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Pyrrhic Victories and Glorious Defeats: Why Defendants Are Winning and Plaintiffs Are Losing the Struggle over Actual Malice and Fictionalized Quotations.

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COMMENTS

Pyrrhic Victories and Glorious Defeats: Why Defendants Are Winning and Plaintiffs Are Losing the Struggle Over Actual Malice and "Fictionalized" Quotations

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Every journalist who is not too stupid or too full of himself to notice what is going on knows that what he does is morally indefensible. He is a kind of confidence man, preying on people's vanity, ignorance or loneliness, gaining their trust and betraying them without remorse.

- Janet Malcolm

Even while Janet Malcolm, a writer and journalist, wrote these words[1] she was a defendant in a libel lawsuit brought by Jeffrey Masson.[2] Masson claimed that Malcolm libeled him by "fictionalizing" quotations that appeared in a feature article in *The New Yorker* magazine.[3] In other words, Masson alleged that Malcolm fabricated the quotes — that she made them up.[4]

I. INTRODUCTION: "FICTIONALIZED" QUOTATIONS

To most readers, the quotation marks that enclose a statement suggest verbatim accuracy — the speaker's actual words.[5] Yet journalists often fail to achieve literal accuracy, and even when they can, the finished product is sometimes "cleaned up" or altered to account for problems in grammar or syntax.[6] Fortunately for reporters, the law recognizes that journalism is not

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1. Malcolm, *Reflections: The Journalist and the Murderer*, THE NEW YORKER, March 13, 1989, at 38.

2. Masson v. New Yorker Magazine, Inc., 895 F.2d 1535 (9th Cir. 1989).

3. *Masson*, 895 F.2d at 1536. In *Masson*, the plaintiff, Jeffrey Masson, sued over a series of allegedly fabricated quotations that appeared in a *New Yorker* magazine article about him that was written by Janet Malcolm. *Id.* at 1536. Masson alleged that the article fabricated quotations attributed to him and that other quotations were misleadingly edited. The district court granted summary judgment for the defendants: the *New Yorker* magazine, Alfred Knopf, Inc. and Janet Malcolm. *Id.* The Ninth Circuit Court of Appeals affirmed this decision. *Id.* at 1548.

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

5. Masson v. The New Yorker Magazine, Inc, 895 F.2d 1535, 1558 (9th Cir. 1989)(Kozinski, J., dissenting); *see also* Note, *Masson v. The New Yorker Magazine, Inc.: Quotes, Lies and Audiotape*, 40 CASE W. RES. L. REV. 875, 876 (1989-1990) (by placing words within quotation marks writer assures reader that they are the speaker's precise words).

6. *See Masson*, 895 F.2d at 1558 (Kozinski, J., dissenting) (journalists recognize that verbatim accuracy in quotations not always possible); J. HULTENG, THE MESSENGER'S MOTIVES:

an exact science; and the "actual malice" standard[7] protects journalists from inadvertent or negligent misquotation.[8] The limits of this constitutional protection, however, are still being tested. Indeed, the United States Supreme Court has never decided whether malice can be inferred from evidence showing that an allegedly defamatory[9] statement does not contain the speaker's precise words.[10] These fabricated or "fictionalized" quotations and the problems they present in public figure defamation cases are the focus of this commentary. The commentary will first address the legal back-

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ETHICAL PROBLEMS IN THE NEWS MEDIA 70 (1976) (absent prepared manuscript, transcript or recording, precision in quotation not always achieved); *see also Associated Press Stylebook and Libel Manual* 184 (1977) (writers should correct quotations to avoid errors in grammar or word usage); J. OLEN, ETHICS IN JOURNALISM 100 (1988) ("Not to clean up quotes is to make intelligent speakers look stupid and stupid speakers look stupider.").

7. New York Times v. Sullivan, 376 U.S. 254 (1964). In *New York Times*, a city official of Montgomery, Alabama brought a civil libel suit against a newspaper and four African-American clergymen charging that an advertisement sponsored by the four clergymen defamed him. *Id.* at 256. The advertisement complained of police misconduct and harassment of Martin Luther King, Jr. *Id.* at 257. The Alabama Supreme Court affirmed a jury verdict for the plaintiff and damages of $500,000. *Id.* at 256. In reversing the Alabama Supreme Court, Justice Brennan, writing for the majority, declared that the first and fourteenth amendments prevented a public official from recovering damages for defamation except upon a showing of actual malice. *Id.* at 279. The Court defined actual malice as knowledge of a statement's falsity or reckless disregard of whether or not it was false. *Id.* at 279-80.

8. *See , e.g.*, Ocala Star-Banner Co. v. Damron, 401 U.S. 295, 301 (1971)(White, J., concurring) (*New York Times* actual malice standard affords constitutional protection to "innocent falsehoods" to prevent suppression of truth); Garrison v. Louisiana, 379 U.S. 64, 79 (1964) (standard under *New York Times* not based upon negligence or ordinary care); Masson v. New Yorker Magazine, Inc., 895 F.2d 1535, 1557 (9th Cir. 1989)(Kozinski, J., dissenting) (noting free speech concerns supporting actual malice standard). Judge Kozinski observed that in order to avoid discouraging free expression through massive liability, reporters are held liable only for deliberate or reckless falsehoods. *Id.*

9. A statement is defamatory if it tends to harm a person's reputation or lower her in the eyes of the community or deter others from associating or dealing with her. RESTATEMENT (SECOND) OF TORTS § 559 (1977). The Restatement lists four elements in a cause of action for defamation: (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault amounting at least to negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. *Id.* at § 558 (1977). According to the Restatement, libel is distinguished from slander because it involves publication by written or printed words or embodiment in some physical form or any other form that possesses potentially harmful qualities typical of written or printed words. *Id.* at § 568(1) (1977). Slander, on the other hand, consists of all other forms of defamation. *Id.* at § 568(2). Under the constitutional protections imposed by the *New York Times* line of cases, a public figure plaintiff must show clear and convincing proof that the defendant:

(1) knew the statement was false and that it defamed the plaintiff, or;

(2) acted in reckless disregard of these matters;

RESTATEMENT (SECOND) OF TORTS § 580A (1977).

10. Masson v. The New Yorker Magazine, Inc., 895 F.2d 1535, 1537 (9th Cir. 1989).

ground and the Supreme Court's development of the actual malice standard. It will then examine a recent case: the 9th Circuit's decision in *Masson v. New Yorker Magazine*.[11] An analysis of the problem through journalistic ethics and investigation of the difficulties confronting libel plaintiffs will follow. Finally, the comment explores the misquotation problem from both a legal and a journalistic perspective.

II. LEGAL BACKGROUND

A. *Origin And Development Of The Actual Malice Standard*

1. Historical Background

The law of libel and slander has a long, distinguished history in the English common law,[12] and for most of that time plaintiffs enjoyed considerable advantages over defendants.[13] As early as 1825, an English court ruled that the law would imply malice from an intentionally defamatory publication whether or not the defandant exhibited any ill-will toward that plaintiff or

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11. 895 F.2d 1535 (9th Cir. 1989).

12. *See generally* W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER & KEETON ON THE LAW OF TORTS 772 (5th ed. 1984). Libel and slander were strict liability torts at common law. *Id.* at 809. The early English common law courts had no jurisdiction over defamation actions until the sixteenth century, when there began a gradual trend toward common law courts and away from ecclesiastical and seignorial courts. *Id.* at 772. Jurisdiction over libel cases then rested with the infamous Star Chamber, which punished the crime of political libel. When the Star Chamber was abolished, the common law courts assumed jurisdiction over libel and slander. For this reason, libel and slander continue to be recognized as separate concepts. *Id.*; *see also* Eaton, *The American Law of Defamation Through* Gertz v. Robert Welch *and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1350 (1975) (the "common law of defamation slowly grew into a forest of complexities, overgrown with anomalies, inconsistencies, and perverse rigidities"); 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 Defendant on Matters of Public Concern*, 18 ST. MARY'S L. J. 581, 584-86 (1986) (discussing early development of common law defamation).

13. *See* Smolla, *The Annenberg Libel Reform Proposal: The Case for Enactment*, 31 WM. & MARY L. REV. 25, 25 (1989) (pre-*New York Times* defamation law favored plaintiffs to the detriment of free speech); *see also* R. BEZANSON, G. CRANBERG & J. SOLOSKI, LIBEL LAW AND THE PRESS: MYTH OR REALITY 1 (1987) (before constitutional protections were promulgated libel plaintiff need not prove fault to recover and strict liability could be imposed even for mistakes or oversights); W. PROSSER, HANDBOOK OF THE LAW OF TORTS 819 (4th ed. 1971) (federal and state court decisions since *New York Times* have considerably broadened privileges available to defendant beyond previous common law scope); R. SACK, LIBEL, SLANDER AND RELATED PROBLEMS 40 (1980) (falsity assumed at common law; plaintiff now has burden of proving falsity). Commentators have argued that constitutional protections make recovery for would-be libel plaintiffs unlikely. *See id.* at xxvi (1980) (only small number of suits for libel end with a verdict for the plaintiff).

thought that the statement was true.[14] American courts soon followed this precedent.[15] They also embraced an English ruling[16] that imposed strict liability — liability whether or not the defandant intended to make the statement — for libelous publications.[17] This meant that if a plaintiff established that the defendant published something that injured the plaintiff's reputation, the defendant was liable.[18]

2. *New York Times* and After

In 1964, however, the United States Supreme Court altered the balance of power in defamation cases with its decision in *New York Times v. Sullivan*.[19]

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14. Bromage v. Prosser, 107 Eng. Rep. 1051, 1051 (K.B. 1825); W. PROSSER, HANDBOOK OF THE LAW OF TORTS 772 (4th ed. 1971).

15. *See, e.g.*, Times Publishing Co. v. Carlisle, 94 F. 762, 767 (8th Cir. 1899) (malice is conclusively implied from publication of a libelous statement); McDonald v. Nugent, 98 N.W. 506, 507 (Iowa 1904) (proof that defendant uttered words accusing person of being affflicted with venereal disease established malice without other evidence); *see also* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 772 (4th ed. 1971) (noting early common law trend in American courts toward English rule implied malice).

16. Hulton & Co. v. Jones, 2 K.B. 44, *aff'd*, 1910 A.C. 20 (1909). In *Jones*, the defendants published a story that Artemus Jones, an intentionally ficticious name, was seen with a woman who was not his wife. Soon a real Artemus Jones appeared and sued for libel. The House of Lords affirmed a verdict for Jones, holding that it is no defense that the defendant did not intentionally defame the plaintiff. *Id.*

17. *See* Bank of Oregon v. Independent News, Inc., 693 P.2d 35, 39 (Or. 1985) (unless privilege established, common law liability standard regarding defamatory publications was liability without fault); *see also* Washington Post Co. v. Kennedy, 3 F.2d 207, 208 (D.C. 1925) (omission of person's initials sufficient grounds for liability); Switzer v. Anthony, 206 P. 391, 392 (Colo. 1922) (liability imposed where defendant did not intend to libel plaintiff or was unaware of his existence); Upton v. Times-Democrat Publishing Co., 28 So. 970, 970 (La. 1900) (word change substituting "colored" for "cultured" libelous despite absence of malice or negligence). *See generally* 2 F. HARPER, F. JAMES & O. GRAY, THE LAW OF TORTS § 5.0 at 3 (2d ed. 1986) (defamation was a strict liability tort at common law); W. PROSSER, HANDBOOK OF THE LAW OF TORTS 772-73 (4th ed. 1971) (noting early common law trend in American courts toward English rule of liability regardless of defendant's intent).

18. 2 F. HARPER, F. JAMES & O. GRAY, THE LAW OF TORTS § 5.0 at 3 (2d ed. 1986); *see* RESTATEMENT OF TORTS § 559 (1938) (communication defamatory if it tends to harm another's reputation and therefore lower her in community's estimation or deter third parties from dealing or associating with her); Montgomery Ward & Co. v. Peaster, 178 S.W.2d 302, 306 (Tex. Civ. App.—Eastland 1944, no writ) (liability established if plaintiff shows that defamatory communication heard by third person who understood derogatory meaning); *see also* 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 Defendant on Matters of Public Concern*, 18 ST. MARY'S L. J. 581, 586 (1986) (discussing common law liability for defamation); *cf.* Coleman v. MacLennan, 98 P. 281, 291-92 (Kan. 1908) (criticizing the implication of malice from mere publication of a libelous statement).

19. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 819 (4th ed. 1971) (*New York Times* was greatest victory for defendants in modern legal history).

In *New York Times*, the Supreme Court extended first amendment[20] protection to media defendants in defamation suits brought by public officials and involving a matter of public concern.[21] The Court held that a public official must prove that a defamatory statement was made with actual malice — knowing or reckless disregard of whether the statement is false — before recovering damages.[22] In this way, the Court introduced an element of fault into American defamation law.[23] Actual malice is not established just by showing bad motive or ill will, however; it concerns a level of awareness about the statement's falsity.[24] But after frequent litigation,[25] and several attempts by the United States Supreme Court to clarify the now-famous actual malice standard,[26] its full meaning has never been fully explained.[27]

In the years after *Sullivan*, the high Court extended this "constitutional-

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20. U.S. CONST. amend. I. The first amendment provides that "[c]ongress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for redress of grievances." *Id.*

21. New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964). Under the "actual malice" standard, a public official plaintiff must establish that the statement was made "with knowledge that it was false or with reckless disregard of whether it was false . . ." *Id.* at 279-80.

22. *New York Times*, 376 U.S. at 279-80. Actual malice is defined as knowledge of the statement's falsity or reckless disregard of whether or not it was false. *Id.* at 280

23. *See* Franklin, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 WM. & MARY L. REV. 825, 836 (1984) (*New York Times* requires plaintiffs who are suing media defendants to establish some fault regarding the challenged statement).

24. *See* Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. __, __, 109 S. Ct 2678, 2685, 105 L. Ed. 2d 562, 576 (1989) (actual malice not related to ill-will or bad motive). The Court also suggested that the term "state of mind" be substituted for actual malice to avoid jury confusion. *Id.*

25. The trend toward costly libel litigation has been the subject of much commentary. *See* R. BEZANSON, G. CRANBERG & J. SOLOSKI, LIBEL LAW AND THE PRESS: MYTH AND REALITY 4 (1987) (empirical study of libel plaintiffs, defendants and the litigation process); *see also* Bezanson, *Libel Law and the Realities of Litigation: Setting the Record Straight*, 71 IOWA L. REV. 226, 227 (1985) (noting reasons why libel plaintiffs sue and concluding that constitutional privileges may encourage libel litigation); Eberhard, *There's Got to be a Better Way: Alternatives to the High Cost of Libel*, 38 MERCER L. REV. 819, 821 (1987) (explaining increase both in cost and number of libel suits against media defendants and effects on news reporting); Franklin, *Good Names and Bad: A Critique of Libel Law and a Proposal*, 18 U.S.F. L. REV. 1, 3 (1983) (actual malice standard fails to encourage early termination of libel cases); Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1, 11-12 (explaining increase in libel actions and suggesting reforms).

26. *See* St. Amant v. Thompson, 390 U.S. 727, 731 (1968) (actual malice includes situations where defendant entertains serious doubts about the truth of his publication); Garrison v. Louisiana, 379 U.S. 64, 74 (1964) (statements made with high degree of awareness of probable falsity fall under *New York Times* actual malice standard).

