SANCTIONING VOICE: QUOTATION MARKS, THE ABOLITION OF TORTURE, AND THE FIFTH AMENDMENT

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On the face of things, it is remarkable that the courts have concerned themselves of late with something so punctilious as the use of quotation marks. One would expect their use, like that of all forms of punctuation, to be prescribed from the schoolroom rather than legislated in the courtroom. Formerly, a misquotation was judged a grammatical solecism; now, however, after the Supreme Court's decision of June 20, 1991,[1] it may be the basis for a civil action. This Article argues that there is nothing fastidious about the Court's focus on this grammatical device. Small ciphers though they are, quotation marks are critical in upholding the constitutional principles upon which American jurisprudence is based.

I

The legal discussion of quotations issued from a recent case in which the psychoanalyst Jeffrey Masson, former project director of the Freud Archives, brought a libel suit against the journalist Janet Malcolm (and her publishers, the New Yorker and Alfred Knopf) for an interview that allegedly misquoted him. Masson argued that numerous quoted passages ascribed to him were defamatory in "falsely portray[ing] him as egotistical, vain, and lacking in personal honesty and moral integrity."[2] He was, for example, quoted as having said that his colleagues considered him an "intellectual gigolo,"[3] that he was "the greatest analyst who ever lived,"[4] that he intended to turn the Freud estate into "a place of sex, women, and fun."[5] For reasons to be discussed below, a California Northern District court ruled that the alleged

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[1] Masson v. New Yorker Magazine, 111 S. Ct. 2419 (1991). I would like to thank Monroe E. Price for urging me to consider this case.

[2] Masson v. New Yorker Magazine, 686 F. Supp. 1396, 1397 (N.D. Cal. 1987).

[3] *Id.* at 1400.

[4] *Id.* at 1405.

[5] *Id.* at 1404.

inaccuracies were not actionable as libel; the Ninth Circuit Court of Appeals affirmed this decision—though with a strong dissenting opinion;[6] and the Supreme Court reversed it, granting Masson the right to a jury trial.[7] At each level, the published interview was compared with the 1065[8] page transcript of the approximately forty[9] hours of taped interviews in order to determine the extent of the difference between what Masson said and what Malcolm quoted him as having said.

The defense countered Masson's complaint that the interview had damaged his reputation with an appeal to the First Amendment's protection of freedom of the press. In the interest of maintaining a free and robust press, the law does not bind reporters and journalists to strict accuracy. In quoting individuals, especially when the transcription of oral statements is involved, they are not liable for certain alterations such as minor inaccuracies, correction of grammar and syntax, and condensation of phrasing.[10] The 1964 *N.Y. Times v. Sullivan*[11] decision extends constitutional protection to the press by superimposing upon state libel law a limiting standard requiring a plaintiff to prove that the statement in question was made with " 'actual malice'—that is, with knowledge that [the defamatory statement] was false or with reckless disregard of whether it was false or not."[12] In applying this standard (and several state precedents) to the *Masson* case, the District Court denied the plaintiff's plea, ruling that "the alleged defamatory statements"[13] were not actionable; they were either "rational interpretation[s]"[14] of Masson's tape-recorded statements or else "substantially true."[15]

In reaching this decision, the Court overlooked the grammatical distinction that quotation marks function to sustain: the distinction between direct quotation and indirect quotation, between what one said and what another said one said; in this case, between what Masson said and what Malcolm reported he said. The Court recognized no semantic difference between Malcolm's third person claim about Masson, and Masson's first person claim

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6 Masson v. New Yorker Magazine, 895 F.2d 1535 (9th Cir. 1989) (Kozinski, J. dissenting).
7 *Masson*, 111 S. Ct. at 2419.
8 *Masson*, 686 F. Supp. at 1397.
9 *Masson*, 111 S. Ct. at 2425.
10 *Id.* at 2431.
11 376 U.S. 254 (1964).
12 *Id.* at 279-80.
13 *Masson*, 686 F. Supp. at 1407.
14 *Id.*
15 *Id.*

