

5-1-1993

Masson v. New Yorker Magazine, Inc.: A "Material Alteration"

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Nathalie L. Hiemstra, *Masson v. New Yorker Magazine, Inc.*: A "Material Alteration", 10 U. Miami Ent. & Sports L. Rev. 283 (1993)
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MASSON v. NEW YORKER MAGAZINE, INC.: A "MATERIAL ALTERATION"

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I. INTRODUCTION

To the average reader, a statement surrounded by quotation marks represents a statement directly asserted by the speaker. A reader will give far more weight to such a statement than to an author's rendition or paraphrase. A direct quotation makes an even greater impression when it is found in a book about the speaker himself and his relationship with others. Quotes attributed to the speaker in such a book, which are not actually what the speaker said, may send a different message than what the speaker meant to convey. This unintended conveyance can take the following distinctive forms: First, the quote can be attributed to the speaker and contain a false factual assertion. Second, a misquote can also indicate an attitude or personal trait the speaker does not hold merely by the fact that the assertion was attributed to him, regardless of the truth or falsity of the factual assertion. Although in certain situations misquotes of both types may be harmless, in others it may be detrimental and actionable in a libel suit. In the recent case of *Masson v. New Yorker Magazine, Inc.*,¹ the Supreme Court recognized the need for relief in a situation involving altered quotations and articulated a test of actual malice to be used in situations where a public figure is misquoted and harmed as a result.

This Note will start by looking at the history of libel law, the rights such laws were created to protect, and the tension resulting from the protection the First Amendment has granted the press. The following section reviews the procedural history of the *Masson* case and will describe in depth the test put forth by the Supreme Court. The final section will analyze the effect this decision has on libel law and its underlying rationale. In particular, that section will show that the *Masson* holding continues the protection of

1. 111 S. Ct. 2419 (1991).

one's reputation while balancing this security with society's interest in allowing the press to freely convey information to the public. Additionally, this Note will establish that the unique interest involved in a libel case concerning altered quotations, the speaker's own freedom of speech, is adequately safeguarded. However, the Note will show that the material alteration test enunciated in *Mason* assumes that only one component exists to a person's interest in reputation, and ignores the subcategorical character trait of believability. This Note then analyzes the consequences of this assumption and proposes a solution to prevent large unwarranted jury verdicts when only a speaker's believability is affected by a misquotation.

II. HISTORY OF LIBEL LAW

A. *Libel Law Generally as it Concerns Private Individuals*

One's reputation in the community is of utmost importance. A good reputation results in respect, trustworthiness, and a good name, all factors contributing to a satisfying life among one's peers. It is therefore not surprising that the law affords redress to a person for harm suffered by false defamatory written statements attacking his reputation.² The tort of libel dates back to the Middle Ages,³ and it is an action which remains viable today. The private individual must be allowed to protect his reputation, and there is no better way to deter people from harming another's reputation through the publication of untrue statements than to allow the private individual an opportunity to obtain compensation from the author of the libelous statement. Under current libel law, restitution may take two forms: (1) monetary compensation for the injury in the form of damages, and (2) public vindication of the individual's reputation.⁴ These remedies attempt to protect the individual's reputation, and in many cases, juries award large verdicts to the plaintiffs.⁵

An essential and distinct component of a person's reputation not separately focused on in the history of libel law is believability, or the degree to which a peer can rely on the truthfulness of a person's statements. The importance and value of this component

2. See, e.g., CAL. PERSONAL RIGHTS CODE § 45 (West 1982); FLA. STAT. ch. 770 (1991); MICH. STAT. ANN. § 27A.2911 (Callaghan 1988).

3. See generally Van Vechten Veeder, *History of Defamation*, 3 COLUM. L. REV. 546, 571 (1903) and R.C. Donnelly, *History of Defamation*, 1949 WIS. L. REV. 99 (1949).

4. LAURENCE H. ELDRIDGE, *THE LAW OF DEFAMATION* § 3, at 4-6 (1978).

5. See *Linn v. United Plant Guard Workers of America*, 383 U.S. 53, 64 (1966).

as an aspect of reputation varies from individual to individual. For example, when a person has a leadership position in the community, it is imperative that the things he says are believed, for if they are not and he is viewed in the eyes of others as unreliable, he may not be able to maintain his followers. When such a person has had his believability falsely attacked by written, published statements, the significance of this aspect of reputation becomes apparent and warrants a call for restitution. Conversely, a person who does not rely on his own believability by his peers does not suffer as great an injury when his believability is falsely attacked. Although he may be entitled to some damages in a libel action, clearly he has not been injured to the same extent as the individual in the first example. This distinctive component of believability needs to be analyzed in libel cases where believability is affected in order for the historic interest of reputation to continue to be adequately protected.

B. *Constitutional Limitations Imposed Upon Libel Law*

Although libel law's historical interest was to protect reputation, a new interest surfaced with the desire to protect the press and media as they inform citizens on matters of public concern.⁶ Prior to 1964, American courts tended to favor the protection of an individual's reputation over the interest in a free press.⁷ This trend, however, came to an end when the Supreme Court decided the landmark case of *New York Times v. Sullivan*.⁸

The Court in *Sullivan* decided that a state's power to award damages in a libel action brought by a public official against critics of his official conduct was limited by the constitutional protections for speech and press afforded by the First Amendment and made applicable to the states through the Fourteenth Amendment.⁹ The Court declared that Alabama law, which provided that "a publication is 'libelous per se' if the words 'tend to injure a person . . . in

6. This interest is provided by the First Amendment which reads, "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. This amendment has been interpreted to be applicable to the states through the Fourteenth Amendment. See *Palko v. Connecticut*, 302 U.S. 319, 324-325 (1937).

7. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 113, at 804 (5th ed. 1984) [hereinafter KEETON]. See also Mark A. Byrd, *Quotations and Actual Malice: Bridging the Gap Between Fact and Fiction*, 10 N. ILL. U. L. REV. 617, 621 (1990).

8. 376 U.S. 254 (1964). *Sullivan* concerned a Commissioner of the City of Montgomery, Alabama, who alleged he had been libeled by statements in a full-page advertisement that was run in the New York Times which charged that Black students were being denied their constitutional right to live in human dignity. *Id.* at 256-257.

9. *Id.* at 264.

his reputation' or 'to bring [him] into public contempt,'"¹⁰ abridged the freedoms of speech and press.¹¹ The Court felt that there was a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."¹² It stated furthermore that the Constitution required a rule that prohibited a public figure from being awarded damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice," or in other words, that it was made with knowledge that it was false or with reckless disregard of whether it was false or not.¹³ This new federal rule resulted in making the libel action for public officials a very onerous proceeding, effectively making it difficult for those individuals in the public eye to protect their reputation, and it commenced a trend in future libel cases of favoring the interest of ensuring the free exchange of information to the general public.¹⁴ As a result of *Sullivan*, libel law was changed forever and the fundamental importance of freedom of the press was manifested.

The Supreme Court further broadened the protection afforded to the freedom of speech and press when it extended the application of the actual malice test to public figures in *Curtis Publishing Co. v. Butts*.¹⁵ In *Curtis Publishing*, an athletic director and former football coach of a state university brought a libel action against a newspaper for publishing an article which accused the director of conspiring to "fix" a football game.¹⁶ After an extensive analysis to determine the extent of protection to be afforded to the guarantee of freedom of speech and press, the Court held that the director commanded a substantial amount of independent public interest at the time of the publications, was considered a "public figure" under ordinary tort rules, and therefore must be subject to

10. *Id.* at 267.

11. *Id.* at 268.

12. *Id.* at 270.

13. *Id.* at 279-280. The Court reversed the Alabama Supreme Court's decision awarding the Commissioner of Montgomery, Alabama \$500,000 in damages. *Id.* at 292. Under the new constitutional standard, the evidence did not show that the newspaper was aware of any erroneous statements or was in any way reckless in that regard. *Id.* at 286.

14. See, e.g., *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984); *Time v. Pape*, 401 U.S. 279 (1971); *St. Amant v. Thompson*, 390 U.S. 727 (1968); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Garrison v. Louisiana*, 379 U.S. 64 (1964).

15. 388 U.S. 130 (1967).

16. *Id.* at 135.

the "actual malice" standard put forth in *Sullivan*.¹⁷ Furthermore, the journalist's attempt to put forth information and opinion on questions of public concern was believed to be a revered activity by the Court.¹⁸

Although the "actual malice" standard after *Curtis* was clearly interpreted to include people in the public eye, the term "public figure" had not been explicitly defined. The Supreme Court addressed this ambiguity in *Gertz v. Robert Welch, Inc.*¹⁹ The Court began by recognizing that "[the Court] . . . has struggled for nearly a decade to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment."²⁰ After a lengthy discussion regarding the appropriate protection afforded to authors and publishers when expressing their sentiments about public officials and public figures,²¹ the Court refused to justify the *Sullivan* and *Curtis* holdings solely by reference to the interest of the press.²² It emphasized the importance of the availability of a legal remedy for damaging defamatory statements attacking a private individual's reputation.²³ The Court held that the "actual malice" standard applied to public officials and public figures only, and that a reputable attorney who was well known in some circles but "had achieved no general fame or notoriety in the community,"²⁴ was not considered a public figure in the context of a libel action.²⁵ Justice Powell defined "public figures" for the purposes of a libel action as those people who have become notorious due to their achievements or those who seek the public's attention with "vigor and success."²⁶

The Supreme Court further extended the freedom of speech and press in the criminal libel case of *Garrison v. Louisiana*.²⁷ The

17. *Id.* at 154-155.

18. *Id.* at 150.

19. 418 U.S. 323 (1974).

20. *Id.* at 325.

21. *Id.* at 344-345.

22. *Id.* at 343 (citing *New York Times v. Sullivan*, 376 U.S. 254 (1964) and *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967)).

23. *Id.* at 345-346.

24. *Id.* at 351-352.

25. *Id.* at 352.

26. *Id.* at 342.

27. 379 U.S. 64 (1964). This case involved a criminal libel action against the District Attorney of Orleans Parish, Louisiana after he held a press conference and made ridiculing comments about eight judges. *Id.* at 64-65. The Supreme Court reversed the state supreme court's decision to convict the district attorney. *Id.* at 67. The Court found Louisiana's criminal libel statute unconstitutional because it punished false statements against public officials if made with ill will without regard to whether they were made with knowledge of their

Court declared at the outset of its decision that the *Sullivan* rule was to be extended to criminal libel actions.²⁸ It went on to explain the reckless disregard prong of the actual malice test.²⁹ The Court held, "only those false statements made with the high degree of awareness of their probable falsity demanded by the New York Times may be the subject of either civil or criminal sanctions."³⁰ This holding further complicated the libel action for a public official or figure.

