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## ***Masson v. New Yorker Magazine, Inc.: Quotes, Lies and Audiotape***

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MASSON v. NEW YORKER MAGAZINE, INC.: QUOTES, LIES AND  
AUDIOTAPE

DOES THE FIRST amendment provide journalists with “the right to deliberately alter quotations?”<sup>1</sup> The Ninth Circuit Court of Appeals, in *Masson v. New Yorker Magazine, Inc.*,<sup>2</sup> held 2-1 that indeed, a journalist may “fabricate” quotations provided that the published quotations are rational interpretations of ambiguous remarks made by the “quoted” person, or that the quotations do not alter the substantive content of unambiguous remarks made by that same person.<sup>3</sup>

In 1983, *The New Yorker* published a two-part article written by Janet Malcolm.<sup>4</sup> The piece discussed psychoanalyst Jeffrey Masson and his association with the Sigmund Freud Archives. While gathering information for the article, Malcolm conducted extensive interviews with Masson, keeping detailed notes and tape recording most of the interview sessions.

After the article was published, Masson filed suit in federal district court against Malcolm, *The New Yorker*, and Alfred A. Knopf, Inc.<sup>5</sup> alleging that he was libeled. Specifically, he claimed that “Malcolm fabricated words attributed to him within quotations [sic] marks, and misleadingly edited his statements.”<sup>6</sup> Additionally, he argued that both *The New Yorker* and Knopf knew of the alleged libel prior to the respective publication dates.<sup>7</sup>

After determining that Masson did not establish actual malice,<sup>8</sup> the district court granted summary judgment in favor of the

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1. *Masson v. New Yorker Magazine, Inc.*, 895 F.2d 1535, 1548 (9th Cir. 1989) (Kozinski, J., dissenting).

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

3. *Id.* at 1539.

4. Malcolm, *Annals of Scholarship: Trouble in the Archives-I*, THE NEW YORKER, Dec. 5, 1983, at 59; Malcolm, *Annals of Scholarship: Trouble in the Archives-II*, THE NEW YORKER, Dec. 12, 1983, at 60.

5. Knopf was sued because it subsequently reprinted The New Yorker article in book form. *Masson*, 895 F.2d at 1536.

6. *Id.* Masson alleged that the statements made “him appear ‘unscholarly, irresponsible, vain, [and] lacking impersonal [sic] honesty and moral integrity.’” *Id.*

7. *Id.*

8. *Masson v. New Yorker Magazine, Inc.*, 686 F. Supp. 1396, 1398 (N.D. Cal. 1987), *aff'd*, 895 F.2d 1535 (9th Cir. 1989).

defendants.<sup>9</sup> Masson then appealed to the Ninth Circuit Court of Appeals. Judge Alarcon affirmed the district court's decision,<sup>10</sup> despite a vigorous dissent from Judge Kozinski.<sup>11</sup> Although the *Masson* majority may be open to criticism, its framework for dealing with "fabricated" quotes is nevertheless an appropriate one. This Comment argues that the rational interpretation/non-substantive alteration standard adequately protects the first amendment rights of the journalist, while still providing a remedy to the libel plaintiff should the journalist stray too far from the plaintiff's actual words. Under this standard, a journalist does have the right to alter quotations to a certain extent.

### I. BACKGROUND

When a journalist places words within quotes, and attributes those words to a speaker, he is representing that they are the speaker's actual utterances. At least, that is the expectation of the reader.<sup>12</sup> Nonetheless, it is common journalistic practice to "clean up" quotes.<sup>13</sup> Moreover, "as a practical matter, it is not always possible for a reporter to be so literally accurate."<sup>14</sup> As a result, the published quote is often not a verbatim account of what the speaker said. Although some speakers might object to this treatment, the first amendment protects the journalist from many adverse legal consequences occasioned by the inexact nature of reporting.<sup>15</sup>

9. *Id.* at 1397.

10. *Masson*, 895 F.2d at 1548.

11. *Id.* at 1548-70 (Kozinski, J., dissenting).

12. *Id.* at 1538 (Kozinski, J., dissenting).

