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## Variations On A Theme: Application Of *Masson V. New Yorker Magazine, Inc.* To A Spectrum Of Misquotation Libel Cases

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## VARIATIONS ON A THEME: APPLICATION OF *MASSON V. NEW YORKER MAGAZINE, INC.* TO A SPECTRUM OF MISQUOTATION LIBEL CASES

In December 1983 Janet Malcolm, a freelance writer, published a two-part article in *The New Yorker* magazine.<sup>1</sup> Malcolm's article largely was concerned with the dismissal of Jeffrey M. Masson, a psychoanalyst, from the employ of the Sigmund Freud Archives (the Archives).<sup>2</sup> During his tenure as projects director of the Archives, Masson publicly voiced his belief regarding Sigmund Freud's abandonment of Freud's seduction theory.<sup>3</sup> Masson believed that Freud had abandoned the seduction theory to placate skeptical colleagues and, thus, advance Freud's career.<sup>4</sup> Malcolm substantially based her article upon a series of interviews she conducted with Masson, during which Masson discussed his views on Freud, Masson's dismissal, and other topics, including Masson's personal life.<sup>5</sup> On November 29, 1984, Masson filed in the United States District Court for the Northern District of California a diversity action against Malcolm, *The New Yorker* and Alfred A. Knopf, Inc. (Knopf)—the publisher of a book by Malcolm that is based upon the same interviews<sup>6</sup>—alleging violation of the California civil libel statute.<sup>7</sup> Specifically, Masson's complaint charged that, with the knowledge of *The New Yorker* and Knopf, Malcolm had knowingly placed in quotation marks remarks that Masson had never uttered, thus attributing them to Masson, and had misleadingly edited other quotations, to the effect that Masson appeared ““unscholarly, irresponsible, vain [and] lacking impersonal [sic] honesty and moral integrity.””<sup>8</sup>

In *New York Times Co. v. Sullivan*, the United States Supreme Court injected a constitutional requirement into libel actions brought by public

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1. Malcolm, *Trouble At The Archives*, *NEW YORKER*, Dec. 5, 1983, at 59 & Dec. 12, 1983, at 60.

2. *Masson v. New Yorker Magazine, Inc.*, 895 F.2d 1535, 1536 (9th Cir. 1989), *rev'd*, 111 S. Ct. 2419 (1991).

3. *Id.* Through his seduction theory, Freud proposed that sexual abuse in childhood is the genesis of certain mental illnesses. *Id.*

4. *Id.*

5. *Id.*

6. See *Masson v. New Yorker Magazine, Inc.*, 686 F. Supp. 1396, 1397 (N.D. Cal. 1987) (describing defendant Knopf's role as publisher of *IN THE FREUD ARCHIVES*), *aff'd* 895 F.2d 1535 (9th Cir. 1989), *rev'd* 111 S. Ct. 2419 (1991).

7. *Masson*, 895 F.2d at 1536. Relevant portions of the California Civil Code read: “[E]very person has . . . the right of protection from . . . defamation . . .” CAL. CIV. CODE § 43 (West.1982); “Defamation is effected by . . . libel.” *Id.* at § 44; “LIBEL, WHAT. Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation.” *Id.* at § 45.

8. *Masson*, 895 F.2d at 1536 (brackets in original).

official plaintiffs against defendants critical of the plaintiffs' official conduct.<sup>9</sup> The Court held that for a plaintiff to win this type of libel case, the plaintiff must prove that the defendant conveying the alleged libelous statement did so with what the court termed "actual malice"—that is, the defendant must have known that the statement was false when made, or must have recklessly disregarded the statement's probable falsity.<sup>10</sup> The Court further held that by operation of the Fourteenth Amendment the actual malice standard applies to the states.<sup>11</sup> Later, the Supreme Court widened the application of the actual malice standard, holding that public figures, in addition to public officials, must also prove a defendant's actual malice in order to recover damages caused by libelous statements.<sup>12</sup>

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9. *New York Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964). In *New York Times* the United States Supreme Court considered a libel action brought against the *New York Times* and four black Alabama clergymen whose names had appeared as signatories of a full page advertisement in the newspaper. *Id.* at 256. The action was based upon claims and insinuations, made in the advertisement, that Montgomery, Alabama police had "ringed" the campus of Alabama State College and had padlocked its cafeteria after a campus civil rights protest. *Id.* at 257. Additionally, the advertisement claimed that the police had arrested Dr. Martin Luther King seven times and had tried to intimidate him with violence. *Id.* at 258. Although not mentioned by name in the advertisement, the plaintiff claimed that the actions that the advertisement had imputed to the police were also imputed to him as the Montgomery Commissioner in charge of the police department. *Id.* at 256, 258. While the Court determined that many of the allegations in the advertisement were not literally true, the Court also concluded that none of the four individual defendants knew that their names had appeared on the advertisement until the plaintiff demanded a retraction. *Id.* at 258-60. The Court also established that while no *New York Times* employee had made any attempt to check the accuracy of the advertisement, none of the newspaper's personnel had believed that the facts asserted in the advertisement were incorrect. *Id.* at 260.

The Court first held that libelous statements that would otherwise be constitutionally protected do not lose that protection merely because the statements were presented in the form of a paid advertisement. *Id.* at 266. Then, finding that the law of libel is not immune from constitutional limitations, the Supreme Court held that the First and Fourteenth Amendments prevent a public official from recovering damages for false and defamatory statements regarding his official conduct unless he proves that the defendant published the statement with what the court termed "actual malice." *Id.* at 269, 279-80. The Court defined actual malice as either knowledge at the time of publication that the statement was false, or reckless disregard of its probable falsity. *Id.* at 279-80. Finally, the court held that the proof offered to show the defendants' actual malice lacked the convincing clarity required for constitutional questions and therefore held that the defendants could not be held liable for damages. *Id.* at 285-86, 292.

10. *Id.* at 279-80. The Supreme Court justified the imposition of the actual malice standard upon the common law of libel by arguing that public officials have an analogous privilege for criticisms they make as part of their official duties. *Id.* at 282. To fail to give a reciprocal right to the public, the Court reasoned, would be to unjustifiably prefer public officials over those they purportedly serve. *Id.* at 282-83. See *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 153 (1967) (emphasizing subjective nature of actual malice standard by restating *New York Times* holding that evidence of mere investigatory failure is not sufficient to satisfy actual malice standard); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964) (emphasizing subjective nature of actual malice standard).

11. *New York Times*, 376 U.S. at 283.

12. See *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1967) (holding that parallels

In *New York Times* the Supreme Court also held that libel plaintiffs must show actual malice with convincing clarity.<sup>13</sup> The Supreme Court later ruled that, even on a motion for summary judgment, a court must consider whether, given the record before the court, a jury reasonably could find clear and convincing evidence of actual malice.<sup>14</sup>

Purporting to work within these constitutional parameters, the district court in *Masson v. New Yorker Magazine, Inc.* granted the defendants' motions for summary judgment.<sup>15</sup> The court stated that Masson had failed to present clear and convincing evidence of actual malice.<sup>16</sup> On appeal, the Ninth Circuit Court of Appeals first reviewed the state of the law regarding actual malice in cases of misquotation.<sup>17</sup> The court concluded that it is improper to infer actual malice from evidence that the defendant knowingly had misquoted the plaintiff when the misquotation is either a rational interpretation of the defendant's vague remarks,<sup>18</sup> or does not differ in substantive content from the defendant's actual unambiguous remarks.<sup>19</sup>

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between libel actions involving public officials and those involving public figures dictate that constitutional considerations be injected into latter type of action also); *see also* Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 (1974) (explaining that public figures warrant less constitutional protection from defamation because of their access to media and consequent ability to counteract defamatory statements made by others). The *Curtis* court stated that the term "public figures" includes those who are not public officials, but are nonetheless connected with issues in which the public has a justified, important interest. *Id.* at 134. With respect to libel cases, the term "public figure" has also been defined to include business people, artists, athletes and persons who are otherwise well known because of who they are or what they have done. BLACK'S LAW DICTIONARY 1229 (6th ed. 1990) (citing *Rosanova v. Playboy Enterprises, Inc.*, 411 F. Supp. 440, 444 (D.C. Ga. 1976), *aff'd*, 580 F.2d 859 (5th Cir. 1978)). *See Gertz*, 418 U.S. at 345 (defining public figures as those who have assumed prominent roles in society and those who have associated themselves with public controversy in order to influence resolution of controversy).

13. *New York Times*, 376 U.S. at 285-86.

14. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986).

15. *Masson v. New Yorker Magazine, Inc.* 686 F. Supp. 1396, 1397 (N.D. Cal. 1987), *aff'd*, 895 F.2d 1535 (9th Cir. 1990), *rev'd*, 111 S. Ct. 2419 (1991). The district court granted defendants' partial summary judgment as to four of the alleged misquotations on August 19, 1986 and, pursuant to a second motion, granted summary judgment on the remaining eight alleged misquotations in its published opinion of August 17, 1987. *Id.*

16. *Id.* at 1407. For summary judgment purposes, the *Masson* plaintiff conceded that he was a public figure and would therefore have to prove that the defendants acted with actual malice. *Masson*, 895 F.2d at 1537.

17. *Masson*, 895 F.2d at 1537-39. Reference in this note to misquotation and falsified quotation means the practice of placing within quotation marks words that were not uttered by the person to whom they are attributed, or of otherwise presenting them in a way that indicates a verbatim transcription of the quoted individual's remarks. The terms misquotation and falsified quotation do not refer to inaccurate paraphrases of speakers' statements.

18. *Id.* at 1539. The court's method of inquiry into whether the defendant's quotations were rational interpretations of the plaintiff's ambiguous remarks will be referred to as the rational interpretation test. *See infra* notes 80, 83-88 and accompanying text (discussing the application of the rational interpretation test in *Dunn v. Gannett New York Newspapers, Inc.*, 833 F.2d 446 (3d Cir. 1987)).

19. *Masson*, 895 F.2d at 1539. The court's method of inquiry into whether the defendant's

Assuming for the purpose of the summary judgment motion that Malcolm knowingly misquoted Masson,<sup>20</sup> the court then examined each of eleven allegedly defamatory quotations to determine whether a jury reasonably could find clear and convincing evidence that the defendants acted with actual malice.<sup>21</sup> In what the Ninth Circuit characterized as an actual malice analysis, the court compared the substance of each of the alleged misquotations to the substance of remarks admittedly made by Masson during his interviews with Malcolm.<sup>22</sup> The court reasoned that if the quotations from Malcolm's article were substantively similar to comments actually made by Masson, as a matter of law the plaintiff would be unable to prove that Malcolm knew the quotations were false at the time of publication.<sup>23</sup> For each quotation, the court determined either that Malcolm had rationally interpreted ambiguous statements, or that Malcolm had not changed the substantive meaning of what Masson had said.<sup>24</sup> Consequently, the court

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quotations differed in substantive content from the plaintiff's actual unambiguous remarks—an inquiry undertaken for the purpose of determining whether the defendant acted with actual malice—will be referred to as the substantive content test. *See infra* notes 81, 89-100 and accompanying text (explaining and critiquing Ninth Circuit's use of *Hotchner v. Castillo-Puche*, 551 F.2d 910 (2d Cir.), *cert. denied*, 434 U.S. 834 (1977), to support court's application of substantive content test).

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

21. *Id.* at 1539-46. The United States Supreme Court has held that, as a matter of federal constitutional law, *de novo* review on appeal is required for all libel cases. *See Bose Corp. v. Consumers Union of United States*, 466 U.S. 485, 510-11 (1984) (holding *New York Times* independent appellate review requirement to be rule of federal constitutional law); *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964) (stating that, in libel cases, appellate court must independently review entire record to assure itself that judgment does not impermissibly intrude on field of free expression); *see also Speer v. Ottaway Newspapers, Inc.*, 828 F.2d 475, 476-77 (8th Cir. 1987), *cert. denied*, 485 U.S. 970 (1988) (stressing appellate court's obligation to ensure that plaintiff has clearly and convincingly proved that disputed publication is not entitled to First Amendment protection); *Bartimo v. Horsemen's Benevolent and Protective Ass'n*, 771 F.2d 894, 896-97 (5th Cir. 1985), *cert. denied*, 475 U.S. 1119 (1986) (holding that, in libel action, appellate court has duty of independent review regardless of whether trial court judgment is for alleged defamer or defamed).

22. *Masson*, 895 F.2d at 1539-46. The court compared the quotations appearing in Malcolm's article to tape recordings and typed copies of handwritten notes from Malcolm's several interviews with Masson. *Id.* at 1537. In the Ninth Circuit's opinion, the court determined that eight of the eleven alleged misquotations were so similar in what the court termed "substantive" meaning to the statements admittedly made by Masson that, as a matter of law, the plaintiff could not prove that Malcolm knew that the meanings of these quotations were false. *Id.* at 1539-46. This test is similar to the doctrine of substantial truth, except that the Ninth Circuit used its substantive content test to determine the existence of actual malice, while courts apply the substantial truth doctrine only to determine whether there is an actionable falsity. *See infra* notes 113-18 and accompanying text (explaining proper application of substantial truth doctrine).