In yet another case, the Supreme Court again addressed the reckless disregard prong of the "actual malice" standard.³¹ In *St. Amant v. Thompson*, the Louisiana Supreme Court's decision entering a judgment for a deputy sheriff in a libel action against a politician, was reversed because the court had not correctly interpreted and applied the *Sullivan* rule.³² Justice White wrote that the reckless conduct was not measured by an objective standard, but rather by a subjective standard.³³ This ruling had the effect of requiring the public official to submit evidence concluding that the defendant himself entertained serious doubts as to the truth of his publication, making the "actual malice" test harder to meet.

III. *Masson v. New Yorker Magazine*

A. *The Facts*

In 1980, Jeffrey Masson, a psychoanalyst, was hired by Dr. Kurt Eissler and Anna Freud as Projects Director of the Sigmund Freud Archives situated on the outskirts of London.³⁴ While working there, he claimed to have made interesting discoveries regard-

falsity or in reckless disregard of whether they were true or false, or if not made in reasonable belief of their truth. *Id.* at 78.

28. *Id.* at 67.

29. *Id.* at 74.

30. *Id.*

31. See *St. Amant v. Thompson*, 390 U.S. 727 (1968).

32. *Id.* at 733. The Louisiana Supreme Court ruled that the defendant had broadcast false information about the deputy sheriff recklessly, though not knowingly. *Id.* at 730. This conclusion was justified by the court because the defendant had no personal knowledge of the plaintiff's activities, he relied solely on a third person, he failed to verify the information, he gave no consideration to whether the statements defamed the plaintiff, and he mistakenly believed he had no responsibility for the broadcast because he was quoting another's words. *Id.*

33. *Id.* at 731.

34. *Masson v. New Yorker Magazine, Inc.*, 111 S. Ct. at 2424. The Sigmund Freud Archives serves as a storage place for materials about Freud, including his own writings, letters, and personal library. *Id.*

ing material that had been hidden by the psychoanalytic world.³⁵ Masson believed that this information led to conclusions that resulted in the destruction of accepted psychoanalytic theories.³⁶ He became disillusioned with Freud's psychological principles, and consequently, at a lecture before the Western New England Psychoanalytical Society in Connecticut in 1981, he professed his growing skepticism of Freud's theories.³⁷ Subsequently, Masson was fired as Projects Director of the Freud Archives.³⁸

Because the admission before the Psychoanalytical Society and the resulting termination of Masson's employment created a large commotion in the psychological world, Janet Malcolm, an author and writer for the New Yorker Magazine, contacted Mr. Masson concerning the writing of a future story on his involvement with the Archives.³⁹ Masson agreed, and he met with Malcolm to do several interviews.⁴⁰ During these exchanges, Malcolm used a tape recorder to notate what was said.⁴¹ She used this data to write a lengthy article for the New Yorker Magazine.⁴² After the article had been submitted to the magazine, an editor called Masson to verify some of the facts concerning the article.⁴³ According to Masson, he expressed concern about the amount of errors in the passages read to him, and requested to review them, but was not given this opportunity.⁴⁴ The article was published in the magazine as a two-part series and was later published by Albert A. Knopf, Inc. as a book.⁴⁵

Following the publication, Masson brought a libel action against Janet Malcolm, The New Yorker Magazine, and Alfred A. Knopf, Inc., claiming that misquotations in the article and book falsely portrayed him as conceited.⁴⁶ All parties agreed Masson was

35. *Masson v. New Yorker Magazine, Inc.*, 686 F. Supp. 1396, 1397 (N.D. Cal. 1987).

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Masson v. New Yorker Magazine, Inc.*, 111 S. Ct. at 2425.

42. *Id.* at 2424. In the article, Malcolm used lengthy passages attributed to Masson, Eissler, and Anna Freud by using quotation marks as a narrative device. *Id.* The New Yorker Magazine is a weekly magazine, and was, at the time the article was run, known for its factual accuracy. *Id.* at 2431.

43. *Id.* at 2424.

44. *Id.* at 2424-2425.

45. *Id.* at 2425. See JANET MALCOLM, IN THE FREUD ARCHIVES (1984) (hereinafter IN THE FREUD ARCHIVES). Alfred A. Knopf, Inc. published the book with knowledge of Masson's allegation that the article contained defamatory material. *Masson*, 111 S. Ct. at 2425.

46. *Masson v. New Yorker Magazine, Inc.*, 686 F. Supp. 1396, 1397 (N.D. Cal. 1987).

a public figure.⁴⁷ In his complaint, Masson identified allegedly libelous passages and the three defendants moved for summary judgment.⁴⁸ The court meticulously reviewed each disputed passage individually and matched it with the relevant portions of the tape recorded interviews.⁴⁹ Finding no direct evidence of actual malice, the court entered an order granting the motions for summary judgment.⁵⁰ The reason for this conclusion, according to the court, was that actual malice could not be inferred when the author's choice of words were rational interpretations of the tape-recorded statements.⁵¹

B. The Appellate Court Decision

Masson appealed from this order to the United States Court of Appeals for the Ninth Circuit.⁵² After noting that Masson had presented evidence that the several quotations attributed to him did not appear in the tape recordings of his interview with Malcolm, the court assumed the quotations were deliberately altered in order to review the district court's decision.⁵³ After reviewing several federal appellate court decisions,⁵⁴ the Ninth Circuit turned to the question of whether actual malice could be inferred from any of the quotations attributed to Masson. Each passage was reviewed separately, and the circuit court concluded that either the misquotes did not alter the substantive content of Masson's statements or were rational interpretations of Masson's statements.⁵⁵ The district court's decision was therefore affirmed.⁵⁶

Circuit Judge Kozinski wrote an emphatic dissenting opinion,⁵⁷ disagreeing with the majority's meaning of quotations.⁵⁸ He considered quotations to represent not merely extrapolations of

47. *Id.*

48. *Id.*

49. *Id.* at 1398. The court analyzed a total of eight passages. *Id.* at 1399-1406.