about himself—between, as Judge Kozinski's dissent later suggested, "Masson thinks he is the greatest analyst who ever lived," and as Masson declared, "I am the greatest analyst who ever lived."[16] The grammatical standard requiring that *words in quotation marks* be reproduced verbatim was tacitly dropped and replaced with the considerably looser journalistic standard that applies to *words outside quotation marks*. The district court's decision suggests that statements within quotation marks need not reproduce what was said word for word in order to be constitutionally protected as free speech. Like any type of reporting, the words within quotation marks need only constitute (1) a fair interpretation or (2) an approximation. As an example of the first, Malcolm can without liability quote Masson as having said his colleagues considered him "an intellectual gigolo"[17] not because Masson said so, but because it was "a rational interpretation of Masson's comments."[18] As an example of the second, Malcolm can quote Masson as having said, "I am the greatest analyst who ever lived," not because those were his words, but because they closely resembled his words—what the court termed "the many egotistical and boastful statements"[19] in the taped interview. According to this ruling, quotation marks no longer set off words a person said from words a person might have said. This slip from the realm of the actual to that of the possible itself suggests that much more is at stake here than grammatical correctness; the distinction signalled by quotation marks between direct and indirect speech—between quoting and paraphrasing—upholds an opposition fundamental to the press (and not only the press) between two kinds of writing: report and commentary. This is an epistemological as well as a generic distinction, for those two kinds of writing are produced by two kinds of knowing as distinct as objective observation and subjective opinion.

The Court of Appeals reviewed six of the quotations alleged to be defamatory and in each case affirmed the District Court's decision. Judge Kozinski, however, submitted a magisterial dissenting opinion in which he parted with the majority "on a simple but fundamental point: the meaning of quotations."[20] While Kozinski found both parts of the majority's test troublesome, he

[16] *Masson*, 895 F.2d at 1549 (Kozinski, J., dissenting).
[17] *Masson*, 686 F. Supp at 1400.
[18] *Id.* at 1400-01.
[19] *Id.* at 1406.
[20] *Masson*, 895 F.2d at 1548 (Kozinski, J., dissenting).

objected particularly to its appeal to "rational interpretation"[21] protection, for it ignored the fact that a direct quotation is understood "to come directly from the speaker"[22] and therefore "to contain *no* interpretation."[23] The courts' failure to preserve the distinction between "[a] speaker's own words"[24] and "an extrapolation of the speaker's words"[25] stretched the First Amendment sanctions from "poetic license" to licentious and illicit "license,"[26] allowing reporters, in effect, to ventriloquize. If the courts were to include fabricated quotations among permissible deliberate alterations, "there are no words whatsoever that they cannot put into a subject's mouth."[27] It is the words a subject is made to speak against himself rather than those spoken against him by another that pose the greatest threat: "they can have a devastating rhetorical impact and thus carry a serious potential for harm."[28] As Judge Kozinski specified, "by putting words in his mouth[,]"[29] rather than making it clear that she was using her own, Malcolm "[made] Masson appear more arrogant, less sensitive, shallower, more self-aggrandizing, and less in touch with reality than he appears from his own [taped] statements."[30] In short, because the misquotations were self-incriminatory, they "caused Masson a serious injury and made it look like a self-inflicted wound."[31]

In reversing the ruling, the Supreme Court continued to stress the distinction between quoted and unquoted statements. Quotation marks guarantee a higher degree of accuracy ("[i]n general, quotation marks indicate a verbatim reproduction"[32]) in addition to conferring special authority upon a statement ("the quotation allows the subject to speak for himself"[33]). As in Judge Kozinski's opinion, the Court's discussion repeatedly returned to the particular danger posed by words that appear to be spoken in the speaker's own person. Were the Court to "assess quotations under a rational interpretation standard, [it] would

21 *Masson*, 686 F. Supp. at 1407.
22 *Masson*, 895 F.2d at 1549.
23 *Id.* (emphasis added).
24 *Id.* at 1548.
25 *Id.*
26 *Id.* at 1554.
27 *Id.* at 1553.
28 *Id.* at 1549.
29 *Id.* at 1554.
30 *Id.*
31 *Id.* at 1550.
32 *Masson*, 111 S. Ct. at 2422.
33 *Id.* at 2434.