23. *Masson*, 895 F.2d at 1538-39. In comparing Malcolm's misquotations to Masson's actual remarks, the court often drew from various parts of Malcolm's interviews with Masson to find substantive remarks that Malcolm had condensed into one short statement. *See id.* at 1540 n.4, 1542, 1543-44 (exemplifying court's practice of drawing from entire interview transcript to justify one misquotation). The court did not confine itself to matching Malcolm's misquotations one-for-one with discrete comments made by Masson. *Id.*

24. *Id.* at 1539-46. With regard to only one of the alleged misquotations—the alleged

concluded that Malcolm had not seriously doubted the truth of any of the passages and, thus, did not possess the requisite actual malice to be held accountable for libeling Masson.<sup>25</sup>

To many observers, the decision reached by the Ninth Circuit seemed counterintuitive.<sup>26</sup> Critics argued that the appellate court's approach would allow the media to falsify quotations with impunity.<sup>27</sup> Indeed, on the surface, Masson's outcome on appeal did seem to sanction deceptive journalistic practices. If there is one sacred canon of the journalistic profession it is that, aside from correcting syntax and eliminating unintended utterances, a journalist must not alter the wording of a speaker's remarks, then publish

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misquotation in which Malcolm claimed that Masson had said, "I was like an intellectual gigolo"—the court invoked the incremental harm branch of the libel proof plaintiff doctrine. *Id.* at 1541. The majority held that the remaining uncontested portion of Malcolm's article made Masson seem so bombastic that the additional harm caused by the "intellectual gigolo" quotation was negligible. *Id.* Because of this and because the court deemed the substantive content of the quotation to be unchanged from that of the original, the court held the quotation to be nonactionable. *Id.* The Ninth Circuit gave no reason why the incremental harm doctrine was invoked for this particular quotation, but was not used for any of the others.

Unlike the substantial truth doctrine, which requires that a false allegation be compared with the truth regarding that allegation, the incremental harm doctrine requires that a contested allegation be compared with allegations made in the uncontested remainder of a publication. *See Simmons Ford, Inc. v. Consumers Union*, 516 F. Supp. 742, 750-51 (S.D.N.Y. 1981) (holding that magazine's false report regarding seatbelt safety of plaintiff's electric car was not actionable in light of many other uncontested disparaging statements made about car in same article). With *Masson*, the Ninth Circuit became the only federal court of appeals to adopt the often criticized incremental harm doctrine. *Masson*, 895 F.2d at 1566 (Kozinski, J., dissenting). For a stinging critique of the doctrine by then-Judge Scalia, see *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563, 1568-69 (D.C. Cir. 1984), *vacated*, 477 U.S. 242 (1986).

25. *Masson*, 895 F.2d at 1539-46. Before publication of the allegedly defamatory material, Masson informed both *The New Yorker* and Knopf of the inaccuracy of the quotations. *Id.* at 1537. The publishers chose to publish the quotes anyway. *Id.* However, the Ninth Circuit held that neither *The New Yorker* nor Knopf could incur vicarious liability for Malcolm's actions because Malcolm herself was not liable. *Id.* at 1546.

26. *See, e.g., Sargeant, Get the Gist? Court Okays Rewritten Quotes*, TRIAL, Dec. 1989, at 19, 21 (quoting lawyer for various media concerns as saying that there is no First Amendment right to fabricate or modify quotations); Rubin & Rawitch, *Journalists Get License to Misquote*, L.A. Daily J., Sept. 28, 1989, at 6 (opining that Ninth Circuit, by upholding summary judgment, had stripped quotation marks of any meaning); Gilbert, *Putting Words in the Mouths of Interviewees*, L.A. Daily J., Sept. 25, 1989, at 7 (predicting that Ninth Circuit's *Masson* opinion would create injustice to reader and interviewee by destroying reporters' incentive to quote accurately); Taylor, *Janet Malcolm's License to Lie*, Legal Times, Aug. 14, 1989, at 21 (warning that new constitutional right created by Ninth Circuit allowed reporter to betray readers). *But see White, In Defense of Poetic License*, L.A. LAWYER, April 1990, at 28 (criticizing Ninth Circuit for examining content of article instead of actions of Malcolm, but supporting result as protective of poetic license).

27. *See Rubin & Rawitch, supra* note 26, at 6 (referring to Ninth Circuit's *Masson* decision as license to misquote); Taylor, *supra* note 26, at 21 (opining that Ninth Circuit's *Masson* ruling gave journalists First Amendment right to fictionalize quotations). *But see* Gilbert, *supra* note 26, at 7 (stating that Ninth Circuit's *Masson* decision does not actually sanction misquotation, but merely absolves journalists when misquotation is substantially same as actual remarks or rational interpretation of those remarks).

the altered remarks as a verbatim transcription of what the speaker said.<sup>28</sup> However, journalistic canons notwithstanding, neither statutory nor common law specifically forbids intentional misquotation of others. The lack of a specific legal proscription on misquotation as such led the courts hearing *Masson* to determine the defendants' liability for their misquotations according to the only body of law applicable within the context of *Masson's* fact pattern—the law of defamation.<sup>29</sup> Unfortunately, until *Masson* post-*New York Times* case law did not directly address the propriety of basing a finding of actual malice solely on the defendants' alleged knowledge that the quotation in question was not a verbatim transcription of the words uttered by the purported speaker.<sup>30</sup>

On appeal, the United States Supreme Court reversed the decision of the Ninth Circuit.<sup>31</sup> The Supreme Court first recognized that a writer's placement of quotation marks around a statement generally indicates that the writer is reporting the speaker's words verbatim.<sup>32</sup> The Court further

28. See *Masson*, 895 F.2d at 1553 (Kozinski, J., dissenting) (citing J. HULTENG, PLAYING IT STRAIGHT: A PRACTICAL DISCUSSION OF THE ETHICAL PRINCIPLES OF THE AMERICAN SOCIETY OF NEWSPAPER EDITORS 64 (1981)) (stating that creation of quotations is never justifiable even if fabricated quotation is commensurate with speaker's personality); *id.* (citing J. HULTENG, THE MESSENGER'S MOTIVES: ETHICAL PROBLEMS OF THE NEWS MEDIA 71 (1976)) (describing as unethical practice of misquoting for purpose of altering reader's feelings regarding news figure or situation); see also *id.* at 1550 n.3 (citing J. HULTENG, THE MESSENGER'S MOTIVES: ETHICAL PROBLEMS IN THE NEWS MEDIA 74 (1976)) (regarding reporter's obligation not to alter essential reality of someone's ideas when reporting on those ideas); *id.* at 1559 n.14 (citing Hersey, *The Legend on the License*, YALE REV., Autumn 1980, at 1, 2) (stating that sacred rule of journalism prohibits fictionalization).

29. See *id.* at 1537. *Masson* sued Malcolm for false light invasion of privacy as well as for libel. *Id.* The elements of the false light tort, both common-law and constitutional, are substantially analogous to those of the libel tort, although the false light action is designed to compensate the plaintiff for injured feelings, as opposed to injured reputation. See *Leidholdt v. L.F.P. Inc.*, 860 F.2d 890, 893 n.4 (9th Cir. 1988) (stating that false light tort is subject to same limitations as libel action); R. SACK, LIBEL, SLANDER AND RELATED PROBLEMS 393-401 (1980) (summarizing law of false light). The district court explicitly ruled that its holdings regarding *Masson's* libel count also applied to *Masson's* false light count and summarily dismissed the latter count along with the libel count. *Masson*, 686 F. Supp. 1396, 1407 & n.7 (N.D. Cal. 1987). The Ninth Circuit made no explicit ruling regarding the false light count, but, presumably, the upholding of the dismissal of that count was subsumed in that of the libel count.

30. *Masson*, 895 F.2d at 1537. In misquotation cases in which the judgment for the plaintiff has been upheld, the courts were not faced with a situation in which the defendant knew that a misquotation had occurred, yet still believed that the substantive content of the quotations was accurate. In these cases, actual malice was established through the defendant's knowledge that the premise behind the quotations, as well as the quotations themselves, had been falsified. See *Carson v. Allied News Co.*, 529 F.2d 206, 213 (7th Cir. 1976) (establishing actual malice through defendant's fabrication of quotations based upon occurrences at a meeting that writer read about in another article); *Bindrim v. Mitchell*, 92 Cal. App. 3d 61, 155 Cal. Rptr. 29 (Cal. Ct. App.) (finding actual malice from defendant's complete fabrication—including fabrication of quotations—of occurrences at psychiatric group session), *cert. denied*, 444 U.S. 984 (1979).

31. *Masson v. New Yorker Magazine, Inc.*, 111 S. Ct. 2419, 2437 (1991).

32. *Id.* at 2430.

noted that within Malcolm's article, Malcolm provided no indication by which a reasonable reader could discern that Malcolm's quoted attributions to Masson were anything but verbatim.<sup>33</sup>

Justice Kennedy, writing for the majority, defined the constitutional question at issue to be whether, accepting Masson's accusations as true, there existed sufficient evidence to indicate that Malcolm had acted with actual malice.<sup>34</sup> In approaching the question of the existence of actual malice, the majority first examined the issue of what would constitute falsity within the parameters of *Masson's* facts.<sup>35</sup> Specifically, the Court questioned whether Malcolm's attribution of words to Masson that Masson did not speak could comprise the falsity necessary for Masson to prove that Malcolm acted with actual malice.<sup>36</sup> The majority rejected Masson's assertion that any changes in excess of those for grammar and syntax would constitute falsity for purposes of an actual malice determination.<sup>37</sup>

Opining that the principles underlying existing defamation law are adequate to determine falsity in the context of quotations, the Court declined to create any specific test for determining falsity of quotations.<sup>38</sup> Instead, the majority applied the common-law substantial truth doctrine<sup>39</sup> and held that knowing alteration of a statement uttered by a speaker does not constitute actual malice unless the alteration has materially changed the meaning arising from the speaker's remarks.<sup>40</sup> Justice Kennedy further explained that the false attribution of words to a speaker through use of quotation marks is an important component of the actual malice inquiry, but is not dispositive of the question in all cases.<sup>41</sup> The Supreme Court recognized that the Ninth Circuit purported to apply the substantial truth test, but criticized the Court of Appeals for finding Malcolm's misquotations to be substantially true by virtue of the fact that the misquotations were rational interpretations of remarks actually made by Masson.<sup>42</sup> Use of quotation marks, Justice Kennedy reasoned, implies to the reader that the writer has not interpreted the speaker's remarks, but has reported them verbatim.<sup>43</sup> Therefore, any constitutional leeway which might exist for

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33. *Id.* at 2431.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 2431-32.

38. *Id.* at 2432.

39. See *infra* notes 113-18 and accompanying text (explaining substantial truth doctrine).

40. *Masson*, 111 S. Ct. at 2433. The Court recognized that the "meaning" at issue included not only the meaning of Masson's remarks themselves, but also the meaning that a reader would attach to the manner in which Masson phrased a particular remark or to the fact that Masson had made the remark at all. *Id.* at 2432.

41. *Id.* at 2433. Justice Kennedy wrote further that "[d]eliberate or reckless falsification that comprises actual malice turns upon words and punctuation only because the words and punctuation express meaning." *Id.*

42. *Id.* at 2433-34.

43. *Id.* at 2434.



interpretation is inapplicable to libel claims involving misquotation.<sup>44</sup>

After outlining the general rules of law to be applied to the facts at hand, the Supreme Court reviewed each of the six claimed misquotations which had reached the Supreme Court for review.<sup>45</sup> For all but one quotation, the Court reversed the Ninth Circuit's affirmation of summary judgment against Masson.<sup>46</sup> The majority found that five of the misquotations differed materially from Masson's purported actual statements and that, for each, a jury could find that the changes were libelous.<sup>47</sup> The Court then remanded the case to the Ninth Circuit for further proceedings.<sup>48</sup>

Justice White, joined by Justice Scalia, dissented from the majority's holding that a misquotation should not be considered false unless the writer has materially altered the meaning to be gleaned from the speaker's remarks.<sup>49</sup> Justice White stated that the traditional approach to libel cases dictates that any knowing misquotation of Masson by Malcolm would constitute the requisite knowledge of falsity for the misquotation to survive summary judgment on the issue of actual malice.<sup>50</sup> As a separate question in ruling upon the propriety of summary judgment, Justice White continued, the Court must consider whether a jury could find that the misquotation actually libeled the speaker.<sup>51</sup> However, the latter determination should be entirely separate from deciding whether there actually has been a knowing falsification.<sup>52</sup> Consequently, both Justices White and Scalia would have reversed the Ninth Circuit's opinion as to all six of the contested quotations, including the dismissal of the one quotation that the Supreme Court majority opined was not materially altered.<sup>53</sup>

A thorough reading of the trial court, appellate court and Supreme Court opinions reveals that the issues of defamation, falsity and actual malice are more complicated than any of the courts admitted.<sup>54</sup> The opinion rendered on appeal by the Ninth Circuit contains some especially glaring oversights.<sup>55</sup> For example, the Ninth Circuit majority did not render an

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44. *Id.*

45. *Id.* at 2434-37. Masson had appealed the district court's summary dismissal of claims arising from eleven quotations to the Ninth Circuit. *See Masson v. New Yorker Magazine, Inc.*, 895 F.2d 1535, 1539-46 (9th Cir. 1989) (reviewing Masson's claims stemming from eleven separate published quotations), *rev'd*, 111 S. Ct. 2419 (1991).

46. *Masson*, 111 S. Ct. at 2434-37.

47. *Id.*

48. *Id.* at 2437.

49. *Id.*

50. *Id.* at 2437-38.

51. *Id.*

52. *Id.*

53. *Id.* at 2439.

54. *See Masson v. New Yorker Magazine, Inc.*, 686 F. Supp. 1396 (N.D. Cal. 1987), *aff'd*, 895 F.2d 1535 (9th Cir. 1989), *rev'd*, 111 S. Ct. 2419 (1991) (revealing, through comparison of decisions by each court, the complexity of the constitutional libel law issues involved).