13. *Id.* (Kozinski, J., dissenting) (quoting J. OLEN, *ETHICS IN JOURNALISM* 100 (1988) ("Not to clean up quotes is to make intelligent speakers look stupid and stupid speakers look stupider.")).

14. *Id.* (Kozinski, J., dissenting) (quoting J.L. HULTENG, *THE MESSENGER'S MOTIVES: ETHICAL PROBLEMS OF THE NEWS MEDIA* 70 (1976)).

15. "The press is . . . protected from liability for inadvertent or negligent misquotations by the requirement that a libel plaintiff prove reckless or deliberate conduct . . . . *New York Times v. Sullivan's* actual malice standard protects even the reporter who negligently misquotes a subject." *Id.* (Kozinski, J., dissenting) (citation omitted). The rationale supporting this protection was accepted even the *Masson* dissent:

Newspapers might never be published if they were required to guarantee the accuracy of every reported fact; time and manpower do not permit the type of verification that would prevent all mistakes. To avoid the stifling effect of massive liability, the press is given wide berth . . . ; reporters are held liable only for deliberate falsehoods or where they act recklessly.

*Id.* at 1557 (Kozinski, J., dissenting).

The extent of this constitutional protection, though, remains relatively unknown. For example, it is unclear whether the plaintiff would have a libel claim based on the following case: in the course of an interview with a journalist, the plaintiff says, "I understand the position taken by the terrorists, and can sympathize with it." The published article quotes the plaintiff as saying "the position taken by the terrorists is a reasonable one, and I wholly support it." In 1964, the Supreme Court of the United States held that a public figure must prove actual malice — actual knowledge of the falsity or reckless disregard of the truth — in order to recover in a libel suit.<sup>16</sup> However, the Supreme Court has not yet considered whether actual malice can be established by a reporter's failure to enclose within quotation marks a verbatim rendering of the plaintiff's statement.<sup>17</sup>

Arguably, some courts have dealt with this thorny problem. In *Dunn v. Gannett New York Newspapers, Inc.*,<sup>18</sup> the Third Circuit Court of Appeals held that a newspaper could not be sued for libel when it published a headline in Spanish, trumpeting that a political official had called Hispanics "cerdos," or "pigs," despite the fact that the English-speaking official did not actually use the word "pigs."<sup>19</sup> The court based its decision on a determination that "the headline was a rational interpretation of remarks that bristled with ambiguities."<sup>20</sup> Although this case is somewhat analogous to the issue of fabricated quotes, its holding seems limited to the facts, especially given the difficulties of translating one language to another.<sup>21</sup>

The Second Circuit decided a similar case in *Hotchner v. Castillo-Puche*.<sup>22</sup> The author of a Spanish language book quoted Ernest Hemingway describing the plaintiff as being "dirty and a terrible ass-licker."<sup>23</sup> In publishing an English language edition,

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16. *Sullivan*, 376 U.S. 254, 279-80 (1964). The *Masson* court assumed without objection that the plaintiff was a public figure. Hence, the actual malice standard of *New York Times* applied. *Masson v. New Yorker Magazine, Inc.*, 895 F.2d 1535, 1537 (9th Cir. 1989).

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

18. 833 F.2d 446 (3d Cir. 1987).

19. *Id.*

20. *Id.* at 452.

21. See *Masson*, 895 F.2d at 1555 (Kozinski, J., dissenting) (construing *Dunn* as applying only to translations).

22. 551 F.2d 910 (2d Cir.), cert. denied sub nom., *Hotchner v. Doubleday & Co.*, 434 U.S. 834 (1977).

23. *Id.* at 914.

the defendant "toned down"<sup>24</sup> the remark, quoting Hemingway as saying, "I don't really trust [the plaintiff]."<sup>25</sup> Plaintiff filed a libel suit, alleging in part that the actual malice standard was satisfied because defendant knowingly changed the quote.<sup>26</sup> In granting summary judgment for the defendant, the court seemingly approved of fictionalized quotations, at least to "some extent,"<sup>27</sup> as long as the "substantive content" of the quote was not altered.<sup>28</sup> This case is even less helpful than *Dunn*, since the alleged libel actually decreased the defamatory impact of the original statement.

