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Neil J. Kinkopf

Georgia State University College of Law, nkinkopf@gsu.edu

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MALICE IN WONDERLAND: FICTIONALIZED QUOTATIONS AND
THE CONSTITUTIONALLY COMPELLED SUBSTANTIAL TRUTH
DOCTRINE

The courts have recently been called upon to determine whether a quotation that has been deliberately altered by its publisher gives rise to a claim of defamation. The Supreme Court has ruled that a "fictionalization" is not false unless it alters the substance of what was actually said. The author contends that this rule is flawed and proposes that any deviation from the words actually spoken be considered false.

INTRODUCTION

A VIETNAM WAR protester shouts, "War is evil! Down with the draft!" but the reporter quotes the protester as exclaiming "Fuck the draft!"¹ An opponent of Nicola Sacco's and Bartolomeo Vanzetti's executions declares, "I am outraged at this immoral act and hold Governor Fuller responsible," but the reporter quotes the opponent as saying "Governor Fuller murdered Sacco and Vanzetti."²

This note examines the issues raised when a speaker, as above, is misquoted and brings a libel action to recover damages from the publisher³ of the misquotation. A necessary element of a libel action is the finding of a false statement of fact.⁴ Unfortunately, the question of what constitutes a false statement of fact in

1. This hypothetical is based on *Cohen v. California*, 403 U.S. 15 (1971) (discussed *infra* notes 187-95 and accompanying text).

2. This hypothetical is based on *Commonwealth v. Canter*, 269 Mass. 359, 168 N.E. 790 (1929), discussed in Schauer, *Language, Truth, and the First Amendment: An Essay in Memory of Harry Canter*, 64 VA. L. REV. 263, 263-66 (1978).

3. In the context of defamation, the term "publisher" is given a broad construction. A publisher is any person who facilitates the "publication" of a misquotation. A publication is "[a]ny act by which the defamatory matter is intentionally or negligently communicated to a third person." RESTATEMENT (SECOND) OF TORTS § 577 comment a (1976). Under some circumstances, even "transitory gestures" can constitute publication. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 568 comment d).

4. 2 F. HARPER, F. JAMES & O. GRAY, *THE LAW OF TORTS* § 5.0, at 3-4 (1986) (liability is based on false statements of fact).

the context of a misquotation has not been resolved. Two possible formulations might be used to determine whether a false statement of fact has been made. The first formulation, referred to in this note as the "literal rule,"⁵ finds a false statement of fact whenever there is any deviation from the words actually articulated by the speaker. The second formulation, referred to in this note as the "essence rule," finds a false statement of fact only when there is a deviation from both the words actually spoken and the meaning of those words. The issue, then, is whether the finding of falsely stated facts necessary to support a libel action must be based on a deviation from the essential meaning of the words or merely on a deviation from the exact words spoken.⁶

It may not be immediately apparent that the choice of one rule over the other has any practical effect or, conceding an actual effect, that harm flowing from a misquotation is properly viewed as defamatory. To illuminate the issue involved in choosing between the literal and essence rules it is helpful to review the two misquotation examples mentioned above.

It is clear that in both examples the literal rule would hold the reported quotation to be a false statement of fact: in both instances, the quote deviates from the words actually spoken by the source. The essence rule, on the other hand, would hold that both reported quotations are *not* false statements of fact, since the general message of each speaker's statement has been conveyed.⁷

5. The literal rule is a standard rather than a specific mandate. States would remain free to adopt this standard and require literal accuracy, or instead to adopt a more lenient rule under common law or by statute.

6. It might be contended that a quotation should be analyzed as an expression of the publisher's opinion of what the speaker said. While the Supreme Court has rejected the contention that all statements of opinion are protected from liability for defamation, "a statement of opinion relating to matters of public concern which does not contain a probably false factual connotation will receive full constitutional protection." *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695, 2706 (1990). Nevertheless, *Milkovich* does not mean that a quotation is a potentially protected form of opinion concerning what was said by the source. To the contrary, it is clear that a quotation is a factual statement that the words appearing between the quotation marks represent at least the thoughts of the speaker. Journalistic convention goes further, holding that "[q]uotation marks mean literally that the words they enclose are exactly as the source gave them—verbatim." M. CHARNLEY & B. CHARNLEY, *REPORTING* 248 (4th ed. 1979). For a more detailed discussion of journalistic conventions and ethics regarding quotations, see *infra* text accompanying notes 74-117.

7. In the first hypothetical, the reporter has conveyed the speaker's opposition to the draft. The alteration affects the intensity and civility but not the central meaning of the statement. In the second hypothetical, the reporter has maintained the sting of the actual statement, choosing to give it a figurative phrasing. The statement would almost certainly be interpreted figuratively. See *infra* note 10.

Therefore, whether a plaintiff can succeed in a libel action against a publisher largely depends upon whether the court applies the literal or essence rule.

These two misquotation examples also demonstrate that altered quotations can be, but are not necessarily, defamatory.⁸ The reporter in the first example has accurately captured the protester's sentiments. However, the profanity used by the reporter is not considered acceptable under most community standards.⁹ Attribution of profane language to the protester tends to lower the misquoted speaker in the estimation of the community. In the second example, however, the misquotation attributed to the opponent of the executions is not likely to be considered defamatory. First, the words themselves fail to cast aspersion on the speaker.¹⁰ Further, although the quotation has been altered, the misquotation conveys the same message as would have been conveyed had no alteration occurred. This result obviates any claim that the speaker has been falsely associated with a disreputable position.

This note seeks to determine whether the literal or essence rule is more harmonious with the various interests implicated in the defamation context. To make this determination, an examination is first made of *Masson v. New Yorker Magazine, Inc.*,¹¹ the only case to present precisely this issue.¹²

The literal and essence rules are then examined in light of the

8. A statement "is defamatory if it tends . . . to harm the reputation of another as to lower him in the estimation of the community." RESTATEMENT (SECOND) OF TORTS § 559 (1976).

9. See THE OXFORD ENGLISH DICTIONARY 237-38 (2d ed. 1989) (the word "fuck" has been "[f]or centuries, and [is] still by the great majority, regarded as a taboo word.").

10. It is most likely that these words would be construed figuratively as meaning that Governor Fuller is morally culpable rather than legally blameworthy. See *Greenbelt Coop. Publishing Ass'n v. Bresler*, 398 U.S. 6 (1970) (characterization of action as "blackmail" construed figuratively); R. SACK, LIBEL, SLANDER, AND RELATED PROBLEMS 74-75 (1980) (the conclusion as to whether a word is construed in a figurative or literal sense is dependent upon jurisdiction, context, and historical period). There are some exceptions. *E.g.*, *Commonwealth v. Canter*, 269 Mass. 359, 371-72, 168 N.E. 790, 790-91 (1929) (holding that the statement "Fuller—Murderer of Sacco and Vanzetti" should be construed as meaning Fuller committed murder). Construed as in *Canter*, the words in the second hypothetical might be libelous, since they are so clearly erroneous that the speaker would appear to be at least hysterical and at worst a liar. Such a construction would "tend[] . . . to harm the reputation of [the speaker] as to lower him in the estimation of the community." RESTATEMENT (SECOND) OF TORTS § 559.

11. 881 F.2d 1452 (9th Cir. 1989), *modified on denial of reh'g and reh'g en banc*, 895 F.2d 1535 (9th Cir. 1990), *rev'd*, 111 S. Ct. 2419 (1991). All references to the Ninth Circuit's opinion will be to the modified opinion reported at 895 F.2d 1535 (9th Cir. 1990).

12. See *infra* notes 19-73 and accompanying text.

functions of journalism¹³ and the manner in which the general public digests the information it receives from the media.¹⁴

Next, the note analyzes how well each rule balances the competing interests involved. In *New York Times Co. v. Sullivan*,¹⁵ the Supreme Court held that the first amendment limits defamation actions. The Court has since applied a balancing test to resolve new issues in defamation. The Court has mandated that the social interests embodied in the Constitution¹⁶ be balanced against the individual interests contained therein¹⁷ to achieve the result that most harmoniously accommodates all interests.¹⁸ Using this test, the note concludes that the literal rule should prevail.

I. THE MASSON CASE

A. The Ninth Circuit Opinion

The issue of whether the essence or literal rule should be adopted presented itself directly in *Masson v. New Yorker Magazine, Inc.*¹⁹ In *Masson*, the plaintiff, a psychoanalyst formerly associated with the Freud Archives, was interviewed by Janet Malcolm, a co-defendant, who was preparing a story for *The New Yorker*. The interviews were tape recorded. The resulting article included a series of quotations attributed to the plaintiff that did not appear on the tape recordings.²⁰ Claiming that he did not

13. See *infra* notes 74-90 and accompanying text.

14. See *infra* notes 91-117 and accompanying text.

15. 376 U.S. 254 (1964).

16. The social interests implicated by a defamation action in the context of an altered quotation are efficient self-government and the attainment of truth through the "marketplace of ideas." See *infra* notes 118-78 and accompanying text.

17. The individual interests implicated are self-fulfillment and reputation. See *infra* notes 179-211 and accompanying text.

18. See *infra* notes 212-27 and accompanying text.

19. 895 F.2d 1535 (9th Cir. 1990), *rev'd*, 111 S. Ct. 2419 (1991).

20. The plaintiff claimed, and the court assumed for the purposes of summary judgment, that a total of nine statements that he did not make were nevertheless attributed to him. *Id.* at 1539-46. Among them were the following:

1) Masson was quoted as saying:

Eissler and Anna Freud told me . . . [t]hey like (sic) 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. at 1540 (emphasis omitted). Masson actually said,

[Eissler and Anna Freud] felt, in a sense, I [Masson] was a private asset but a public liability. They like (sic) 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

make these statements and that their attribution to him was defamatory, the plaintiff brought an action for libel.²¹ The District Court granted the defendants' motion for summary judgment, ruling that "[n]o clear and convincing evidence exists that would justify a finding that [the defendants] entertained serious doubts about the truth of the disputed passages."²²

In assessing the propriety of this ruling, the Ninth Circuit began its analysis by assuming that the quotations attributed to the plaintiff "were deliberately altered."²³ The court then surveyed cases from other circuits to derive "[t]he state of the current law governing the defamatory nature of [fabricated quotations]."²⁴ According to the Ninth Circuit, the current state of the law held that when a "fabricated quotation[]" was either a "ra-

these important training analysts to be caught dead with me.

Id. at 1540 (footnote omitted) (brackets in original).

2) Masson was quoted as saying, "if he [Masson] had been allowed to move into Anna Freud's house in London, the house not only would have been 'a place of scholarship, but it would also have been a place of sex, women, fun.'" *Id.* at 1542. Masson actually said, "in discussing the changes he would make to Freud's home: 'They're going to be calling the police on me every, every time I give a party or something'; and that 'I could have had some fun.'" *Id.*

3) Masson was quoted as saying, "he changed his middle name from Lloyd to Moussaieff because 'it sounded better.'" *Id.* at 1539-40. In fact, Masson explained that "he changed his middle name to Moussaieff because, inter alia, he 'just liked it.'" *Id.* at 1540.

4) Masson was quoted as saying, "Freud's 'entire theory after he abandoned seduction was the product of moral cowardice.'" *Id.* at 1541. Masson actually said, "'I think . . . [Freud] was a great and remarkable thinker but he was still a, 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.* (brackets in original).

5) Masson was quoted as predicting that it would be said, "'after Freud, he's [Masson's] the greatest analyst who ever lived.'" *Id.* at 1542 (brackets in original). Masson actually said "'for better or for 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.* (brackets in original).

6) Masson was quoted as saying of a stinging quip at Freud, which he delivered at the conclusion of a paper, "'[t]hat 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.'" *Id.* Masson actually said, "'the last sentence . . . was . . . [a] possibly gratuitously offensive way to end a paper to a group of analysts.'" *Id.* (brackets in original)

7) Masson was quoted as responding to his girlfriend's complaint that Masson was insensitive to Dr. Eissler, "'[she] worries too much.'" *Id.* at 1544. Masson actually noted only that he and Eissler were not "'close.'" *Id.*

21. *Id.* at 1536.

22. *Masson v. New Yorker Magazine, Inc.*, 686 F. Supp. 1396, 1407 (N.D. Cal. 1987), *aff'd*, 895 F.2d 1535 (9th Cir. 1990), *rev'd*, 111 S. Ct. 2419 (1991).

