Quotations and Actual Malice: Bridging the Gap Between Fact and Fiction

Malice will not be inferred from evidence showing that the quoted language does not contain the exact words used by the plaintiff provided that the fabricated quotations are either rational interpretations of ambiguous remarks made by the public figure . . . or do not alter the substantive content of unambiguous remarks actually made by the public figure.

* Masson v. New Yorker Magazine, 895 F.2d 1535, 1539 (9th Cir. 1989) (Alarcon, J., for the court).

While courts have a grave responsibility under the first amendment to safeguard freedom of the press, the right to deliberately alter quotations is not, in my view, a concomitant of a free press . . . to invoke the right to deliberately distort what someone else has said is to assert the right to lie in print.

Masson v. New Yorker Magazine, 895 F.2d 1535, 1548, 1570 (9th Cir. 1989) (Kozinski, J., dissenting).

At what point does the altering or fabricating of portions of direct quotations cross the threshold between a summary judgment in favor of a libel defendant and allowing the plaintiff to have his case

* Following the authoring of this article, the United States Supreme Court granted certiorari to review the decision of the Ninth Circuit. As of the printing of this article, oral arguments have been heard and a decision is expected sometime during the Spring 1991 term.

1. Libel is a subset of defamation. Defamation is defined as: "A communication . . . [which] tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." Restatement (Second) of Torts § 559 (1977). Libel is defined as: "the publication of defamatory matter by written or printed words, by its embodiment in physical form or by any other form of communication that has the potentially harmful qualities characteristic of written or printed words." Restatement (Second) of Torts § 568 (1) (1977). The Restatement distinguishes libel from slander, which is defined as "the publication of defamatory matter by spoken words, transitory gestures or by any form of communication other than those stated in Subsection (1)." Restatement (Second) of Torts § 568(2).
heard before a jury? The United States Court of Appeals for the Ninth Circuit recently drew the line by articulating the test appearing in the first quotation cited above.² If the published quote constitutes a rational interpretation of the speaker's ambiguous words, or fails to alter the substantive content of the speaker's nonambiguous words, a public official/figure defendant in the Ninth Circuit will be able to obtain summary judgment in the pretrial stage, because the author's conduct fails to warrant an inference of actual malice.³ As the second quotation cited above indicates, however, there are those who believe the holding in that case erects a bridge between the reporting of fact and fiction.

This note will examine the issue of whether fabricated and altered quotations warrant an inference of actual malice. After outlining a brief history of libel law before and after New York Times v. Sullivan⁴, an in-depth analysis of Masson v. New Yorker Magazine will be undertaken. This analysis will scrutinize the Masson test as applied to journalists who alter or fabricate direct quotations in an arguably defamatory way. When an author chooses to interpret an event, it is assumed that it is an event which lends itself to interpretation. Direct quotations, however, convey the belief that the words as printed accurately represent the speaker's words.⁵ This makes the defamatory impact of an altered or fabricated quotation even greater. This author takes the position that the Masson test is inappropriate when applied to direct quotations, and that such an application strikes an inappropriate balance between the competing interests of press freedom and individual reputation.⁶ Following this analysis, suggestions for a more

². The test enunciated in that quotation is the rational interpretation/substantive content test addressed in this note. The terms rational interpretation/substantive content test and the Masson test will hereinafter be used interchangeably.

³. The actual malice standard enunciated in New York Times v. Sullivan, 376 U.S. 254 (1964), constitutionalized libel law by subjecting both state and federal laws to first amendment scrutiny. The test, as defined in Sullivan and subsequent cases, requires a public official/figure suing for libel, to establish as a part of his prima facie case, that the defendant published the statement with "knowledge that it was false, or with reckless disregard of whether it was false or not." Id. at 280. See infra notes 25-34 and accompanying text.


⁵. Masson v. New Yorker Magazine, 895 F.2d 1535, 1549 (9th Cir. 1989) (Kozinski, J., dissenting) ("by using quotation marks the writer warrants that she has interposed no editorial comment, has resolved no ambiguities, has added or detracted nothing of substance.")

⁶. One of the primary goals of libel law is to protect the reputational interest. The importance of reputation in our society is demonstrated by the fact that the interest has taken on a quasi-Constitutional character. See infra note 8 and accompanying text.
objective and appropriate standard for evaluating altered and fabricated direct quotations will be advanced.

A. ACTUAL MALICE AND BEYOND: PREVENTING MEDIA CHILL

The history of libel in the United States can best be characterized as a balance between two interests which, for the most part, coexist without conflict. The interests involved are the freedom to publish information, and the freedom to cultivate and maintain an unblemished reputation. Both are extremely important values in our society, and arguably, both receive constitutional protection. Occasionally however, the exercise of one of these interests leads to an infringement of the other, and courts must then attempt to maintain an appropriate balance between the two. Prior to Sullivan, the balance between these rights favored reputation. This was evidenced by the ease with which a plaintiff could maintain a successful libel action. The constitutional protections of actual malice were not yet in place, and authors whose works defamed others were subjected to strict liability in most jurisdictions, depending on the statutory and common law of each state.

7. See supra note 6, infra notes 8, 31-32 and accompanying text.

8. The freedom to publish information is uncontestably protected by the first amendment to the Constitution, which states: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. Const. amend. I. Reputational interests are arguably property, which is protected from governmental deprivation by the due process clauses of the fifth and fourteenth amendments. See Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971) (Where a person's good name, reputation, honor, or integrity is at stake, liberty interests are implicated, and state officials must therefore satisfy procedural due process requirements.); see also L. Forer, A Chilling Effect: The Mounting Threat of Libel and Invasion of Privacy Actions to the First Amendment 113 (1987) ("The law treats reputation as a property right that is balanced against the First Amendment claims of the author.") [hereinafter Forer]. But see Paul v. Davis, 424 U.S. 693 (1976) (Reputation alone is not a constitutionally protected interest in the same vein as liberty or property.). See generally, Reich, The New Property, 73 Yale L. J. 733 (1964), and Sunstein, Hard Defamation Cases, 25 WM. & MARY L. Rev. 891 (1984) ("Notwithstanding Paul v. Davis, the reputational interest always had and continues to receive protection as a part of the 'liberty' protected by the Fourteenth Amendment."). Although the fifth and fourteenth amendments prohibit infringement by the federal and state governments, the fact that the reputational interest is protected at all supports the author's argument that it is an important constitutional interest.


10. See Prosser, supra note 9, § 113, at 804; see also A. Sheer and A.
To establish liability against the journalist, the plaintiff was required to prove by a preponderance of the evidence that the defendant published a defamatory statement of and concerning the plaintiff. Depending on the nature of the statement, the plaintiff was often required to prove damages proximately caused by the publication; otherwise, damages were presumed by the court. Once these elements of the prima facie libel case were established, the court presumed that the statement was false, and the burden shifted to the defendant, who could plead and prove valid defenses. Truth was considered an absolute bar to recovery and could be established by a showing that the publication was substantially true, meaning essentially that the "gist" or "sting" of the words were true.