give journalists the freedom to place statements in their subjects' mouths without fear of liability."[34] Once again, it is the damage of self-defamatory words that is most to be feared. While any inaccurate quotation "may be a devastating instrument for conveying false meaning,"[35] a self-incriminating one is particularly "damning."[36] As several published responses to the interview suggested, Malcolm's misquotation was so effective in discrediting Masson "because so much of it appeared to be a self-portrait, told by petitioner in his own words."[37] As the elemental rule of evidence confirms, "[a] self-condemnatory quotation may carry more force than criticism by another."[38] It is precisely to prohibit the press from fabricating self-defamatory quotations that the Court retained only the "substantially true" defense applied in various previous rulings; it ruled out the "rational interpretation" protection, maintaining that "interpretative license" is applicable when the ambiguity of a statement (or event) requires interpretation; but the mere conveyance of a statement ordinarily involves no ambiguity, especially, it might be added, when it has been taped. With this stricter standard, the Supreme Court reversed the decisions of the lower courts, finding five of Malcolm's six fabricated quotations actionable as libel. Justice White, joined by Justice Scalia, filed a partially dissenting opinion calling for even tighter strictures on published quotations.[39] Appealing to the *Sullivan* standard that, as we have seen, equated "malice" with a deliberate falsehood or "reckless disregard" for truth or falsity,[40] they contended that *any* deliberate alteration of what a speaker said constitutes "malice," not just one that materially alters its meaning; *all* of the misquotations would, therefore, be actionable.[41]

II

What is remarkable about the legal discussion surrounding the issue of libel in *Masson v. New Yorker*, is how close quotation marks came to being rendered obsolete (or at least insignificant) in the first two rulings, before being firmly reinstated by the Supreme Court's reversal. The first two rulings extended to quo-

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34 *Id.*
35 *Id.* at 2433.
36 *Id.*
37 *Id.*
38 *Id.* at 2430.
39 *Id.* at 2437 (White, J. & Scalia, J., dissenting).
40 N.Y. Times v. Sullivan, 376 U.S. 254, 279-80 (1964).
41 *Masson*, 111 S. Ct. at 2437-39.

tations the same "rhetorical license"[42] that applies to all other forms of reporting. By eliminating "the rational interpretation"[43] standard, however, the Supreme Court, following Kozinski, restored to them a unique standard of accuracy.

What is still more remarkable about the case is the prospect that compelled the Supreme Court to tighten constraints: the fear, for Judge Kozinski, that "there are no words whatsoever that [journalists] cannot put into a subject's mouth";[44] the dread, for the Court, that reporters would be free "to place statements in their subjects' mouths."[45] Lax use of quotations summons up the grisly shadow of compulsory self-incrimination, of being forced to bear witness against oneself, in this instance by being made to speak (or, more precisely, by being made to *look in print* to speak) self-condemnatory words. The extreme epithets that emerge in this context—misquotation is a "devastating instrument"[46] and "damning"[47] device producing "serious injury" and "a self-inflicted wound"—bring to mind the atrocious contraptions by which such self-incriminations were once legally extorted: racks, strappados, wheels. Lurking behind the Courts' dread of misquotation is, I would like to suggest, a long history of the gruesome inquisitorial procedures deployed in Europe and England to exact self-incriminating testimonies. Defamatory misquotation and coerced confessions are both procedures for putting self-incriminating words into another's mouth. This suggestion should not blur the vast phenomenological differences between the two: between a journalist making a public figure *appear in print* to speak in self-condemnation (for purposes of engaging her readership) and a torturer's or inquisitor's making a suspect *in deed* speak in self-condemnation (for legal, political, religious, or even sadistic purposes). Misquotation belongs in the realm of the representational, while torture exists in that of the experiential. All the same, both practices produce the same effect: the takeover of another's voice.

The Fifth Amendment to the U.S. Constitution[48] was drafted to guard against the juridical horror of coerced confessions and testimonies, guaranteeing that no defendant "shall be compelled

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42 *Masson*, 895 F.2d at 1554.
43 *Masson*, 686 F. Supp at 1407.
44 *Masson*, 895 F.2d at 1553.
45 *Masson*, 111 S. Ct. at 2434.
46 *Id.* at 2433.
47 *Id.*
48 U.S. CONST. amend. V.