50. *Id.*

51. *Id.* at 1399.

52. *Masson v. New Yorker Magazine*, 895 F.2d 1535, 1536 (9th Cir. 1989).

53. *Id.* at 1537. The standard of review governing summary judgment in the district courts in libel actions brought by public figures was described by the Supreme Court in *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986). "Where the factual dispute concerns actual malice . . . , the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding . . . that the plaintiff has shown actual malice by clear and convincing evidence" *Id.* at 255-256.

54. *Id.* at 1537-1539.

55. *Id.* at 1539-1546.

56. *Id.* at 1548.

57. *Id.* at 1548-1570.

58. *Id.* at 1548.

the speaker's words, but "the speaker's own words or something very close to them."⁵⁹ According to Kozinski, the majority had given a journalist the right to lie by allowing him to expressly alter what someone else said.⁶⁰ In addition, he thought the majority had misinterpreted existing caselaw and that the previous decisions did not support the rational interpretation test in the Masson situation at all.⁶¹ He proposed an alternative solution to determine actual malice in the context of quotations, consisting of a five-step inquiry:

- 1) Does the quoted material purport to be a verbatim repetition of what the speaker said?
- 2) If so, is it inaccurate?
- 3) If so, is the inaccuracy material?
- 4) If so, is the inaccuracy defamatory?
- 5) If so, is the inaccuracy a result of malice, i.e., is it a fabrication or was it committed in reckless disregard of the truth?⁶²

If the response to any of these five questions were to be "no", then, as a matter of law, the inquiry would stop and the defendant's motion for summary judgment would be granted.⁶³

Although the dissenting opinion protects the speaker more against misquotation than the majority's holding, each opinion has been heavily criticized as not putting forth an effective test to determine "actual malice" when misquotation is involved.⁶⁴ There is a uniqueness about quotations that calls for a special standard that will afford protection to the journalist as he interprets ambiguous notes and at the same time will guard the speaker's own freedom of speech and his reputation when he is misquoted. Most law re-

59. *Id.*

60. *Id.* at 1570.

61. *Id.* at 1554-1557. The caselaw relied upon by the majority, which Judge Kozinski claims is misinterpreted, consists of *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), *Dunn v. Gannett New York Newspapers, Inc.*, 833 F.2d 446 (3d Cir. 1987), *Hotchner v. Castillo-Puche*, 551 F.2d 910 (2d Cir.), *cert. denied*, 434 U.S. 834 (1977), and *Carson v. Allied News Co.*, 529 F.2d 206 (7th Cir. 1976).

62. *See Masson v. New Yorker Magazine, Inc.*, 895 F.2d 1535, 1549 (9th Cir. 1989)(Kozinski, J., dissenting).

63. *See Id.*

64. *See, e.g., Sarah H. Arnholz, Masson v. New Yorker Magazine: The Question of Quotations*, 65 N.Y.U. L. REV. 1566, 1576-1587 (1990); M. Carter Crow, *Libel & Slander: Masson v. The New Yorker: Fabricated Malice*, 43 OKLA. L. REV. 531, 543-548 (1990); Jonathan I. Lessner, *Masson v. New Yorker Magazine, Inc.: "Sex, Women, Fun, and Altered Quotations"*, 45 U. MIAMI L. REV. 159, 186-197 (1990); Michael A. Pavlick, *Masson v. New Yorker Magazine, Inc.: Quotes, Lies and Audiotape*, 40 CASE W. RES. L. REV. 875, 883-888 (1989-90).

view articles written on the Court of Appeals decision suggest other alternatives which purport to strike a more effective balance between these competing interests.⁶⁵ Although a discussion of these alternatives would be helpful in determining an appropriate test to ascertain "actual malice" in libel cases involving altered quotations, such an analysis is beyond the focus of this Note.

C. *The United States Supreme Court Decision*

Masson appealed again and the United States Supreme Court, having never before applied the *Sullivan* doctrine to a case in which a defendant allegedly fabricated quotations and attributed them to a public figure,⁶⁶ granted certiorari to hear the case.⁶⁷ Masson had dropped some of the passages alleged to be defamatory in his brief to the Supreme Court, and so the Court had fewer passages to consider.⁶⁸ The Court commenced by recognizing that a fabricated quotation might injure a plaintiff in two ways: (1) by crediting a false factual assertion to the speaker, and/or (2) by attributing, regardless of the truth or falsity of the factual matters asserted within the quoted statement, a statement whose manner of expression or the very fact that the statement was made indicates a negative personal trait or an attitude the speaker does not hold.⁶⁹ After examining each of the passages submitted by Masson, the Court also noted that no identical statement appeared in the more than 40 hours of taped interviews.⁷⁰ The majority found that

65. See *supra* note 64.

66. See M. Carter Crow, *Libel & Slander: Masson v. The New Yorker: Fabricated Malice*, 43 OKLA. L. REV. 531, 533 (1990).

