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To Quote or Not to Quote: The Status of Misquoted Material in Defamation Law

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RECENT DEVELOPMENT

To Quote or Not to Quote: The Status of Misquoted Material in Defamation Law

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I. INTRODUCTION

To quote or not to quote¹ is no longer a valid question in defamation² law because courts have lessened the burden on writers to use the exact words of the speaker in quoted language.³ If individuals feel that the press has misquoted them, they have three realistic options: First, ignore the misquotation; second, contact the media and request a retraction;⁴ and third, file a lawsuit claiming defamation and seeking monetary damages.⁵ The first alternative is the easiest, but given the emotional overtones of defamation,⁶ it is also the most unlikely. If the media were more sensitive and less defensive, the second alternative might be the best solution.⁷ For many individuals, however, a lawsuit appears to be the only way to obtain satisfaction.⁸

Yet if the individual elects to file a lawsuit, the truth or falsity of the quotation will be far down the list of factors addressed by the court and may not be addressed at all.⁹ Plaintiffs in a defamation suit first must weave their way through the maze of categories that the courts have erected.¹⁰ The most pressing questions include: (1) Is the plaintiff

1. Adapted from W. SHAKESPEARE, *THE TRAGEDY OF HAMLET, PRINCE OF DENMARK*, Act III, Scene 1.

2. A defamatory communication is one that tends to harm the reputation of a person and, thus, to lower that person in the estimation of the community. Defamatory statements hold a person up to ridicule, contempt, or scorn in a considerable part of the respectable community. The meaning attributed to the statement is that which the recipient reasonably understands that it was intended to express. RESTATEMENT (SECOND) OF TORTS §§ 559, 563 (1977); BLACK'S LAW DICTIONARY 375-76 (5th ed. 1979).

The term "defamation" traditionally includes both libel and slander. Libel consists of defamation by printed words or embodiment in physical form. Slander is defamation by spoken words or transitory gestures. RESTATEMENT (SECOND) OF TORTS § 568 (1977). Although this Recent Development examines the publication of misquoted material and, therefore, technically concerns libel, the terms "libel" and "defamation" will be used interchangeably to refer to such publications.

3. In *Masson v. New Yorker Magazine*, 895 F.2d 1535 (9th Cir. 1989), the Ninth Circuit held that actual malice could not be inferred from a failure to use the speaker's exact words provided that the fabricated quotations do not alter the substantive content of remarks that the speaker actually made or are rational interpretations of the speaker's ambiguous remarks. *Id.* at 1539; see also *Dunn v. Gannett N.Y. Newspapers*, 833 F.2d 446 (3d Cir. 1987) (holding that the word "cerdos," which translates as "pigs," was a fair translation of "litterer," the word actually used by the mayor of Elizabeth, New Jersey to describe the relationship between the city's Hispanics and the city's litter problem).

4. See R. BEZANSON, G. CRANBERG, J. SOLOSKI, *LIBEL LAW AND THE PRESS* 25 (1987) [hereinafter *LIBEL LAW AND THE PRESS*].

5. *Id.* at 78-94.

6. *Id.* at 152-59; see also R. SMOLLA, *SUING THE PRESS* 3-9 (1986).

7. See Eberhard, *There's Got to Be a Better Way: Alternatives to the High Cost of Libel*, 38 *MERCER L. REV.* 819, 828-29 (1987); *LIBEL LAW AND THE PRESS*, *supra* note 4, at 82-88.

8. See *LIBEL LAW AND THE PRESS*, *supra* note 4, at 78-82.

9. See Bezanson, *Libel Law and the Realities of Litigation: Setting the Record Straight*, 71 *IOWA L. REV.* 226, 226-27 (1985); see also *LIBEL LAW AND THE PRESS*, *supra* note 4, at 104-07.

10. See *LIBEL LAW AND THE PRESS*, *supra* note 4, at 200.

a public official, a public figure, or a private figure; (2) Did the plaintiff bring suit against a media defendant or a nonmedia defendant; (3) Does the quoted language concern an issue of public or private concern; and (4) Can the plaintiff prove actual malice by the defendant? Doctrines such as the libel-proof plaintiff¹¹ and neutral reportage¹² also must be considered. Because the answers to these questions usually are unclear, commentators in the field have described defamation law as contradictory and confusing¹³ and a "hodge-podge that operates erratically at best, and perversely at worst."¹⁴

This Recent Development will explore defamation law in the context of quoted material. Part II chronicles the judicial decisions that have given rise to the categorization of defamation suits, the definition of actual malice, and the resulting procedural problems. Part III focuses on the decision in *Masson v. New Yorker Magazine*¹⁵ and discusses recent developments in the actual malice area and burden of proof requirements at the summary judgment stage as these developments relate to misquoted material. Part IV analyzes current problems that plaintiffs in defamation cases encounter because courts fail to consider

11. The libel-proof plaintiff theory first appeared in *Cardillo v. Doubleday & Co.*, 518 F.2d 638 (2d Cir. 1975), when the court held that because of the plaintiff's life as an habitual criminal, he would be unlikely to recover anything more than nominal damages for allegedly libelous statements and, therefore, affirmed the action's dismissal. Under the incremental harm branch of the libel-proof plaintiff doctrine, if the disputed statements add little harm to that inflicted by the undisputed statements, then the new harm is virtually nonexistent and the disputed statements are not actionable. A split in the circuits developed when the District of Columbia Circuit expressly rejected the libel-proof plaintiff doctrine in *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563, 1568-69 (D.C. Cir. 1984), *vacated on other grounds*, 477 U.S. 242 (1986). The Supreme Court, in vacating the judgment, declined to review the lower court's holding on the libel-proof plaintiff issue, thus letting stand the rejection of the doctrine in the D.C. Circuit. *Liberty Lobby*, 477 U.S. at 242. In a subsequent denial of certiorari in a Second Circuit case, *Herbert v. Lando*, 781 F.2d 298 (2d Cir.), *cert. denied*, 476 U.S. 1182 (1986), however, the Supreme Court let stand a form of the libel-proof plaintiff doctrine. See Magnetti, "In the End, Truth Will Out" . . . Or Will It?, 52 Mo. L. Rev. 299, 336-39 (1987). See generally Note, *The Libel-Proof Plaintiff Doctrine*, 98 HARV. L. REV. 1909 (1985).

12. The neutral reportage privilege first appeared in *Edwards v. National Audubon Soc'y, Inc.*, 556 F.2d 113 (2d Cir.), *cert. denied*, 434 U.S. 1002 (1977). Under this doctrine, the press may report defamatory charges made by another without assuming liability for them. The republication of such defamatory remarks is protected when four elements are met: (1) the charge must relate to a pre-existing public controversy or generate its own controversy; (2) the charge must be made by a public official, public figure, or prominent organization; (3) the charge must concern a public official or public figure; and (4) the charge must be republished accurately and disinterestedly, *i.e.*, neutral. R. SMOLLA, LAW OF DEFAMATION § 4.14[3] (1989); see also Magnetti, *supra* note 11, at 329-31. See generally Note, *The Developing Privilege of Neutral Reportage*, 69 VA. L. REV. 853 (1983).

13. Smolla, Dun & Bradstreet, Hepps, and Liberty Lobby: A New Analytic Primer on the Future Course of Defamation, 75 GEO. L.J. 1519, 1519 (1987) (describing defamation law as "dripping with contradictions and confusion").

14. Franklin, *Good Names and Bad Law: A Critique of Libel Law and a Proposal*, 18 U.S.F. L. REV. 1, 2 (1983).

15. 895 F.2d 1535 (9th Cir. 1989).

the truth or falsity element of the defamation tort and primarily focus on constitutional protection under the first amendment.

Part V proposes alternatives that could aid an aggrieved plaintiff without infringing on first amendment rights. These proposals include a more sensitive media, legislation recognizing retraction statutes and declaratory judgment suits, and an expansion of the actual malice definition in cases concerning deliberate misquotation. This Recent Development concludes that freedom of expression in a democratic society may be maintained without the protection of deliberately misquoted material and suggests that the protection of such misquotations actually may hinder public debate.

II. LEGAL BACKGROUND

With the decision in *New York Times v. Sullivan*¹⁶ in 1964, the United States Supreme Court constitutionalized defamation law.¹⁷ The *New York Times* case and its progeny developed a myriad of categories into which a defamation action must fall before a court can determine both liability and damages.¹⁸ The new actual malice rule set forth in *New York Times* required further delineation.¹⁹ The conflict between the media's first amendment protection and an individual's reputational rights also resulted in numerous procedural decisions by the Court.²⁰ These major decisions, however, posed as many new questions as they answered old ones.²¹

16. 376 U.S. 254 (1964).