11. PROSSER, *supra* note 9, at 804. See also Sheer and Zardkoohi, *supra* note 10, at 208.

12. PROSSER, *supra* note 9, at 802.

13. At common law, damages were presumed in cases of defamation per se. The four categories of publication constituting defamation per se, and therefore a presumption of damages, are: 1) imputations of criminal conduct; 2) imputations of a venereal or otherwise loathsome disease; 3) imputations of conduct, character, or condition which would adversely affect his fitness to properly carry out his business, trade, or profession; and 4) imputations of serious sexual misconduct. *Restatement (Second) of Torts* §§ 570-4 (1977).

14. PROSSER, *supra* note 9, at 802.

15. See *Restatement (Second) of Torts* § 581a (Truth); § 583 (Consent); §§ 606-610 (Fair Comment); § 611 (Report of official proceeding or public meeting). In addition, also included in the list of defenses were the absolute and qualified privileges, discussed at *infra* note 16. Finally, procedural defenses such as the statute of limitations and lack of jurisdiction were available.

16. Additional absolute privileges included: 1) Immunity for publication of statements made in the course of judicial proceedings; 2) Immunity for publication of statements made in the course of legislative proceedings; 3) Executive privilege for communications made in the discharge of their Constitutional duties; 4) Consent of the plaintiff; 5) Political broadcasts, including campaign and other speeches and communications; and 6) Interspousal tort immunity. Qualified privileges included: 1) necessity to protect the publisher's legitimate interests; 2) necessity to protect the legitimate interests of others; 3) furtherance of a common interest; and 4) communications to one who may act in the public interest. Qualified privileges could be defeated by establishing that the privilege was abused. For a comprehensive discussion of privileges and abuses, see PROSSER, *supra* note 9, §§ 113A-115, at 813-839.

17. PROSSER, *supra* note 9, §116, at 842. The rational interpretation/substantive content test is a modern application of the "gist" or "sting" approach to falsity. Although the test well serves the purposes of the first amendment in ordinary libel
As is readily apparent from common law treatment of libel prior to *Sullivan*, the balance between the interest in a free press and the individual's reputation favored the latter. From the burden of proof awaiting a plaintiff to the presumptions of fault and falsity attributed to the defendant and his statements, the press was unarguably in a disfavored position during litigation. Press freedom, however, was not totally abandoned. Recognizing the value of a free and robust press to a democratic society, the courts adopted the aforementioned defenses in an effort to maintain the balance, and prevent media self-censorship, or "chill" as it is frequently called. Notwithstanding these efforts, it became evident that the press, faced with the threat of increased damage awards and an adversarial system which favored the plaintiff, was being chilled from aggressively reporting the news. In 1960 however, the libel landscape began a transformation that is still unfolding today.

During that year, the New York Times published a full page advertisement concerning the civil rights movement entitled "Heed Their Rising Voices." The advertisement contained statements alleging misconduct on the part of Montgomery, Alabama police officials in connection with civil rights demonstrations by black students. In addition, the article implied that the police were involved in the bombing of Dr. Martin Luther King's home, and the wrongful contexts, it is the author's position that such an approach is inappropriate when applied to situations where a journalist alters or fabricates direct quotations prior to publication. See infra notes 165-186 and accompanying text.

18. This is evidenced by the increasing burdens imposed on plaintiff as a result of *New York Times v. Sullivan* and it's progeny. Also supporting this proposition is the fact that plaintiffs win less than ten percent of all litigated defamation actions. See Franklin and Bussel, *supra* note 9, at 825-827. See also infra notes 31-34 and accompanying text.

19. *See* Franklin and Bussel, *supra* note 9, at 825-827. See also infra notes 31-34 and accompanying text.


prosecution of Dr. King in an attempt to intimidate civil rights activists. L. B. Sullivan, one of the Commissioners for the City of Montgomery, brought a libel action against the New York Times, alleging that the publication attributed official misconduct to him in his capacity as Commissioner.26

Under Alabama law at the time, defenses could not be alleged by the defendant unless the truth of all facts supporting the defense were proven.27 Applied to the New York Times, the law required that it prove the truth of all criticisms in the advertisement before a privilege of “fair comment” would be sustained.28 Following trial, the jury awarded the plaintiff $500,000.29 On appeal to the Alabama Supreme Court, the verdict was sustained.30 The defendant then appealed the case to the United States Supreme Court alleging that Alabama’s libel standards were an unconstitutional violation of the first amendment.

Faced with the issue of whether a state could enforce such a restrictive law regarding the burden of proving defenses in actions for libel, the United States Supreme Court articulated the actual malice test. For the first time in our nation’s history, the Supreme Court established a constitutional privilege for reporters publishing information concerning public officials:31

The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with “actual malice”—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.32

In so holding, the Supreme Court removed the defendant’s common law burden of proving truth as an affirmative defense, and

26. Id. at 258.
27. Id. at 256.
28. Id. For information regarding the privilege of fair comment, see supra notes 15-16.
30. Id.
31. R. Smolla, Suitig the press: Libel, the Media, & Power 27 (1986) [hereinafter Smolla]. “Times v. Sullivan revolutionialized the American law of libel because in one sudden burst of federal judicial power, state libel laws were made subject to the strictures of the First Amendment, and, with that ruling, hundreds of years of evolving state libel laws were rendered obsolete.” Id. See also Franklin and Bussel, supra note 9, at 826.
instead required that a plaintiff in such actions establish falsity as a part of her prima facie case. Moreover, the plaintiff’s burden of proof was elevated from the much lower preponderance of the evidence to a standard of clear and convincing evidence. Therefore, in addition to pleading defamation in accord with the laws of the forum state, public officials after \textit{Sullivan} were required to establish the constitutional requirements of actual malice with clear and convincing evidence. The test has proven to be a difficult standard to define and apply, and many subsequent cases heard by the Court have dealt with defining the test and determining to whom it is applicable.

What began as a test to protect publications concerning the conduct of government officials soon increased in scope. In a pair of cases decided in 1967, the Supreme Court faced the issue of whether the protections of actual malice should extend to journalists who published information concerning public figures rather than public officials. In \textit{Curtis Publishing Co. v. Butts}, the plaintiff was a football coach at a public university accused of conspiring to fix a football game. Similarly, in \textit{Associated Press v. Walker}, the plaintiff was a retired army general accused of leading a violent, anti-desegregation demonstration at the University of Mississippi. In each case, the Court held that the protections of actual malice would apply
to publications concerning plaintiffs who are public figures.\textsuperscript{41}

The rationale for creating this new classification included the realization that, in the United States, the line separating public officials and public figures is often blurred, and public figures are often as responsible for shaping public opinion and policies as are government officials.\textsuperscript{42} Actual malice was further complicated by subsequent cases addressing matters of public concern\textsuperscript{43} and private figures.\textsuperscript{44} In addition to these numerous cases defining the scope of the doctrine's applicability, much of the Court's subsequent analysis dealt with defining the test itself.

In \textit{St. Amant v. Thompson},\textsuperscript{45} the Court addressed the minimum fault requirements under the actual malice test, and established several examples of journalistic conduct which constitute reckless disregard for the truth or falsity of allegedly defamatory statements.\textsuperscript{46} Reckless disregard for truth or falsity was not, the Court noted, measured by whether a reasonably prudent man would have published or investigated before publishing.\textsuperscript{47} Rather, to establish reckless disregard, the plaintiff must prove the publisher in fact entertained serious doubts that the publication was true.\textsuperscript{48} The Court recognized that the parameters of conduct constituting the entertainment of "serious doubts" would have to be determined through case by case adjudication, but believed that this was the best way to maintain a proper balance between reputational and first amendment interests.\textsuperscript{49}


\textsuperscript{42.} Smolla, supra note 31, at 54.

