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Note


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I. INTRODUCTION

The direct quotation is a narrative device treasured much by writers and readers alike. But the quoted passages that appear in print are not always carbon copies of the words actually spoken. Writers and reporters—for a number of reasons, some better than others—have been known to misquote those who feed them their steady diet of news. When writers attribute to newsmakers damning words they did not utter, the cry of libel can sound. During the 1991 term, the Supreme Court addressed the issue of errant quotations in Masson v. New Yorker Magazine, Inc.¹

The plaintiff in Masson did not contend that The New Yorker had negligently misquoted him. Negligently misquoting a public figure is a pardonable offense under the “actual malice” standard articulated in New York Times Co. v. Sullivan.² The allegedly libeled plaintiff in Masson maintained that the woman who penned his profile deliberately misquoted him in a number of defamatory passages. The Court held that deliberately misquoting a public figure is not actionable unless the alterations materially change the meaning of the actual

This Note divides Masson into the three opinions it spawned—that of the Ninth Circuit, the Supreme Court majority and the Supreme Court dissent. The three opinions differ sharply on the issue of how far wayward a writer may wander when surrounding with quotation marks the words of another. The Ninth Circuit extended broad immunity to writers, mandating very little in the way of accuracy. The Court's majority offered significant protection, demanding only that quotes not be terribly errant. The dissent would have offered no protection, requiring writers to either paraphrase or reproduce with painstaking precision their sources' spoken words. The merits, minuses and prospective effects of the three opinions are the focus of this Note.

II. BACKGROUND

The courts that would decide Masson had watching over them the precedential power broker that is New York Times Co. v. Sullivan. The libel landmark prevents a public official from recovering damages for publication of a defamatory falsehood unless she proves by clear and convincing evidence that it was published with "actual malice." A plaintiff can demonstrate actual malice by proving that the defamatory statement was published with "knowledge that it was false or with reckless disregard of whether it was false or not." Three years later, in Curtis Publishing Co. v. Butts, the Court extended to public figures application of the "actual malice" standard. Unlike the

7. Id. at 279-80.
9. The Court defined a public figure as a person who thrusts her personality into the "vortex" of an important public controversy. Id. at 155. In Gertz, the Court said a person becomes a public figure by reason of the notoriety of his achievements or the vigor and success with which he seeks the public's attention. Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974). Gertz also distinguished between all-purpose and "limited" public figures. Id. at 351.
10. Libel law is more protective of private citizens than of public figures. Private individuals are believed to be more vulnerable to injury and more deserving of recovery. Unlike private citizens, public figures are said to have easy access to media channels. If and when their good names are bespattered, public figures often are afforded the opportunity to counteract the false statements. Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 (1974). By not accepting public office or assuming an influential role in ordering society, a private citizen has relinquished no part of her interest in protecting her good name. Consequently, she has a more compelling call on the courts for redress of injury inflicted from a libelous statement. Id. at 345. "Thus, private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery."
"knowledge of falsity" element of the actual malice standard, the "reckless disregard" component is not easily defined. A defendant invites a finding of reckless disregard when he publishes with a "high degree of awareness of . . . probable falsity" or "entertain[s] serious doubts as to the truth of his publication."

When time came for the Ninth Circuit to render a decision in Masson, the cupboards were not well stocked with case law on matters of misquotation. What scant case law there was had been put on the shelves by sister circuits. In Dunn v. Gannett New York Newspapers, Inc., the mayor of a city in New Jersey indicated that excessive litter was largely the result of incoming foreigners whose previous exposure to abject poverty had caused them to lack respect for others' property. Editors at a Spanish newspaper wrote a headline based on the mayor's comments. The headline, translated into English, read: "Elizabeth Mayor on the Attack: Calls Hispanics 'Pigs.'" The mayor sued for libel and lost. The Third Circuit reasoned that the headline was a "rational interpretation" of the mayor's remarks. Moreover, "pigs" was said to be a fair translation for "litterbug," a word for which there was no Spanish equivalent.

The Second Circuit addressed misquoted matter in Hotchner v. Castillo-Puche. A.E. Hotchner, a successful writer and lecturer, was a friend and traveling companion of Nobel Prize-winning author Ernest Hemingway. Hemingway allegedly described Hotchner, a public

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14. In public figure libel litigation, a statement—in order to be actionable—must be more than false and published with actual malice. The statement also must be defamatory. Fabricated quotations may be defamatory in two senses. The Masson Court stated:

First, the quotation might injure because it attributes an untrue factual assertion to the speaker. An example would be a fabricated quotation of a public official admitting he had been convicted of a serious crime when in fact he had not. Second, regardless of the truth or falsity of the factual matters asserted within the quoted statement, the attribution may result in injury to reputation because the manner of expression or even the fact that the statement was made indicates a negative personal trait or an attitude the speaker does not hold.