27. *See* Harte-Hanks Communications, Inc. v. Connaughton, __ U.S. __, __, 109 S. Ct. 2678, 2685, 105 L. Ed. 2d 562, 576 (1989) ("reckless disregard" is difficult to enclose within a single definition); *St. Amant*, 390 U.S. at 730-31 ("reckless disregard" defies description in one definition and will require case-by-case development).

ized" actual malice standard to public figures,[28] but not to private figures.[29] In *Gertz v. Robert Welch, Inc.*,[30] the Court defined a public figure as a person who has assumed an influential role in society or who has thrust herself into the forefront of particular public affairs.[31] Subsequent decisions further refined the public figure concept.[32] However, the Court declined to extend the actual malice standard to all cases involving matters of public concern,[33] and the Court has refused to require actual malice as a prerequisite to recovering punitive damages[34] if the challenged speech involves only a private subject.[35]

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28. *See* Curtis Publishing Company v. Butts, 388 U.S. 130, 164 (1967) (actual malice standard extends to public figure plaintiffs); Gertz v. Robert Welch, Inc., 418 U.S. 323, 342-45 (1974) (*New York Times* standard extends to public figures but not private individuals).

29. *Gertz*, 418 U.S. at 347. The *Gertz* court acknowledged that significant differences exist between private and public figures in that private figures typically lack effective means to respond to falsehoods, and private figures have not assumed any risks that normally accompany involvement in public affairs. *Id.* at 344-45. States were left free to define their own standards for private figures so long as strict liability was not imposed. *Id.* at 347.

30. 418 U.S. 323 (1974).

31. *Gertz*, 418 U.S. at 345. In *Gertz*, the plaintiff sued Robert Welch, Inc., over publication of an article accusing Gertz of being a "Leninist" and a "Communist-fronter," and of framing a Chicago policeman convicted of murder. *Id.* at 325-26. A jury awarded Gertz $50,000 damages, but the trial court granted the defendant judgment n.o.v. because the plaintiff did not prove that the defendant published the accusations with actual malice. *Id.* at 329. This decision was affirmed by the Seventh Circuit Court of Appeals. *Id.* at 331-32. The Supreme Court held that the actual malice standard should not be applied to private individuals. *Id.* at 343. Provided they do not impose strict liability, states are free to set their own liability standards for cases involving media defamation of a private person. *Id.* at 347.

32. *See* Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 157, 159 (1979) (plaintiff involved in criminal proceedings was unwillingly thrust into public controversy); Hutchinson v. Proxmire, 443 U.S. 111, 135 (1979) (plaintiff/recipient of U.S. Senator's "Golden Fleece" award for government waste did not willingly thrust himself into public controversy); Time Inc. v. Firestone, 424 U.S. 448, 453-55 (1976) (famous divorcee not prominent enough to be public figure for all purposes).

33. Gertz v. Robert Welch, Inc., 418 U.S. 323, 346 (1973). *Gertz* rejected the application of the actual malice standard to all communications involving matters of public concern. *Id.* at 346. This standard was enunciated in *Rosenbloom v. Metromedia*, 403 U.S. 29, 59-62 (1971). The *Gertz* court instead established a public and private plaintiff dichotomy. *Gertz*, 418 U.S. at 347. So long as states do not impose liability without fault, they are free to define the liability standard for media publishers of defamatory falsehoods that injure private individuals. *Id.* But a private figure plaintiff would be required to show actual malice to recover punitive damages. *Id.* at 349.

34. Damages in an action for defamation generally fall into the three broad categories of actual or compensatory, nominal and punitive. W. KEETON, D. DOBBS, R. KETTON, & D. OWEN, PROSSER & KEETON ON THE LAW OF TORTS 842 (5th ed. 1984). General or compensatory damages compensate the plaintiff for reputational harm caused by the publication. RESTATEMENT (SECOND) OF TORTS § 621 comment a (1977). Under *Gertz*, the plaintiff's compensation, absent a showing of actual malice, is limited to actual harm. *Gertz*, 418 U.S. at 349. However, in *Dun & Bradstreet v. Greenmoss Builders*, the Court held that the *Gertz* protection against awarding punitive damages did not apply where the challenged speech was a

B. *Actual Malice And Misquotations*

1. The Meaning Of Falsity

Actual malice is often discussed in terms of a defendant's state of mind[36] — an awareness or a reckless disregard of whether the statement is false.[37] A libel plaintiff, in addition to showing that a media defendant was aware of the statement's defamatory meaning, must also prove that the statement itself was false.[38] Falsity, then, is an independent element of defamation,[39]

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purely private matter. 472 U.S. 749, 763 (1985). Nominal damages are awarded when the plaintiff's character, or the insignificant nature of the defamatory statement, convinces a jury that the plaintiff's reputation has not been substantially harmed. RESTATEMENT (SECOND) OF TORTS § 620 comment a (1977). The effect of the *Gertz* ruling on nominal damage awards absent an actual injury is unclear. *Id.* Punitive damages are awarded against a defendant to punish her for outrageous conduct and to deter others from engaging in similar conduct. RESTATEMENT (SECOND) OF TORTS § 908(1) (1977). Such damages could be awarded for outrageous conduct, for example evil motive or for reckless indifference to the rights of others. RESTATEMENT (SECOND) OF TORTS § 908(2) (1977). In awarding punitive damages, the trier of fact may consider the nature of the defendant's act, the defendant's financial resources and the extent of the plaintiff's injury. *Id.*

35. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761 (1985). In *Dun & Bradstreet*, the Court held that the *Gertz* protection against awarding punitive damages save upon a showing of actual malice did not apply where the challenged expression was purely a matter of private concern. *Id.* at 763. While noting that speech on topics of public concern is the essence of first amendment protection, the Court concluded that speech on matters of strictly private concern is of less first amendment interest. *Id.* at 759. This is because the first amendment was written to ensure the free exchange of ideas for political or social change in a democratic society. *Id.*

36. *See* Harte-Hanks Communications, Inc. v. Connaughton, __ U.S. __, __, 109 S. Ct. 2678, 2685 n.7, 105 L. Ed. 2d 562, 576 n.7 (1989) (suggesting that juries be instructed with term "state of mind" and not actual malice to avoid confusion). The Court also noted that instruction of juries "in plain English" concerning meaning of the phrase actual malice would help ensure clearer application. *Id.*; *see also* Westmoreland v. CBS, Inc., 596 F. Supp. 1170, 1172-73 n.1 (S.D.N.Y. 1984) (discussing need for using "state of mind" as opposed to actual malice to avoid jury confusion).

37. New York Times Co. v. Sullivan, 333 U.S. 254, 279-80 (1964); *see also* Franklin & Bussel, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 WM. MITCHELL L. REV. 825, 834 (1984) (discussing *New York Times* in terms of defendant's awareness regarding statement's falsity).

38. *See* Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 776 (1985) (shifting common law burden on falsity from defendant to plaintiff). Under the common law's rule on falsity, the defendant had the burden of proving that the statement was true in order to prevail. The *Hepps* court required the plaintiff to prove that a defamatory statement was false before she could recover damages. *Id.*; *see also* Franklin & Bussel, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 WM. MITCHELL L. REV. 825, 834 (1984) (discussing plaintiff's burden regarding falsity); Smolla, Dun & Bradstreet, Hepps *and* Liberty Lobby: *A New Analytic Primer on the Future Course of Defamation*, 75 GEO. L.J. 1519, 1528 (1987) (explaining effects of *Hepps* ruling on plaintiff's falsity burden).

39. *See Harte-Hanks*, __ U.S. at __, 109 S. Ct. at 2684-86, 105 L. Ed. 2d at 576 (discusses actual malice solely in terms of defendant's state of mind and not falsity); *see also* Comment,

and should not be confused with actual malice.[40] Yet because reporters rarely publish statements with knowledge of their falsity,[41] courts will have difficulty finding awareness of falsity to a "clear and convincing" degree.[42] The Supreme Court has never directly addressed the question whether a mere misquotation is evidence of the defendant's awareness of a statement's falsity.[43] But the Court has held that calculated falsehoods and intentional lies warrant no constitutional protection[44] stating that such statements fail to advance any compelling first amendment interests.[45]

2. The Rational Interpretation Standard

Apart from considerations over falsity, the Supreme Court's major contri-

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Masson v. New Yorker Magazine: *Actual Malice and Direct Quotations — The Constitutional Right to Lie*, 65 NOTRE DAME L. REV. 564, 574 (1990) (falsity is a separate element of defamation).

40. Comment, Masson v. New Yorker Magazine: *Actual Malice and Direct Quotations - The Constitutional Right to Lie* , 65 NOTRE DAME L. REV. 564, 574 (1990) (falsity is a separate element of defamation). The Supreme Court has described the relationship between actual malice and falsity in terms of practicality. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 778 (1985). Evidence offered by plaintiffs on the publisher's fault in adequately investigating the truth of the published statements will generally include evidence concerning the falsity of the challenged statement. *Id.*; *see also* Keeton, *Defamation and Freedom of the Press*, 54 TEX. L. REV. 1221, 1236 (1976).

41. *See* F. BASKETTE, J. SISSONS & B. BROOKS, THE ART OF EDITING 134 (3d ed. 1982) (commenting on dearth of deliberate libels). The authors note that "[f]ew libels are deliberate. Nearly all result from erroneous reporting, misunderstanding of the law or careless editing." *Id.*

42. *See* New York Times v. Sullivan, 376 U.S. 254, 285-86 (1964) (actual malice must be established with "convincing clarity"); *see also* Bloom, *Proof of Fault in Media Defamation Litigation*, 38 VAND. L. REV. 247, 256 (1985) (arguing that plaintiffs will have trouble establishing the defendant's knowledge absent objective contemporaneous indications); *cf.* Carson v. Allied News Co., 529 F.2d 206, 213 (7th Cir. 1976) (court reluctant to find knowledge of falsity and instead speaks of a reckless disregard).

43. *See* Masson v. New Yorker Magazine, Inc., 895 F.2d 1535, 1537 (9th Cir. 1989), *cert. granted*, __ U.S. __, 111 S. Ct. 39, 112 L. Ed. 2d 16 (1990) (question of fabricated quotations is one of first impression). The court noted that the U.S. Supreme Court has never before addressed the question of whether malice can be inferred from evidence that a defamatory statement does not contain the speaker's exact words. *Id.*

44. *See, e.g.*, Hustler Magazine v. Falwell, 485 U.S. 46, 52 (1988) (false statements of fact have no constitutional value); Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) (falsehoods have no constitutional value); Garrison v. Louisiana, 379 U.S. 64, 75 (1964) (a knowingly and deliberately published falsehood should enjoy no constitutional immunity).

45. *See, e.g.*, *Falwell*, 485 U.S. at 52 (false statements of fact interfere with the "truth-seeking function of the marketplace of ideas"); *Gertz*, 418 U.S. at 340 (rejecting constitutional protection for falsehoods). "Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust and wide-open debate' on public issues" *Id.* (quoting New York Times v. Sullivan, 376 U.S. 254, 270 (1964)).

bution to the misquotation issue appeared in *Time, Inc. v. Pape*.[46] In *Pape*, the Court held that *Time's* publication of one possible, rational interpretation of a document that "bristled with ambiguities" was not defamatory.[47] To find malice in such a situation, reasoned the Court, would "impose a much stricter standard of liability on errors of interpretation . . . than on errors of historical fact."[48] This reasoning was followed by the third circuit in *Dunn v. Gannett NY Newspapers*,[49] and two years later by the *Masson* court.[50] It was also used by the Supreme Court in *Bose Corp. v. Consumers Union of United States, Inc.*[51] The *Bose* Court held that a consumer magazine's description of the plaintiff's stereo equipment was insufficient to support a finding of actual malice because it was a rational interpretation of an event filled with ambiguities.[52] Thus, merely selecting the most damaging inference from ambiguous facts does not, by itself, establish actual malice.[53]

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46. 401 U.S. 279 (1971).

47. *Id.* at 290. In *Pape*, the dispute involved a *Time* magazine article about a report by the U.S. Commission on Civil Rights. *Id.* at 281-82. The report examined civil rights violations by Chicago police officers alleged in *Monroe v. Pape*, 365 U.S. 167, 169-70 (1961). *Pape*, 401 U.S. at 280-82. In summarizing the *Monroe* case, however, *Time* did not indicate that the allegations were made by the plaintiff, not the commission. *Id.* at 282. Pape, a Chicago police officer involved in the raid in *Monroe*, sued Time for defamation. The Court found the article a rational interpretation of a long document replete with ambiguities. *Id.* at 289-90.

48. *Id.* at 290.

49. 833 F.2d 446 (3d Cir. 1987). In *Dunn*, the plaintiff, the mayor of Elizabeth, New Jersey, said during a debate that the city was trying to encourage foreign immigrants to keep the city clean to avoid litter problems. *Id.* at 448. The defendant's Spanish-language newspaper ran a story about the mayor with the Spanish word "cerdos," or pigs, in quotation marks. Translated from Spanish, the headline read: "Elizabeth Mayor on the attack: Calls Hispanics 'Pigs'." The plaintiff sued the newspaper for defamation. *Id.* The appellate court affirmed a summary judgment for the defendant, holding that the word "cerdos" was a rational interpretation of the plaintiff's remarks. *Id.* at 452. The court added that misinterpretation of a person's words is not enough to establish actual malice. *Id.*

50. Masson v. New Yorker Magazine, Inc., 895 F.2d 1535, 1539 (9th Cir. 1989), *cert. granted*, __ U.S. __, 111 S. Ct. 39, 112 L. Ed. 2d 16 (1990); Dunn v. Gannett New York Newspapers, Inc., 833 F.2d 446 (3d Cir. 1987). Other courts have cited *Pape* with approval. *See, e.g.*, Bartimo v. Horsemen's Benevolent and Protective Ass'n, 771 F.2d 894, 898 (5th Cir. 1985) (suit by racetrack president against horsemen's association for article in trade journal); Ryan v. Brooks, 634 F.2d 726, 733 (4th Cir. 1980) (corporate officer for Bell Telephone sued author for report of officer's political activities); LaBruzzo v. Associated Press, 353 F. Supp. 979, 985 (W.D. Mo. 1973) (libel action against news agency and television stations for publications and broadcasts linking plaintiff to organized crime); Jackson v. Atlantic Monthly Co., 324 F. Supp. 1302, 1309 (N.D. Ga. 1971) (suit over magazine article based upon interview with plaintiff).

51. 466 U.S. 485 (1984).

52. *Bose*, 466 U.S. at 512-513.

53. Time, Inc. v. Pape, 401 U.S. 279, 290 (1971); Orr v. Argus-Press Co., 586 F.2d 1108, 1116 (6th Cir. 1978), *cert. denied*, 440 U.S. 960 (1979); Simmons Ford, Inc. v. Consumers Union, Inc., 516 F. Supp. 742, 750 (S.D.N.Y. 1981); Trans World Accounts, Inc. v. Associ-

If a reporter is convinced that one side of a story is true, the first amendment does not require him to present the other side.[54] Similarly, failure to report contradictory evidence does not by itself establish subjective doubt about a publication's truth or falsity.[55]

3. Fabricated Quotations

Some courts have followed the rational interpretation standard to resolve disputes over fabricated quotations,[56] but others have used different reasoning. In *Carson v. Allied News Co.*,[57] the United States Court of Appeals for the Seventh Circuit held that malice could be inferred from fabricated quotations that are entirely manufactured by the defendant.[58] But one year later,

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ated Press, 425 F. Supp. 814, 821-22 (N.D. Cal. 1977); *see also* Smolla, *"Where have you gone, Walter Cronkite?": The First Amendment and the End of Innocence*, 3 ARK. L. REV. 311, 316 (1985) (selection of most damaging inference does not *by itself* establish actual malice).

54. Arnheitner v. Random House, Inc., 578 F.2d 804, 805-06 (9th Cir. 1978), *cert. denied*, 444 U.S. 931 (1979) (defendant conducting thorough research did not exhibit actual malice in supporting plaintiff's removal from military command); Reliance Ins. Co. v. Barron's, 442 F. Supp. 1341, 1352 (S.D.N.Y. 1977) (rejecting plaintiff's contentions that selective omissions of data provided circumstantial evidence of actual malice); *see also* Smolla, *"Where Have You Gone, Walter Cronkite?": The First Amendment and the End of Innocence*, 39 ARK. L. REV. 311, 316-17 (1985) (observing that defendant is under no obligation to present both sides of a story).

