HULTENG, *supra* note 229, at 70; James C. Goodale, *A Sigh of Relief*, N.Y.L.J., June 28, 1991, at 2; David G. Savage, *Writers Can't Recklessly Alter Quotes*, *High Court Says*, L.A. TIMES, June 21, 1991, at A27.

257. See *Masson v. New Yorker Magazine, Inc.*, 111 S. Ct. 2419, 2432 (1991); David G. Savage, *Writers Can't Recklessly Alter Quotes*, *High Court Says*, L.A. TIMES, June 21, 1991, at A27.

258. See *Press Ethics: Quotes . . . (cf: . . . and Don't Quotes)*, CHRISTIAN SCI. MONITOR, June 27, 1991, at 20; Susan Ellicott, *When Reporters Make Free With Speech*, THE TIMES (London), June 26, 1991, at 36.

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

260. Adopting the standard that the dissent and the petitioner proposed may not result in more libel judgments against journalists because the misquoted statements may not be defamatory. See *id.* at 2438 (White, J., dissenting). However, to hold that any deliberate or reckless alteration of a quotation beyond corrections for grammar and syntax errors constitutes actual malice would encourage libel suits against journalists and other nonfiction writers who use quotations, thereby discouraging the use of this literary instrument.

261. *Id.* at 2431.

262. *Id.*

263. *Id.* at 2431-33.

ment that is defamatory and false.²⁶⁴ Unless a false quotation materially alters the meaning of what the speaker actually said, in either substance or manner of expression, the writer has done nothing to defame the speaker.²⁶⁵ Without a material alteration, the speaker is not exposed to "hatred, contempt, ridicule . . . [or] obloquy," and the author has not caused "him to be shunned or avoided."²⁶⁶ Additionally, if the quotation has not materially changed the speaker's message, then whatever falsity the quotation creates does not amount to substantial falsity.²⁶⁷ Similarly, if no material change in meaning has taken place, even if the actual statement is altered beyond corrections for grammar and syntax errors, the quotation is not substantially false.²⁶⁸ The majority's standard recognizes common law principles of libel, and thus eliminates the need for the creation of a "discrete body of jurisprudence directed to this subject alone."²⁶⁹

Further, by requiring that the alteration be material and deliberate, the Court created a standard consistent with *New York Times*.²⁷⁰ The author of the materially false quotation must possess the necessary mental state at the time of publication before the altered quotation will support a finding of actual malice.²⁷¹ The Court recognized that if the only requirement for a libel action was a material change in the meaning created by the quotations, irrespective of the author's intent, then the constitutional protections that *New York Times* extended to journalists and other non-fiction writers would be ignored.²⁷²

V. CASE IMPACT

A. *Increase in Journalistic Credibility*

Like other facets of American life, the news media has become increasingly commercialized over the past two decades.²⁷³ Because mod-

264. *Id.* at 2432. See also *supra* notes 159-61 and accompanying text.

265. *Masson*, 111 S. Ct. at 2432.

266. *Id.* at 2429 (quoting CAL. CIV. CODE § 45 (West 1982)).

267. *Id.* at 2431-32.

268. See *id.*

269. *Id.* at 2432.

270. See *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964) (holding that statements about public officials cannot constitute libel unless published with actual malice: known falsity or reckless disregard for the truth).

271. *Id.* at 280.

272. *Masson*, 111 S. Ct. at 2429-33.

273. See Scott C. Herlihy, Comment, *Masson v. New Yorker Magazine, Inc.: Actual*

ern journalists often blend fact with fiction, inject large amounts of creativity into their work, and are profit-driven, the news media is partially responsible for creating the public's mistrust of news and news reporting.²⁷⁴ This animosity is evidenced by the number of public figures who have sued the media for printing allegedly false stories.²⁷⁵ Johnny Carson,²⁷⁶ Carol Burnett,²⁷⁷ and General Westmoreland²⁷⁸ are just a few of the public plaintiffs who have sued over stories concerning their personal and private lives. The Supreme Court, however, in holding that quotations must materially mean what the speaker said, may help reverse this negative trend of increasing mistrust of the media.

The primary beneficiary of the *Masson* ruling, besides the petitioner himself, was the news media.²⁷⁹ Not only did the Court's decision in *Masson* give reporters room to interview sources and rework quotations for clarity and style, but it also boosted the credibility of their profession.²⁸⁰ In journalism, more than any other literary device, quotations mean authority.²⁸¹ "They are evidence for a reader that a story is real, not something that is merely a fancy of people who have decided, for whatever reason, to put out a newspaper."²⁸² Also, quotations, more than any other part of an article, are what future historians rely on most when using newspapers to reconstruct the past.²⁸³ Therefore, their accu-

Malice and Direct Quotations—The Constitutional Right to Lie, 65 NOTRE DAME L. REV. 564, 579-80 (1990) (arguing that the increased commercialization of the news media supports "strict protection of the integrity of direct quotations"). See generally Richard A. Gonzales, Comment, *Pyrrhic Victories and Glorious Defeats: When Defendants Are Winning and Plaintiffs Are Losing the Struggle Over Actual Malice and "Fictionalized" Quotations*, 22 ST. MARY'S L.J. 1037, 1053-57 (1991); Gail Appleson, *Court Decisions Could Open Door for Warfare Against Press*, REUTERS, July 9, 1991, at 22.