55. *See Masson*, 895 F.2d 1535 (9th Cir. 1989) (comprising Ninth Circuit's appellate decision).

opinion as to whether Malcolm's misquotations were actually true or false and it also did not address whether the changes that Malcolm made defamed Masson.<sup>56</sup> The court, relying on its case law analysis, merely decided that Malcolm's misquotations were so similar in substance to remarks that Masson had actually made during their interviews that Malcolm could not have believed that what she was writing was false.<sup>57</sup> The Court of Appeals did not adequately address Malcolm's knowledge that the quotations themselves, regardless of any similarity between their substance and the substance of Masson's actual statements, contained words that Masson did not utter and at least in this respect were false.<sup>58</sup>

Although in its opinion the Supreme Court addressed and rectified most of the Ninth Circuit's oversights,<sup>59</sup> the Court's opinion failed to specify how evidence of a writer's knowledge of misquotation should be employed in future misquotation libel cases. The Supreme Court held that a writer's knowledge of the falsity of a quotation is an important factor in the actual malice inquiry, but may not serve to establish actual malice in all cases.<sup>60</sup> However, the Court did not explain under what circumstances a writer's knowledge of a quotation's false form should be dispositive of the actual malice question. Neither did the Court opine specifically as to how this type of knowledge should be employed in cases where the knowledge is not dispositive.

An in-depth exploration of the constitutionally mandated connection between knowledge, falsity and defamation required to establish the existence of actual malice in a libel action renders a logical approach to use of knowledge of misquotation in misquotation libel cases. As the Supreme Court acknowledged, the defendant's knowledge of misquotation is too strong an indication of culpability to be ignored.<sup>61</sup> This indication is strong enough that knowledge of any misquotation should create a rebuttable presumption of actual malice in misquotation cases.<sup>62</sup> To understand the reasoning behind this conclusion, one must grasp the connection between a

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56. *Id.* at 1536-46. The Ninth Circuit never addressed the issue of whether any defamatory falsity existed, but instead proceeded straight to the issue of actual malice. *Id.* Even on the issue of actual malice, the majority dwelled only upon Malcolm's state of mind regarding the substantive meaning of her misquotations—the court did not consider the effect of the defendant's knowledge that the words within her quotations themselves were falsified. *Id.* See *supra* text accompanying notes 17-25 (explaining Ninth Circuit's analytical approach to actual malice question).

57. *Masson*, 895 F.2d at 1539-44.

58. See *id. passim*. On appeal, it was assumed that Malcolm had deliberately altered the quotations. *Id.* at 1537.

59. See *supra* notes 31-48 and accompanying text (describing Supreme Court's holdings and reasoning in *Masson*).

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

61. *Id.*

62. See *infra* text accompanying notes 150-57 (detailing logical reasons for allowing defendant's knowledge of misquotation to establish rebuttable presumption of actual malice).

defendant's knowledge of a quotation's false form and the defamatory effect inflicted by the quotation.<sup>63</sup> For example, in any type of libel case involving a public figure as plaintiff, a defendant can be liable only if the defendant defames the plaintiff through a false assertion published with knowledge of or reckless disregard for the assertion's falsity.<sup>64</sup> Therefore, if a libel defendant knows that he has falsified the form of a quotation, yet believes that he has faithfully conveyed the meaning intended by the speaker, post-*New York Times* case law seems to dictate that the defendant can be considered to have acted with actual malice only if the plaintiff was defamed by the false form of the quotation and not merely by the substance of the remarks.<sup>65</sup> Similarly, one must be able to identify those types of cases in which such an exacting inquiry is unnecessary.<sup>66</sup> As the Supreme Court indicated, well-developed post-*New York Times* case law is more than adequate to effectively adjudicate the full range of misquotation cases—courts need not resort to the development of special rules for misquotation cases.<sup>67</sup>

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63. See *infra* text accompanying notes 142-54 (explaining possible connections between quotation's false form and reputational harm inflicted by quotation).

64. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974).

65. See *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695, 2706-07 & n.7 (1990) (explaining that falsity relevant to actual malice inquiry is only falsity relating to defamatory aspects of statement). *New York Times* and its progeny dictate that there must be a congruence between the defendant's knowledge of falsity and the false element, if any, that gives rise to the defamation. See *id.* Therefore, if the defendant does not believe that the substance of a misquotation is false, post-*New York Times* case law seems to dictate that any reputational harm arising from that substance is nonactionable for lack of actual malice.

The attempt to distinguish between form and substance is for analytical purposes and one should not construe this attempt to imply that form and substance are totally separable. Indeed, any change of wording within a quotation may change the explicit, implicit and speaker-referential meanings of the quotation no matter how literally synonymous the misquotation appears to be to the original. See *infra* notes 129-36 and accompanying text (discussing form/substance dichotomy and effect of formal change on meaning). Here, a misquotation that is termed "false as to form only" is one that does not contain the precise words actually uttered by the speaker, but that does relay the explicit, apparently intended message of the speaker—*i.e.*, something that would be a valid paraphrase. A misquotation that is termed "false as to substance" is one that changes the explicit, apparently intended meaning of the speaker's actual comments. The latter category includes misquotations that are complete fabrications.

66. See *supra* note 30 (citing *Carson* and *Bindrim* as examples of cases in which inquiry into defendant's knowledge of misquotation was unnecessary); *infra* notes 70-79 and accompanying text (explaining, *inter alia*, that knowledge of misquotation was not crucial element in actual malice analyses in *Bindrim* and *Carson*). Generally, in cases such as *Bindrim v. Mitchell*, 92 Cal. App. 3d 61, 155 Cal. Rptr. 29 (Cal. Ct. App.), *cert. denied*, 444 U.S. 984 (1979), and *Carson v. Allied News Co.*, 529 F.2d 206 (1976), in which the premise behind the quotations is itself false, it would seem unnecessary to split the actual malice inquiry into knowledge of form and knowledge of content, because knowledge of the false form would necessarily be subsumed within the knowledge of the false premise.

67. See *Masson v. New Yorker Magazine, Inc.*, 111 S. Ct. 2419, 2432 (1991) (asserting that fundamental principles of defamation law are sufficient to cover cases of misquotation, rendering creation of specific body of law for misquotation cases unnecessary). *But see*

Before attempting to develop a rational general approach to misquotation cases, it is instructive to examine and critique the opinions rendered in *Masson*. The Ninth Circuit's case law analysis is especially worth examining, both because it addresses the constitutional misquotation libel decisions rendered before *Masson* and because, through its misinterpretations and oversights, it illustrates many of the pitfalls into which courts may stumble in future misquotation cases.<sup>68</sup> Misquotation case law to date, even after the Supreme Court's *Masson* decision, has failed to develop into a comprehensive approach that generally can be employed to decide misquotation cases. Specifically, the written opinions in each of the misquotation cases relied upon by the Ninth Circuit majority are narrowly tailored and do not effectively translate from one case to another.<sup>69</sup>

The Ninth Circuit relied on *Bindrim v. Mitchell*<sup>70</sup> for the proposition that the privilege to falsify quotations is not boundless.<sup>71</sup> The *Bindrim*

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Comment, *Fabricated Quotations as Cause for Libel Recovery by a Public Figure*, 57 U. CHI. L. REV. 1353, 1384-85 (1990) (proposing that, in cases like *Masson*, plaintiff be required to prove both knowledge of falsity and knowledge of defamatory effect before being able to recover from defendant). Others have suggested that, as a general actual malice rule, all plaintiffs should be required to prove that the defendant knew of the defamatory effect of the publication at issue, in addition to knowing of its falsity. See Schauer, *Language, Truth and the First Amendment: An Essay in Memory of Harry Canter*, 64 VA. L. REV. 263, 281-94 (1978) (suggesting that plaintiff be required to prove defendant knew of defamatory effect of falsification to prove actual malice). However, such a rule has yet to be adopted by any court. Until such a rule is adopted, there is no legitimate reason why such a standard should be applied to misquotation cases while it is not applied to other types of libel cases. See *infra* notes 142-55 and accompanying text (suggesting method for applying existing requirements for actual malice to misquotation cases).

68. See *Masson v. New Yorker Magazine, Inc.*, 895 F.2d at 1537-39 (9th Cir. 1989) (attempting to apply of four inapposite misquotation cases to *Masson* facts), *rev'd*, 111 S. Ct. 2419 (1991). The Ninth Circuit relied on four cases in its misquotation libel law analysis: *Dunn v. Gannett New York Newspapers, Inc.*, 833 F.2d 446 (3d Cir. 1987); *Hotchner v. Castillo-Puche*, 551 F.2d 910 (2d Cir.), *cert. denied*, 434 U.S. 834 (1977); *Carson*, 529 F.2d 206; *Bindrim*, 92 Cal. App. 3d 61, 155 Cal. Rptr. 29. Before *Masson*, this was the extent of directly relevant post-*New York Times* case law on the subject of libel actions based upon misquotation brought by public figures.

69. See *infra* notes 70-100 and accompanying text (discussing *Masson* court's reliance on four inapposite misquotation cases).

70. 92 Cal. App. 3d 61, 155 Cal. Rptr. 29 (Cal. Ct. App.), *cert. denied*, 444 U.S. 984 (1979). In *Bindrim*, the California Court of Appeal upheld the trial court verdict that an author and a publisher had defamed the plaintiff in a novel by portraying the plaintiff as obscene and demanding with his patients. *Id.* at 82, 155 Cal. Rptr. at 41. The plaintiff, a psychologist who used a so-called "nude marathon"—a type of nude encounter session—for group therapy, sued the author and the publisher of a novel about a psychiatrist who also employed nude marathons as part of his therapeutic repertoire. *Id.* at 69-70, 155 Cal. Rptr. at 33-34. The plaintiff complained, *inter alia*, that he was libeled by a passage in the novel in which the fictional doctor insensitively and profanely attempted to persuade a clergyman to bring his wife to the nude marathon. *Id.* at 70, 155 Cal. Rptr. at 34. The Court of Appeal, noting that the defendant author had herself attended one of the plaintiff's nude marathons and knew that the literary portrayal of the event was inaccurate, upheld the jury's finding that the defendant had acted with the requisite actual malice. *Id.* at 72-73, 155 Cal. Rptr. at

court, before finding that supposed fictional characters in a novel written by the defendant were identifiable as the plaintiff psychiatrist and his patients,<sup>72</sup> found that the defendants knew that neither the plaintiff nor his patients had ever uttered quoted statements attributed to the fictional characters.<sup>73</sup> However, the court did not find it necessary to consider the effect of the misquotations separately from what the court characterized as the defendant's substantially inaccurate and defamatory description of the events that transpired at the nude encounter session being run by the plaintiff, at which the statements were purportedly made.<sup>74</sup> The *Bindrim* opinion's lack of concentration on the misquotations indicates that the court would have found the defendant's published statements to be false and defamatory regardless of the presence of misquotations.<sup>75</sup>

Similarly, in *Carson v. Allied News Co.*,<sup>76</sup> the court found that the defendant newspaper reporter had completely fabricated a story about

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35. The court further held that because the defendant publisher was on notice that the character in the novel might actually refer to the plaintiff and that the descriptions of events in the novel were inaccurate, the defendant publisher had published the paperback version of the novel with actual malice. *Id.* at 74, 155 Cal. Rptr. at 36. The court rejected the defendants' contention that the fictional psychiatrist could not be identified as the plaintiff, pointing out that transcripts of the encounter session attended by the defendant author closely paralleled the narrative in the novel. *Id.* at 76, 155 Cal. Rptr. at 37-38. Finally, in upholding the jury's verdict, the *Bindrim* court opined that the jury was entitled to decide whether a reader identifying the fictional doctor with the plaintiff would interpret the damaging passages as fiction, or as an accurate reflection of actions taken by the plaintiff. *Id.* at 78, 155 Cal. Rptr. at 39.

71. *Masson*, 895 F.2d at 1539. The *Masson* court did not render an opinion as to what should be the bounds of the privilege.

72. *Bindrim*, 92 Cal. App. 3d at 75-76, 155 Cal. Rptr. at 37-38.

73. *Id.* at 72-73, 155 Cal. Rptr. at 35-36.

74. *Id.* at 77, 155 Cal. Rptr. at 38.

75. *See id.* at 72-73, 155 Cal. Rptr. at 35 (holding merely that defendant's reckless disregard for truth was established because she knew what transpired at encounter session, and must have known that her literary portrayals were different).

76. 529 F.2d 206 (7th Cir. 1976). In *Carson*, the Seventh Circuit Court of Appeals reversed the district court's summary judgment in favor of the defendant newspaper which had printed a story, including purported quotations of the plaintiff television personality, alleging that the plaintiff had dishonorable motives for moving the broadcast location of his television program from New York to California. *Id.* at 208, 214. The defendant, publisher of the tabloid *National Insider*, published an article alleging that plaintiff Carson wanted to move his *Tonight Show* from New York to Hollywood to be near his soon-to-be second wife, Joanna Holland—also a plaintiff—who, the newspaper claimed, had broken up Carson's first marriage. *Id.* at 208. Plaintiffs conceded that they both were public figures and asserted that Holland had never lived in California until a few weeks before her marriage to Carson and that Carson had not met Holland until several months after his separation from his first wife. *Id.* at 211. The defendants claimed that the reporter who wrote the story based his facts upon an article that had appeared several weeks earlier in a Chicago newspaper. *Id.* The court found that the defendant had failed to disclose any source from which it might have learned that Holland broke up Carson's first marriage. *Id.* at 212. In addition, the writer of the story disclosed that he simply had fabricated a purported conversation between Carson and network executives "as a logical extension" of occurrences described in the earlier Chicago article. *Id.*

television personality Johnny Carson's purportedly selfish and unjustifiable reasons for moving the broadcast location of his *Tonight Show* from New York to California.<sup>77</sup> The Ninth Circuit cited *Carson* for the proposition that a court may infer actual malice from a misquotation when the misquoted statement is wholly the product of the author's imagination.<sup>78</sup> However, as in *Bindrim*, because the premise behind the falsified quotations was itself defamatory and originated entirely in the defendant's imagination, the court found it unnecessary to opine as to the separate reputational harm, if any, caused by the defamatory quotations attributed directly to plaintiff Carson.<sup>79</sup>

While the Ninth Circuit merely drew vague conclusions from *Bindrim* and *Carson*, the court relied heavily on *Dunn v. Gannett New York Newspapers, Inc.*<sup>80</sup> and *Hotchner v. Castillo-Puche*<sup>81</sup> in formulating the two

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212-13. The *Carson* court held that, because of the foregoing established falsifications, the plaintiffs were entitled to a jury determination on the existence of actual malice. *Id.* at 213. Based upon the record, the court believed that the jury reasonably could decide that the defendant had acted with actual malice. *Id.*

77. *Carson v. Allied News Co.*, 529 F.2d 206, 210-13 (7th Cir. 1976).