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

24. *Id.* at 1539.

tional interpretation[]' of ambiguous remarks" or "[did] not 'alter the substantive content' of unambiguous remarks," no finding of actual malice could be sustained.²⁵ The court concluded that application of this rule barred the inference of actual malice from any of the alterations made by the defendants.²⁶

The *Masson* court's ruling was manifestly unsound. First, the authorities that were cited to support the majority's reading of the current state of the law did not support the majority's position. The court relied on *Hotchner v. Castillo-Puche*²⁷ as authority for the proposition that actual malice cannot be inferred from a fictionalized quotation that "do[es] not 'alter the substantive content' of unambiguous remarks."²⁸ Such a reading of *Hotchner* is not justified. The defendant in *Hotchner* published a Spanish-language biography of Ernest Hemingway. The biography quoted Hemingway describing the plaintiff as "dirty and a terrible asslicker. There's something phony about him. I wouldn't sleep in the same room with him."²⁹ When translated into English, the quotation was toned down by the publisher to read "I don't trust him."³⁰ After failing to persuade the Second Circuit that the "asslicker" quotation was falsely attributed to Hemingway, the plaintiff claimed that liability should be imposed "simply because [the defendant] knowingly published a bowdlerized version of Hemingway's alleged statement."³¹ The *Hotchner* court disagreed, holding that although the defendant "was fictionalizing . . . the change did not increase the defamatory impact . . . of Hemingway's

25. *Id.* (quoting *Dunn v. Gannett New York Newspapers, Inc.*, 833 F.2d 446, 452 (3d Cir. 1987)). This rule creates a distinction between two categories of factual statements: ambiguous and unambiguous. However, there is no bright line between these categories, nor did the *Masson* court provide a test for determining whether a quote is or is not ambiguous. Detailed analysis on the propriety of making a distinction between ambiguous and unambiguous factual statements is beyond the scope of this note, but such a distinction may be impractical or impossible. See generally B. RUSSELL, HUMAN KNOWLEDGE: ITS SCOPE AND LIMITS 94-103 (1948) (explaining that "the meaning of a word is always more or less vague except in logic and pure mathematics" *Id.* at 98.); F. WAISMANN, PRINCIPLES OF LINGUISTIC PHILOSOPHY (1965) (explaining the irregularities of language and the necessity of verifying ambiguous language). In fact the *Masson* court itself seemed uncomfortable with this distinction, ruling without explanation that eight of the nine altered quotations were unambiguous remarks. See *Masson*, 895 F.2d at 1540-44. The court did not explain its characterization of the remaining statement as ambiguous. *Id.* at 1544.

26. *Masson*, 895 F.2d at 1544.

27. 551 F.2d 910 (2d Cir.), cert. denied, 434 U.S. 834 (1977).

28. *Masson*, 895 F.2d at 1539 (quoting *Hotchner*, 551 F.2d at 914).

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

30. *Id.*

31. *Id.*

statement”³² and that “[i]f [the defendant] could not have been liable for publishing the uncut version, it cannot be liable for deciding to make the passage less offensive.”³³ The *Hotchner* court did not hold, as the *Masson* court stated, that malice will not be inferred if the quoted language does not “‘alter the substantive content’ of unambiguous remarks.”³⁴ Instead, the *Hotchner* court’s decision was premised on the absence of harm to the plaintiff’s reputation.³⁵

The *Masson* court also relied on *Dunn v. Gannett New York Newspapers, Inc.*³⁶ for the proposition that actual malice cannot be inferred from “fabricated quotations [that] are . . . ‘rational interpretations’ of ambiguous remarks.”³⁷ This reliance is again misguided. In *Dunn*, the Mayor of Elizabeth, New Jersey, attributed the city’s litter problems to recent immigrants. A local Spanish-language newspaper, interpreting the Mayor’s comments to mean that Hispanics in Elizabeth are litterbugs, ran a headline stating that “Alcalde . . . LLAMA ‘CERDOS’ A LOS HISPANOS.”³⁸ The *Dunn* court did not consider the word *cerdos*, which appeared in single quotation marks, to have been a direct quote. The court noted that the publisher used this punctuation to indicate a figurative usage of the word, rather than a direct quotation.³⁹ In addition, the holding and reasoning of the case were based on the peculiar factual backdrop of translating speech into a language foreign to the speaker. Relying on this factual twist, the court held that when a plaintiff fails to offer “factual evidence of actual malice . . . a fair, albeit inadequate, translation,” will preclude a finding of actual malice.⁴⁰ The leniency afforded a misquotation in the translating process, central to the holding in *Dunn*, is

32. *Id.*

33. *Id.*

34. *Masson*, 895 F.2d at 1539 (quoting *Hotchner*, 551 F.2d 910, 914 (2d Cir. 1977)).

35. *Hotchner* established the principle that in assessing defamatory impact, the court should not compare the plaintiff’s reputation after the altered quotation to the plaintiff’s reputation before the quotation. Rather, the relevant inquiry compares the plaintiff’s reputation after the fictionalized quotation with what the plaintiff’s reputation would have been had a verbatim quotation been published. See *Hotchner*, 551 F.2d at 914.

36. 833 F.2d 446 (3d Cir. 1987).

37. *Masson*, 895 F.2d at 1539 (quoting *Dunn*, 833 F.2d at 452).

38. *Dunn*, 833 F.2d at 448. In English, the headline would read “Mayor . . . CALLS HISPANICS ‘PIGS.’” *Id.*

39. *Id.* at 451 (the court relied upon an affidavit which explained that quotation marks used in Spanish do not necessarily denote a literal quotation.).

40. *Id.* at 452.

inapposite to the issue presented in *Masson*.⁴¹

In addition to misinterpreting precedent, the *Masson* majority failed to recognize the issues before the court. The threshold inquiry was whether a false statement of fact had been made. The existence of a false statement of fact is a requisite element in every defamation case.⁴² Only when a false statement of fact is found does the inquiry proceed to the defendant's culpability.⁴³ Thus, the issue in *Masson* was whether to adopt the literal rule or the essence rule: only after one rule or the other was chosen and applied to determine whether any false statement of fact was made could the *Masson* court properly turn to the question of culpability.

41. For further criticism of the *Masson* majority's treatment of the cited precedents, see *Masson*, 895 F.2d at 1554-57 (Kozinski, J., dissenting).

42. See *supra* note 4 and accompanying text.

43. Schauer, *supra* note 2, at 286 ("a court must find falsity before it can determine malice"). At common law, defamation was an action that "lay for falsehoods communicated . . . by the [publisher] about another . . . to one or more third persons, tending to injure the reputation of the victim." 2 F. HARPER, F. JAMES & O. GRAY, *supra* note 4, § 5.0, at 3 (footnotes omitted). Because defamation actions were strict liability torts, defendants were required to plead and prove the truth of their statements as an affirmative defense. *Id.* § 5.20, at 168-69. Nevertheless, "[l]iability was on the whole predicated on false statements of fact." *Id.* § 5.0, at 3-4. The common law framework for defamation claims was radically altered when the Supreme Court constitutionalized libel actions brought by public officials in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). In the wake of this decision and its sweeping rationale, the Court shifted the burden of proving falsity. See *id.* at 279. In any defamation action brought after *New York Times* involving a public issue, the plaintiff, regardless of his or her status, bears the burden of proving the offending statement false. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775-77 (1986); see *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964) (requiring public official plaintiffs to prove falsity). Only after proving falsity does the inquiry move to the defendant's culpability, i.e., actual malice for public figure plaintiffs and negligence for private figure plaintiffs. See *Hepps*, 475 U.S. at 775-78 (constitutional requirements for plaintiffs that are public officials are more burdensome than for private figure plaintiffs).

The *Hepps* Court also noted in dicta that "[w]hen the speech is of exclusively private concern and the plaintiff is a private figure, as in *Dun & Bradstreet*, the constitutional requirements do not necessarily force any change in at least some of the features of the common-law landscape." *Hepps*, 475 U.S. at 775 (discussing *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985)). Therefore, cases involving private figures bringing private issue defamation actions retain the common law framework of allocating to the defendant the burden of proving truth. Moreover, such actions are governed by the common law generally and thus require no showing of culpability. *Dun & Bradstreet*, 472 U.S. at 760-61 (applying the "rationale of the common-law rules"). Because *Masson* involved private figures and a private issue, the culpability of the defendants was not pertinent and the language of *Masson* allowing a jury to infer culpability has no application. Liability in such cases is predicated solely on a finding of falsity. 2 F. HARPER, F. JAMES & O. GRAY, *supra* note 4, § 5.0, at 3-4. A failure to distinguish these inquiries and to order them properly can lead to a dilution of constitutional protection. See *infra* notes 45-52 and accompanying text.

It is important to note that this separation of the inquiries into falsity and culpability comprises the constitutional armor that protects the press. A libel plaintiff must carry the burden of proof on each of the issues in order to recover. To collapse them into a single inquiry diminishes the burden borne by the plaintiff and seriously undermines the efficacy of the protection that the first amendment has been held to afford.⁴⁴

The Ninth Circuit failed to recognize that defamation actions require this two step analysis. Rather than beginning with the distinct issue of falsity, the court saw the issue as whether it could infer actual malice.⁴⁵ Even though the court consistently phrased the inquiry in terms of inferring actual malice, it was in fact, and apparently without realizing it, inquiring into the issue of falsity.⁴⁶ The opening assumption of the court's analysis, that "the quotations were deliberately altered," illustrates its confusion.⁴⁷ Under the literal rule, this assumption would decide the case: if a deviation from the words actually used is a falsity, then there must be actual malice since the deviation is assumed to be deliberate.⁴⁸ Only if a deviation from the words actually used is not considered a falsity is culpability still in issue.

This confused inquiry into falsity instead of culpability is per-

44. Where the plaintiff claims to have been libeled by a publication dealing with a public issue, the plaintiff must first prove falsity, *see supra* note 43, and then prove the requisite degree of culpability. *See New York Times*, 376 U.S. at 279-80 (public officials need to show falsity of statements and culpability of "actual malice" before they can recover). When the plaintiff is a private figure claiming to have been defamed by a publication dealing with a private issue, however, there is no constitutional requirement that culpability be shown. *Dun & Bradstreet*, 472 U.S. at 760-61; *see also supra* note 43. Collapsing of issues is therefore of no concern in the *Dun & Bradstreet* context as there is only one issue—falsity. Masson, however, admitted that he was required to show both falsity and culpability. *Masson*, 895 F.2d at 1537. This additional burden is the essence of the constitutional protection in defamation suits.

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

46. Actual malice in the defamation context has been defined as a statement made "with knowledge that it [is] false or with reckless disregard of whether it [is] false or not." *New York Times*, 376 U.S. at 280. Given this definition, it is difficult for any court, even one which never explicitly acknowledges the issue of falsity, to deal with actual malice without making an implicit determination as to falsity.

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

48. However, the court was not dealing with the issue of whether the alterations were ultimately defamatory. The dissent suggested that between the inquiries into falsity and culpability, the court should interpose inquiries into the materiality of the alteration and its defamatory impact. *Masson*, 895 F.2d at 1562 (Kozinski, J., dissenting). The majority rejected this formulation, at least implicitly, in finding that actual malice could not be inferred from the inaccuracies at issue and only then moving on to consider defamatory impact. *Id.* at 1541.

haps most clearly revealed in the rule the court announced: no liability will be imposed where "the fabricated quotations are either 'rational interpretations' of ambiguous remarks . . . or do not 'alter the substantive content' of unambiguous remarks."⁴⁹ This test does not examine the mental state of the publisher, the proper culpability inquiry, but rather serves as a means to assess the accuracy of the quotation. By focusing on accuracy, the court is actually inquiring into the issue of falsity: an inaccurate quote is a false statement of fact. Further, grounding the test in terms of "substantive content" demonstrates that the court has adopted a formulation of the essence rule. By affirming summary judgment for the publisher, the court rejected the literal rule, and thus implicitly adopted the essence rule.