17. At common law, defamation was essentially a strict liability tort. If the plaintiff proved publication of defamatory words "of and concerning" the plaintiff, falsity was presumed. The defendant then could raise the affirmative defenses of truth, fair comment, or privilege. For discussions of common-law defamation on the eve of the *New York Times* opinion, see R. LABUNSKI, *LIBEL AND THE FIRST AMENDMENT* 25-59 (1987); R. SMOLLA, *supra* note 12, §§ 1.02-1.04; Magnetti, *supra* note 11, at 300-07.

18. See *LIBEL LAW AND THE PRESS*, *supra* note 4, at 200; see also *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749 (1985) (concerning the distinction between public and private matters); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (concerning a private figure); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967) (concerning a public figure); *New York Times*, 376 U.S. at 254 (concerning a public official).

19. See *St. Amant v. Thompson*, 390 U.S. 727 (1968); *Garrison v. Louisiana*, 379 U.S. 64 (1964).

20. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) (discussing summary judgment); *Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986) (discussing the burden of proof); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984) (discussing independent appellate review); *Herbert v. Lando*, 441 U.S. 153 (1979) (discussing the discovery process).

21. See generally W. HOPKINS, *ACTUAL MALICE: TWENTY-FIVE YEARS AFTER TIMES V. SULLIVAN* 1-8, 24-47 (1989) (examining the questions answered by the *New York Times* ruling as well as the questions posed by it); see also *LIBEL LAW AND THE PRESS*, *supra* note 4, at 200-06.

A. *The Categorization Decisions*

1. Public Officials

*New York Times*²² was the first case in which the Supreme Court granted certiorari to review a state court judgment in a civil defamation case.²³ In *New York Times* a City Commissioner of Montgomery, Alabama brought a civil libel action against the newspaper and four black clergymen alleging that an advertisement sponsored by the four individuals defamed him.²⁴ The plaintiff's duties included supervision of the police department, and the advertisement concerned police abuses and official harassment of Dr. Martin Luther King, Jr.²⁵ The plaintiff received a favorable verdict and a 500,000 dollar damage award from an Alabama circuit court jury. The Alabama Supreme Court affirmed.²⁶

The United States Supreme Court reversed the Alabama court's decision. Justice William Brennan's majority opinion announced a new standard in libel actions: the Constitution requires a rule prohibiting public officials from recovering damages for defamatory falsehoods concerning their official conduct unless they can prove that the statement was made with actual malice.²⁷ The Court defined actual malice as knowledge of a statement's falsity or reckless disregard of whether it was false or not.²⁸

This standard arose out of the Court's recognition of an important national commitment to the principle that debate on public issues, even if it includes criticism of government and public officials, should be uninhibited.²⁹ If freedom of expression is to have the breathing space required to survive,³⁰ the occasional erroneous statement arising from free debate must be afforded a measure of protection.³¹ The majority

22. 376 U.S. at 254.

23. *Magnetti*, *supra* note 11, at 307 n.36. As its vehicle for articulating a new libel standard, the Court chose a case arising from the burgeoning civil rights movement in the South. For a detailed analysis of the role of *New York Times* in the evolving political and moral values of its time, see R. SMOLLA, *supra* note 6, at 26-52.

24. *New York Times*, 376 U.S. at 256.

25. *Id.* at 257-58. The advertisement did not mention the plaintiff specifically, but the plaintiff contended that it was "of and concerning" him because he was the commissioner responsible for police department supervision. *Id.* at 258, 288.

26. *Id.* at 256.

27. *Id.* at 279.

28. *Id.* at 279-80. Although the majority adopted a balancing approach between first amendment protection and reputational rights, Justices Hugh Black, William O. Douglas, and Arthur Goldberg asserted an absolute privilege for citizens and the press in a democratic society to criticize official conduct. *Id.* at 293 (Black, J., joined by Douglas, J., concurring); *id.* at 298-99 (Goldberg, J., concurring).

29. *Id.* at 270.

30. *Id.* at 271-72.

31. Applying the newly adopted constitutional standard, the Court determined that the

concluded that the application of the new actual malice standard to public officials would provide that measure of protection.³²

2. Public Figures

In 1967 the Supreme Court decided the companion cases of *Curtis Publishing Co. v. Butts*³³ and *Associated Press v. Walker*.³⁴ The Court purposefully heard both cases together to consider the impact of the *New York Times* ruling on persons who are not public officials but are public figures involved in issues of public interest.³⁵ Chief Justice Earl Warren set forth the majority view³⁶ that the *New York Times* actual malice standard extended to plaintiffs who are public figures.³⁷ The Chief Justice reasoned that public figures play influential roles in areas of concern to society and that free debate on the involvement of public figures in public issues is crucial.³⁸

The *Curtis* and *Walker* cases vaguely defined the term "public figure." A more precise definition appeared seven years later in *Gertz v. Robert Welch, Inc.*³⁹ Public figures were deemed to be those persons who have assumed influential positions in societal affairs or who have thrust themselves into the public spotlight to influence the resolution of

plaintiff had failed to show actual malice with the convincing clarity that the standard demands. *Id.* at 285-88.

32. The *New York Times* Court failed to define the term "public official." In *Rosenblatt v. Baer*, 383 U.S. 75 (1966), decided less than two years after *New York Times*, the Court expressly declined to define the term, stating simply that "the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." *Id.* at 85.

33. 388 U.S. 130 (1967). In *Curtis* the University of Georgia athletic director brought a libel action against the *Saturday Evening Post* after the *Post* published an article accusing Butts of fixing a football game. *Id.* at 135-36.

34. 388 U.S. 130 (1967). The *Walker* suit arose when a news dispatch reported that a former Army officer, then a political activist with his own support group, personally had led a charge against federal marshals sent to the University of Mississippi to carry out a desegregation decree. *Id.* at 140.

35. *Id.* at 134.

36. Three other opinions were written in the case. Justice John Harlan's plurality opinion, joined by Justices Tom Clark, Potter Stewart, and Abe Fortas, announced a new standard for public figures: highly unreasonable conduct that constitutes an extreme departure from professional publishing standards would be actionable. *Id.* at 155. Chief Justice Earl Warren and Justices Byron White and William Brennan applied the *New York Times* actual malice standard. *Id.* at 164 (Warren, C.J., concurring); *id.* at 172 (Brennan, J., concurring and dissenting). Justices Black and Douglas, in order for the Court to reach a decision, joined Chief Justice Warren in applying the *New York Times* standard. They reiterated, however, their adherence to the absolute privilege doctrine that they had initially espoused in *New York Times*. *Id.* at 170-71 (Black, J., concurring and dissenting); see also Magnetti, *supra* note 11, at 312-13.

37. *Curtis*, 388 U.S. at 164.

38. *Id.*

39. 418 U.S. 323 (1974). For a fuller discussion of *Gertz*, see *infra* notes 49-59 and accompanying text.

particular public controversies.⁴⁰

Several post-*Gertz* decisions have further refined limited purpose public figures who thrust themselves to the forefront of controversy. Those public figures do not include a wealthy socialite drawn into a sensational divorce case,⁴¹ an individual unwillingly dragged into an investigation of Soviet espionage activities,⁴² or a research scientist receiving federal funds for animal research.⁴³

3. Private Figures

The *New York Times* ruling continued to gain momentum with the decision in *Rosenbloom v. Metromedia, Inc.*⁴⁴ The suit resulted from a radio broadcast referring to a distributor of nudist magazines as a "girlie-book peddler[]" engaged in "the smut literature racket."⁴⁵ Although the plaintiff was a private figure prior to the controversy,⁴⁶ Justice Brennan's plurality opinion concluded that the actual malice standard enunciated in *New York Times* applied to all communication involving subjects of public or general concern.⁴⁷

Justice John Harlan's dissent is particularly interesting. He argued that a different standard should apply to plaintiffs who are private figures because they have not thrust themselves voluntarily into the

40. *Gertz*, 418 U.S. at 345. In discussing public figures, the Court stated:

[T]hose who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.

Id.

41. In *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), Mary Alice Firestone sued *Time* for defamation arising from a report on her divorce. The Court held that she was not prominent enough to be a public figure for all purposes, nor was her voluntary use of the court system to obtain a divorce enough to qualify her as a limited purpose public figure. *Id.* at 453-55.

