

## 31. Defamation

“Words are, in my not-so-humble opinion, our most inexhaustible source of magic. Capable of both inflicting injury, and remedying it.”

– Albus Dumbledore, *Harry Potter and the Deathly Hallows*, by J.K. Rowling, 2007

### Introduction

Defamation is all about reputation and falsehoods. As a cause of action, it applies when a defendant makes false statements that are harmful to a plaintiff’s reputation.

At first blush, defamation may seem to be something of an island, unconnected to the rest of the doctrinal landscape of torts. But at an instinctual level, it has something in common with the intentional torts of battery, assault, false imprisonment and intentional infliction of emotional distress. All these torts might be thought of as a suite of doctrines protecting a person’s right to not be “messed with.” While the tort of battery protects a person’s sense of bodily integrity, defamation and the various privacy torts (covered in the next chapter) protect a person’s non-corporeal integrity. Defamation recognizes that we are more than our bodies. Our existence is also defined by our relationships with others. Thus, our protectable personal interests run to the web of interconnected impressions about us held in the imagination of others.

Although simple in concept, American defamation is complex as a matter of legal doctrine. There are two parts to the analysis. First is the common law, which itself is labyrinthine. Second is the First Amendment analysis imposed by the U.S. Supreme Court, which changes the requirements for defamation cases where important free-speech values are at play.

## The Basic, Unconstitutionalized Doctrine of Defamation

To begin to explore the tort of defamation, we will start with a basic, blackletter formulation of the tort in its unconstitutionalized form (where the First Amendment does not come into play):

A plaintiff can establish a **prima facie case for defamation** by showing: (1) A defamatory statement (2) regarding a matter of fact (3) that was of and concerning the plaintiff (4) was published by the defendant, and (5) an extra condition is satisfied, being either that (a) the statement constitutes libel per se, (b) the statement constitutes libel per quod, (c) the statement constitutes slander per se, or (d) special damages are proven.

One thing you should notice about the prima facie case for defamation is that proving the falsity of the statement is not required. At its heart, defamation is about falsehoods, but the prima facie case – in its unconstitutionalized form – only requires that the plaintiff show the reputation-harming aspect of the defendant’s statement. The issue of falsity is not the plaintiff’s to prove. Instead, common-law defamation sees truth as an affirmative defense.

### Defamatory Statement

The essence of a defamatory statement is that it is reputation-harming. “A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.” *Nuyen v. Slater*, 372 Mich. 654 (Mich. 1964).

The reference point for “reputation” is the whole community or, at least, some substantial and morally respectable group. Calling someone a murderer clearly qualifies as reputation-harming, for instance, because pretty much everyone considers committing murder to reflect poorly on someone’s character. But what about something that is only reputation-harming in certain circles? That’s where the substantial-and-morally-respectable-group requirement comes in. Suppose someone is falsely said to be Jewish. That’s not

defamatory – notwithstanding that such a statement might tend to harm one’s reputation among the neo-Nazis. The neo-Nazis are not a morally respectable group. So the fact that a statement harms one’s reputation among them can’t make it defamatory.

### **The Per Se Categories**

Under traditional defamation law, certain kinds of statements are considered **per se** defamatory. (The Latin “per se” means “in itself” and can be translated as “as such.”) In other words, there is no need to debate the issue or ask a jury to determine whether these statements are reputation-harming. Statements from the per se categories are reputation-harming *as such*. End of discussion.

There are four categories of per se defamation: (1) making a statement that is adverse to one’s profession or business, (2) saying that a person has a loathsome disease, (3) imputing guilt of a crime of moral turpitude, (4) imputing to a person a lack of chastity.

Let’s take these in turn.

The first per se category is a statement **adverse to one’s profession**. An example would be calling a lawyer a liar. Since honesty is essential in the legal profession, saying that a lawyer is dishonest is to harm the lawyer’s professional reputation. Whether a statement is adverse to one’s profession clearly depends on the profession. Saying that an accountant is “bad with numbers” is to make a statement adverse to that person’s profession. But saying that an actor or poet is bad with numbers would not have the same effect.

The second per se category is **loathsome disease**. Leprosy and sexually transmitted diseases are leading examples. (The persistence of leprosy as a leading example – even though leprosy these days is easily treatable – highlights the ancientness of this legal doctrine.) There is no list of other diseases that qualify as “loathsome,” but presumably any disease that would generally cause others to shun the sufferer could qualify.

The third per se category is imputing **guilt of a crime of moral turpitude**. Categorizing certain crimes as morally turpitudinous is not just a defamation concept – it comes up under multiple areas of law.

In U.S. immigration law, for instance, a conviction for a crime of moral turpitude can make a non-citizen deportable. And in legal ethics, a conviction for a crime of moral turpitude can be cause for disbarment or denial of admission to the bar. Despite its cross-category significance, however, the boundaries of what constitutes a crime of moral turpitude are fuzzy. One court hearing a defamation case has said that “moral turpitude involves an act of inherent baseness, vileness or depravity in the private and social duties which man does to his fellow man or to society in general, contrary to the accepted rule of right and duty between man and law.” *Lega Siciliana Social Club, Inc. v. St. Germaine*, 77 Conn. App. 846 (Conn. App. 2003) (internal quotes omitted). Recently, in the immigration context, a crime involving moral turpitude has been described as “conduct that shocks the public conscience as being inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general.” *Da Silva Neto v. Holder*, 680 F.3d 25, (1st Cir. 2012). As to what crimes are in or out, it can be said with a certainty that murder, rape, and mayhem (assaults causing permanent injury, such as disfigurement or dismemberment) are crimes of moral turpitude. Crimes that involve lying, such a perjury and forgery, are also moral-turpitude crimes. Theft crimes, however, are more of a toss up – some being turpitudinous, others not. Larceny under false pretenses has been held morally turpitudinous. But simple shoplifting might not be.

The fourth category is imputing a **lack of chastity**. Chastity is abstaining from sex altogether, or, for married persons, abstaining from sex outside of the marriage. Originally, this doctrine only applied for female plaintiffs, but modern courts have extended it to cover male plaintiffs as well. And the category has also been used to cover statements short of alleging sexual intercourse, such as saying that a person has made sexual advances or evinced a willingness to engage in sexual intercourse. Different, but within the same sphere of subject matter, some courts have concluded that an allegation of impotence is per se defamatory.

### **Beyond the Per Se Categories**

To be defamatory, a statement need not be per se defamatory. Any statement that tends to be reputation-harming can be held defamatory. Statements that have been held to be defamatory outside the per se categories include imputing that someone is mentally ill, abuses drugs, is bankrupt or financially irresponsible, or is dishonest.

Courts “take the world as it is” when deciding what is defamatory, even if doing so seems to give credence to wrong-headed thinking. For instance, while there is nothing wrongful about being a victim of rape, some courts have held that making a statement that someone is a rape victim is defamatory. And as of a few years ago, most courts held imputing that someone is of lesbian, gay, or bisexual orientation was defamatory. The current trend, however, is toward holding that such imputations are not defamatory.

Other changes in what is considered reputation-harming reflect great arcs of American history. Calling someone a Communist was generally not considered defamatory before World War II. But during the Cold War, it was.

### **Regarding a Matter of Fact**

To count as defamation, the statement at issue must be regarding a matter of fact. Opinion is off-limits for defamation plaintiffs.

The difference between what counts as a factual assertion and what is non-actionable opinion can often be a close issue, but the court will consider the context in which the statement is made, the medium, the intended audience, and whether the statement is theoretically provable.

In the case of *Obsidian Finance Group v. Cox*, 2011 WL 2745849 (D. Or. 2011), blogger Crystal Cox used a blog called *obsidianfinancesucks.com* to make a variety of withering comments about Obsidian Finance Group and bankruptcy trustee Kevin Padrick. Judge Marco A. Hernández held her blogging to be non-actionable opinion:

[T]he statements are not sufficiently factual to be susceptible of being proved true or false.

Cox repeatedly poses her statements as questions or asserts that she will prove her accusations. For example, she asserts that “a Whole Lot” of the “Truth” is “Coming Soon,” that she “intend[s] to Expose every Dirty Deed,” that Padrick “WILL BE EXPOSED,” that “YOU [meaning Padrick] will BE Indicted SOME TIME, someday,” and that she “WILL PROVE IT ALL.” She tells the reader to “STAY TUNED,” and she asks “Kevin Padrick, Guilty of Tax Fraud?” She also states that Padrick is a “cold hearted evil asshole” and is a “Cruel, Evil Discriminating Liar.”~

Defendant’s use of question marks and her references to proof that will allegedly occur in the future negate any tendency for her statements to be understood as provable assertions of fact. Her statements contain so little actual content that they do not assert, or imply, verifiable assertions of fact. They are, instead, statements of exaggerated subjective belief such that they cannot be proven true or false.

Considering all of the statements in the record under the totality of circumstances, the statements at issue are not actionable assertions of fact, but are constitutionally protected expressions of opinion. Plaintiffs’ motion for summary judgment on the liability of the defamation claim is denied.

The *Cox* case points up the fact that the more wild and outlandish the language and medium, the less likely the content will be taken as factual. Outsized invective and wanton use of capital letters or bold type seem to move the needle toward the safe zone of protected opinion. On the other hand, sobriety of language and prestige of the forum make it easier to push toward the red line of actionable assertions of fact.

### **Of and Concerning the Plaintiff**

The requirement that the statement be of and concerning the plaintiff means that the statement must somehow identify the plaintiff. This is easy in cases where the defendant calls out the plaintiff by name. But identification need not be express. It can be implied.

Suppose the defendant never uses the plaintiff's name, but says, instead, "You all know who I'm talking about." Has the plaintiff been identified? That will be an issue of fact. A jury will have to decide whether the audience would have understood that the defendant was referring to the plaintiff.