55. *See* Martin Marietta Corp. v. Evening Star Newspaper Co., 417 F. Supp. 947, 960 (D.D.C. 1976) (publication of story following denial of allegations by plaintiff did not establish actual malice); *cf.* Brophy v. Philadelphia Newspapers, Inc., 422 A.2d 625, 633 (Pa. 1980) (actual malice may not be inferred merely because reporter's gathered information is presented in ambiguous or potentially defamatory manner). *See generally* Smolla, *"Where Have You Gone, Walter Cronkite?": The First Amendment and the End of Innocence*, 39 ARK. L. REV. 311, 316-17 (1985) (failing to report contradictory evidence does not establish malice).

56. *See, e.g.*, Masson v. The New Yorker Magazine, Inc., 895 F.2d 1535, 1539, 1541 (9th Cir. 1989), *cert. granted*, __ U.S. __, 111 S. Ct. 39, 112 L. Ed. 2d 16 (1990) (defendant's editing was rational interpretation of plaintiff's remarks); Dunn v. Gannett New York Newspapers, Inc., 833 F.2d 446, 452 (3d Cir. 1987) (translation of word from English into Spanish rational interpretation of plaintiff's remarks).

57. 529 F.2d 206 (7th Cir. 1976). In *Carson*, talk show host Johnny Carson sued a tabloid over quotes allegedly taken from conversation between Carson and NBC executives. *Id.* at 212. Although the writer never heard any of the alleged conversations and never interviewed Carson about them, the writer argued that the quotes were logical extentions of information compiled from other sources on which he based the story. The trial court granted summary judgment for defendant. *Id.* at 208. The court of appeals reversed and remanded, holding that the total fabrication of quotes showed serious doubt as to truth or falsity. *Id.* at 213-14.

58. *Carson*, 529 F.2d at 213; *see also* St. Amant v. Thompson, 390 U.S. 727, 731 (1968) (publishing story while entertaining serious doubts as to its truth qu[illegible]s as reckless disregard of the truth). In *St. Amant*, the plaintiff sued a candidate for public office over a series of questions and a third party's answers to those questions read by the defendant in a televised speech. *Id.* at 728-29. In finding that the defendant did not exhibit reckless disregard, the Supreme Court noted that reckless disregard exists when the defendant entertains serious

the Second Circuit held, in *Hotchner v. Castillo-Puche*,[59] that knowledge of the fabrication, by itself, does not establish liability for defamation unless the impact or content of the quotation is thereby altered.[60] Some states have ruled that inaccurate quotations that damage individual reputations may be defamatory.[61] However, so long as the publication is substantially true, minor inaccuracies should not necessarily render it false.[62]

C. *Actual Malice And Procedural Obstacles*

A fabricated quotation will yield a verdict for a public figure plaintiff only if she first proves actual malice by offering "clear and convincing" evidence.[63] But before she can present her case to a jury, she may first have to

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doubts as to the publication's truth, not when a reasonably prudent person would have published or investigated before publishing. *Id.* at 731.

59. 551 F.2d 910 (2d Cir. 1977). In *Hotchner*, a public figure plaintiff, Hotchner, sued the author and publisher of an English translation of a book about Ernest Hemingway written in Spanish. *Id.* at 911. One allegedly libelous quote, as originally translated, described the plaintiff as "a dirty and a terrible ass-licker. There's something phony about him. I wouldn't sleep in the same room with him." This quote was edited by the English translators to read "I don't really trust him, though." The plaintiff alleged that the edited version was libelous because the defendant knowingly published an adulterated version of Hemingway's statement. *Id.* at 914. The appellate court noted that while the edited version of the quote was somewhat fictionalized, it neither increased "the defamatory impact nor altered the substantive content of Hemingway's statement." The court also explained that where, as in the present case, "a passage was incapable of independent verification or where there were no convincing indica of unreliability, publication of the passage could not constitute reckless disregard of the truth." *Id.*

60. *Hotchner*, 551 F.2d at 914.

61. *See, e.g.*, Bindrim v. Mitchell, 155 Cal. Rptr. 29, 38 (Cal. 1979), *cert. denied*, 444 U.S. 984 (1979) (defendant displayed reckless disregard by fictionalizing quotations despite existence of tape-recorded evidence); Schrottman v. Barnicle, 437 N.E.2d 205, 214 (Mass. 1982) (negligence established by defendant's accuracy regarding altered quotation).

62. *See* Pritchard v. Times Southwest Broadcasting, Inc. 642 S.W.2d 877, 879 (Ark. 1982) (explaining that although truth is a defense in defamation, exact truth not required); Saleeby v. Free Press, Inc., 91 S.E.2d 405, 407 (Va. 1956) (unnecessary for defendants to prove literal truth of article, and slight inaccuracies immaterial); Simpson v. Times Journal, 316 S.E.2d 795, 796 (Ga. App. 1984) (article calling plaintiff "bankrupt" found substantially correct and thus unactionable despite fact that plaintiff was never adjudicated bankrupt). *See generally* V. JOHNSON, *Defamation (Libel and Slander)*, in PERSONAL INJURY: ACTIONS, DEFENSES, DAMAGES (Matthew Bender (1986)) (less-than-total report of the truth non-defamatory so long as publication substantially true and facts not distorted or arranged to convey defamatory meaning); W. PROSSER, HANDBOOK OF THE LAW OF TORTS 798-99 (4th ed. 1971) (unnecessary for plaintiff to prove literal truth of publication and only substantial truth need be established).

63. *See* New York Times v. Sullivan, 376 U.S. 254, 285-86 (1964) (referring to "convincing clarity"). In *Addington v. Texas*, 441 U.S. 418, 431-33 (1979), the Court explained that "convincing clarity" was more than a preponderance of the evidence yet less than beyond a reasonable doubt. R. SACK, LIBEL, SLANDER AND RELATED PROBLEMS 225 (1980). The issue was resolved in Bose Corp. v. Consumer's Union of the United States, 466 U.S. 485, 511

withstand a motion for summary judgment.[64] Most defamation cases end before they have even begun — with a defendant's successful motion for summary judgment.[65] Again, however, the threshold question in a summary judgment situation is whether the evidence supports a reasonable jury finding that the plaintiff showed "clear and convincing" evidence of actual malice.[66] This places a heavy burden on a plaintiff,[67] and cases have suggested that establishing actual malice at trial by a preponderance of the evidence

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(1984). The Court held that appellate review in public figure defamation cases will be under a standard of "clear and convincing" evidence. *Id.* This standard is now used before the factfinder as well. *See generally* R. SACK, LIBEL, SLANDER AND RELATED PROBLEMS 225 (1980) (commenting on evolution and development of "convincing clarity" standard).

64. The Federal Rules of Civil Procedure require that the party moving for summary judgment establish specific facts showing "that there is no genuine issue of material fact." FED. R. CIV. P. 56(c); *see also* United States v. Diebold, Inc., 369 U.S. 654, 655 (1962) (in summary judgment situation, all inferences drawn from underlying facts should be construed in light most favorable to party opposing the motion).

65. *See* Matheson, *Procedure in Public Person Defamation Cases: The Impact of the First Amendment*, 66 TEX. L. REV. 215, 289-90 n.430 (1987) (citing study on defamation and summary judgments). Between 1980 and 1981, 83% of all defense motions concerning the issue of actual malice were granted on summary judgment; between 1982 and 1984, defendants prevailed on summary judgment 71% of the time. *See generally* Louis, *Summary Judgment and the Actual Malice Controversy in Constitutional Defamation Cases*, 57 S. CAL. L. REV. 707, 710 & n.23 (1984) (citing study finding that between 1976 and 1980, over 75% of defense summary judgment motions on actual malice issue were granted). Some courts justify the frequent use of summary judgment in defamation cases by reasoning that a multiplicity of libel suits would inhibit free speech. *See, e.g.*, Bon Air Hotel, Inc. v. Time, Inc., 426 F.2d 858, 864-65 (5th Cir. 1970) (need for protecting newspapers in exercising their first amendment rights less public debate become "less robust"); Washington Post Co. v. Keogh, 365 F.2d 965, 968 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967) (summary judgments essential to first amendment rights because free debate at issue). Others point to the heavy burden that awaits public figure plaintiffs should the case go to a jury. *See, e.g.*, Fadell v. Minneapolis Star & Tribune Co., 557 F.2d 107, 108-09 (7th Cir. 1977), *cert. denied*, 434 U.S. 966 (1977) (plaintiff failed to sustain *New York Times* burden of proof); Bon Air Hotel, Inc. v. Time, Inc., 426 F.2d 858, 863-64 (5th Cir. 1970) (record devoid of facts from which plaintiff could prove actual malice).

66. Anderson v. Liberty Lobby, 477 U.S. 242, 255-56 (1986). In *Anderson*, the Court ruled that in determining whether a genuine issue of material fact exists in a summary judgment situation, the trial judge must consider "the actual quantum and quality of proof necessary to support liability under *New York Times*." *Id.* at 254. Furthermore, the Court said that in applying the "convincing clarity" standard, judges should consider whether a reasonable factfinder might conclude that the plaintiff had proven actual malice with convincing clarity. *Id.* at 252. Another court has concluded that summary judgment for the defendant should be granted unless pretrial affidavits, depositions or documentary evidence show that the plaintiff can prove actual malice. Fadell v. Minneapolis Star and Tribune, 557 F.2d 107, 108 (7th Cir. 1977) (quoting Wasserman v. Time, Inc., 424 F.2d 920, 922-23 (D.C. Cir. 1970)).

67. *See, e.g.*, Tucci v. Guy Gannet Publishing Co., 464 A.2d 161, 166 (Me. 1983) (public figure plaintiff faces heavy burden under actual malice standard); McMurry v. Howard Publications, Inc., 612 P.2d 14, 18 (Wyo. 1980) (knowledge of falsity under "clear and convincing" standard difficult to establish); Whitmore v. Kansas City Star Co., 499 S.W.2d 45, 51 (Mo. App. 1973) (plaintiff failed to satisfy heavy burden of "clear and convincing" evidence); *see*

would be less diffficult than meeting the "clear and convincing" standard at the summary judgment stage.[68] Moreover, the standard for proving actual malice is subjective;[69] and evidence of the defendant's thoughts and editorial processes are essential.[70] A plaintiff may be able to prove a defendant's state of mind with circumstantial evidence — departure from accepted standards of journalism, for example.[71] Even so, the battle does not end with a favorable verdict, for *New York Times* imposes a duty on reviewing appeals courts to conduct an independent evaluation of the entire record to determine whether actual malice was proven with convincing clarity.[72]

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also Bloom, *Proof of Fault in Media Defamation Litigation*, 38 VAND. L. REV. 255-56 (1985) (noting heavy burden on plaintiff in public figure defamation cases).

68. *See, e.g.*, Long v. Arcell, 618 F.2d 1145, 1148 (5th Cir. 1980), *cert. denied*, 449 U.S. 1083 (1981) (affirming judgment n.o.v. because plaintiff failed to meet "clear and convincing" standard, although verdict supported by preponderance of evidence); Buckley v. Littell, 539 F.2d 882, 895 (2d Cir. 1976) (trial court incorrectly interpreted defamatory document by "clear and convincing" standard); Firestone v. Time, Inc., 460 F.2d 712, 721 (5th Cir. 1972) (plaintiff's verdict reversed because record failed to show "clear and convincing" evidence greater than a preponderance); Miss America Pageant, Inc. v. Penthouse Int'l, Ltd., 524 F. Supp. 1280, 1287 (D.N.J. 1981) (evidence suggested awareness of falsity but not "clear and convincing" evidence); *see also* Bloom, *Proof of Fault in Media Defamation Litigation*, 38 VAND. L. REV. 247, 255-56 (1985) (noting difference between jury issue and clear and convincing proof). Confusion also surrounds the difference between an actual malice burden of persuasion and a summary judgment burden of production. *See generally* Louis, *Summary Judgment and the Actual Malice Controversy in Constitutional Defamation Cases*, 57 S. CAL. L. REV. 707, 713 n.37 (1984) (discussing difference between summary judgments and burden of proof for actual malice). The "clear and convincing" standard is a persuasion burden, while the consideration on summary judgment is the equivalent production burden. *Id.* As the persuasion burden rises beyond a preponderance to burden beyond a reasonable doubt, the amount of evidence needed to satisfy the production burden, establish a prima facie case, and escape a motion for a directed verdict or its equivalent also rises. *Id.*

69. *See* Hutchinson v. Proxmire, 443 U.S. 111, 120 (1979) (actual malice depends on defendant's state of mind).

70. *See* Herbert v. Lando, 441 U.S. 153, 160 (1979) (describing importance of state of mind of defendant at time of publication).

71. *See* Harte-Hanks Communications, Inc. v. Connaughton, __ U.S. __, __, 109 S. Ct. 2678, 2686, 105 L. Ed. 2d 562, 576-77 (1989) (discussing departure from accepted journalistic standards and proving actual malice with evidence thereof).

72. New York Times v. Sullivan, 376 U.S. 254, 285-86 (1964). In a later decision, the Supreme Court reaffirmed the independent appellate review doctrine, calling it a rule of federal constitutional law in cases governed by *New York Times*. Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 511-12 (1984). The Court added that it is the duty of reviewing judges to independently decide whether the evidence in the record is sufficient to support a judgment of actual malice by clear and convincing proof. *Id.* Five years later, the Court again affirmed the independent review doctrine, holding that a review of the entire record revealed the evidence supported a finding of actual malice. Harte-Hanks Communications, Inc. v. Connaughton, __ U.S. __, __, 109 S. Ct. 2678, 2696-97, 105 L. Ed. 2d 562, 589 (1988). The independent review doctrine presents a formidable obstacle for plaintiffs who win at the trial level and go through an appeal. *See* Note, *To Quote or Not to Quote: The Status of Misquoted*

III. RECENT DEVELOPMENTS

A. Masson v. New Yorker Magazine

1. Introduction

The preceding issues — actual malice, rational interpretation, summary judgment — were before the Ninth Circuit in a recent decision that pitted the rights of a public figure plaintiff against the editorial freedom of a journalist defendant.[73] At issue were a series of allegedly fabricated quotations that appeared in a *New Yorker* magazine article written by Janet Malcolm.[74] The plaintiff, Jeffrey Masson, was the focus of the story, which was based on a series of tape-recorded conversations between Malcolm and Masson.[75] Masson alleged that the article fabricated quotations attributed to him[76] and that other statements were misleadingly edited to portray him as "unscholarly, irresponsible, [and] vain . . . ."[77] Citing the absence of clear and convincing evidence to support Masson's allegations, the district court granted summary judgment in favor of the defendants.[78] The United States Court of Appeals for the Ninth Circuit affirmed the trial court's ruling.[79]

2. The Majority

Relying mainly on *Dunn*[80] and the *Carson*,[81] *Hotchner*[82] and *Pape*[83] deci-

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Material in Defamation Law, 43 VAND. L. REV. 1637, 1650 n.100 (1990). One study found a 67% reversal rate of libel actions decided between 1980-84. *Id.* Among courts using the independent review doctrine, the rate of reversal was over 80%. *Id.*

73. Masson v. New Yorker Magazine, Inc., 895 F.2d 1535, 1537, 1539 (9th Cir. 1989), *cert. granted*, __ U.S. __, 111 S. Ct. 39-40, 112 L. Ed. 2d 16 (1990).

74. *Masson*, 895 F.2d at 1536.

75. *Id.*

76. *Id.* In his complaint, Masson identified twelve allegedly defamatory passages. Masson v. New Yorker Magazine, Inc., 686 F. Supp. 1396, 1397 (N.D. Cal. 1987). Among the nine allegedly fabricated quotations cited by Masson, one purported to quote him saying "I was like an intellectual gigolo — you get your pleasure from him, but you don't take him out in public." *Masson*, 895 F.2d at 1540. The appellate court held that this quote, even if not uttered by Masson, was not defamatory. *Id.* at 1541. Masson denies ever making the statement. *Id.* Another disputed quotation had Masson predicting that sales of a forthcoming book would establish him as "the greatest analyst that ever lived." *Id.* at 1542. Again Masson denies ever saying this. *Id.* Interestingly, neither quotation appears on any of the taped interviews. *Id.* at 1540, 1542. None of the other allegedly fabricated quotes — or the precise words attributed to Masson — appear on any of the taped interviews. *Id.* at 1539-44.