In *Carson v. Allied News Co.*,<sup>29</sup> the court ruled that statements allegedly made by entertainer Johnny Carson were a "sheer fabrication"<sup>30</sup> on the part of the author/defendant. The Seventh Circuit allowed the case to go to the jury, stating that journalists could "not invent quotations and attribute them to actual persons."<sup>31</sup> This case is also of limited precedential value, since the defendant literally made up the quotes without having any factual basis for the alleged conversations.

From this sparse body of law was born *Masson v. New Yorker Magazine, Inc.*, a case which tried to provide some legal standards for dealing with fictionalized quotations.

## II. MASSON V. NEW YORKER MAGAZINE, INC.

### A. The Majority Opinion

After analyzing the *Dunn*, *Hotchner*, and *Carson* cases,<sup>32</sup> the majority, in an opinion by Judge Alarcon, created a standard for dealing with libel cases in which the published quotations do not completely match the actual statements made by the plaintiff. Specifically, the court said that actual malice may be inferred

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24. *Id.* at 912.

25. *Id.*

26. *Id.* at 914.

27. *Id.*

28. *Id.*

29. 529 F.2d 206 (7th Cir. 1976).

30. *Id.* at 212.

31. *Id.* at 213.

32. The *Masson* court, which was obligated to apply California law in this diversity case, also relied on *Bindrim v. Mitchell*, 92 Cal. App. 3d 61, 155 Cal. Rptr. 29, *cert. denied*, 444 U.S. 984 (1979), which it interpreted to stand for the proposition that "an author's privilege to alter quotations is not unlimited." *Masson v. New Yorker Magazine, Inc.*, 895 F.2d 1535, 1539 (9th Cir. 1989).

“when the language attributed to the plaintiff is wholly the product of the author’s imagination.”<sup>33</sup> However, fictionalized quotations are allowed to some extent. Even though the quoted language does not contain the exact words used by the plaintiff, the fabricated quotation is not evidence of actual malice if it is either a “‘rational interpretation[.]’ of ambiguous remarks made by a public figure,”<sup>34</sup> or does not alter the substantive content of unambiguous statements actually made by the plaintiff.<sup>35</sup>

Applying this standard, the court found that none of quotations attributed to Masson could be the basis of a finding of actual malice, and therefore affirmed the district court’s grant of summary judgment to the defendants.<sup>36</sup> There were a number of challenged quotations which the court discussed in light of its new standard. For example, Malcolm quoted Masson as calling himself an “*intellectual gigolo*.”<sup>37</sup> This phrase was not on the tape recordings,<sup>38</sup> although the tapes did reveal Masson claiming that the “[other analysts] felt . . . I . . . : was a private asset but a

33. *Masson*, 895 F.2d at 1539 (citing *Carson v. Allied News Co.*, 529 F.2d 206, 213 (7th Cir. 1976)).

34. *Id.* (quoting *Dunn v. Gannett New York Newspapers, Inc.*, 833 F.2d 446, 452 (3d Cir. 1987)).

35. *Id.* (citing *Hotchner v. Castillo-Puche*, 551 F.2d 910, 914 (2d Cir.), *cert. denied sub nom.*, *Hotchner v. Doubleday & Co.*, 434 U.S. 834 (1977)).

36. The court also refused to find *The New Yorker* and Knopf vicariously liable for Malcolm’s actions, *Id.* at 1546, and denied defendants’ motions for attorneys fees pursuant to Rule 11 and California law. *Id.* at 1547-48. Most importantly, the court rejected Masson’s claim that actual malice could be inferred from passages in the article which Masson contended were edited in a misleading manner. *Id.* at 1544-46. In one instance, Malcolm edited out 33 of 40 words from a remark made by Masson. Masson argued that the published quotation (“[I was] the wrong man”), taken out of the context of his deleted comments, made it look like Masson “‘was the wrong man’ to ask to do something honorable.” *Id.* at 1546. Had Malcolm not edited the remark, but published it verbatim, Masson contended that it would look like Masson was declaring himself “the wrong man” to do something for selfish reasons. The court said that “the wrong man” quote was ambiguous, and could be interpreted several different ways. Moreover, Malcolm’s interpretation of “the wrong man” remark, reflected in her editing, was a rational one. *Id.* As such, editing quotes will always be protected by the first amendment as long as the statement attributed to the plaintiff was a rational interpretation of the plaintiff’s ambiguous remarks. Thus, the court treated the “misleading editing” claim the same way it treated the “fabricated quotations” issue.