\textsuperscript{43.} See Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) (extended actual malice requirements to all plaintiffs whenever the published information was a matter of public interest or concern). Considered the most expansive protection of first amendment interests to date, the \textit{Rosenbloom} Court was criticized for having "emasculated the law of libel to the point where it was essentially powerless." Smolla, supra note 31, at 57. The \textit{Rosenbloom} ruling was soon limited in \textit{Gertz v. Robert Welch, Inc.}, 418 U.S. 323 (1974).

\textsuperscript{44.} See Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (limited Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) (holding that states can regulate the fault requirement which private figure plaintiffs must prove, provided that defendants not be held strictly liable for the publications)); see supra note 43.

\textsuperscript{45.} St. Amant v. Thompson, 390 U.S. 727 (1968).

\textsuperscript{46.} Id. at 732.

\textsuperscript{47.} Id. at 731.

\textsuperscript{48.} Id.

\textsuperscript{49.} St. Amant v. Thompson, 390 U.S. 727, 731 (1968) ("But to insure the ascertainment and publication of the truth about public affairs, it is essential that
The next major change enacted by the Court was to increase the plaintiff’s burden of proof in a motion for summary judgment. In *Anderson v. Liberty Lobby, Inc.*, the Court considered the issue of whether the plaintiff, in arguing against a motion for summary judgment, must prove actual malice under the same evidentiary standard as is required at trial. Therefore, the public official/public figure plaintiff, in attempting to defeat a motion for summary judgment, must establish actual malice with clear and convincing evidence. The *Anderson* Court was careful, however, to ensure that all traditional summary judgment standards were left unaffected by its decision:

Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.

By enacting a much higher summary judgment standard than the original standard of a preponderance of the evidence, *Anderson* further decreased the public official/public figure’s chances of making their case before a jury.

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the First Amendment protect some erroneous publications as well as true ones.”* Id. at 732.

51. *Id.* at 254-55.
52. *Id.*
53. *Id.*
54. These trends have reversed the common law balance between reputational and press interests to now favor the latter. See Franklin and Bussel, *supra* note 9, at 826-27:

With the Supreme Court’s constitutionalization of this area of the law, however, the plaintiff has lost his favored position. . . . [t]he shoe is indeed on the other foot. In light of the plaintiff’s now disfavored position, it is not surprising that plaintiffs win less than ten percent of the litigated defamation suits.

Franklin and Bussel, *supra* note 9, at 826-27. See also Kaufman, *supra* note 22, at 6-7 (1989):

[A]ll the available data indicate that more than 90 percent of seriously litigated media libel cases never go to trial . . . . [a] more recent study of motions to dismiss in libel actions brought by public official plaintiffs from 1976 to 1984 showed similar results: more than 60 percent were granted. Moreover, approximately 75 percent of motions for summary judgment are granted in favor of the libel defendant.

The actual malice standard allows journalists tremendous discretion in publishing information concerning public officials and public figures. While much authority supports the high degree of protection granted to journalists,55 this freedom has also been criticized by numerous legal and journalistic scholars.6 Some of the criticisms center around the belief that the test does not truly insulate journalists from libel suits.57 Others are based on the belief that such protection actually discourages accurate reporting.58 Whatever the individual observer’s belief, one fact cannot be denied—New York Times v. Sullivan has remade and will continue to remake the law of libel in the United States. With every new case, the doctrine is fashioned and adapted to meet each unique and unforeseen situation. This was the

55. See generally Smolla, supra note 31 (supporting the current standards for libel suits); and Forer, supra note 8 (noting the threat to press freedom caused by the current libel explosion).


57. See Kaufman, supra note 22, at 15: “The major conclusion that must be drawn from all of the hard economic realities outlined above can be briefly stated: The more than twenty-year-old promise of constitutionally guaranteed protection from the unduly chilling economic effects of libel claims remains today decidedly unfulfilled." See also Forer, supra note 8, at 18: “Countless libel cases are being docketed in state and federal courts every day. The increase in libel litigation is extraordinary and anomalous.”; M. Nadel, Refining the Doctrine of New York Times v. Sullivan, reprinted in The Cost of Libel: Economic and Policy Implications 157 (E. Dennis & E. Noam, eds. 1989) [hereinafter Nadel]: “Ironically, however, Sullivan appears to have increased libel costs by indulging the instinct of the press to engage in behavior which antagonizes potential plaintiffs, thereby encouraging them to sue and thus to increase the costs of resolving libel complaints.” Id.


The second major effect of certain of the protections is to decrease the accuracy of the information. Use of the actual malice standard or absolute privilege . . . will reduce the incentive to use care below that which would be used under strict liability. Similarly, restrictions on recoverable damages will result in lower accuracy. The reduction in accuracy . . . is clearly undesirable, and constitutes the major disadvantage of using constitutional privileges to subsidize the media.

Id. See also Dun and Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) (Burger, C.J., and White, J., concurring in separate opinions, examine, inter alia, the actual malice doctrine and its effect on accurate journalism.).
QUOTATIONS AND ACTUAL MALICE

prophecy of St. Amant v. Thompson, and history has proven it to be true. Numerous courts have struggled with the analytical framework of Sullivan and its progeny. It was with this framework and historical basis in mind that the Ninth Circuit addressed the issue of whether actual malice should be inferred when the alleged libel stems from the publication of altered or fabricated quotations.

B. MASSON V. NEW YORKER MAGAZINE: WHEN ARE FACTS FICTION?

Plaintiff Jeffrey M. Masson, a psychoanalyst and former Projects Director for the Sigmund Freud Archives, brought a diversity action for libel and false light invasion of privacy in the United States District Court for the Northern District of California, against defendants Janet Malcolm, New Yorker Magazine, and Alfred A. Knopf Publishing Co. Malcolm, a staff writer for New Yorker Magazine, contacted Masson to arrange interviews for the purpose of writing a story about Masson’s termination from his directorship at the Archives. The two met on several occasions, and Malcolm compiled numerous tapes containing conversations between them. In 1983, Malcolm published her two part article, which extensively quoted Masson, in New Yorker magazine. The article addressed the falling out between Masson and two of the other board members at the Archives and his subsequent termination from the position of Projects Director. The articles were later quoted verbatim in a book published

59. See supra note 49 and accompanying text.

60. Forer, supra note 8, at 17:
In more than sixty-seven cases dealing with freedom of speech and of the press decided by the Supreme Court from 1964 to 1986, the law continually has been rewritten. Each new decision has created more unprecedented and complicated doctrines, rules, and distinctions that constitute hurdles for both plaintiffs and defendants.

Id.

(This note does not address the false light claim, which is based on invasion of privacy. However, the district court in Masson disposed of the false light claim under the same actual malice standard). See Masson v. New Yorker Magazine, 686 F. Supp. 1396, 1397 (N. D. Cal. 1987).