15. 833 F.2d 446 (3rd Cir. 1987).
16. Id. at 448.
17. Id.
18. Id. at 452.
19. Id.
20. 551 F.2d 910 (2nd Cir. 1977).
figure, in a way that was clearly unflattering and arguably profane. Spanish writer Jose Luis Castillo-Puche used Hemingway's words verbatim in his 1967 book. But editors at Doubleday & Company, Inc.—the company that published the English translation of Castillo-Puche's work—used an emasculated version of Hemingway's quotation. Hotchner brought suit, contending that Doubleday should be liable for knowingly publishing a bowdlerized version of Hemingway's alleged statement. The libel suit ended in a judgment for the defendant. The Second Circuit said the watered-down words had not increased the defamatory impact of Hemingway's statement or substantively altered its content.

Far more egregious was the reportorial impropriety in Carson v. Allied News Co. National Insider, a tabloid periodical, published an article asserting that Johnny Carson's motivation for moving the Tonight Show to Hollywood was the entertainer's desire to be closer to Joanna Holland. The tabloid labeled Ms. Holland as the woman who "broke up" Carson's former marriage. The reporter in Carson did not merely alter sources' spoken words. Rather, the reporter conjured them up in a reckless fit of creativity. The district court granted the defendant's motion for summary judgment. The Seventh Circuit reversed, holding that the plaintiffs were entitled to a jury trial on the issue of actual malice.

Thus, when time came for the courts to decide Masson, there was on the table a collage of case law and a handful of propositions. Carson found actual malice present when the words flanked by quotation marks were conjured up by the writer. Hotchner refused to condemn those who had tampered only slightly with others' words. Dunn

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21. Hemingway allegedly said that Hotchner was "dirty and a terrible ass-licker. There's something phony about him. I wouldn't sleep in the same room with him." Id. at 914.

22. The English version of Castillo-Puche's work quoted Hemingway as having said of Hotchner: "I don't really trust him, though." Id. at 912.

23. Id. at 914.

24. Id.

25. 529 F.2d 206 (7th Cir. 1976).

26. Id. at 208.

27. Id.

28. In reversing, Circuit Judge Sprecher wrote:

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

Id. at 213.

29. See also St. Amant v. Thompson, 390 U.S. 727, 732 (1968)(asserting that professions of good faith will likely be unpersuasive when the story is a "product of [the defendant's] imagination."
stood for the proposition that writers need not reproduce the speaker's precise utterance, provided the words opted for are a rational interpretation of those actually spoken.

III. STATEMENT OF THE CASE

Psychoanalyst Jeffrey M. Masson was hired in 1980 as the projects director of the Sigmund Freud Archives. Located at Maresfield Gardens outside of London, the Archives serve as a repository rich in Freudian materials. Masson accepted the post at the invitation of Archives leader Dr. Kurt Eissler and Freud's daughter, Dr. Anna Freud. But Masson was unwilling to work at the behest of those who had hired him. He grew disenchanted with Freudian psychology and was terminated soon after his anti-Freudian feelings surfaced during a 1981 lecture before the Western New England Psychoanalytical Society.30

Masson later agreed to sit down with Janet Malcolm for a series of interviews. Malcolm was a contributing writer for The New Yorker, a weekly magazine of much literary repute. Malcolm's exhaustive interviews with Masson resulted in a 48,500-word profile, published by The New Yorker in 1983 as a two-part series. In the article, quotation marks flanked lengthy passages attributed to Masson.31 Masson took umbrage to several of the quoted passages, alleging that they were fraught with defamatory inaccuracies. The article was reprinted one year later, this time as a 165-page book published by Alfred A. Knopf, Inc.32 The reviews were largely commendatory.33 But Masson, cast as a belligerent and unbearable egomaniac with a penchant for promiscuity,34 was less willing to shower Malcolm with authorial accolades. He filed a $10 million libel suit in the United States District Court for the Northern District of California35 and named as defendants The New Yorker, Malcolm and Knopf. Masson alleged that Malcolm had surrounded with quotation marks words and passages he had not ut-

31. Id.
32. Id. at 2425.
33. Id.
34. In Masson, the Court resurrected a review published in the Boston Globe. The reviewer said Masson emerged as a "grandiose egoist—mean-spirited, self-serving, full of braggadocio, impossibly arrogant and, in the end, a self-destructive fool. But it is not Janet Malcolm who calls him such: his own words reveal this psychological profile . . . ." Id. at 2425.
35. The suit was brought under California libel law. In California, "libel is a false and unprivileged publication . . . 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." Cal. Civ. Code Ann. sec. 45 (West 1982). However, the Court noted that the First Amendment limits California's libel law in several respects. Masson v. New Yorker Magazine, Inc., 111 S. Ct. 2419, 2429 (1991).
He bolstered his contention with the interview tapes, none of which contained the quoted passages with which he took issue.\footnote{36} The parties agreed at the outset that Masson was deserving of the "public figure" label. When the allegedly libeled plaintiff is a public figure, the defendant is entitled to summary judgment unless the finder of fact can conclude by clear and convincing evidence that the defamatory statement was published with actual malice.\footnote{38} In \textit{Masson}, the defendants' motion for summary judgment was granted. The district court found that the allegedly fabricated quotations either were substantially true or were rational interpretations of what Masson said on tape.\footnote{39} On appeal, a three-judge panel for the Ninth Circuit affirmed, with one judge dissenting.\footnote{40} The appellate court's rationale essentially mirrored that of the lower court. The Supreme Court reversed on a 7-2 decision penned by Justice Kennedy. The Court held that deliberately altered quotations attributed to a public figure may be libelous only if the alterations materially change the meaning of what was actually said.\footnote{41} Justice White, joined by Justice Scalia, wrote an opinion in which he concurred in part and dissented in part.