78. *Masson v. New Yorker Magazine, Inc.*, 895 F.2d 1535, 1539 (9th Cir. 1989), *rev'd*, 111 S. Ct. 2419 (1991).

79. *See Carson*, 529 F.2d at 213 (holding that plaintiff was entitled to jury determination regarding actual malice based both upon accusations that plaintiff was marriage breaker and upon defendant's fabricated recounting of remarks made by plaintiff).

80. 833 F.2d 446 (3d Cir. 1987). In *Dunn*, the Third Circuit Court of Appeals affirmed the district court's summary judgment in favor of the defendant newspaper publisher who, the plaintiff mayor claimed, libeled the plaintiff by inaccurately translating remarks the plaintiff had made regarding the city's Hispanic population. *Id.* at 452. The defendant's Spanish language newspaper had covered a campaign debate in which the mayor of Elizabeth, New Jersey implied that foreigners moving into Elizabeth who had not yet been assimilated into American culture might be partly responsible for the city's litter problem. *Id.* at 448. Several days later, a headline appeared in the newspaper reading, in Spanish, "Elizabeth Mayor on the attack: CALLS HISPANICS 'PIGS.'" *Id.* The plaintiff brought a libel suit based upon this headline and upon a subsequently published open letter to the plaintiff which compared the plaintiff to Adolf Hitler and Fidel Castro. *Id.* at 448, 453-54. Referring to the Spanish word "cerdos"—in English, "pig"—as a "fair, albeit inadequate, translation" of "litterbug," the court held that the defendant's mischaracterization of the plaintiff's remarks was not sufficient ground to hold the newspaper liable under the *New York Times* actual malice standard. *Id.* at 452. Additionally, the court also held that the open letter published by the defendant constituted pure opinion and, therefore, was protected absolutely by the First Amendment. *Id.* at 454-55.

81. 551 F.2d 910 (2d Cir. 1977), *cert. denied*, 434 U.S. 834 (1977). In *Hotchner*, the Second Circuit Court of Appeals reversed a libel judgment against a defendant who had published a book containing several defamatory remarks about the plaintiff. *Id.* at 914. Plaintiff Hotchner, a successful writer and friend of the late Ernest Hemingway, brought suit against the defendant publisher Doubleday & Co., charging that Hotchner had been libeled by several comments appearing in Doubleday's English translation of Jose Luis Castillo-Puche's Spanish language memoir of Hemingway. *Id.* at 911. In his book, Castillo-Puche made several unflattering remarks about Hotchner and also attributed to Hemingway at least one equally unflattering remark regarding Hotchner. *Id.* at 911-12. Regarding Castillo-Puche's opinions, the court held that Doubleday could not be liable because, based upon the author's reputation and photographs of the author with Hotchner, Doubleday had good reason to believe that

specific actual malice tests the court employed in its analysis.<sup>82</sup> In *Dunn* the plaintiff mayor sued a Spanish language newspaper for improperly translating plaintiff's English language remarks as referring to local Hispanics as "cerdos"—a Spanish word meaning "pigs"—when the plaintiff had actually implied the word "litterbug."<sup>83</sup> The *Dunn* court, recognizing that there is no exact Spanish equivalent for the English word "litterbug," held that the plaintiff had failed to produce evidence to show that the translation was not a fair one.<sup>84</sup> The court held that because no reasonable jury could find actual malice with convincing clarity, summary judgment in favor of the defendant was proper.<sup>85</sup> It was from *Dunn* that the Ninth Circuit gleaned the proposition that courts should not infer actual malice from a defendant's knowing misquotation of a plaintiff if the falsified quotations are rational interpretations of ambiguous comments made by the plaintiff.<sup>86</sup> However, in *Dunn* because the plaintiff's remarks required translation, a verbatim quotation would have been impossible. Unlike the case in *Masson*, the *Dunn* defendant had no choice but to interpret the plaintiff's remarks regardless of whether he chose to quote or paraphrase the plaintiff.<sup>87</sup> Consequently, the defendant properly benefitted from the constitutionally mandated margin for error in judging the most accurate way to reflect the plaintiff's remarks.<sup>88</sup>

Castillo-Puche had based his opinions on first hand knowledge about Hotchner. *Id.* at 913-14. Finally, regarding the remarks that Castillo-Puche had attributed to Hemingway, the *Hotchner* court ruled that although Doubleday had altered the remarks from the version provided by Castillo-Puche, the publisher's alterations neither changed the subject matter nor increased the defamatory content of the remarks as originally submitted by Castillo-Puche. *Id.* at 914. Because of this, the court ruled that Doubleday did not act with actual malice and, therefore, was not liable for publication of the statement. *Id.*

82. See *Masson*, 895 F.2d at 1539 (describing the conclusions drawn from *Dunn* and *Hotchner*); see also *supra* notes 17-25 and accompanying text (discussing Ninth Circuit's application of rational interpretation and substantive content tests).

83. *Dunn v. Gannett New York Newspapers, Inc.*, 833 F.2d 446, 447-48 (3d Cir. 1987).

84. *Id.* at 452.

85. *Id.*

86. *Masson*, 895 F.2d at 1539.

87. See *id.* at 1555 (Kozinski, J., dissenting) (stating that translation necessarily entails judgment, while no judgment is required to quote an English-speaking person in English); see also *Washington Post*, Nov. 19, 1990, at D3, col. 3. (detailing comments by United States State Department translator regarding difficulties in retaining nuances of meaning when translating from one language to another). Regarding translations from one language to another, Alexis Oblensky, Chief of the United States State Department's Russian translation section and United States supervisor of translation for the Treaty on Conventional Armed Forces in Europe, said, "No language is translatable verbatim into another language. And therefore when one deals with [translation], the problem that arises . . . is how to give as close a possible verbatim version of the other language texts without biasing the substance and the sense." *Id.* (ellipses in original).

In addition to the fact that translation was necessary in *Dunn*, whether the use of quotation marks in the contested newspaper headline was meant to denote a verbatim quotation or simply to indicate that the word "cerdos" was being used figuratively was unclear. *Dunn*, 833 F.2d at 451.

88. See *Masson v. New Yorker Magazine, Inc.*, 111 S. Ct. 2419, 2433-34 (1991) (citing

*Hotchner* is the misquotation case that is most factually similar to *Masson*.<sup>89</sup> In *Hotchner* the court found that the defendant publishers knowingly had changed the wording of a quotation purportedly made by the late Ernest Hemingway about the plaintiff from “[Hotchner is] dirty and a terrible ass-licker. There’s something phony about him. I wouldn’t sleep in the same room with him,” to the milder “I don’t trust him.”<sup>90</sup> Although the court also found the misquotation to be defamatory, it held that the knowingly falsified quotation was not actionable because the falsification did not increase the defamatory impact that Hemingway’s actual quotation otherwise would have had.<sup>91</sup> In fact, by bowdlerizing Hemingway’s original bawdy quotation, the defendants made it markedly less defamatory of the plaintiff.<sup>92</sup>

The Ninth Circuit drew heavily upon the *Hotchner* court’s holding that the defendants could not be held liable for their knowing alteration of Hemingway’s quotation because “the change did not increase the defamatory impact or alter the substantive content” of the original remarks.<sup>93</sup> The appellate majority chose to read the foregoing *Hotchner* clauses disjunctively, believing that the Second Circuit had intended to create in that case two separate mechanisms for absolving defendants in misquotation cases.<sup>94</sup> The Ninth Circuit cited *Hotchner* for the proposition that writers are free to fictionalize quotations so long as they do not “alter the substantive content” of the speaker’s remarks, ignoring the first part of the *Hotchner* holding regarding differences in defamatory impact.<sup>95</sup>

Because the *Hotchner* court disposed of the plaintiff’s misquotation claim in less than one hundred words, citing no authority, it is not clear whether that court intended its holding always to be read as a whole, or whether the court believed the elements of the holding could be employed

*Time, Inc. v. Pape*, 401 U.S. 279 (1971) & *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984)) (describing proper application of rational interpretation standard and declining to apply standard to case at bar).

89. *See Hotchner v. Castillo-Puche*, 551 F.2d 910, 914 (2d Cir. 1977), *cert. denied*, 434 U.S. 834 (1977) (explaining that defendants knew that they had altered third party’s quotation, but did not believe they had changed quotation’s substance). *Hotchner* is in one sense the case most relevant to the *Masson* situation in that the defendants in *Hotchner* altered a quotation, but did not believe that they had changed the substantive meaning of the quotation. *Id.* However, *Hotchner* is also significantly different from *Masson* in that *Hotchner* involved the misquotation of a third party regarding the plaintiff (third person misquotation case), *id.*, whereas *Masson* involved the misquotation of the plaintiff himself (first person misquotation case). *Masson*, 895 F.2d at 1536. *See infra* note 122 (contrasting elements of first and third person misquotation cases).

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

91. *Id.*

92. *Id.*

93. *Masson v. New Yorker Magazine, Inc.*, 895 F.2d 1535, 1538 (9th Cir. 1989), *rev’d*, 111 S. Ct. 2419 (1991). *See Hotchner*, 551 F.2d at 914 (holding that defendants could not be liable because they neither increased defamatory impact, nor changed substantive content of speaker’s actual remarks).

94. *See Masson*, 895 F.2d at 1538, 1539 (drawing conclusion that defendant is absolved if she believed merely that she did not change substantive content of plaintiff’s remarks).

95. *See id.* at 1539 (quoting *Hotchner*, 551 F.2d at 914).



separately.<sup>96</sup> However, if one assumes that a federal court of appeals would not formulate a special new actual malice test without more thoroughly explaining itself, it is most consistent with existing libel law to read "or alter the substantive content" as a mere qualifier of the clause "did not increase the defamatory impact" and not as an alternative criterion for excusing defendants from liability. If read this way, the *Hotchner* analysis is merely a restatement of existing libel law: defendants may only be liable for defaming a plaintiff when the plaintiff is actually defamed by the defendants' falsification.<sup>97</sup>

This reading first provides that a falsification of a quotation by a defendant cannot be actionable if it does not add to the defamatory impact of the original statement. This is then qualified by the "substantive content" provision: that even if the falsification does not increase the defamatory impact of the statement, the change can still be actionable if the change gives rise to a wholly different defamatory meaning, whether more or less severe than that of the original statement.<sup>98</sup> In other words, if the *Hotchner* defendants had changed Hemingway's remark to read, "I think Hotchner is a very poor writer," they would have been liable for their falsification despite the fact that the defamatory sting of the latter statement may be no greater than that of Hemingway's calling Hotchner "phony" and "a terrible ass-licker." The Second Circuit seemed to be ensuring explicitly that its opinion could not be read to imply that a publisher is free to publish a false quotation that defames the plaintiff in a manner entirely different than would the plaintiff's actual statement so long as the misquotation is less defamatory of the plaintiff than the plaintiff's actual statement.<sup>99</sup> The *Hotchner* court squarely and properly based its decision summarily to dismiss

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96. See *Hotchner*, 551 F.2d at 914 (disposing of misquotation claim in less than 100 words). The *Hotchner* court's entire analysis concerning the misquotation consisted of the following:

Appellee contends that [the defendant] should be liable simply because it knowingly published a bowdlerized version of Hemingway's alleged statement. We disagree. It is true that in transforming Hemingway's words to the much milder "I don't trust him," [the defendant] was fictionalizing to some extent. However, the change did not increase the defamatory impact or alter the substantive content of Hemingway's statement about [the plaintiff]. If [the defendant] could not have been liable for publishing the uncut version, it cannot be liable for deciding to make the passage less offensive to [the plaintiff].

*Id.* This indicates that the Second Circuit's decision revolved around the fact that the falsity was not defamatory, and was not based solely upon the raw fact that the defendants had not altered the quotation's substantive content.

97. See *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695, 2706 n.7 (1990) (noting that falsity issue relates only to defamatory facts within statement).

98. The phrase "the change did not increase the defamatory impact or alter the substantive content," *Hotchner*, 551 F.2d at 914, is most reasonably interpreted as an indivisible whole and not as an either/or proposition.

99. See RESTATEMENT (SECOND) OF TORTS § 581A comment f (1977) (calling fact that plaintiff undertook actions different from, but at least as reprehensible as actions alleged in contested publication insufficient to absolve defendant of liability).

the plaintiff's suit on the fact that the only defamatory impact arising from the contested quotation came from the substantive residue of Hemingway's actual remarks, not from the falsification in which defendants engaged.<sup>100</sup>

The two main actual malice tests employed by the Ninth Circuit—the rational interpretation test drawn from *Dunn*<sup>101</sup> and the substantive content test gleaned from *Hotchner*<sup>102</sup>—merely clouded the issue of whether the defendant knowingly published a defamatory falsity. As in any other type of libel case, a court entertaining a libel suit brought by a public figure and based upon misquotation should first determine whether the elements of a libel action exist—that is, whether there is an actionable defamatory falsity concerning the plaintiff, published with actual malice by the defendant.<sup>103</sup> Misquotation cases may possess unique and difficult elements which need to be addressed, but once these elements are understood it becomes easier to fit the spectrum of misquotation cases within the general analytical framework that has been developed since *New York Times*.<sup>104</sup>

Because many of the elements of misquotation libel cases are ambiguous, functionally overlapping and situation-dependent, a hypothetical is useful to evaluate the logic and practical applicability of the proposed analysis, as well as to make the analysis clearer. In the hypothetical, reporters question P, the president of a large corporation often criticized for its poor record in hiring and promoting women, regarding P's failure to promote mid-level manager F, a female, into a vacant vice-presidency of the corporation. The entire interview consists of the following exchange:

*President P:* While the directors highly value the contribution F has made to the corporation, I simply do not believe that women like F are sufficiently tough to handle the complex responsibilities of the position.