As with defamatory meaning, identification of the plaintiff can arise by accident. This sometimes happens in media that juxtaposes images and words, such as television shows or magazines.

Suppose a magazine runs a story about pathological liars next to a file photo of lawyers exiting a courthouse. If readers tend to think that the lawyers pictured are examples of the pathological liars the story is talking about, then the of-and-concerning-the-plaintiff element of the tort is met.

### **Published by the Defendant**

Defamation requires communication, and communication cannot happen without at least two people – a sender and a receiver. Thus, to be actionable, a defamatory statement must be "published" to at least one person, not including the plaintiff.

The word "published" here is a term of art. A statement is published in the defamation sense if it is uttered to a person who hears it. The requirement has nothing to do with publication in a formal sense, such as by a respected newspaper or book publisher. Uttering something aloud or writing it on a post-it note will count as publication as long as at least one other person hears or reads the message.

Note that you can not defame a person by communicating only to that person. Defamation is about reputational harm, not insult. So unless someone other than the plaintiff and the defendant perceives

the statement, there can be no effect on the plaintiff's reputation, and thus there's no cause of action.

### **The Necessity of an “Extra Condition”**

On top of the above elements, defamation needs something more. We have marked this out as the fifth element of the defamation case. There are four different ways to satisfy the extra condition:

**The “extra condition” can be satisfied** by any one of the following:

- (a) the statement constitutes libel per se
- (b) the statement constitutes libel per quod
- (c) the statement constitutes slander per se
- (d) special damages are proven

Here we encounter **the distinction between libel and slander.**

The word **libel** refers to defamation that comes in writing or in some other permanent, non-ephemeral form. By contrast **slander** refers to defamation that is uttered as speech or is otherwise ephemeral. Because a written falsehood is presumed to be capable of more damage than a falsehood uttered into the air, the barriers to suing over libel are lower than they are to suing over slander.

You may wonder whether defamation by radio or television broadcast counts as libel or slander. That's a good question. The jurisdictions are split. It's libel in some, slander in others. The courts in Georgia found the question troubling enough to put defamation by broadcast under the heading of a newly minted tort, which they call “defamacast.” *See, e.g., Jaillett v. Georgia TV Co.*, 520 S.E.2d 721, 724 (Ga. App. 1999).

Given the disarray over broadcasting, you will not be surprised to hear that whether defamation over the internet should be categorized as libel or slander remains a largely unresolved question. At least some jurisdictions, however, have categorized internet defamation as libel.

Now that we have some understanding of “libel” and “slander,” we can talk about what counts as “slander per se,” “libel per quod,” and



“libel per se.” Although jurisdictions vary, the following are helpful generalizations:

A statement is **slander per se** if it is slander (meaning it doesn’t rise to the level of qualifying as libel), and if it fits within one of the per se categories discussed above. To review, those per se categories are adverse to one’s profession, having a loathsome disease, guilt of a crime of moral turpitude, and having a lack of chastity. If it fits within one of those categories, then it qualifies as slander per se, and the final requirement of the defamation case is satisfied.

A statement is **libel per quod** if it is libel (as opposed to slander), if some external information is needed to understand its defamatory nature, and if it fits within one of the per se categories. The Latin “per quod” means “meaning whereby” – it refers to the necessity of having some external information to understand the meaning. In other words, a statement that is libel per quod is not defamatory on its face, but it is defamatory once context is taken into account.

Here’s an example of a libel per quod issue. Imagine that a newspaper prints a notice that “Doris Orband Sydney of Throgs Bay and Basil Keane Arbuckle of West Orange Hill are deeply in love and engaged to be married, with a ceremony to be held next Saturday.” Nothing about this engagement notice is defamatory on its face. But taking into account external factors, it might be. Suppose newspaper readers know that Ms. Sydney and Mr. Arbuckle are both married to other people. In that case, the extrinsic facts of their existing marriages makes the engagement notice defamatory because it imputes a lack of chastity to the alleged couple. (Botched engagement notices have, in fact, been a recurrent source of libel per quod cases.)

A statement is **libel per se** if it is libel and if no external information is necessary to understand its defamatory meaning. So long as the communication counts as libel and its defamatory meaning is clear on its face, then it fulfills the fifth element’s extra condition and is actionable. This means that *libel per se qualifies as actionable regardless of whether its content fits within any of the per se categories*. If that sounds confusing, you heard it correctly: Despite having “per se” in its name, libel per se does not need to fit within one of the per se categories.

The per se categories are, instead, used for slander per se and libel per quod. (Clearly, no one designed these terms for ease of learning.)

For an example of libel per se, suppose this is printed in the newspaper: “Ozella Grantham Clifton of Upper Larnwick, a noted methamphetamine addict, is a bankrupt spendthrift.” This is libel per se because it is libel (as opposed to slander), it is reputation-harming, and no external information is needed to understand its defamatory meaning. Thus, it won’t matter that the facts attributed to Ozella Grantham Clifton don’t fall into any of the per se categories. This statement will be actionable as libel per se.

Now, if a statement is defamatory, but it doesn’t qualify as slander per se, libel per quod, or libel per se, it can still be actionable if the plaintiff can prove **special damages**. In this case, “special” means *specific* (as opposed to unique). Special damages are those damages that are provably quantifiable in dollars lost. For instance, if the plaintiff is paid on a commission basis and loses sales because of a reputation-harming statement, there are special damages. Getting fired or not being hired would count as well. What will not count as special damages is a *general* lowering of one’s esteem in the community.

### **Check-Your-Understanding Questions About the Extra Condition**

Do the following satisfy the extra condition required for a prima facie defamation case? If so, on what grounds?

- A.** A statement uttered in spoken conversation that accuses the plaintiff of being a terrorist sympathizer.
- B.** A written statement that, given extrinsic facts known to most in the community, clearly insinuates that the plaintiff committed perjury.
- C.** A written statement clearly accusing the plaintiff by name of being a heroin addict.
- D.** An oral statement that the plaintiff frequently daydreams of ways of inflicting physical injury on her or his boss, along with evidence

showing that this statement caused the plaintiff's dismissal from employment.

**E.** A whispered statement that the plaintiff is sick with a weaponized form of smallpox, readily communicable through the air.

### **Defamation and the First Amendment**

In the landmark case of *New York Times v. Sullivan*, 376 U.S. 254 (1964), the Supreme Court held that the First Amendment guarantee of free speech alters and restricts common-law defamation. Thus, through *New York Times v. Sullivan* and subsequent cases, the court has constitutionalized the law of defamation.

To perform the constitutional analysis, you must first begin with this question: Is the plaintiff a public official or public figure, or does the statement involve a matter of public concern? If the answer is yes, then the First Amendment comes into play. If the answer is no, then First Amendment has nothing to say about the case, and the original common-law analysis under state law will control.

What the First Amendment does – if it comes into play – is change around the elements and defenses of the common-law analysis. What changes and how depends on whether the plaintiff is considered a public official or public figure, or, alternatively, a private person.

If the plaintiff is a public official or public figure, then, in addition to the common-law elements of defamation, the plaintiff takes on the burden of having to prove two additional elements. That is, on top of the five common-law elements of the prima facie case for defamation, the public-official-or-public-figure plaintiff must add two more elements to have a prima facie case.

Under the first added constitutional element, the public-official/public-figure plaintiff must prove that the allegedly defamatory statement is **false**. Note that under the traditional common law, falsity is not a prima facie element. Instead, truth is an affirmative defense. The constitutionalized form of defamation, however, shifts the burden on the truth/falsity issue, making it the plaintiff's job to prove up front.

Second, the public figure or public official plaintiff must prove that the defendant acted with **actual malice** in making the statement. “Actual malice” is a term of art. It does not mean that the plaintiff was somehow “malicious.” Instead, the actual malice requirement speaks to the level of care used by the defendant, and it signifies a standard above that of negligence. Actual malice means that the defendant either knew the statement was false, or else acted with reckless disregard for whether the statement was true or not.

If the plaintiff is a private person, but the statement was on a matter of public concern, then the plaintiff is given a little extra flexibility as compared with public figures or public officials. The private-person plaintiff in a constitutionalized defamation case must still prove the falsity of the statement, but as to the other added element, the private-person plaintiff has a choice. The private-person plaintiff can either (1) prove actual malice or (2) prove negligence plus actual injury suffered by the plaintiff.

We can sum this up as blackletter law in this way:

A plaintiff who is **a public official or public figure must, as part of a prima facie case for defamation**, additionally prove: (6) that the statement was false, and (7) that the defendant acted with actual malice.

A plaintiff who is **a private person suing over a statement made regarding a matter of legitimate public concern must, as part of a prima facie case for defamation**, additionally prove: (6) that the statement was false, and (7) either (a) the defendant acted with actual malice, or (b) the defendant was negligent and the plaintiff suffered an actual injury.

The bottom line is that it is very hard to win a lawsuit for defamation if you are a public official or public figure, or if the subject is one of legitimate public concern. And it’s hard because the First Amendment wants it that way.

Here is an example that will show you how these elements work with a set of facts:

*Example: Geopolis Gazette* – The Geopolis Gazette publishes a story about police corruption that, owing to hasty layout and photo editing, inadvertently implies that Pablo is one of the people discussed in the story who has bribed police officers. Pablo is a dental assistant who has never held public office or been publicly well-known. He has never bribed or attempted to bribe anyone. Because of the newspaper story, Pablo is put on a two-week unpaid suspension at work.

Can Pablo prevail in a defamation case against the Geopolis Gazette? Probably yes.