42. In *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 159 (1979), the plaintiff sued when a book published by the defendant listed him as a Soviet agent. In 1958 the plaintiff had appeared several times before a grand jury investigating Soviet intelligence activities, at one point had disobeyed a subpoena, and subsequently had pleaded guilty to criminal contempt. *Id.* at 161-63. Although the media had covered these events in 1958, the Court found that the plaintiff had not thrust himself to the forefront of public controversy voluntarily, but rather had been dragged unwillingly into the investigation. *Id.* at 166.

43. In *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), plaintiff research scientist brought suit against defendant Senator for defamation arising from the defendant's bestowal of his "Golden Fleece" award for wasteful government spending. *Id.* at 114. The Court found that the plaintiff had not thrust himself into the public controversy. The controversy was a consequence of the award, and the Court adamantly asserted that "those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." *Id.* at 135.

44. 403 U.S. 29 (1971), *overruled by Gertz*, 418 U.S. at 323.

45. *Rosenbloom*, 403 U.S. at 33-36.

46. *Id.* at 78 (Marshall, J., dissenting).

47. *Id.* at 44, 52.

public spotlight and have less access to the media than do public figures and public officials.⁴⁸

Within three years the Court overruled the *Rosenbloom* decision in *Gertz v. Robert Welch, Inc.*⁴⁹ Justice Harlan's dissent in *Rosenbloom* became an essential part of the *Gertz* majority view. Although the Court continued to focus on a plaintiff's status rather than the injury to reputation, the Court did attempt to relieve the burden on private plaintiffs by authorizing the use of a standard different from that of *New York Times*.⁵⁰ The Court recognized that a tension exists between the need for an aggressive and uninhibited press and the justifiable interest in remedying wrongful injury.⁵¹

The Court reaffirmed its application of the actual malice standard to public officials and public figures,⁵² but acknowledged two major differences between public persons and private persons: Private persons have less access to the channels of communication necessary to counteract false statements, and private persons have not assumed the risk of close public scrutiny that is a necessary consequence of involvement in public affairs.⁵³ The Court held that states may set forth their own liability standard for media defamation of a private person, provided that the standard is not strict liability.⁵⁴ The Court then looked at the nature and extent of the private person's involvement in the controversy in *Gertz* and refused to characterize as a public figure an attorney representing a client in litigation of public interest.⁵⁵

Although the *Gertz* Court allowed recovery under a lower standard than actual malice, recovery under that standard was limited to actual damages, including impairment of reputation, personal humiliation, and mental suffering.⁵⁶ The Court specifically mandated that states may not allow recovery of punitive and presumed damages without a showing of actual malice.⁵⁷ Furthermore, because states must impose at least a neg-

48. *Gertz, Id.* at 70 (Harlan, J., dissenting).

49. 418 U.S. at 323. In *Gertz* a reputable Chicago attorney had represented the Nelson family in a civil suit against the police officer who had killed their son. *Id.* at 325. The attorney then filed a defamation action when the defendant's magazine labeled him a "Leninist" and a "Communist-frontier" and alleged that he had arranged the frame-up of the police officer. *Id.* at 326-27. The plaintiff won a jury verdict in his favor and a damage award of \$50,000. The trial court entered judgment notwithstanding the verdict in favor of the defendant, the Seventh Circuit affirmed, and the Supreme Court granted certiorari. *Id.* at 328-30.

50. See Magnetti, *supra* note 11, at 314-15.

51. *Gertz*, 418 U.S. at 341-42.

52. *Id.* at 342.

53. *Id.* at 344-45.

54. *Id.* at 347.

55. *Id.* at 351-52.

56. *Id.* at 349-50.

57. *Id.* at 349.

ligence standard⁵⁸ on private plaintiffs, the *Gertz* decision provides no substantial relief to the private plaintiff. Only Justice Byron White in his dissenting opinion recognized that plaintiffs face the same problem in *Gertz* as faced in *New York Times*: the inability to obtain a judgment that the publication is false, not because it is true, but because the defendant had not acted negligently or recklessly.⁵⁹

4. Public Concern or Private Concern

In *Dun & Bradstreet v. Greenmoss Builders*⁶⁰ the Court once again faced the distinction between a public and a private concern that was first addressed in *Rosenbloom* and later overruled in *Gertz*. In a suit arising from the defendant's issuance of an inaccurate credit report on the plaintiff, the plaintiff received a favorable jury verdict and an award of 50,000 dollars compensatory damages and 300,000 dollars punitive damages.⁶¹ The award was inconsistent with the *Gertz* prohibition on recovery of punitive damages without a showing of actual malice,⁶² but the Vermont Supreme Court upheld the jury verdict by finding the media protection in *Gertz* inapplicable in nonmedia cases.⁶³

The United States Supreme Court upheld the verdict, but on different grounds. Because the credit report was only of interest to the plaintiff and its customers and the report was furnished only to five customers who contractually were foreclosed from disseminating it further, the Court determined that the report concerned no public issues.⁶⁴ This type of reporting required no special protection to ensure vigorous debate on matters of public concern.⁶⁵ Justice Lewis Powell's plurality opinion concluded that the *Gertz* prohibition on recovery of punitive and presumed damages in the absence of proof of actual malice is inapplicable when defamatory statements do not involve matters of public concern.⁶⁶ The Powell opinion does not address the distinction between media and nonmedia cases relied on by the Vermont Supreme Court, but five of the Justices specifically rejected that distinction.⁶⁷

58. See R. SMOLLA, *supra* note 12, §§ 3.09-3.11; see also Magnetti, *supra* note 11, at 318-19 n.96.

59. *Gertz*, 418 U.S. at 376 (White, J., dissenting).

60. 472 U.S. 749 (1985). For a detailed analysis of the *Dun & Bradstreet* opinion as it relates to past and future defamation law, see Smolla, *supra* note 13, at 1535-48.

61. *Dun & Bradstreet*, 472 U.S. at 751-52.

62. See *Gertz*, 418 U.S. at 349.

63. *Dun & Bradstreet*, 472 U.S. at 753.

64. *Id.* at 762.

65. *Id.*

66. *Id.* at 763.

67. See *id.* at 773 (White, J., concurring); *id.* at 781-82 (Brennan, J., joined by Marshall, Blackmun, and Stevens, JJ., dissenting). In the subsequent case of *Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986), the majority opinion again failed to address the distinction between

B. Actual Malice Defined

The actual malice standard has been confusing since its inception in *New York Times*.⁶⁸ The *New York Times* Court defined actual malice as knowledge of a statement's falsity or reckless disregard of whether it was false or not.⁶⁹ Several months later in *Garrison v. Louisiana*,⁷⁰ the Court elaborated on the reckless disregard prong of the actual malice test by requiring a high degree of awareness of the statement's falsity⁷¹ to satisfy the standard.

With the 1968 decision in *St. Amant v. Thompson*,⁷² the Court made its most obvious effort to delineate the actual malice standard. In *St. Amant* the petitioner, a candidate for public office, read a series of questions and a third party's answers thereto in a televised speech. Based on references made to him in those answers, the respondent filed a defamation action.⁷³ In holding that the petitioner's broadcast of the answers failed to meet the reckless disregard prong of the actual malice test, the Court observed that recklessness is measured by whether a defendant actually had serious doubts as to the truth of the publication, not by whether a reasonably prudent person would have published or investigated before publishing.⁷⁴

The Court conceded that tying the reckless disregard requirement to a reasonable person or a prudent publisher standard would result in greater incidents of recovery. Such a standard, however, would not further first amendment protection against media self-censorship.⁷⁵ After *St. Amant* reckless disregard can be established when a story is proven to be fabricated, to be based on an unverified and anonymous source, or to be inherently implausible; when obvious reasons exist to doubt the

media and nonmedia defendants. *Id.* at 779 n.4. Justice Brennan, however, repeated his rejection of this distinction. *Id.* at 780 (Brennan, J., joined by Blackmun, J., concurring).

68. See Kaufman, *Press Privacy and Malice: Reflections on New York Times Co. v. Sullivan*, 5 CARDOZO L. REV. 867, 873 (1984).

69. *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964). For an in-depth analysis of the evolution of Justice Brennan's actual malice theory, see W. HOPKINS, *supra* note 21, at 96-107.

70. 379 U.S. 64 (1964).

71. *Id.* at 74.

72. 390 U.S. 727 (1968).

73. *Id.* at 728-29.

74. The Court stated:

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

Id. at 731.