\section*{IV. ANALYSIS}

The Court wisely refused to immunize from libel litigation irresponsible, too-quick-to-quote writers who deliberately and materially alter the words of another. Nonetheless, the holding still allows writers and journalists to tinker too much with their sources' spoken words. Thus, a Court bent on protecting the press insults it as well, further inviting readers and newsmakers to question the credibility that has so long served as the trump card of the print media.

\subsection*{A. The Ninth Circuit Opinion}

The Ninth Circuit panel affirmed the district court's order granting summary judgment to the defendants. After wading through each of the quoted passages to which Masson took exception, the court concluded that the alleged inaccuracies did not raise a jury question of

\footnote{36. The Court noted that California courts previously had held that false attribution of statements to a person may be libelous if the falsity exposes the person to an injury comprehended by the statute. \textit{See} Selleck v. Globe Int'l, Inc., 212 Cal. Rptr. 838, 844 (1985); Cameron v. Wernick, 60 Cal. Rptr. 102 (1967).}

\footnote{37. Malcolm maintained that not all of her conversations with Masson had been recorded on tape. \textit{Masson} v. New Yorker Magazine, Inc., 111 S. Ct. 2419, 2428 (1991). But on motions for summary judgment, all justifiable inferences are drawn in favor of the nonmoving party. Because of that, the Court and the Ninth Circuit assumed that the quotations had been deliberately altered.}

\footnote{38. \textit{Anderson} v. Liberty Lobby, Inc., 477 U.S. 242, 255-56 (1986).}


\footnote{40. \textit{Masson} v. New Yorker Magazine, Inc., 895 F.2d 1535 (9th Cir. 1989).}

actual malice. The panel used a handful of reasons—some more objectionable than others—to pardon each passage. In some instances, Malcolm’s alleged alterations were deemed not actionable because there was no “substantive difference” between what was published and what was said.\textsuperscript{42} In other instances, the panel found the published passages to be “rational interpretations” of the actual statements.\textsuperscript{43} Finally, the panel took note of the bombastic backdrop constructed by Masson and relied upon the “incremental harm” doctrine to excuse the challenged statements.\textsuperscript{44}

The first misquotation assessed by the Ninth Circuit was deemed harmless because the words actually spoken and the published quotation were substantively the same. Masson’s grandfather had changed the family name from Moussaieff to Masson. The article quoted Masson as saying that he substituted Moussaieff for Lloyd as his middle name because “it sounded better.”\textsuperscript{45} Nowhere on the tapes can be found the phrase “it sounded better.” But in one tape-recorded statement, Masson said he changed his middle name to his family’s one-time surname because he “just liked it.”\textsuperscript{46}

Even the finicky would have trouble quarreling with the appellate court’s finding that the two passages were materially the same. The Supreme Court, in its sole exhibition of acquiescence, chose not to disturb the lower court’s finding on the “it sounded better” quotation.\textsuperscript{47}

The Ninth Circuit’s inaugural assessment was also its best. The panel bid adieu to a “substantive difference” test that the Court later found palatable. From there, the Ninth Circuit’s analysis slithered downhill. The next quotation reviewed involved Masson’s characterization of his relationship with Eissler and Anna Freud. Malcolm quoted Masson as saying that, to those who had hired him, he was not unlike an “intellectual gigolo.”\textsuperscript{48} On tape, Masson uttered no such thing. Rather, the psychoanalyst stated that Eissler and Anna Freud viewed him as a “private asset but a public liability.”\textsuperscript{49} Masson also said that Eissler and Anna Freud thought he was “much too junior within the hierarchy of analysis, for these important training analysts to be caught dead with [him].”\textsuperscript{50} The appellate court agreed with the district court’s finding that use of the term “intellectual gigolo”\textsuperscript{51} was

\begin{itemize}
\item[42.] Masson v. New Yorker Magazine, Inc., 895 F.2d 1535, 1540 (9th Cir. 1989).
\item[43.] \textit{Id.} at 1541-42, 1546.
\item[44.] \textit{Id.} at 1541.
\item[45.] \textit{Id.} at 1540.
\item[46.] \textit{Id.}
\item[48.] Masson v. New Yorker Magazine, Inc., 895 F.2d 1535, 1540 (9th Cir. 1989).
\item[49.] \textit{Id.}
\item[50.] \textit{Id.}
\item[51.] Whether the term “intellectual gigolo” is defamatory is a question of California law. Masson v. New Yorker Magazine, Inc., 111 S. Ct. 2419, 2436 (1991) (stating...
not something from which malice could be inferred.\(^{52}\) The term was considered to be a rational interpretation of Masson's tape-recorded comments.\(^{53}\)