37. *Id.* at 1540.

38. The phrase did appear in Malcolm’s interview notes. *Id.* Thus, there was a factual dispute — Masson claimed the quote was fabricated because it was not tape recorded, while Malcolm claimed that she took the quote word for word from an untaped interview. However, for the purposes of a summary judgment motion, any factual dispute is resolved in favor of the party opposed to the motion. As such, the court assumed “that Masson did not refer to himself as an intellectual gigolo.” *Id.*

public liability. They like me . . . alone in their living room . . . . [b]ut . . . within the hierarchy of analysis . . . these important . . . analysts [would not] be caught dead with me."<sup>39</sup> The court held that "[w]hile it may be true that Masson did not use the words 'intellectual gigolo,' Malcolm's interpretation did not alter the substantive content of Masson's description of himself as a 'private asset but a public liability.'<sup>40</sup> Therefore actual malice was not proved.

The analysis was similar with regard to the other quotations.<sup>41</sup> Thus, despite the fact that none of the challenged quotes

39. *Id.*

40. *Id.*

41. The substantive alteration test was used on most of the other challenged quotations. For example, Masson was quoted as saying that Freud's house in London would have been "a place of sex, women, fun" had Masson moved in. Although this statement did not appear in the tape recordings, the attributed quote did not alter the substance of other Masson comments, such as a remark that he envisioned the home as a place for wild parties, and boasts about his sexual prowess. The attributed quote, reasoned the court, was consistent with those comments. *Id.* at 1542. In another example, Malcolm quoted Masson as saying he would be considered, "after Freud, . . . the greatest analyst who ever lived." *Id.* Once again, this quotation does not appear in the taped interview. However, "[t]he purportedly fictionalized quotation actually reflects the substance of Masson's" remarks, which included statements that "'for better or worse, analysis stands or falls with me now; 'it's me and Freud against the rest of the analytic world. . . . Not so, it's me. It's me alone'; and '[I] could single-handedly bring down the business [of Freudian psychology].'" *Id.*

Only once did the court apply the "rational interpretation of ambiguous remarks" test to one of the allegedly fabricated quotes. The challenged quotation concerned the Schreber case study. Schreber was an Austrian who wrote a book about his delusions, including a delusion that his psychiatrist, Flechsig, wanted to castrate him. Based on Schreber's book, Sigmund Freud conducted a case study which formed the basis of Freud's theory on homosexuality. *Id.* at 1543. In going through Freud's papers, Masson discovered an article written by Flechsig describing experimental castrations he had performed. Once Masson determined that Freud received the article before finishing the Schreber study, *Id.*, Masson formulated the belief "that Freud knew Schreber's concerns about castration had some basis in reality prior to his publication of the . . . case study." *Id.* at 1544.

Malcolm quoted Masson as saying that Eissler [another analyst] would have admitted that he [Masson] "was right" in this belief. Masson contended he never said that, although the statement, "He [Eissler] agrees with me, of course," did appear on tape. *Id.* This comment appeared at the end of a protracted conversation on the subject of the Schreber case study, and the court noted that "[i]t is difficult to discern [based on the recorded conversation] whether Masson is claiming that Eissler 'agrees' with" Masson's current belief that Freud knew that Flechsig performed castrations at the time [Freud] published his case study, or that Eissler 'agrees' with Masson's statement that Freud did *not* know that Schreber had a basis in reality for some of his other delusions. *Id.*

The court held that the quote Malcolm attributed to Masson was "a rational interpretation of Masson's ambiguous remarks about Eissler's reactions to his discoveries about the Schreber case." *Id.* Therefore, Masson failed to present evidence of actual malice.

With regards to the issue of misleadingly edited quotes, the court used the "rational

was actually said by Masson, the court held that the fabrications were close enough to reality to affirm the district court's grant of summary judgment.