First let's look at the constitutional analysis. Pablo is not a public figure or public official, but police corruption is clearly a matter of legitimate public concern. Therefore, the First Amendment comes into play. Pablo will be required to prove the falsity of the statement, but he can do this simply by taking the stand and being credible in front of a jury. Next, we look at the actual-malice/negligence issue. The description of the editing as "hasty" suggests the newspaper acted with negligence. Proving actual malice would be more difficult, but happily for Pablo, he will not need to show actual malice. Negligence is enough since Pablo can show actual injury: his unpaid suspension. Thus, Pablo's case survives First Amendment scrutiny.

Now let's look at the remaining common law analysis. Implying that someone has bribed police officers would certainly tend to lower that person's reputation in the community, so it's a defamatory statement. Bribing police officers is a matter of fact, not opinion. And the statement was of and concerning Pablo because the photo in the context of the layout implied that Pablo was one of the bribers. And the statement was published by Geopolis Gazette in its own pages. All that remains is the "extra element." This is satisfied three different ways. The communication counts as libel per se, since it was communicated in written form. But, for argument's sake,

even if it were not, the extra requirement would still likely be satisfied because bribery would likely be considered a crime of moral turpitude. And even if we put that aside, Pablo can allege and prove special damages, since he was given an unpaid two-week suspension from work. So, on these facts, Pablo has a strong defamation claim.

The blackletter law of defamation is, admittedly, quite complex. But, as you can see, if you work through it systematically, it's quite manageable.

**Case: *Bindrim v. Mitchell***

This case points up the hazards of ripped-from-the-headlines fiction writing. If you find it surprising, you wouldn't be alone. When the court issued this decision it sent shockwaves through the book-publishing and novel-writing worlds.

***Bindrim v. Mitchell***

Court of Appeals of California, Second Appellate District, Division  
Four  
April 18, 1979

92 Cal.App.3d 61. PAUL BINDRIM, Plaintiff and Appellant, v. GWEN DAVIS MITCHELL et al., Defendants and Appellants. Civ. No. 52133. Judge Bernard Jefferson wrote a concurrence, not reproduced here.

**Justice ROBERT KINGSLEY:**

This is an appeal taken by Doubleday and Gwen Davis Mitchell from a judgment for damages in favor of plaintiff-respondent Paul Bindrim, Ph.D. The jury returned verdicts on the libel counts against Doubleday and Mitchell. Plaintiff is a licensed clinical psychologist and defendant is an author. Plaintiff used the so-called "Nude Marathon" in group therapy as a means of helping people to shed their psychological inhibitions with the removal of their clothes.

Defendant Mitchell had written a successful best seller in 1969 and had set out to write a novel about women of the leisure class. Mitchell attempted to register in plaintiff's nude therapy

but he told her he would not permit her to do so if she was going to write about it in a novel. Plaintiff said she was attending the marathon solely for therapeutic reasons and had no intention of writing about the nude marathon. Plaintiff brought to Mitchell's attention paragraph B of the written contract which reads as follows: "The participant agrees that he will not take photographs, write articles, or in any manner disclose who has attended the workshop or what has transpired. If he fails to do so he releases all parties from this contract, but remains legally liable for damages sustained by the leaders and participants."

Mitchell reassured plaintiff again she would not write about the session, she paid her money and the next day she executed the agreement and attended the nude marathon.

Mitchell entered into a contract with Doubleday two months later and was to receive \$150,000 advance royalties for her novel.

Mitchell met Eleanor Hoover for lunch and said she was worried because she had signed a contract and painted a devastating portrait of Bindrim.

Mitchell told Doubleday executive McCormick that she had attended a marathon session and it was quite a psychological jolt. The novel was published under the name "Touching" and it depicted a nude encounter session in Southern California led by "Dr. Simon Herford."

Plaintiff first saw the book after its publication and his attorneys sent letters to Doubleday and Mitchell. Nine months later the New American Library published the book in paperback.

The parallel between the actual nude marathon sessions and the sessions in the book "Touching" was shown to the jury by means of the tape recordings Bindrim had taken of the actual sessions.~

Plaintiff asserts that he was libeled by the suggestion that he used obscene language which he did not in fact use. Plaintiff also alleges various other libels due to Mitchell's inaccurate portrayal of what actually happened at the marathon. Plaintiff

alleges that he was injured in his profession and expert testimony was introduced showing that Mitchell's portrayal of plaintiff was injurious and that plaintiff was identified by certain colleagues as the character in the book, Simon Herford.

## I

Defendants first allege that they were entitled to judgment on the ground that there was no showing of "actual malice" by defendants. As a public figure, plaintiff is precluded from recovering damages for a defamatory falsehood relating to him, unless he proved that the statement was made with "actual malice," that is, that it was made with knowledge that it is false or with reckless disregard of whether it was false or not. (*New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 279-280.) The cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Thus, what constitutes actual malice focuses on defendants' attitude toward the truth or falsity of the material published and reckless disregard of the truth or falsity cannot be fully encompassed by one infallible definition but its outer limits must be marked by a case-by-case adjudication.

Evidence establishing a reckless disregard for the truth must be clear and convincing evidence, and proof by a preponderance of evidence is insufficient. (*New York Times Co. v. Sullivan* (1964) supra., 376 U.S. 254, at pp. 285-286.) Whether or not there was such malice is a question of fact to be determined by the trier of fact.. However, the reviewing court is required to review the evidence in a libel action by a public figure, to be sure that the principles were constitutionally applied. The court has the duty to examine the record to determine whether it could constitutionally support a judgment in favor of plaintiff, but this does not involve a de novo review of the proceedings below wherein the jury's verdict is entitled to no weight.

There is clear and convincing evidence to support the jury's finding that defendant Mitchell entertained actual malice, and



that defendant Doubleday had actual malice when it permitted the paperback printing of “Touching,” although there was no actual malice on the part of Doubleday in its original printing of the hardback edition.

Mitchell’s reckless disregard for the truth was apparent from her knowledge of the truth of what transpired at the encounter, and the literary portrayals of that encounter. “The fact that “Touching” was a novel does not necessarily insulate Mitchell from liability for libel, if all the elements of libel are otherwise present.” Since she attended sessions, there can be no suggestion that she did not know the true facts. “There is no suggestion that Mitchell was being malicious in the fabrication; her intent may have been to be colorful or dramatic.” [Yet because] “actual malice” concentrates solely on defendants’ attitude toward the truth or falsity of the material published, and not on malicious motives, certainly defendant Mitchell was in a position to know the truth or falsity of her own material, and the jury was entitled to find that her publication was in reckless disregard of that truth or with actual knowledge of falsity.”

## II

[T]he award for punitive damages against Doubleday may stand. A public figure in a defamation case may be awarded punitive damages when there is “actual malice,”~ and, as we have said above, actual malice was established for Doubleday.~

## III

Appellants claim that, even if there are untrue statements, there is no showing that plaintiff was identified as the character, Simon Herford, in the novel “Touching.”

Appellants allege that plaintiff failed to show he was identifiable as Simon Herford, relying on the fact that the character in “Touching” was described in the book as a “fat Santa Claus type with long white hair, white sideburns, a cherubic rosy face and rosy forearms” and that Bindrim was clean shaven and had short hair.~ In the case at bar, the only differences between plaintiff and the Herford character in “Touching” were physical appearance and that Herford was a psychiatrist rather than

psychologist. Otherwise, the character Simon Herford was very similar to the actual plaintiff. We cannot say that no one who knew plaintiff Bindrim could reasonably identify him with the fictional character. Plaintiff was identified as Herford by several witnesses and plaintiff's own tape recordings of the marathon sessions show that the novel was based substantially on plaintiff's conduct in the nude marathon.

Defendant also relies on *Middlebrooks v. Curtis Publishing Co.* (4th Cir. 1969) 413 F.2d 141, where the marked dissimilarities between the fictional character and the plaintiff supported the court's finding against the reasonableness of identification. In *Middlebrooks*, there was a difference in age, an absence from the locale at the time of the episode, and a difference in employment of the fictional character and plaintiff; nor did the story parallel the plaintiff's life in any significant manner. In the case at bar, apart from some of those episodes allegedly constituting the libelous matter itself, and apart from the physical difference and the fact that plaintiff had a Ph.D., and not an M.D., the similarities between Herford and Bindrim are clear, and the transcripts of the actual encounter weekend show a close parallel between the narrative of plaintiff's novel and the actual real life events. Here, there were many similarities between the character, Herford, and the plaintiff Bindrim and those few differences do not bring the case under the rule of *Middlebrooks*. There is overwhelming evidence that plaintiff and "Herford" were one.

#### IV

However, even though there was clear and convincing evidence to support the finding of "actual malice," and even though there was support for finding that plaintiff is identified as the character in Mitchell's novel, there still can be no recovery by plaintiff if the statements in "Touching" were not libelous. There can be no libel predicated on an opinion. The publication must contain a false statement of fact.

Plaintiff alleges that the book as a whole was libelous and that the book contained several false statements of fact. We find it unnecessary to discuss each alleged libel separately, since if any

of the alleged libels fulfill all the requirements of libel, that is sufficient to support the judgment.<sup>47</sup>

Our inquiry then, is directed to whether or not any of these incidents can be considered false statements of fact. It is clear from the transcript of the actual encounter weekend proceeding that some of the incidents portrayed by Mitchell are false: i.e., substantially inaccurate description of what actually happened. It is also clear that some of these portrayals cast plaintiff in a disparaging light since they portray his language and conduct as crude, aggressive, and unprofessional.