Because the court inappropriately couched its inquiry into falsity in terms of culpability, the rule it adopted is less protective of the press than would be an explicit adoption of the essence rule. Whenever there is a deviation from the essence of the actual quotation, as defined by *Masson*, malice may be inferred. Had the court explicitly adopted the essence rule in determining whether the statement is false, the plaintiff would still have to present evidence of actual malice. Thus, by conflating the culpability inquiry and the determination of falsity, the court has diluted the protection it sought to extend. In addition, by mixing together distinct issues, the court needlessly complicates the legal standards.

An examination of the two-step process will illustrate this point. Under an explicitly adopted essence rule, the plaintiff must first prove that the attributed quotation deviates from the substantive meaning of the words actually spoken. If successful, the plaintiff must then prove that the false quotation was published with the requisite culpability. The *Masson* formulation allows culpability to be inferred from a deviation from the substantive meaning alone.⁵⁰ Such a standard eviscerates the protection that the culpability requirement was intended to afford.

Since the *Masson* court adopted the essence rule implicitly and without recognizing the issue presented to it, no analysis of the rule is provided.⁵¹ For this reason, the rule enunciated in *Mas-*

49. *Id.* at 1539 (quoting *Dunn*, 833 F.2d at 452).

50. *Id.*

51. The *Masson* court's failure to provide an analysis of the essence rule also results from the court's misguided reliance on *Dunn* and *Hotchner* as precedents. See *supra* notes 27-41 and accompanying text.

son is inherently suspect. Moreover, by combining the separate inquiries of falsity and culpability, the court has failed to adequately appreciate the distinct constitutional dimensions of these inquiries.⁵²

B. The Supreme Court Opinion

The Supreme Court agreed to hear the case.⁵³ The Court expressly rejected the literal rule⁵⁴ but nevertheless reversed the Ninth Circuit's holding.⁵⁵ The Supreme Court employed a different analysis, which lead it to a distinct formulation of the essence rule.

The Supreme Court recognized that under existing doctrine the inquiries into falsity and culpability are separate and the burden of proving falsity rests with the plaintiff.⁵⁶ The *Masson* Court then went further, holding that the first amendment governs the substance of the falsity inquiry, not just the allocation of the proof burden. In the Court's own words, "[t]he constitutional question" it faced was "whether the requisite falsity inheres in the attribution of words to the petitioner which he did not speak."⁵⁷ The Court also discussed "the falsity required to prove actual malice"⁵⁸ and "falsity in the sense relevant to determining actual malice under the First Amendment."⁵⁹

The obvious implication of *New York Times Co. v. Sullivan*⁶⁰ is that defamed plaintiffs must prove falsity. It would be nonsense to require a plaintiff to prove that a defendant had knowledge that a statement was false without first proving the statement itself false.⁶¹ The Court made this implication explicit in *Philadelphia Newspapers, Inc. v. Hepps* by allocating to the plaintiff the bur-

52. This error did not pass unnoticed. In his dissent, Judge Kozinski proposed a five step analysis. Under his analysis, the court would examine the culpability of the publisher only after it has determined that the purported verbatim repetitions are materially inaccurate and defamatory. *Masson*, 895 F.2d at 1562 (Kozinski, J., dissenting).

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

54. *Masson v. New Yorker Magazine, Inc.*, 111 S. Ct. 2419, 2431 (1991).

55. *Id.* at 2437.

56. *Id.* at 2433 (citing *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1986)).

57. *Id.* at 2431.

58. *Id.*

59. *Id.* at 2431-32.

60. 376 U.S. 254 (1964).

61. See *supra* text accompanying notes 42-43.

den of proving falsity.⁶² In doing so, the Court limited its holding to the allocation of the burden of proof, abjuring imposition of substantive standards of falsity, and thus extended first amendment coverage only as far as necessarily implied by *New York Times*.⁶³ By determining that the first amendment compels the use of a particular rule in determining whether a statement is false, the Supreme Court has extended the first amendment's coverage beyond its previous boundaries, and beyond the necessary implications of *New York Times*.

Having determined that the first amendment governs the rule by which falsity is determined, it was left for the Court to articulate this rule. The Court decided to adopt the common law "substantial truth" doctrine.⁶⁴ Under this formulation, an altered quotation is false only if the modification "effects [a] material change in meaning."⁶⁵ The Court rejected the literal rule, even with an exception for "cleaned up" quotations, reasoning that under such a rule, "the practice of journalism, which the First Amendment standard is designed to protect, would require a radical change, one inconsistent with our precedents and First Amendment principles."⁶⁶ The Court offered little substantiation for this claim. It noted that the practices of reconstructing quotations after an interview and of editing quotations would be impinged.⁶⁷ The Court also observed that there may be instances when the actual words

62. 475 U.S. 767, 775-76 (1986); see R. SMOLLA, *THE LAW OF DEFAMATION* § 5.03[4], at 5-6 (1990).

63. See *Hepps*, 475 U.S. at 779 n.4; R. SMOLLA, *supra* note 62, § 5.07, at 5-10.

64. "The common law of libel takes but one approach to the question of falsity . . . [i]t overlooks minor inaccuracies and concentrates on substantial truth Our definition of actual malice relies upon this historical understanding." *Masson*, 111 S. Ct. at 2432-33 (citations omitted). The Court then "conclude[d] that a deliberate alteration of the words uttered by a plaintiff does not equate with knowledge of falsity for purposes of *New York Times* . . . unless the alteration results in a material change in the meaning conveyed by the statement." *Id.* at 2433 (citation omitted). Prior to this ruling, "substantial truth" was strictly a common law doctrine. In all the defamation cases to reach the Supreme Court between its decisions in *New York Times* and *Masson*, the court used the term "substantial truth" only once, and then it noted explicitly that this was a common law doctrine. See *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 137 (1967) ("[T]he only defense raised by petitioner Curtis was one of substantial truth. No constitutional defenses were interposed . . .").

65. *Masson*, 111 S. Ct. at 2432.

66. *Id.* at 2431.

67. *Id.* at 2431-32. Justices White and Scalia dissented from the Court's analysis, arguing that in such circumstances journalists could avoid liability by paraphrasing rather than quoting their subject. *Id.* at 2438 (White, J., concurring in part and dissenting in part). For further discussion of this point, see *infra* text accompanying notes 221-22.

spoken would have to be altered in order to preserve the speaker's meaning, such as when one misspeaks.⁶⁸ The court concluded that an alteration that preserves the material meaning causes "no injury to reputation that is compensable as a defamation."⁶⁹

This reasoning, however, is misdirected. Whether the alteration is a defamation—that is, tends to injure one's reputation—cannot be determined by examining whether the alteration is false.⁷⁰ This is the point of *Hotchner v. Castillo-Puche*, the inquiry should focus on whether the alteration increased the defamatory impact of the statement.⁷¹ *Masson* instead focuses on whether the alteration effects a material change in the meaning. Being representative of the community, juries seem well-equipped to determine whether one statement has a greater tendency to harm a plaintiff's reputation in the community than does another statement. However, juries, or any other body for that matter, do not appear well-equipped to determine whether one statement has a materially different meaning than another.⁷²

The Supreme Court rejected the second component of the Ninth Circuit's formulation of the essence rule, that a defendant could not be held liable for publishing a rational interpretation of an ambiguous statement. The Court based this ruling on its determination that a rational interpretation standard would allow journalists to put words in the mouths of their subjects, diminish the trustworthiness of the printed word, and cause subjects to be less willing to speak to the press, all of which "ill-serve[s] the values of

68. *Masson*, 111 S. Ct. at 2432.

69. *Id.*

70. Justice White made exactly this point. *See id.* at 2438 (White, J., concurring in part and dissenting in part).

71. 551 F.2d 910, 914 (2d Cir. 1977).

72. The *Masson* opinion itself is illustrative. The Court upheld summary judgment as to the alteration of the quote regarding the change in Masson's middle name. On tape Masson explained that his grandfather changed the family name from Moussaieff to Masson "to hide his Jewishness." *Id.* at 2426. Masson stated that he initially changed his last name back to Moussaieff, but when his wife objected, he used it as a middle name. He explained the change, saying "It was sort of part of analysis: a return to the roots, and your family tradition and so on" and that he "just liked it." *Id.* The article, however, explained that Moussaieff was the traditional family name and then quoted Masson as saying that he changed his middle name because the family name "sounded better." *Id.* To say Masson adopted Moussaieff because he liked it might indicate an affinity for his heritage, as if to say, "I liked it because it is the family name," while to say it sounded better might indicate an indifference toward this heritage. Such an alteration might be considered to convey a materially different meaning. The Court offered no explanation for its conclusion that the statements are materially identical in meaning. *See id.* at 2436.

the First Amendment."⁷³ The Court did not address itself to whether its substantial truth formulation of the essence rule would have any tendency toward these ills.

The Supreme Court has thus adopted a substantial truth formulation of the essence rule. However, it is not clear that this rule is more consistent with first amendment values than the literal rule, much less that it is constitutionally compelled. Consideration of this issue is the focus of the remainder of the analysis.

II. ETHICAL CONVENTIONS IN JOURNALISM

The various canons of journalistic ethics shed some light on the practice of altering quotations.⁷⁴ While journalists' ethical treatment of this issue is not determinative,⁷⁵ the accepted standards of professional conduct ought to be persuasive in the proper formulation of a legal rule. At the very least, the legal rule adopted should not be inconsistent with professional canons.⁷⁶

The ethics of journalism are grounded in the role of the press in society. The function of the press stems from the social contract existing between the press and the public.⁷⁷ According to this contract, "[s]ociety seems to promise the press freedom to function

73. *Id.* at 2434.

74. *Cf.*, AMERICAN SOCIETY OF NEWSPAPER EDITORS, STATEMENT OF PRINCIPLES Article IV (1975) ("Every effort must be made to assure that the news content is accurate, free from bias and in context, and that all sides are presented fairly."); ASSOCIATED PRESS MANAGING EDITORS ASSOCIATION CODE OF ETHICS (1975) ("The newspaper should guard against inaccuracies, carelessness, bias or distortion through either emphasis or omission."); SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI, CODE OF ETHICS (1973) ("There is no excuse for inaccuracies or lack of thoroughness.").

75. See *Masson v. New Yorker Magazine, Inc.*, 895 F.2d 1535, 1562 (9th Cir. 1990) (Kozinski, J., dissenting) ("The standards and aspirations of the profession are not, of course, dispositive . . ."), *rev'd*, 111 S. Ct. 2419 (1991). But *cf.* *Horne v. Patton*, 291 Ala. 701, 708, 287 So. 2d 824, 829 (1974) (court looked to the Principles of Medical Ethics promulgated by the American Medical Association as some authority for its holding that a physician's violation of the ethical obligation not to disclose a patient's medical information can be an actionable invasion of privacy).

76. In recognition of this principle, Judge Kozinski's dissent in *Masson* includes a review of journalistic ethics. See *Masson*, 895 F.2d at 1558-62 (Kozinski, J., dissenting). Failure to use verbatim quotes is acceptable when correcting grammar and word usage. It is more controversial, however, to deliberately improve statements by the speaker, such as fixing "false starts, rambling and incomplete sentences." *Id.* at 1559. Likewise, it is controversial "to vary or rearrange the facts of a story in order to advance a literary purpose." *Id.* Neither the Supreme Court's majority nor its dissent surveyed conventions of journalistic ethics.

77. See Hodges, *Defining Press Responsibility: A Functional Approach*, in RESPONSIBLE JOURNALISM 19 (D. Elliott ed. 1986) (discussing the socially contracted responsibilities of the press).

with the assumption that the press will serve society's needs for information and opinion."⁷⁸ The contractual obligations conferred on the press, as presently construed,⁷⁹ fall into two primary categories: the political 'watchdog' function and the educational function.⁸⁰

Under the political watchdog function, the public "'send[s]' journalists to watch the government on [the public's] behalf."⁸¹ Because individuals cannot personally monitor the actions of public officials, the political watchdog function is a prerequisite to democratic government. The press, by performing this role, allows citizens to respond to government abuses of power without having to discover the abuses independently. In addition, a vigilant press deters those officials who might abuse the power of government if the watchful eye of the press were not upon them.⁸²

Under the rubric of education, the press promotes two core interests of the first amendment: the search for truth and self-government.⁸³ The press advances the search for truth by reporting the entire spectrum of perspectives and opinion. This unfettered exchange of ideas eventually yields truth.⁸⁴ In addition to the "search for truth," the press makes self-government possible. It has been explained that "[p]ublic discussion is the only viable way of refining and disseminating our thoughts on [truth,] and the refinement and dissemination of such matters is an absolute precondition for wise public policy in a democratic state."⁸⁵ In other words, the press disseminates information to the public in order for the public to make decisions that are necessary for effective

78. *Id.*

79. The specific needs of society to be met by the press "must be worked out informally on a continuing basis between specific press organizations and their audiences." *Id.* at 19.