### B. The Dissenting Opinion

Judge Kozinski filed a vigorous dissent in the Masson case, declaring that whatever responsibility the courts have to safeguard the first amendment guarantee of freedom of the press, "the right to deliberately alter quotations is not . . . a concomitant of a free press."<sup>42</sup>

Judge Kozinski agreed with the majority that actual malice must be proven, but differed as to how it must be proven. He provided a framework for evaluating fabricated quotes, and using that standard, found that the plaintiff's case should have been allowed to go to a jury.<sup>43</sup>

Before developing his own approach to the issue of fabricated quotes, Judge Kozinski first criticized the majority opinion. In essence, Judge Kozinski argued that the standard set forth by the majority imposed "no meaningful bounds"<sup>44</sup> upon the journalist. Under the majority approach, for example, if an interviewee made "statements that could reasonably be construed as boastful or arrogant (or callous or stupid or reflecting any other trait of character or intellect) the reporter may attribute to [the speaker] any other statement reflecting that same trait."<sup>45</sup> Thus given a "license to invent quotations on the basis of what they perceive to be a speaker's character, there are no words whatsoever that [reporters] cannot put into a subject's mouth."<sup>46</sup>

If a writer actually put words into her subject's mouth, she crosses "the line between poetic license and license. The latter the first amendment does not protect."<sup>47</sup> However, Judge Kozinski largely based his constitutional determination on the fact that fabricating quotes is simply bad journalism: "Unlike my colleagues, I am unable to construe the first amendment as granting journalists a privilege to engage in practices they themselves

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interpretation of ambiguous remarks" test more often. *See supra* note 36 and text accompanying note 34.

42. *Id.* at 1548 (Kozinski, J., dissenting) (footnote omitted).

43. *Id.* at 1562-70 (Kozinski, J., dissenting).

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

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

46. *Id.* at 1553 (Kozinski, J., dissenting).

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

frown upon, practices one of our defendants has flatly disowned as journalistic heresy."<sup>48</sup> Unfortunately, "journalistic heresy" does not necessarily violate the first amendment. Even Judge Kozinski himself admitted that the "standards and aspirations of the [journalistic] profession are not, of course, dispositive of the legal question [of fabricated quotes]."<sup>49</sup>

Displeased with the majority test, Judge Kozinski formulated his own. Arguing that no cases were precisely on point,<sup>50</sup> the dissent based its standard on the twin first amendment policies espoused in *New York Times v. Sullivan*: protecting journalists from mistakes of fact and judgment.<sup>51</sup> Taking the easy case first, Judge Kozinski asserted that the right to fabricate quotes does not serve the policy of protecting the press from errors of fact, since the press already possesses sufficient protection in this regard.<sup>52</sup> Regarding mistakes in judgment, Judge Kozinski took the position that "changing the language of quotations is the type of *judgment*" which is not "important to the operation of a free and robust press[.]"<sup>53</sup> The rationale for this determination was again the general opinion in journalistic circles that, for the most part, fabrication of quotes is unacceptable.

The test established by Judge Kozinski to evaluate cases like *Masson* involves 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

48. *Id.* at 1562 (Kozinski, J., dissenting). "It is never justifiable for a journalist to make up quotations, however plausible or characteristic . . ." *Id.* at 1553 (quoting J.L. HULTENG, PLAYING IT STRAIGHT: A PRACTICAL DISCUSSION OF THE ETHICAL PRINCIPLES OF THE AMERICAN SOCIETY OF NEWSPAPER EDITORS 64 (1981)). In discussing the "greatest analyst who ever lived" quote, *see supra* note 41, Judge Kozinski states that "using [a statement] and other snatches as yarn from which to weave a wholly different statement to be passed off as a quote from Masson is a power few self-respecting journalists arrogate to themselves." *Masson v. New Yorker Magazine*, 895 F.2d 1535, 1550 (9th Cir. 1989) (Kozinski, J., dissenting).

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

50. *Id.* at 1557 (Kozinski, J., dissenting).