. . . to be a witness against himself."[49] As is indicated by several references in the debates leading to the Constitution's ratification in 1787, the right against involuntary self-incrimination was intended to protect the individual against the state's power to coerce confessions through torture and inquisition, a power exercised by European states up through the eighteenth century.[50] In Roman canon-law, torture had been integral to the juridical process: a conviction required a declaration, either in the form of the testimony of two witnesses, a voluntary confession, or a coerced confession (in conjunction with circumstantial evidence).[51] In the absence of the first two proofs, torture was applied in order to exact both a confession and corroborating details. Juridical procedures, then, depended upon torture not for punishment, but to produce the evidence required by law. Even in England, where jury trials based convictions on other standards, prisoners were tortured for confessions and information in cases of treason and heresy.[52] The abolition of juridical torture in Europe at the time of the French Revolution was attended by the recognition on this side of the Atlantic of the right against compulsory self-incrimination. In the summary of one Constitutional historian, "The disappearance of torture and the recognition of the right against compulsory self-incrimination were victories in the same struggle."[53]

III

Emerging at the time of this same struggle was the very feature under review in the *Masson* case. Not until the end of the eighteenth century, was the use of quotation marks made mandatory in the duplication of the spoken or scripted words of another.[54] While they appear sporadically in earlier manuscripts

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[49] *Id.*

[50] George Mason, for example, urged the Virginia delegation to adapt prohibitions against compulsory self-incrimination (as well as against "cruel and unusual infliction of punishment") in order to distinguish the emergent nation from "those countries where torture [was] used [and] evidence was extorted from the criminal himself." 3 ELLIOT'S DEBATES 452 (2d ed. rev., J.D. Lippincott 1941) (1787). *See also* LEONARD W. LEVY, THE ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION 418-19 (2d ed. Macmillan 1986) (1968).

[51] JOHN H. LANGBEIN, TORTURE AND THE LAW OF PROOF: EUROPE AND ENGLAND IN THE ANCIEN REGIME 4-5 (1977).

[52] *Id.* at 73-138. *See also* Elizabeth Hanson, *Torture and Truth in Renaissance England*, 34 REPRESENTATIONS 53, 58-62 (1991).

[53] Leonard W. Levy, *The Right Against Self-Incrimination*, 3 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1575 (1986).

[54] For a list of late eighteenth-century grammar books that prescribe quotation marks, see C.J. Mitchell, *Quotation Marks, Compositorial Habits and False Imprints*, 5 THE

and printed materials before then, they were not standardized until near the close of the century.[55] Only then did they assume their routine modern function of guaranteeing that the passage within quotes has been accurately reproduced and correctly ascribed. Before this period, grammar books prescribed no rules on the use of quotation marks. Nor was it customary in printing houses to bracket statements with quotes in order to indicate that they belonged to a given speaker or writer. While books printed in the sixteenth and seventeenth century did not use quotes for this purpose, quotation marks are edited in when the same books are reprinted in the nineteenth century.

This is not to say that quotation marks were not used before the eighteenth century. They existed in both manuscript and print, but served a different and even antithetical function. A single or double quotation mark, generally in the margin, was interchangeable with the pointing finger or indices: it pointed to or indicated an authoritative saying like a proverb, commonplace, or statement of consensual truth.[56] Marginal quote ciphers indicated that a passage possessed authoritative status, commonly derived from a classical (Aristotle, Seneca) or patristic (St.Augustine, St. Thomas) author or authority who was, in most cases, dead. By highlighting an utterance that was of potential interest and use to all readers, quotation marks facilitated the "lifting" of the passages they marked. Renaissance readers, it can be assumed, routinely scanned the margins for quote marks in order to spot passages suitable for inscription in their own personalized common-place books.[57] In brief, rather than cordoning off a passage as property of another, quotation marks

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LIBRARY 377 n.50 (1983). For the relation of quotation marks to various forms of editorial ascription, see MARGRETA DE GRAZIA, SHAKESPEARE VERBATIM 214-18, 220 (1991) [hereinafter DE GRAZIA, SHAKESPEARE VERBATIM]. For a condensed history of the bibliographic forms in which Shakespeare has been quoted, see Margreta de Grazia, *Shakespeare in Quotation Marks*, *in* THE APPROPRIATION OF SHAKESPEARE 57-71 (Jean Marsden ed., 1991).