80. *Id.* at 21, 22-24. Hodges states that the press is responsible for performing four functions: political, educational, utility and cultural. Under the utility function, the press "operates as the society's 'bulletin board.'" *Id.* at 21. Under its cultural function, the press "holds up a mirror to society and reflects the kind of people we are." *Id.* This note, however, examines only the press's political and educational functions.

81. *Id.* at 22.

82. *Id.*

83. These theories are discussed fully *infra* text accompanying notes 125-78.

84. Hodges, *supra* note 77, at 24-25 ("No activity, in short, is as likely to unseat false opinion as an unfettered encounter with truer ones.") (citing J. MILL, *On Liberty*, in *UTILITARIANISM, LIBERTY, AND REPRESENTATIVE GOVERNMENT* 108 (1951)); see also J. MILTON, *AREOPAGITICA* 11 (J. Suffolk ed. 1968) (arguing that the best means of attaining truth is an unfettered exchange of ideas).

85. Hodges, *supra* note 77, at 24.

self-government.

Thus, the press, having been assigned watchdog and educational functions, is a necessary vehicle for achieving the core interests of the first amendment. Though there is concern as to the effectiveness of the press in meeting the first amendment's core interests,⁸⁶ this concern does not diminish the need for journalistic ethics to ensure that the public's trust has not been misplaced.

Public trust is one of the foundations of journalistic ethics. "The media need not ever be loved or even fully understood to carry out their function in society. But they must be trusted if they are to be credible in their watchdog role over the government, which has the power—with public backing—to restrict press freedom."⁸⁷ Although observers differ as to the extent to which alarm is justified, there is substantial evidence of public distrust of the media.⁸⁸ Since the press requires public trust to perform its role in society, journalistic ethics must be aimed at maintaining this trust.

An ethical rule that preserves society's trust must be based on an understanding of how the public absorbs the information and opinions offered by the press. A particularly helpful construction is the "reasonable reader" standard.⁸⁹ This standard explicitly draws on the legal reasonable person standard and "is designed to incorporate the common body of assumptions that the members of a society make about their fellow citizens."⁹⁰

In the context of quotations, "most people assume that quotation marks do indicate exact renderings."⁹¹ The "reasonable reader" standard suggests that quotation marks should only be placed around the exact, unaltered words of the source.

86. *But see id.* at 25 ("No other institutions on the horizon can meet the need as effectively and efficiently.").

87. S. KLAIDMAN & T. BEAUCHAMP, *THE VIRTUOUS JOURNALIST* 154 (1987) (quoting SIGMA DELTA CHI, SOCIETY OF PROFESSIONAL JOURNALISTS, WHITE PAPER OF THE ADVISORY COMMITTEE ON PUBLIC OPINION 12 (1984)).

88. *See id.* at 158 (Seventy-five percent of all adults have some reservations about the credibility of the media and twenty percent harbor deep distrust).

89. *Id.* at 32-34. The Supreme Court adopted this standard in *Masson*, but in a different context. The court recognized that quotation marks may be put to uses other than indicating an actual quotation. *Masson v. New Yorker Magazine, Inc.*, 111 S. Ct. 2419, 2430-31 (1991). For example, quotation marks might indicate that a word is used in other than its usual sense, or that the words are part of a hypothetical conversation. Therefore, the court ruled that whether quotation marks indicate an actual quotation is to be determined by reference to the reasonable reader. *Id.*

90. *Id.* at 32.

91. J. OLEN, *ETHICS IN JOURNALISM* 98-99 (1988).

Furthermore, it has been noted that "trust is based on the expectation that persons, institutions, and so on will act as anticipated."⁹² This coincides with the expectation under the "reasonable reader" standard that quotations contain the exact words of the speaker. The commitment to preserving the public trust is therefore inextricably tied to the "reasonable reader" standard. If journalistic ethics fail to demand that quotation marks surround only the exact words of the speaker, then the public trust underlying the social contract will be severely eroded.

It seems to be universally accepted that quotation marks are only to be used when they surround the words of the speaker, transcribed verbatim.⁹³ It is widely admitted, however, that precise transcription of every quotation is not possible.⁹⁴ Thus, it could be contended that an ethical requirement of verbatim quotation is unrealistic and unreasonable.⁹⁵ This contention, however, is not persuasive. Journalists who take notes of speeches or interviews but fail to transcribe the words fully or precisely are not ethically culpable.⁹⁶ This concession sheds no light on the culpa-

92. *Id.* at 155.

93. See J. CHANCELLOR & W. MEARS, *THE NEWS BUSINESS* 98 (1983) (It is not the newswriter's duty to paraphrase or correct the speaker. The newswriter's duty is to quote the speaker accurately); M. CHARNLEY & B. CHARNLEY, *supra* note 6, at 248 ("Quotation marks mean literally that the words they enclose are exactly as the source gave them — verbatim."); N. CRAWFORD, *THE ETHICS OF JOURNALISM* 217 (1924) (Employees of the *Springfield* (Mass.) *Republican* were reminded, "[w]hen people are quoted, the paper is placed in the position of assuring its readers that the quoted passages were literally spoken; consequently, inaccuracy in quotation is unpardonable."); J. HULTENG, *THE MESSENGER'S MOTIVES: ETHICAL PROBLEMS OF THE NEWS MEDIA* 70 (1976) ("Most of the newspaper codes or canons tend to stress literal accuracy when quoting news sources."); J. OLEN, *supra* note 91, at 98 ("All of us have learned that quotation marks should be reserved for exact quotes only."); UNIVERSITY OF CHICAGO PRESS, *THE CHICAGO MANUAL OF STYLE* §10.6, at 283 (13th ed. 1982) ("direct quotations must reproduce *exactly* . . . the wording" (emphasis in original)); cf. P. MEYER, *ETHICAL JOURNALISM* 59 (1987) (noting as further support for verbatim quotations that "the choice is not between fictionalizing and forgoing the conveyance of certain kinds of insights to the reader"). It could be argued that a less rigid rule would suffice in situations involving altered quotations attributed to unnamed or non-existent sources. J. OLEN, *supra* note 91, at 101 (It is acceptable practice for reporters to attribute their own opinion to unnamed or non-existent sources.).

94. See J. HULTENG, *supra* note 93, at 70 ("[A]s a practical matter, it is not always possible for a reporter to be so literally accurate, unless there is a prepared manuscript, a trial transcript, or a tape recording to turn to.").

95. See S. KLAIDMAN & T. BEAUCHAMP, *supra* note 87, at 20 ("[T]he standard of moral scrutiny must not be so high that the expectations for conduct are that the journalist be heroic or saintly. . . . [E]thics for journalism must be within reach of ordinary persons.").

96. See, e.g., J. HULTENG, *supra* note 93, at 70-71 ("Even if every syllable hasn't been captured as uttered, even if every article isn't exactly in place, the quote can still be

bility of one who, after painstakingly obtaining a verbatim transcription, deliberately alters it. Indeed, those commentators who assert that verbatim quotations are an unobtainable ideal nevertheless condemn the practice of intentionally altering quotations.⁹⁷

It might also be argued that the practice of "cleaning up" quotations supports the rejection of an ethical requirement that quotes be verbatim. "Cleaning up" quotations entails correcting grammatical and syntactical errors and removing "false starts" ("ums" and "ers"). Some commentators find this practice acceptable.⁹⁸ However, the majority of commentators reject this practice.⁹⁹

Even accepting its propriety, changing tense or deleting an "um" is substantially different than changing the words used by the speaker. Even if considered false, a cleansed quotation does not alter the defamatory impact of the original statement, and, under *Hotchner*, cannot be held defamatory.¹⁰⁰

The most recent challenge to the settled ethical principle that quotations be verbatim has been mounted by the new journalism movement.¹⁰¹ New journalism is an aberrant strain within the pro-

considered an acceptably accurate one if it honestly reflects what the speaker said."). Nor would they be legally culpable. Under the literal rule, there would be a false statement of fact, but actual malice would be absent. Even if the plaintiff is a private figure invoking a negligence standard, it is doubtful that the journalist's error would be sufficient to support a finding of this reduced level of culpability.

Under the essence rule, there would be no false statement and thus no liability, as long as the attributed statement does not alter the substantive content of the actual statement. If the writer's error failed to preserve the essence of the original statement it would constitute a false statement of fact, but, as discussed *supra*, the culpability element still must be proven. Only under the Ninth Circuit's formulation would a finding of falsity alone support an inference of actual malice.

97. Compare, e.g., J. HULTENG, *supra* note 93 (recognizing that literal accuracy is impractical, but maintaining that the speaker's intent must remain intact), with J. HULTENG, PLAYING IT STRAIGHT: A PRACTICAL DISCUSSION OF THE ETHICAL PRINCIPLES OF THE AMERICAN SOCIETY OF NEWSPAPER EDITORS 64 (1981) ("It is never justifiable for a journalist to make up quotations, however plausible or characteristic, or to edit a source's comments so that their thrust or meaning is altered in any way.").

98. See J. OLEN, *supra* note 91, at 100 ("Not to clean up quotes is to make intelligent speakers look stupid and stupid speakers look stupider.").

99. See, e.g., J. CHANCELLOR & W. MEARS, *supra* note 93, at 98 (condemning practice of "cleaning up" quotations even where the alteration is merely to correct verb tense); J. HULTENG, *supra* note 93, at 72 (cleaning up quotations is not sound practice).

100. *Hotchner v. Castillo-Puche*, 551 F.2d 910, 914 (2d Cir.), (liability will be imposed only when an alteration "increase[s] the defamatory impact of" the actual statement), *cert. denied*, 434 U.S. 834 (1977). For a discussion of *Hotchner*, see *supra* text accompanying notes 27-35.

101. See generally E. DENNIS & W. RIVERS, OTHER VOICES: THE NEW JOURNALISM IN AMERICA 5 (1974) (New journalists take an interpretive rather than objective approach

fession.¹⁰² Traditionally, journalists strive to convey their factual knowledge of an event, leaving the job of understanding to the reader.¹⁰³ New journalists reject these distinctions,¹⁰⁴ instead, conveying to the readers their own perceptions of truth.

New journalists argue that "facts" are only a part of the larger "truth" of an event. This school emphasizes that every statement and every event has a meaning beyond its attendant "facts."¹⁰⁵ In light of this principle, the new journalists have an avowed willingness to sacrifice "facts" to get at the larger truth. Time, place, and identity are all subject to alteration in order to illuminate the larger truth as perceived by the individual journalist.¹⁰⁶ In the context of quotations, the words used by the speaker are facts, while the "meaning" of those words constitutes the larger "truth" of the statement.¹⁰⁷ To cast it in terms of an event rather than a remark, "to *know* what happened is to know the facts, but to *understand* what happened is to grasp the truth."¹⁰⁸

In spite of the manifest correctness of the new journalists' assertion that events involve larger truths, the validity of their practice of subverting facts in order to ascertain the larger truth must be analyzed in light of the function of the press.¹⁰⁹ The press facilitates self-government by providing the citizenry with facts necessary for making decisions about public affairs. New journalism interferes with the role of the citizenry in self-government by failing to inform readers of the accuracy of their articles, thereby passing off fiction as fact.¹¹⁰ The effect of the new journalism, then, is to substitute the judgment of the press for the judgment of

to reporting, focusing on the "[c]olor, flavor, atmosphere, the ultimate human meaning, rather than the facts.").

102. See, e.g., P. MEYER, *supra* note 93, at 56-60 (discussing the limited number of reporters who have adopted this approach, many of whom have written "themselves right out of the newspaper business." *Id.* at 57).

103. To do otherwise subverts those interests that the press is intended to advance. See *supra* notes 77-90 and accompanying text.

104. See E. DENNIS & W. RIVERS, *supra* note 101, at 1 (In a general way, new journalism can be defined as "dissatisfaction with existing standards and values.").