77. *Masson*, 895 F.2d at 1536. The court considered two passages that were misleadingly edited. *Id.* at 1545-46.

78. *Id.* at 1535.

79. *Id.* at 1548.

80. Dunn v. Gannett NY Newspapers, 833 F.2d 446 (3d Cir. 1987).

81. Carson v. Allied News Company, 529 F.2d 206 (2d Cir. 1976).

82. Hotchner v. Castillo-Puche, 551 F.2d 910 (2d Cir. 1977).

83. Time, Inc. v. Pape, 401 U.S. 279 (1971).

sions, Judge Alarcron, writing for the majority, summarized the law on defamatory misquotations in three parts: (1) actual malice can be inferred from a fabricated quotation that is entirely a product of the writer's imagination;[84] but (2) actual malice will not be inferred when the disputed language is either a rational interpretation of ambiguous remarks,[85] or (3) it does not alter the "substantive content" of the speaker's statements.[86]

Like the trial court, the majority assumed that the quotations were deliberately altered.[87] Yet even if Masson did not use the precise words attributed to him, the majority concluded that Malcolm's interpretation of Masson's remarks did not alter their substantive content.[88] According to the majority, the edited remarks were not defamatory because under the holding of *Pape* they were rational interpretations of ambiguous remarks.[89] For further support, Judge Alarcron found one of the challenged quotations non-defamatory under the incremental harm branch of the libel-proof plaintiff doctrine, in which a challenged statement is not actionable if it adds little or no harm beyond that imposed by unchallenged statements in the same article.[90]

3. The Dissent

In an angry dissent, Judge Alex Kozinski condemned the majority's reasoning as an open invitation for writers to fashion significant changes in the wording and content of quotations.[91] Noting that most readers think quota-

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84. Masson v. New Yorker Magazine, Inc., 895 F.2d 1535, 1539 (9th Cir. 1989), *cert. granted*, __ U.S. __, 111 S. Ct. 39-40, 112 L. Ed. 2d 16 (1990); *see also Carson*, 529 F.2d at 213 (jury question existed regarding actual malice of reporter who fabricated quotations attributed to Johnny Carson). *See generally* Comment, *To Quote or Not to Quote: The Status of Misquoted Material in Defamation Law*, 43 VAND. L. REV. 1637, 1651 (1990) (explaining majority's decision in *Masson*).

85. *See* Dunn v. Gannett N.Y. Newspapers, 833 F.2d 446, 452 (3d Cir. 1987) (translation of "litterers" into Spanish "cerdos" or "pigs" was not grounds for imputing malice).

86. *See* Hotchner v. Castillo-Puche, 551 F.2d 910, 914 (2d Cir.), *cert. denied*, 434 U.S. 834 (1977) (malice will not be inferred from changes that do not "increase the defamatory impact or alter the substantive content" of the statement).

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

88. *Id.* at 1541.

89. *Id.* at 1546.

90. *Masson*, 895 F.2d at 1541. Under this doctrine, if the challenged statements add little or no harm to beyond that imposed by the unchallenged statements, the existing harm is nominal or non-existent and the statements are regarded as unactionable. Herbert v. Lando, 781 F.2d 298, 310-11 (2d Cir.), *cert. denied*, 476 U.S. 1182 (1986). The doctrine originated in *Cardillo v. Doubleday & Co., Inc.*, 518 F.2d 638, 639 (2d Cir. 1975). In *Cardillo*, the plaintiff, a habitual criminal, was unable to recover anything more than nominal damages because of his criminal behavior. *Id.*

91. Masson v. New Yorker Magazine, Inc., 895 F.2d 1535, 1548 (9th Cir. 1989), *cert. granted*, __ U.S. __, 111 S. Ct. 39-40, 112 L. Ed. 2d 16 (1990)(Kozinski, J., dissenting).

tion marks suggest verbatim accuracy,[92] Judge Kozinski cited journalistic sources that condemned the fabrication of quotations.[93] Finally, the dissent acknowledged the need to protect negligent or inadvertent misquotation[94] and editorial changes in grammar or syntax,[95] but it argued that deliberate misquotations were unworthy of first amendment protection.[96]

IV. JUDGES, JOURNALISTS AND PROFESSIONAL STANDARDS

A. *Journalists And Professional Standards*

1. General Written Standards On Controlling Journalistic Practices

The first journalistic standards appeared in the early twentieth century as reporters and educators sought to raise journalism's professional standing by creating industry-wide codes of ethics.[97] Since then industry associations like the American Society of Newspaper Editors (ASNE) and the Society of Professional Journalists (SPJ) have written ethical codes to guide their members,[98] and today most newspapers maintain some kind of written policy controlling the collection and dissemination of the news.[99] But unlike the newsroom standards that, according to one survey, govern almost sixty per-

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92. *Id.* at 1558 (Kozinski, J., dissenting).

93. *Id.* at 1559 (Kozinski, J., dissenting). Judge Kozinski cited the following sources, among others, THE ASSOCIATED PRESS STYLEBOOK AND LIBEL MANUAL 183 (1977); M. CHARNLEY & B. CHARNLEY, REPORTING 248 (4th ed. 1979); J. HULTENG, THE MESSENGER'S MOTIVES: ETHICAL PROBLEMS IN THE NEWS MEDIA 70 (2d ed. 1985).

94. *Id.* at 1557-58 (Kozinski, J., dissenting). Judge Kozinski interpreted the *New York Times* line of cases to protect journalists from both errors of fact committed honestly and professionally as well as errors of judgment in the selection of which words to print. *Id.* at 1557. The dissent explained that compelling journalists to scrutinize every printed word for possibly libelous inferences might destroy journalism, not to mention the first amendment. *Id.*

95. *Id.* at 1558-59 (Kozinski, J. dissenting).

96. *Id.* at 1562 (Kozinski, J., dissenting).

97. Sheran & Isaacman, *Do We Want A Responsible Press?: A Call For The Creation of Self-Regulatory Mechanisms*, 8 WM. MITCHELL L. REV. 1, 96-97 (1982). The first code of journalistic conduct was established by the Kansas Editorial Association in 1910. *Id.* at 97. The American Society of Newspaper Editors adopted its "Canons of Journalism" in 1923. *See* Comment, *Standards Governing the News: Their Use, Their Character, and Their Legal Implications*, 72 IOWA L. REV. 637, 638 (1987) (discussing origin of media industry canons of ethics).

98. Sheran & Isaacman, *Do We Want a Responsible Press?: A Call for the Creation of Self-Regulatory Mechanisms*, 8 WM. MITCHELL L. REV. 1, 97-99 (1982); Comment, *Standards Governing the News: Their Use, Their Character, and Their Legal Implications*, 72 IOWA L. REV. 637, 638, 695-99 (1987) (reprint of current codes adopted by the ASNE and SPJ).

99. Comment, *Standards Governing the News: Their Use, Their Character, and Their Legal Implications*, 72 IOWA L. REV. 637, 679 (1987) (giving results of survey of newspaper editors regarding reporting standards). In the survey, 107 out of 182 news editors surveyed responded that their newspapers maintained some kind of internal written standards. *Id.* Eighty-eight of 107 said that these standards originated at the newspaper. *Id.* at 680.

cent of newspaper journalists,[100] the industry canons are broad statements of principle.[101] In the ASNE Statement of Principles, for example, six articles are grouped under broad titles: "Responsibility," "Freedom of the Press," "Independence," "Truth and Accuracy," "Impartiality" and "Fair Play."[102] The SPJ Code of Ethics uses similarly expansive language.[103] Indeed, the lofty philosophical tone of the industry canons has caused some critics to ask what guidance they can offer journalists with practical ethical concerns.[104] Some journalists and scholars would argue that newspapers should use written standards to increase the reader's confidence in a reporter's accuracy;[105] others fear that such standards would offer powerful ammunition to libel plaintiffs.[106] In any event, the absence of any procedures to enforce ethical

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100. *See generally* Comment, *Standards Governing the News: Their Use, Their Character, and Their Legal Implications*, 72 IOWA L. REV. 637, 679 (1987) (giving results of survey of newspaper editors regarding reporting standards). The survey revealed that 58% of newspapers used some written standards. *Id.* at 645. In the survey, a majority of news editors polled responded that their newspapers maintained some internal written standards. A majority also indicated that these standards originated at the newspaper. *Id.* Fifty-seven of 107 respondents indicated that these standards were in the form of a policy manual. *Id.* at 680. Yet 67 of 107 said that there were no disciplinary actions based upon the standards within the past 5 years. *Id.* at 681.

101. *Id.* at 639; J. HULTENG, THE MESSENGER'S MOTIVES: ETHICAL PROBLEMS OF THE NEWS MEDIA 206-07 (2d ed. 1985).

102. Comment, *Standards Governing the News: Their Use, Their Character, and Their Legal Implications*, 72 IOWA L. REV. 637, 695-96 (1987).

103. The SPJ code of ethics is organized under the six broad categories of "Responsibility;" "Freedom of the Press;" "Ethics;" "Accuracy and Objectivity;" and "Fair Play." *Id.* at 697-98.

104. *See* J. HULTENG, THE MESSENGER'S MOTIVES: ETHICAL PROBLEMS OF THE NEWS MEDIA 206-07 (1983). William Thomas, former editor of the LA Times was quoted as saying that "I've never seen a written code of ethics that wasn't so damned obvious that is was clear you were doing it more for outside PR value than for any impact inward." *Id.* H.L. Mencken wryly summed up the thoughts of many commentators towards the first industry codes:

> Journalistic codes of ethics are all moonshine. Essentially, they are as absurd as would be codes of street-car conductors, barbers or public jobholders. If American journalism is to be purged of its present swinishness and brought up to a decent level of repute — and God knows that such an improvement is needed — it must be accomplished by the devises of morals, not by those of honor. That is to say, it must be accomplished by external forces, and through the medium of penalties exteriorly inflicted.

Pennekamp v. Florida, 328 U.S. 331, 365 n.13 (1946) (Frankfurter, J., concurring).

105. *See* Sheran & Isaacman, *Do We Want A Responsible Press?: A Call For The Creation of Self-Regulatory Mechanisms*, 8 WM. MITCHELL L. REV. 1, 140-41 (1982) (media must create self-regulatory mechanism to overcome lack of public confidence); Comment, *Standards Governing the News: Their Use, Their Character, and Their Legal Implications*, 72 IOWA L. REV. 637, 643 (1987) (use of written standards assures readers that media is concerned about ethical problems).

106. Comment, *Standards Governing the News: Their Use, Their Character, and Their Legal Implications*, 72 IOWA L. REV. 637, 643 (1987). The trend toward admitting a media organization's internal communications as evidence of malice has been noted in several promi-

codes means they remain largely statements of principle.[107]

2. Standards Governing Misquotations

While ethical canons remain vague and unenforceable, the first written codes of journalistic conduct used by newspapers urged reporters to quote sources precisely.[108] Few of the current ethical codes come so close to advocating verbatim accuracy,[109] and some news organizations now maintain no written guidelines on editing quotations.[110] Yet while nearly all journalists and scholars agree that reporters must never fabricate, manufacture or "fictionalize" quotations,[111] a minority suggest that reporters should be granted

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nent cases. *See, e.g.*, Sharon v. Time, Inc., 599 F. Supp. 538, 570-71, 583-85 (S.D.N.Y. 1984) (editor's letter to reporter raised material issue regarding media defendant's state of mind and supported denial of summary judgment); Rebozo v. Washington Post Co., 637 F.2d 375, 382 (5th Cir. 1981) (court admitted internal memorandum casting doubt on news story as evidence of malice); Westmoreland v. CBS, Inc., 601 F. Supp. 66, 67 (S.D.N.Y. 1984) (plaintiff cited CBS internal memo as evidence supporting actual malice determination).

107. *See* Pennekamp v. Florida, 328 U.S. 331, 365 (1946) (quoting H.L. Mencken's skeptical reaction to the first media industry codes); *see also* Sheran and Isaacman, *Do We Want A Responsible Press?: A Call For The Creation of Self-Regulatory Mechanisms*, 8 WM. MITCHELL L. REV. 1, 101 (1982) (SPJ and ASNE codes deal in detailed or comprehensive way with day-to-day problems of journalists); Comment, *Standards Governing the News: Their Use, Their Character, and Their Legal Implications*, 72 IOWA L. REV. 637, 640 (1987) (media-industry codes state only lofty principles that remain unenforceable).

108. T. GOLDSTEIN, THE NEWS AT ANY COST: HOW JOURNALISTS COMPROMISE THEIR ETHICS TO SHAPE THE NEWS 202 (1985). The Christian Science Monitor cautioned reporters to check all quotations as time would permit. *Id.* The Kansas Editorial Association's code of ethics disapproved of publishing interviews in quotation unless the precise, approved language of the speaker was used. *Id.* A Massachusetts newspaper summarized its policy this way: "When people are quoted, the paper is placed in the position of assuring its readers that the quoted passages were literally spoken; consequently, inaccuracy in quotations is unpardonable." *Id.*

109. *Id.* at 202. ABC'c current guidelines allow for some tampering with the sequence in which questions and answers are presented, provided the thrust of the interview is not changed. *Id.*; *see also* THE ASSOCIATED PRESS STYLE MANUAL 184 (1977) (approving of minor alterations in quotations). The manual states that "[q]uotations normally should be corrected to avoid errors in grammar and word usage . . . ." *Id.*

110. McNamus, *The, uh, Quotation Quandry*, COLUMBIA JOURNALISM REVIEW, May/June 1990 at 54. The writer noted that three major publications - *The New York Times*, the *Dallas Times Herald* and *Fortune* - maintained no written guidelines on the editing of quotations. *Id.*

111. *See, e.g.*, ASSOCIATED PRESS STYLEBOOK AND LIBEL MANUAL 183 (1977) (quotation marks should surround the precise words of the speaker or writer); B. BROOKS, NEWS REPORTING & WRITING 112 (1980) (urging reporters to not quote someone unless they are sure of what she means); H. GOODWIN, GROPING FOR ETHICS IN JOURNALISM 171 (1983) (quotation marks tell the reader that what is inside are the speaker's exact words); G. HOUGH, NEWS WRITING 270 (2d ed. 1980) (direct quotes should be the speaker's exact words); J. HULTENG, THE MESSENGER'S MOTIVES: ETHICAL PROBLEMS IN THE NEWS MEDIA 71 (2d ed. 1985) (noting that editing quotations carries with it an ethical obligation to not alter the

some literary license to alter quotes and vary or rearrange the words to suit the writer's needs.[112] Some editors still advocate a strict interpretation standard that urges verbatim accuracy in quotations.[113] Quotation marks, they argue, should be deleted (and paraphrasing substituted) even for minor alterations.[114] A quotation, in other words, should "mean literally that the words they enclose are exactly as the source gave them — verbatim."[115] Most reporters, however, follow a looser standard that permits reporters, according to *Associated Press Stylebook and Libel Manual*, "to avoid the errors in grammar and word usage that often occur unnoticed when someone is speaking but are embarrassing in print."[116]

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reality of the material); J. OLEN, ETHICS OF JOURNALISM 99 (1988) (reporters who reconstruct or condense quotes run risk of distorting speaker's words); Hersey, *The Legend on the License*, THE YALE REVIEW, Autumn 1980 at 1, 2 (condemning brand of journalism that advocates invention to suit literary needs); Stien, *9th Circuit: It's OK to Make Up Quotes*, COLUMBIA JOURNALISM REVIEW, August 12, 1989 at 16 (citing interviews with newspaper editors, majority of whom condemned practice of fabricating quotes); Whitaker, *The Right to Fake Quotes*, TIME, August 21, 1989 (quoting editor of *Washington Journalism Review* criticizing *Masson* decision).