The jurisprudential ancestry of the rational interpretation doctrine dates back to *Time v. Pape*.\(^ {54}\) That suit stemmed from a report issued by the United States Commission on Civil Rights. The report contained a description of an incident of alleged police brutality in Chicago.\(^ {55}\) The report included a critical disclaimer, explicitly stating that the incident described was based on allegations in a complaint.\(^ {56}\) *Time*, a weekly news magazine, quoted heavily from the complaint without indicating that the charges were those leveled by the *victim* rather than the Commission.\(^ {57}\) The Court found for *Time*, reasoning that omission of the word "alleged" was a "rational interpretation[ ] of a document that bristled with ambiguities."\(^ {58}\) That the rational interpretation test has its place is not doubted. The query deserving of an answer is whether the Ninth Circuit had any business applying that doctrine in *this* case. The Supreme Court did well to answer in the negative.

In reversing, the Court correctly stated that quotation marks without qualification alert readers that they are reading the speaker's words—not the writer's interpretation of the same.\(^ {59}\) Newspapers and magazines do not come equipped with margin notes that say "you are now reading precisely what the speaker said." Quotation marks accomplish as much. But as the Court noted, a rational interpretation standard would strip the reader of her only method of sorting actual

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\(^{52}\) Masson v. New Yorker Magazine, Inc., 895 F.2d 1535, 1541 (9th Cir. 1989).
\(^{53}\) In assessing the "intellectual gigolo" quotation, the district court clearly used the rational interpretation test. Masson v. New Yorker Magazine, Inc., 686 F. Supp. 1396, 1400-01 (N.D. Cal. 1987). The Ninth Circuit appears to endorse the same test, though there is a certain amount of ambiguity. Masson v. New Yorker Magazine, Inc., 895 F.2d 1535, 1541 (9th Cir. 1989). Even if the Ninth Circuit did not use the rational interpretation test to analyze the "intellectual gigolo" quotation, it undeniably used the same test in reviewing at least two other quotations. *Id.* at 1541-42, 1546.

\(^{54}\) 401 U.S. 279 (1971).
\(^{55}\) *Id.* at 280-81.
\(^{56}\) *Id.* at 280.
\(^{57}\) *Id.* at 282.

\(^{58}\) *Id.* at 290. See also Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485 (1984). In *Bose, Consumer Reports* published an article reviewing a loudspeaker system placed on the market by the plaintiff. The article stated that instruments heard through the Bose system tended to "wander about the room." *Id.* at 488. The Court excused the writer's choice of words under the rational interpretation test. *Id.* at 512-13.

utterances from authorial interpretations. The prospective harm in removing such a sorting device was recognized by the Court. The term “direct quotation” would have become a misnomer. Such a standard would have eviscerated the trust that readers have long placed in words flanked by quotation marks. And a newsmaker, cognizant of a reporter’s license to tinker with his words, might have stood mute rather than run the risk of being misquoted in the morning paper.

The rational interpretation doctrine, though somewhat elastic, is not infinitely malleable. To be certain, writers and reporters spend a good share of their days and nights interpreting. Consider the reporter sent to cover the president’s State of the Union Address. The article that adorns the newspaper’s front page the following morning will be sprinkled with whatever sprightly and contentious quips the nation’s top executive had to offer. But everything not enclosed in quotation marks—the majority of the article, no doubt—is the writer’s interpretation of what the president said. The reporter who skims a police report and files a story is interpreting. So too is the reporter who writes an article after sifting through a newly introduced, 30-page legislative bill. To do anything other than serve the readership with an official transcript is to interpret.

But writers and reporters receive a respite from the almost incessant interpretation when they choose to use direct quotations. When quoting, gone is the often arduous duty of culling clarity from the sea of confusion. Reporters who quote directly are inserting no editorial slant, importing no personal synthesis. As the Court’s majority and the Ninth Circuit dissenting opinion so accurately note, a direct quotation is commonly understood to contain no interpretation. A writer who uses a direct quote no more interprets than does a tape recorder. By wrapping quotation marks around the speaker’s words, the reporter is handing to the reader the baton of interpretation.

Malcolm’s taped interviews with Masson spanned some forty hours. Judging from the comments indisputably made by Masson, the psychoanalyst is an eclectic thinker, perhaps bordering on being bizarre. During the twosome’s protracted question-and-answer session, Masson indubitably made ambiguous remarks that clear heads would not untangle easily. In paraphrasing Masson’s words, Malcolm’s job must have been difficult. But when Malcolm opted to bracket Masson’s words with quotation marks, her job took a sudden turn toward the simple. Her need to interpret faded. And with it, so too did the doctrine that allows one to interpret erroneously. If all courts were to join hands with the Ninth Circuit and make available

60. Id.
61. Id.; Masson v. New Yorker Magazine, Inc., 895 F.2d 1535, 1549 (9th Cir. 1989) (Kozinski, J., dissenting).
the rational interpretation defense, quotation marks⁶³ could accurately be described as decorative accents. They would signify nothing, save that the words within them are distant heirs of those actually spoken.