63. Brief for Appellant at 4-5, Masson v. New Yorker Magazine, 895 F.2d 1535 (9th Cir. 1989) (No. 87-2665).

64. Id. at 5.


66. Id.
by Alfred A. Knopf, Inc. Masson claimed that the article, specifically the quotations, was defamatory and portrayed him in a false light. To support the claim, he alleged that the published quotations were not his words and that their fabrication constituted actual malice.

In the district court each defendant moved for summary judgment. All three motions were granted by the court on the grounds that Masson had failed to produce clear and convincing evidence justifying a jury conclusion that the defendants published the quotations with actual malice. Specifically, the court held that partial fabrication or alteration of quotes prior to publication would not warrant an inference of actual malice so long as the published version was a rational interpretation of the original. The district court then concluded that Malcolm’s article was a rational interpretation of Masson’s true words, and therefore granted her motion for summary judgment. Masson appealed, and the decision was affirmed by the United States Court of Appeals for the Ninth Circuit.

In affirming, the Ninth Circuit adopted a portion of the district court’s analysis and concluded that, for purposes of summary judgment, actual malice would not be inferred when the published quotations were either a rational interpretation of the speaker’s ambiguous remarks, or failed to alter the substantive content of their unambiguous remarks. The lengthy dissent attacked the court’s reasoning and application of precedent, noting that the decision not only failed to further the interests of the first amendment, but created a precedent which allowed journalists to place defamatory words into a speaker’s mouth in complete disregard of the subject’s reputation. To fully understand each side’s arguments and analysis, the quotations themselves must be examined in both their original and published form.

68. See supra note 61, and accompanying text.
69. Id. See also infra notes 79-81, 103-104, 112, and accompanying text.
71. Id. at 1407.
72. Id. at 1399-1407.
73. Id.
74. Masson v. New Yorker Magazine, 895 F.2d 1535, 1549 (9th Cir. 1989).
75. Id. at 1539.
76. Masson v. New Yorker Magazine, 895 F.2d 1535, 1548-70 (9th Cir. 1989 (Kozinski, J., dissenting). See also infra notes 90-98, 155-164 and accompanying text.
77. Id. at 1562. See also infra note 181 and accompanying text.
78. Id. at 1550.
1. The Masson interviews: Before and After

To fully understand the extent of the editorial license condoned by the Ninth Circuit, some of the altered quotations should be examined in both their pristine as well as their published form and compared in light of the court's analysis. Therefore, two of the most extreme examples of Malcolm's alterations are discussed below.

a. Intellectual Gigolo

The intellectual gigolo quote best exemplifies the way in which the court's analysis allows journalists to substitute their own words for those actually spoken. The following quotation, attributed to Masson, appeared in the article:

She [the graduate student] said, "[w]ell, it is very nice sleeping with you in your room, but you are the kind of person who should never leave the room— you're just a social embarrassment anywhere else, though you do fine in your own room." You know, in their way, if not in so many words, Eissler and Anna Freud told me the same thing. They like me well enough "in my own room." They loved to hear 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.79

The portion of the quote dealing with the graduate student's comments was not in Malcolm's recorded transcripts because they occurred much earlier in a completely different discussion between Malcolm and Masson.80 The quote dealing with Dr. Eissler's and Anna Freud's opinions of him was in Malcolm's transcripts, but appeared in the following way:

[Eissler and Anna Freud] felt, in a sense, I was a private asset and a public liability. They like me when I was alone in their living room, and I could talk and chat and tell them the truth about things and they would tell me. But that I was, in a sense, much too junior within the hierarchy of analysis, for these important training analysts to be caught dead with me.81

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80. Brief for Appellant at 29, Masson v. New Yorker Magazine, 895 F.2d 1535 (9th Cir. 1989) (No. 87-2665).
81. Masson v. New Yorker Magazine, 895 F.2d 1535, 1540 (9th Cir. 1989).
1.) The Court’s Perspective

In evaluating this alteration, the Ninth Circuit accepted the district court’s conclusion that the statement was a rational interpretation of Masson’s ambiguous language.82 The court further reasoned that, based on other portions of the tape where Masson had discussed events with language that could be construed as sexual,83 the substitution of “intellectual gigolo” for “private asset and a public liability,” did not alter the substantive content of Masson’s self description and was therefore not supportive of defamation under the actual malice standard.84 Specifically, numerous statements which the court held to be “substantive equivalent[s] of . . . gigolo” appeared throughout the article, outweighing Masson’s “simple, albeit vehement denial” that he ever used the phrase intellectual gigolo.85 Finally, the court accepted the district court’s characterization of the term intellectual gigolo, which was interpreted to mean that Masson’s views were privately entertaining yet publicly embarrassing.86

Aside from their application of the term intellectual gigolo to the substantive content prong of the test, the court further noted that this was not a true example of a journalist attributing a defamatory “self assessment” to a subject, but was rather, the publication of Dr. Eissler and Anna Freud’s opinions of Masson, which at the time was nonactionable in American libel law.87 Finally, the court applied the “incremental harm branch” of the “libel proof doctrine”88 to rule that, in light of the “provocative, bombastic statements” made by Masson during the recorded interviews, the defamatory impact of the

82. Id. at 1541.
83. Specifically, the court refers to Masson’s quotes concerning “Suck stories,” or stories about how other junior psychoanalysts “suck up” to the senior analysts in the field in order to further their own careers. Masson v. New Yorker Magazine, 895 F.2d 1535, 1540, n. 4 (9th Cir. 1989).
84. Masson v. New Yorker Magazine, 895 F.2d 1535, 1541 (9th Cir. 1989).
85. Id. at 1540, n. 4.
86. Id. at 1541.
88. The incremental harm branch of the libel-proof doctrine tests the defamatory impact of the publication. If the harm inflicted upon the plaintiff’s reputation is determined to be de minimis, the publication is deemed nonactionable. See Herbert v. Lando, 781 F.2d 298, 310-11 (2nd Cir. 1986).
fictionalized quotations was lessened to the point where Masson was essentially libel-proof.89

2.) The Dissent: A Different Characterization

The dissent noted the damning impact that the use of intellectual gigolo was likely to have on the reader,90 and concluded that a fair reading of the phrase would lead the reader to believe that Masson was the type of person who “forsakes intellectual integrity in exchange for pecuniary or other gain.”91 Furthermore, the majority took the most “benign interpretation of gigolo” available, thereby giving Malcolm every possible benefit of the doubt.92 It was also noted that the majority interpretation of gigolo actually contradicted Malcolm’s, which was determined through depositions to be the selling of sexual favors.93 For the dissent, the conclusion was clear: “For an academic to refer to himself as an intellectual gigolo is such a devastating admission of professional dishonesty that a jury could well conclude that it is libellous.”94

The dissent then attacked the other elements of the majority’s reasoning, first noting that the opinion placed the Ninth Circuit in direct opposition with both the D.C. Circuit and the California Supreme Court by “breathing life” into the “stillborn” libel proof doctrine.95 In addition, the majority’s conclusion that Masson’s denial was insufficient to outweigh the sexual connotations actually made was characterized as a “swearing contest between reporter and subject,” where “the reporter always wins.”96 Furthermore, by using a rationale characterized as “explosive,”97 the dissent noted that “if