67. *Masson v. New Yorker Magazine, Inc.*, 111 S. Ct. 39 (1990).

68. *Masson v. New Yorker Magazine, Inc.*, 111 S. Ct. at 2425.

69. *Id.* at 2430.

70. *Id.* Specifically, the Court considered six passages which Masson claimed were defamatory. The following is a list of the quoted sections as they appear in the book and the tape-recorded interviews they were derived from:

(1) Book describing Masson's relationship with Eissler and Anna Freud: "Then I met a rather attractive older graduate student and I had an affair with her. One day, she took me to some art event, and she said she was sorry afterward. She said, 'Well, it was 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 liked 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" IN THE FREUD ARCHIVES, *supra* note 45, at 38. Tape describing relationship: "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, and I could talk and chat and tell them the truth about things and they would tell me. But that I was, in a sense, much too junior within the hierarchy of analysis, for these important training ana-

the Court of Appeals erred by determining that an altered quota-

lysts to be caught dead with me.' " *Masson*, 111 S. Ct. at 2426.

(2) Book describing Masson's plans for Maresfield Gardens, which he had hoped to procure when Anna Freud died: " 'It was a beautiful house, but it was dark and sombre and dead. Nothing ever went on there. I was the only person who ever came. I would have renovated it, opened it up, brought it to life. Maresfield Gardens would have been a center of scholarship, but it would also have been a place of sex, women, fun. It would have been like the change in *The Wizard of Oz*, from black-and-white into color.' " IN THE FREUD ARCHIVES, *supra* note 45, at 33. Tape notes: "[I]t is an incredible storehouse. I mean, the library, Freud's library alone is priceless in terms of what it contains: all his books with his annotations in them; the Schreber case annotated, that kind of thing. It's fascinating." *Masson*, 111 S. Ct. at 2426.

(3) Book concerning Masson's history of his family: " 'My father is a gem merchant who doesn't like to stay in any one place too long. His father was a gem merchant, too - a Bessarabian gem merchant, named Moussaieff, who went to Paris in the twenties and adopted the name Masson. My parents named me Jeffrey Lloyd Masson, but in 1975 I decided to change my middle name to Moussaieff - it sounded better.' " IN THE FREUD ARCHIVES, *supra* note 45, at 36. Tape describing similar statement, "Masson explained at considerable length that his father had changed the family name from Moussaieff to Masson when living in France, '[j]ust to hide his Jewishness'. [Masson] had changed his name back to Moussaieff, but his then-wife Terry objected that 'nobody could pronounce it and nobody knew how to spell it, and it wasn't the name that she knew me by.' [Masson] had changed his name to Moussaieff because he 'just liked it.' '[I]t was sort of part of analysis: a return to the roots, and your family tradition and so on.' " *Masson*, 111 S. Ct. at 2426.

(4) Book recounting a conversation between Masson and Malcolm about the paper Masson presented at his 1981 New Haven lecture: "[I] asked him what had happened between the time of the lecture and the present to change him from a Freudian psychoanalyst with somewhat outré views into the bitter and belligerent anti-Freudian he had become." "Masson sidestepped my question. 'You're right, there was nothing disrespectful of analysis in that paper,' he said. '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.' " IN THE FREUD ARCHIVES, *supra* note 45, at 53-54. Tape recording contains a different discussion: "Masson: 'So they really couldn't judge the material. And, in fact, until the last sentence I think they were quite fascinated. I think the last sentence was an in, [sic] possibly, gratuitously offensive way to end a paper to a group of analysts. Uh,-' Malcolm: 'What were the circumstances under which you put in the [in]? . . . ' Masson: 'That it was, was true . . . I really believe it. I didn't believe anyone would agree with me . . . But I felt I should say something because the paper's still well within the analytic tradition in a sense . . . It's really not a deep criticism of Freud. It contains all the material that would allow one to criticize Freud but I didn't really do it. And then I thought, I really must say one thing that I really believe, that's not going to appeal to anybody and that was the very last sentence. Because I really do believe psychoanalysis is entirely sterile . . . ' " *Masson*, 111 S. Ct. at 2427.

(5) Book: "A few days after my return to New York, Masson, in a state of elation, telephoned me to say that Farrar Straus & Giroux has taken *The Assault on Truth* [Masson's book]. 'Wait till it reaches the best-seller list, and watch how the analysts will crawl,' he crowed. 'They move whichever way the wind blows. 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. Suddenly they'll be calling, begging, cajoling: "Please take back what you've said about our profession-our patients are quitting." They'll try a short smear campaign, then they'll try to buy me, and ultimately they'll have to shut up. Judgment will be passed by history. There is no possible refutation of this book. It's going to cause a revolution in psychoanalysis. Analysis stands or falls with me now.' " IN THE FREUD ARCHIVES, *supra* note 45,

tion is protected provided the alteration is a rational interpretation of the actual declaration.⁷¹ The Court decided that, although much of the Court of Appeals' decision was based on the reasoning that substantial truth is needed when quoting a speaker, the lower court went too far by ruling that an altered quotation is protected by the First Amendment as long as it is an author's rational interpretation of the speaker's actual declaration.⁷² The Court held that the Ninth Circuit had misinterpreted the higher court's decision in the libel case of *Time, Inc. v. Pape*⁷³ by applying the rational interpretation test stated in that case, which did not concern quotations, to the situation of fabricated quotations.⁷⁴ The rational interpretation test, according to the Court, only affords First

at 162. Tape on related topic: "' . . . I assure you when that book comes out, which I honestly believe is an honest book, there is nothing, you know, mean-minded about it. It's the honest fruit of research and intellectual toil. And there is not an analyst in the country who will say a single word in favor of it.' 'Talk to enough analysts and get them right down to these concrete issues and you watch how different it is from my position. It's utterly the opposite and that's finally what I realized, that 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.' "