*Reporter:* Does the fact that F refused your sexual advances have anything to do with the decision?

*President P:* That question does not merit a response. Thank you, now I have a plane to catch.

The following day, coverage of the comments appears in the city's four newspapers. Unfortunately, none of the quotations of P are entirely accurate. The accounts are as follows:

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100. See *Hotchner*, 551 F.2d at 914 (holding defendants not liable because they neither increased defamatory impact, nor changed substantive content of speaker's original remarks).

101. *Dunn v. Gannett New York Newspapers, Inc.*, 833 F.2d 446 (3d Cir. 1987). See *supra* notes 80, 82-88 and accompanying text (discussing Ninth Circuit's application of rational interpretation test from *Dunn*).

102. *Hotchner*, 551 F.2d 910. See *supra* notes 81, 89-100 and accompanying text (explaining and critiquing Ninth Circuit's use of *Hotchner* to support court's application of substantive content test).

103. *Old Dominion v. Austin*, 418 U.S. 264, 284 (1974).

104. See *Masson v. New Yorker Magazine, Inc.*, 111 S. Ct. 2419, 2432 (1991) (stating that existing principles of libel law are sufficient to decide cases of misquotation and, therefore, declining to create specific actual malice test for such cases).

*Newspaper #1:* When asked about the corporation's failure to promote F, P replied, "I feel that females of F's ilk are not tenacious enough to successfully undertake the difficult tasks that the job entails."

*Newspaper #2:* When asked about the corporation's failure to promote F, P replied, "I instead am considering making her the manager of our low pressure Phoenix operation, to which I think a woman like F would be best suited."

*Newspaper #3:* When asked about the corporation's failure to promote F, P replied, "I think little fillies like her are just too damned cute and fragile to be successful in a big, scary job like that."

*Newspaper #4:* When asked about the corporation's failure to promote F, P replied, "Any woman who refuses me should not expect a promotion any time soon."

After seeing these fractured versions of his interview, P is quite angry and sues all four newspapers for libel. The attribution of all four printed quotations appears to be injurious to P's reputation, albeit in different ways.<sup>105</sup> In addition, all four versions above purport to quote P directly, but none of them is accurate. How should a court respond to each case?

A court's primary task after establishing that the defendant has published material that is *prima facie* injurious to a plaintiff's reputation is to determine whether an actionable portion of defamation arises from a false assertion.<sup>106</sup> Sometimes determining whether injury arises from falsity is not difficult. A court does not need to surgically explore the genesis of the falsity if the truth regarding the subject matter of the false and defamatory allegation would not be at all injurious to the plaintiff's reputation.<sup>107</sup> Even in cases where the truth regarding the allegation is itself harmful to the plaintiff's reputation, if the true and false elements of the published assertion are discrete, a court also can determine whether the injury arises from a falsity with relative ease.<sup>108</sup> The most difficult cases are those in which

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105. See *infra* text accompanying notes 119-40 (discussing, *inter alia*, possible defamatory implications arising from each hypothetical misquotation).

106. See *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1196 (9th Cir.), *cert. denied*, 110 S. Ct. 59 (1989) (explaining that existing case law prohibits recovery for defamation unless publication contains a defamatory statement of false fact).

107. See *Carson v. Allied News Co.*, 529 F.2d 206 (7th Cir. 1976) (involving, *inter alia*, completely fabricated story about television personality's marital arrangements). As an example of a total fabrication, if a newspaper reported, "K (a prominent politician) smoked crack cocaine at the Hilton Hotel," when K actually had never smoked crack at all, the fact that the defamation of K arises from the false claim that K smoked crack would be readily apparent.

108. See *Herrmann v. Newark Morning Ledger Co.*, 48 N.J. Super 420, 431-32, 138 A.2d 61, 68-69 (holding that newspaper's misidentification of local labor union chapter to which plaintiff belonged was immaterial to libel claim that plaintiff had attended national labor conventions without proper credentials). As an example of a story in which true and false elements are easily separable, if politician K actually had smoked crack at the Ritz Hotel, but a newspaper reported that "K was seen smoking crack at the Hilton," the only falsity contained

defamation does arise from a false element of the contested publication, yet the truth regarding the same element would also damage the plaintiff to some degree.<sup>109</sup> Both *Masson* and misquotations #3 and #4 of the hypothetical are representative of the latter type of case. In all three, the speaker's original remarks, if published, might have injured his reputation, but the publisher's falsifications increased the harmful effects of the comments.<sup>110</sup> Because the change of a single word in a quotation may alter the connotative meaning of the formally accurate phrasing around the word, separating what is true, false, defamatory and nondefamatory into discrete elements can be difficult in a misquotation case. As the Supreme Court majority in *Masson* recognized,<sup>111</sup> a misquotation case is a prime opportunity for the application of the common-law substantial truth doctrine, which provides that when the defamatory effect produced by a false statement is

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in the newspaper's publication would be the claim that K had been at the Hilton, not at the Ritz, while smoking crack. Although an element of the newspaper's allegation is false, the defamation does not arise from the falsity because K would suffer the same damage to his reputation no matter which hotel he was alleged to have been in while smoking crack. Therefore, despite the falsification, the newspaper cannot be liable for any reputational harm inflicted on the plaintiff by the published material.

109. See *Liberty Lobby v. Anderson*, 746 F.2d 1563, 1568 & n.6 (D.C. Cir. 1984) (stating that plaintiff can still be defamed by falsity even if truth regarding matter also would be injurious to plaintiff, but that, at certain point, incremental falsity becomes nonactionable), *rev'd on other grounds*, 477 U.S. 242 (1986). As an example of a story in which the true and false versions would both be defamatory, if a newspaper reports that K was seen on the street purchasing three grams of cocaine when K actually purchased only two grams of cocaine, the false allegation probably is not actionable because the overriding defamatory impact of the statement—that K purchased illegal narcotics from a street peddler—is true. On the other hand, if the newspaper reports that K was seen selling two grams of cocaine when, in fact, K actually purchased two grams of cocaine, the falsification probably would be actionable. In the latter instance, K, in truth, had purchased illegal narcotics, while the false allegation led the reading public to believe that K was a street peddler of narcotics—in our society a qualitatively worse attribution.

110. See *Masson v. New Yorker Magazine, Inc.*, 895 F.2d 1535, 1564 (9th Cir. 1989) (Kozinski, J. dissenting) (comparing *Masson's* actual disdainful remarks about Freud with possibly stronger remarks about Freud attributed to *Masson* by Malcolm), *rev'd*, 111 S. Ct. 2419 (1991); *infra* text accompanying notes 128-40 (discussing difference between reputationally harmful effects of actual statement in hypothetical with harmful effects inflicted by misquotations #3 and #4).

111. See *Masson*, 111 S. Ct. at 2432-33 (employing doctrine of substantial truth to facts of case). Justices White and Scalia overlook the traditional role of the substantial truth doctrine in their dissent from the majority's holding that a knowing alteration of a speaker's statement does not constitute actual malice unless the alteration causes a material change in the meaning arising from the statement. These Justices claim that, in deciding a summary judgment motion, any quotation which contains words that the speaker did not utter should be deemed false, and that whether the falsity gives rise to an actionable libel should be a separate inquiry. *Id.* at 2438 (White, J., dissenting in part). However, the substantial truth doctrine provides that if an assertion is essentially true in its defamatory implication, then the assertion is not to be considered false for purposes of a libel action arising from the assertion. See *infra* notes 113-18 and accompanying text (explaining substantial truth doctrine). Thus, the doctrine precludes a court from considering a quotation to be false in the libel sense unless attribution of the altered quotation is more libelous than, or libelous in a different way than attribution of the correct quotation would be.

not more than negligibly different in degree or subject matter from the defamatory effect that would arise from the truth relating to the allegation, then the statement, although defamatory, is nonactionable.<sup>112</sup>

In libel actions, courts often invoke the platitude that truth is an absolute defense to libel,<sup>113</sup> but also that a publication need not be literally true for a publisher to escape liability—the publication need only be “substantially true.”<sup>114</sup> This doctrine of substantial truth is deceptive in name because a publication may be fraught with falsifications, intentional or not, yet a defendant can be liable only if an actionable amount of reputational harm to the plaintiff actually arises from a falsification—otherwise, the plaintiff can have no cause of action for libel.<sup>115</sup> As courts often explain,

112. RESTATEMENT (SECOND) OF TORTS § 581A comment f (1977). “It is not enough that the accused person is found to have engaged in some other substantially different kind of misconduct, even though it is equally or more reprehensible.” *Id.* See *Aids Counseling and Testing Centers v. Group W Television, Inc.*, 903 F.2d 1000, 1004 (4th Cir. 1990) (holding that if what court termed as statement’s “gist” or “sting” is substantially true, minor inaccuracies will not support libel action).

113. See, e.g., *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 767 (1986) (describing Pennsylvania law to be that truth is absolute defense); *Guccione v. Hustler Magazine, Inc.*, 800 F.2d 298, 301 (2d Cir. 1986) (holding proposition that truth is absolute defense to libel to be fundamental under New York law), *cert. denied*, 479 U.S. 1091 (1987); *Hoffman v. Washington Post Co.*, 433 F. Supp. 600, 600 (D.D.C. 1977) (asserting that truth is complete defense to libel action), *aff’d*, 578 F.2d 442 (1978); *Kemper v. American Broadcasting Cos.*, 365 F.Supp. 1275, 1276-77 (S.D. Ohio 1973) (holding that in Ohio truth is complete defense to libel action); *Gantry Constr. Co. v. American Pipe & Constr. Co.*, 49 Cal. App. 3d 186, 122 Cal. Rptr. 834 (1975) (calling idea that truth is complete defense to libel fundamental); see also RESTATEMENT (SECOND) OF TORTS § 581A (1977) (stating that publisher of defamatory statement of fact is not liable for defamation if statement is true).

114. See, e.g., *Guccione v. Hustler Magazine, Inc.*, 800 F.2d 298, 301 (2d Cir. 1986) (holding that if alleged defamatory statement is substantially true, action must be dismissed, regardless of injury to plaintiff’s reputation); *Alioto v. Cowles Communications, Inc.*, 623 F.2d 616, 619 (9th Cir. 1980) (stating that, under California law, defendant can defeat libel suit by proving that implication of allegedly defamatory publication is substantially true), *cert. denied*, 449 U.S. 1102 (1981); *Maheu v. Hughes Tool Co.*, 569 F.2d 459, 465-66 (9th Cir. 1977) (same).

The substantial truth doctrine is a common-law creation which originated when truth was always a defense to libel. See R. SACK, *supra* note 29, at 39 n.27. In *Hepps*, the Supreme Court made explicit that public figure libel plaintiffs are now constitutionally required to prove that an allegedly defamatory statement is false in order to recover damages. 475 U.S. at 777. However, although the burden of proof has shifted, courts still use the substantial truth doctrine in determining whether a statement is actionably false and defamatory. See *Schiavone Constr. Co. v. Time, Inc.*, 847 F.2d 1069, 1084 (3d Cir. 1988) (explaining that truth must be as broad as defamatory sting to preclude libel action); *Zerangue v. TSP Newspapers, Inc.* 814 F.2d 1066, 1073 (5th Cir. 1987) (stating that publication is to be considered substantially true if its gist or sting is true); see also Note, *Libel Proof Plaintiffs—Rabble Without A Cause*, 67 B.U.L. REV. 993, 1015 (1987) (summarizing substantial truth doctrine).

115. See *Aids Counseling and Testing Centers v. Group W Television, Inc.*, 903 F.2d 1000, 1004 (4th Cir. 1990) (holding that plaintiffs may not recover in libel by combining harm arising from true statements with falsity of separate, immaterial statements); RESTATEMENT (SECOND) OF TORTS § 581A comment f (calling establishment of literal truth unnecessary to defend against libel action if substance of defamatory charge is true).

this is because a publication is to be considered substantially true if the "gist" or "sting" of the published defamation is true.<sup>116</sup> Essentially, the core purpose of the substantial truth doctrine is simply to discern whether the defamatory effect of a contested statement arises overwhelmingly from a gleam of truth shining through any falsity, or whether the falsity superimposed upon the truth also contributes an actionable injurious effect.<sup>117</sup> The complexities of the substantial truth doctrine should not obscure that the doctrine is merely one way of describing the court's essential responsibilities to determine from where within a publication<sup>118</sup> defamation is coming and to determine whether the source of that defamation is false.

Applying the substantial truth test to the hypothetical, if one compares newspaper #1's quotation word-for-word with P's actual statement, the published quotation seems almost totally false. On a strictly quantitative basis, only seven of the twenty-one words in newspaper #1's quotation are in P's actual statement. As a reflection of the audible sounds that wafted from P's mouth, then, version #1 fails miserably. On the other hand, if one focuses on the substantive meanings—the meaning seemingly intended by the speaker—of the two quotations, one could conclude that newspaper #1's summary of P's remarks is accurate—that is, each would make a perfectly acceptable paraphrase of the other. However, in applying the substantial truth doctrine to misquotation cases, one should not merely compare the meaning of the misquotation with the meaning of the actual remarks. Instead, one should put primary emphasis on comparing the injurious implications of the defamatory allegation with the implications that would arise from the truth regarding that allegation.<sup>119</sup> In misquotation cases, the defamatory allegation usually is not the misquotation itself, but the attribution of the misquotation to the speaker.<sup>120</sup>

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116. See, e.g., *Group W*, 903 F.2d at 1004 (asserting that minor inaccuracies will not support defamation claim if gist or sting of published statement is true); *Schiavone Constr. Co. v. Time, Inc.*, 847 F.2d 1069, 1084 (3d Cir. 1988) (explaining that truth must be as broad as defamatory sting to preclude libel action); *Zerangue v. TSP Newspapers, Inc.*, 814 F.2d 1066, 1073 (5th Cir. 1987) (stating that publication is to be considered substantially true if its gist or sting is true); *Alioto v. Cowles Communications, Inc.*, 623 F.2d 616, 619 (9th Cir. 1980) (stating that statement is substantially true if gist or sting of publication is true).