89. Masson v. New Yorker Magazine, 895 F.2d 1535, 1541 (9th Cir. 1989).
90. Id. at 1551 (Kozinski, J., dissenting).
91. Id.
92. Id.
93. Masson v. New Yorker Magazine, 895 F.2d 1535, 1551-52 n.6 (9th Cir. 1989) (Kozinski, J., dissenting).
94. Id. at 1557.
95. The dissent concluded that the majority fundamentally misread Herbert, which avoided a holding similar to that applied by the majority. In addition, the dissent noted that the majority was attempting to graft the doctrine onto California libel law, in direct contradiction to the conclusion in Baker v. Los Angeles Herald Examiner. Masson v. New Yorker Magazine, 895 F.2d 1535, 1565-66 (9th Cir. 1989) (citing Baker v. Los Angeles Herald Examiner, 42 Cal. 3d 254 (1986) (rejecting the doctrine)). Moreover, the dissent noted that the doctrine has never been accepted in any federal appellate court. See Masson v. New Yorker Magazine, 895 F.2d 1535, 1565-66 (9th Cir. 1989) (Kozinski, J., dissenting).
96. Id. at 1552 n. 7.
97. Id. at 1550.
you make statements that could reasonably be characterized as boastful or arrogant (or callous or stupid or reflecting any other trait of character or intellect) the reporter may attribute to you any other statement reflecting that same trait. 98 The intellectual gigolo quote is but one example of the court’s application of the test. Perhaps a better example is presented by the court’s treatment of the quotation “[h]e had the wrong man.” 99

b. He Had The Wrong Man

Masson’s claim was further supported through Malcolm’s depiction of a discussion between him and Dr. Eissler. 100 Masson had learned that Sigmund Freud suppressed information which discounted his seduction theory. 101 After learning that his position at the Archives had been terminated, Masson discussed with Dr. Eissler his plans to publicly announce his discoveries concerning Freud. 102 Malcolm’s article, in reporting Masson’s recollection of that discussion, attributed to him the following quotation:

[Eissler] . . . was always putting moral pressure on me [to keep silent about my discoveries about Freud]. “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 for 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. 103

The taped interview, however, offers a very different version, and sheds light on the true meaning of Masson’s statement:

[Eissler] . . . was constantly putting various kinds of moral pressure on me, and “Do you want to poison Anna Freud’s last days” “Have you no heart?” He called me up, “Have you no heart? Think of what she’s done for you, and you are now willing to do this to her.” I said, “What am I, What

98. Id.
100. Id.
101. Id.
102. Id.
103. Id.
QUOTATIONS AND ACTUAL MALICE

have I done? You’re doing it, you’re firing me. What am I supposed to do, thank you? Be grateful to you?” He said, “Well, you could never talk about it, you could be silent about it, you could swallow it. I know it’s painful for you, but just live with it in silence.” “F[---] you,” I said, “Why should I do that? 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 quietly and humbly accept our judgment, who knows in a few years if we don’t bring you back?” Well, he had the wrong man. 104

The majority upheld the deletion under the rational interpretation prong of the test. Applying Time v. Pape, 105 which controls cases involving quotations that are alleged to have been “misleadingly edited,” 106 the court concluded: “It is unclear whether [Masson] was declaring that he was the ‘wrong man’ to keep silent for selfish purposes, or the ‘wrong man’ to ask to do something honorable.” 107

Given this linguistic ambiguity, the court held that the language chosen by Malcolm was a rational interpretation of Masson’s statements, and therefore failed to support an inference of actual malice. 108 The dissent however, accepted Masson’s contention that the deleted portion changed the true meaning of his words. 109 Remarking that the majority’s rationale had “no meaningful bounds,” 110 the dissent concluded:

[Malcolm] deleted 33 words out of a 40 word sentence, utterly changing Masson’s meaning so as to make him say the antithesis of what he actually said . . . . [T]he contrast between the two statements could not be sharper. As reported by Malcolm, Masson portrays himself as a swine, boasting that he would never be swayed to do the right and honorable thing. Masson’s unedited statement makes him sound more like a hero, someone willing to speak the unpleasant truth even if it damages his career . . . .

104. Masson v. New Yorker Magazine, 895 F.2d 1535, 1546 (9th Cir. 1989) (emphasis in original).
107. Id. at 1546.
108. Id.
110. Id. at 1554.
111. Id. at 1553-54.
Additionally, there were several other examples of fabricated quotes appearing in Malcolm's articles. In each instance, the court refused to find that the misquotation constituted clear and convincing evidence that could lead a reasonable jury to conclude that Malcolm in fact entertained serious doubts about the truth of the quotations attributed to Masson. The court’s basis for so holding was that, in each instance, the published quotations either: 1) were rational interpretations of ambiguous statements made by Masson; or 2) failed to alter the substantive content of non-ambiguous remarks made by him. The Ninth Circuit tailored this test from two earlier libel decisions: one in the Second Circuit Court of Appeals, and the other from the United States Supreme Court.

2. The Test: Its Origins And Applications

The first part of the Masson test states that actual malice will not be inferred from fabricated quotations, provided that the quote is a rational interpretation of the speaker’s ambiguous remarks. This language was first articulated by the United States Supreme Court in Time v. Pape. In Pape, the Court was faced with a situation where the publisher printed a story concerning racially motivated police brutality, based in part upon a United States Civil Rights Commision report which contained allegations from one victim’s complaint. Although the Commission’s report was careful to qualify its account of the victim’s story concerning Officer Pape’s “alleged” acts of brutality, Time was not as careful. The word “alleged” was ommitted in its version, and as a result, the article suggested that the unproven allegation of brutality was true. How-

112. There were eight counts briefed and argued by Masson before the ninth circuit. The two most extreme examples are presented in this article. Regarding the other counts, see “It Sounded Better,” id. at 1539-40; “Greatest Analyst who ever lived,” id. at 1542; “The Schreber case,” id. at 1543; “Don’t know why I put it in,” id. at 1542; “Denise worries too much,” id. at 1544; and “Sex, Women, Fun,” id. at 1542.

113. Id. at 1539-44.

114. Id.

115. Id. at 1538. See Hotchner v. Castillo-Puche, 551 F.2d 910 (2nd Cir. 1977).


119. Id. at 281-83.

120. Id.

121. Id.
ever, the Supreme Court denied relief, finding that omission of the word "alleged" was not sufficient to establish actual malice, given that the document was "bristling with ambiguity," and that the journalist's account was a "rational interpretation" of that document.

The *Time* standard was also applied in *Dunn v. Gannett New York Newspapers*, which was somewhat closer to the facts in *Masson* than *Time v. Pape*. In *Dunn*, the Mayor of Elizabethtown, New Jersey was quoted in a Spanish newspaper as calling the Hispanics of Elizabethtown "cerdos," meaning "pigs." In fact, the Mayor had been criticizing the litter problem in the Hispanic community. In so doing he called the community's Hispanics "litterbugs." There is, however, no direct Spanish translation for the word "litterbug." The closest translation available to the publisher was "cerdos." The Third Circuit ruled that the use of the word "cerdos" did not alter the substantive content of "litterbug" since it was a fair, albeit inadequate, translation and was therefore a rational interpretation of Mayor Dunn's ambiguous remarks.