Even had the Ninth Circuit not pulled from the shelf the rational interpretation defense, it nonetheless would have found the “intellectual gigolo” passage non-defamatory. The panel pointed to two courts that have used the “incremental harm branch” of the “libel-proof” doctrine to defeat plaintiffs’ libel claims.⁶⁴ The argument in support of that defense runs as follows: Suppose a public figure’s reputation has been bespattered by printed statements that were not made with actual malice and are thus not actionable. If other defamatory statements in the same article were published with actual malice—but inflict wounds no deeper than those already inflicted—the statements are not actionable. The non-actionable portion of the story becomes the measuring stick.

Armed with the incremental harm doctrine, the Ninth Circuit looked at Malcolm’s article as a whole. The panel noted that Masson was neither meek nor modest.⁶⁵ The appellate court concluded that the stream of provocative utterances and braggadocio made nominal, if not non-existent, the additional harm done by the “intellectual gigolo” quotation. The Ninth Circuit’s dissenting opinion could find little merit in the incremental harm doctrine. Judge Kozinski found the doctrine particularly ill-suited for application in Masson. The dissenting judge did not dispute the panel’s assertion that less-than-modest remarks littered the article. But Judge Kozinski reasoned that the most “provocative, bombastic” statements attributed to Masson were the very ones the psychoanalyst denied having made.⁶⁶ Thus, the dissent in the Ninth Circuit took issue with the doctrine because, in applying it, the panel assumed that the other disputed remarks were, in fact, made. Reference to an eloquent and well-reasoned D.C. Circuit opinion, written by Justice Scalia, further fueled the harangue against the incremental harm doctrine.⁶⁷

⁶³. A quotation mark is “one of a pair of punctuation marks . . . used to indicate the beginning and the end of a quotation in which the exact phraseology of another or of a text is directly cited.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1971)(emphasis added).


⁶⁵. The panel stated that Masson, on tape, boasted of his sexual prowess, claiming to have slept with more than 1,000 women before becoming an analyst. Masson v. New Yorker Magazine, Inc., 895 F.2d 1535, 1542 (9th Cir. 1989).


⁶⁷. Id. In Liberty Lobby, Inc. v. Anderson, 746 F.2d 1563, 1568 (D.C. Cir. 1984), rev’d
The Supreme Court majority rejected the incremental harm doctrine for reasons not unlike those outlined in the Ninth Circuit's dissenting opinion. Going one step further, the Court's majority made it abundantly clear that the incremental harm doctrine is not embedded in the First Amendment protection for speech.\textsuperscript{68} Dismissing suggestions to the contrary, the Court reasoned that the question of incremental harm has no bearing upon whether a defendant published the subject statement with the requisite actual malice.

Though only two of the six contested quotations have thus far been assessed in this Note, the Ninth Circuit offered no new wrinkles in examining the other four passages. The question now ripe for the asking is this: would damage have been done had the Supreme Court simply put upon the appellate court's decision its stamp of approval? The appellate panel gave writers a license to do that which any reputable publication would frown upon.\textsuperscript{69} The panel would have allowed writers, when confronted with ambiguous utterances, to interpret what the speaker said—then stuff it between quotation marks and pass it off as a carbon copy of the actual statement. Never mind that the quotation might wildly miss the mark. If the interpretation is rational, the writer skirts libel litigation. Should that avenue lead to a dead end, the reporter can escape by traveling the path of incremental harm. That doctrine seemingly condones battering he who has already been beaten. The Court's reversal did much for Masson and countless other public figures. It did even more for a profession that would have been

\begin{itemize}
\item \textsuperscript{68} On other grounds, 477 U.S. 242 (1986), Justice Scalia said of the incremental harm doctrine:
\begin{quote}
[The theory must be rejected because it rests upon the assumption that one's reputation is a monolith, which stands or falls in its entirety. The law, however, proceeds upon the optimistic premise that there is a little bit of good in all of us—or perhaps upon the pessimistic assumption that no matter how bad someone is, he can always be worse. It is shameful that Benedict Arnold was a traitor; but he was not a shoplifter to boot, and one should not have been able to make that charge while knowing its falsity with impunity. . . . Even the public outcast's remaining good reputation, limited in scope though it may be, is not inconsequential.]
\end{quote}
\item \textsuperscript{69} Consider the standard of quoting accuracy at the \textit{New York Times}. The following appeared in an internal bulletin issued from the \textit{Times} news desk:
\begin{quote}
When is a quote not a quote? "That was a center of world terror that doesn't exist anymore," we quoted Ariel Sharon as having said of southern Lebanon (Feb. 26). But what he said—and what the reporter filed—was less succinct: "That was a center of world terror; that center of world terror doesn't exist anymore." Scant difference in meaning, but a larger difference ethically: Quotation marks guarantee the reader that we're transmitting the subject's words, \textit{literally}. If the speaker isn't terse enough to suit us, we can tidy up the prose—but only after removing the quotation marks.
\end{quote}
\end{itemize}

\textit{Tone of the Times, Winners & Sinners, N.Y. TIMES, Apr. 13, 1984, at 1, quoted in Masson v. New Yorker Magazine, Inc., 895 F.2d 1535, 1562 (9th Cir. 1989)(Kozinski, J., dissenting).}
embarrassed by a ruling exculpating writers so derelict in their disseminative duties.