(6) Book on Masson's termination: "[Eissler] was always putting moral pressure on me. 'Do you want to poison Anna Freud's last days? Have you no heart? You're going to kill the poor old woman.' I said to him, 'What have I done? You're doing it. You're firing me. What am I supposed to do-be grateful to you?' " "You could be silent about it. You could swallow it. I know it is painful for you. But you could just live with it in silence." "Why should I do that?" "Because it is the honorable thing to do." Well, he had the wrong man." IN THE FREUD ARCHIVES, *supra* note 45, at 67. Tape contains relatively the same conversation as in the beginning of quote in the book, but the book quote deletes much: "' . . . 'You fired me. What am I supposed to do: Thank you? be grateful to you?' He said, 'Well you could never talk about it. . . . I know it's painful for you but just live with it in silence.' 'Fuck you,' I said, 'Why should I do that? You know, why should one do that?' " "Because it's the honorable thing to do and you will save face. And who knows? If you never speak about it and you quietly and humbly accept our judgment, who knows that in a few years if we don't bring you back?" Well, he had the wrong man.'" Masson, 111 S. Ct. at 2428.

71. Masson v. New Yorker Magazine, Inc., 111 S. Ct. 2419, 2433 (1991).

72. *Id.*

73. 401 U.S. 279 (1971). In this case, a Chicago police officer filed a libel action against a magazine, based on an article which had discussed a report on police brutality by the United States Commission on Civil Rights. *Id.* at 281. The article had reported as a Commission finding of brutality, material which had only appeared in the Commission's report as a description of allegations of brutality in a private civil rights action against the police officer. *Id.* at 281-282. The Supreme Court held that the magazine was not to be held liable, because it had not engaged in a falsification sufficient to create a jury issue of actual malice. *Id.* at 289. The author of the article had stated that the context of the report of the brutality incident indicated to him that the Commission believed that the incident had occurred as described. *Id.* The court reasoned, "Time's omission of the word 'alleged' amounted to the adoption of one of a number of possible rational interpretations of a document that bristled with ambiguities." *Id.* at 290.

74. Masson v. New Yorker Magazine, Inc., 111 S. Ct. at 2433.

Amendment protection to authors when they are relying on ambiguous sources.⁷⁵ This test does not apply to situations where a writer utilizes a quotation to convey what the speaker said and a reasonable reader would interpret the quotation as such.⁷⁶ The Court recognized the danger of allowing the rational interpretation test to stand by saying, "[w]ere we to assess quotations under a rational interpretation standard, we would give journalists the freedom to place statements in their subjects' mouths without fear of liability."⁷⁷ The Court accordingly enunciated a different test, holding that a deliberate alteration of words uttered by a plaintiff will equate to the knowledge of falsity required by *Sullivan* if the alteration results in a material change in the meaning conveyed by the statement.⁷⁸

Applying this new test, the Court, for the purposes of the defendants' motion for summary judgment, assumed that Masson had not made the declarations attributed to him in Malcolm's article, and that Malcolm wrote the passages with knowledge or reckless disregard of the differences between what Masson had said when interviewed and what was quoted.⁷⁹ Next, it surveyed the six passages at issue, and found that the jury could find actual malice in all but one.⁸⁰ The Court then reversed the Court of Appeals' judgment.⁸¹

IV. THE EFFECT OF THE MASSON DECISION ON LIBEL LAW

A. *The Continued Protection of Reputation and of the Press*

The Supreme Court's new test, granting First Amendment protection to inaccurate quotations that do not materially alter the meaning of what was actually said by the speaker,⁸² clearly contin-

75. *Id.* at 2434.

76. *Id.*

77. *Id.* The Court also noted, "By eliminating any method of distinguishing between the statements of the subject and the interpretation of the author, we would diminish to a great degree the trustworthiness of the printed word, and eliminate the real meaning of quotations. Not only public figures but the press doubtless would suffer under such a rule. Newsworthy figures might become more wary of journalists, knowing that any comment could be transmuted and attributed to the subject, so long as some bounds of rational interpretation were not exceeded." *Id.*

78. *Id.* at 2433.

79. *Id.* at 2435.

80. *Id.* at 2435-2437. The passage found not to materially alter the meaning of Masson's statement was the one describing Masson's acquisition of the name of Moussaieff. See *supra* note 70.

81. *Id.* at 2437.

82. *Id.* at 2433.

ues the historic protection of reputation. A public figure, if quoted as saying something which a reader believes to be the public figure's own words, cannot have his reputation harmed unless he intentionally makes an egotistical, derogatory, or offensive declaration. If the public figure makes an impudent remark and it is quoted, the action of libel is not available to him, for there has been no invasion by a third party of his interest in his reputation and good name.⁸³ The author has not materially altered the meaning of what was in reality stated by the speaker. The speaker has libeled himself, in a sense. In this situation, one has no problem concluding that the press has an overriding interest in conveying the declaration to the public. If a free society is to operate successfully, the public must have access to all relevant information concerning all activities carried on in that society.⁸⁴

This concept is easily understood by reference to an example: A politician will be running in an upcoming election. If there is something he has said which may affect a person's vote on election day, a free society compels disclosure of the politician's declaration. In the above situation, he has willingly made a declaration, and therefore publications relating to his statement can in no way wrongfully harm his reputation.