The second portion of the *Masson* test states that actual malice will not be inferred when the published quotations do not alter the substantive content of the plaintiff's actual remarks. Although the

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122. *Id.* at 290. The Court stated:

Time's omission of the word "alleged" amounted to the adoption of one of a number of possible rational interpretations of a document that bristled with ambiguities. To permit the malice issue to go to the jury because of the omission of a word like "alleged", despite the context of that word in the Commission Report and the external evidence of the Report's overall meaning, would be to impose a much stricter standard of liability on errors of interpretation or judgment than on errors of historic fact.

*Id.*

123. *Id.* *Time v. Pape* is overwhelmingly distinguishable from the facts in *Masson*. In *Pape*, the omission of one word from a government document was held insufficient for establishing actual malice. Masson's case however, was supported with eleven independent examples of altered quotations. Many of the alterations were blatant, (e.g., "He had the wrong man"), and are to that extent very different from *Pape*.


125. To the extent that *Dunn* addressed the interpretation of a verbal interview rather than a printed document, it more closely resembles the facts in *Masson*.


127. *Id.*

128. *Id.* at 451.

129. *Id.*

130. *Id.* at 452.

substantive content prong of the test seems to have its roots in the common law notion of substantial truth, the Ninth Circuit cited as authority *Hotchner v. Castillo-Puche*.\(^{133}\)

*Hotchner* concerned the publication of a book of Ernest Hemingway memoirs entitled *Hemingway in Spain*.\(^{134}\) Both the author of the text as well as the publisher of the English translation were sued for printing allegedly defamatory statements about Hotchner.\(^{135}\) In attempting to establish actual malice, the plaintiff argued that the publisher fabricated the defamatory Hemingway quotations. Specifically, the publisher took the following passage from the original: 

"[Hotchner is] dirty and a terrible ass-licker. There's something phony about him. I wouldn't sleep in the same room as him,"\(^{136}\) and toned it down to simply read, "I don't trust him."\(^{137}\)

The Second Circuit Court of Appeals found that the defendants had to some extent fictionalized the quotations.\(^{138}\) Nevertheless, because the translation actually weakened the defamatory impact of the passage and did not alter the substantive content of Hemingway's criticisms of Hotchner, his claim that the alteration sufficed to support an inference of actual malice was denied.\(^{139}\)

The majority in *Masson* characterized the holding in *Hotchner* as authority for the proposition that quotations may be fictionalized "to some extent."\(^{140}\) Locating a proper place to draw the line between fictionalized quotations falling within the "some extent" category identified in *Dunn*, and that category justifying an inference of actual malice, posed little problem for the Ninth Circuit. The result was the adoption of the substantive content prong of the *Masson* test, to be applied to situations where the speaker's true words were non-ambiguous. This portion of the test allows journalists to interpret the speaker's language even when the original version is clear in its meaning. The final federal case cited by the majority as authority for its adoption of the rational interpretation/substantive content test is *Carson v. Allied News* a Seventh Circuit case addressing completely fabricated quotations as a source of inferring actual malice.\(^{141}\)

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132. *See supra* notes 16-17 and accompanying text.
134. *Id.* at 911.
135. *Id.*
136. *Id.* at 914.
138. *Id.*
139. *Id.*
140. Masson v. New Yorker Magazine, 895 F.2d 1535, 1539 (9th Cir. 1989).
In *Carson*, the defendants published alleged conversations between NBC executives and entertainer Johnny Carson, depicting an argument between them over Carson's move of *The Tonight Show* from New York to California. Additionally, the article reported that the sole reason for Carson's move was to be closer to his mistress, Joanna Holland. Carson testified in depositions that there was no power struggle between him and NBC executives and that the published conversations between them were fabricated. The defendant, in deposition, stated that the reported conversation was a "logical extension of what must have gone on."

A unanimous court found that the fabricated quotations of the non-existent conversation between NBC and Johnny Carson formed a sufficient basis for plaintiff's claim of actual malice. Citing *St. Amant v. Thompson*, the court reasoned:

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

The *Masson* court concluded that *Carson* stood for the proposition that only complete fabrications warrant an inference of actual malice. *Masson* was therefore distinguished from *Carson* on the grounds that Malcolm only partially fabricated Masson's quotations. Under the rationale of *Dunn*, such a partial fabrication is allowable. By drawing on *Time v. Pape*, *Hotchner v. Castillo-Puche*, *Dunn v. Gannett New York Newspapers*, and *Carson v. Allied News*, the *Masson* Court read the law to require a two-part inquiry. First, whenever a journalist completely fabricates quotations, under

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142. *Id.* at 208.
143. *Id.*
144. *Id.* at 212.
145. *Id.*
147. See *supra* notes 45-48, and accompanying text.
150. *Id.*
151. See *supra* notes 126-130; see also *Masson v. New Yorker Magazine*, 895 F.2d 1535, 1539 (9th Cir. 1989).
Carson an inference of actual malice is warranted.\textsuperscript{152} If the quotations are not complete fabrications, then the rational interpretation/substantive content test must be applied.\textsuperscript{153} Because Malcolm’s quotations were not completely fictionalized, they were scrutinized under this test, and were determined to not constitute sufficient grounds for an inference of actual malice.\textsuperscript{154}

3. The Dissent: Problems with the Majority’s Application of Precedent.

The dissent on the other hand, took the position that fabrications of Malcolm’s magnitude were complete fabrications, and that each case cited by the majority was either clearly distinguishable or actually supported Masson’s claim.\textsuperscript{155} Beginning with \textit{Time v. Pape}, the dissent argued that the rational interpretation test applied in that case was inapplicable to \textit{Masson}. While \textit{Pape} allowed interpretation of a document that bristled with ambiguity, the claim of actual malice was not based on the alteration of direct quotations. A unique defamatory impact is created when the defamation appears to come from the speaker’s own mouth.\textsuperscript{156} Moreover, there is little need for interpretation when both the reporter and speaker are English, and the material is published as direct quotations.\textsuperscript{157}

That there should be no substantive interpretation when an English subject is quoting an English speaker was also one of the dissent’s lines of approach to \textit{Dunn}, \textit{Hotchner}, and the substantive content prong of the \textit{Masson} test. Although the Second Circuit in that case did apply the \textit{Time v. Pape} rational interpretation test to altered or fabricated quotations, the journalist in that case was faced with translating an English speaker’s words into Spanish, when there was no direct interpretation available. The journalist in \textit{Dunn} did not purport to interpret the words of Mayor Dunn, but was instead seeking an appropriate translation for the word “litterbug.” This was but one of the dissent’s criticisms of the majority’s reliance on \textit{Dunn}.

Another was the fact that, to the extent \textit{Dunn} allowed the admission of collateral evidence to further support the plaintiff’s

\begin{enumerate}
\item[152.] Masson v. New Yorker Magazine, 895 F.2d 1535, 1539 (9th Cir. 1989) (Kozinski, J., dissenting).
\item[153.] Id.
\item[154.] See supra note 112 and accompanying text.
\item[155.] Masson v. New Yorker Magazine, 895 F.2d 1535, 1554, 1557 (9th Cir. 1989) (Kozinski, J., dissenting).
\item[156.] Id. at 1549.
\item[157.] Id.
claim of actual malice, it directly supported Masson. In *Masson*, there was present what was characterized as a "mountain of countervailing factual evidence" supporting the claim of actual malice. Nevertheless, this collateral evidence carried little weight with the majority. Under the rational interpretation prong of the *Masson* test, journalists now reserve the right to interpret a subject's language prior to its publication as verbatim quotations, as long as their subject's words can be characterized as ambiguous and their interpretation construed as rational. And if the words cannot be characterized as ambiguous, the journalist may still interpret the direct quotation as long as the substantive content remains intact.