B. The Supreme Court Majority Opinion

The majority eschews the appellate court's application of the incremental harm doctrine and the rational interpretation test. The Court, instead, opts for a test that measures the materiality of the alterations made within the quotation marks. The Court, noting that libel law overlooks minor inaccuracies and concentrates on substantial truth, holds that deliberate alteration of a public figure's words is not actionable unless the alterations materially change the meaning conveyed by the statement. The words can be bent; the meaning cannot be broken. The Court proceeded to find the requisite material change in five of the six quoted passages at issue. The Court found within the general principles of defamation law sufficient elasticity to address matters of misquotation. The idea of a special test tailored to inaccurate quotations was explicitly rejected by the majority. The majority rightly reversed the appellate panel, the members of which issued to a generally responsible lot an unnecessary invitation to dabble in defam-

71. Id.
72. The Court concluded that the evidence presented a jury question as to whether Malcolm acted with actual malice in the following five passages:

1. Masson was quoted as saying that he was like an "intellectual gigolo." On tape, Masson said: "They felt, in a sense, I was a private asset but a public liability. . . . They liked me when I was alone in their living room . . ." Id. at 2426.
2. Masson, speaking about Maresfield Gardens, was quoted as saying that "it would also have been a place of sex, women, fun." On tape, Masson said "we were to stay with each other and [laughs] we were going to pass women on to each other, and we were going to have a great time together when I lived in the Freud house." Id.
3. Speaking of the anti-Freudian remarks made during the paper presentation in 1981, Masson was quoted as saying: "That remark about the sterility of psychoanalysis was something I tacked on at the last minute, and it was totally gratuitous. I don't know why I put it in." On tape, he said: "I think the last sentence was an in, [sic] possibly gratuitously offensive way to end a paper. . . ." He also said on tape that the remark "was true . . . I really believe it. I didn't believe anybody would agree with me." Id. at 2427.
4. Speaking of how analysts would react to his own book, Masson was quoted as saying: "They will want me back, they will say that Masson is a great scholar, a major analyst—after Freud, he's the greatest analyst who ever lived." On tape, Masson said: "I hold a position that no other analyst holds, including, alas, Freud. At first I thought: Okay, it's me and Freud against the rest of the analytic world. . . . Not so, it's me. It's me alone." Id.
5. The fifth passage is too lengthy to reproduce in full and cannot be explained by extracting portions of the quote. In sum, it can be said that, as quoted, Masson appears to assert that he was the "wrong man" to do "the honorable thing." On tape, Masson described himself as a person willing to undergo a scandal in order to shine the light of publicity upon the actions of the Freud Archives. Id. at 2428.
73. Id. at 2432.
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atory inaccuracies. Still, Justice Kennedy's majority opinion is noticeably sympathetic to the difficulties often encountered by journalists in reconstructing quotations. Should the Court have demanded still more of writers and reporters? That is, does there exist under a standard that takes note only of material alterations a possibility for abuse?

The Court begins by giving to writers and those who edit their copy the authority to make grammatical and syntactical corrections within the quotation marks. With this, few can quarrel. Persons often speak in long-winded clauses and parenthetical comments. As a result, they falter in their efforts to make their verbs agree with their subjects. There is scant harm in changing "is" to "are" or "do" to "does." Such minuscule cleanup work is excepted, partly because of the recognition that it is more difficult to speak eloquently than to write well. Writing is a methodical trade often plied in secluded and comfortable confines. In contrast, speakers find themselves staring at bright lights, encircled by notebook-toting reporters thirsty for contentious commentary. To demean a speaker for an occasional grammatical gaffe is neither nice nor necessary. And to consider so minor a make-over as libel fodder is unthinkable.

Beyond grammatical and syntactical changes, the Court also excuses alterations that do not materially change the meaning of the actual statement. The question of what constitutes a material change in meaning becomes the fighting issue. Reviewing the six passages to which the Court applied its "material change" standard is of limited help. The five alterations that the Court deemed material begged for such a conclusion. A review of the standard as applied to those five passages only alerts writers that a gross twisting of another's words is impermissible.

There may be more value in examining the alterations that the Court found to be immaterial. As has been previously stated, Masson said on tape that he changed his middle name to Moussaieff because he "just liked it." Malcolm quoted him as saying that he made the change because "it sounded better." It is hard to imagine how such an alteration could cripple one's character. The Court obviously felt that when words are reshaped in so harmless a way, the public figure should be left remediless. But had the "it sounded better" passage been the only misquotation in the 48,500-word piece, one wonders whether Masson would have instigated a libel suit. And if he had filed suit on the basis of that statement, would a jury have awarded any

74. Id. at 2431-32.
75. Id. at 2433.
76. Id. at 2426.
77. Id.
meaningful amount of money? The assumption in this Note is that Masson would, in the hypothetical case, receive little or nothing. However, exorbitant libel awards are in no way uncommon. In 1984, the Libel Defense Resource Council reported that jury awards in libel cases had risen faster than awards in any other category. See RALPH L. HOL-SINGER, MEDIA LAW 118 (1st ed. 1987). Further libel statistics indicate that plaintiffs who can get past summary judgment have a success rate with juries in the range of 80 percent. MARC A. FRANKLIN & DAVID A. ANDERSON, CASES AND MATERIALS ON MASS MEDIA LAW 406 (4th ed. 1990). But defendants appeal virtually all jury losses and obtain reversals in about 70 percent of the cases. Id.