105. See *id.* at 4 ("The best objective report may cover all the surfaces of an event, the best interpretive report may explain all its meanings, but both are bloodless, a world away from the experience.").

106. See, e.g., P. MEYER, *supra* note 93, at 56-60 (offering examples of new journalism).

107. J. OLEN, *supra* note 91, at 83.

108. *Id.* at 83 (emphasis in original).

109. See *supra* notes 77-86 and accompanying text.

110. P. MEYER, *supra* note 93, at 56.

the public.¹¹¹

Despite the existence of new journalism and the debate regarding the cleaning up of quotations, the ethical obligation to render verbatim quotations remains well-settled and consistent with the role of the press in society.¹¹² It does not follow, however, that this ethical principle should be adopted as a matter of law.¹¹³ There is an important distinction to be drawn between press responsibility and press accountability. Responsibility pertains to what a journalist should do, while accountability pertains to what a journalist may be compelled to do.¹¹⁴ Although many commentators agree that there is a responsibility to render verbatim quotations,¹¹⁵ few are willing to impose legal accountability for a failure to adhere to this standard.¹¹⁶ A principle argument against imposing legal accountability on the press is premised upon conclusory statements that the first amendment prohibits such a course of action.¹¹⁷ Whether the imposition of legal accountability is consistent with the first amendment is a legal question to be resolved within the framework laid down by the courts. It is that framework which will now be examined.

III. FIRST AMENDMENT ANALYSIS FOR ALTERED QUOTATIONS

In *New York Times Co. v. Sullivan*¹¹⁸ and subsequent cases, the Supreme Court has established an analytical framework to determine the standards that are constitutionally appropriate in issues of first impression. Whether it was proper for the *Masson* Court to adopt a substantial truth formulation of the essence rule

111. New journalism may have other adverse consequences. In order for the press to adequately perform its function, it must have the trust of the public. See *supra* text accompanying notes 86-88. The inaccuracies of new journalism are apt to erode this trust.

112. See *supra* notes 77-86 and accompanying text.

113. Cf. MODEL RULES OF PROFESSIONAL CONDUCT Scope [6] ("Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached.").

114. See Hodges, *supra* note 77, at 13-15.

115. See *supra* note 93.

116. See Hodges, *supra* note 77, at 15 ("Democracy demands a fiercely independent press, especially one free from accountability to government. . . . Although there is good reason for the press to be wary, defensive, and resistant about matters of accountability, there is no reason for the same wariness about responsibility.").

117. See, e.g., Merrill, *Three Theories of Press Responsibility and the Advantages of Pluralistic Individualism*, in RESPONSIBLE JOURNALISM 47 (1986) (Legal accountability "would seem to be a direct affront to the First Amendment; therefore . . . it has to be set aside.").

118. 376 U.S. 254 (1964).

should be determined by reference to this framework.

When confronting unresolved issues of law in the defamation context, courts have consistently derived legal rules by accommodating the constitutionally recognized interests implicated by the unresolved issue.¹¹⁹ Under the rubric of constitutionally recognized interests, two categories are recognized: first amendment expression interests and reputational interests.¹²⁰ The first amendment expression interest itself implicates the social interest¹²¹ in self-government,¹²² the social interest in the search for truth,¹²³ and the individual interest in self-fulfillment.¹²⁴ Thus, the rule ultimately selected must accommodate the first amendment's social and individual interests as well as the more general constitutional interest in protecting reputation.

119. See, e.g., *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 757 (1985) ("To make this determination, we must . . . balance the State's interest in compensating . . . individuals for injury to their reputation against the First Amendment interest in protecting . . . expression."); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340-345 (1974) (accommodating both the first amendment interest of avoiding self-censorship and the constitutional interest in protecting one's reputation); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (need to accommodate those interests mentioned in *Gertz* was implicit in the Court's rejection of Justice Black's contention that the first amendment stands as an absolute bar to defamation actions); *Ollman v. Evans*, 750 F.2d 970, 978 (D.C. Cir. 1984) (en banc) (in fashioning a rule the court must accommodate the "interests in free expression . . . and in an individual's reputation"), *cert. denied*, 471 U.S. 1127 (1985), *overruled on other grounds*, *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695 (1990). Prior to *New York Times*, however, the Court had consistently regarded defamation claims as beyond the scope of first amendment protection. See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include . . . [defamation].") (footnote omitted).

120. The Supreme Court, in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), recognized reputation as a constitutional interest. The Court held that although the constitutional scheme left the protection of reputation largely to the states, "this does not mean that the right [to protection of one's reputation] is entitled to any less recognition by this Court as a basic of our constitutional system." *Gertz*, 418 U.S. at 341 (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring)).

121. The choice between the essence rule and the literal rule does not entail the potential for repression of speech to such an extent that social unrest becomes a reasonable concern. As such, this question does not implicate the "social safety valve" theory of the first amendment. For a discussion of this theory, see T. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* 11-14 (1967).

122. See *id.* at 8-11.

123. See *id.* at 7-8.

124. See *id.* at 4-7.

A. The Social Theories of the First Amendment

The social theories of the first amendment, self-government and the search for truth, are substantially similar. Each theory regards the first amendment as a means of achieving a greater social benefit. Both theories hold that speech should be protected, not because of the need to safeguard an individual's right to speak, but to protect society's need to hear. It is in this sense that self-government and the search for truth are social theories vindicating social interests.

The self-government theory is generally attributed to Alexander Meiklejohn.¹²⁵ According to this theory the purpose of the first amendment is to enable citizens to govern themselves.¹²⁶ That is, "[t]he people, not the government, possess the absolute sovereignty."¹²⁷ The prerequisite to effective self-governance is that citizens make informed decisions. For the citizenry to govern itself effectively, it must have access to all information and opinions.¹²⁸ Stated alternatively, access to all relevant information¹²⁹ is a prerequisite to self-government.

Under the self-government theory, the first amendment facilitates the establishment of a forum in which debate of public issues¹³⁰ and dissemination of necessary information is possible.¹³¹

125. See, e.g., Epstein, *Was New York Times v. Sullivan Wrong?*, 53 U. CHI. L. REV. 782, 782 (1986) (calling Meiklejohn "the father of modern first amendment theory").

126. "Under the compact upon which the Constitution rests, it is agreed that men shall not be governed by others, that they shall govern themselves." A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 89 (1948).

127. *New York Times Co. v. Sullivan*, 376 U.S. 254, 274 (1964) (quoting James Madison from his report on the Virginia Resolutions of 1795).

128. A. MEIKLEJOHN, *supra* note 126, at 88 ("[E]ssential, if men are to be their own rulers, is the demand that whatever truth may become available shall be placed at the disposal of all the citizens of the community.").

129. Acceptance of the view that the first amendment embodies the advancement of self-government creates the problem of determining what information is truly necessary to the political decision-making process. Meiklejohn defines the scope of information necessary for political decision-making broadly. "The freedom of mind which befits the members of a self-governing society is not a given and fixed part of human nature. It can be increased and established by learning, by teaching, by the unhindered flow of accurate information, by giving men health and vigor and security" A. MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 19 (1965).

130. See *New York Times*, 376 U.S. at 270 (There is "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.").

131. Alexander Meiklejohn argued forcefully that public dissemination of information is the true function of the first amendment:

It's purpose is to give to every voting member of the body politic the fullest

The first amendment interest vindicated under this theory is "the successful operation of the political process."¹³² Because the political process is the relevant first amendment interest, the purpose underlying the protection of speech is not the individual right to express one's self; instead, it is the right, even the need, of the public to hear all relevant information.¹³³ Meiklejohn uses the "traditional American town meeting" model as an illustration of the self-government theory of the first amendment.¹³⁴ Every person can attend the meeting and, once there, has a right and even a duty to formulate their own views, to communicate those views, and to hear the views of others.¹³⁵ The second social interest of the first amendment, the search for truth, is similar in rationale to the self-government theory. The search for truth theory holds that truth in all matters—political, scientific, moral, artistic and so on—is best attained by hearing all ideas and arguments and then determining the most rational conclusion. The truth-finding process must be maintained in order to assure that the truth is not suppressed in favor of irrational beliefs. The role of the first amendment in this context is to ensure that ideas and arguments are widely available to facilitate the public's continual reassessment of its beliefs.¹³⁶

The model for this theory is generally referred to as the marketplace of ideas. All ideas are allowed to compete with one another and ultimately, it is hypothesized, the truth will prevail. The concept is similar to the market for goods wherein the most efficient producer, when allowed to compete freely and fairly, prevails over inefficient producers.¹³⁷

possible participation in the understanding of those problems with which the citizens of a self-governing society must deal. When a free man is voting, it is not enough that the truth is known by someone else . . . The voters must have it, all of them.

A. MEIKLEJOHN, *supra* note 126, at 88.

132. A. BICKEL, *THE MORALITY OF CONSENT* 62 (1975).

133. A. MEIKLEJOHN, *supra* note 126, at 66 ("We listen, not because [we] desire to speak, but because we need to hear.").

134. *Id.* at 22.

135. *Id.*

136. See T. EMERSON, *supra* note 121, at 7 ("[T]he soundest and most rational judgment is arrived at by considering all facts and arguments which can be put forth in behalf of or against any proposition. Human judgment is a frail thing. . . . It can seldom rest at the point any single person carries it, but must always remain incomplete and subject to further extension, refinement, rejection or modification.").

137. This concept has deep roots in Anglo-American tradition. See generally J. MILL, *ON LIBERTY AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 1-13 (1951)

The search for truth theory views the first amendment instrumental to advancing truth, morality, science, and the arts¹³⁸ through the largely uninhibited dissemination of information and opinion. Likewise, the self-government theory views the first amendment as instrumental to decision making through liberal dissemination of information and opinion. For the purposes of the issue at hand, self-government is simply the political branch of the search for truth.¹³⁹ Conversely, the attainment of truth may be viewed as a necessary component of democratic self-government.¹⁴⁰ Under either articulation, these theories are sufficiently enmeshed that they may be considered together. The issue of which rule, literal or essence, is more appropriate, lies within the intersection of these theories.

Each of these social theories imposes the same requirement on the law of defamation: avoidance of self-censorship.¹⁴¹ However, the Court has held that speech may be restricted where free speech stands as an impediment to the achievement of the social interests embodied in the first amendment.¹⁴² Avoidance of self-censorship supports adoption of the essence rule because it demands less precision from publishers. On the other hand, the attainment of truth, including political truth, may recommend the

(free exchange of ideas is essential to prevent tyranny); J. MILTON, *supra* note 84, at 68 ("[A]ll opinions, yea errors, known, read, and collated, are of main service and assistance toward the speedy attainment of what is truest."). Justice Holmes was the first on the bench to offer the search for truth as a theory of the first amendment in his dissent in *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting):

[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas--that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.

Id. at 630.

138. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 147 (1967).

139. In *Butts*, the Court recognized the interrelationship of the self-government and search for truth theories when it held that political expression is not the sole foundation of the first amendment guaranties. *Id.* Professor Nimmer has also classified self-government as a subset of the search for truth. See M. NIMMER, *NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT* § 1.02[H] (1991).

140. See generally A. MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* (1965) (discussing freedom of speech in the context of political freedom).

141. See *infra* notes 147-49 and accompanying text.

142. See *infra* notes 160-70 and accompanying text.

literal rule.¹⁴³ Weighing these conflicting considerations requires a fuller examination of the case law.

The Supreme Court's most notable reliance on the social theories appears in *New York Times Co. v. Sullivan*.¹⁴⁴ The Court recognized that vindication of the social interests embodied in the first amendment, effective self-government and the attainment of truth, requires a forum in which all information and opinion is expressed and disseminated to the public.¹⁴⁵ Consistent with this notion, the Court found "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."¹⁴⁶ Thus, the *New York Times* Court adopted the social theories view of the first amendment as providing a forum for such a debate.

In order to engender a free and open public debate, the first amendment requires that self-censorship be avoided.¹⁴⁷ One rationale behind this rule is that the "[f]ear of guessing wrong [about a statement's truth] must inevitably cause self-censorship and thus create the danger that [a] legitimate utterance will be deterred."¹⁴⁸ Maintaining a robust public debate requires the court "to tip [the scales] in favor of protecting true speech."¹⁴⁹ Thus, in choosing between the literal rule and the essence rule, the court must consider the "chilling effect" each rule may have on the withholding of information from the public.