112. *See* Masson v. New Yorker Magazine, Inc., 895 F.2d 1535, 1548 (9th Cir. 1989) (Kozinski, J., dissenting) (noting school of thought in journalism that advocates author's right to vary or rearrange story to suit a literary purpose), *cert. granted*, __ U.S. __, 111 S. Ct. 39-40, 112 L. Ed. 2d 16 (1990). *But see* Hersey, *The Legend on the License*, THE YALE REVIEW, Autumn 1980, at 1, 2 (condemning distortion of journalistic sources). Hersey wrote:

> I will assert that there is one sacred rule of journalism. The writer must not invent. The legend on the license must read: NONE OF THIS WAS MADE UP. The ethics of journalism, if we can be allowed such a boon, must be based on the simple truth that every journalist knows the difference between the distortion that comes from subtracting observed data and the distortion that comes from adding invented data.

Id.

113. *See* F. BASKETTE, J. SISSONS & B. BROOKS, THE ART OF EDITING 1117 (3d ed. 1982) (noting that some editors still insist that quotation marks be deleted even for minor alterations in a quotation); H. GOODWIN, GROPING FOR ETHICS IN JOURNALISM 171 (1983) (commenting on journalistic convention of "cleaning up" ungrammatical, offensive or obscene quotations). Max Frankel, executive editor of the *New York Times*, summarized the newspaper's attitude towards editing quotations as follows:

> We think quotation marks are sacred. They represent our bond to the reader that the words inside the quotation marks were actually spoken in the way reported. Since the language and the law leave us free to paraphrase and interpret at will, we tolerate no exceptions to the rule, period.

Stien, *9th Circuit: It's OK to Make Up Quotes*, COLUMBIA JOURNALISM REVIEW, August 12, 1989 at 16.

114. Stien, *9th circuit: It's OK to Make Up Quotes*, COLUMBIA JOURNALISM REVIEW, August 12, 1989 at 16.

115. Masson v. New Yorker Magazine, Inc., 895 F.2d 1535, 1558 (9th Cir. 1989) (quoting M. CHARNLEY & B. CHARNLEY, REPORTING 248 (4th ed. 1979)), *cert. granted*, __ U.S. __, 111 S. Ct. 39-40, 112 L. Ed. 2d 16 (1990).

116. *See* ASSOCIATED PRESS STYLEBOOK AND LIBEL MANUAL 184 (1977); *see also* J. OLEN, ETHICS IN JOURNALISM 100 (1988) ("Not to clean up quotes is to make intelligent

Embedded in such logic is a notion that most speakers prefer to have their quotes altered or "cleaned up," less they look like inarticulate fools.[117] Indeed, few people speak clearly; they take grammatical short-cuts that look unintelligent if literally transcribed.[118] Yet since even "minor changes in quoted language can have a major effect on how a speaker is perceived,"[119] discovering the extent to which reporters alter, modify or edit quotes can sometimes be surprising. On November 15, 1979, Ronald Reagan spoke at the Waldorf-Astoria hotel in New York City. Responding to a question about his campaign for the presidency, Reagan observed: "And . . . uh . . . it's kind of encouraging that more of the people seem to be coming the same way, believing the same things."[120] The Associated Press version, however, read: "It's remarkable how people are beginning to see things my way."[121] It is unlikely that readers were aware of these changes.[122]

B. *The View From The Bench*

Although even an extreme departure from journalistic standards will not by itself justify a verdict for a defendant,[123] deviation from professional stan-

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speakers look stupid and stupid speakers look stupider."); J. HULTENG, THE MESSENGER'S MOTIVES: ETHICAL PROBLEMS IN THE NEWS MEDIA 68 (2d ed. 1985) (literal accuracy in quotes not always possible). Hulteng writes:

> as a practical matter, it is not always possible for a reporter to be so literally accurate, unless there is a prepared manuscript, a trial transcript, or a tape recording to turn to. So some working conventions have been built into the journalist's ethic where quotations are concerned. Even if every syllable hasn't been captured as uttered, even if every article isn't exactly in place, the quote can still be considered an acceptably accurate one if it honestly reflects what the speaker said.

Id.

117. J. OLEN, THE ETHICS OF JOURNALISM 100 (1988). Olen remarks:

> We cannot reasonably expect reporters to include every "uh" and "er," every false start, every error in grammar, every bit of tortured syntax. People judge the spoken word and written word by different standards. Not to clean up quotes is to make intelligent speakers look stupid and stupid speakers look stupider. At least some cleaning up, then, should be permissible.

Id.

118. *Id.* at 99-100.

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

120. Turovsky, *Did He Really Say That?*, COLUMBIA JOURNALISM REVIEW, July-August 1980, at 39.

121. *Id.*

122. *See* Masson v. New Yorker Magazine, Inc., 895 F.2d 1535, 1558 (9th Cir. 1989) (quotation marks suggest verbatim accuracy (citing M. CHARNLEY & B. CHARNLEY, REPORTING 248 (4th ed. 1979)), *cert. granted*, __ U.S. __, 111 S. Ct. 39-40, 112 L. Ed. 2d 16 (1990).

123. *See* Harte-Hanks Communications, Inc. v. Connaughton, __ U.S. __, __, 109 S. Ct. 2678, 2685, 105 L. Ed. 2d 562, 576 (1989) (noting that the Court has rejected Justice Harlan's "extreme departure" standard in favor of *New York Times* rule); *see also* Janklow v. News-

dards, including the defendant's choice of which facts to report or her resolution of inferences and ambiguities, could support a finding of actual malice.[124] What is more, the trend is toward admitting a news organization's internal communications as evidence of actual malice.[125] In searching for other indicia of malice, courts consider many factors including ill will,[126] lack of supporting sources[127] and style, tone or editorial slant.[128] Yet a reporter is under no general duty to investigate a story,[129] and choices about

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week, 788 F.2d 1300, 1306 (8th Cir. 1986) (selectivity is inherent to news gathering process and concluding that decision regarding selection of information better left to journalists).

124. *See, e.g., Harte-Hanks*, __ U.S. at __, 109 S. Ct. at 2686, 105 L. Ed 2d at 577 (plaintiff can prove a defendant's state of mind with circumstantial evidence); Tavoulareas v. Piro, 759 F.2d 90, 98 (D.C. Cir. 1985) (judgment n.o.v. for media defendant inappropriate because circumstantial evidence supported finding of actual malice); Rebozo v. Washington Post Co., 637 F.2d 375, 382 (5th Cir. 1981), *cert. denied*, 454 U.S. 964 (1981) (reporter's uncertainty regarding facts constituted enough evidence of actual malice to defeat summary judgment); Time, Inc. v. Ragano, 427 F.2d 219, 221 (5th Cir. 1970) (editorial deletions supported actual malice and summary judgment properly denied); *see also* Smolla, *"Where Have You Gone, Walter Cronkite?": The First Amendment and the End of Innocence*, 39 ARK. L. REV. 311, 318 n.16 (1985) (citing cases holding that defendant's selection of information may be probative of issue of actual malice). *But see* Westmoreland v. CBS, Inc., 601 F. Supp. 66, 69 (S.D.N.Y. 1984) (evidence of violation of standards could be inadmissible because relevance of violation may be outweighed by potential for misunderstanding, confusion and prejudice).

125. *See Tavoulareas*, 759 F.2d at 137 (editor's internal memo questioning article's assertions supported inference of reckless disregard); Sharon v. Time, Inc., 599 F. Supp. 538, 570-71, 583-85 (S.D.N.Y. 1984) (editor's letter to reporter raised material issue regarding media defendant's state of mind and supported denial of summary judgment); *see also Rebozo*, 637 F.2d 375, 382 (5th Cir. 1981) (court admitted internal memorandum casting doubt on news story as evidence of malice); *Westmoreland*, 601 F. Supp. at 67 (plaintiff cited CBS internal memo as evidence supporting actual malice determination). *But see* Smolla, *"Where Have You Gone Walter Cronkite?": The First Amendment and the End of Innocence*, 39 ARK. L. REV. 311, 324 (1985) (arguing that case law trend toward internal evidence discourages media self control and critique); Comment, *Standards Governing the News: Their Use, Their Character, and Their Legal Implications*, 72 IOWA L. REV. 637, 661-62 (1987) (noting trend involving internal standards has caused media lawyers to advise their clients to avoid adopting written standards).

126. *See* Indianapolis Newspapers, Inc. v. Fields, 259 N.E.2d 651, 664 (Ind.), *cert. denied*, 400 U.S. 930 (1970) (holding evidence of ill will relevant and admissible on issue of actual malice). The Court commented that evidence of ill will could tend to prove that a defendant published despite indications of falsity. *Id.*

127. *See* Goldwater v. Ginzburg, 414 F.2d 324, 332, 336, 340 (2d Cir. 1969) (verdict for plaintiff affirmed when defendant published allegations of plaintiff's mental instability without source support); Deloach v. Beaufort Gazette, 316 S.E.2d 139, 141, 143 (S.C. 1984) (verdict for plaintiff affirmed because defendant/news reporter failed to check arrest docket after denial of story by police officer).

128. *See* Tavoulareas v. Piro, 759 F.2d 90, 121 (D.C. Cir. 1985) (weighing evidence of newspaper's editorial policies). In *Tavoulareas*, the D.C. court considered evidence that Washington Post reporters were encouraged to write "hard-hitting investigative journalism," or news that Bob Woodward called "holy shit" stories. *Id.*

129. *See* St. Amant v. Thompson, 390 U.S. 727, 733 (1968) (investigative failure does not

which material to print, as well as decisions regarding its size and content, are protected as exercises of editorial judgment.[130] Malice, then, could only be found from a failure to investigate or verify information if there are obvious reasons to doubt its accuracy.[131] However, courts are less likely to find malice in an investigative failure if there is some need for rapid dissemination of the information.[132] Finally, although good faith about the information's accuracy will not save a reporter who fabricates or manufactures a story,[133] merely writing a one-sided or accusatory article does not prove that the writer believed it was false.[134]

V. WHY PLAINTIFFS ARE LOSING

A. *Libel Plaintiffs And Their Problems*

1. Lawsuits Of The Rich And Famous

While jurists and journalists argue over standards for evaluating fabricated quotations,[135] opinion polls reveal a steady trend toward ever-

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by itself establish bad faith); El Paso Times v. Trexler, 447 S.W.2d 403, 406 (Tex. 1969) (proof of utter failure to investigate not evidence of malice).

130. *See* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 244-54 (1974) (state statute granting politician right to equal reply to newspaper's criticism held unconstitutional); *see also* V. JOHNSON, *Defamation (Libel and Slander)*, in PERSONAL INJURY: ACTIONS, DEFENSES, DAMAGES § 1.02[1][b][i] (Matthew Bender 1986) (editorial choices as to material, size and content protected under first amendment).

131. *St. Amant*, 390 U.S. at 732 (malice may be found where obvious reasons exist to doubt veracity of informant or accuracy of his reports). *But see* Hackworth v. Larson, 165 N.W.2d 705, 711-12 (S.D. 1969) (summary judgment for defendant affirmed when plaintiff alleged failure to investigate); O'Brien v. Tribune Publishing Co., 499 P.2d 24, 34-35 (Wash. App. 1972) (partial summary judgment for defendant granted even though editor conducted inadequate investigation, relying on newspaper clippings supplied by candidate).

132. *See* Curtis Publishing Co. v. Butts, 388 U.S. 130, 159 (1967) (referred to a necessity for rapid dissemination of information); *cf.* Carson v. Allied News Co., 529 F.2d 206, 211 (7th Cir. 1976) (concluding defendants were not confronted with early deadline and had ample time to investigate); Vandenberg v. Newsweek, Inc., 507 F.2d 1024, 1026 (5th Cir. 1975) (stories not written under time pressure should be more thoroughly prepared).

133. *St. Amant*, 390 U.S. at 732. A story that is so distorted that it harms another's reputation would give rise to an action for defamation. *See* Cianci v. New York Times Publishing Co., 639 F.2d 54, 63 (2d Cir. 1980) (article from which reader could conclude that plaintiff had committed crime of which he only stood accused held defamatory).

134. *See* Westmoreland v. CBS, Inc., 601 F. Supp. 66, 68 (S.D.N.Y. 1984) (fairness of broadcast not an issue in libel suit and libel law does not require publisher to grant accuser equal time for fair reply).

135. *See* Masson v. New Yorker Magazine, Inc., 895 F.2d 1535, 1549 (9th Cir. 1989)(Kozinski, J., dissenting) (quotation marks suggest writer has interposed no editorial comment), *cert. granted*, __ U.S. __, 111 S. Ct. 39-40, 112 L. Ed. 2d 16 (1990); *see also* Carson v. Allied News Co., 529 F.2d 206, 213 (7th Cir. 1976) ("In the catalogue of responsibilities of journalists . . . must be a canon that a journalist does not invent quotations . . . "); *cf.* Reader's

greater distrust of the news media.[136] The growing hostility toward the press is often revealed in lawsuits brought by public figures and personalities who, in growing numbers, are suing news organizations over stories that once might have gone unchallenged.[137] Carol Burnett,[138] Johnny Carson,[139] General William Westmoreland of Viet Nam era fame[140] and Ariel Sharon, the controversial Israeli politician,[141] are only a few famous people who have joined a growing army of libel plaintiffs.[142] Yet plaintiffs seldom win these battles; and even when they do, the fruits of their victory — a damage award — are often small[143] and frequently lost or diminished on appeal.[144] A Los

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Digest Ass'n v. Superior Court, 690 P.2d 610, 621 (Cal. 1984) (United States Supreme Court recognized need for some certain degree of literary license in reporting).

136. R. SMOLLA, SUING THE PRESS 9 (1986). Professor Smolla cites a Harris study indicating that only 20% of those polled responded that they had "a great deal of confidence" in the people who control the media. *Id.* He also argues that litigation is the only existing outlet for frustrations that are rooted in growing perceptions of media imbalance. *Id.* at 14-15. According to one survey, 37% of those surveyed thought that existing restrictions on the press were not tough enough. Sheran & Isaacman, *Do We Want A Responsible Press?: A Call for the Creation of Self-Regulatory Mechanisms*, 8 WM. MITCHELL L. REV. 1, 27 (1982) (citing results of Gallup survey on public perceptions of news media). Another 32% thought they were about right; only 17% felt they were too strict. *Id. But see* Smolla *"Where Have You Gone, Walter Cronkite?": The First Amendment and the End of Innocence*, 39 ARK. L. REV. 311, 330 (1985) (noting possibility of reduced free speech protections). Professor Smolla fears a "crawling, creeping trivialization of the value of free expression." *Id.*

137. *See, e.g.*, Tavoulareas v. Piro, 759 F.2d 90, 121 (D.C. Cir. 1985) (Mobil Oil president sued Washington Post in trial during which Bob Woodward described Post's hard-hitting journalism as a search for "holy shit" stories); Rebozo v. Washington Post, 637 F.2d 375, 382 (5th Cir. 1981) (former Nixon confidant sued over article linking him to stolen stock); Westmoreland v. CBS, 601 F. Supp. 66, 67 (S.D.N.Y. 1984) (former Vietnam General sued CBS over news program implicating him in conspiracy to undercount enemy troop strength); Burnett v. National Enquirer, 193 Cal. Rptr. 206, 208 (Cal. App. 1983) (entertainer sued Enquirer over story that accused her of public drunkenness).

138. *Burnett*, 193 Cal. Rptr. at 206.