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

52. *Id.* at 1558 (Kozinski, J., dissenting). Judge Kozinski added:

The press is already protected from liability for inadvertent or negligent misquotations by the requirement that a libel plaintiff prove reckless or deliberate conduct. Thus, if a reporter takes notes and is unable to catch every word, she will be protected from liability even though she was negligent in failing to use a tape recorder or in double-checking her source. *New York Times v. Sullivan*'s actual malice standard protects even the reporter who negligently misquotes a subject.

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

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

so, is the inaccuracy defamatory? (5) If so, is the inaccuracy a result of malice . . . ?”<sup>54</sup> If all five questions are answered affirmatively, the case should be sent to the jury.

Using this standard, Judge Kozinski concluded that Masson should have been allowed to present his claims against all three defendants to a jury. First, there was substantial evidence that Malcolm’s use of quotation marks represented that she was reporting precisely what Masson said.<sup>55</sup> Second, a straightforward comparison between the tape recordings and the published articles indicated inaccuracies.<sup>56</sup> Third, the changes between the recordings and the article were not “merely cosmetic or immaterial.”<sup>57</sup> Fourth, as a matter of state law, California recognizes that misquotations can be defamatory and actionable.<sup>58</sup> Finally, Judge Kozinski said that all three defendants could have been found to have acted with actual malice — Malcolm because she had the opportunity to check the quotations in her article against the tape recordings in her possession,<sup>59</sup> *The New Yorker* because it failed to follow up on Masson’s protestations that he had been misquoted,<sup>60</sup> and Knopf for its similarly “cavalier” treatment of Masson’s complaint.<sup>61</sup>

After going through the analysis required by the five-step inquiry, Judge Kozinski concluded by once more hammering home his main point: fabricating quotes “debases the journalistic profession as a whole.”<sup>62</sup>

### III. ANALYSIS

Neither Judge Alarcon, writing for the majority, nor dissenting Judge Kozinski, presented a perfect solution to the problem posed by the issue of fabricated quotes. Given the nature of the first amendment, there probably is no perfect answer. But unlike Judge Kozinski, the majority offered an approach which should prove workable without compromising the first amendment.

The main flaw in the majority opinion is its blind insistence

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

55. *Id.* at 1563 (Kozinski, J., dissenting).

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

57. *Id.* at 1564-65 (Kozinski, J., dissenting).

58. *Id.* at 1565 (Kozinski, J., dissenting).

59. *Id.* at 1566-68 (Kozinski, J., dissenting).

60. *Id.* at 1568-69 (Kozinski, J., dissenting).

61. *Id.* at 1569-70 (Kozinski, J., dissenting).

62. *Id.* at 1570 (Kozinski, J., dissenting).

in supporting its decision with precedent.<sup>63</sup> Judge Kozinski was absolutely correct in asserting that "no cases were precisely on point,"<sup>64</sup> and that any test had to be culled from the first amendment.<sup>65</sup> Nonetheless, the majority produced a standard which remained true to first amendment policies.

Altering quotations goes to the heart of the question of how much leeway a journalist has in exercising editorial judgment. Ideally, a happy medium should be struck between the uninhibited editorial discretion to doctor quotes, and no discretion whatsoever. At the very least, the majority ended up somewhere in the middle of those two extremes. The fairness of the majority standard can best be illustrated by an example. A journalist interviews a professor who says, "I am good in my field." In putting together her article, the writer edits the quote to read, "I am the best in my field." Presuming that the author was working from notes (either written or tape-recorded), a libel suit filed by the professor could be decided either way, with the court's decision hinging upon its analysis of the notes. If the notes<sup>66</sup> indicate that the professor made several boastful, egotistical remarks, the court can justifiably say that the "fabricated" quote did not alter the substantive content of what was actually said throughout the course of the interview, or was a rational interpretation of the ambiguous word "good." Hence, summary judgment would be granted.

On the other hand, if the professor's actual remark was an isolated one, or was surrounded in the notes by humble ruminations on his abilities, then the court would find that the writer substantively altered or unreasonably interpreted the professor's

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63. See *supra* notes 32-36 and accompanying text.

64. *Masson v. New Yorker Magazine, Inc.*, 895 F.2d 1555-57 (9th Cir. 1989) (Kozinski, J., dissenting).