55 Sandra Sherman has drawn my attention to an interesting (and, I would maintain, idiosyncratic) early use of quotes in DANIEL DEFOE, THE HISTORY AND REALITY OF APPARITIONS (n.p. 1720). In a text intent on establishing belief in supernatural phenomenon, Defoe uses quotation marks to enhance his credibility, announcing that he will enclose the reports of others to enable readers both to verify his sources and to discern between his own first-hand and their second-hand accounts.

56 For the use of quotations to signal the words of authorities in the Middle Ages, see ARTHUR J. MINNIS, MEDIEVAL THEORY OF AUTHORSHIP 10 (2d ed. 1988). On "gnomic pointing" in Renaissance texts, see George K. Hunter, *The Marking of Sententiae in Elizabethan Plays, Poems, and Romances*, 6 THE LIBRARY 171-88 (1951).

57 On the relation of "reading" in the early modern period to various forms of transcription, see Max W. Thomas, *Reading and Writng the Renaissance Commonplace Book. A Question of Authorship?*, 10 CARDOZO ARTS & ENT. L.J. 665 (1992). For a peculiar modern analogue that transforms the reader from passive consumer to active producer, see

flagged the passage as property belonging to all—"common places" to be freely appropriated (and not necessarily verbatim and with correct authorial ascription). Not until after the seventeenth century did quotation marks serve to enclose an utterance as the exclusive material of another which could be borrowed only if accurately reproduced and ascribed.[58]

As this short history indicates, the use of quotation marks in the modern period was not simply revised but reversed. No longer highlighting authoritative words to be profitably used by *all* readers and writers, quotation marks came to privilege and protect words belonging to the individual who produced them. The double brackets announce that words belong to their utterer and can be "borrowed" only on certain conditions. In tethering words to their utterer, rather than to transpersonal or traditional truth, they work to the same effect as the legal and hermeneutic ascriptive practices which fasten works to authors in this same period.[59] In the same way that copyright legislation and textual criticism ascribe works to their authors, so too quotation marks ascribe words to their utterers. All three practices depend on a reconceptualizing of language as a discursive field capable of being portioned into assignable private tracts or lots over which proprietary and usufructuary rights prevail. Indeed, quotation marks bear striking and pervasive witness to this reconfiguration of language as property, fixing discursive boundaries on the page between the *meum* belonging to the author and the *suum* "bor-

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MICHEL DE CERTEAU, *Reading as Poaching*, *in* THE PRACTICE OF EVERYDAY LIFE (Steven Rendall trans., 1984).

[58] For a discussion of the prevalence of quoting in the post-seventeenth-century forms of the novel and Romantic verse, see HERMAN MEYER, THE POETICS OF QUOTATION IN THE EUROPEAN NOVEL (Theodore & Yetta Ziolkowski trans., 1968) and JONATHAN BATE, SHAKESPEARE AND THE ENGLISH ROMANTIC IMAGINATION (1986).

[59] On the legal debates leading to the copyright laws which tie works to authors, see Mark Rose, *The Author as Proprietor:* Donaldson v. Becket *and the Genealogy of Modern Authorship*, 23 REPRESENTATIONS 51 (1988) [hereinafter Rose, *Donaldson v. Becket*] and MARK ROSE, THE AUTHOR AS PROPRIETOR (forthcoming 1992). For the hermeneutical consequences of this tie, see Foucault's canonical discussion of how the more or less psychological configuration of "author" tends to regulate textual meaning. Michel Foucault, *What is an Author?*, LANGUAGE, COUNTER-MEMORY, PRACTICE, 113 (Donald F. Bouchard trans. & ed., 1977). My *Shakespeare Verbatim* examines how the textual apparatus that is constructed around Shakespeare's works in 1790 grounds his works in what can be objectively documented of his life and subjectively inferred as his responses to that life, through such practices as the establishing of an authentic text, the devising of a chronology, the assembling of historical background, the cross-referencing of words and passages, etc. DE GRAZIA, SHAKESPEARE VERBATIM, *supra* note 54. For a discussion of how the author figure comes to curtail and regulate the semantics of Shakespeare's two most ostensibly interiorized works (the Sonnets and *Hamlet*), see Margreta de Grazia, *The Motive for Interiority*, 23 STYLE: TEXTS AND PRETEXTS IN THE ENGLISH RENAISSANCE 430 (1989).