The dissent also argued that *Hotchner* failed to support the majority's position in *Masson* and that to the extent it was applicable at all, it supported the plaintiff. *Hotchner* presented a completely different problem, because the altered quotations lessened the defamatory impact of Hemingway's criticisms of Hotchner. In *Masson* however, the altered quotations not only increased the defamatory impact of the words, but the fact that they were published as direct

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158. Id. at 1555.
159. There was present in *Masson*, as noted by Judge Kozinski, a: Mountain of "countervailing factual evidence" tending to show malice: assurances Malcolm allegedly gave Masson that all quotes would be verbatim; the existence of tape recordings for many of the conversations; that Masson had advised The New Yorker's fact-checkers that he was being misquoted; evidence that at least one of the quotations was changed, apparently in Malcolm's handwriting, to make it more bombastic but less accurate.

Masson v. New Yorker Magazine, 895 F.2d 1535, 1555 (9th Cir. 1989) (Kozinski, J., dissenting).

160. The dissent noted that:

*Hotchner*, however, is relevant and, like *Dunn*, helps Masson. It provides a fair and reasonable standard for evaluating a publisher's responsibility for defamatory quotations . . . . [T]he court held that Doubleday could not have been reckless as to the accuracy of the passage in question because (1) the incident was believable; (2) the passage sounded like Hemingway; (3) there were no convincing indicia of unreliability; and (4) the passage was incapable of independent verification . . . . the third and fourth of these factors cut very sharply against the defendants in this case . . . . With tapes in hand and fact-checkers alerted to Masson's protestations that he had been misquoted, defendants had the means for verifying the accuracy of the quotations and the "convincing indicia of unreliability" that should have prompted them to do so. Applying *Hotchner* to this case leads precisely to the opposite conclusion from that reached by the majority.

Masson v. New Yorker Magazine, 895 F.2d 1535, 1556 (9th Cir. 1989) (Kozinski, J., dissenting).
quotations made them appear to come from Masson's own mouth, adding a unique dimension to his reputational harm. As the dissent further noted, Masson's denial of ever making the statements at issue brought the case directly within Carson. Additionally, the majority was criticized for drawing "minute distinctions" in order to appear consistent with the other circuits addressing this issue:

If Carson does not cover a situation where the journalist invents a conversation that never took place and reports words that the subject never uttered, I am not sure exactly what it does cover. . . . Despite the majority's attempt to close ranks with our sister circuits, today's decision stands in conflict with that of every other circuit that has addressed the issue.

Clearly, the majority's reliance on precedent in Masson can be called into question. As the dissent established, each of these cases can be turned to support Masson's claim. The following section of this note addresses the problematic nature of the rational interpretation/substantive content test as applied to journalists who alter or fabricate direct quotations.

4. Criticism's of the Test

To the extent that spoken words may be classified as an event, failure to characterize them as they actually occurred constitutes fictionalization which, under the Carson standard, warrants an inference of actual malice. In attempting to draw the line between a protected and an actionable alteration or fabrication of a directly quoted speaker, the Masson court applied a standard that this author believes is inappropriate and problematic.

Several problems are posed by the Masson standard. One of the most readily observable is the tremendous leeway which journalists now have to edit and insert into quotations their own thoughts and ideas. What they are doing in essence, is placing words into the mouths of quoted speakers where such action is unwarranted.

A second problem is that both the rational interpretation and substantive content prongs of the test are predicated upon a judicial

161. Id. at 1549-50.
162. Id. at 1556.
163. Id.
164. Id.
165. Masson v. New Yorker Magazine, 895 F.2d 1535, 1553 (9th Cir. 1989) (Kozinski, J., dissenting).
166. Id.
determination of whether the quoted language in its original form is ambiguous. To the extent that every word in the English language is capable of having at least two or three different definitions, and sometimes as many as seven or eight,\textsuperscript{167} language that could not reasonably be held to be ambiguous is difficult to envision. Thus, it would seem that virtually any quotation, under the Masson standard, may be altered prior to publication. Accordingly, the value of an individual's right to reputation, as well as the utility of quotations and the faith the reader places in them have been severely weakened by the holding in Masson.\textsuperscript{168}

In addition, the test itself contradicts standards traditionally applied by courts in motions for summary judgment.\textsuperscript{169} In ruling on a motion for summary judgment, courts are expected to construe the factual record in the light most favorable to the nonmoving party to determine if the record presents a factual dispute upon which a jury could reasonably conclude in the nonmoving party's favor.\textsuperscript{170} If the record supports such a determination, then summary judgment is to be denied;\textsuperscript{171} conversely, should the court conclude that there is no material issue of fact, summary judgment should be granted.\textsuperscript{172} Under the Masson test, however, courts are allowed to comb the record and make arguments concerning whether the quoted language was ambiguous, and whether or not the language was a "rational interpretation" or "altered the substantive content" of those remarks.

Perhaps the best example of this is illustrated by the majority's treatment of Masson's statement "he had the wrong man."\textsuperscript{173} Whether the language actually used by Masson in that passage was ambiguous in meaning should have been construed as a question for the fact-finder. Nevertheless, the court concluded that the passage was ambiguous as a matter of law and application of its test quickly disposed

\textsuperscript{167} Virtually any dictionary entry makes this point clear. For example, the definition of false is: "1. not true; incorrect; wrong 2. untruthful; lying 3. unfaithful 4. misleading 5. not real, artificial." Likewise, the definition of true is: "1. faithful; loyal 2. in accordance with fact; not false 3. conforming to standard, etc., correct 4. rightful; lawful 5. accurately fitted, shaped, etc. 6. real; genuine." WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 221, 641 (Warner Books Paperback Ed. 1984).

\textsuperscript{168} Masson v. New Yorker Magazine, 895 F.2d 1535, 1554, 1570 (9th Cir. 1989) (Kozinski, J., dissenting).

\textsuperscript{169} See supra notes 50-54 and accompanying text.

\textsuperscript{170} See supra notes 50-54 and accompanying text.

\textsuperscript{171} See supra notes 50-54 and accompanying text.

\textsuperscript{172} See supra notes 50-54 and accompanying text.