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

66. Implicit in the majority opinion is the idea that the court should just consider the notes taken by the journalist during the course of the interview with her subject. A journalist should not be allowed to alter her subject's quotations based on information gleaned from other sources, such as previous interviews conducted by other journalists. Since the writer does not know for sure that the words attributed to her subject in the alternate sources were actually uttered, she would in essence be fabricating a quote in her own article based on quotations that might also have been fabricated. Without first-hand knowledge that the comments forming the basis of her alterations were ever made, the writer would seem to fall under the *Carson* case, which prohibits inventing quotations out of thin air. *Carson v. Allied News Co.*, 529 F.2d 206 (7th Cir. 1976). That the majority did not explicitly require courts to consider only the defendant's notes in making its determination as to whether the fabricated quotes substantively altered the actual remarks made by the plaintiff is a flaw which needs to be corrected.

actual remark. As such, malice could be inferred, and the case might be sent to a jury. Situations which fall somewhere between these two examples can be handled by the court on a case-by-case basis. Thus, under the majority approach, some freedom is tolerated, but a journalist who ventures too far from the truth will be punished.<sup>67</sup> No more could be asked for.

Unlike the majority opinion, the dissent failed to find a middle ground in its effort to police editorial judgment. Depending on whether the focus is on Judge Kozinski's underlying rationale or the practical effect of his opinion, his approach can be viewed as either giving the press free reign in altering quotations, or virtually barring the press from changing even a word.

Although Judge Kozinski described the majority rationale as "explosive,"<sup>68</sup> the rationale underlying his dissenting opinion is much more explosive. Several times Judge Kozinski seemed to predicate constitutional protection for journalists upon their compliance with professional standards.<sup>69</sup> While there is little doubt that Malcolm's article was bad, perhaps even unethical journalism, it remains protected by the first amendment. Bad journalism is not synonymous with libel and if the case was otherwise, courts would be flooded with defamation suits. The majority opinion seemed to recognize the distinction between poor and unprotected reporting; the dissent disregarded it. Although the dissent's rationale of equating constitutional protection with the quality of the reporting is appealing in light of the *Masson* case, that type of

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67. It could be argued that the majority test is actually very underprotective of the press. The court's job in a libel case is essentially two-fold: to determine if a false statement of fact was made, and then to determine whether actual malice existed. Arguably, the majority standard collapsed these two inquiries. Thus, if a plaintiff can prove that the challenged quotation did substantively alter the content of what he said, then not only is there a false statement of fact, but a finding of actual malice would automatically follow. The language in the majority opinion, however, does not support this line of reasoning. The court flatly stated that malice will not be inferred when the plaintiff fails to prove a substantive alteration or an unreasonable interpretation. *Masson*, 895 F.2d at 1539. Presumably, this is because the plaintiff did not demonstrate that a false statement of fact was ever published. Hence, a finding of actual malice would be irrelevant. In contrast, where the plaintiff carries his burden of proof, the court states that actual malice "may" be inferred. *Id.* The use of the permissive word "may" leads to the conclusion that although the plaintiff has proven there was a false statement of fact, whether or not a court can find that actual malice existed depends upon the plaintiff's production of evidence showing actual malice. The plaintiff cannot merely rely on the fact that he satisfied the "rational interpretation/non-substantive alteration" standard to prove malice.

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

69. *See supra* notes 47-48 and accompanying text.

reasoning poses a significant threat to freedom of the press.

The dissent's rationale is dangerous because rather than relying on principles of law to determine whether or not libel occurred, a court will use principles of journalism. The court will have to make a subjective determination as to what is good journalism and what is bad journalism, with their only guidance being the professional standards of an unfamiliar profession. Thus, in each step of Judge Kozinski's five-part inquiry,<sup>70</sup> the court will look to journalists themselves for answers to its questions,<sup>71</sup> rather than exercise its own independent judgment. For example, the determination of whether an inaccuracy is "material" will be made in compliance with guidelines established by the press. Under current journalistic practice, a cleaned-up quote would be an immaterial inaccuracy, while something more would be material.<sup>72</sup> But journalism is a dynamic profession, and in the future, substantially revising quotes might be considered standard operating procedure. This gives the media, through manipulation of its own standards, the power to libel-proof itself. Therefore, it is the dissent's approach, and not the majority's, which in the long run leaves the media potentially unbounded.<sup>73</sup>

Of more immediate concern than the spectre of lowered journalistic standards dictating what is and what is not protected by the first amendment are the practical implications of Judge Kozinski's approach: a chilling effect on the press, and a decrease in the quality of journalism. The dissent's methodology leaves the journalist little room to maneuver in editing quotes, since the test Judge Kozinski sets forth<sup>74</sup> is too easily met by the libel plaintiff.