143. The Supreme Court failed to consider this possibility when it adopted the substantial truth formulation of the essence rule. See *supra* text accompanying note 73.

144. 376 U.S. 254 (1964).

145. The Court stated:

The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.

Id. at 269 (quoting *Stromberg v. California*, 283 U.S. 359, 369 (1931)).

146. *Id.* at 270.

147. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) ("Although the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate And punishment of error runs the risk of inducing . . . intolerable self-censorship."); *New York Times*, 376 U.S. at 279 (arguing that even if a defense of truth is established, the burden and expense of having to prove the truth will execute a self-censorship which "dampens the vigor and limits the variety of public debate").

148. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 50 (1971); see *New York Times*, 376 U.S. at 279 ("A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable 'self-censorship.'").

149. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986).

The literal rule would protect only verbatim renderings of the speaker's statement.¹⁵⁰ Despite the fact that the plaintiff is still required to show the requisite culpability, the ease with which falsity is shown would arguably have "a chilling effect" on publishers. Adoption of the essence rule would have the advantage of minimizing the "chilling effect" because, as discussed previously,¹⁵¹ this rule grants publishers wider latitude in altering quotations without incurring legal liability. The essence rule protects both exact renderings and deviations that preserve the substantive content of the statement.¹⁵² Because the essence rule affords publishers greater protection,¹⁵³ publishers are less likely to be "chilled" by the fear of either not satisfactorily proving their renderings true or incurring the expense of doing so.¹⁵⁴

The weakness of the argument that first amendment interests in avoiding self-censorship favors the use of the essence rule, however, is exposed when one examines the actual censorship avoided by this rule. Here, as opposed to the context of *New York Times*, the self-censorship will not entail a withholding of information from public discourse but rather a withholding of quotation marks. That is, rather than enclosing a statement in quotation marks, the "chilled" publisher will merely paraphrase the speaker.

While the contrast between a statement and silence seems

150. Under the literal rule the misquotation would be considered false, thereby supporting a libel claim. The plaintiff would still be required to convince a jury that there was a deviation from the words actually spoken, that the deviation was material, that the deviation was defamatory, and that the defendant acted with the requisite degree of culpability, in this instance actual malice. See *Masson v. New Yorker Magazine, Inc.*, 895 F.2d 1535, 1562 (9th Cir. 1990) (Kozinski, J., dissenting), *rev'd*, 111 S. Ct. 2419 (1991).

151. See *supra* notes 143-44 and accompanying text.

152. This is true of both the Ninth Circuit's formulation, see *Masson*, 895 F.2d at 1562, and the Supreme Court's formulation, see *Masson*, 111 S. Ct. at 2433.

153. In *Masson*, the plaintiff, a public figure, was the subject of an article published by the defendants. The author conducted several interviews with the defendant. These interviews were recorded on audio tape. For a discussion of the recorded conversations, see *supra* note 20. The article quoted Masson as asserting that others regarded him as an "intellectual gigolo." The tapes do not reveal this statement and, for the purposes of ruling on summary judgment, the court assumed that it was never made. Nevertheless, the court found that the essence of this statement was sufficiently similar to his actual statement that his employers considered him to be "a private asset but a public liability." *Masson*, 895 F.2d at 1541. It is reasonable to conclude that such a broad protection as that afforded by the Ninth Circuit's formulation of the essence rule would encourage the press to be robust and unfettered in quoting its subjects.

154. See *New York Times*, 376 U.S. at 279 (the "chilling effect" is minimized by adopting a rule which avoids creating "doubt [that truth] can be proved in court or fear of the expense of having to do so.").

more significant than that between a quotation and paraphrase, both entail a loss of information. The statement enclosed in quotation marks conveys the same message as a substantially identical statement that is not so enclosed. However, the quotation also reveals to the reader something about the speaker to whom the statement is attributed that the paraphrase does not.¹⁵⁵ The loss of this information is potentially relevant to the citizen in assessing the strength of various viewpoints. This self-censorship causes the public to lose information, thereby undermining the first amendment's role in vindicating relevant social interests.¹⁵⁶

Although the essence rule stands in contradiction to the convention "that quotation marks do indicate exact renderings,"¹⁵⁷ it might be said that this rule merely requires the public to become more skeptical.¹⁵⁸ The social theories of the first amendment place substantial responsibilities on the public. These theories require active, alert participation of the public in the forum created by the first amendment and require the public to listen with an appropriately skeptical ear.¹⁵⁹ Although considerations of skepticism do not compel the adoption of a particular rule, the assumption that

155. See J. MILTON, *supra* note 84, at 48-50 (One's expressions "contain a potency of life in them to be as active as that soul was whose progeny they are."); *Masson*, 895 F.2d at 1549 (Kozinski, J., dissenting) (Through a quotation a person's "'own words reveal [a] psychological profile—a self-portrait.'" (quoting Coles, *Freudianism Confronts its Malcontents*, Boston Globe, May 27, 1984, at 58, 60, col. 2)).

156. See *Masson*, 111 S. Ct. at 2430 ("Quotations allow the reader to form his or her own conclusions, and to assess the conclusions of the author, instead of relying entirely on the author's characterization of her subject.").

157. J. OLEN, *supra* note 91, at 98-99.

158. Some commentators argue that considerations of skepticism support the adoption of a rule that requires greater alertness on the part of the public. See Skolnick, *Foreword: The Sociological Tort of Defamation*, 74 CALIF. L. REV. 677, 681-82 (1986) (implying that the court should adopt those rules which cultivate an appropriate degree of skepticism in the public).

159. Meiklejohn posed the challenge thusly:

Do we the people of the United States wish to be thus mentally "protected"? To say that would seem to be an admission that we are intellectually and morally unfit to play our part in what Justice Holmes has called the experiment of self-government. Have we, on that ground, abandoned or qualified the great experiment?

A. MEIKLEJOHN, *supra* note 126, xiii-xiv. Meiklejohn ultimately concluded that we have not abandoned the "experiment," and modern first amendment jurisprudence bears him out. See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) ("debate on public issues should be uninhibited, robust, and wide-open"); *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (arguing that public discourse is a duty); cf. Skolnick, *supra* note 149, at 681 (rather than seeking a governmental warranty of truth, the public is best served by being skeptical and concluding for itself whether a statement is true).

the public is skeptical, which underlies the social theories, demonstrates that the mere incongruence of the essence rule with a public perception is not itself sufficient reason to reject the essence rule.

Yet the first amendment's manifest interest in the avoidance of self-censorship is by no means unqualified.¹⁶⁰ Justice Black, in his concurrence in *New York Times*, argued that the Constitution "completely prohibit[s] a State from exercising [the] power . . . to award damages for libel in actions brought by public officials against critics of their official conduct."¹⁶¹ This construction was rejected by a majority of the Court.¹⁶² Despite the fact that its holding would cause greater self-censorship than Black's formulation, the Court implicitly recognized that some speech is not protected by the first amendment.¹⁶³

Underlying the Court's reasoning is the notion that the first amendment must be interpreted so as to advance the social interests it embodies.¹⁶⁴ In its opinion in *New York Times*, the Court

160. It has been observed that "[a]ccountability, like subjection to law, is not necessarily a net subtraction from liberty." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 399 (1974) (White, J., dissenting) (quoting COMMISSION ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS 130 (1947)).

161. 376 U.S. at 293 (Black, J., concurring).

162. *Id.* at 281-82.

163. In *New York Times*, the Court held that knowingly published false speech lies beyond first amendment protection. *Id.* at 280. The *Gertz* Court asserted that this was the underlying rationale of *New York Times*, noting that "[t]he need to avoid self-censorship by the news media is . . . not the only societal value at issue. If it were, this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation." *Gertz*, 418 U.S. at 341.

164. Even Milton recognized this point. He asserted, "[f]or who knows not that Truth is strong next to the Almighty; she needs no policies, no stratagems, no licensing to make her victorious." J. MILTON, *supra* note 84, at 128. Milton was quick to qualify this statement, however, indicating that notions which undermine the integrity of the debate should be excluded: "I mean not tolerated Popery, and open superstition, which as it extirpates all religions and civil supremacies, so itself should be extirpate . . ." *Id.* at 130. See Epstein, *supra* note 125, at 799 ("A belief in markets for ordinary goods requires government protection (funded by taxes) against theft and fraud. A belief in the marketplace of ideas requires the same protection.").

The self-government theory also supports this argument. In the town meeting model, discussed *supra* at text accompanying notes 134-35, Meiklejohn recognizes that some abridgement of speech is necessary to allow the meeting to take place and some speech may ultimately be subverted to insure wise political decision making. For example, speakers may be required to adhere to rules of order, and if they transgress, they may be censored. A. MEIKLEJOHN, *supra* note 126, at 23 ("The meeting has assembled not primarily to talk, but primarily by means of getting business done. And the talking must be regulated and abridged as the doing of business under actual conditions may require."). The abridgement of speech permitted in a town meeting is roughly analogous to that permitted by the

indicated that there might be some value to false speech.¹⁶⁵ However, this argument has been repeatedly rejected in subsequent cases,¹⁶⁶ based in part on the recognition that truth may need policies or stratagems "to make her victorious."¹⁶⁷ As the Court stated in *Gertz v. Robert Welch, Inc.*, "an opportunity for rebuttal seldom suffices to undo [the] harm of [a] defamatory falsehood. Indeed, the law of defamation is rooted in our experience that the truth rarely catches up with a lie."¹⁶⁸

For truth to be at a "competitive disadvantage" with falsehood is inconsistent with the social theories of the first amendment and the expansive protection they extend to the press.¹⁶⁹ To the

first amendment. *Id.* at 23-24. Thus, speech that impedes wise political decision making is inconsistent with the self-government interest of the first amendment and must be subverted to this interest. False speech has "no constitutional value," *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974), and to the extent that it is an impediment to self-government it has negative constitutional value in the social context. The first amendment interest in effective self-government requires that such negative influences be removed. *See* A. BICKEL, *supra* note 132, at 62-63 ("[T]he First Amendment should protect and indeed encourage speech so long as it serves to make the political process work . . . but *not* when it amounts to an effort to supplant, disrupt, or coerce the process . . .").

These principles have led courts to enjoin speech that would impede the political process. *See, e.g.*, *Tomei v. Finley*, 512 F. Supp. 695, 699 (N.D. Ill. 1981). The *Tomei* court enjoined a municipal committee affiliated with the Democratic Party from using or distributing literature bearing a name that the court found would mislead the public into believing its candidates were affiliated with and endorsed by the Republican party. The court held, "the First Amendment goal [of] . . . '[p]reserving the integrity of the electoral process, preventing corruption, and 'sustain[ing] the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government' are interests of highest importance.'" *Id.* at 698 (quoting *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 788-89 (1978) (quoting *United States v. U.A.W.*, 352 U.S. 567, 575 (1957))). However, courts have generally been reluctant to enjoin speech. *See, e.g.*, *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (holding that compulsion to speak may be as violative of the first amendment as prohibitions on speech); *Mills v. Alabama*, 384 U.S. 214 (1966) (holding that "no test of reasonableness [could] save a state law from invalidation as a violation of the First Amendment when that law makes it a crime for a newspaper editor to do no more than urge people to vote one way or another in a publicly held election[]"). *But see* *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 388 (1969) (upholding the constitutionality of the F.C.C.'s "fairness doctrine" requiring that both sides of public issues be given fair coverage because of limited frequencies available for broadcasting).

165. 376 U.S. at 279 n.19 ("Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'").

166. *See, e.g.*, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (renouncing the notion that false statements might have constitutional value but also cautioning against overdeterrence); *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968) ("[n]either lies nor false communications serve the ends of the First Amendment").

167. *But see supra* note 164.

168. 418 U.S. 323, 344 n.9 (1974).

169. "[T]rust in the operation of the marketplace [of ideas] implies a trust that the

extent that truth is handicapped in its competition with falsity, the commitment to finding the truth under the first amendment requires that the scales be tipped to favor truth. Thus, the *Gertz* Court, aware that its holding would cause greater self-censorship than would application of the actual malice standard, allowed libel recovery by private figures upon a showing of mere negligence.¹⁷⁰

The holding in *Gertz* was based, in part, on the lack of access to the media held by private figures.¹⁷¹ The Court noted that "public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy."¹⁷² Consequently, when a publication involves a public figure, the press is given a freer hand because the public figure's access to the media means the truth is more likely to prevail. However, where the publication involves a private figure with limited access to the media, the truth is less able to prevail through public debate. In this latter situation, courts restrict the hand of the press,¹⁷³ thereby giving truth an advantage in its competition with falsehood.