117. See *Guccione*, 800 F.2d at 301-02 (approving trial court jury charge defining substantial truth test as whether published statement had different impact on mind of reader than literal truth).

118. See BLACK'S LAW DICTIONARY 1228 (6th ed. 1990) (defining publication in libel sense). The noun "publication" as used here refers to any material published in the libel sense in that it is transmitted from one person to another. The word is not meant to apply exclusively to mass media, although this may be the most common usage.

119. See *supra* notes 113-18 and accompanying text (explaining that substantial truth doctrine involves truth of defamatory implications).

120. See *Dunn v. Gannett New York Newspapers, Inc.*, 833 F.2d 446, 447 (3d Cir. 1987) (describing purported libel at issue to be attribution of remarks to plaintiff, not the remarks themselves); *Bindrim v. Mitchell*, 92 Cal. App. 3d 61, 71, 155 Cal. Rptr. 29, 35 (Cal. Ct. App.) (characterizing purported libel in question to be not quotations themselves, but suggestion, through quotations, that plaintiff used obscene language), *cert. denied*, 444 U.S. 984 (1979).

When a publisher quotes an individual, that publisher essentially is claiming that the individual engaged in a particular action—the articulation of a specified group of words. Uttering a statement, after all, is an act in a similar sense to that of robbing a bank, eating a bowl of spaghetti, accepting a bribe, or even thinking a thought.<sup>121</sup> In a libel case in which the defendant effects a defamation by attributing a certain act to the plaintiff, the defamatory harm to the plaintiff would stem from the public's assessment of the plaintiff's character as evidenced by the action that he is purported to have performed. Likewise, in most imaginable misquotation cases involving misquotation of the plaintiff himself, the defamatory allegation would be the defendant's claim that the plaintiff executed a certain act—that of speaking particular words.<sup>122</sup> While the Supreme Court recognized that the attribution of the misquotation—not the misquotation itself—was the relevant defamatory assertion,<sup>123</sup> the Ninth Circuit majority failed to realize this. Therefore, the appellate court mistakenly compared the substantive meaning of Malcolm's misquotations to the meanings of Masson's actual remarks.<sup>124</sup> Instead, the court should have compared the defam-

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121. See S. LITTLEJOHN, *THEORIES OF HUMAN COMMUNICATION* 105 (1983) (stating that to speak is to perform an act). "When one speaks, one performs an act. The act may involve stating, questioning, commanding, promising, or any of a number of other acts." *Id.*

122. For example, in cases in which the plaintiff himself has been misquoted, the defamatory assertion would take the form "P said, 'XYZ.'" See *Dunn v. Gannett New York Newspapers*, 833 F.2d 446, 447-48 (3d Cir. 1987) (considering newspaper's allegation that "[plaintiff] calls Hispanics 'pigs'" to be purportedly defamatory assertion at issue). "XYZ" itself usually would not be the defamatory assertion, except in the case that P might be quoted as saying something like, "I, P, am an axe murderer." The statement itself then might be considered to be the defamatory assertion, although the attribution of such a statement to P would also be a defamatory assertion with two implications: (1) that P is an axe murderer; and (2) that P is anxious to let others know he is an axe murderer.

Conversely, in most imaginable cases where a third person has been misquoted regarding the plaintiff, the defamatory assertion is the quoted statement itself, because the assertion usually would be merely a republication of injurious remarks made about the plaintiff. For example, if a publisher writes, "T claims, 'P robbed me blind with his insurance scam,'" it is "P robbed [T] blind with his insurance scam" that is the defamatory assertion—not the attribution of that remark to T. Of course, in certain circumstances, the attribution of the remark—especially if it expresses an opinion—to a particular third person could be considered to be itself the defamatory assertion. For example, in *Hotchner* the defendants published, in essence, the assertion: Hemingway said, "I don't trust the plaintiff." *Hotchner v. Castillo-Puche*, 551 F.2d 910, 914 (2d Cir.), *cert. denied*, 434 U.S. 834 (1977). Here, the claim that someone does not trust the plaintiff is not the only element defamatory of the plaintiff. Presumably, the fact that Hemingway was the one who felt this way also injured the plaintiff's reputation—both because Hemingway was a highly regarded personality and because he was perceived to be the plaintiff's friend, thus stinging the plaintiff that much more. See *id.* at 912 (detailing Hemingway's close relationship with plaintiff).

123. See *Masson v. New Yorker Magazine, Inc.*, 111 S. Ct. 2419, 2431 (1991) (defining as key question whether attribution of words to Masson that Masson never uttered constituted falsity requisite to maintain libel action).

124. See *Masson v. New Yorker Magazine, Inc.*, 895 F.2d 1535, 1539-46 (9th Cir. 1989) (comparing substantive meanings of Malcolm's misquotations to substantive meanings of Masson's claimed actual remarks), *rev'd*, 111 S. Ct. 2419 (1991).

atory implications arising from the attributions of the misquotations to Masson with the implications that would have arisen from attribution of Masson's actual remarks to Masson.<sup>125</sup>

Thus, in newspaper #1's quotation, the alleged defamatory allegation is: "P replied, 'I feel that females of F's ilk are not tenacious enough to successfully undertake the difficult tasks that the job entails.'" <sup>126</sup> Under one reasonable construction, the foregoing allegation asserts that P made a statement which would lead the public to believe that P may hold a sexist viewpoint—probably a defamatory assertion. Comparatively, the published attribution of P's true remarks to P—"P replied, 'I simply do not believe that women like F are sufficiently tough to handle the complex responsibilities of the position'"—would give rise to an almost identical defamatory impact in both subject matter and severity. Just as is the case with newspaper #1's attribution, the revelation that P spoke the words that he actually did utter could also lead the public to believe that P may be a sexist. In addition, the form of wording chosen by newspaper #1 to effect its misquotation itself does not add any extra force to the sexist implication of

125. Comparison of the different analyses employed by the Supreme Court and the Ninth Circuit to the same misquotation reveals the courts' divergent understandings of what constitutes a false and defamatory misquotation. For example, Malcolm asked Masson about why Masson had ended a lecture to a group of psychoanalysts with a stinging remark about the "sterility" of psychoanalysis. *Masson*, 895 F.2d at 1542. Malcolm quoted Masson as replying, "[the remark] was totally gratuitous. I don't know why I put it in." *Id.* Malcolm's tape recordings indicated that, in fact, Masson had replied, *inter alia*, that "[the remark] was [a] . . . possibly, gratuitously offensive way to end a paper to a group of analysts" and that his reason for making the remark was that the remark "was true." *Masson*, 111 S. Ct. at 2426-27. In comparing the defamatory effect of Masson's actual remarks with the effect of the purported falsification, the Supreme Court concluded that "it is conceivable that the alteration results in a statement that could injure a scholar's reputation." *Id.* at 2437. The Ninth Circuit, though, concluded merely that the alteration "did not alter the substantive content" of Masson's answer. *Masson*, 895 F.2d at 1543. The key difference between the two inquiries is that, while the Supreme Court considered the effect arising from the attribution of the remarks to Masson, the Ninth Circuit examined only the substantive meaning of the quoted words themselves.

While the substantive meaning of the words enveloped by quotation marks is not the primary element to be considered in applying the substantial truth test, this is not to imply that such meanings are without importance. Actually, these meanings are necessarily part of the consideration of the substantial truth of the defamatory implications in the attribution of the misquotation to the speaker. The point is merely that two statements attributed to a speaker may be roughly synonymous, yet each may yield different defamatory implications regarding the plaintiff. See *infra* notes 128-37 and accompanying text (illustrating how denotatively synonymous statements can reflect differently upon reader).

126. The defamatory assertion in each hypothetical misquotation is the attribution of the particular remarks to P—not the remarks themselves. This is important to grasp in applying the substantial truth doctrine because the implications and meanings of "P said, '[actual statement]'" and "P said, '[misquotation]'" are what must be compared, not the meaning of the actual statement alone to the misquotation alone. Of course, the meanings of the true and false remarks still play a substantial role in determining the meaning of the attributions. See *supra* notes 124-25 (describing role played by substantive meaning of remarks in determining effect of attribution of remarks).



the attribution of P's original statement to P: first, the tone of both is equally business like and lacking in rhetorical hyperbole; and second, in both formulations the idea that P's message is sexist is not entirely clear, because what is meant by "females of F's ilk" and "women like F" in relation to the rest of the remarks is subject to debate. Thus, because the defamatory impact of the material does not arise from the falsification of the form, newspaper #1's allegation is substantially true. As such, whether or not newspaper #1 knew of the formal falsification, P can have no cause of action against the newspaper for the misquotation.

In contrast to newspaper #1's formulation, the version of P's remarks offered by newspaper #2 is not only false on a formal level, but is substantively inaccurate as well. In the actual interview, P said nothing at all about sending F to Phoenix, nor did he discuss any aspect of the company's Phoenix branch—that is, newspaper #2's misquotation would not even be an adequate paraphrase of P's actual remarks. Whether or not a court or jury would deem misquotation #2 to be substantially true hinges largely on the factfinder's viewpoint regarding the breadth of the defamatory sting of the false attribution.<sup>127</sup> For example, a broad interpretation of the defamatory effect in newspaper #2 might be "P is a sexist," while a narrow

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127. Although the substantial truth analysis turns on how broad the court determines the "sting" of a defamatory statement to be, few courts have explained how they arrive at this determination. In *Schiavone Constr. Co. v. Time, Inc.*, one of the few recent cases that has addressed the issue, the Third Circuit explained that determining the breadth of defamatory gist is a function of the jury, because reasonable minds could differ on the subject. 847 F.2d 1069, 1084 (3d Cir. 1988). In *Schiavone* the plaintiff brought suit against Time Magazine for publishing allegations that the plaintiff's name appeared several times in FBI files regarding the disappearance of Jimmy Hoffa. *Id.* at 1074. The court admitted that reasonable minds could differ as to the scope of the defamatory "sting" of the allegation, with possibilities including: generally, that the plaintiff's name appeared in files concerning the mafia; that the plaintiff's name appeared specifically in the Hoffa investigation file; that the plaintiff was involved with the mafia; or that the plaintiff was involved in the notorious probable murder of Hoffa. *Id.* at 1084. The *Schiavone* court held that the question of substantial truth must go to the jury because the determination depended on how the jury interpreted the sting of the published allegation. *Id.* at 1085.

In *Vachet v. Central Newspapers, Inc.*, 816 F.2d 313 (7th Cir. 1987), the Seventh Circuit explained that, to determine the "gist" or "sting" of a publication, a court must look to the highlight and hurtfulness of the article and not to immaterial details. *Id.* at 316. The plaintiff in *Vachet* complained that the defendant newspaper had falsely reported that the plaintiff was arrested, pursuant to a court-issued warrant, for harboring a fugitive rapist. *Id.* In fact, although such an arrest occurred, it was not pursuant to a warrant. *Id.* The court held that the defamatory "gist" of the published material was the implication that the plaintiff had associated with the suspected rapist of an old woman and that, therefore, the allegation was substantially true. *Id.* However, the *Vachet* court failed to explain how it arrived at its particular interpretation of the defamatory gist. The court's failure in this regard implies the unlikely result that the newspaper could have printed any set of facts implying that the plaintiff had associated with the alleged rapist and still could have won on summary judgment for having printed the substantial truth. Presumably, the Seventh Circuit would not rule this way if faced with the question directly. Therefore, although some courts have acknowledged that the scope of a defamation may be open to various interpretations, they have provided little guidance regarding how the issue should be resolved.

interpretation might be "P has the gall to relegate an employee to the non-prestigious Phoenix post simply because she is a female." If a decision-maker were to adopt the former interpretation, then misquotation #2 is substantially true, as would be thousands of other sexist remarks that the newspaper could place in P's mouth. If a court or jury chose the narrower view, then the misquotation could not be considered substantially true at all.

Realistically, a court addressing newspaper #2's situation might tread a middle ground and consider the defamation to be something like: "P does not believe that women are capable of handling the demanding jobs within the company." If this measure of sting is used, there would be little question that misquotation #2 conveys the substantial truth of the defamatory gist of P's real remarks. The effect of both attributions is to make P possibly appear to be sexist in making his personnel decisions. In fact, newspaper #2's formulation may actually cause milder injury to P than his original statement. First, newspaper #2 at least credited P with acknowledging that F was capable of handling another presumably prominent position in the company—a factor which might lead readers to temper their suspicions about P's sexism. Second, while newspaper #2 quotes P as saying that "a woman like F would be better suited" to a "low pressure" environment, this combination may portray P as being more subtle in willingly exposing his sexism than does P's actual claim that "women like F" are not "sufficiently tough" for the position in question. Although the form and substantive meanings of misquotation #2 and P's actual remarks are quite different, then, their defamatory effects are quite similar—similar enough that most courts would probably deem newspaper #2's attribution to be substantially true and, thus, nonactionable.