This is precisely the standard that Masson urged the Court to adopt. Masson v. New Yorker Magazine, Inc., 111 S. Ct. 2419, 2431 (1991).

78. The Court's discussion is confined to words spoken. But what of the reporter who quotes from that which is written? The Court does not say whether the same "material change" standard would apply. Major metropolitan newspapers ran stories on the Masson case one day after the decision came down. Most of those stories quoted portions of Justice Kennedy's majority opinion. But were those Kennedy's exact words, or was the justice misquoted? Couldn't reporters have taken the forgiving "material change" standard for a test drive one day after the Court put it on the lot?
for such tinkering under the Court’s holding? Probably so. The meaning of the governor’s actual statement is left intact. The governor, in both the actual utterance and the altered quotation, is simply asserting that Democrats are attempting to spend beyond the state’s means.

That a reporter would be tempted to make less vapid his sources’ spoken words should surprise no one. A newsmaker can give to a reporter no greater gift than an animated utterance. During a four-hour committee hearing on taxation legislation, there undoubtedly will be a dearth of quotable quips. The lawmaker who pipes up with a snappy quote attains instant hero status among the press corps. Certain politicians, coaches and celebrities are quoted more often than are others. It’s not that these oft-quoted types are more important than their colleagues. Rather, they are the poets, able to weave words artistically. Reporters soon develop an ear for the perfect quote. The minute a smidgen of eloquence spills from a speaker’s mouth at a press conference, members of the reporting legion put pens to paper and the writing race is on.

Under *Masson*, ears that deftly detect good quotes are unnecessary. So long as the reporter pays attention to the meaning conveyed by the speaker, his creativity will supply the vivacious quotes. Will it ever happen? Readers may never know. A person not blessed with oratorical talents is unlikely to cry foul when made to look sharper than she is.

But suppose the altered quotation makes the speaker appear more lifeless and inarticulate than is actually the case. Simply flip-flop the aforesaid scenario. If the governor actually made the “champagne appetite” comment, might a reporter bereft of conscience doctor the quote to the governor’s detriment? That is, might the reporter wrap quotation marks around the comparatively dull language? When good quotes knock, reporters generally answer. But reporters and newsmakers are not always the best of friends. Adversarial relationships are common, if not necessary. The Court’s standard seemingly would allow a reporter to turn a well-spoken wordsmith into a blunderbuss. The only catch—a small one—is that the meaning of

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81. Concededly, the reporter’s alteration in the fictitious scenario would not be injurious to the governor’s reputation—unless the governor was known by the electorate to be an ardent teetotaler who never would allow intoxicants to spill over into his vocabulary. This Note does not endorse making non-defamatory alterations actionable. Rather, the scenario above has been included in this Note primarily to decry the way in which the *Masson* standard allows one to intentionally alter quotations without offending the actual malice standard.

82. A plaintiff made to look worse (as in this scenario) is more likely to recover than the plaintiff who—due to the reporter’s desire to inject life into the quotation—is made to look better. That’s because the published statement, to be actionable, must also be *defamatory*. Persons made to appear foolish due to an altered quota-
the statement must be substantially preserved. Whether a speaker is made to look better or worse, the practice of deliberately altering quotations in a defamatory fashion deserves condemnation in the courtroom and newsroom alike.

The Court, through its Masson decision, has given to writers and reporters what many will view as a break. But the gift will reap little good. To newspapers and magazines, credibility is critical. Indeed, it is all they have. Many newspapers today have been diagnosed with a life-threatening ailment: declining readership. People pressed for time are resorting to the electronic media. But print media boosters don't decline invitations to extol the virtues of their product. They claim that there is in a newspaper depth and detail not available on the telly or over the airwaves. They also preach proudly of what they say is a painstaking commitment to unequaled accuracy. To be accurate is to be credible. And court rulings that relax accuracy standards chip away at the credibility that the print media can ill afford to lose.

C. The Supreme Court Dissenting Opinion

The dissent proposes saddling writers and reporters with the most stringent of standards. Under the approach embraced by Justices White and Scalia, the actual malice requirement would be satisfied upon a showing that a quotation had been deliberately altered. At first blush, the dissent's stance appears unduly unforgiving. In the end, it isn't. White proceeds logically, arriving at a virtually inescapable conclusion.

The dissent begins by reiterating that actual malice means publication with knowledge of falsity or reckless disregard as to truth or falsity. White then allies himself with the majority in stating that quotation marks indicate that the source spoke the words as quoted. His conclusion is simple: if Malcolm asserted that Masson spoke those very words, knowing that he did not, she published a "knowing falsehood." White is on target in asserting that Times v. Sullivan forbade reporting a known falsehood. Commenting on the Masson majority, White wrote that "[t]he falsehood, apparently, must be substantial; the
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reporter may lie a little, but not too much." The implication is that, on matters of misquotation, the rule of *Times v. Sullivan* is ignored, or at least loosened to the benefit of the press.