Turning to the context of altered quotations, concern for private figures tends to support the literal rule. Although the first amendment interest in self-government is best served when citizens are engaged and skeptical,¹⁷⁴ it is not inconsistent with first amendment analysis to force journalists to adhere to certain fundamental conventions upon which the average citizen can rely without question.¹⁷⁵ Given the expectations of the average reader,

truth eventually will prevail." Schauer, *supra* note 2, at 271.

170. See *Gertz*, 418 U.S. at 342.

171. *Id.* at 344.

172. *Id.*

173. See, e.g., *id.* at 323. It has been argued that the Court's opinion in *Gertz* is hostile to the marketplace of ideas. See Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 UCLA L. REV. 915, 952-54 (1978). This claim is warranted if one views *Gertz* solely in contrast with the plurality opinion in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971) (holding that private figure plaintiffs were required to show actual malice where the alleged defamation was related to a public issue). While the *Gertz* Court may have been hostile to a laissez faire approach, which assumes a perfect market, the Court did not wholly reject the marketplace of ideas theory of the first amendment. Rather, the *Gertz* Court was cognizant of the imperfections in the marketplace of ideas and acted accordingly. The *Gertz* Court did not abandon the market, it merely allowed some regulation of the market.

174. See *supra* note 159 and accompanying text.

175. That the determinative inquiry here involves an "assess[ment] [of] the average

then, the Supreme Court should have adopted the literal rule, because the convention with respect to quotations is that "quotation marks do indicate exact renderings."¹⁷⁶

For the first amendment to vindicate successfully the social interests entrusted to its care, the public must be allowed to evaluate independently the statements presented to it. When the presentation deviates from traditional conventions, this task becomes unnecessarily complicated. Failure to publish verbatim renderings will impair the assessment of even the most well-educated and skeptical observers.¹⁷⁷ The social theories underlying the first amendment require that the public be presented with information and that the public's evaluation of the information be unimpaired. The literal rule is most consistent with these first amendment values.

A further argument in favor of the literal rule concerns the dissemination of new ideas. Vindication of the first amendment's social interests requires that all ideas relevant to political decision making be placed before the public. Expressing a new idea often requires assigning new meaning to existing words.¹⁷⁸ In this con-

reader's view . . . rather than that of either the most skeptical or most credulous reader" is established by *Ollman v. Evans*, 750 F.2d 970, 979 n.16 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985), *overruled on other grounds*, *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695 (1990). While *Ollman* discussed the average reader's view concerning the distinction between fact and opinion in the context of a defamation action, it has also been held that the average reader's view should govern in the context of fabricated quotations:

'[n]ot only is the language employed to be regarded with reference to the actual words used . . . in passing upon the sufficiency of [the allegedly defamatory] language as stating a cause of action, a court is to place itself in the situation of the hearer or reader, and determine the sense or meaning of the language of the complaint for libelous publication according to its natural and popular construction.'

Selleck v. Globe Int'l, Inc., 166 Cal. App. 3d 1123, 1131, 212 Cal. Rptr. 838, 843 (1985) (quoting *MacLeod v. Tribune Publishing Co.*, 52 Cal. 2d 536, 546-47, 343 P.2d 36, 41 (1959)). Thus, the understanding of the average reader must be assessed to determine which rule most effectively advances the objectives of the first amendment.

176. J. OLEN, *supra* note 91, at 98-99.

177. See, e.g., *Masson v. New Yorker Magazine, Inc.*, 895 F.2d 1535, 1549 (9th Cir. 1990) (Kozinski, J., dissenting) (Robert Coles, a leading psychiatrist, premised his conclusions regarding Masson upon the quotes by Masson which Coles believed to be verbatim.), *rev'd*, 111 S. Ct. 2419 (1991).

178. See F. WAISMANN, *supra* note 25, at 323-25 ("Sometimes . . . a word is used in a quite novel way . . . then we step beyond the bounds of ordinary language; we extend language or we construct a new symbolism."); Schauer, *supra* note 2, at 283 ("[T]o describe something completely new or unconventional, or to convey an idea not previously put into words, the speaker must use language in a somewhat unconventional fashion." (footnote omitted)).

text word choice is critical, and deviations from the original statement may result in new ideas being kept from the public. Neither the self-government nor the search for truth theory will abide such a circumstance. Thus, the literal rule is more appropriate.

B. Self-Fulfillment¹⁷⁹

Although *Areopagitica*¹⁸⁰ is most often cited in support of the search for truth theory, Milton also recognized the importance of freedom of speech to the pursuit of self-fulfillment.¹⁸¹ Milton observed that writings "contain a potency of life in them to be as active as that soul was whose progeny they are."¹⁸² This recognition that self-expression is the progeny of the soul demonstrates Milton's appreciation of the close relation between self-expression and self-fulfillment.¹⁸³ Milton's argument indicates a deeply-

179. This section considers a speaker's interest in self-expression, and more particularly in the preservation of word choice. This interest is wholly self-contained; it is in no way affected by any interests of the larger community. Self-fulfillment deals solely with an individual's autonomy in representing one's self to the community. See generally T. EMERSON, *supra* note 121, at 4-7 (discussing an individual's right to self-fulfillment). The vindication of this interest might be thought to fall under an action for false light invasion of privacy rather than defamation. Although these torts overlap substantially, they are distinguishable. Defamation is designed "to protect a person's interest in a good reputation" while false light invasion of privacy is intended "to protect a person's interest in being let alone." W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *PROSSER AND KEETON ON THE LAW OF TORTS* 864 (5th ed. 1984). An action in defamation will lie only for harm to one's reputation caused by a false statement of fact. However, it is possible to recover damages under false light invasion of privacy even where the false statement of fact does not harm one's reputation, though typically these latter claims include recovery for reputational harm. *Id.*

When the injury involves reputational interest, the appropriate remedy is a defamation action even though the plaintiff may also succeed under a false light claim. See, e.g., *Carson v. Allied News Co.*, 529 F.2d 206 (7th Cir. 1976) (the defendant wholly fabricated all conversations between the plaintiff and his employer, yet the court dealt with the claim as sounding in defamation rather than false light invasion of privacy). If the plaintiff was not allowed to bring a defamation suit in these cases, similar injuries would be treated differently with the distinction resting on the infirm foundation of "artful pleading." Zimmerman, *False Light Invasion of Privacy: The Light That Failed*, 64 N.Y.U. L. REV. 364, 396 (1989). But see Schwartz, *Explaining and justifying a Limited Tort of Invasion of False Light Invasion of Privacy*, 41 CASE W. RES. L. REV. 885 (1991) (false light actions are appropriate when a false statement is highly offensive but not disparaging, and thus not actionable as defamatory).

180. J. MILTON, *supra* note 84, at 42-138.

181. See *id.* at 72 (The self-fulfillment theory works in conjunction with the search for truth. In self-fulfillment, individuals freely express themselves and these expressions supply the information for the search for truth. Freedom of expression is needed to satisfy self-fulfillment, which in turn furthers the collective search for truth.).

182. *Id.* at 48-50.

183. Those who read Milton's argument narrowly as supporting only a marketplace

rooted recognition that expressions chosen by a speaker have great personal consequence.

First amendment jurisprudence is no less cognizant of the individual interests embodied in self-expression. The idea that the first amendment protects a speaker's interest in self-fulfillment was first proffered by Justice Brandeis in *Whitney v California*.¹⁸⁴ Brandeis asserted that "[t]hose who won our independence believed that the final end of the State was to make men free to develop their faculties; They believed liberty to be the secret of happiness"¹⁸⁵ Legal scholars have also concluded that an important purpose of freedom of speech is its role "as a means of assuring individual self-fulfillment."¹⁸⁶

The Supreme Court most clearly embraced the self-fulfillment rationale in *Cohen v California*.¹⁸⁷ Cohen was convicted of disturbing the peace for wearing a jacket bearing the words "Fuck the Draft."¹⁸⁸ The Court reversed the conviction, grounding its decision on the individual interests protected by the first amendment.¹⁸⁹ The Court began by characterizing Cohen as falling into the category of "persons who wish to ventilate their dissident views."¹⁹⁰ The Court thus focused on Cohen's right to express his views rather than on the need for the public to hear them. This formulation of the self-fulfillment rationale shows it to be the

of ideas theory miss its point. Even the arguments Milton makes in support of such a model construe the marketplace as a means to self-fulfillment. See *id.* at 72 ("Since the knowledge and survey of vice is in this world so necessary to the constituting of human virtue how can we more safely, and with less danger scout into the regions of sin and falsity than by reading all manner of tractates, and hearing all manner of reason?").

184. 274 U.S. 357 (1927) (Brandeis, J., concurring); see Blasi, *The First Amendment and the Ideal of Civic Courage in Whitney*, 29 WM. & MARY L. REV. 653 (1987) (Brandeis, in his *Whitney* concurrence, envisioned the first amendment as designed to instill hope, imagination, and character in the citizenry).

185. *Id.* at 375.

186. E.g., T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6 (1970) ("The proper end of man is the realization of his character and potentialities as a human being. For the achievement of this self-realization the mind must be free. Hence suppression of expression is an affront to the dignity of man."). Some scholars have gone so far as to suggest that protection of the individual interests embodied in the first amendment is its sole aim. See Baker, *Scope of the First Amendment Freedom of Speech* 25 UCLA L. REV. 964, 966 (1978) ("Speech is protected not as a means to a collective good but because of the value of speech conduct to the individual."); Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982).

187. 403 U.S. 15 (1971).

188. *Id.* at 16.

189. *Id.* at 26.

190. *Id.* at 23.

"flip-side" of the social theories, which hold that speech should be protected to enable the public to make decisions effectively.¹⁹¹

The *Cohen* Court concluded that "much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force."¹⁹² In order to effect the first amendment's goal of advancing self-fulfillment, the Court found it necessary to protect both the cognitive and emotive aspects of speech.

Adapting the self-fulfillment theory of the first amendment to the context of altered quotations, the holding in *Cohen* can be construed as a recognition "that the choice of words itself may be part of the message."¹⁹³ Such a construction supports application of the literal rule. Even if the publisher is able to alter the quotation in a manner that does not change the substantive content or alternatively maintains the signification of the statement,¹⁹⁴ the speaker's word choice is not preserved. To use *Cohen* as an example, had Cohen issued his exhortation, "Fuck the Draft," and a reporter then quoted him as saying, "I am profoundly opposed to the draft," the emotive force of Cohen's statement would have been substantially diminished. The self-fulfillment rationale holds that a misquotation of this sort would seriously impede a primary goal behind the first amendment.¹⁹⁵ The essence rule, however, permits such an alteration. The first amendment interest in the facilitation of self-fulfillment, therefore, is best advanced by the literal rule.

191. See *supra* notes 119-40 and accompanying text. It is the person being quoted who is protected under the first amendment's self-fulfillment rationale, not the public's right to hear.

192. *Id.* at 26.

193. Schauer, *supra* note 2, at 281.

194. Signification is the property of a statement that determines whether the statement is true. Signification has two aspects: subjectively, "it 'expresses' the condition of the person uttering it," and objectively, "it points outside this present condition to something in virtue of which it is true or false." B. RUSSELL, *supra* note 25, at 128. Two differently worded statements may have the same signification. For example, "A is the employer of B" has the same signification as "B is the employee of A." *Id.* at 127. However, the first statement expresses an emphasis on the role of A in the employment relationship, while the second statement emphasizes the role of B. An alteration in emphasis, therefore, can hinder a speaker's ability to achieve self-fulfillment, even though signification is preserved.

195. See Baker, *supra* note 186, at 994 ("To engage voluntarily in a speech act is to engage in self-definition . . .").