The falsity of newspaper #3's misquotation is similar to that of newspaper #1's misquotation—the defendant has formally misquoted the speaker, yet has been substantially faithful to the word-for-word denotative meaning of the speaker's actual remarks. Here, however, the defamatory sting of the misquotation is quite obviously more harmful to P than are his actual remarks. Misquotation #3 exposes the mistake of comparing, as the Ninth Circuit did in its *Masson* decision, only the substantive meanings of the remarks, as opposed to comparing the defamatory implications arising from attribution of the remarks. Substantively, misquotation #3 is similar to P's actual remarks, but the defamatory implications the public may draw from newspaper #3's attribution are far more hurtful to P than attribution of the original statement would be. This is because the form through which an individual chooses to convey her ideas can be as revealing of the individual as the ideas themselves.<sup>128</sup>

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128. See *Masson v. New Yorker Magazine, Inc.*, 111 S. Ct. 2419, 2430 (1991) (explaining that attribution of particular remark to speaker may cause reputational injury if manner of expression or fact that statement was made at all would indicate negative attitude or trait possessed by speaker). The Supreme Court cited two ways in which the false attribution of a

In his article *Language, Truth, and the First Amendment: An Essay in Memory of Harry Canter* Professor Frederick Schauer demonstrated that statements, even apparently factual statements, often include elements of opinion, belief, interpretation, or emotion.<sup>129</sup> Word choices made by a speaker often bare the speaker's beliefs and emotions to the public, whether the speaker intends this occurrence or not. When a writer paraphrases a statement made by a speaker, the writer, by her word choice, reveals her own opinions and emotions about what the speaker said.<sup>130</sup> However, when a writer paraphrases a speaker and, by use of quotation marks, attributes the words verbatim to the speaker, the writer is assigning her opinions and emotions to the speaker. If these opinions and emotions injure the reputation of those who are believed to possess them, then, through use of quotation marks, the writer has defamed the plaintiff even though the writer may not have changed the substantive content of the speaker's remarks.

The United States Supreme Court recognized the emotional force of particular word choices in its decision in *Cohen v. California*.<sup>131</sup> The *Cohen*

statement to an individual might harm the person's reputation. *Id.* First, the purported statement might assert directly an unsavory claim regarding the speaker. *Id.* For example, the speaker might be quoted as admitting he had been convicted of a crime when he actually had not. *Id.* Second, the claimed speaker might suffer reputational harm because of the manner in which he was reported to have expressed his thoughts or because of the idea that he made a particular statement at all. *Id.* As an example of the latter, the Court recalled John Lennon's reported statement regarding the Beatles that "[w]e're more popular than Jesus Christ now." *Id.* Irrespective of whether the underlying claim in Lennon's assertion was true, the fact that he was claimed to have said it may have injured his reputation. *Id.*

129. Schauer, *supra* note 67, at 279 n.64.

130. For example, if newspaper #3 had paraphrased its version of P's remarks to "P replied that little fillies like her are too damn cute and fragile for a big, scary job like that," the obnoxious and condescending tone of the remarks would be attributable the newspaper. One can imagine a reporter, outraged at P's seemingly sexist remarks, sarcastically paraphrasing what P said to evidence the reporter's displeasure with P's comments. In such a case, P probably would have no cause of action for the change because newspaper #3 was merely using permissible rhetorical hyperbole—in a way that makes clear that it is the newspaper's hyperbole, not P's—to summarize and convey its opinion of P's remarks. See *National Ass'n Letter Carriers v. Austin*, 418 U.S. 264, 285-86 (1974) (allowing use of word "scab" to describe strike-breakers as merely being reflection of union members strong feeling on subject); *Greenbelt Coop. Publishing Ass'n v. Bresler*, 398 U.S. 6, 14 (1970) (holding that use of word "blackmail" to describe defendant's legal activity was, in context, not falsehood, but merely "rhetorical hyperbole" reflecting public's strong feeling on subject).

131. 403 U.S. 15 (1971). In *Cohen* the United States Supreme Court held that a state may not outlaw, consistently with the First and Fourteenth Amendments, mere public display of an offensive word. *Id.* at 26. The appellant, Cohen, had been arrested for walking through a courthouse corridor wearing a jacket adorned with the phrase "fuck the draft." *Id.* at 16. Cohen was subsequently convicted before the Superior Court of Los Angeles County for disturbing the peace. *Id.* The conviction was affirmed by the California Court of Appeal. *Id.* at 17. After the California Supreme Court refused to review the appellate decision, the appellant turned to the United States Supreme Court, which agreed to hear the case on appeal. *Id.* The Supreme Court, in reversing the decision of the California Court of Appeal, held that the epithet displayed on the appellant's jacket was speech—not conduct—constitutionally protected by the First and Fourteenth Amendments. *Id.* at 18, 26. Key to the Court's ruling

majority pointed out that language fulfills two communicative functions: the conveyance of ideas capable of precise and objective explication and the conveyance of emotions not otherwise capable of expression.<sup>132</sup> The Court recognized that the emotive function of a statement is often the most important element in conveying the message a speaker or writer is attempting to communicate.<sup>133</sup> In his dissent in *FCC v. Pacifica Foundation* Justice Brennan further stressed that neither the content of a message, nor the effect of the message on those who receive it is separable from the words chosen to convey the message.<sup>134</sup> Brennan also emphasized that, in *Cohen* the Supreme Court already had agreed that word choice cannot "surgically be separated" from the thoughts that the speaker is attempting to convey.<sup>135</sup> Thus, when the appellant in *Cohen* chose the words "fuck the draft" to convey his opinion of the Vietnam War draft, he conveyed an emotive message that he could not have communicated through the literally synonymous phrase "I disagree violently with the draft, wish to have no part of it, and urge others to share my views."<sup>136</sup>

In a similar fashion, newspaper #3's allegation that "P replied, 'I think little fillies like her are just too damned cute and fragile to be successful in a big, scary job like that'" is charged with an emotive force that the attribution of P's original remarks to P would not have been. The effect

was the idea that the particular words chosen to convey an idea are often the most important component of the expression. *Id.* at 26. The Supreme Court held that, absent compelling reasons (for example, that the words might incite violence), a state could not consistently with the First and Fourteenth Amendments criminalize the display of profane language. *Id.* at 20, 26. Justices Burger and Blackmun dissented, *inter alia*, on the ground that the appellant's display of the vulgar phrase was more conduct than speech and, as such, did not warrant First Amendment protection. *Id.* at 27.

132. *Cohen v. California*, 403 U.S. 15, 26 (1971). *Cf.* *Southern Air Transport, Inc. v. American Broadcasting Cos.*, 877 F.2d 1010, 1015 (D.C. Cir. 1989) (pointing out that defamatory effect of television report could not be fully understood by reading transcript alone and that understanding of emotive force required viewing of visual portion as well).

133. *Cohen*, 403 U.S. at 26. *See* Schauer, *supra* note 67, at 279 n.64 (illustrating the manner in which denotatively synonymous word choices may differ in connotative meaning). Professor Schauer, writing about the presence of opinion, emotion and value judgment in speech that is otherwise regarded as factual, lucidly demonstrates the effect that word choice may have on the meaning conveyed to the audience. He states:

If I refer to someone as an alcoholic, I should be referring to a relatively identifiable illness . . . . But if instead I use the word "drunk," I may have the same object in mind, as well as the same inferences, but I have added a degree of negative personal judgment. . . . If I refer to someone as a "theoretical academician," I am probably being complimentary, but if I call that same person an "egghead," the meaning changes substantially.

*Id.*

134. 438 U.S. 726, 773 (1978) (Brennan, J., dissenting). Brennan opined that "[t]he idea that the content of a message and its potential impact on any who might receive it can be divorced from the words that are the vehicle for its expression is transparently fallacious. A given word may have a unique capacity to capsule an idea, evoke an emotion, or conjure up an image." *Id.*

135. *FCC v. Pacifica Foundation*, 438 U.S. 726, 773 (1978) (Brennan, J., dissenting).

136. Schauer, *supra* note 67, at 280.

that this new emotive force has on how the reading public may perceive P is profound. The manner in which newspaper #3 claims P addressed F's employment situation makes the possibility implicit in P's actual statement—that P may be a sexist—appear to be a truism. In addition to making the existence of P's sexism appear more probable, newspaper #3's attribution also makes any sexist outlook that P may possess appear much more severe. The public is led to believe not only that P discriminates against females in personnel decisions, but also that P sees fit to denigrate verbally female employees in public because of their gender. Finally, newspaper #3's allegation may be construed to injure P's reputation in ways totally different from the implications arising from his original comments. Among these wholly new and topically discrete defamations could be: that P is generally condescending; that P is profane; that P is insensitive; and that P has poor public relations—and, perhaps, business—judgment. Thus, although newspaper #3 may claim that its misquotation did not change the technical substance of P's remarks, the formal falsification in which the newspaper did partake inflicted significant harm to P's reputation, in addition to any harm P may have suffered via publication of his actual words. Because newspaper #3 did publish a defamatory falsity, then, its publication is actionable if newspaper #3 knew of the false form of the quotation.<sup>137</sup>

Determining the relationship between falsity and defamation in newspaper #4's misquotation is a relatively elementary task. Here, a court need not dwell excessively upon the subtle effect that the use of quotation marks may have because the entire premise behind the misquotations is false and defamatory—P never addressed the subject matter embodied in the misquotation. As was the case in *Bindrim*<sup>138</sup> and *Carson*,<sup>139</sup> even if the defendant had chosen to attribute these remarks to P through paraphrase, the paraphrase would be almost as false and defamatory, because the harm lies primarily in the idea expressed rather than in the form by which the idea is conveyed. Newspaper #4 attributed to P remarks implying that P had made romantic overtures to F and giving the impression that P's personnel decisions regarding females were based upon their providing sexual favors. Such implications sting P significantly more than the implied sexism in P's original remarks. Although P actually did make a comment implying that gender was a consideration in his personnel decisions, P's comments had no connotations of sexual harassment.<sup>140</sup> Because newspaper #4's misquotation is false in both form and substance and inflicts a substantially different and more severe defamatory sting than would quotation of P's

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137. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974) (explaining that public figures may recover for defamation only if public figure proves defendant knew of or recklessly disregarded existence of defamatory falsity).

138. *Bindrim v. Mitchell*, 92 Cal. App. 3d 61, 155 Cal. Rptr. 29 (Cal. Ct. App.), cert. denied, 444 U.S. 984 (1979).

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

140. In response to the reporter's question regarding possible sexual advances on F, P replied only that the "question [did] not merit a response."

original comments, the misquotation and, in fact, even an identically worded paraphrase is actionable if newspaper #4 knew of the falsity.

The four misquotations in the hypothetical exemplify four general categories of misquotation: a nondefamatory change in form only; a nondefamatory change in form and substance; a defamatory change in form only; and a defamatory change in form and substance. To these four one may add two more categories that may not properly be termed "misquotation": a nondefamatory change in substance only; and a defamatory change in substance only. These types of quotations are correct in that they accurately reflect a portion of what the speaker said, but are edited or presented in such a way as to inaccurately convey the meaning intended by the speaker.<sup>141</sup> Again, the crucial element in determining whether such a quotation is substantially true is whether the injury inflicted by the edited quotation is materially different from that which would have resulted from publication of the full quotation, with all of its qualifications.

After establishing that a defamatory falsity exists comes the task of determining the defendant's state of mind with regard to that falsity. If clear and convincing proof exists by which a jury reasonably can decide that the defendant either knew of or recklessly disregarded the defamatory falsity at the time of publication, then the case may go to a jury to decide the actual malice question.<sup>142</sup> Although the actual malice concept is itself fraught with ambiguities, the complexities of the standard's application are greatly reduced when a court first methodically investigates the issues of falsity and defamation and the connection between the latter two elements. In the hypothetical, because the defamatory falsity analysis established that the injurious effect of the misquotations published by newspapers #1 and #2 did not arise from any changes that those newspapers made, the actual malice inquiry with regard to those two misquotations is moot. If there is no defamatory falsity, there can be no liability on the part of the defendant regardless of his state of mind at the time of publication.<sup>143</sup> Having eliminated the first two hypothetical quotations from the actual malice inquiry, the investigation focuses upon determining what sort of knowledge should suffice to establish actual malice in those cases where the plaintiff has established the existence of a defamatory falsehood.<sup>144</sup>

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141. See *Masson v. New Yorker Magazine, Inc.*, 895 F.2d 1535, 1545-46 (9th Cir. 1989) (addressing quotations allegedly misleadingly edited by Malcolm), *rev'd*, 111 S. Ct. 2419 (1991).

142. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986) (stating that summary judgment is not proper if reasonable jury could find clear and convincing proof of actual malice).

143. See *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1196 (9th Cir. 1989) (explaining that existing case law allows recovery for defamation only if speech contains defamatory statement of untrue fact), *cert. denied*, 110 S. Ct. 59 (1990).

144. In the general field of libel, some advocate that, to prove actual malice, the plaintiff not only be required to show that the defendant knew of the falsity, but also that the defendant knew that the falsity would defame the plaintiff in the eyes of the reading public. See Franklin & Bussel, *The Plaintiff's Burden in Defamation: Awareness and Falsity* 25 WM. & MARY L.

The misquotation promulgated by newspaper #3 in the hypothetical represents cases where the denotative meaning of a speaker's statement remains relatively constant, but where the form is falsified so as to make the attribution of the statement to the speaker put the speaker in a more defamatory light than would attribution of the actual remarks. Because the added reputational harm to the speaker arises only from the erroneous attribution to the speaker of obnoxious phraseology and does not result from any change in the denotative meaning of the speaker's message, logic dictates that the actual malice determination here rationally can be based upon the defendant's knowledge that the form of the quotation was falsified. In this case, whether or not the newspaper believes that it has changed the substance of P's remarks is irrelevant because the injury is not caused by any change in substance. If newspaper #3 knows that it led the public to believe that P conveyed his ideas in a way that, in reality, P did not, then the newspaper has published with actual malice and is open to damages for libel.