139. Carson v. Allied News Co., 529 F.2d 206 (7th Cir. 1976).

140. Westmoreland v. CBS, Inc., 601 F. Supp. 66 (S.D.N.Y. 1984).

141. Sharon v. Time, Inc., 599 F. Supp. 538 (S.D.N.Y. 1984).

142. *See* Eberhard, *There's Got to be a Better Way: Alternatives to the High Cost of Libel*, 38 MERCER L. REV. 819, 819-820 (1987) (citing survey of newspaper editors on frequency of libel litigation). According to the data cited by Eberhard, of 229 newspaper editors who responded to the survey, 132 said they had been involved in libel or privacy suits within the last three years. *Id.* Commentators offer various explanations for this increase in libel litigation. *See* Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1, 11 (1983). Smolla lists four reasons for the increase in libel litigation: (1) an increased concern both in law and in popular culture for emotional or psychological injury; (2) a general shift in tort law toward compensation for plaintiffs; (3) a blurring of the distinction between the entertainment and informative functions of modern journalism; and (4) "doctrinal confusion" resulting from grafting constitutional protections over common law principles. *Id.*

143. E. DENNIS & E. NOAM, THE COST OF LIBEL 267 (1989). One study found that $683,500 was awarded in 291 cases, making the average award $18,472. *Id.* Another study

Angeles jury awarded Carol Burnett over $1,300,000 in punitive damages for a story in the *National Enquirer* that accused her of public drunkenness.[145] On appeal, the award was reduced to $300,000.[146] A former beauty queen sued *Penthouse* magazine and received a jury award of $26.5 million.[147] The trial court reduced it to $14 million, and an appeals court reversed and dismissed the action entirely.[148]

2. The Odds Confronting An Ordinary Libel Plaintiff

For ordinary plaintiffs, the odds are no less daunting. Statistics compiled from 1980-1984 on libel plaintiffs who successfully proceeded to trial show that the plaintiff never won more than nine percent of the time in any given year.[149] Another study concluded that plaintiffs in defamation suits lost seventy-five percent of the cases at the trial level and seventy-five percent of the resulting appeals.[150] The loss rate in other tort actions, by comparison, is only fifty percent.[151] No wonder, then, libel plaintiffs win fewer cases than any other area of tort law.[152]

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cited by the authors found $829,500 awarded in 35 cases that went through trial (and 34 through a subsequent appeal), making the average award $23,700. *Id.* Still another study noted that successful plaintiffs obtained an average award of $20,600, and much of that went toward fees and costs. *Id.*

144. *Id.* The authors cite three studies that explained the unprofitability of defamation suits. *Id* at 279 n.35. One study, covering 291 cases over 4 years, revealed that 37 cases went to trial and only 23 of these ended in awards for plaintiffs. Thirteen of the awards for plaintiffs were reversed on appeal. Another study by the Libel Resource Defense Center scrutinized this data and concluded that of 47 trials where damages were awarded, 18 were set aside, 1 was reduced and only 7 were affirmed. *Id.* Two other cases were settled and 19 more were unresolved at the conclusion of the study. This study also found that only 10% of defamation suits ended in affirmation of damage awards.

145. Burnett v. National Enquirer, Inc., 193 Cal. Rptr. 206, 208, 223 (Cal. App. 1983).

146. *Id.* at 223.

147. Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1, 4 n.21 (1983).

148. *Id.*

149. R. BEZANSON, G. CRANBERG & J. SOLOSKI, LIBEL LAW AND THE PRESS: MYTH AND REALITY 123 (1987). The study was based on 909 libel and privacy cases surveyed between 1974 and 1984. *Id.* at 96. Of the cases, 700 involved defamation, and it was the primary legal theory in 82% of the surveyed cases. *Id.*

150. E. DENNIS & E. NOAM, THE COST OF LIBEL 278 n.28 (1989); *see also* Franklin, *Suing the Media for Libel: A Litigation Study*, 1981 AM. B. FOUND. RES. J. 797, 802.

151. Priest & Klien, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 5 (1984).

152. *See* Franklin, *Good Names and Bad Law: A Critique of Libel Law and a Proposal*, 18 U.S.F. L. REV. 1, 5 (1983) (noting that statistics on plaintiff victories in defamation suits suggest most dismal performance for plaintiffs of all areas of tort law).

B. *Pyrrhic Victories And Glorious Defeats*

1. Why Plaintiffs Keep Trying

Despite protracted litigation, extravagant legal costs[153] and even the daunting "clear and convincing" standard, the libeled have not stopped seeking relief in court.[154] But as Robert Sack has observed:

> The few plaintiffs who succeed resemble the remnants of an army platoon caught in an enemy crossfire. Their awards stand witness to their good luck, not to their virtue, their skill or the justice of their cause. It is difficult to perceive the law of defamation, in this light, as a real "system" for protection of reputation at all.[155]

Liability in libel actions often turns on actual malice and the defendant's "state of mind" at the time of publication, not the harm to the plaintiff's reputation or the truth or falsity of the publication.[156] The inquiry, in other

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153. *See* E. DENNIS & E. NOAM, THE COST OF LIBEL 267 (1989) (estimating cost of bringing a libel suit ranges from ten to fifty thousand dollars). Between 7 and 9 million dollars was spent in the *Westmoreland* case and approximately $3.25 million of it was spent on the plaintiff's side. *Id.* at 280 n.39; *see also* Franklin, *Good Names and Bad Law: A Critique of Libel Law and a Proposal*, 18 U.S.F. L. REV. 1, 14 (1983) (noting that plaintiff's legal expenses in *Tavoulareas v. Washington Post* amounted to $1.8 million); Smolla, *Taking Libel Reform Seriously*, 38 MERCER L. REV. 793, 803 (1987) (CBS reportedly spent between 5 and 10 million dollars fending off General Westmoreland's libel suit). In another case, ABC's legal bills after four months of trial totalled 7 million dollars. Franklin, *Good Names and Bad Law: A Critique of Libel Law and a Proposal*, 18 U.S.F. L. REV. 1, 13 (1983); *see also* Eberhard, *There's Got to be a Better Way; Alternatives to the High Cost of Libel*, 38 MERCER L. REV. 819, 819-20 (1987) (citing study on costs of libel litigation). In the survey, 132 editors who said they had been sued in the last three years estimated the total cost of defending these suits at 13 million. *Id.* at 820. The average cost for defending each newspaper was $95,852. Among newspapers with circulation over 400,000, the average cost of defending libel suits was over half a million dollars. *Id.*

154. *See* R. BEZANSON, G. CRANBERG & J. SOLOSKI, LIBEL LAW AND THE PRESS: MYTH AND REALITY 157 (1987) (explaining statistics on libel plaintiffs and attitudes toward litigation process). The survey revealed that 87% of the libel plaintiffs questioned would sue again if given an opportunity. *Id.* The study suggested that many plaintiffs, despite losing at trial or on appeal, felt vindicated by the legal process. *Id.* at 152-53. Sixty-three percent felt that something useful emerged from the suit and this feeling was unrelated to the legal resolution of the problem. *Id.* at 154.

155. R. SACK, LIBEL, SLANDER AND RELATED PROBLEMS xxvi (1980).

156. *See, e.g.*, Cianci v. New York Times Publishing Co., 639 F.2d 54, 59, 71 (2d Cir. 1980) (lower court's order holding article non-actionable because plaintiff could not prove falsity of allegations reversed); Buckley v. Littell, 539 F.2d 882, 889-90 (2d Cir. 1976) (falsity and defamation are not a substitute for actual malice); Kuhn v. Tribune-Republican Publishing Co., 637 P.2d 315, 319 (Colo. 1981) (finding sufficiently clear and convincing evidence from which jury could conclude that newspaper published article with reckless disregard); Cape Publications v. Adams, 336 So. 2d 1197, 1200 (Fla. 1976) (evidence supported finding that defendant newspaper exhibited reckless disregard whether charges were true or false); Stevens v. Sun Publishing Co., 240 S.E.2d 812, 815 (S.C. 1978) (finding jury's verdict sup-

words, centers on the conduct of the media defendant instead of the harm, if any, to the plaintiff's reputation or the truth (or lack of it) of the publication.[157] In *Masson*, the plaintiff's reputational interests were never seriously discussed; the analysis instead turned — as in most public figure defamation cases — on the defendant's knowledge and conduct.[158] Masson's reputation, to the extent it was even an issue, was considered in only one of the challenged quotations.[159]

Why Masson sued, and why most libel plaintiffs keep suing despite the odds against them, probably has more to do with a desire for repairing an injured reputation or correcting a falsehood — to set the record straight — than just a hoped-for legal victory.[160] The desire to sue, in fact, usually follows a conclusion that there are no alternatives to litigation.[161] Yet merely the act of filing a lawsuit and pursuing a legal remedy serves some therapeutic need.[162] Plaintiffs usually lose, but they only lose according to the standards set by the judicial process.[163] As Randall Bezanson has observed, "[p]laintiffs do not have to sue to win; they can win by suing."[164]

2. Nobody Really Likes The System

Complaints about the system do not come only from libel plaintiffs; media defendants, despite victories in most defamation cases, routinely criticize the

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ported by evidence based upon satisfaction of actual malice standard); *see also* R. BEZANSON, G. CRANBERG & J. SOLOSKI, LIBEL LAW AND THE PRESS: MYTH AND REALITY 200 (1987) (liability can result from finding of actual malice without proof of reputational harm or falsity).

157. Bezanson, *Libel Law and the Realities of Litigation: Setting the Record Straight*, 71 IOWA L. REV. 226, 227 (1985).

158. Masson v. New Yorker Magazine, Inc., 895 F.2d 1535, 1537, 1539 (9th Cir. 1989), *cert. granted*, __ U.S. __, 111 S. Ct. 39-40, 112 L. Ed. 2d 16 (1990).

159. *Id.* at 1541. This was the "intellectual gigolo" quote. The majority found that Malcolm's alteration of the challenged quotation did not alter the substantive content of Masson's original words. The majority also cited the libel-proof plaintiff doctrine as further justification for finding the alleged quote non-defamatory. *Id.*

160. Bezanson, *Libel Law and the Realities of Litigation: Setting the Record Straight*, 71 IOWA L. REV. 226, 228 (1985).

161. *See* R. BEZANSON, G. CRANBERG & J. SOLOSKI, LIBEL LAW AND THE PRESS: MYTH AND REALITY 26 (1987) (citing results of survey of libel plaintiffs). Seventy-one percent of the plaintiffs surveyed responded that the media could have retracted or apologized to avoid a suit. *Id.* Seventy-eight percent said the media organization was first asked to retract or apologize before litigation was started. *Id.*

162. *See id.* at 154, 157 (explaining results of survey of libel plaintiffs toward litigation process). In the responses to the survey, 41% of the plaintiffs who lost still thought that their reputation was successfully defended. *Id.* at 154. Another 40% felt that further publicity was stopped. *Id.* In perhaps the most telling statistic, 68.5% of the plaintiffs surveyed said they would sue again. *Id.* at 157.

163. Bezanson, *Libel Law and the Realities of Litigation: Setting the Record Straight*, 71 IOWA L. REV. 226, 228 (1985).

164. *Id.*

system.[165] The press might win nearly all the battles, but the price of victory — both in legal fees and publicity — is high indeed.[166] Not surprisingly, proposals for reforming defamation law number in the multitudes.[167]

Often the discussion focuses on the highly complex system of constitutional privileges born out of the *Sullivan* and *Gertz* line of cases.[168] Indeed,

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165. *See, e.g.*, Fields, *Media Task Force Castigates Proposed Uniform Libel Law*, PUBLISHER'S WEEKLY, August 12, 1990 at 309 (media group objects to consideration of uniform national libel law); Lottman, *Media Group Seeks Ban on Punitive Damages Awards*, PUBLISHER'S WEEKLY, June 22, 1990 at 13 (groups representing information media urge ban on punitive damages awards in libel cases). The plea for a reduction of punitive damages came in a friend-of-the-court brief filed in a case before the United States Supreme Court testing the constitutionality of punitive damages awards. *Id.*; *see also* Smolla, *Why Does Libel Law Need Reform?*, SOCIETY, July/August 1989 at 67 (proposing libel reform act to curtail chilling effect of expensive and protracted litigation); *cf.* Ackland, *All the Fiction Fit to Print — or Broadcast*, THE BULLETIN OF THE ATOMIC SCIENTISTS 2 (Nov. 1989) (criticizing trend in news media toward fictional recreation of news events).

166. *See* Smolla, *Taking Libel Reform Seriously*, 38 MERCER L. REV. 793, 803 (1987) (CBS spent between 5 and 10 million dollars fending off General William Westmoreland's libel suit); *see also* Eberhard, *There's Got to be a Better Way: Alternatives to the High Cost of Libel*, 38 MERCER L. REV. 819, 819-820 (1987) (citing study on the costs of libel litigation); Franklin, *Good Names and Bad Law: A Critique of Libel Law and a Proposal*, 18 U.S.F. L. REV. 1, 13-14 (1983) (explaining high costs of defamation litigation). *Cf.* Franklin, *Good Names and Bad Law: A Critique of Libel Law and a Proposal*, 18 U.S.F. L. REV. 1, 14 (1983) (noting that plaintiff's legal costs in *Tavoulareas v. Washington Post* totalled $1.8 million).

167. *See, e.g.*, Anderson, *Reputation, Compensation and Proof*, 25 WM. & MARY L. REV. 747, 774-78 (1984) (proposing rule that plaintiff prove actual harm in libel case); Lebel, *Defamation and the First Amendment: The End of the Affair*, 25 WM. & MARY L. REV. 779, 788-91 (1984) (urging "remedy of repair" for plaintiffs); Lewis, New York Times v. Sullivan *Reconsidered: Time to Return to "The Central Meaning of the First Amendment,"* 83 COLUM. L. REV. 603, 623-25 (1983) (suggesting bar to suit if plaintiff prominent and issue publicly relevant); Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1, 11-12 (1983) (analyzing increase in defamation suits and proposing reforms). *See generally* R. Bezanson, G. Cranberg & J. Soloski, *Libel Law and the Press: Setting the Record Straight*, 71 IOWA L. REV. 215, 218 (1985) (outlining data on libel litigation); Eberhard, *There's Got to be a Better Way: Alternatives to the High Cost of Libel*, 38 MERCER L. REV. 819, 823-28 (1987) (proposals to avoid costly libel litigation); Franklin, *A Declaratory Judgment Alternative to Current Libel Law*, 74 CALIF. L. REV. 809, 812-13 (1986) (urging adoption of statutory proposal to reform libel law); Smolla & Gaertner, *The Annenberg Libel Reform Proposal: The Case for Enactment*, 31 WM. & MARY L. REV. 25, 32 (1989) (outlining libel reform proposal and urging adoption).

168. *See* R. BEZANSON, G. CRANBERG & J. SOLOSKI, LIBEL LAW AND THE PRESS: MYTH AND REALITY 200 (1987) (principles expounded in *Sullivan* through *Gertz* have resulted in highly structured and complex system); R. SACK, LIBEL, SLANDER AND RELATED PROBLEMS XXVI (1980) (plaintiffs seldom penetrate maze of "privileges, defenses and practical hurdles" barring relief); Eaton, *The American Law of Defamation Through* Gertz v. Robert Welch *and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1351 (1975) (studying "the army of first amendment principles, rules, standards and options" that have overtaken common law defamation principles); Smolla, Dun & Bradstreet, Hepps, *and* Liberty Lobby: *A*

perplexing questions immediately confront any party to a libel action.[169] Is the plaintiff, for example, a public official, a public figure, private figure or a public or private entity?[170] Assuming the plaintiff is a private person, then the party must decide whether the defendant is to be categorized as a media or a non-media defendant.[171] Finally, the status of the quoted language — public or private matter — must be weighed; and, as if this were not enough, all plaintiffs in public figure or public official cases must still overcome the actual malice standard.[172] Small wonder, given such complexities, that the plaintiff's reputational interest — theoretically the foundation of libel and slander law[173] — frequently gets lost in a maze of categories and mind-numbing terminology.[174]

New Analytic Primer on the Future Course of Defamation, 75 GEO. L.J. 1519, 1572 (1987) (criticizing doctrinal confusion resulting from increasing categorization of libel law).