C. The Reputation Interest

The constitutional dimensions of the reputation interest were first recognized in *New York Times Co. v. Sullivan*.¹⁹⁶ This recognition was implicit in the majority's rejection of Justice Black's argument that the first amendment stands as an absolute bar to defamation suits brought by public officials.¹⁹⁷ Subsequently, reputation was explicitly accepted as an interest entitled to "recognition . . . as a basic of our constitutional system."¹⁹⁸ The Court has characterized the constitutional interest in reputation as "[t]he right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt[, which] reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty."¹⁹⁹

It is not immediately clear whether this reputation interest is individual or social in nature. Reputation has an inherently individual quality because it is a fundamental element of one's individuality.²⁰⁰ However, there is an inextricable social element in the concept of reputation as well²⁰¹—it is society's perceptions that comprise reputation. This paradox can be resolved through social psychology. The symbolic interactionism school²⁰² views reputation as arising from the interaction between an individual's personality and the perceptions of the community and its institutions.²⁰³ Thus, the interaction between an individual and society

196. 376 U.S. 254 (1964).

197. See *supra* text accompanying notes 160-63.

198. *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring); see also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341-43 (1974).

199. *Rosenblatt*, 383 U.S. at 92 (Stewart, J., concurring).

200. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 261-62 (1974) (White, J., concurring) ("[W]e have cherished the average citizen's reputation interest enough to afford him a fair chance to vindicate himself in an action for libel . . .").

201. Bellah, *The Meaning of Reputation in American Society*, 74 CALIF. L. REV. 743, 743 (1986) ("Reputation is the extension and elaboration of that *recognition* which lies at the basis of our social existence.") (emphasis in original). An example of one social element of reputation is the need for public trust in order for public officials to be effective. *Id.* at 745. This public trust aspect is actually an element of the self-government theory of the first amendment. The self-government theory is discussed *supra* notes 125-35 and accompanying text.

202. See generally J. CHARON, *SYMBOLIC INTERACTIONISM: AN INTRODUCTION, AN INTERPRETATION, AN INTEGRATION* (1979) (symbolic interactionism views the individual, or self, as a social creation resulting from one's interactions with the larger society).

203. See Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CALIF. L. REV. 691, 708-10 (1986).

yields an individual quality of reputation in spite of its inseparable social element.²⁰⁴ The law is in accord with the social sciences on this point, as the law seeks to protect reputation as an individual interest.²⁰⁵

Recognition of the individual's interest in reputation is acknowledged in the role of defamation actions to provide individuals the opportunity to vindicate their reputational interests.²⁰⁶ The strength of this constitutional interest is clearly manifested in *Rosenblatt v. Baer*,²⁰⁷ in which Justice Stewart asserted that the right to protect one's reputation is as central a concept to "ordered liberty" as is the concept of the "dignity and worth of every human being."²⁰⁸ Justice Stewart's characterization of the individual's reputation interest was subsequently accepted by the Court²⁰⁹ to expand the protection against defamation beyond that which would have been allowed under a *New York Times* actual malice standard.²¹⁰

This strong commitment to protecting reputation supports the adoption of the literal rule. By using the speaker's words verbatim, the publisher cannot impair the reputation of the speaker.²¹¹ Any

204. Symbolic interactionism holds that "society . . . makes possible the self." J. CHARON, *supra* note 202, at 64. Although it views humans as entirely social, symbolic interactionism recognizes a self that results from social interaction. *Id.* at 63-65. Thus, in spite of the ubiquity of society, there are individual interests, such as reputation.

205. Justice Stewart focused on "[t]he right of a man to the protection of his own reputation." *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring). Justice White looked to "the average citizen's reputation interest." *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 261-262 (1974) (White, J., concurring). The *Gertz* Court sought to protect against "injury to the reputation of private individuals." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343 (1974); *see also Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 757 (1985) (commenting that a state should not be lightly required to set aside the interest in compensating private individuals for damage to reputation).

206. *See Tornillo*, 418 U.S. at 261-62 (while individuals can not force the press to print retractions and clarifications, they can get judgments and monetary awards against the press).

207. 383 U.S. 75 (1966).

208. *Id.* at 92 (Stewart, J., concurring).

209. *Gertz*, 418 U.S. at 341; *see Dun & Bradstreet*, 472 U.S. at 757 (utilizing the approach approved in *Gertz*, the Court held that the state has an interest in allowing for compensation to private individuals for injury to their reputation).

210. *E.g., Dun & Bradstreet*, 472 U.S. 763 (holding that because of the strength of the individual reputation interest, presumed and punitive damages could be awarded in a defamation action involving a private figure plaintiff on a showing of something less than actual malice); *Gertz*, 418 U.S. 323 (holding that a private figure plaintiff claiming to have been defamed by a publication relating to a public issue may recover actual damages for individual harm to reputation upon a showing of mere negligence rather than actual malice).

211. The obvious exception is when a literally accurate quote is published out of

claim disallowed under the literal rule would also be disallowed under the essence rule, since it is impossible for the essence of the words attributed to the speaker to deviate from the essence of the words spoken when the words attributed are identical to those spoken. The converse, however, is not necessarily true: as both *Masson* opinions demonstrate, the essence rule disallows claims that the literal rule would allow.²¹² Under the essence rule, cases in which a jury could reasonably find harm to an individual's reputation might go uncompensated.

IV. WEIGHING THE INTERESTS

The analysis sanctioned by the Court in *New York Times Co. v. Sullivan*²¹³ and *Gertz v. Robert Welch, Inc.*²¹⁴ requires that an accommodation of the constitutional and reputational interests be reached in deriving the legal rules of libel. Within such a framework, there are meritorious arguments to be made in favor of both the literal and essence rules.

Under the social theories of the first amendment, the Supreme Court has placed great importance on minimizing self-censorship.²¹⁵ The essence rule offers the attractive advantage of minimizing the "chilling effect" of defamation law. However, the value in avoiding self-censorship is not unqualified.²¹⁶ The social theories behind the first amendment also require that the integrity of public debate be preserved.²¹⁷ In order to preserve the integrity of public debate, some self-censorship inevitably will occur. Pro-

context. Discussion of the law on this subject is beyond the scope of this note.

212. Clearly, the literal rule would lead to a different outcome than the Ninth Circuit's. *Masson v. New Yorker Magazine, Inc.*, 895 F.2d 1535 (9th Cir. 1990), *rev'd*, 111 S. Ct. 2419 (1991). As to the outcome arrived at by the Supreme Court, the Court found that the inaccurate statement regarding Masson's motive for changing his name was not sufficiently false. The literal rule would impose a different analysis and possibly a different outcome. *See supra* note 72.

213. 376 U.S. 254 (1964); *see supra* notes 144-46 and accompanying text.

214. 413 U.S. 323 (1974); *see supra* text accompanying notes 164-73.

215. *See, e.g., Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986) (to avoid self-censorship, the Court must be protective of speech); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (concern over self-censorship justifies, in part, the high actual malice standard).

216. *See supra* text accompanying notes 160-68.

217. In terms of self-government, rules of order are a prerequisite to effective political decision making. *See supra* note 164 and accompanying text. Further, without regulation of the marketplace of ideas, the search for truth could be hindered. *See, e.g., Epstein, supra* note 118, at 798-99 (without government protection of the marketplace of ideas, lies would go unpunished and misinformation would be prevalent).

tecting public debate is best advanced by the literal rule.²¹⁸

The trade-off discussed above is affected by other competing considerations that make the adoption of the literal rule more attractive. At present, there is a widespread perception that the press lacks credibility.²¹⁹ In order for the social contract between the public and the press to produce the results envisioned by the first amendment, the press must have the public's trust. The literal rule, being more in tune with public expectation, readily advances this goal.

Second, a more laissez faire approach, such as the essence rule, is only justified once the public is in a position to perform its responsibility of independently evaluating the information and opinions secured through the first amendment. By adopting the essence rule, and thus permitting journalists to inject their own subjective interpretations of the speaker's quote, the public's ability to evaluate information and opinions would be impaired.²²⁰ To disarm the public in this way is inconsistent with first amendment protections. Given that the literal rule is more compatible with the public's role and the public's expectations, the literal rule is more appropriate.

Even if it were found that the social interests of the first amendment require minimizing the "chilling effect" of defamation actions at the expense of informed public debate, the strength of these social interests must be assessed before weighing them against the other relevant interests. The "chilling effect" at issue here would cause publishers to refrain from enclosing statements in quotation marks, thereby conveying to readers that the material only paraphrases the words of the speaker.²²¹ This consideration carries significantly less weight than the self-censorship involved in *New York Times*, for instance, where the fear was that potential speakers would remain silent. Since the risk here is not silence, the strength of this consideration is diluted.²²²

218. See *supra* text accompanying note 176.

219. See S. KLAIDMAN & T. BEAUCHAMP, *supra* note 87, at 158 (showing public distrust of the press running as high as 75%).

220. See, e.g., *Masson v. New Yorker Magazine, Inc.*, 895 F.2d 1535, 1549 (9th Cir. 1990) (Kozinski, J., dissenting) (recognizing that because an unqualified quotation creates a presumption of literal veracity, the potential exists for serious harm if the words are not completely accurate), *rev'd*, 111 S. Ct. 2419 (1991).

221. See *supra* text accompanying notes 154-55.

222. The concerns behind the "chilling effect" are further mitigated when the literal rule is viewed in light of the plaintiff's full burden. In addition to falsity and culpability the plaintiff must show the altered quotation to be defamatory. The *Hotchner* principle re-

Further, the constitutional framework requires assessment of the individual self-fulfillment interest embodied in the first amendment²²³ as well as the individual interest in reputation.²²⁴ These interests clearly and strongly militate in favor of the literal rule.

An argument favoring adoption of the essence rule can be made. Although the information "chilled" may not affect the ability of the public to assess the important issues of the day, some harm to an individual's reputation must be tolerated to avoid self-censorship. While the essence rule would exact a toll on individual interests, the Court has, at least in some situations, found this to be an acceptable price for self-government.²²⁵

The framework fashioned by the Court to weigh and accommodate the social and individual interests, however, mandates a contrary result. Assuming the interest in avoiding self-censorship prevails in the social interest realm, it must be weighed against the asserted individual interests. The approach of *Gertz* is particularly instructive. The *Gertz* Court noted that in *New York Times* the individual interests gave way to the social interest in avoiding self-censorship because the individual interests of the public figure were relatively weak.²²⁶ When the same interest in avoiding self-censorship came up against the strengthened individual interest of a private figure in *Gertz*, however, the barriers to maintaining a libel suit were rolled back.²²⁷

In the *Masson* situation, the social interest in avoiding self-

quires the plaintiff show the altered quotation to have caused harm to his or her reputation above that which would have occurred had the defendant published a verbatim transcription. See *supra* notes 34-35 and accompanying text. When a plaintiff fails to prove an alteration is, in the eyes of the community, substantively dissimilar to the actual statement, the plaintiff will fail to show defamatory impact. Thus, the opponent of the executions of Sacco and Vanzetti could not prevail because the alteration was not itself harmful, in the eyes of the community, to the opponent's reputation. See *supra* note 2 and accompanying text. Conversely, it is likely that the Vietnam War protester could prove that the alteration itself increased the defamatory impact of the publication. See *supra* note 1 and accompanying text.

223. See *supra* notes 179-95 and accompanying text.

224. See *supra* notes 196-213 and accompanying text.

225. See, e.g., *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776-77 (1986) (placing upon plaintiff the burden of proving falsity protects speech on public concerns); *New York Times Co. v. Sullivan*, 376 U.S. 254, 281-82 (1964) (discussing the privilege afforded public officials).

226. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342-46 (1974); see also *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-62 (1985) (when the first amendment social interests are weaker, the Court will tip the scales in favor of the individual reputation interest).

227. *Gertz*, 418 U.S. at 342-46.

censorship is particularly weak, while the individual interests at stake are substantial. A reasonable assessment, then, must favor the literal rule.

CONCLUSION

This note has sought to determine the most appropriate rule to apply when a publisher misquotes a speaker who then seeks to recover damages through a defamation action. First amendment doctrine mandates that the choice between the literal and essence rules be governed by weighing the individual's interest in self-fulfillment and reputation with the social interests in self-government and the search for truth. The social interests embodied in the first amendment are equivocal on this point, while the individual interests strongly support adoption of the literal rule. First amendment doctrine, therefore, compels adoption of the literal rule, which takes into account both society's and the individual's interests, and the Supreme Court's contrary holding is ill-founded.

NEIL J. KINKOPF