Whenever a writer places something in quotes that does not comport exactly with tape recordings or notes, the first two prongs are met. Thus, even cleaned up quotes are swept into the realm of libel by the initial steps of the inquiry. The answer to the fourth part of the test is determined by state law, and it seems that in a great number of cases misquotations could be defamatory. So long as there were notes which potentially could have verified accuracy, it is fair to say that the fifth part of the test is also satisfied.

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70. See *supra* notes 54-61 and accompanying text.

71. This will be particularly so with regard to the first three parts of Judge Kozinski's test.

72. See *Masson*, 895 F.2d at 1564-65 (Kozinski, J., dissenting).

73. See *supra* notes 44-46 and accompanying text.

74. See *supra* notes 54-61 and accompanying text.

Therefore, the key inquiry is the third step: whether the inaccuracy identified in step two is "material." Judge Kozinski equates "immaterial" changes with "cosmetic" changes.<sup>75</sup> A cleaned-up quote might be immaterial, but virtually anything else could be material. Faced with the choice of exercising a minimal degree of editorial judgment and risking a costly libel trial, or watering down an article by paraphrasing (or perhaps choosing not to write the story at all in order to avoid litigation), the "chilled" journalist will probably find the second option more palatable and more prudent. When such a decision is made, freedom of the press suffers.

The quality of journalism suffers, too. Careful writers will be reluctant to quote directly from their sources, thereby decreasing the impact and credibility of the subsequent articles. A bland, boring brand of journalism will develop. If journalists opt to use quotations, their hesitation to alter them in any way will adversely affect the flow, style, and quality of the pieces, making them more difficult and less enjoyable to read. Moreover, the speaker could sound unintelligent if his quotations are left unedited, since errors made in speaking often go unnoticed, while errors in print jump out at the reader.<sup>76</sup> The risk of embarrassing himself might also make a speaker reluctant to give written interviews.

The *Masson* majority presents the better alternative for dealing with fabricated quotations. However, something gnaws at one's sense of fairness when a writer is allowed to fabricate quotes which do not exactly reflect the speaker's true thoughts and words. It seems unjust to sanction "creative editing." The short answer to this concern is that the constitution demands such protection; without it, the press would lose much of the vitality which makes it an important part of a free society. A better answer is that the legal system is not the only way of controlling abuses. The media is quite good at policing itself, evidenced by Judge Kozinski's frequent reliance on journalists' negative opinions regarding fabricated quotes. Judge Kozinski recounted an incident concerning a journalist who admitted using composite characters and inventing conversations in allegedly non-fiction articles, without informing his readers.<sup>77</sup> A tremendous controversy in the journalistic community erupted, which resulted in the wide-spread

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75. *Masson*, 895 F.2d at 1565 (Kozinski, J., dissenting).

76. *See id.* at 1558 (Kozinski, J., dissenting).

77. *Id.* at 1560-61 (Kozinski, J., dissenting).

condemnation of his actions.<sup>78</sup>

Judge Kozinski found this controversy “instructive” because “it points to the great resistance on the part of journalists and publishers to the blurring of fact and fiction.”<sup>79</sup> In this regard, Judge Kozinski is right, but she missed the underlying meaning of the incident—journalists and publishers are quite capable of taking care of their own. Moreover, the general public most certainly would be wary of journalists who operate on the ethical edge, thereby inhibiting those journalists’ chances for the top stories and career advancement. These three protections — the majority standard, journalistic standards enforced by the profession itself and public awareness — adequately protect against and deter the use of fabricated quotations.

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78. Even the journalist’s magazine employer, after initially supporting the writer, eventually condemned his practices. *Id.* at 1561 (Kozinski, J., dissenting).

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