274. See Gonzales, *supra* note 273, at 1059-61.

275. See *id.* at 1060.

276. *Id.* See Carson v. Allied News Co., 529 F.2d 206 (7th Cir. 1976). Carson and his second wife sued the newspaper after it had published a story accusing his second wife of breaking up his first marriage.

277. Burnett v. National Enquirer, Inc., 193 Cal. Rptr. 206 (Cal. Ct. App. 1983). Burnett sued the *National Enquirer* over a story reporting she was drunk in public.

278. Westmoreland v. CBS, Inc., 601 F. Supp. 66 (S.D.N.Y. 1984). A former high-ranking officer in Vietnam sued CBS over a news program that implicated him in a conspiracy to purposely conceal the strength of enemy troops.

279. See *The Malcolm Decision*, WASH. TIMES, June 24, 1991, at D2.

280. *Id.* See also Paul Gray, *Justice Comes in Quotes: Journalists Can Tinker With the Words of Interview Subjects—But Reckless Falsity Can Be Libelous*, TIME, July 1, 1991, at 68.

281. See *Masson v. New Yorker Magazine, Inc.*, 111 S. Ct. 2419, 2430 (1991); *The Malcolm Decision*, *supra* note 279, at D2. See generally HULTENG, *supra* note 229, at 70-71; ANDERSON & ITULE, *supra* note 232, at 69-73.

282. *The Malcolm Decision*, *supra* note 279, at D2.

283. See *id.*

racy and validity are crucial. By denying constitutional protection to journalists who place quotation marks around their own rational interpretations of an interviewee's statements instead of around the speaker's exact words or the material meaning of those words, the Court took a significant step in keeping quotation marks credible and reliable. The result is a strengthening of the media's credibility.

Furthermore, the Court's decision in *Masson* heightens the media's role in promoting the exercise of the general public's First Amendment rights. If a speaker has a First Amendment right to have his speech accurately reproduced, and assuming society has the First Amendment right to hear the speaker's ideas and not merely a reporter's rational interpretation of them, then this decision strengthens the media's traditional role of accurately informing the general populace.²⁸⁴ When the media does not properly perform this duty, the media loses the respect of the public.²⁸⁵

B. Increase in Lawsuits Against the Media

Masson seems to open up a new area of liability for journalists who quote public officials and public figures. By holding that any quotation which materially changes the meaning of a quotee's statement is potentially actionable, *Masson* may lead many public figures to take a second look at what reporters are placing inside quotation marks.²⁸⁶

The Ninth Circuit's rational interpretation test obviously did not expose writers to high risk liability for misquoting public figures and officials. Because the Ninth Circuit laid down no guidelines for what constituted a "rational interpretation," the very ambiguity of this phrase gave journalists significant room to defend against libel accusations.²⁸⁷ But the Court's standard in *Masson* is different. The changing of a single

284. Although the Court has never held that the media, as an institution, has a constitutional role in informing the general public, traditionally the media has assumed that role. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *New York Times v. Sullivan*, 376 U.S. 254 (1964).

285. See RODNEY A. SMOLLA, *SUING THE PRESS* 9 (1986) ("In recent years highly publicized and embarrassing mistakes [by the media] have plagued even the most estimable of media outlets.")

286. See James C. Goodale, *A Sigh of Relief*, N.Y.L.J., June 28, 1991, at 2; David Gonzales, *Some Caution Greets Libel Decision*, N.Y. TIMES, June 21, 1991, at A13.

287. See *Masson v. New Yorker Magazine, Inc.*, 881 F.2d 1452, 1464 (9th Cir. 1989) (Kozinski, J., dissenting) (arguing that the rational interpretation test denies public plaintiffs a remedy).

word in a sentence or statement can easily change its meaning.²⁸⁸ If a speaker says "I killed him" and is quoted as saying "I murdered him," the altered quotation would have materially changed the meaning of the statement if the death had been an accident.²⁸⁹

In order to recover, the public plaintiff is nevertheless required to show by clear and convincing evidence that the defendant deliberately altered the quotations.²⁹⁰ Of course, the plaintiff must also survive the defendant's motion for summary judgment.²⁹¹ Many defamation cases fail at the summary judgment stage because public plaintiffs are unable to present clear and convincing evidence that would support a jury finding that the defendant acted with actual malice.²⁹² Further, the subjectivity of actual malice does not make this burden any easier to meet.²⁹³ Clearly, proving actual malice at the time of publication is easier when the defendant is not under a working deadline and has adequate time to study notes or listen to tapes of the plaintiff's interview, as in *Masson*.²⁹⁴ But presenting evidence of the defendant's state of mind, his thoughts, intents, and motives at the time he published the questioned statements has never been an easy task.²⁹⁵