Defendants contend that the fact that the book was labeled as being a “novel” bars any claim that the writer or publisher could be found to have implied that the characters in the book were factual representations not of the fictional characters but of an actual nonfictional person. That contention, thus broadly stated, is unsupported by the cases. The test is whether a reasonable person, reading the book, would understand that the fictional character therein pictured was, in actual fact, the plaintiff acting as described. (*Middlebrooks v. Curtis Publishing Co.* (4th Cir. 1969) supra., 413 F.2d 141, 143.) Each case must stand on its own facts. In some cases, such as *Greenbelt Pub. Assn. v. Bresler* (1970) supra., 398 U.S. 6, an appellate court can, on examination of the entire work, find that no reasonable person would have regarded the episodes in the book as being other than the fictional imaginings of the author about how the character he had created would have acted. Similarly, in *Hicks v. Casablanca Records* (S.D.N.Y. 1978) 464 F.Supp. 426, a trier of fact was able to find that, considering the work as a whole, no reasonable reader would regard an episode, in a book purporting to be a biography of an actual person, to have been anything more than the author’s imaginative explanation of an episode in that person’s life about which no actual facts were known. We cannot make any similar determination here. Whether a reader, identifying plaintiff with the “Dr. Herford” of the book, would regard the passages herein complained of as mere fictional embroidering or as reporting actual language and conduct, was for the jury. Its

verdict adverse to the defendants cannot be overturned by this court.

## V

Defendants raise the question of whether there is “publication” for libel where the communication is to only one person or a small group of persons rather than to the public at large. Publication for purposes of defamation is sufficient when the publication is to only one person other than the person defamed. Therefore, it is irrelevant whether all readers realized plaintiff and Herford were identical.

## VI

Appellant Doubleday alleges several charges to the jury were erroneous, and that the court improperly refused to give certain proffered instructions by them. Doubleday objects that the court erred when it rejected its instruction that Bindrim must prove by clear and convincing evidence that defendants intentionally identified Bindrim. Firstly, the “clear and convincing evidence” standard applies to the proving that the act was done with “actual malice” and an instruction to that effect was given by the court. Secondly, defendants’ instructions that the jury must find that a substantial segment of the public did, in fact, believe that Dr. Simon Herford was, in fact, Paul Bindrim, was properly refused. For the tort of defamation, publication to one other person is sufficient, ante.~

### **Presiding Justice GORDON L. FILES, dissenting:**

This novel, which is presented to its readers as a work of fiction, contains a portrayal of nude encounter therapy, and its tragic effect upon an apparently happy and well-adjusted woman who subjected herself to it. Plaintiff is a practitioner of this kind of therapy. His grievance, as described in his testimony and in his briefs on appeal, is provoked by that institutional criticism.~The record demonstrates the essential truth of the author’s thesis. A tape recording of an actual encounter session conducted by plaintiff contains this admonition to the departing patients: “... Now, to top that off, you’re turned on, that is you’re about as turned on as if you’ve had 50 or 75 gammas of LSD. That’s the

estimate of the degree of the turn-on is. And it doesn't feel that way, because you're [sic] been getting higher a little bit at a time. So don't wait to find out, take my word for it, and drive like you've had three or four martinis. Drive cautiously.”<sup>7</sup> Plaintiff's “concession” that he is a public figure appears to be a tactic to enhance his argument that any unflattering portrayal of this kind of therapy defames him.

The decision of the majority upholding a substantial award of damages against the author and publisher poses a grave threat to any future work of fiction which explores the effect of techniques claimed to have curative value.

The majority opinion rests upon a number of misconceptions of the record and the law of libel. I mention a few of them.

*Defamation.*

Libel is a false and unprivileged publication which exposes any person to hatred, contempt, ridicule or obloquy, or which causes him to be shunned or avoided or which has a tendency to injure him in his occupation. (Civ. Code, § 45.) A libel which is defamatory without the necessity of explanatory matter is said to be a libel on its face. Language not libelous on its face is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a result thereof. (Civ. Code, § 45a.)

Whether or not matter is on its face reasonably susceptible of a libelous meaning is a question of law.

The complaint in this action quotes verbatim the portions of the defendant's novel which are alleged to be libelous. No explanatory matter or special damages are alleged. The only arguably defamatory matter I can find in that complaint is in the passages which portray the fictional therapist using coarse, vulgar and insulting language in addressing his patients. Some of the therapeutic techniques described in the quoted passages may seem bizarre, but a court cannot assume that such conduct is so inappropriate that a reputable therapist would be defamed if that technique were imputed to him. The alleged defamation therefore is limited to the imputation of vulgar speech and insulting manners.

The defendants asked the trial court to give an instruction to the jury identifying the matter which it could consider as defamatory. The trial court refused. Instead, the court sent the case to the jury without distinction between actionable defamation and constitutionally protected criticism. In addition, the trial court's instructions authorized the jury to award special damages for loss of income which could have resulted from the lawful expression of opinion.

*Identification.*

Whether or not an allegedly defamatory communication was made "of and concerning the plaintiff" is an issue involving constitutional rights. (*New York Times v. Sullivan* (1964) 376 U.S. 254, 288; see Rest. 2d Torts, § 580A com. (g).) Criticism of an institution, profession or technique is protected by the First Amendment; and such criticism may not be suppressed merely because it may reflect adversely upon someone who cherishes the institution or is a part of it.

Defendants' novel describes a fictitious therapist who is conspicuously different from plaintiff in name, physical appearance, age, personality and profession.

Indeed the fictitious Dr. Herford has [none] of the characteristics of plaintiff except that Dr. Herford practices nude encounter therapy. Only three witnesses, other than plaintiff himself, testified that they "recognized" plaintiff as the fictitious Dr. Herford. All three of those witnesses had participated in or observed one of plaintiff's nude marathons. The only characteristic mentioned by any of the three witnesses as identifying plaintiff was the therapy practiced.

Plaintiff was cross-examined in detail about what he saw that identified him in the novel. Every answer he gave on this subject referred to how the fictitious Dr. Herford dealt with his patients.

Plaintiff has no monopoly upon the encounter therapy which he calls "nude marathon." Witnesses testified without contradiction that other professionals use something of this kind. There does not appear to be any reason why anyone could not conduct a

“marathon” using the style if not the full substance of plaintiff’s practices.

Plaintiff’s brief discusses the therapeutic practices of the fictitious Dr. Herford in two categories: Those practices which are similar to plaintiff’s technique are classified as identifying. Those which are unlike plaintiff’s are called libelous because they are false. Plaintiff has thus resurrected the spurious logic which Professor Kalven found in the position of the plaintiff in *New York Times v. Sullivan*, supra., 376 U.S. 254. Kalven wrote: “There is revealed here a new technique by which defamation might be endlessly manufactured. First, it is argued that, contrary to all appearances, a statement referred to the plaintiff; then, that it falsely ascribed to the plaintiff something that he did not do, which should be rather easy to prove about a statement that did not refer to plaintiff in the first place. ...” Kalven, *The New York Times Case : A Note on “The Central Meaning of the First Amendment,”* 1964 Sup. Ct. Rev. 191, 199.

Even if we accept the plaintiff’s thesis that criticism of nude encounter therapy may be interpreted as libel of one practitioner, the evidence does not support a finding in favor of plaintiff.

Whether or not a publication to the general public is defamatory is “whether in the mind of the average reader the publication, considered as a whole, could reasonably be considered as defamatory.” (*Patton v. Royal Industries, Inc.* (1968) 263 Cal.App.2d 760, 765.

The majority opinion contains this juxtaposition of ideas: “Secondly, defendants’ [proposed] instructions that the jury must find that a substantial segment of the public did, in fact, believe that Dr. Simon Herford was, in fact, Paul Bindrim was properly refused. For the tort of defamation, publication to one other person is sufficient, ante.”

The first sentence refers to the question whether the publication was defamatory of plaintiff. The second refers to whether the defamatory matter was published. The former is an issue in this case. The latter is not. Of course, a publication to one person

may constitute actionable libel. But this has no bearing on the principle that the allegedly libelous effect of a publication to the public generally is to be tested by the impression made on the average reader.

*The jury instruction on identification.*

The only instruction given the jury on the issue of identification stated that plaintiff had the burden of proving “That a third person read the statement and reasonably understood the defamatory meaning and that the statement applied to plaintiff.”

That instruction was erroneous and prejudicial in that it only required proof that one “third person” understood the defamatory meaning.

The word “applied” was most unfortunate in the context of this instruction. The novel was about nude encounter therapy. Plaintiff practiced nude encounter therapy. Of course the novel “applied to plaintiff,” particularly insofar as it exposed what may result from such therapy. This instruction invited the jury to find that plaintiff was libeled by criticism of the kind of therapy he practiced. The effect is to mulct the defendants for the exercise of their First Amendment right to comment on the nude marathon.

*Malice.*

The majority opinion adopts the position that actual malice may be inferred from the fact that the book was “false.” That inference is permissible against a defendant who has purported to state the truth. But when the publication purports to be fiction, it is absurd to infer malice because the fiction is false.

As the majority agrees, a public figure may not recover damages for libel unless “actual malice” is shown. Sufficiency of the evidence on this issue is another constitutional issue. (*St. Amant v. Thompson* (1968) 390 U.S. 727, 730.) Actual malice is a state of mind, even though it often can be proven only by circumstantial evidence. The only apparent purpose of the defendants was to write and publish a novel. There is not the slightest evidence of any intent on the part of either to harm



plaintiff. No purpose for wanting to harm him has been suggested.

The majority opinion seems to say malice is proved by Doubleday's continuing to publish the novel after receiving a letter from an attorney (not plaintiff's present attorney) which demanded that Doubleday discontinue publication "for the reasons stated in" a letter addressed to Gwen Davis. An examination of the latter demonstrates the fallacy of that inference.