75. *Id.* at 731-32.

accuracy of the information; or when the defendant makes inconsistent statements.⁷⁶

C. *The Procedural Decisions*

1. Scope of Discovery

The first major procedural decision emanating from the *New York Times* case came in 1979 when in *Herbert v. Lando*⁷⁷ the Court determined that the actual malice rule dictated the scope of discovery permitted in defamation actions.⁷⁸ *St. Amant* had brought the defendant's state of mind into play in a plaintiff's attempt to show actual malice,⁷⁹ and *Herbert* tested that ruling. The *Herbert* case arose when the plaintiff, a retired Army officer, filed suit against Columbia Broadcasting Company and producer Barry Lando for allegations made on the program *60 Minutes* that the plaintiff fabricated reports of war crimes in Vietnam.⁸⁰ When Lando refused to answer interrogatories concerning his state of mind while preparing the program, the district court ordered that Lando answer the questions because his state of mind was of major importance to the malice issue.⁸¹

On interlocutory appeal, the Second Circuit reversed on grounds that disclosure of the editorial process would have a chilling effect on news reporting.⁸² On certiorari, the Supreme Court refused to grant an evidentiary privilege for the editorial process. The Court explained that the actual malice standard of *New York Times* and its progeny had expanded the plaintiff's burden, resulting in a plaintiff's need to focus on the editorial process in order to establish some degree of culpability for false publication.⁸³

76. *See id.* at 732.

77. 441 U.S. 153 (1979).

78. *See Kaufman, supra* note 68, at 874.

79. *See St. Amant*, 390 U.S. at 727; *see also supra* notes 72-76 and accompanying text (discussing the definition of actual malice).

80. *Herbert*, 441 U.S. at 155-56.

81. *Id.* at 157 (citing *Herbert v. Lando*, 73 F.R.D. 387, 395 (S.D.N.Y. 1977)).

82. *Herbert v. Lando*, 568 F.2d 974 (2d Cir. 1977), *rev'd*, 441 U.S. 153 (1979); *see also Kaufman, supra* note 68, at 873-75.

83. *Herbert*, 441 U.S. at 175-76. On remand, the district court dismissed nine statements because the plaintiff failed to meet the actual malice standard. 596 F. Supp. 1178 (S.D.N.Y. 1984). The appellate court then labeled the remaining two statements as subsidiary to primary, nonactionable issues and held them to be unactionable as well. 781 F.2d 298, 311-12 (2d Cir. 1986). This approach is a modified version of the incremental harm branch of the libel-proof plaintiff doctrine. *See supra* note 11.

2. Burden of Proof

New York Times and *Curtis Publishing Co. v. Butts* imposed the burden of proof of falsity on public plaintiffs through the application of the actual malice test.⁸⁴ The *Gertz v. Robert Welch, Inc.* decision allocated to plaintiffs who are private figures the burden of proving either negligence or malice by media defendants in cases dealing with speech of public concern.⁸⁵ *Gertz*, however, failed to address the issue of who bears the burden of proving truth or falsity if the negligence standard were applicable.

The Supreme Court specifically addressed that question in *Philadelphia Newspapers v. Hepps*.⁸⁶ The Court determined that when speech concerns public matters, the common-law rule that the defendant bear the burden of proving truth must succumb to a constitutional mandate that the private plaintiff bear the burden of proving both falsity and fault before recovering damages from a media defendant.⁸⁷ The Court left unanswered the questions of who bears the burden of proving falsity when the suit involves a public figure and private speech, a private figure and private speech, or any category of plaintiff or speech with a nonmedia defendant.⁸⁸

3. Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure provides that a grant of summary judgment is appropriate only if there is no genuine issue of material fact in the case.⁸⁹ In reviewing a lower court's grant of summary judgment in *Hutchinson v. Proxmire*,⁹⁰ the Supreme Court expressed concern over the lower court's statement that summary judgment was the rule rather than the exception in libel cases.⁹¹ The Court observed that proof of actual malice involves a defendant's state of

84. See *supra* notes 22-32 and accompanying text (discussing *New York Times*); *supra* notes 33-38 and accompanying text (discussing *Curtis*).

85. See *supra* notes 49-59 and accompanying text (discussing *Gertz*).

86. 475 U.S. 767 (1986). Hepps, the principal stockholder in a corporation that franchised "Thrifty" stores, brought a defamation action against a newspaper and two reporters for a series of articles linking him with organized crime and alleging use of those links to influence official conduct. *Id.* at 769. Although as a private plaintiff Hepps was required to prove negligence or malice by the defendant, the Pennsylvania courts followed the common-law view that a defamatory statement is presumptively false and the defendant bears the burden of proving truth as a defense. *Id.* at 770.

87. *Id.* at 776.

88. For a fuller analysis of the *Hepps* decision and possible answers to these questions, see Smolla, *supra* note 13, at 1525-31.

89. FED. R. CIV. P. 56(c).

90. 443 U.S. 111 (1979); see *supra* note 43 (discussing *Hutchinson*).

91. 443 U.S. at 120 (in dictum).

mind and is not normally suitable for summary disposition.⁹²

Despite the Court's remarks in *Hutchinson*, summary judgment remained a potent weapon for the media defendant.⁹³ In *Anderson v. Liberty Lobby, Inc.*⁹⁴ the Court further strengthened the likelihood of the media defendant's success at the summary judgment stage. The Court concluded that the substantive evidentiary standards applicable to a given case must guide the determination of whether a genuine factual issue exists for submission to the jury.⁹⁵ In ruling on a summary judgment motion in a defamation action, the trial court must determine whether the public plaintiff has demonstrated actual malice with clear and convincing evidence.⁹⁶ The majority opinion, however, presented conflicting guidelines for the trial court's use in determining the existence of a genuine factual issue with respect to actual malice.⁹⁷ While the Court exhorted the trial judge to look at the quantum and quality of the proof to determine whether it is of sufficient caliber to meet the clear and convincing standard,⁹⁸ the Court also warned that the judge's role does not extend to weighing evidence, making credibility determinations, or drawing legitimate inferences from the facts.⁹⁹

4. Independent Appellate Review

The doctrine of independent appellate review is the final barrier to recovery for defamation plaintiffs.¹⁰⁰ The *New York Times* ruling imposes a duty on reviewing courts to make an independent examination of the entire record to ensure that actual malice was proven with con-

92. *Id.* at 120 n.9. In enunciating the new actual malice standard, the *New York Times* Court stated that such actual malice must be shown with convincing clarity. *New York Times v. Sullivan*, 376 U.S. 254, 285-86 (1964).

93. A survey conducted by the Libel Defense Resource Center revealed that 75% of the 110 summary judgment motions recorded by the Center from 1980-1982 were granted. Of the 136 summary judgment motions the Center recorded from 1982-1984, just under 75% were granted. See Kaufman, *Libel 1980-85: Promises and Realities*, COMM. LAW., Fall 1985, at 21.

94. 477 U.S. 242 (1986).

95. *Id.* at 255.

96. This ruling resolved a split in the circuits. Compare *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563, 1570 (D.C. Cir. 1984) (holding clear and convincing evidence irrelevant for purposes of summary judgment), *vacated on other grounds*, 477 U.S. 242 (1986) with *Rebozo v. Washington Post Co.*, 637 F.2d 375, 381 (5th Cir.) (holding clear and convincing evidence proper standard on summary judgment ruling), *cert. denied*, 454 U.S. 964 (1981); *Yiamouyiannis v. Consumers Union of United States, Inc.*, 619 F.2d 932, 940 (2d Cir.) (holding clear and convincing standard proper for summary judgment ruling), *cert. denied*, 449 U.S. 839 (1980).

97. Justice Brennan highlights these conflicting guides in his dissenting opinion. *Liberty Lobby*, 477 U.S. at 266 (Brennan, J., dissenting).

98. *Id.* at 254.

99. *Id.* at 255.

100. Studies conducted by the Libel Defense Resource Center indicated an approximate 67% reversal rate on libel actions decided from 1980-84. When courts employ independent review, the reversal rate rises to about 80%. See Kaufman, *supra* note 93, at 21, 23.

vincing clarity.¹⁰¹ Rule 52(a) of the Federal Rules of Civil Procedure, however, establishes a clearly erroneous standard for review of factual findings made by the trial judge.¹⁰²

In *Bose Corp. v. Consumers Union of United States, Inc.*¹⁰³ the Supreme Court addressed the potential conflict between the two standards¹⁰⁴ and reaffirmed the independent appellate review doctrine, characterizing it as a federal constitutional mandate in those cases governed by *New York Times*.¹⁰⁵ The Court sidestepped conflict with Rule 52(a) by stating that the rule does not expressly preclude independent review.¹⁰⁶ The Court's opinion also supports the theory that independent appellate review in defamation cases might be outside the scope of Rule 52(a) because the entire record is examined, not with a view toward overturning factual findings, but rather for determining whether the evidence surpasses the constitutional threshold barring an entry of judgment without clear and convincing proof of actual malice.¹⁰⁷

Subsequent to the ruling in *Bose*, a conflict developed concerning the proper deference to be given jury verdicts upon de novo review.¹⁰⁸ In *Tavoulaareas v. Piro*¹⁰⁹ the District of Columbia Circuit, although not specifically addressing the scope of the *Bose* standard, conducted its own examination, independent of the jury's findings, of the facts supposedly establishing malice. In *Connaughton v. Harte Hanks Communications*¹¹⁰ the Sixth Circuit rejected the *Tavoulaareas* interpretation and held that the reviewing court, in making its own independent assessment that actual malice was proven clearly and convincingly, must assume that all facts which a jury reasonably could have found favorable to the plaintiff were found favorable to the plaintiff.¹¹¹

After granting certiorari in *Harte-Hanks Communications v. Connaughton*, the Supreme Court seemed to reach a middle ground. Rather

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

102. FED. R. CIV. P. 52(a); see also R. SMOLLA, *supra* note 12, § 12.09 (discussing the doctrine of independent judicial review in defamation case appeals).