It would be unfair to simply laud the arrows of criticism that White aims in the majority's direction. The position actually advocated by the dissent deserves assessment. It is apparent that the dissent carves no exception for writers and editors who make grammatical or syntactical changes to quotations. Not even Masson urged adoption of so strict a standard. Rather, he maintained that changes *beyond* grammar and syntax should be taken to constitute actual malice. An exception for grammatical and syntactical changes has been endorsed previously in this Note.

The dissent, by issuing a reminder that statements are actionable only if *defamatory*, does well to quell fears that so unforgiving a standard would spawn a deluge of libel litigation. White makes a critical point in noting that a plaintiff would not automatically advance to trial even if the actual malice issue is determined to be one for the jury. Motions for summary judgment can be made on grounds other than want of actual malice. For instance, it could be decided as a matter of law that no reasonable jury could find that the public figure was subjected to hatred, ridicule or contempt. With the fear of frivolous suits effectively defused by White, the dissent's stance, however stringent, seems appropriate.

The dissenting opinion does more than put its support behind a strict standard. It tells writers how they could avoid running afoul with the standard, if indeed it were in place. White contends that a reporter unable to reproduce the words precisely as they were spoken should simply paraphrase. White is right. But so elementary a solution is not easily seconded, if for no other reason than White's apparent failure to recognize the value of the direct quotation. The Ninth Circuit's dissenting opinion recognizes that direct quotations lend credibility to an article. Only through direct quotes can readers draw their own conclusions and get a true feel for the speaker. And in pieces such as the one penned by Malcolm, direct quotes are more a necessity than a narrative luxury. But quotations do more than en-

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88. *Id.* at 2438.
89. *Id.* at 2431.
90. See discussion of the majority opinion, *supra*.
91. *Id.* at 2438.
92. *Id.*, referring to CAL. CIV. CODE ANN. sec. 45 (West 1982).
93. White offered this example: if Malcolm would have written that Masson said he wore contact lenses, when in fact he said nothing of his eyes or vision, the judge would grant summary judgment to the defendants and dismiss the case. *Id.*
94. *Id.*
hance credibility and pad profiles. Objective reporting requires news copy to be surrounded with a stylistic straitjacket. The news is a bland course, served to the reader with little or no seasoning. But once in a while—about every three or four column inches—the reader is fed a direct quotation. The quote is an oasis of sorts, offering relief from the sterility that so permeates newswriting.

As White suggests, reporters should not use direct quotations when unable to resurrect the speaker's words with precision. But neither should reporters accept paraphrasing as a suitable alternative. Had four other justices endorsed White's view, reporters simply would have had to try harder when attempting to resurrect exact utterances. Reporters anxious to obviate the risk of misquotation can run tape recorders if not up against tight deadlines. Reporters can also read quotes back to the source. Should the source attempt to alter the words originally spoken, the reporter can quote the second version or paraphrase the first. Finally, writers can "capture the gist" of a statement by using "intermittent quotation marks," as illustrated in this sentence.

The dissent's apparent inability to appreciate the problems that plague reporters is somewhat disturbing. But the standard it advocates is not. Ideally, the dissent would have excepted grammatical and syntactical alterations. But the dissent's endorsement of a standard that fosters a strong commitment to accuracy more than offsets its failure to carve out the aforementioned exception. If White would have had his way, direct quotations would have been just that. There would have been no cloudburst of libel litigation. And by refusing to excuse deliberate alterations, the dissent would have meritoriously maintained the readership's trust in the words within the quotation marks.

V. CONCLUSION

Quoting a newsmaker can be as simple as pressing the "record" button on the tape recorder. Writers and reporters who adore the quote but abhor the recorder must scribble furiously. Trying to catch a speaker's every word with mere pen and paper is not an activity for those destitute of dexterity. But the note-taking reporter who misses an occasional word need not hail a libel lawyer. Negligently misquoting a source is excusable error under the standard set forth in New York Times Co. v. Sullivan. Thus, the Masson Court unnecessarily and paternalistically rushes to the aid of a profession already equipped

with an adequate arsenal. In *Masson*, the Court builds on the forgiveness already extended to those who misquote *negligently* and misappropriates protection to those who misquote *deliberately*. The erroneous implication is that intentional distortion is a vital organ that prolongs life among newspapers and magazines.

In medical parlance, the question in *Masson* was whether quotations could be doctored. The Ninth Circuit would have given to writers and editors an ax to perform major reconstructive surgery on quotations. The Court refused to tolerate such gross disfigurement, but still allowed writers to perform substantial operations on others’ words. The best standard, urged by Masson himself, went unadopted. The petitioner would have placed in the palms of writers and editors a scalpel to surgically remove grammatical blunders. The dissent came closest to the standard urged by Masson, recognizing that one’s words are no less inviolate than his person. Had more members of the Court recognized as much, a noble and credibility-enhancing benediction would have been given to a standard encouraging the utmost in accuracy.

*Steven M. Thomas, '93*