However, in the case of newspaper #4, where the defamatory falsity lies in the subject matter of the statement, it is logically more difficult to characterize the newspaper's knowledge of the false form of the quotation, without more, as actual malice.<sup>145</sup> If newspaper #4 knows that, in fact, P said nothing about P expecting female employees to succumb to his romantic overtures, actual malice is established because the newspaper is aware that the defamatory premise behind the quotation is false.<sup>146</sup> However, if news-

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REV. 825, 845-47 (1984). At the very least, a defendant must know of the meaning that is defamatory—implicit in the subjective nature of the actual malice standard. *Fong v. Merena*, 655 P.2d 875, 877 (Haw. 1982). The reasons for and against requiring defendants to know of the defamatory nature of their publication are numerous, and in-depth exploration of this topic is beyond the scope of this note. The important point is that, however the actual malice standard is interpreted, the standard is no different for misquotation cases than it is for libel cases in general. *But see* Comment, *supra* note 67, at 1384-85 (suggesting that, in misquotation cases, courts require plaintiffs to show that defendant knew he was defaming plaintiff to establish actual malice).

145. If the defendant publisher has accomplished an actionable defamation of the plaintiff that he could not have done by merely paraphrasing the plaintiff's statements, then the defendant's knowledge that he has attributed words to the speaker that the speaker did not utter should suffice for actual malice. In other words, one must differentiate between the effect of having the words in question coming out of the mouth of the writer and the effect of having them coming out of the mouth of the purported speaker. In the case of newspaper #4, publishing "P replied that any woman that refuses him should not expect a promotion anytime soon," and actually quoting P do not seem to elicit very different levels of defamation. The words coming directly out of P's mouth are a little more credible than the paraphrase, but essentially the defamatory impact of both formulations is the same. In this situation, then, hinging actual malice merely upon the defendant's knowledge that some words in P's quotation were falsified would not be proper because the great majority of the harm in the attribution comes from the denotative substance. Although far-fetched in this hypothetical, if newspaper #4 actually did not know that, by rewording P's statement, it had changed the meaning of the quotation, then that newspaper should not be liable, for it did not act with actual malice with regard to the falsity that is injuring P's reputation.

146. *See supra* notes 138-40 and accompanying text (describing how in hypothetical case

paper #4, while realizing that it misquoted the plaintiff, honestly believed that the misquotation conveyed the substantive meaning of P's remarks, the logical case for actual malice becomes much more obscure. That the newspaper could have succeeded in implying the same essential defamatory facts through paraphrase demonstrates that the use of quotation marks is not itself the primary source of harm. The misquotation is just incidentally the means by which newspaper #4 chose to convey incorrect information regarding the substance of P's comments.<sup>147</sup> Therefore, to base a finding of actual malice solely on the newspaper's knowledge that it inaccurately quoted P would run counter to the *New York Times* requirement of subjective knowledge that the element giving rise to defamation is false.<sup>148</sup> Where a publisher knowingly alters a quotation—perhaps believing that he is merely “tidying up” the quotation—yet does not believe that he is changing the meaning of the quotation, that publisher logically cannot be held liable for defamation arising from a change in meaning.<sup>149</sup>

of newspaper #4, discrete inquiry into knowledge of misquotation is unnecessary because entire premise behind quotation is false).

147. See *Masson v. New Yorker Magazine, Inc.*, 111 S. Ct. 2419, 2433 (1991) (stating that inquiry into actual malice turns on punctuation to extent that punctuation conveys meaning).

148. See *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964) (emphasizing subjective nature of *New York Times* actual malice standard). The subjective knowledge problem is probably the most compelling argument against using defendant's knowledge of misquotation alone to establish actual malice in cases exemplified by misquotation #4. See Schauer, *supra* note 67, at 263-65 (illustrating result when court fails to consider defendant's subjective knowledge of meaning). Critics have complained that courts often fail to use a subjective standard when determining whether a defendant acted with actual malice. See Franklin & Bussel, *supra* note 144, at 840-41 (emphasizing that when courts use objective standard for determining meaning of published material, defendants may be held liable for unintended defamatory meanings). For example, Professor Franklin argues that “[t]he use of a reasonable person standard by the courts for determining the meaning of a statement would expose those who are less well-educated, less well-advised, less adept with language, or simply less intelligent, to the risk of liability for meanings that they never contemplated.” *Id.*

Some courts have held that a defendant acted with actual malice in publishing words which, taken literally, would be defamatory even when the defendant intended and believed that the words would be understood in a nondefamatory figurative sense. See *Sprouse v. Clay Communication, Inc.*, 211 S.E.2d 674, 685-87, 693 (W. Va. 1975) *cert. denied*, 423 U.S. 882 (1975) (upholding award of actual damages against defendant for describing plaintiff's wholly legal dealings with terms such as “land grab,” “bonanza” and “dummy firm”). Regarding *Sprouse*, Professor Schauer states,

Although the court did acknowledge the multiple meanings of the words, in essence it used the same evidence to find falsity as to infer actual malice. This is a rather egregious bootstrap argument. . . .

. . . .

. . . [I]f the average person would interpret the words as implying some illegal activity, then this is an archetypal example of majoritarian restrictions on language becoming restrictions on conveying the ideas themselves.

Schauer, *supra* note 67, at 286-87.

149. For example, reporter R asks P what P likes to do when he is not busy with his corporate duties. P replies, “I enjoy taking pictures.” The reporter, because of limited space,



However, granting that on a theoretical level the subjectivity argument has substantial merit, one hardly can deny that there is a very strong practical positive correlation between the false form of a quotation and the differences between the implications which arise from that misquotation and from the speaker's actual remarks. If nothing else, knowledge of misquotation is certainly substantial evidence that a publisher at least recklessly has disregarded any substantive change that such misquotation may have wrought.<sup>150</sup> First, as the facts of *Masson* illustrate, the formal and substantive aspects of a quotation rarely can be separated with precision.<sup>151</sup> Simply put, both changes in the particular wording employed and changes in the subject matter addressed can change the meaning of a statement as perceived by an audience.<sup>152</sup>

Second, even in cases where a paraphrase containing the same wording as the direct quotation would be itself false and defamatory, the addition of quotation marks invariably adds to defamatory impact by increasing the credibility of the statement. In the case of paraphrase, the reading public is at least aware that some amount of the author's interpretation has been injected into the statement. Use of quotation marks, however, precludes this possibility. Thus, even if the subject matter of an attributed statement is the primary source of reputational harm, a direct quotation almost invariably will have more defamatory impact than a paraphrase encompassing the same subject matter. In fact, the latter phenomenon is one conceivable reason why a publisher might knowingly choose to misquote,

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needs to shorten P's quotation so that it will fit at the end of his column. R shortens P's quote by hand to "I enjoy photography," but, because of R's poor handwriting, the typist believes that R meant the quotation to read "I enjoy pornography." Although R knows that he has changed the wording of P's quotation, he believes he has only inserted one innocuous synonym for another and that he has not changed the substantive meaning in the slightest. Should one consider R to have acted with actual malice simply because he knew that he was changing a few words in P's statement? Any reading of the actual malice standard that would bring R's state of mind in the foregoing example within its penumbra would be a bastardization of the entire concept of actual malice. Here, R's motive in changing P's quotation could hardly be characterized as sinister. R only wanted to shorten the quotation and neither intended to, nor believed he did change the meaning of the message that P had relayed to him. Should R be held liable merely because he knew that the misquotation was false in that P actually used a different pattern of words? Consider the fact that if R had merely paraphrased P's remarks into "P says that he enjoys pornography," the publication still would be almost, if not just as, false and defamatory as the direct quotation. Yet most courts would not consider the inaccurate paraphrase to be the result of actual malice, assuming that the typist had accidentally misread the word "photography."

150. See *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) (explaining that actual malice standard requires plaintiff to produce evidence sufficient to allow conclusion that defendant actually had serious doubts regarding truth of publication).

151. As used in the hypothetical, the form/substance dichotomy is merely an artificial analytical device used to illuminate the Ninth Circuit's failure to recognize that particular word choices made by a speaker sometimes heavily contribute to the meaning that the receiving audience perceives.

152. See *supra* notes 129-36 and accompanying text (discussing interplay of form and substance in creating meaning of statements).

rather than paraphrase, a speaker—purported direct quotations give each allegation and the story as a whole more credibility in the eyes of the reader.<sup>153</sup> Finally, the knowing misquotation of a speaker may evince a conscious attempt by the publisher to deceive the reader. Courts should not ignore the possibility that the deception achieved was the deception intended by the publisher.

Therefore, although use of publisher's knowledge of misquotation to establish irrebuttable actual malice is improper where the choice of words itself is not the cause of defamation, logic suggests that courts should not completely ignore this knowledge. The defendant's proven knowledge of misquotation can be rationally employed to establish a rebuttable presumption of actual malice in cases where existence of a defamatory falsity has been shown.<sup>154</sup> A court should proceed on the rational assumption that a publisher is aware of the common meanings attached to the words and phrases he is employing. If the assumption is accurate, then the publisher cannot help but know in which circumstances he has altered the meaning of a quotation by changing its wording. If for some reason the publisher was not aware that his formal changes produced a change in substantive meaning, then the publisher merely would need to come forward with some evidence to that effect to rebut the actual malice presumption. The burden would then fall on the plaintiff to prove that the publisher was, in fact, aware that he was changing the substantive meaning of the quotation in question.<sup>155</sup>

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153. See *Carson v. Allied News Co.*, 529 F.2d 206, 212-13 (7th Cir. 1976) (describing reporter who already had fabricated facts behind story as also creating quotations to support falsified facts). In *Carson* the defendant's reporter presumably believed that his story about Johnny Carson's move to California would have more credibility in the eyes of the reader if the story contained purported quotations of comments seemingly made by Carson.

154. See *Zerangue v. TSP Newspapers, Inc.*, 814 F.2d 1066, 1070 (5th Cir. 1987) (holding that sufficient circumstantial evidence of actual malice can overcome defendant's bare assertion of good faith). In a misquotation case, knowledge of the misquotation would seem to fall within the "sufficient circumstantial evidence" category.

155. In the event that the defendant is able to rebut the assumption of actual malice, the fact that the defendant knowingly altered the quotations still would remain, of course, a major element in the in the plaintiff's arsenal of circumstantial evidence. Although actual malice is a subjective state of mind, its existence may be proved by circumstantial evidence such as knowledge of misquotation would be in this situation. *Zerangue*, 814 F.2d at 1070. The *Zerangue* court explained that "[a]lthough the defendant's state of mind is a subjective fact, it can be shown by indirect or circumstantial evidence." See also *Golden Bear Distrib. Systems of Texas, Inc. v. Chase Revel, Inc.*, 708 F.2d 944, 950 (5th Cir. 1983) (holding that reporter's notes showing reporter was aware of facts contradicting her story were enough to sustain finding of actual malice).

In the case of the quotation which, though it contains statements actually made by the purported speaker, is taken out of context or is edited in such a way as to convey a meaning not intended by the speaker, inquiry into knowledge of the falsity of the form is irrelevant because the form has not been falsified. Here, the plaintiff must prove that the defendant actually knew that the defendant was conveying a substantive meaning different from that intended by the speaker.

This employment of defendants' knowledge of misquotation would fulfill the core purpose of the actual malice rule. The purpose behind the actual malice rule is not only to prevent the chilling of free speech, but also to continue to protect reputational interests to a reasonable degree.<sup>156</sup> Therefore, when a court vindicates damage to an individual's reputation without encroaching upon material free speech interests, the court is fulfilling the central aim of the actual malice standard. To use a defendant's knowledge of misquotation in establishing actual malice is to protect valid reputational interests while still allowing publishers to practice their interpretation and poetic license through paraphrase—a mode by which the reader will not be deceived as to the nature of the information she is receiving.

In the future, misquotations on which libel actions may be based most likely will not be susceptible to the strict categorization between formal and substantial changes as those in the hypothetical were. Instead, as in *Masson*, alteration of a speaker's remarks probably will effect a change in both form and substantive meaning. Because of this, proof of the defendant's knowledge that misquotation has occurred should in every case establish at least a presumption of actual malice rebuttable only by presentation of evidence that the defendant was unaware that she was changing the substantive meaning of the speaker's remarks. In addition, if the plaintiff can establish that the alleged defamation could not have been effected but through the use of quotation marks—that is, the defamation arose largely from the way in which something was purportedly stated by the speaker—then the defendant's proven knowledge of misquotation should be considered to be irrebuttable proof of actual malice.<sup>157</sup>

Courts must not be disconcerted by the complexities of a misquotation case. By first determining whether the defendant has falsified the quotation in question in a way that defames the plaintiff, the court can eliminate a large portion of possible libel actions.<sup>158</sup> By then requiring plaintiff to prove that the defendant knowingly misquoted the speaker, another group of misquotation cases would be subject to summary judgment. If the plaintiff succeeded in carrying his burden of proof regarding knowledge of misquotation and also showed that the use of quotation marks itself gave rise to actionable defamation, actual malice would be established. If the plaintiff proved knowledge of misquotation, but failed to show that the use of quotation marks was itself defamatory, the actual malice presumption would be rebuttable merely by the defendant's production of evidence that there was no subjective knowledge of changed substantive meaning. We need not

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156. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342-43 (1974). If free speech were to be protected at any cost, there would be no actual malice standard—all speech would be absolutely immune from legal attack. *Id.*

157. See *supra* notes 128-37 and accompanying text (illustrating case where form of quotation is only defamatory falsity).

158. Elimination of those cases where no defamatory falsity exists, would of course, preclude action on those quotations for which a publisher had merely corrected syntax, or eliminated stammering or hesitations.

use blunt tools in applying First Amendment protections when we have precision instruments that will protect free speech equally as well without encroaching upon other vital interests.

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