103. 466 U.S. 485 (1984). This defamation action arose out of a product disparagement claim in which the respondent, in a published review of the petitioner's loudspeakers, observed that the sound "wander[ed] about the room." *Id.* at 487-88.

104. See Note, *The Future of Libel Law and Independent Appellate Review: Making Sense of Bose Corp. v. Consumers Union of United States, Inc.*, 71 CORNELL L. REV. 477 (1986); Comment, *The Expanding Scope of Appellate Review in Libel Cases—The Supreme Court Abandons the Clearly Erroneous Standard of Review for Findings of Actual Malice*, 36 MERCER L. REV. 711 (1985).

105. *Bose*, 466 U.S. at 510-11.

106. *Id.* at 499.

107. See *id.* at 510-11; see also sources cited *supra* note 104.

108. See R. SMOLLA, *supra* note 12, §§ 12.09(2)-12.09(4).

109. 817 F.2d 762, 788-98 (D.C. Cir.) (en banc), *cert. denied*, 484 U.S. 870 (1987).

110. 842 F.2d 825 (6th Cir. 1988), *aff'd*, 109 S. Ct. 2678 (1989).

111. 842 F.2d at 843-44.

than accepting the narrow view that judicial deference must be given to all findings a jury reasonably could have made or the broad view that no deference be given to jury findings,¹¹² the majority opinion accepted the jury's determination of controverted facts.¹¹³ The Court then reviewed the full record to determine whether the evidence supported the jury's findings and whether actual malice could follow inextricably from those findings.¹¹⁴ The Court indicated in dictum that this view was consistent with its earlier decision in *Bose*.¹¹⁵

III. RECENT DEVELOPMENT: *MASSON v. NEW YORKER MAGAZINE*

A. Majority Opinion

Divergent opinions¹¹⁶ greeted the Ninth Circuit's split decision in *Masson v. New Yorker Magazine*,¹¹⁷ a defamation case arising from the publication of misquoted statements. *Masson* exemplifies many of the categorization, actual malice determination, and procedural problems encountered in a defamation action.

In *Masson* author Janet Malcolm published a serial article in *The New Yorker* magazine concerning psychoanalyst Jeffrey Masson and his stormy association with the Sigmund Freud Archives. The article, which was reprinted later as a book, primarily was based on the author's tape-recorded interviews with Masson.¹¹⁸ Masson filed a libel action against Malcolm, *The New Yorker*, and publisher Knopf, contending that Malcolm had fabricated quotations attributed to him and had edited his statements to his detriment.¹¹⁹ The district court granted the defendants' summary judgment motions on the grounds that the plaintiff failed to show by clear and convincing proof any malice by the defendants in publishing the disputed passages.¹²⁰

The plaintiff appealed to the Ninth Circuit. Because the Ninth Circuit was reviewing a grant of summary judgment, the court assumed that defendant Malcolm deliberately altered the plaintiff's state-

112. See R. SMOLLA, *supra* note 12, §§ 12.09(2)-12.09(4).

113. *Harte-Hanks*, 109 S. Ct. at 2696-98.

114. *Id.* at 2697.

115. See *id.* at 2696 n.35.

116. For example, Harold W. Fuson, Jr., general counsel to a San Diego-based newspaper chain and head of American Newspaper Publishers Association's legal affairs committee, stated that "[j]ournalists don't have to be ashamed of this opinion," while *Time* magazine wrote that "the victory seemed Pyrrhic." DeBenedictis, *No Malice in Fabricated Quotes*, A.B.A. J., Oct. 1989, at 32.

117. 895 F.2d 1535 (9th Cir. 1989).

118. *Id.* at 1536.

119. *Id.* Masson contended that the remaining two defendants knew of Malcolm's misconduct before publishing the material. *Id.*

120. *Masson v. New Yorker Magazine*, 686 F. Supp. 1396, 1407 (N.D. Cal. 1987).

ments.¹²¹ The court then turned to the issue of whether the plaintiff, by clear and convincing evidence, had shown actual malice by the defendants.¹²² In affirming the summary judgment ruling, the court summarized the current law governing defamatory misquotations as follows: (1) actual malice may be inferred from a fabricated quotation that is wholly a product of the author's imagination;¹²³ (2) actual malice will not be inferred when the quoted language, although not in the exact words of the speaker, represents a rational interpretation of the speaker's ambiguous statements;¹²⁴ and (3) actual malice will not be inferred when the misquoted language does not alter the substantive content of the speaker's unambiguous statements.¹²⁵

The court analyzed in detail the eleven passages in dispute and found five of them to be substantially true and the remaining six to be rational interpretations of ambiguous statements made by the plaintiff, thereby precluding any finding of actual malice.¹²⁶ The most damaging

121. The parties disputed whether the statements were quoted accurately. For summary judgment purposes, however, the court resolved the dispute in favor of the plaintiff, the party opposing the motion. *Masson*, 895 F.2d at 1537, 1547.

122. *Id.* at 1537-39.

123. *Id.* at 1539; see also *Carson v. Allied News Co.*, 529 F.2d 206, 213 (7th Cir. 1976) (finding that a jury question existed as to whether a reporter who completely fabricated quotations attributed to Johnny Carson in conversations with NBC executives over a purported struggle to move his show from New York to Hollywood exhibited actual malice).

124. *Masson*, 895 F.2d at 1538; see also *Dunn v. Gannett N.Y. Newspapers*, 833 F.2d 446, 452 (3d Cir. 1987) (holding that the translation of the word "hitters" into the Spanish word "cerdos," the English equivalent being "pigs," was a fair, albeit inadequate, translation from which malice could not be inferred).

125. *Masson*, 895 F.2d at 1538; see also *Hotchner v. Castillo-Puche*, 551 F.2d 910, 914 (2d Cir.) (stating that actual malice will not be inferred from a change that does not increase the defamatory impact or alter the substantive content of an original statement), *cert. denied*, 434 U.S. 834 (1977).

126. The court found that (1) *Masson's* name change because "it sounded better" when the tape reflected he "just liked it" was substantially true, *Masson*, 895 F.2d at 1539-40; (2) *Masson's* reference to himself as an "intellectual gigolo" was a rational interpretation of his equivalent remark that he was considered to be a "private asset but a public liability," *id.* at 1540-41; (3) the "moral cowardice" on the part of Freud comment was a rational interpretation of *Masson's* acknowledged comment that Freud was "a man who just lost his courage. He was a brilliant mind who didn't have the courage to stick with things that he knew were true," *id.* at 1541-42; (4) the comment that *Masson* would have turned Freud's house into a "place of sex, women, fun" was substantially true because, although the plaintiff did not use these words, they were consistent with the plaintiff's earlier description of his lifestyle and his idea of fun, *id.* at 1542; (5) the plaintiff's reported prediction that he would be seen as "the greatest analyst who ever lived" reflected the substance of his own self-appraisal even though the quotation did not appear in the taped interviews, *id.*; (6) the comment of "don't know why I put it in" in reference to *Masson's* remark blaming Freud for the sterility of psychoanalysis was a rational interpretation of an ambiguous statement, *id.* at 1542-43; (7) *Masson's* comment "my discovery about the Schreber case" was substantially the same as remarks on tape, *id.* at 1543-44; (8) his comment "Eissler would have admitted I was right" was a rational interpretation of ambiguous remarks, *id.* at 1544; (9) the comment "Denise worries too much" was substantially the same as *Masson's* remarks on tape, *id.*; (10) the remark "aren't too many interpretations possible" was a rational interpretation of a confusing pas-

of the fabricated quotations was the plaintiff's reference to himself as an "intellectual gigolo—you get your pleasure from him, but you don't take him out in public."¹²⁷ Although the plaintiff emphatically denied making this statement, the court reasoned that the statement was a rational interpretation of the plaintiff's earlier remarks to the effect that he was a private asset but a public liability to others at the Freud Archives.¹²⁸ To further support its determination that the fabrication was not actionable, the court stated that because of other more provocative statements made by the plaintiff concerning himself, the "intellectual gigolo" quote was not defamatory under the incremental harm branch of the libel-proof plaintiff doctrine.¹²⁹ The court concluded that the plaintiff could not meet the requirements of the actual malice standard on any of the disputed passages and, therefore, affirmed the district court's grant of summary judgment.¹³⁰