The letter to Davis [Mitchell] asserted that the book violated a confidential relationship, invaded plaintiff's privacy, libelled him and violated a "common law copyright" by "using the unpublished words" of plaintiff. It added "From your said [television] appearances, as well as from the book, it is unmistakable that the 'Simon Herford' mentioned in your book refers to my client."

The letters did not assert that any statement of purported fact in the book was false. The only allegation of falsity was this: "In these [television] appearances you stated, directly or indirectly, that nude encounter workshops, similar to the one you attended, are harmful. The truth is that those attending my client's workshops derive substantial benefit from their attendance at such workshops."

These letters gave Doubleday no factual information which would indicate that the book libelled plaintiff.

The letters did not put Doubleday on notice of anything except that plaintiff was distressed by the expression of an opinion unfavorable to nude encounter therapy-an expression protected by the First Amendment. (See *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 339.)

From an analytical standpoint, the chief vice of the majority opinion is that it brands a novel as libelous because it is "false," i.e., fiction; and infers "actual malice" from the fact that the author and publisher knew it was not a true representation of plaintiff. From a constitutional standpoint the vice is the chilling effect upon the publisher of any novel critical of any

occupational practice, inviting litigation on the theory “when you criticize my occupation, you libel me.”

I would reverse the judgment.

### **Questions to Ponder About *Bindrim v. Mitchell***

- A.** Do you agree with the dissent that this decision was bound to have a chilling effect on writers and publishers? Do you think defamation doctrine as applied here impinges on free speech?
- B.** What could Mitchell have done to avoid defamation liability? Could she have written essentially the same book, with just minor changes? Or would she have had to write a substantially different book?
- C.** What did Bindrim do that helped him put together a successful case?
- D.** What have you seen in books, movies, television shows, or other media that appears to have been shaped by concerns about defamation liability?

### **Case: *Masson v. New Yorker Magazine***

In the following case the U.S. Supreme Court confronts how much poetic license a writer has with quotes for a magazine story about a real person. Reading it will give you a more nuanced feel for how the First Amendment frustrates defamation actions in order to give the press plenty of breathing room.

### ***Masson v. New Yorker Magazine***

Supreme Court of the United States

June 20, 1991

501 U.S. 496. MASSON v. NEW YORKER MAGAZINE, INC., ET AL. No. 89-1799.

**Justice ANTHONY KENNEDY delivered the opinion of the Court:**

In this libel case, a public figure claims he was defamed by an author who, with full knowledge of the inaccuracy, used quotation marks to attribute to him comments he had not made.

The First Amendment protects authors and journalists who write about public figures by requiring a plaintiff to prove that the defamatory statements were made with what we have called “actual malice,” a term of art denoting deliberate or reckless falsification. We consider in this opinion whether the attributed quotations had the degree of falsity required to prove this state of mind, so that the public figure can defeat a motion for summary judgment and proceed to a trial on the merits of the defamation claim.

## I

Petitioner Jeffrey Masson trained at Harvard University as a Sanskrit scholar, and in 1970 became a professor of Sanskrit & Indian Studies at the University of Toronto. He spent eight years in psychoanalytic training, and qualified as an analyst in 1978. Through his professional activities, he came to know Dr. Kurt Eissler, head of the Sigmund Freud Archives, and Dr. Anna Freud, daughter of Sigmund Freud and a major psychoanalyst in her own right. The Sigmund Freud Archives, located at Maresfield Gardens outside of London, serves as a repository for materials about Freud, including his own writings, letters, and personal library. The materials, and the right of access to them, are of immense value to those who study Freud and his theories, life, and work.

In 1980, Eissler and Anna Freud hired petitioner as projects director of the archives. After assuming his post, petitioner became disillusioned with Freudian psychology. In a 1981 lecture before the Western New England Psychoanalytical Society in New Haven, Connecticut, he advanced his theories of Freud. Soon after, the board of the archives terminated petitioner as projects director.

Respondent Janet Malcolm is an author and a contributor to respondent *The New Yorker*, a weekly magazine. She contacted petitioner in 1982 regarding the possibility of an article on his relationship with the archives. He agreed, and the two met in person and spoke by telephone in a series of interviews. Based on the interviews and other sources, Malcolm wrote a lengthy article. One of Malcolm’s narrative devices consists of enclosing

lengthy passages in quotation marks, reporting statements of Masson, Eissler, and her other subjects.

During the editorial process, Nancy Franklin, a member of the fact-checking department at *The New Yorker*, called petitioner to confirm some of the facts underlying the article. According to petitioner, he expressed alarm at the number of errors in the few passages Franklin discussed with him. Petitioner contends that he asked permission to review those portions of the article which attributed quotations or information to him, but was brushed off with a never-fulfilled promise to “get back to [him].” Franklin disputes petitioner’s version of their conversation.

The *New Yorker* published Malcolm’s piece in December 1983, as a two-part series. In 1984, with knowledge of at least petitioner’s general allegation that the article contained defamatory material, respondent Alfred A. Knopf, Inc., published the entire work as a book, entitled *In the Freud Archives*.

Malcolm’s work received complimentary reviews. But this gave little joy to Masson, for the book portrays him in a most unflattering light. According to one reviewer:

“Masson the promising psychoanalytic scholar emerges gradually, as a grandiose egotist – mean-spirited, self-serving, full of braggadocio, impossibly arrogant and, in the end, a self-destructive fool. But it is not Janet Malcolm who calls him such: his own words reveal this psychological profile – a self-portrait offered to us through the efforts of an observer and listener who is, surely, as wise as any in the psychoanalytic profession.” Coles, *Freudianism Confronts Its Malcontents*, *Boston Globe*, May 27, 1984, pp. 58, 60.

Petitioner wrote a letter to the *New York Times Book Review* calling the book “distorted.” In response, Malcolm stated:

“Many of [the] things Mr. Masson told me (on tape) were discreditable to him, and I felt it best

not to include them. Everything I do quote Mr. Masson as saying was said by him, almost word for word. (The ‘almost’ refers to changes made for the sake of correct syntax.) I would be glad to play the tapes of my conversation with Mr. Masson to the editors of The Book Review whenever they have 40 or 50 short hours to spare.”

Petitioner brought an action for libel under California law in the United States District Court for the Northern District of California. During extensive discovery and repeated amendments to the complaint, petitioner concentrated on various passages alleged to be defamatory, dropping some and adding others. The tape recordings of the interviews demonstrated that petitioner had, in fact, made statements substantially identical to a number of the passages, and those passages are no longer in the case. We discuss only the passages relied on by petitioner in his briefs to this Court.

Each passage before us purports to quote a statement made by petitioner during the interviews. Yet in each instance no identical statement appears in the more than 40 hours of taped interviews. Petitioner complains that Malcolm fabricated all but one passage; with respect to that passage, he claims Malcolm omitted a crucial portion, rendering the remainder misleading.

(a) *“Intellectual Gigolo.”* Malcolm quoted a description by petitioner of his relationship with Eissler and Anna Freud as follows:

“Then I met a rather attractive older graduate student and I had an affair with her. One day, she took me to some art event, and she was sorry afterward. She said, “Well, it is very nice sleeping with you in your room, but you’re the kind of person who should never leave the room – you’re just a social embarrassment anywhere else, though you do fine in your own room.” And you know, in their way, if not in so many words, Eissler and Anna Freud told me the same thing. They like me well enough “in

my own room.” They loved to hear from me what creeps and dolts analysts are. I was like an intellectual gigolo – you get your pleasure from him, but you don’t take him out in public ... .”  
*In the Freud Archives* 38.

The tape recordings contain the substance of petitioner’s reference to his graduate student friend, but no suggestion that Eissler or Anna Freud considered him, or that he considered himself, an “intellectual gigolo.” Instead, petitioner said:

“They felt, in a sense, I was a private asset but a public liability... . They liked me when I was alone in their living room, and I could talk and chat and tell them the truth about things and they would tell me. But that I was, in a sense, much too junior within the hierarchy of analysis, for these important training analysts to be caught dead with me.”

(b) “*Sex, Women, Fun.*” Malcolm quoted petitioner as describing his plans for Maresfield Gardens, which he had hoped to occupy after Anna Freud’s death:

“It was a beautiful house, but it was dark and sombre and dead. Nothing ever went on there. I was the only person who ever came. I would have renovated it, opened it up, brought it to life. Maresfield Gardens would have been a center of scholarship, but it would also have been a place of sex, women, fun. It would have been like the change in *The Wizard of Oz*, from black-and-white into color.” *In the Freud Archives* 33.

The tape recordings contain a similar statement, but in place of the references to “sex, women, fun” and *The Wizard of Oz*, petitioner commented:

“[I]t is an incredible storehouse. I mean, the library, Freud’s library alone is priceless in terms of what it contains: all his books with his annotations in them; the Schreber case annotated, that kind of thing. It’s fascinating.”

Petitioner did talk, earlier in the interview, of his meeting with a London analyst:

“I like him. So, and we got on very well. That was the first time we ever met and you know, it was buddy-buddy, and we were to stay with each other and [laughs] we were going to pass women on to each other, and we were going to have a great time together when I lived in the Freud house. We’d have great parties there and we were [laughs] –

“... going to really, we were going to live it up.”

(c) *“It Sounded Better.”* Petitioner spoke with Malcolm about the history of his family, including the reasons his grandfather changed the family name from Moussaieff to Masson, and why petitioner adopted the abandoned family name as his middle name. The article contains the passage:

“My father is a gem merchant who doesn’t like to stay in any one place too long. His father was a gem merchant, too – a Bessarabian gem merchant, named Moussaieff, who went to Paris in the twenties and adopted the name Masson. My parents named me Jeffrey Lloyd Masson, but in 1975 I decided to change my middle name to Moussaieff – it sounded better.” *In the Freud Archives* 36.