The overriding interest of the press in conveying the declaration to the public is not changed when the declarations are not the speaker's exact words, but the quotation published does not materially alter the meaning of what was said. This is again based upon the premise that, in this situation, the speaker's reputation is not wrongfully harmed. Conversely, when a speaker is falsely quoted and the meaning he originally meant to convey has been changed, and this change in meaning results in harm to his reputation, the interest of the press is no longer controlling. In this situation, the historical interest in protecting reputation prevails.

Presumably, the Supreme Court seems to have struck a perfect balance between the two competing interests. Authors and publishers may still use quotations and are not strictly limited to correcting their grammar and syntax,⁸⁵ and public figures' concern in their reputations allows them recovery if false quotations are imputed to them which do not convey the originally intended meaning. However, in the *Masson* case, due to the unique situation

83. See KEETON, § 113, at 780.

84. *Id.* at 804. See also *Pennekamp v. Florida*, 328 U.S. 331, 354 (1946) (stating "[w]ithout a free press, there can be no free society.").

85. *Masson v. New Yorker Magazine, Inc.*, 111 S. Ct. at 2431.

of altered quotations, a third interest is given protection by the Court, which will be discussed below.

B. Protection of the Speaker's Freedom of Speech

In libel cases, the press undoubtedly has a constitutional privilege that has been granted by the First Amendment.⁸⁶ However, the First Amendment grants freedom of speech to everyone, not just the press.⁸⁷ Because quotation marks signal to the average reader that the author is asserting the speaker's actual words,⁸⁸ quotation marks around a statement signify individual expression.⁸⁹ This individual expression, it has been reasoned, should be afforded equal First Amendment protection as is furnished to the author who chose to quote it.⁹⁰ The Supreme Court's new test for determining actual malice in the case of altered quotations affords a balance between these two competing concerns. By allowing an action for libel to defeat summary judgment if quotations materially alter the speaker's intended meaning, the speaker's freedom of speech is adequately, although not completely protected. In many cases, this adequate protection is beneficial to the speaker because an author is given the freedom to alter an indisputable misstatement made by the speaker.⁹¹

In addition, the author is granted the liberty of altering the quotation as long as the meaning conveyed to a reasonable reader is not modified. This is significant because, as the Court in *Masson* wrote:

Even if a journalist has tape recorded the spoken statement of a public figure, the full and exact statement will be reported in only rare circumstances. The existence of both a speaker and a reporter; the translation between two media, speech and the printed word; the addition of punctuation; and the practical necessity to edit and make intelligible a speaker's perhaps rambling comments, all make it misleading to suggest that a quota-

86. See *New York Times v. Sullivan*, 376 U.S. 254 (1964).

87. See *supra* note 6.

88. See *Masson v. New Yorker Magazine, Inc.*, 895 F.2d 1535, 1558 (Kozinski, J., dissenting) ("What someone says is a fact no less than what someone does."); see also Patricia H. Webb, *Masson v. New Yorker Magazine, Inc.: Inadequate Protection Against Altered Quotations*, 69 TEX. L. REV. 473, 482-483 (1990).

89. See Webb, *supra* note 88, at 483.

90. *Id.*

91. See *Masson v. New Yorker Magazine, Inc.*, 111 S. Ct. at 2432. The Court stated: "[I]f a speaker makes an obvious misstatement, for example by unconscious substitution of one name for another, a journalist might alter the speaker's words but preserve his intended meaning." *Id.*

tion will be reconstructed with complete accuracy.⁹²

C. Protection of Believability

In the context of a libel case involving altered quotations, misquoting a public figure may harm more than the public figure's general reputation in the community and his freedom of speech. His believability may also be adversely affected if he is misquoted and later the quoted statement is proven inaccurate. The readers of the misquotation will assume that the statement within the quotation marks are the actual factual assertions made by the speaker. The result of this assumption is that the facts within the quotation, if they are later proven to be false, will harm the speaker's characteristic trait of believability.

An example will facilitate discussion on this point: A politician is running in an upcoming election. He is interviewed by a reporter and asked the question, "Have you ever had extramarital relations?" The politician answers, "No comment". Although the *Masson* holding forbids the reporter to change the material meaning of this statement when quoting the politician, the reporter nevertheless misquotes the politician as having said, "I have never had an extramarital affair." Under these circumstances, the politician will defeat a motion for summary judgment in a libel action under the *Masson* holding, for his statement to the reporter was not accurately relayed in the quotation attributed to him.⁹³ Referring again to the example, it is one thing for a politician to have been quoted as admitting having had extramarital relations when he has in reality not had them. In this case, the politician's reputation has been wrongfully attacked by a quote attributed to him. Most voters will be influenced by such a false quote, and might prejudge the politician as a candidate lacking morality. Under such circumstances, the politician may rightfully bring a libel action against the author or publisher of the false quotation to redress harm to his reputation.