B. Dissenting Opinion

In an explosive dissent, Judge Alex Kozinski expounded his view that first amendment principles do not extend to protection of deliberate alterations of quoted material.¹³¹ The dissent did recognize first amendment protection for inadvertent or negligent misquotation¹³² and cosmetic changes to improve grammar or word usage.¹³³ The protection of deliberate misquotations, however, according to the dissent, was unnecessary for the functioning of a free press.¹³⁴ If a statement is ambig-

sage, *id.* at 1545-46; (11) the comment "he had the wrong man," although taken out of context, was a rational interpretation of an ambiguous statement concerning whether the plaintiff was the wrong man to do the honorable thing or was the wrong man to keep silent for selfish reasons, *id.* at 1546.

127. *Id.* at 1540. The quotation in its entirety reads as follows:

She [the graduate student] said, "Well, it is very nice sleeping with you in your room, but you're the kind of person who should never leave the room—you're just a social embarrassment anywhere else, though you do fine in your own room." *And, you know, in their way, if not in so many words, Eissler and Anna Freud told me the same thing. They like me well enough "in my own room." They loved to hear from me what creeps and dolts analysts are. I was like an intellectual gigolo—you get your pleasure from him, but you don't take him out in public.*"

Id. (emphasis added by the court). The italicized portion of this quote did not appear in the tape recordings, although it did appear in the author's notes.

128. *Id.* at 1540-41.

129. *Id.* at 1541; *see also supra* note 11 (explaining the libel-proof plaintiff doctrine).

130. *Masson*, 895 F.2d at 1546, 1548.

131. *Id.* at 1548 (Kozinski, J., dissenting).

132. *Id.* at 1565, 1557-58 (Kozinski, J., dissenting); *see also* *Harte-Hanks Communications v. Connaughton*, 109 S. Ct. 2678, 2696 (1989).

133. *Masson*, 895 F.2d at 1558-59 (Kozinski, J., dissenting); *see also* *THE ASSOCIATED PRESS STYLEBOOK AND LIBEL MANUAL* 180 (1986) (instructing journalists to correct grammatical and word usage errors in quotations).

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

uous, an author may select an interpretation, but must attribute that interpretation to the speaker in the author's own words, not in the speaker's words.¹³⁵ The dissent reasoned that in the minds of readers, quotation marks signal the direct words of the speaker, free of interpretation or editorial comment.¹³⁶ Readers, then, can draw their own conclusions rather than accepting the author's perceptions.¹³⁷ When authors present their defamatory interpretations as exact quotations of speakers, speakers receive serious injuries that appear to the reader as "self-inflicted wound[s]."¹³⁸ The dissent concluded that the Constitution does not protect an author's use of quotation marks to conceal the editorial role from the reader, and that libel law prohibits such conduct.¹³⁹

The dissent disputed the applicability of the case law on which the majority relied.¹⁴⁰ In conducting an examination of the discrepancies in the quoted material, the dissent concluded that a jury could find that nine of the eleven misquotations were defamatory.¹⁴¹ The dissent charged that those nine misquotations differed from the plaintiff's actual statements in tone and content and that the majority examined them either in isolation or out of context.¹⁴² The majority found "intellectual gigolo" to be a rational interpretation of comments actually made by the plaintiff. At the summary judgment stage, however, the court must give the plaintiff the benefit of any doubt.¹⁴³ In view of the images and emotions that gigolo is likely to evoke,¹⁴⁴ the dissent found that a jury certainly could conclude that the plaintiff's intellectual in-

135. *Id.* at 1554 (Kozinski, J., dissenting).

136. *Id.* at 1549 (Kozinski, J., dissenting).

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

138. *Id.* at 1550 (Kozinski, J., dissenting).

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

140. The dissent found that *Carson v. Allied News Co.*, 529 F.2d 206 (7th Cir. 1976), favored the plaintiff because both cases concerned fabrication of quotations. The dissent believed that *Dunn v. Gannett N.Y. Newspapers*, 833 F.2d 446 (3d Cir. 1987), was inapposite because language translation involves judgment, especially when precise translation is impossible. This judgment is not required, however, when quoting an English speaking person in English. *Hotchner v. Castillo-Puche*, 551 F.2d 910 (2d Cir.), *cert. denied*, 434 U.S. 834 (1977), was also inapplicable because that misquotation resulted from a translation intended to decrease the defamatory impact of insulting words. *Masson*, 895 F.2d at 1554-56 (Kozinski, J., dissenting); *see also supra* notes 123-25 and accompanying text.

141. The two exceptions were "Denise worries too much" and "it sounded better." *Masson*, 895 F.2d at 1565 (Kozinski, J., dissenting).

142. The dissent specifically addressed problems with the majority's analysis of the following statements: "intellectual gigolo," *id.* at 1551-52 (Kozinski, J., dissenting); "moral cowardice," *id.* at 1564 (Kozinski, J., dissenting); "sex, women, fun," *id.* at 1553 (Kozinski, J., dissenting); "greatest analyst," *id.* at 1550-51 (Kozinski, J., dissenting); and "wrong man" and "Eissler," *id.* at 1553 (Kozinski, J., dissenting); *see also supra* note 126 (listing all 11 misquotations).

143. *Id.* at 1551 (Kozinski, J., dissenting).

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

tegrity was up for sale, an interpretation clearly unsupported by the plaintiff's actual comments.¹⁴⁵

The dissent found strong evidence of malice on the part of the defendants. The author had possession of the tapes. Because many of the disputed passages bore a striking resemblance to the originals, a jury could find that the author deliberately changed the statements or that she exhibited reckless disregard by quoting from notes or memory without verifying against the tapes.¹⁴⁶ Both the magazine and the book publisher were on notice prior to publication that the plaintiff disputed certain passages. A jury could infer reckless disregard from their failure to listen to the tapes themselves or to request that the author document the disputed passages because she previously had informed them that all of her quotations were on tape.¹⁴⁷ The dissent closed by observing that the plaintiff lost his case, but the defendants and the media lost far more.¹⁴⁸

IV. ANALYSIS

As a vehicle for analysis of the current status of defamation law in the area of misquotations, a hypothetical Ms. *P* will be taken through the litigation process. If a statement attributed to *P* by use of quotation marks is defamatory, *P* in essence defames herself. If the defamatory quotation does not contain *P*'s exact words, however, that which appears to be a self-inflicted injury actually is imposed by another person.¹⁴⁹ If *P* unsuccessfully seeks a retraction and if she chooses not to ignore the matter, does she have a realistic chance of recovery in a libel action against the publisher of the defamatory misquotation?

Because of the Supreme Court's constitutionalization of libel law, the answer to that question depends more on *P*'s personal status and the perceived status of the misquoted statement than on the falsity of the misquotation itself.¹⁵⁰ Because four of the current Supreme Court Justices have rejected the distinction between media and nonmedia cases,¹⁵¹ that categorization will be eliminated for purposes of analysis.

145. *Id.* (Kozinski, J., dissenting). The dissent also rejected the incremental harm doctrine relied on by the majority and noted that adoption of the doctrine conflicted with the District of Columbia Circuit's express rejection of it. *Id.* at 1566 (Kozinski, J., dissenting).

146. *Id.* at 1566-67 (Kozinski, J., dissenting).

147. *Id.* at 1568-70 (Kozinski, J., dissenting).

148. *Id.* at 1570 (Kozinski, J., dissenting). Following this decision, the plaintiff requested a rehearing before the Ninth Circuit, and the request was denied. 895 F.2d 1535 (9th Cir. 1990). The plaintiff's petition for writ of certiorari is pending before the United States Supreme Court. 58 U.S.L.W. 3755 (U.S. May 16, 1990) (No. 89-1799).

149. *See Masson*, 895 F.2d at 1550 (Kozinski, J., dissenting).

150. *See Magnetti*, *supra* note 11, at 362.