In the most similar tape-recorded statement, Masson explained at considerable length that his grandfather had changed the family name from Moussaieff to Masson when living in France, “[j]ust to hide his Jewishness.” Petitioner had changed his last name back to Moussaieff, but his then-wife Terry objected that “nobody could pronounce it and nobody knew how to spell it, and it wasn’t the name that she knew me by.” Petitioner had changed his name to Moussaieff because he “just liked it.” “[I]t was sort of part of analysis: a return to the roots, and your family tradition and so on.” In the end, he had agreed with Terry that “it wasn’t her name after all,” and used Moussaieff as a middle instead of a last name.

(d) “*I Don’t Know Why I Put It In.*” The article recounts part of a conversation between Malcolm and petitioner about the paper petitioner presented at his 1981 New Haven lecture:

“[I] asked him what had happened between the time of the lecture and the present to change him from a Freudian psychoanalyst with somewhat outré views into the bitter and belligerent anti-Freudian he had become.

“Masson sidestepped my question. ‘You’re right, there was nothing disrespectful of analysis in that paper,’ he said. ‘That remark about the sterility of psychoanalysis was something I tacked on at the last minute, and it was totally gratuitous. I don’t know why I put it in.’” *In the Freud Archives* 53.

The tape recordings instead contain the following discussion of the New Haven lecture:

Masson: “So they really couldn’t judge the material. And, in fact, until the last sentence I think they were quite fascinated. I think the last sentence was an in, [sic] possibly, gratuitously offensive way to end a paper to a group of analysts. Uh, –”

Malcolm: “What were the circumstances under which you put it [in]? ...”

Masson: “That it was, was true.

.....

“... I really believe it. I didn’t believe anybody would agree with me.

.....

“... But I felt I should say something because the paper’s still well within the analytic tradition in a sense. . . .

.....

“... It’s really not a deep criticism of Freud. It contains all the material that would allow one to



criticize Freud but I didn't really do it. And then I thought, I really must say one thing that I really believe, that's not going to appeal to anybody and that was the very last sentence. Because I really do believe psychoanalysis is entirely sterile . . . ."

(e) "*Greatest Analyst Who Ever Lived.*" The article contains the following self-explanatory passage:

"A few days after my return to New York, Masson, in a state of elation, telephoned me to say that Farrar, Straus & Giroux has taken *The Assault on Truth* [Masson's book]. 'Wait till it reaches the best-seller list, and watch how the analysts will crawl,' he crowed. 'They move whichever way the wind blows. They will want me back, they will say that Masson is a great scholar, a major analyst – after Freud, he's the greatest analyst who ever lived. Suddenly they'll be calling, begging, cajoling: 'Please take back what you've said about our profession; our patients are quitting.'" They'll try a short smear campaign, then they'll try to buy me, and ultimately they'll have to shut up. Judgment will be passed by history. There is no possible refutation of this book. It's going to cause a revolution in psychoanalysis. Analysis stands or falls with me now.'" *In the Freud Archives* 162.

This material does not appear in the tape recordings. Petitioner did make the following statements on related topics in one of the taped interviews with Malcolm:

" . . . I assure you when that book comes out, which I honestly believe is an honest book, there is nothing, you know, mean-minded about it. It's the honest fruit of research and intellectual toil. And there is not an analyst in the country who will say a single word in favor of it."

"Talk to enough analysts and get them right down to these concrete issues and you watch

how different it is from my position. It's utterly the opposite and that's finally what I realized, that I hold a position that no other analyst holds, including, alas, Freud. At first I thought: Okay, it's me and Freud against the rest of the analytic world, or me and Freud and Anna Freud and Kur[t] Eissler and Vic Calef and Brian Bird and Sam Lipton against the rest of the world. Not so, it's me. it's me alone."

The tape of this interview also contains the following exchange between petitioner and Malcolm:

Masson: ". . . analysis stands or falls with me now."

Malcolm: "Well that's a very grandiose thing to say."

Masson: "Yeah, but it's got nothing to do with me. It's got to do with the things I discovered."

(f) "*He Had The Wrong Man.*" In discussing the archives' board meeting at which petitioner's employment was terminated, Malcolm quotes petitioner as giving the following explanation of Eissler's attempt to extract a promise of confidentiality:

"[Eissler] was always putting moral pressure on me. "Do you want to poison Anna Freud's last days? Have you no heart? You're going to kill the poor old woman." I said to him, "What have I done? *You're* doing it. *You're* firing me. What am I supposed to do – be grateful to you?" "You could be silent about it. You could swallow it. I know it is painful for you. But you could just live with it in silence." "Why should I do that?" "Because it is the honorable thing to do." Well, he had the wrong man." *In the Freud Archives* 67.

From the tape recordings, on the other hand, it appears that Malcolm deleted part of petitioner's explanation (italicized below), and petitioner argues that the "wrong man" sentence relates to something quite different from Eissler's entreaty that

silence was “the honorable thing.” In the tape recording, petitioner states:

“But it was wrong of Eissler to do that, you know. He was constantly putting various kinds of moral pressure on me and, ‘Do you want to poison Anna Freud’s last days? Have you no heart?’ He called me: ‘Have you no heart? You’re going to kill the poor old woman. Have you no heart? Think of what she’s done for you and you are now willing to do this to her.’ I said, ‘What have I, what have I done? You did it. You fired me. What am I supposed to do: thank you? be grateful to you?’ He said, ‘Well you could never talk about it. You could be silent about it. You could swallow it. I know it’s painful for you but just live with it in silence.’ ‘Fuck you,’ I said, ‘Why should I do that? Why? You know, why should one do that?’ ‘Because it’s the honorable thing to do *and you will save face. And who knows? If you never speak about it and you quietly and humbly accept our judgment, who knows that in a few years if we don’t bring you back?*’ Well, he had the wrong man.”

Malcolm submitted to the District Court that not all of her discussions with petitioner were recorded on tape, in particular conversations that occurred while the two of them walked together or traveled by car, while petitioner stayed at Malcolm’s home in New York, or while her tape recorder was inoperable. She claimed to have taken notes of these unrecorded sessions, which she later typed, then discarding the handwritten originals. Petitioner denied that any discussion relating to the substance of the article occurred during his stay at Malcolm’s home in New York, that Malcolm took notes during any of their conversations, or that Malcolm gave any indication that her tape recorder was broken.

Respondents moved for summary judgment. The parties agreed that petitioner was a public figure and so could escape summary judgment only if the evidence in the record would permit a reasonable finder of fact, by clear and convincing evidence, to

conclude that respondents published a defamatory statement with actual malice as defined by our cases. The District Court analyzed each of the passages and held that the alleged inaccuracies did not raise a jury question. The court found that the allegedly fabricated quotations were either substantially true, or were “one of a number of possible rational interpretations’ of a conversation or event that ‘bristled with ambiguities,’” and thus were entitled to constitutional protection. The court also ruled that the “he had the wrong man” passage involved an exercise of editorial judgment upon which the courts could not intrude.

The Court of Appeals affirmed, with one judge dissenting. The court assumed for much of its opinion that Malcolm had deliberately altered each quotation not found on the tape recordings, but nevertheless held that petitioner failed to raise a jury question of actual malice, in large part for the reasons stated by the District Court. In its examination of the “intellectual gigolo” passage, the court agreed with the District Court that petitioner could not demonstrate actual malice because Malcolm had not altered the substantive content of petitioner’s self-description.

The dissent argued that any intentional or reckless alteration would prove actual malice, so long as a passage within quotation marks purports to be a verbatim rendition of what was said, contains material inaccuracies, and is defamatory. We granted certiorari, and now reverse.

## II

### A

~The First Amendment limits California’s libel law in various respects. When, as here, the plaintiff is a public figure, he cannot recover unless he proves by clear and convincing evidence that the defendant published the defamatory statement with actual malice, *i.e.*, with “knowledge that it was false or with reckless disregard of whether it was false or not.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280 (1964). Mere negligence does not suffice. Rather, the plaintiff must demonstrate that the author

“in fact entertained serious doubts as to the truth of his publication,” or acted with a “high degree of awareness of . . . probable falsity[.]”

Actual malice under the *New York Times* standard should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will. We have used the term actual malice as a shorthand to describe the First Amendment protections for speech injurious to reputation, and we continue to do so here. But the term can confuse as well as enlighten. In this respect, the phrase may be an unfortunate one. In place of the term actual malice, it is better practice that jury instructions refer to publication of a statement with knowledge of falsity or reckless disregard as to truth or falsity. This definitional principle must be remembered in the case before us.

## B

In general, quotation marks around a passage indicate to the reader that the passage reproduces the speaker’s words verbatim. They inform the reader that he or she is reading the statement of the speaker, not a paraphrase or other indirect interpretation by an author. By providing this information, quotations add authority to the statement and credibility to the author’s work. Quotations allow the reader to form his or her own conclusions and to assess the conclusions of the author, instead of relying entirely upon the author’s characterization of her subject.

A fabricated quotation may injure reputation in at least two senses, either giving rise to a conceivable claim of defamation. First, the quotation might injure because it attributes an untrue factual assertion to the speaker. An example would be a fabricated quotation of a public official admitting he had been convicted of a serious crime when in fact he had not.

Second, regardless of the truth or falsity of the factual matters asserted within the quoted statement, the attribution may result in injury to reputation because the manner of expression or even the fact that the statement was made indicates a negative personal trait or an attitude the speaker does not hold. John

Lennon once was quoted as saying of the Beatles, “We’re more popular than Jesus Christ now.” *Time*, Aug. 12, 1966, p. 38. Supposing the quotation had been a fabrication, it appears California law could permit recovery for defamation because, even without regard to the truth of the underlying assertion, false attribution of the statement could have injured his reputation. Here, in like manner, one need not determine whether petitioner is or is not the greatest analyst who ever lived in order to determine that it might have injured his reputation to be reported as having so proclaimed.