However, the *Masson* holding, when applied to a variation of these facts, goes too far. The kind of harm to a politician's status is different when he has been misquoted regarding the extramarital relations and it is later proven that the misquotation itself is false, but the underlying facts asserted in the misquotation are true. For example, if the politician has been asked by a reporter, "Have you

92. *Id.*

93. *See id.*

ever had an extramarital affair?" and the politician answers, "I refuse to answer such an offensive question," but he is quoted in a newspaper article as having denied involvement in extramarital affairs, under the *Masson* test the politician could defeat a motion for summary judgment, and possibly collect a large jury verdict even if he had in reality had an extramarital affair. If the public later found out that he had engaged in extramarital relations, only the believability aspect of the politician's reputation has been adversely affected. This premise becomes clear when one considers that if he had not initially been misquoted, and his true answer, "I refuse to answer such an offensive question," had been printed, but the press had exposed his extramarital relations when they were later discovered, his reputation would still have been harmed. However, in this instance, the harm was not wrongful. An action for libel would not be available to him under these facts.

Society's interest in the free flow of information to the public becomes important in light of this example. Assuming the participation in extramarital relations is publicly considered immoral, a democratic society compels disclosure of such acts in order to enable voters to make an informed choice in an election. Harm done solely to the public figure's believability therefore should not be given equal weight as harm done to his entire reputation when falsely quoted. If a politician is allowed a potentially large recovery against an author or publisher for the publication of false quotations which assert true factual contents, the press will be deterred from supplying our society with valuable information. This is not to say that an author should be allowed to misquote a public figure. An author who misquotes should still be subject to liability, for he has harmed the public figure. However, the recovery available to the public figure who has only had his believability attacked should be considerably less than that available to a public figure who has had other aspects of his reputation wrongfully attacked. This argument becomes clear when one views the harm to believability not as a separate interest, different from the interest in reputation, but as a small component thereof. When only a part of his reputation has been injured, the amount of damages the libel plaintiff is able to recover should not be equal to that amount obtainable when his entire reputation has been wrongfully harmed.

The *Masson* decision does not make a distinction between the interest in reputation and the subinterest in believability. Although the facts of *Masson* may not have made the necessary distinction between an interest in reputation and one in believability apparent because the supposed fabricated published quotations al-

legedly harmed more than Jeffrey Masson's believability, it is imperative that in cases where only the believability aspect of a public figure's reputation is harmed, this distinction be made. If the distinction is not made, then libel plaintiffs will have easier access to juries as well as large jury verdicts. The *Masson* holding will subsequently make it is easier for libel plaintiffs to defeat a motion for summary judgment.⁹⁴ This result is dreaded by the press because, statistically, once a libel action comes before a jury, the press ends up paying damages more often than not.⁹⁵ Additionally, juries are known for their large awards of damages in libel cases.⁹⁶ The consequential effect of *Masson*, rather than balancing the press' interest in freedom of speech and the individual's interest in his reputation, will be a return to favoring the individual's interest in his reputation.

A possible solution to regain the balance sought by the Supreme Court between the interest of reputation and freedom of the press is to preclude the plaintiff's right to punitive damages where the harm inflicted by a misquote is solely destructive to his/her believability. This will result in libel actions being brought only by individuals whose interest in this aspect of their reputation is so important to them that they are willing to risk high court costs and attorney's fees in order to receive public vindication of their believability. In addition, an author will be deterred from publishing false quotations, because he will still face potential liability and possible costly litigation fees.

V. CONCLUSION

An author's misquotation of a speaker's words is often interpreted by readers as the actual words the speaker meant to convey. This implicates both free speech and reputational interests. In order to balance these interests consistently with previous decisions, the Supreme Court in *Masson v. New Yorker Magazine, Inc.* rejected the Ninth Circuit's rational interpretation standard and for-

94. See James A. Goodale, *A Sigh of Relief?*, 205 N.Y. L.J. 2 (1991).

95. *Id.*

96. See, e.g., *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 762 (1985)(jury award for \$50,000 compensatory damages and \$300,000 punitive damages affirmed); *K-Mart Corp. v. Weston*, 530 So. 2d 736 (Ala. 1988)(jury award for \$5,000 compensatory damages and \$15,000 punitive damages affirmed); *Sheeran v. Colpo*, 460 A.2d 522 (Del. 1983)(award for \$9,000 general damages and \$12,000 punitive damages affirmed); *Georgia Soc'y of Plastic Surgeons, Inc. v. Anderson*, 363 S.E.2d 140 (Ga. 1987) (award for \$500,000 actual damages and \$1,000,000 punitive damages was affirmed). See also *supra* note 5.

mulated its own test to determine "actual malice" in a libel action by applying a material alteration standard. The effect of this holding, however, is the blanket protection of the interest in reputation, without taking into consideration the subcategory of believability. This results in the conclusion that believability and reputation should be afforded equal protection. Believability is but a mere component of reputation and should therefore not be afforded identical protection.

In order to prevent awards of large, unwarranted damages to plaintiffs and to protect the press while it informs the public on matters of interest, it is imperative to recognize a distinction between an individual's interest in his reputation as a whole and an individual's subinterest in his believability. When only the aspect of a plaintiff's believability has been harmed by defamation, punitive damages should not be made available to him. By allowing only public vindication of his believability, a public figure who has been wrongfully attacked will be adequately protected. In addition, it will preserve society's interest in the free flow of information by not exposing the press to unlimited liability.

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* B.A., 1990, University of Michigan; J.D., 1993, University of Miami School of Law. University of Miami Entertainment and Sports Law Review, Research and Writing Editor, 1992-1993. The author would like to express her sincere gratitude to Professor Michael H. Graham for all his patience and invaluable insight.