rowed" from other authors.[60]

The shift in the function of quote marks provides a tidy example of a development crucial to a more complex history: the emergence of the concept of intellectual property. Mark Rose has discussed how the concept of literary property depended on an important transformation in the notion of "text"—from a gesture or act to be performed within a patronage system to a thing or commodity to be owned within a marketplace structure.[61] The writing process was rendered into an object capable of being owned in order to be commercially negotiated and legally regulated—in other words, in order to qualify as literary property.[62] This transformation needs to be stressed as the precondition for the concurrence we have already noted: the simultaneous codification of the right against compulsory self-incrimination in the U.S. Constitution and of the rules for correct quoting in English grammars. Both developments presuppose that words are, like property, assignable. A citizen or subject must be assumed to own words before being granted the right to keep them, even when it means withholding them from the legal process that seeks their disclosure. Ownership must also be assumed before written words are bracketed in proprietary markers. The legal right and the grammatical rule, therefore, depend on the same conferral of ownership over one's words; so too does their violation.

Quotation marks punctuate a page with sanctions—enclosing private materials from public use. When those enclosed words are about the very speaker who speaks them—when he is both the subject speaking and the subject spoken—they may be

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60 Even when quotation marks are used as an ironic device, to distance the writer from the quoted material, property determinations come into play. Disowning a statement is a form of ascribing it, i.e., the *non meum* is simply a more alienated form of the *suum*. Theodor W. Adorno cryptically but relevantly refers to the "abundant ironic quotations marks" in Marx and Engels as "shadows that totalitarian methods cast in advance upon their writings." Theodor W. Adorno, *Punctuation Marks, in* NOTES TO LITERATURE 94 (1991). Also germane is Michel de Certeau's discussion of quotation in terms of Friday's footprint on Crusoe's island, an encroachment or displacement on the latter's discursive turf that is both *"le texte propre"* and *"le discours du proprietaire."* Michel de Certeau, *Quotations of Voices* in THE PRACTICE OF EVERYDAY LIFE 155. Still more to the point to this study is ANTOINE COMPAGNON, LA SECONDE MAIN OU LE TRAVAIL DE LA CITATION (1979), which discusses the shift in the use of quotation in France (and the corresponding requirement of *"la perigraphie"*) as a kind hypostatized property dispensation that immobilizes the text. *See id.* at 349-356.

61 Mark Rose, *The Author in Court:* Pope v. Curll, 10 CARDOZO ARTS & ENT. L.J. 475 (1992).

62 For a survey of the complex history of copyright that involves repeated reconceptualizations of both 'work' and 'authorship,' see Peter Jaszi, *Towards a Theory of Copyright: The Metamorphoses of Authorship*, 1991 DUKE L.J. 455.

said to be doubly his and, therefore, to possess a double indemnity against preemption: hence the magnitude of Malcolm's injury to Masson in attributing to him not only words he did not speak, but derogatory words about himself he did not speak; hence, too, the atrocity of a juridical system that wrests self-condemnatory statements from a defendant. For the Fifth Amendment[63] (as well as its equivalents in common and state law) could be said to extend to the courts the proprietary sanctions represented by quotes on the page, with hugely heightened consequences to be sure. The prosecution is prohibited from forcing the accused to speak against himself, thereby preventing reversion to an early juridical system that allowed for, indeed depended upon, the separation of voice from agency. Quotes function as an ubiquitous caveat against prying words out of or putting words into the mouth of another, the objective of inquisitional torture. In writing, conventional punctuation suffices to caution against such appropriation; but in the courts where innocence and guilt are determined, the Constitution itself defends against it. It is, then, perfectly appropriate that the highest court in the land should trouble itself over minutiae like quotation marks. These grammatical ciphers support, however superficially, the Bill of Rights' protection of the individual, placing protective warranties around the individual's words, pervasive reminders integral to writing itself that words belong to their utterer. The Fifth Amendment protects that ownership precisely when an individual might be most pressured to relinquish it: even when bound "to tell the whole truth," a defendant is entitled to remain silent. The choice of what to say and what not to say abides with the speaker, even when under prosecution, assuring that speech remains under the defendant's control . . . as inalienably as life, liberty, and property—the other rights of the prosecuted safeguarded by the Fifth Amendment.[64]