A self-condemnatory quotation may carry more force than criticism by another. It is against self-interest to admit one’s own criminal liability, arrogance, or lack of integrity, and so all the more easy to credit when it happens. This principle underlies the elemental rule of evidence which permits the introduction of statements against interest, despite their hearsay character, because we assume “that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true.”

Of course, quotations do not always convey that the speaker actually said or wrote the quoted material. “Punctuation marks, like words, have many uses. Writers often use quotation marks, yet no reasonable reader would assume that such punctuation automatically implies the truth of the quoted material.” *Baker v. Los Angeles Herald Examiner*, 42 Cal. 3d 254 (Cal. 1986). In *Baker*, a television reviewer printed a hypothetical conversation between a station vice president and writer/producer, and the court found that no reasonable reader would conclude the plaintiff in fact had made the statement attributed to him. Writers often use quotations as in *Baker*, and a reader will not reasonably understand the quotations to indicate reproduction of a conversation that took place. In other instances, an acknowledgment that the work is so-called docudrama or historical fiction, or that it recreates conversations from memory, not from recordings, might indicate that the quotations should not be interpreted as the actual statements of the speaker to whom they are attributed.

The work at issue here, however, as with much journalistic writing, provides the reader no clue that the quotations are being used as a rhetorical device or to paraphrase the speaker's actual statements. To the contrary, the work purports to be nonfiction, the result of numerous interviews. At least a trier of fact could so conclude. The work contains lengthy quotations attributed to petitioner, and neither Malcolm nor her publishers indicate to the reader that the quotations are anything but the reproduction of actual conversations. Further, the work was published in *The New Yorker*, a magazine which at the relevant time seemed to enjoy a reputation for scrupulous factual accuracy. These factors would, or at least could, lead a reader to take the quotations at face value. A defendant may be able to argue to the jury that quotations should be viewed by the reader as nonliteral or reconstructions, but we conclude that a trier of fact in this case could find that the reasonable reader would understand the quotations to be nearly verbatim reports of statements made by the subject.

### C

The constitutional question we must consider here is whether, in the framework of a summary judgment motion, the evidence suffices to show that respondents acted with the requisite knowledge of falsity or reckless disregard as to truth or falsity. This inquiry in turn requires us to consider the concept of falsity; for we cannot discuss the standards for knowledge or reckless disregard without some understanding of the acts required for liability. We must consider whether the requisite falsity inheres in the attribution of words to the petitioner which he did not speak.

In some sense, any alteration of a verbatim quotation is false. But writers and reporters by necessity alter what people say, at the very least to eliminate grammatical and syntactical infelicities. If every alteration constituted the falsity required to prove actual malice, 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. Petitioner concedes that this absolute

definition of falsity in the quotation context is too stringent, and acknowledges that “minor changes to correct for grammar or syntax” do not amount to falsity for purposes of proving actual malice. We agree, and must determine what, in addition to this technical falsity, proves falsity for purposes of the actual malice inquiry.

Petitioner argues that, excepting correction of grammar or syntax, publication of a quotation with knowledge that it does not contain the words the public figure used demonstrates actual malice. The author will have published the quotation with knowledge of falsity, and no more need be shown. Petitioner suggests that by invoking more forgiving standards the Court of Appeals would permit and encourage the publication of falsehoods. Petitioner believes that the intentional manufacture of quotations does not “represent[t] the sort of inaccuracy that is commonplace in the forum of robust debate to which the *New York Times* rule applies,” and that protection of deliberate falsehoods would hinder the First Amendment values of robust and well-informed public debate by reducing the reliability of information available to the public.

We reject the idea that any alteration beyond correction of grammar or syntax by itself proves falsity in the sense relevant to determining actual malice under the First Amendment. An interviewer who writes from notes often will engage in the task of attempting a reconstruction of the speaker’s statement. That author would, we may assume, act with knowledge that at times she has attributed to her subject words other than those actually used. Under petitioner’s proposed standard, an author in this situation would lack First Amendment protection if she reported as quotations the substance of a subject’s derogatory statements about himself.

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



rambling comments, all make it misleading to suggest that a quotation will be reconstructed with complete accuracy. The use or absence of punctuation may distort a speaker's meaning, for example, where that meaning turns upon a speaker's emphasis of a particular word. In other cases, if a speaker makes an obvious misstatement, for example by unconscious substitution of one name for another, a journalist might alter the speaker's words but preserve his intended meaning. And conversely, an exact quotation out of context can distort meaning, although the speaker did use each reported word.

In all events, technical distinctions between correcting grammar and syntax and some greater level of alteration do not appear workable, for we can think of no method by which courts or juries would draw the line between cleaning up and other changes, except by reference to the meaning a statement conveys to a reasonable reader. To attempt narrow distinctions of this type would be an unnecessary departure from First Amendment principles of general applicability, and, just as important, a departure from the underlying purposes of the tort of libel as understood since the latter half of the 16th century. From then until now, the tort action for defamation has existed to redress injury to the plaintiff's reputation by a statement that is defamatory and false. As we have recognized, "[t]he legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood." If an author alters a speaker's words but effects no material change in meaning, including any meaning conveyed by the manner or fact of expression, the speaker suffers no injury to reputation that is compensable as a defamation.

These essential principles of defamation law accommodate the special case of inaccurate quotations without the necessity for a discrete body of jurisprudence directed to this subject alone. [W]e reject any special test of falsity for quotations, including one which would draw the line at correction of grammar or syntax. We conclude, rather, that the exceptions suggested by petitioner for grammatical or syntactical corrections serve to illuminate a broader principle.~

[T]he statement is not considered false unless it “would have a different effect on the mind of the reader from that which the pleaded truth would have produced.” Our definition of actual malice relies upon this historical understanding.

We conclude that a deliberate alteration of the words uttered by a plaintiff does not equate with knowledge of falsity for purposes of *New York Times Co. v. Sullivan* and *Gertz v. Robert Welch, Inc.* unless the alteration results in a material change in the meaning conveyed by the statement. The use of quotations to attribute words not in fact spoken bears in a most important way on that inquiry, but it is not dispositive in every case.

Deliberate or reckless falsification that comprises actual malice turns upon words and punctuation only because words and punctuation express meaning. Meaning is the life of language. And, for the reasons we have given, quotations may be a devastating instrument for conveying false meaning. In the case under consideration, readers of *In the Freud Archives* may have found Malcolm’s portrait of petitioner especially damning because so much of it appeared to be a self-portrait, told by petitioner in his own words. And if the alterations of petitioner’s words gave a different meaning to the statements, bearing upon their defamatory character, then the device of quotations might well be critical in finding the words actionable.

#### D

The Court of Appeals applied a test of substantial truth which, in exposition if not in application, comports with much of the above discussion. The Court of Appeals, however, went one step beyond protection of quotations that convey the meaning of a speaker’s statement with substantial accuracy and concluded that an altered quotation is protected so long as it is a “rational interpretation” of an actual statement. [W]e cannot accept the reasoning of the Court of Appeals on this point.

In *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), a Consumer Reports reviewer had attempted to describe in words the experience of listening to music through a pair of loudspeakers, and we concluded that the result was not an

assessment of events that speak for themselves, but “one of a number of possible rational interpretations’ of an event ‘that bristled with ambiguities’ and descriptive challenges for the writer.” ~ We refused to permit recovery for choice of language which, though perhaps reflecting a misconception, represented “the sort of inaccuracy that is commonplace in the forum of robust debate to which the *New York Times* rule applies.”~

The protection for rational interpretation serves First Amendment principles by allowing an author the interpretive license that is necessary when relying upon ambiguous sources. Where, however, a writer uses a quotation, and where a reasonable reader would conclude that the quotation purports to be a verbatim repetition of a statement by the speaker, the quotation marks indicate that the author is not involved in an interpretation of the speaker’s ambiguous statement, but attempting to convey what the speaker said. This orthodox use of a quotation is the quintessential “direct account of events that speak for themselves.”~ More accurately, the quotation allows the subject to speak for himself.

The significance of the quotations at issue, absent any qualification, is to inform us that we are reading the statement of petitioner, not Malcolm’s rational interpretation of what petitioner has said or thought. Were we to assess quotations under a rational interpretation standard, we would give journalists the freedom to place statements in their subjects’ mouths without fear of liability. By eliminating any method of distinguishing between the statements of the subject and the interpretation of the author, we would diminish to a great degree the trustworthiness of the printed word and eliminate the real meaning of quotations. Not only public figures but the press doubtless would suffer under such a rule. Newsworthy figures might become more wary of journalists, knowing that any comment could be transmuted and attributed to the subject, so long as some bounds of rational interpretation were not exceeded. We would ill serve the values of the First Amendment if we were to grant near absolute, constitutional protection for such a practice. We doubt the suggestion that as a general rule readers will assume that direct quotations are but a rational

interpretation of the speaker's words, and we decline to adopt any such presumption in determining the permissible interpretations of the quotations in question here.

### III

#### A

We apply these principles to the case before us. On summary judgment, we must draw all justifiable inferences in favor of the nonmoving party, including questions of credibility and of the weight to be accorded particular evidence. So we must assume, except where otherwise evidenced by the transcripts of the tape recordings, that petitioner is correct in denying that he made the statements attributed to him by Malcolm, and that Malcolm reported with knowledge or reckless disregard of the differences between what petitioner said and what was quoted.~

#### B

We must determine whether the published passages differ materially in meaning from the tape-recorded statements so as to create an issue of fact for a jury as to falsity.