169. R. BEZANSON, G. CRANBERG & J. SOLOSKI, LIBEL LAW AND THE PRESS: MYTH AND REALITY 200 (1987); Comment, *To Quote or Not to Quote: The Status of Misquoted Material in Defamation Law*, 43 VAND. L. REV. 1637, 1638-39 (1990).

170. R. BEZANSON, G. CRANBERG & J. SOLOSKI, LIBEL LAW AND THE PRESS: MYTH AND REALITY 200 (1987).

171. *Id.* Private plaintiffs are those not qualifying as public officials or figures, either because they have no political office or notoriety, or because the challenged statement bears no relationship to position. *Id.* at 101. Private plaintiffs must establish negligence to win against a media defendant in a libel action. Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974). If a private plaintiff is suing a non-media defendant over a matter of purely private concern, then constitutional safeguards may permit the old common law remedy of strict liability. *See* Smolla, Dun & Bradstreet, Hopps *and* Liberty Lobby: *A New Analytic Primer on the Future Course of Defamation*, 75 GEO. L.J. 1519, 1572 (1987); *see also* Dun & Bradstreet v. Greenmoss Builders, Inc., 472 U.S. 749, 763 (1984) (majority leaves open question whether distinction between media and non-media defendants is relevant to application of negligence or strict liability suits brought by private-figure plaintiffs).

172. R. BEZANSON, G. CRANBERG & J. SOLOSKI, LIBEL LAW AND THE PRESS: MYTH AND REALITY 200 (1987).

173. Rosenblatt v. Baer, 383 U.S. 75, 92-93 (1966). Justice Potter Stewart, explaining the plaintiff's interest in a defamation suit, wrote:

> The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being - a concept at the root of any decent system of ordered liberty.

Id.; *see also* Milkovich v. Lorain Journal Co., __ U.S. __, __, 110 S. Ct. 2695, 2702, 111 L. Ed. 2d 1, 12 (1990) ("Since the latter half of the sixteenth century, the common law has afforded a cause of action for damages to a person's reputation by the publication of false and defamatory statements"); Brown v. Kelly Broadcasting Co., 771 P.2d 406, 426-28 (Ca. 1989) (need for reputational redress as important today as when defamation first recognized).

174. *See* R. BEZANSON, G. CRANBERG & J. SOLOSKI, LIBEL LAW AND THE PRESS: MYTH AND REALITY 200 (1987) (criticizing trend in libel law toward a "confusing maze of categorical rules"); Smolla, Dun & Bradstreet, Hepps, *and* Liberty Lobby: *A New Analytic Primer on the Future Course of Defamation*, 75 GEO L.J. 1519, 1572 (1987) (criticizing increasing complexity and categorization of defamation law). Professor Smolla writes:

> From its inception, the law of defamation has been singularly bent on establishing its reputation for quirky terminology and byzantine doctrine. Whereas the rest of the law of

VI. Analysis: If We Don't Quote, Then What Do We Do?

A. *The Legal Perspective*

1. Rejecting The Rational Interpretation Standard

Finding a way out of the maze requires courts to strike a balance between the demands of plaintiffs and the contradictory demands of modern journalism.[175] In *Masson*, the majority judged these competing interests under the rational interpretation standard of *Time, Inc. v. Pape*.[176] But this standard is ill-suited for a situation where the writer fabricates or alters a direct quotation,[177] because when a reporter places a speaker's words within quotation marks, she is telling the reader that this is what was said — period; the quotes serve as raw data to support the writer's conclusions.[178] In such a situation there should be no ambiguities to interpret, and were there any, a paraphrase could be used instead of a direct quotation.[179] It was, in fact, for just such a situation, where the writer paraphrases or indirectly quotes an unclear source, that the rational interpretation standard was devised.[180] *Pape* only protects a writer forced to choose specific words when she departs from direct quotation and chooses to paraphrase an ambiguous source.[181]

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torts tended to strive for the earthly simplicity of 'the ordinary reasonable person,' the law of defamation developed a vocabulary all its own, replete with such queer sounding words packed with multiple meanings as 'per se' and 'per quod,' 'malice in law' and 'actual malice,' 'inducement,'' 'colloquium,' and 'innuendo.'

Id. Smolla has developed a chart showing the current constitutional fault standards and burdens of proof; the chart contains eight separate categories. *Id.* at 1572. *See generally* R. Sack, Libel, Slander and Related Problems xxv (1980) (noting that even plaintiffs suffering a certain damage to their reputation cannot often penetrate "the web of privileges, defenses, and practical hurdles" that bar recovery); W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser and Keeton on the Law of Torts 772 (4th ed. 1971) (much of defamation law "makes no sense").

175. *See, e.g.*, Rosenblatt v. Baer, 383 U.S. 75, 86 (1966) (discussing tension between preventing attacks on reputation and first amendment interests); McCabe v. Rattiner, 814 F.2d 839, 841 (1st Cir. 1987) (constitutional protections for opinions are an attempt to reconcile conflict between defamation law and first amendment).

176. 401 U.S. 279 (1971).

177. Masson v. New Yorker Magazine, Inc., 895 F.2d 1535, 1557 (9th Cir. 1989)(Kozinski, J. dissenting), *cert. granted*, __ U.S. __, 111 S. Ct. 39-40, 112 L. Ed. 2d 16 (1990).

178. *Masson*, 895 F.2d at 1549(Kozinski, J., dissenting); *see also* Carson v. Allied News Co., 529 F.2d 206, 213 (7th Cir. 1976).

179. *See, e.g.*, F. Baskette, J. Sissons & B. Brooks, The Art of Editing 117 (3d ed. 1982) (some editors still insist that quotation marks be deleted even for minor alterations in a quotation); G. Goodwin, Groping for Ethics in Journalism 171 (1983) (commenting on journalistic convention of "cleaning up" ungrammatical, offensive or obscene quotations).

180. *See Masson*, 895 F.2d at 1557(Kozinski, J., dissenting) (*Pape* protects exercise of editorial judgment); *see also* Brief for Petitioner at 33, Masson v. New Yorker Magazine, Inc., __ U.S. __ (No. 89-1799).

181. *Masson*, 895 F.2d at 1557(Kozinski, J., dissenting); *see also* Levine v. CMP Publica-

But in any event, the Supreme Court only held that a reporter's editorial choices in the face of ambiguities were insufficient to prove actual malice - it did not hold that they were irrelevant.[182]

When viewed in this light, fabricated or intentionally altered quotations look more like calculated falsehoods or false statements of fact, both condemned by the United States Supreme Court as unworthy of first amendment protection.[183] Press freedom, after all, is not limitless.[184] The media has never enjoyed absolute immunity from liability for defamation,[185] and a writer is not entitled to use every form of communication or expression.[186] The press, moreover, is not beyond the reach of civil or criminal statutes, the first amendment notwithstanding.[187] Nor has the increasing consolidation

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tions, Inc., 738 F.2d 660, 669 (5th Cir. 1984) (*Pape* very fact specific case interpretation of actual malice as applied to public figure).

182. Tavoulareas v. Piro, 817 F.2d 762, 836 (D.C. Cir. 1987)(McKinnon, J., dissenting). While acknowledging that a defendant's single or occasional selection of the most damaging interpretations would not be sufficient evidence of actual malice, Judge McKinnon argued that rejection of favorable interpretations in favor of the most damaging would suggest "a reckless disregard for the truth." *Id.*

183. *See, e.g.*, Hustler Magazine v. Falwell, 485 U.S. 46, 52 (1988) (false factual statements are valueless); Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) (neither intentional lies nor careless errors significantly advance society's interest in wide-open debate on public issues); Garrison v. Louisiana, 379 U.S. 64, 75 (1964) (calculated falsehoods should enjoy no constitutional immunity because they are "at odds with the premises of democratic government . . .").

184. *See, e.g.*, Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 569-70 (1976) (implicitly approving restrictions on press coverage of trials to protect sixth amendment rights); Branzburg v. Hayes, 408 U.S. 665, 708 (1972) (requiring reporters to appear and testify before grand jury does not violate first amendment free press clause); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (libelous remarks beyond protection of first amendment's press clause).

185. Goldwater v. Ginzburg, 414 F.2d 324, 335 (2d Cir. 1969) (falsities enjoy protection only when "honestly made").

186. *See, e.g.*, Heffron v. Int'l Soc'y for Krishna Consciousness, 452 U.S. 640, 647 (1981) (no first amendment protection to state viewpoint "at all times and places or in any manner that may be desired"); Abrams v. United States, 250 U.S. 616, 618-19 (1919) (printing and distributing anti-war pamphlets encouraging desertion not protected under first amendment). A better example of first amendment limits can be found in Justice Holmes's famous analogy of a fire in a crowded theater. Holmes observed that even the most stringent free speech guarantees would not protect someone who falsely shouted fire in a crowded theatre and caused a panic. Schenck v. United States, 249 U.S. 47, 52 (1919). Moreover, restrictions are less valid where "remaining modes of communication are inadequate." City Council v. Taxpayers for Vincent, 466 U.S. 789, 812 (1984). *But see* Texas v. Johnson, __ U.S. __, 109 S. Ct. 2533, 2548, 105 L. Ed. 2d 342, 364 (1989) (act of flag burning is expressive conduct protected under first amendment).

187. *See, e.g.*, FCC v. National Citizens Comm. For Broadcasting, 436 U.S. 775, 779 (1978) (antitrust regulation of media permissible under first amendment); Oklahoma Press Publishing Co. v. Walling 327 U.S. 186, 192-93 (1945) (press not exempt from Fair Labor Standards Act); Associated Press v. United States, 326 U.S. 1, 19-20 (1945) (media not exempt

of the news media — and with it control over the information seen or read by most Americans — into ever-fewer hands escaped the notice of the Supreme Court.[188] Even so, the marketplace of ideas[189] is too sparsely regulated to tolerate an altered quotation only because "the writer can argue with straight face that it is a rational interpretation of what the speaker said."[190]

2. An Alternative Approach

Finding a solution to the misquotation problem requires courts to balance the needs of journalists, often working under considerable time pressures,[191] against public expectations that quotation marks accurately reflect what the speaker said.[192] Naturally, reporters should not be held accountable for editing quotations if readers are aware that the writing is an interpretation of events — not factually precise.[193] Nor must newspapers or magazines face

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from provisions of Sherman Act); Associated Press v. NLRB, 301 U.S. 103, 132-33 (1937) (news media subject to provisions of National Labor Relations Act); Grosjean v. American Press Co., 297 U.S. 233, 250 (1936) (nondiscriminatory taxation of newspapers does not violate first amendment). Unlike the print media, electronic media are extensively regulated by government through the FCC. *See* W. FRANCIS, MASS MEDIA LAW AND REGULATION 482 (5th ed. 1990) (discussing various regulatory powers of the FCC). One justification for such varied treatment is that there is a dearth of available air frequencies, whereas the number of newspapers is potentially unlimited. *See* CBS v. Democratic Nat'l Comm. 412 U.S. 94, 101 (1973) (broadcast media are scarce resource); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 376 (1969) (broadcast media are scarce resource that can be regulated by government).

188. *See* Miami Publishing Co. v. Tornillo, 418 U.S. 241, 248-250 (1974) (describing the process and effects of media concentration); *see also* Sheran & Isaacman, *Do We Want a Responsible Press?: A Call for the Creation of Self-Regulatory Mechanisms*, 8 WM. MITCHELL L. REV. 1, 10-14 (1982) (growing concentration of print and electronic media threatens to decrease diversity of information).

189. Abrams v. United States, 250 U.S. 616, 630 (1919)(Holmes, J., dissenting) (origin of "marketplace of ideas" concept).

190. Masson v. New Yorker Magazine, Inc., 895 F.2d 1535, 1548 (9th Cir. 1989)(Kozinski, J., dissenting), *cert. granted*, __ U.S. __, 111 S. Ct. 39-40, 112 L. Ed. 2d 16 (1990).

191. *Cf.* Carson v. Allied News Co., 529 F.2d 206, 211 (7th Cir. 1976) (concluding that defendants were not confronted with an early deadline and so had ample time to investigate); Vandenberg v. Newsweek, Inc., 507 F.2d 1024, 1026 (5th Cir. 1975) (stories not written under time pressure should be more thoroughly prepared).

192. *See* Rosenblatt v. Baer, 383 U.S. 75, 86 (1966) (discussing tension between preventing attacks on reputation and first amendment interests); McCabe v. Rattiner, 814 F.2d 839, 841 (1st Cir. 1987) (constitutional protections for opinions are an attempt to reconcile conflict between defamation law and first amendment); *see also Masson*, 895 F.2d at 1557(Kozinski, J., dissenting) (direct quotations understood to contain no interpretations).

193. *See* Baker v. Los Angeles Herald Examiner, 721 P.2d 87, 87 (Cal. 1986) (where author gives impression of what subject could have said, it is required only that she convey clearly that she is expressing an opinion); Hustler Magazine v. Falwell, 485 U.S. 46, 50 (1988) (first amendment prevented recovery for emotional distress for ad parody that could not reasonably be interpreted as stating actual facts about public figure plaintiff); Letter Carriers v.

liability for statements that cannot reasonably be interpreted as making factual assertions.[194] Neither should journalists answer for minor editorial changes in grammar or word usage if such changes do not alter the substantive impact of the speaker's actual remarks.[195] But falsely attributing or misleadingly editing a statement is a false statement of fact, which is beyond any first amendment protection.[196] Finally, the writer is always free to paraphrase should there be any doubt about the quotation's accuracy.[197]

If deliberately altered quotations are viewed as calculated falsehoods and false statements of fact, then a traditional defamation analysis could sufficiently measure the level of malice in a challenged quotation. Judge Kozinksi, dissenting in *Masson*, suggested such an analysis:

1. Does the quoted material purport to be a verbatim repetition of what the speaker said?
2. If so, is it accurate?
3. If so, is the inaccuracy material?
4. If so, is the inaccuracy defamatory?
5. If so, is the inaccuracy the result of malice?[198]

Judge Kozinski thought that all these questions would have to be answered affirmatively before the case could go to a jury.[199] His five-step approach reflects the standard analysis performed in defamation cases: determination of truthfulness, defamatory impact and malice.[200]

Austin, 418 U.S. 264, 284-86 (1974) (use of word "traitor" in definition of union "scab" not basis for defamation suit because wording constituted mere rhetorical hyperbole).

194. *See, e.g.*, Milkovich v. Lorain Journal, __ U.S. __, __, 110 S. Ct. 2695, 2706, 111 L. Ed. 2d 1, 19 (1990) (first amendment protects statements that cannot reasonably be interpreted as making factual assertions); Hustler Magazine v. Falwell, 485 U.S. 46, 50 (1988) (first amendment prevented recovery for emotional distress for ad parody that could not reasonably be interpreted as stating actual facts about public figure plaintiff); *Austin*, 418 U.S. at 284-86 (wording constituted mere rhetorical hyperbole); Greenbelt Cooperative Publishing Ass'n, Inc. v. Bresler, 398 U.S. 6, 13 (1970) (use of word "blackmail" to describe person's business tactics was not libelous because word was only rhetorical hyperbole).

195. *See* Hotchner v. Castillo-Puche, 551 F.2d 910, 914 (2d Cir. 1977) (change in statement not defamatory because it did not increase defamatory impact or alter substantive content).

196. *See* Gertz v. Robert Welch, Inc., 418 U.S. 324, 340 (1974) (neither intentional lies nor careless errors significantly advances society's interest in wide-open debate on public issues); Garrison v. Louisiana, 379 U.S. 64, 75 (1964) (calculated falsehoods should enjoy no constitutional immunity because they conflict with the premises of democratic society); Selleck v. Globe International, Inc., 212 Cal. Rptr. 838, 844 (Cal. 1985) (falsely attributing statements is equivalent to false statements of fact).