\textsuperscript{173} See supra notes 100-108 and accompanying text.
of the issue.\textsuperscript{174} The court’s treatment of that quote seems difficult to reconcile with the \textit{Anderson v. Liberty Lobby, Inc.}, requirement that all factual determinations be construed in the light most favorable to the non-moving party.\textsuperscript{175}

Although the court paid lip service to traditional summary judgment standards by stating that the evidence was construed against Malcolm,\textsuperscript{176} other areas of their analysis indicate that they did the opposite.\textsuperscript{177} For example, by adopting what the dissent characterized as the most benign interpretation of "gigolo" available\textsuperscript{178} and in accepting Malcolm’s use of that word over Masson’s "vehement denial,"\textsuperscript{179} the court appeared to construe the evidence in Malcolm’s favor. Perhaps this is a problem inherent in the \textit{Masson} test. By requiring judicial determinations of ambiguity, followed by conclusions as to whether the published version of quotations were either rational interpretations or failed to alter the substantive content of the original, the \textit{Masson} test allows courts to interpret the record in the light most favorable to the journalist in ruling on summary judgment motions. Such an outcome inherently conflicts with the function of the jury as factfinder, as well as the Supreme Court’s mandate in \textit{Anderson} that traditional principles of summary judgment be maintained.\textsuperscript{180}

The Ninth Circuit’s approach strikes the balance between the competing interests of reputation and press freedom much too far in favor of the interest in freedom of the press. The irony of this determination is apparent in the fact that many journalists themselves recognize the alteration of quotations to be highly unethical and not at all supportive of any First Amendment values.\textsuperscript{181} Although the

\begin{itemize}
  \item See supra notes 105-108 and accompanying text.
  \item See supra notes 50-54 and accompanying text.
  \item Masson v. New Yorker Magazine, 895 F.2d 1535, 1550 (9th Cir. 1989) (Kozinski, J., dissenting).
  \item \textit{Id.} at 1550-58.
  \item \textit{Id.} at 1551-52.
  \item \textit{Id.} at 1552 n. 7.
  \item See supra notes 50-54 and accompanying text.
  \item For example, \textit{The Associated Press Stylebook and Libel Manual} states:
  Never alter quotations even to correct minor grammatical errors or word usage. Casual minor tongue slips may be removed by using ellipses but even then that should be done with extreme caution. If there is a question about a quote, either don’t use it or ask the speaker to clarify ....
  ...
  ...[quotation marks] surround the exact words of a speaker or writer
\end{itemize}
Supreme Court recently rejected application of professional journalistic standards when adjudicating libel actions, to the extent that the protections of actual malice were enacted to protect and prevent the media from engaging in self-censorship, there is merit in comparing the Masson test to the purposes of actual malice. Through such a comparison the utility of the test can be discerned.

It is difficult to imagine any degree of "chill" or self-censorship that would arise from application of a standard different from that articulated in Masson. Just as fabricating or altering direct quotations prior to publication constitutes poor journalism, legal standards which support journalists in such endeavors constitute poor law. Given the significant threat to reputation posed by Masson, and the minute effect its holding will have on first-amendment values, the Masson test is inappropriate for determining whether actual malice should be inferred from evidence that defamatory quotations have been fabricated. There are, however, available alternatives that would appear to strike a more appropriate balance between individual reputations and the values of the First Amendment.

D. SUGGESTIONS

This section presents possible alternatives to the Masson standard for ruling on motions for summary judgment in a public official/public figure libel suit based upon the alteration or fabrication of quotations. Because much of this note adopts the approach of the dissent in that case, Judge Kozinski’s proposed test is presented first. This test would consist of an application by the court of the following five part inquiry:

(1) Does the quoted material purport to be a verbatim repetition of what the speaker said?

when reported in a story.

The Associated Press Stylebook and Libel Manual 176, 273 (C. French and N. Goldstein, Eds., 1988.). To the extent that the journalism profession discourages such practices, the first amendment does not seem furthered by a standard which allows or even encourages it. See also J. Hulteng, The Messenger’s Motives: Ethical Problems Of The News Media 70 (1985); Masson, 895 F.2d at 1558-62.


183. See supra notes 20-24, 31-32 and accompanying text.

184. See Masson v. New Yorker Magazine, 895 F.2d 1535 (9th Cir. 1989) (Kozinski, J., dissenting).

185. See supra note 181 and accompanying text.
(2) If so, is it inaccurate?
(3) If so, is the inaccuracy material?
(4) If so, is the inaccuracy defamatory?
(5) If so, is the inaccuracy the result of malice, i.e., is it a fabrication or was it committed in reckless disregard of the truth? If the answer to any of these questions is no as a matter of law, the inquiry stops and the defendant wins. If they could all be answered yes, I would send the matter to the jury.186

Such an inquiry would be less burdensome for the libel plaintiff trying to escape an unfavorable summary judgment. It would tip the balance more in favor of reputation, and is a more objective test because it is not predicated on a judicial determination of whether the quoted plaintiff’s language was ambiguous. Nor does this test appear to allow a court to subjectively apply the most benign interpretation of language available, in order to justify granting the defendant’s motion for summary judgment. Such determinations of ambiguity and interpretations of language are appropriately left for the factfinder. In a jury trial, a judge making such determinations not only treads on the jury’s function, but also violates traditional standards for summary judgment in violation of Anderson.

The history of libel has illustrated the fact that no test is without its limitations. However, the fact that Judge Kozinski’s five-step inquiry would better serve both the interests of reputation (by discouraging the alteration and fabrication of quotations) and freedom of the press (by not legitimizing the use of fabricated or altered quotations, thereby perpetuating ethical journalism) makes it a more appealing standard than that enunciated in Masson.

Another alternative would be to simply allow an inference of actual malice in this situation, and allow the issue of meaning to go to the jury. This would essentially be a tailoring of Carson to the situation where the quote is not completely a product of the journalist’s imagination, but is fabricated in the sense that it is not a true account of the speaker’s actual words. Perhaps to the extent that defamation, by definition, requires an interpretation of language which lowers the plaintiff’s reputation in the eyes of the community,187 the jury should be the entity to interpret the statements and determine whether or not the alterations are serious enough to establish reckless disregard as to their truth or falsity. Furthermore, for the reasons

187. See definition of libel, supra note 1 and accompanying text.
outlined above, the likelihood that this approach will "chill" the media is slight at best.

E. CONCLUSION

Oliver Wendell Holmes Jr. once remarked, "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." 188

When a subject's words are published in an article as verbatim quotations, they are presented to the reader as the true and unadulterated words of the speaker. They have not been interpreted, because any interpretation necessary will be carried out by the reader. To that extent, words encircled with quotation marks are crystal. It is therefore necessary that courts treat them as crystal for purposes of inferring actual malice at the summary judgment stage.

This note has examined Masson v. New Yorker Magazine, and the rational interpretation/substantive content test enunciated therein. It has analyzed the decision, the precedent on which the case was based, and the value of the test in furthering both the values of reputation and free press. By examining Masson, it was noted that the standard will result in inconsistent caselaw, as judges apply their own attitudes and biases when determining whether a plaintiff's language was originally ambiguous, and in applying the proper prong of the test. Overall, the standard, as applied to such situations, strikes an improvident balance between the interests of reputation and press freedom. Nevertheless, in the Ninth Circuit, it is the controlling standard. While other jurisdictions disagree, the United States Supreme Court has not yet examined the issue.

Eventually the Court will decide it, be it through Masson, or a subsequent case where an unfortunate plaintiff has sustained damages as the result of published quotations that were attributed to him, yet never spoken. When the issue is ultimately resolved, the crystalline nature of verbatim quotations will hopefully be affirmed, with a more appropriate balance being struck between the first amendment guarantee of a free press, and the individual's right to an unblemished reputation. To allow such a bridge between fact and fiction poses a serious threat to the journalistic profession, and allows unmeasurable harm to be inflicted upon the reputations of individuals.

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