C. *Impact on Journalism Instruction*

The impact of the *Masson* decision on how journalism schools and programs instruct students to use quotations remains to be seen. Currently, journalism students are taught that "[quotation] marks around a sentence mean that the words are exactly—or nearly exactly—what the person said Quotations normally should [only] be corrected to avoid the errors in grammar and word usage that often occur unnoticed when

288. See *Masson v. New Yorker Magazine, Inc.*, 111 S. Ct. 2419, 2438 (1991) (White, J., dissenting) (arguing that changing a single word in a sentence, if defamatory, should be actionable).

289. See Lessner, *supra* note 103, at 195.

290. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 285-86, (1964) (requiring that actual malice be shown with "convincing clarity"); see also Gonzales, *supra* note 273, at 1048.

291. The party seeking a motion for summary judgment must show "that there is no genuine issue of material fact." FED. R. CIV. P. 56(c). See also Gonzales, *supra* note 273, at 1048-49.

292. See Gonzales, *supra* note 273, at 1049 n.65 (citing a study that indicates that between 1980 and 1981, 83% of all defense motions concerning the issue of actual malice were granted and that between 1982 and 1984, defamation defendants were victorious on summary judgment motions 71% of the time).

293. See Gonzales, *supra* note 273, at 1050; see also *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9 (1979) (demonstrating that the state of mind of the defendant is key to proving actual malice).

294. *Masson v. New Yorker Magazine, Inc.*, 111 S. Ct. 2419, 2435 (1991).

295. See *Hutchinson*, 443 U.S. at 120.

someone is speaking but are embarrassing in print."²⁹⁶ Students are instructed that when in doubt of the exact words a speaker used to express himself, paraphrase, do not quote.²⁹⁷

These strict standards for quotations are taught to journalism students and applied by the majority of working journalists, not so much because members of the journalism profession are fearful of defamation suits, but because such standards correspond with good journalism.²⁹⁸ One commentator remarked after the *Masson* decision, "The rules of good journalism are stricter than the libel laws, and that remains the case after this decision even with respect to the use of quotations."²⁹⁹

It must be remembered, however, that the majority of newspapers, magazines, and television stations today must compete in a free market and turn a profit if they wish to remain in existence.³⁰⁰ Therefore, no matter what ideal concerning the use of quotations schools teach today or in the future, the actual use of quotations outside of academic walls may move towards taking advantage of the stylistic freedom the *Masson* Court has given to writers who quote public figures. In the days to come, the meaning of the words contained in quotation marks may be identical to that expressed by the speaker's actual words—the language, however, may be different.

VI. CONCLUSION

Seventy-three years ago, Justice Holmes stated in *Abrams v. United States*,³⁰¹ "[T]he ultimate good desired is better reached by free trade in ideas . . . the best test for truth is the power of the thought to get itself accepted in the competition of the market."³⁰² However, reputations can get damaged in Holmes' "marketplace of ideas." Therefore, a body of

296. ANDERSON & ITULE, *supra* note 232, at 72.

297. *Id.* at 73. See generally HULTENG, *supra* note 229, at 70-71.

298. See David Gonzalez, *Some Caution Greets Libel Decision*, N.Y. TIMES, June 21, 1991, at A13. See generally HULTENG, *supra* note 229, at 70-71; ANDERSON & ITULE, *supra* note 232, at 69-73.

299. David Gonzalez, *Some Caution Greets Libel Decision*, N.Y. TIMES, June 21, 1991, at A13.

300. See Herlihy, *supra* note 273, at 579-80 (arguing that the more profit-oriented the media becomes, the more creative it gets); see also SMOLLA, *supra* note 285, at 11-12 (observing that one component of contemporary journalism is pure entertainment that makes substantial profits).

301. 250 U.S. 616 (1919).

302. *Id.* at 630.

defamation law has developed over the decades to remedy that damage. Every time the Supreme Court hears a defamation case, free speech and reputation rights conflict. How these rights are balanced will often determine the Court's decision. In *Masson*, the Court established a standard that gives the media, and other critics of people in the public eye, enough "breathing space" to continue to use quotations so that their written work will not lose its credibility and longevity. Yet *Masson* did not deprive those with public popularity of the ability to make their reputations whole again after being misquoted. Whether Jeffrey Masson will ultimately win his defamation suit against Janet Malcolm and *The New Yorker* has yet to be seen. For public figures, the media, and the general public, however, *Masson v. New Yorker Magazine, Inc.* is a victory.

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