197. *See* Masson v. New Yorker Magazine, Inc., 895 F.2d 1535, 1562 (9th Cir. 1989)(Kozinski, J., dissenting) (quotation marks should be deleted before editing a quotation), *cert. granted*, __ U.S. __, 111 S. Ct. 39-40, 112 L. Ed. 2d 16 (1990).

198. *Masson*, 895 F.2d at 1562 (Kozinski, J., dissenting).

199. *Id.*

200. *See* Herbert v. Lando, 441 U.S. 153, 199-200 (1979)(Stewart, J., dissenting) (discuss-

B. *The Morality Of Misquotation*

Given the inherent tension between defamation law and the first amendment, with plaintiffs and defendants making simultaneous and contradictory demands, some confusion is inevitable.[201] The solution, if there is one, must call for changes in the standards under which journalists edit and revise quotations. In *Masson*, the Ninth Circuit began its analysis with an assumption that the challenged quotations were deliberately altered.[202] But the people who read Janet Malcolm's article in the *New Yorker* probably never knew this.[203] News stories, after all, do not carry disclaimers: WARNING! THE QUOTES IN THIS ARTICLE MAY HAVE BEEN ALTERED BY THE WRITER AND DO NOT REFLECT THE PRECISE WORDS OF THE SPEAKER. Nor does anyone seriously suggest that newspapers be required to print such notices.[204] Compelling the press to answer for every period and comma — every instance of bad journalism — would be no less damaging to first amendment interests.[205] Fortunately for reporters, there are journalistic alternatives short of such extremes.

The simplest solution would be for journalists to take readers into confidence and tell them what writers do with quotations. A warning to the reader about the news organization's policy on editing quotations and, assuming they are edited, an explanation to the reader on why the quoted word must be edited, would go far toward assuaging the reader's suspi-

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ing four elements that must be satisfied before public figure plaintiff can recover under *New York Times*); Comment, Masson v. New Yorker Magazine: *Actual Malice and Direct Quotations - The Constitutional Right to Lie*, 65 NOTRE DAME L. REV. 564, 582 (1990) (Kozinski approach reflects traditional defamation analysis).

201. *See, e.g.*, Rosenblatt v. Baer, 383 U.S. 75, 86 (1966) (discussing tension between preventing attacks on reputation and first amendment interests); McCabe v. Rattiner, 814 F.2d 839, 841 (1st Cir. 1987) (constitutional protections for opinions are an attempt to reconcile conflict between defamation law and first amendment); *see also* R. SACK, LIBEL, SLANDER AND RELATED PROBLEMS xxvii-xxix (1980) (discussing alternatives to modern defamation law).

202. Masson v. New Yorker Magazine, Inc., 895 F.2d 1535, 1537 (9th cir. 1989), *cert. granted*, __ U.S. __, 111 S. Ct. 39-40, 112 L. Ed. 2d 16 (1990).

203. *Cf. Masson*, 895 F.2d at 1549 (Kozinski, J., dissenting) (arguing that unqualified quotations are commonly understood to contain no alterations).

204. Gitlow v. New York, 268 U.S. 652, 666 (1925) (first amendment rights protected from state abridgement). Regulating the content of a news report also violates clearly established first amendment interests and is constitutionally forbidden. Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 229-30 (1987); Regan v. Time, Inc., 468 U.S. 641, 648-49 (1984).

205. *Masson*, 895 F.2d at 1557 (Kozinski, J., dissenting). Judge Kozinski argues that newspapers, which must digest voluminous amounts of information with amazing speed, might never be published were they required to vouch for the accuracy of every published fact. *Id.* Modern journalism, coping with limits of both time and manpower, does not permit scientific accuracy. *Id.*

cions.[206] Some writers, in fact, suggest that newspapers inform their readers if they follow a policy of altering quotes.[207]

There is, however, another solution to this moral dilemma; the word is PARAPHRASE. Quotations are not the only tools a writer possesses; a paraphrased statement would inform the reader even while it assured her that what followed was an interpretation — not literally transcribed.[208] As an internal memo of *The New York Times* declared: "[i]f the speaker isn't terse enough to suit us, we can tidy up the prose — but only after removing the quotation marks."[209]

Careful and precise reporting would go far toward assuring greater accuracy in quotations. Indeed, disagreements — and consequently expensive litigation — over misquotations could often be avoided if reporters just took precautions to assure accurate quotation.[210] Janet Malcolm taped over forty hours of interviews with Jeffrey Masson, yet at least eight of the challenged quotations do not appear on any of the taped conversations.[211] Whether Malcolm fabricated these quotes or, as she alleges, they came from unre-

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206. J. OLEN, ETHICS IN JOURNALISM 101 (1988). Professor Olen writes:

> Readers should know that reconstruction and cleaning up are going on. If they don't, they are being misled, however benignly. Newspapers and magazines have a variety of ways of telling their readers. [sic] A column on the op-ed page under a title like "Why People in Newspapers Talk So Much better than You Do" is one. A frank admission of quotation policy in the ombudsman column of a newspaper or editor's page of a magazine is another. So is running an article like [Ronald] Turovsky's [titled *Did He Really Say That?*, COLUMBIA JOURNALISM REVIEW, July-August 1980, at 38.]

Id.

207. *See, e.g.*, T. GOLDSTEIN, THE NEWS AT ANY COST: HOW JOURNALISTS COMPROMISE THEIR ETHICS TO SHAPE THE NEWS 203, 206 (1985) (news organizations should disclose policy of altering quotations, if they have one); J. OLEN, ETHICS IN JOURNALISM 101 (1988) (readers should be informed if reconstruction of quotations is occurring).

208. *See, e.g.*, Masson v. New Yorker Magazine, Inc., 895 F.2d 1535, 1537 (9th Cir. 1989)(Kozinski, J., dissenting), *cert. granted*, __ U.S. __, 111 S. Ct. 39-40, 112 L. Ed. 2d 16 (1990). Judge Kozinski cites an internal report from the *New York Times* that urged its reporters to paraphrase a speaker if he "isn't terse enough to suit us . . . ." *Id.*; Brief for Petitioner at 24, Masson v. New Yorker Magazine, Inc., __ U.S. __ (No. 89-1799) (if journalist finds person's words unusable, then paraphrase should be used); McNamus, *The, Uh, Quotation Quandry*, COLUMBIA JOURNALISM REVIEW, May/June 1990, at 54 (paraphrasing is option for dealing with ungrammatical quote).

209. *Masson*, 895 F.2d at 1562(Kozinski, J., dissenting).

210. Comment, Masson v. New Yorker Magazine: *Actual Malice and Direct Quotations - The Constitutional Right to Lie*, 65 NOTRE DAME L. REV. 564, 579 (1990) (noting that advancing audio and video technology permits reporters to record words with ever-greater accuracy); *see also* J. OLEN, ETHICS IN JOURNALISM 100 (1988) (journalists could avoid misunderstandings and hostility by confirming quotations with speakers before publication).

211. *Masson*, 895 F.2d at 1540-44.

corded conversations,[212] trouble might have been averted had she confirmed the quotes with Masson before publication.[213] Memory, of course, will fade over time, and there is always a danger that the speaker will deny ever saying what was attributed to him.[214] But at least where the purpose of quoting is to give the reader insight into the speaker's personality and not to express a particular idea, confirmation might go far toward reducing mistrust between journalists and the people they interview.[215]

Solutions aside, far more questions are raised by the consequences of a journalistic "clean up." Would voters reach the same conclusions about their politicians if they knew that mangled syntax was magically transformed into sparkling prose?[216] If this courtesy is not extended to both sides of a political controversy, does it not amount to political favoritism?[217] At some point, then, what begins as mercy toward an inarticulate public figure must eventually become a license to transform quotations beyond all recognition.[218] To be sure, reporters are more than stenographers, and readers

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212. Brief for Respondant at 3, Masson v. New Yorker Magazine, Inc., __ U.S. __ (No. 89-1799).

213. Masson v. New Yorker Magazine, Inc., 895 F.2d 1535, 1568 (9th Cir. 1989) (Kozinski, J., dissenting), *cert. granted*, __ U.S. __, 111 S. Ct. 39-40, 112 L. Ed. 2d 16 (1990). Nancy Franklin of *The New Yorker's* fact-checking department promised to get back with Masson about the possibility of verifying the quotations, but she never did. *Id.*

214. *See* Harte-Hanks Communications, Inc. v. Connaughton, __ U.S. __, __, 109 S. Ct. 2678, 2698 n.37, 105 L. Ed. 2d 562, 570 n.37 (1989) (denials commonplace in public life and should not by themselves alert reporter to possible error).

215. *See Masson*, 895 F.2d at 1568 n.25 (Kozinski, J., dissenting); *see also* T. GOLDSTEIN, THE NEWS AT ANY COST: HOW JOURNALISTS COMPROMISE THEIR ETHICS TO SHAPE THE NEWS 204 (1985) (arguing that confirmation of quotations might lessen hostility of those interviewed toward news media).

216. *See* Turovsky, *Did He Really Say That?*, COLUMBIA JOURNALISM REVIEW, July-August 1980, at 39 (failing to extend to politician courtesy of improving his quotes can be powerful weapon). Mr. Turovsky cites an example from the 1980 presidential campaign. *Id.* Edward Kennedy was criticized for ungainly phrasing after he was quoted verbatim, while Ronald Reagan's quotes were often favorably altered. In another example, the editor of the Louisville, Kentucky *Courier-Journal* was adamant about not altering the words of a local politician who frequently mangled his syntax: "Let the goddam idiots who voted for him see what they have done." *Id.*

217. *Id.*; *see also* J. HULTENG, THE MESSENGER'S MOTIVES: ETHICAL PROBLEMS IN THE NEWS MEDIA 70 (1985) (arguing that manipulation or fabrication of quotes "to condition the reader's perceptions of a news figure or a news situation" is a serious breach of ethics).

218. *See* Carson v. Allied News Co., 529 F.2d 206, 213 (7th Cir. 1976) (noting journalistic obligation regarding quotations). Judge Sprecher, writing for the majority, summarized the reporter's responsibility when quoting:

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

would be disappointed (and probably shocked) if the morning newspaper quoted anyone with verbatim accuracy.[219] Yet those same readers might be just as surprised to learn that quotation marks could conceal editorial alteration of the speaker's words.[220]

Perhaps no one will ever know whether the glowing reviews of Malcolm's article would have dimmed with an acknowledgment that literary license was used in quoting Jeffrey Masson.[221] It may be true that the vagaries and ambiguities of language make at least some editing of quotations necessary, if not always desirable.[222] Still, the standards adopted by the Ninth Circuit — in addition to the already formidable actual malice burden — will probably insulate journalists from liability for such changes.[223]

Id. Judge Kozinski argued that the majority's reasoning in *Masson* permits significant changes in quotations beyond the speaker's original intent. Masson v. New Yorker Magazine, 895 F.2d 1535, 1548 (9th cir. 1989)(Kozinski, J., dissenting), *cert. granted*, __ U.S. __, 111 S. Ct. 39-40, 112 L. Ed. 2d 16 (1990).

219. *See, e.g.*, T. GOLDSTEIN, THE NEWS AT ANY COST: HOW JOURNALISTS COMPROMISE THEIR ETHICS TO SHAPE THE NEWS 202 (1985) (leaving politician's quotes with the "uh's," "y'knows," "I means" and fragmented sentences is "terribly harmful and unfair"); Turovsky, *Did He Really Say That?*, COLUMBIA JOURNALISM REVIEW, July-August 1980, at 39 (quoting associate editor of *Esquire* magazine). Rob Fleder summed it up this way: "If people were quoted directly and exactly, it would seem the whole world is full of bumbling idiots." *Id.*

220. *See Masson*, 895 F.2d at 1550 (1989)(Kozinski, J., dissenting) (use of quotation marks to conceal editorial role of journalists is not constitutionally protected); Note, Masson v. New Yorker Magazine: *But Don't Quote Me On That*, 21 PAC. L. J. 1107, 1135 (journalistic credibility with public could be eroded by *Masson* decision).

221. *Masson*, 895 F.2d at 1549 (Kozinski, J., dissenting). A review of Malcolm's *New Yorker* article in the *Boston Globe* read: "Masson . . . emerges gradually, as a grandiose 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 . . . ." *Id.* An article in *Kirkus Reviews* concluded that ". . . Malcolm's portrait of Masson is devastating: largely through his own words he emerges as a feverish jumble of vanity, self-destruction, childishness, and ruthlessness." *Id.*

222. *See, e.g.*, ASSOCIATED PRESS STYLEBOOK AND LIBEL MANUAL 184 (1977) (minor alterations in quotations necessary to compensate for spoken errors in grammer or sentence structure); J. OLEN, ETHICS IN JOURNALISM 100 (1988) ("Not to clean up quotes is to make intelligent speakers look stupid and stupid speakers look stupider."); J. HULTENG, THE MESSENGER'S MOTIVES: ETHICAL PROBLEMS IN THE NEWS MEDIA 68 (2d ed. 1985) (literal accuracy in quotes not always possible).

223. *See, e.g.*, Note, Masson v. New Yorker Magazine Inc.: *Quotes, Lies and Audiotape*, 40 CASE. W. RES. L. REV. 875, 875 (1989-90) (Malcolm's article, while unethical, remains protected by first amendment); Comment, Masson v. New Yorker Magazine: *Actual Malice and Direct Quotations - The Constitutional Right to Lie*, 65 NOTRE DAME L. REV. 564, 585 (1990) (*Masson* court's analysis is "ambiguous, complex, and biased in favor of defendants"); Note, Masson v. New Yorker Magazine, Inc.: *But Don't Quote Me On That*, 21 PAC. L.J. 1107, 1136 (1990) (under *Masson* analysis, journalists will be able to create a paraphrase and call it a quotation); Comment, *When Is A Quote Not A Quote?: The Subjectivity of Truth in* Masson v. New Yorker Magazine, Inc., 64 ST. JOHN'S L. REV. 150, 164-165 (1989) (*Masson*

VII. CONCLUSION

Protecting journalists from inflexible legal maxims that could strangle free expression was supposed to justify a heavy actual malice burden. The rational interpretation standard, applied to the misquotation problem by the *Masson* majority, was also promulgated under a general theme of safeguarding free expression. But the result has been the replacement of the plaintiff-dominated common law regime with an equally inflexible defense-oriented system. Somewhere along the way, the plaintiff's reputational interest, theoretically the purpose behind defamation law, got lost in all the constitutional change.

Few, of course, would like to return to the oppressive system that existed before *New York Times* changed the constitutional landscape. Yet the notion that stricter standards regarding quotations would discourage intrepid reporting or cause news organizations to turn away from controversial subjects out of fear of liability is not supported by the experiences of ordinary libel plaintiffs — most of whom lose either on summary judgment or, assuming a favorable verdict, on appeal. Even so, plaintiffs like Jeffrey Masson will continue to sue, despite the frustration and the legal fees, usually because they see no alternative. And once they are in court, those plaintiffs must weave through a byzantine maze of constitutional questions from which many will never emerge. Neither plaintiffs nor defendants really like this system; in fact, they hate it. Yet the system locks them in a destructive embrace, and neither wants to be the first to let go.

The struggle over fabricated quotations, and whether to apply a traditional actual malice analysis or the embellishments of the *Masson* court, is only one skirmish in this struggle. The plaintiff, Jeffrey Masson, lost that battle, but he seeks a reversal of fortune before the United States Supreme Court. Many questions will confront the justices should they consider the problem of accurate quotation in modern journalism. Many other ethical questions may remain unanswered, but the morality — if such a word can be used — of altering the speaker's words while most readers still believe they are reading a verbatim account is not something that any journalist should overlook.

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analysis will provide unwarranted protection for distortions and fabrications); Comment, *To Quote or Not To Quote: The Status of Misquoted Material in Defamation Law*, 43 VAND. L. REV. 1637, 1662 (1990) (protecting deliberately misquoted material extends privilege to news media without corresponding gain in free expression).