151. *See Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 773 (1985) (White, J., con-

The most likely categories into which *P* will fall and the requirements she must meet are as follows:

(1) Public Official or Public Figure and Speech of Public Concern

Fault level: prove actual malice

Burden of proof of falsity: on *P* because must prove actual malice

Damages: actual, presumed, punitive

(2) Public Official or Public Figure and Speech of Private Concern

Fault level: unclear, may be less than actual malice

Burden of proof of falsity: unclear

Damages: presumed and punitive may be recovered even if no actual malice proven

(3) Private Person and Speech of Public Concern

Fault level: state elects proof of actual malice

Burden of proof of falsity: on *P* because must prove actual malice

Damages: actual, presumed, punitive

(4) Private Person and Speech of Public Concern

Fault level: state elects proof of negligence

Burden of proof of falsity: on *P*

Damages: actual

(5) Private Person and Speech of Private Concern

Fault level: may be strict liability

Burden of proof of falsity: if statement defamatory, falsity presumed

Damages: actual, presumed, punitive¹⁵²

P faces many barriers in the course of her litigation. Because cases involving a private person and speech of private concern are rare, *P* most likely will need to meet an actual malice or a negligence standard. Her chances of recovery under the negligence standard are considerably better than under the actual malice standard.¹⁵³ Under a negligence fault standard, however, *P* could recover only actual damages.¹⁵⁴ To recover punitive and presumed damages in addition to actual damages, *P* must meet the actual malice standard by producing clear and convincing evidence of the defendant's knowledge of falsity or reckless disregard.¹⁵⁵

In producing evidence of actual malice in the publication of misquoted material, technical or minor inaccuracies are insufficient.¹⁵⁶

curing); *id.* at 781-82 (Brennan, J., joined by Marshall, Blackmun, and Stevens, JJ., dissenting); see also *supra* note 67 and accompanying text.

152. This chart is based on an analysis of *Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986); *Dun & Bradstreet*, 472 U.S. at 749; *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *New York Times v. Sullivan*, 376 U.S. 254 (1964); see also Smolla, *supra* note 13, at 1572-73.

153. See Smolla, *supra* note 13, at 1548 n.123.

154. See *Gertz*, 418 U.S. at 323.

155. See *New York Times*, 376 U.S. at 254.

156. See Sabelman, *The Court's Role in Interpreting Language in Libel and Slander Cases*, 45 J. MO. BAR 399, 404-05 (1989); see also Note, *A Broader Approach to the Substantial Truth Defense*, 29 B.C.L. REV. 769, 784-85 (1988).

Proof of inadvertent or negligent fabrication also will not suffice.¹⁵⁷ If *Masson* is upheld, even deliberate fabrication will not meet the actual malice standard as long as the misquotation qualifies as a rational interpretation of an ambiguous remark or does not alter the substantive meaning of an unambiguous remark.¹⁵⁸

Statistically, *P*'s case never will reach the jury. About seventy-five percent of all defamation actions are dismissed at the summary judgment stage.¹⁵⁹ If *P* does meet her burden of proof, she possibly could receive a jury verdict and a large monetary award in her favor. A ninety percent likelihood exists, however, that her verdict will be overturned at the appellate level on grounds of insufficient proof of actual malice.¹⁶⁰ If the verdict survives appellate review, the damage award likely will be reduced to between five and ten percent of the initial award.¹⁶¹

These figures illustrate that the truth or falsity determination necessary to vindicate *P*'s reputation becomes lost in the doctrinal morass of categorization and procedure that protects the first amendment freedom of open debate in a democratic society. *P*'s chances of recovery are extremely limited because the emphasis of defamation law has switched from the essential element of falsity and reputational injury to the publisher's awareness of falsity.¹⁶² In an effort to protect press freedom, the courts arguably have gone further than the Framers intended by protecting deliberate misquotations that are unnecessary to the functioning of a free press.¹⁶³

V. SUGGESTED REFORMS

In balancing the constitutional guarantee of free speech and individual reputational interests, the scales are weighted heavily in favor of the press.¹⁶⁴ Although *Dun & Bradstreet* and *Hepps* produced visible cracks in the analytical foundations supporting *New York Times* and its progeny,¹⁶⁵ many reform proposals have surfaced.¹⁶⁶ The plaintiff's inability to meet the actual malice standard, prohibitive defense costs,

157. See *supra* notes 132 & 156 and accompanying text.

158. See *Masson*, 895 F.2d at 1539.

159. Kaufman, *supra* note 93, at 20-21.

160. Magnetti, *supra* note 11, at 343-44 & n.236.

161. Johnston & Kaufman, *Annenberg, Sullivan at Twenty-Five, and the Question of Libel Reform*, COMM. LAW., Winter 1989, at 8.

162. See generally Franklin & Bussel, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 WM. & MARY L. REV. 825 (1984) (tracing the shift from the defense of truth to the plaintiff's burden to show falsity by clear and convincing proof).

163. See *Masson*, 895 F.2d at 1561-62 (Kozinski, J., dissenting).

164. Magnetti, *supra* note 11, at 362.

165. Smolla, *supra* note 13, at 1567.

166. See R. SMOLLA, *supra* note 6, at 238-57.

long delays, and failure to litigate the truth or falsity issue are the principal reasons cited in support of reform.¹⁶⁷

Because individuals often feel that the press has misquoted them, the newsroom is the most logical place to begin reform. Ninety percent of all plaintiffs in libel suits contact the media prior to filing suit.¹⁶⁸ Because many callers perceive reporters to be arrogant and defensive,¹⁶⁹ newspapers would benefit from a mandatory in-house training program in human relations.¹⁷⁰ Disorganized newsroom policies could be countered by centering complaint-handling responsibilities in a single individual, possibly an ombudsman¹⁷¹ or a director of public relations.¹⁷² A more sensitive press could diffuse many potential libel claims prior to the formal filing of suit, particularly those relating to misquotations.

General reform suggestions in the libel area can be applied in the misquotation arena as well. Retraction statutes and declaratory judgment actions appear in several reform proposals.¹⁷³ The Plaintiff's Option Libel Reform Act¹⁷⁴ developed by Professor Marc Franklin authorizes a declaratory judgment action on the falsity question, thus precluding money damages. The Act further provides that a retraction prior to filing suit completely bars the action.¹⁷⁵ Such measures could cause both the media and the potential plaintiff to take a closer look at the core issue—the accuracy of the quotation.

The most ambitious reform proposal currently under debate is the Libel Reform Act developed by the Annenberg Washington Program.¹⁷⁶

167. See, e.g., THE ANNENBERG WASHINGTON PROGRAM PROPOSAL FOR THE REFORM OF LIBEL LAW 9-10 (1988) (available from the Annenberg Washington Program in Communications Policy Studies of Northwestern University, The Willard Office Building, 1455 Pennsylvania Ave., N.W., Suite 200, Washington, D.C. 20004).

168. See LIBEL LAW AND THE PRESS, *supra* note 4, at 82.

169. See generally *id.* at 29-53 (discussing the media's role in libel disputes, including interviews with various newsroom personnel).

170. *Id.* at 53.

171. Eberhard, *supra* note 7, at 829-30 (examining the role of the ombudsman in the newsroom).

172. See LIBEL LAW AND THE PRESS, *supra* note 4, at 53.

173. See *infra* notes 174-75 and accompanying text.

174. See Franklin, *A Declaratory Judgment Alternative to Current Libel Law*, 74 CALIF. L. REV. 809, 812-13 (1986). In this article, Professor Franklin presents a detailed analysis of his proposal. The proposed Act authorizes a declaratory judgment action on the falsity question, precluding money damages; places a clear and convincing burden of proof standard on the plaintiff; awards attorney's fees to the prevailing party, provided, however, that if the plaintiff prevails, the plaintiff must have disclosed all evidence to the defendant prior to suit to recover fees; bars pre-trial discovery; provides that retraction prior to filing suit completely bars action; and establishes a one-year statute of limitations. *Id.*

175. *Id.*

176. The Annenberg Washington Program in Communications Policy Studies at Northwestern University brought together 11 defamation experts from diverse constituencies to study libel litigation and propose reforms. The project was directed by Rodney Smolla, the James Gould Cut-

Stage I of the Act also imposes a powerful retraction mechanism, which must be exercised within thirty days of publication.¹⁷⁷ At Stage II either the plaintiff or the defendant may opt for a declaratory judgment action. If the option is exercised, the Act precludes the plaintiff's pursuit of monetary damages and provides for forfeiture of any protection that the defendant may have had under constitutional fault requirements.¹⁷⁸ The truth or falsity of the statement is the sole issue for adjudication, the plaintiff bears the burden of proof, and the losing party pays the winning party's attorney's fees.¹⁷⁹ Fee shifting creates an incentive for self-examination of a party's claim because of the escalating costs of maintaining a suit.¹⁸⁰ Stage III of the Act provides for an action similar to the traditional defamation suit for money damages. A successful plaintiff, however, can recover only actual damages and no fee shifting occurs.¹⁸¹