(a) *"Intellectual Gigolo."* We agree with the dissenting opinion in the Court of Appeals that "[f]airly read, intellectual gigolo suggests someone who forsakes intellectual integrity in exchange for pecuniary or other gain." 895 F. 2d, at 1551. A reasonable jury could find a material difference between the meaning of this passage and petitioner's tape-recorded statement that he was considered "much too junior within the hierarchy of analysis, for these important training analysts to be caught dead with [him]."

The Court of Appeals majority found it difficult to perceive how the "intellectual gigolo" quotation was defamatory, a determination supported not by any citation to California law, but only by the argument that the passage appears to be a report of Eissler's and Anna Freud's opinions of petitioner. *Id.*, at 1541. We agree with the Court of Appeals that the most natural interpretation of this quotation is not an admission that petitioner considers himself an intellectual gigolo but a statement that Eissler and Anna Freud considered him so. It

does not follow, though, that the statement is harmless. Petitioner is entitled to argue that the passage should be analyzed as if Malcolm had reported falsely that *Eissler* had given this assessment (with the added level of complexity that the quotation purports to represent petitioner's understanding of Eissler's view). An admission that two well-respected senior colleagues considered one an "intellectual gigolo" could be as, or more, damaging than a similar self-appraisal. In all events, whether the "intellectual gigolo" quotation is defamatory is a question of California law. To the extent that the Court of Appeals based its conclusion in the First Amendment, it was mistaken.

The Court of Appeals relied upon the "incremental harm" doctrine as an alternative basis for its decision. As the court explained it: "This doctrine measures the incremental reputational harm inflicted by the challenged statements beyond the harm imposed by the nonactionable remainder of the publication." The court ruled, as a matter of law, that "[g]iven the . . . many provocative, bombastic statements indisputably made by Masson and quoted by Malcolm, the additional harm caused by the 'intellectual gigolo' quote was nominal or nonexistent, rendering the defamation claim as to this quote nonactionable."

This reasoning requires a court to conclude that, in fact, a plaintiff made the other quoted statements, and then to undertake a factual inquiry into the reputational damage caused by the remainder of the publication. As noted by the dissent in the Court of Appeals, the most "provocative, bombastic statements" quoted by Malcolm are those complained of by petitioner, and so this would not seem an appropriate application of the incremental harm doctrine.

Furthermore, the Court of Appeals provided no indication whether it considered the incremental harm doctrine to be grounded in California law or the First Amendment. Here, we reject any suggestion that the incremental harm doctrine is compelled as a matter of First Amendment protection for speech. The question of incremental harm does not bear upon

whether a defendant has published a statement with knowledge of falsity or reckless disregard of whether it was false or not. As a question of state law, on the other hand, we are given no indication that California accepts this doctrine, though it remains free to do so. Of course, state tort law doctrines of injury, causation, and damages calculation might allow a defendant to press the argument that the statements did not result in any incremental harm to a plaintiff's reputation.

(b) *"Sex, Women, Fun."* This passage presents a closer question. The "sex, women, fun" quotation offers a very different picture of petitioner's plans for Maresfield Gardens than his remark that "Freud's library alone is priceless." Petitioner's other tape-recorded remarks did indicate that he and another analyst planned to have great parties at the Freud house and, in a context that may not even refer to Freud house activities, to "pass women on to each other." We cannot conclude as a matter of law that these remarks bear the same substantial meaning as the quoted passage's suggestion that petitioner would make the Freud house a place of "sex, women, fun."

(c) *"It Sounded Better."* We agree with the District Court and the Court of Appeals that any difference between petitioner's tape-recorded statement that he "just liked" the name Moussaieff, and the quotation that "it sounded better" is, in context, immaterial. Although Malcolm did not include all of petitioner's lengthy explanation of his name change, she did convey the gist of that explanation: Petitioner took his abandoned family name as his middle name. We agree with the Court of Appeals that the words attributed to petitioner did not materially alter the meaning of his statement.

(d) *"I Don't Know Why I Put It In."* Malcolm quotes petitioner as saying that he "tacked on at the last minute" a "totally gratuitous" remark about the "sterility of psychoanalysis" in an academic paper, and that he did so for no particular reason. In the tape recordings, petitioner does admit that the remark was "possibly [a] gratuitously offensive way to end a paper to a group of analysts," but when asked why he included the remark, he answered "[because] it was true . . . I really believe it."

Malcolm's version contains material differences from petitioner's statement, and it is conceivable that the alteration results in a statement that could injure a scholar's reputation.

(e) "*Greatest Analyst Who Ever Lived.*" While petitioner did, on numerous occasions, predict that his theories would do irreparable damage to the practice of psychoanalysis, and did suggest that no other analyst shared his views, no tape-recorded statement appears to contain the substance or the arrogant and unprofessional tone apparent in this quotation. A material difference exists between the quotation and the tape-recorded statements, and a jury could find that the difference exposed petitioner to contempt, ridicule, or obloquy.

(f) "*He Had The Wrong Man.*" The quoted version makes it appear as if petitioner rejected a plea to remain in stoic silence and do "the honorable thing." The tape-recorded version indicates that petitioner rejected a plea supported by far more varied motives: Eissler told petitioner that not only would silence be "the honorable thing," but petitioner would "save face," and might be rewarded for that silence with eventual reinstatement. Petitioner described himself as willing to undergo a scandal in order to shine the light of publicity upon the actions of the Freud Archives, while Malcolm would have petitioner describe himself as a person who was "the wrong man" to do "the honorable thing." This difference is material, a jury might find it defamatory, and, for the reasons we have given, there is evidence to support a finding of deliberate or reckless falsification.

### C

Because of the Court of Appeals' disposition with respect to Malcolm, it did not have occasion to address petitioner's argument that the District Court erred in granting summary judgment to The New Yorker Magazine, Inc., and Alfred A. Knopf, Inc., on the basis of their respective relations with Malcolm or the lack of any independent actual malice. These questions are best addressed in the first instance on remand.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

### **Historical Note About *Masson v. New Yorker***

After remand, a jury found that two quotations were false and one was defamatory. But the jury also found actual malice to be lacking, resulting in a victory for the defense.

Janet Malcolm continued writing for *The New Yorker*. She is a controversial figure. Some journalists were critical of Malcolm's handling of her story about Masson. Others lauded her. Craig Seligman, a Malcolm supporter, wrote this for *Salon*:

The public pillorying of Janet Malcolm is one of the scandals of American letters. The world of journalism teems with hacks who will go to their graves never having written one sparkling or honest or incisive sentence; why is it Malcolm, a virtuoso stylist and a subtle, exciting thinker, who drives critics into a rage? What journalist of her caliber is as widely disliked or as often accused of bad faith? And why did so few of her colleagues stand up for her during the circus of a libel trial that scarred her career? ... Dryden famously noted the "vast difference betwixt the slovenly butchering of a man, and the fineness of a stroke that separates the head from the body, and leaves it standing in its place." Malcolm's blade gleams with a razor edge. Her critics tend to go after her with broken bottles.

In 1989, as the *Masson* case was working its way through the courts, Malcolm wrote about journalistic ethics in *The Journalist and the Murderer*, published as a two-part series in *The New Yorker* and later as a book. In the work, Malcolm indicted all journalists as being "morally indefensible," writing:

[The journalist] is a kind of confidence man, preying on people's vanity, ignorance or loneliness, gaining their trust and betraying



them without remorse. Like the credulous widow who wakes up one day to find the charming young man and all her savings gone, so the consenting subject of a piece of nonfiction learns – when the article or book appears – *his* hard lesson.

### Questions to Ponder About *Masson v. New Yorker*

- A. How would you characterize Malcolm's conduct? Was she "reworking" quotes or "making them up"?
- B. How would you characterize Malcolm? Is she a hero, a villain, neither, or both?
- C. Does this case change your view of journalism – magazine journalism or *The New Yorker* in particular? Would you have thought quotes in a magazine like *The New Yorker* were verbatim? Or have you have assumed that writers take some latitude in the wording?
- D. Should persons quoted by journalists have a cause of action for being deliberately and substantially misquoted – even if this is not done in a reputation-harming way?
- E. Besides potential defamation liability, are there are other constraints on journalist behavior with regard to material in quotes? If so, what would they be?

### Defamation Privileges

As difficult as it is for a plaintiff to win a prima facie case for defamation, particularly in its constitutionalized form, there are still more hurdles to successfully obtaining a judgment. Defamation defendants have powerful array of affirmative defenses to use.

First, there are **absolute privileges**. An absolute privilege protects anything said in official meetings of the legislature. That includes the floor of Congress or the state assembly chamber, as well as what happens in committee hearings.

Absolute privilege also applies to statements made in the course of court proceedings and in court documents. This makes civil and criminal litigation a huge safe harbor for defamation. This applies to lawyers, judges, jurors, and witnesses. For instance, an attorney could

tell the most malicious lies to the judge or jury, and absolutely no defamation liability would result. Of course, such behavior could get a lawyer disbarred. But that is a matter of rules of court and canons of legal ethics – tort law will not enter the fray. Yet once a lawyer steps outside and meets the press on the courthouse steps, the shields are down and defamation liability can attach to whatever is said.

In addition to matters of absolute privilege, there are affirmative defenses that the courts have categorized as **qualified privileges**. The most prominent is probably the “fair reporting privilege,” a common-law doctrine pre-dating *New York Times v. Sullivan* that allows for accurate reporting of defamatory statements made in public records, in the courtroom, or in similar official contexts. The privilege is “qualified” because malice or unfairness on the part of the defendant can cause the privilege to be exceeded. Courts have recognized other qualified privileges as well, including a limited privilege for employers providing references for their former employees.