IV

In the conclusion to *The Origins of the Fifth Amendment*, Leonard W. Levy endorses an earlier study of the Amendment which

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63 U.S. CONST. amend. V.

64 "Nor shall [any person] be compelled in a criminal case to be witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken . . . ." U.S. CONST. amend. V. Miranda v. Arizona, 384 U.S. 436 (1966), expanded Fifth Amendment protection during the trial stage of a prosecution to the earliest stage of a criminal action; in addition, *Miranda* specifies that a defendant must be informed upon arrest of his legal right to refuse to answer, *id.*, whereas the Fifth Amendment established only the defendant's right to invoke it.

stresses its importance in establishing the superior (indeed sovereign) claims of the individual over those of the state:

> [The state] has no right to compel the sovereign individual to surrender or impair his right of self-defense. . . . *Mea culpa* belongs to a man and his God. It is a plea that cannot be exacted from free men by human authority. To require it is to insist that the state is the superior to the individuals who compose it, instead of their instrument.[65]

But suppose the relation were precisely reversed: suppose the state sovereign and the individual subject to that sovereign. Suppose, in other words, an absolutist state prevailed rather than a liberal democracy. Would the sovereign then have a right to assert his authority, in this instance, to the end of compelling confession from accused subjects? However schematic, the reversal does enable us to look back to the period prior to the late eighteenth century. We have found that the modern use of quotations correlates with the U.S. Constitution's sanctioning of individual property. Might, then, the earlier use of quotes to sanction authorities be related to the Crown's prerogative to extend its power through its courts, even to the point of coercing voice? We have seen how the use of quotation marks to rope off statements coincides historically with the codification of a right against compulsory self-incrimination: both developments secure an individual's ownership over his words. Does the fact that such security was needed suggest an earlier distribution in which that ownership was maintained by another? In a period in which torture was not only legitimate but a part of the legal procedure itself, how could the state's or Crown's appropriation of voice be a crime? Did truth, wherever it resided, belong to the king, like the royal deer that ranged widely through other men's domains yet remained Caesar's property?

There may be no more awesome display of an absolutist state's power over its subjects than its violent confiscation of their voices. By inflicting pain to coerce confession, the state seizes the faculty associated with free will, the very site where agency is posited. As patristic exegetes pointed out, Genesis represented Creation as an act of speaking ("And God said, Let there be light") in order to establish that God created freely—of his own accord—and not by compulsion or necessity. Yet torture is designed to snap the connection between voice and will, to dis-

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[65] Abe Fortas, *The Fifth Amendment: Nemo Tenetur Prodere Seipsum*, 25 CLEVELAND BAR ASS'N J. 91 (1954), *quoted in* LEVY, *supra* note 50, at 431.

empower a prisoner's agency by abolishing his or her exercise of not only movement but also speech. Will perforce surrenders to pain its control over voice, abandoning it to the torturer's instruments, the instruments whose use up through the seventeenth century was considered a royal prerogative.[66]

Elaine Scarry, in her arresting analysis of torture in *The Body in Pain*, lists the tactics torturers used to take possession of the prisoner's voice, the final and most extreme of which results in a form of coerced self-condemnation "by temporarily breaking off the voice, making it their own, making it speak their words, making it cry out when they want it to cry, be silent when they want its silence, turning it on and off, using its sound to abuse the one whose voice it is."[67] In her account, it is the volition of the torturers rather than of the speaker that controls voice, *their* instruments of torture wielding *his* or *her* instrument of voice. The extremity of the dislocation is stressed when Scarry imagines the unimaginable, what consciousness would register if not lost to pain: "The sounds I am making no longer form my words but the words of another."[68] Torture, in her account, effects a sadistic redistribution of voice as the prisoner's loss becomes the torturers' gain: "while the prisoner has almost no voice . . . the torturer and the regime have doubled their voice since the prisoner is now speaking their words."[69] In torture, then, the prisoner is dispossessed of the very faculty associated with agency. And since agency is power, the dispossessed prisoner is also disempowered and, conversely, the possessing torturers empowered.