A declaratory judgment bill¹⁸² similar to Stage II of the Annenberg Proposal was introduced in Congress in 1985, but the bill was withdrawn without formal consideration.¹⁸³ Rodney Smolla, the Director of the Annenberg Washington Program proposal, reported that the Connecticut legislature introduced a bill based on the proposal and that Congressman Charles Schumer of New York was considering introducing a bill at the federal level based on the proposal.¹⁸⁴ One noted commentator, however, vehemently opposes declaratory judgment on the ground that libel actions are best suited to trial by jurors from the plaintiff's community familiar with the plaintiff's reputation and the media defendant.¹⁸⁵ That view pays homage to a mere ideal in light of the statistics on summary judgment and appellate review reversal of jury verdicts presented in this Recent Development.¹⁸⁶ Although a declaratory judgment bill will face an uphill battle, reform advocates may

ler Professor of Constitutional Law and Director, Institute of Bill of Rights Law, Marshall-Wythe School of Law, College of William & Mary. For Professor Smolla's detailed analysis of the Program's proposed Act, see Smolla & Gaertner, *The Annenberg Libel Reform Proposal: The Case for Enactment*, 31 WM. & MARY L. REV. 25 (1989).

177. *Id.* at 32-33.

178. *Id.* at 33.

179. *Id.* at 33-34.

180. According to the American Society of Newspaper Editors, the average cost of defending a libel suit is \$95,000. Legal fees for CBS in the *Westmoreland v. CBS* case were in the range of five million to ten million dollars and in the *Herbert v. Lando* case were between three and four million dollars. CBS "won" both cases. Smolla, *Taking Legal Reform Seriously*, 38 MERCER L. REV. 793, 803 (1987).

181. Smolla & Gaertner, *supra* note 176, at 34.

182. H.R. 2846, 99th Cong., 1st Sess. (1985).

183. Johnston & Kaufman, *supra* note 161, at 5.

184. Smolla & Gaertner, *supra* note 176, at 27 n.12.

185. Reuben, *Reform Libel Law?*, A.B.A. J., Apr. 1989, at 42, 43.

186. See *supra* notes 159-61 and accompanying text.

draw encouragement from the language of Justice White's dissenting opinion in *Gertz v. Robert Welch, Inc.*¹⁸⁷ and Justice Sandra Day O'Connor's majority opinion in *Philadelphia Newspapers v. Hepps*.¹⁸⁸ The two Justices may have opened the door for declaratory judgment actions.

A final reform proposal that relates only to suits involving misquoted language would add another situation to those that the courts already have recognized as proving actual malice.¹⁸⁹ Proof of deliberate fabrication or distortion of quoted material that results in defamation to the supposed speaker automatically would evidence a knowledge of falsity or reckless disregard sufficient to meet the actual malice standard.¹⁹⁰ Under this expansion, deliberate fabrication would cover more than imaginary quotations. If authors have access to the speaker's exact words but make their own interpretations of those words and attribute that interpretation to the speaker by use of quotation marks, authors are guilty of deliberate fabrication or distortion. Such a deliberate change of the speaker's exact words evidences the author's awareness of the falsity of the quotation or, at the very least, a reckless disregard by failing to check the wording of the quotation against the speaker's exact words, which are in the author's possession. The deliberateness of an act is a factual question, and if any doubt exists, dismissal at the summary judgment stage will be inappropriate.¹⁹¹ Because negligent, inadvertent, or minor misquotations do not meet this standard, a strict liability problem is avoided. If the factfinder determines that the misquotation was not deliberate or if it is not defamatory, the defendant prevails. If the factfinder determines that the misquotation was deliberate and defamatory, then the plaintiff has met the burden of proof. Reform proposals advocating an expansion of the actual malice test, however, likely will collide with the Court's reluctance to delineate further the vague language of the standard.

187. Justice White stated, "I have said before, but it bears repeating, that even if the plaintiff should recover no monetary damages, he should be able to prevail and have a judgment that the publication is false." *Gertz*, 418 U.S. 323, 393 (1974) (White, J., dissenting).

188. Justice Sandra Day O'Connor, in dictum, stated, "Nor need we consider what standards would apply . . . if a State were to provide a plaintiff with the opportunity to obtain a judgment that declared the speech at issue to be false but did not give rise to liability for damages." *Hepps*, 475 U.S. 767, 779 n.4 (1986).

189. See *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968) (listing situations that indicate malice).

190. This proposal is consistent with the dissent in *Masson v. New Yorker Magazine*, 895 F.2d 1535, 1548 (9th Cir. 1989) (Kozinski, J., dissenting); see also Note, *supra* note 156, at 784-85.

191. See FED. R. Civ. P. 56(c).

VI. CONCLUSION

Defamation law straddles the fence between constitutional law and tort law.¹⁹² In attempting to balance the protection of a free press against the protection of individual reputation, the courts most often favor freedom of the press because of its perceived importance to open debate in a democratic society. By raising deliberate misquotations to the level of constitutionally protected speech, the *Masson* opinion is the latest reinforcement of the courts' position in the clash between first amendment and tort law. The principle of open debate, however, simply cannot support an extension of constitutional protection to fabrication or distortion of quoted material by the media. Rather than furthering freedom of expression, protecting such quotations likely would have a chilling effect on open debate.

Elementary, high school, and college English classes teach that material placed within quotation marks represents the actual words uttered by the speaker. The ordinary person, however, realizes that authors of fictional works put words in their characters' mouths. With the advent of the docudrama, the ordinary viewer realizes that some simulated dialogue takes place between the historical figures depicted.¹⁹³ This same ordinary person, however, when reading a work of nonfiction, expects the materials placed within quotation marks to be the speaker's own words, free of the author's interpretations, observations, and conclusions. Protecting on first amendment grounds the author's ability to change a speaker's exact words but still place them within quotation marks as the speaker's own words is a reverse reading of first amendment protection. If persons choose to speak out, do they not have the right to expect that their speech will be quoted accurately rather than quoted in terms of someone else's rational interpretation of their remarks? If the United States Supreme Court condones these deliberate fabrications, both the quality and quantity of persons willing to speak out publicly may diminish. If quotation marks no longer signal the speaker's words, the reader's confidence in the press may plummet further. If *Masson* prevails, the media purportedly wins the misquotation battle, but in reality both the media and the public lose the war.

192. See Smolla, *supra* note 13, at 1570.

193. The court in *Davis v. Costa-Gavras*, 654 F. Supp. 653 (S.D.N.Y. 1987), defined a docudrama as "a dramatization of an historical event or lives of real people," and as "a creative interpretation of reality." *Id.* at 658. Docudramas employ actors, simulated dialogue, and composite characters and scenes. The court further stated that "the First Amendment protects such dramatizations and does not demand literal truth in every episode depicted." *Id.*; see also *Street v. National Broadcasting Co.*, 645 F.2d 1227 (6th Cir.), *cert. granted*, 454 U.S. 815, *cert. dismissed*, 454 U.S. 1095 (1981); *Leopold v. Levin*, 45 Ill. 2d 434, 259 N.E.2d 250 (1970).

In closing out a ten year libel action,¹⁹⁴ Judge Irving Kaufman of the Second Circuit observed that the facts and law in the case had been obfuscated by emotions.¹⁹⁵ Unfortunately, this description applies to nearly all defamation litigation. Because of the powerful interests at stake and the entrenchment of the *New York Times* ruling and its progeny, the clamor for reform will not be answered quickly. As the reform debate continues, though, courts, legislators, and reformers should remember that the first amendment guarantees free expression but does not create a privileged industry.¹⁹⁶ The protection of deliberately misquoted material simply extends another privilege to the media industry without any commensurate gain in free expression.

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194. *Herbert v. Lando*, 73 F.R.D. 387 (S.D.N.Y. 1977), *rev'd*, 568 F.2d 974 (2d Cir. 1977), *rev'd*, 441 U.S. 153 (1979); *Herbert v. Lando*, 596 F. Supp. 1178 (S.D.N.Y. 1984), *aff'd in part and rev'd in part*, 781 F.2d 298 (2d Cir.), *cert. denied*, 476 U.S. 1182 (1986).

195. *Herbert*, 781 F.2d at 312.

196. *See Gertz*, 418 U.S. at 399.

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