The language of possession invites the association of torture with not only the inhumane but the demonic—with the forces believed capable of taking over voice, similarly depleting human agency to augment their own dark powers. It is important, however, to keep torture in the realm of the human, and even, in respect to the greater portion of European history, the legal. Scarry, who focuses on present political rather than past juridical torture, insists that there can be only a fraudulent relation between the physical act of inflicting pain and the verbal act of exacting information. While interrogation is made to appear the motive for inflicting pain, it is in fact no more than a gratuitous

66 LANGBEIN, *supra* note 51, at 130-31.

67 ELAINE SCARRY, THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD 54 (1985).

68 *Id.* at 35.

69 *Id.* at 36.

flaunting of the torturers' power. Michel Foucault in *Discipline and Punish* provides a very different account of the practice on which justice depended for so many centuries, emphasizing its deep implication in the court's responsibility of finding and also publishing the truth.[70] In his description of what he terms the "classical penal tradition" that prevailed in early modern Europe, pain and interrogation, body and voice, power and knowledge are not so easily parted. The state deployed body and voice in order to establish both knowledge and power as the exclusive prerogatives of the sovereign and his delegated magistrates. The responses tortured out of prisoners by the juridical process itself yielded evidence contributing to the state's "production of truth," the truth of the crime and its retribution. The state required the confession of the accused, free or compelled, in order to verify its judgment, thereby establishing the univocality of its power. A protracted ritual of promulgation followed the sentence—in private among the magistrates and in public before a crowd—for purposes of confirming the "truth" of the sentence through multiple repetitions and reenactments of the crime. The court's verdict was borne out by the accused's confession, forced if necessary (and later repeated spontaneously), and its multiple reiterations during the procession to the scaffold through various rites (amendes honorables, penance at the scaffold) and signs (the placard born by the convicted, the display of the punished body, subsequent narrations and chronicling of the event). The self-condemnation of the accused was enlisted to authenticate the production of juridical truth: "Through the confession, the accused himself took part in the ritual of producing penal truth";[71] the accused was called upon "if necessary by the most violent persuasion—to play the role of voluntary partner in this procedure."[72]

English jurisprudence is the exception to Foucault's account, for, from as early as the fifteenth century, England prided itself in a jury system based on laws of evidence that required no coerced confessions. Records attest, however, that torture did occur, however unsystematically, in cases of the highest crimes in the

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[70] MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan trans., 1979). JOHN H. LANGBEIN & EDWARD PETERS, TORTURE 79-89 (1985) and Hanson, *supra* note 52, similarly argue for the torture's importance to the epistemology of the early modern period, i.e., its definition of what constitutes evidence and proof.

[71] *Id.* at 38.

[72] *Id.* at 39.

land: sedition and heresy.[73] In addition, there was one form of torture that the English *did* systematically apply, at the very threshold of criminal prosecution. Upon being arraigned, a prisoner was asked to enter a plea (of guilty or innocent) so that his trial could proceed; if he refused, he was tortured by the *peine forte et dure*. As late as 1769, Blackstone described the "cruel process" of "penance for standing mute":

> the prisoner shall be remanded to the prison from whence he came; and put into a low, dark chamber; and there be laid on his back, on the bare floor, naked, unles where decency forbids; that there be placed upon his body as great a weight of iron as he can bear, and more . . . .[74]

The torture, the pressing to death by the gradual loading of heavy weights on the body, was applied until the prisoner assented—or died. Like juridical coerced confession, this procedure attempted the same seizure of the prisoner's voice; in both cases, the state expropriated (or destroyed) the voice it needed in order to conduct its procedures, in this instance pressuring the body to release the consent of the accused. If a prisoner persisted in "standing mute" to the death, he avoided trial and conviction. As a result, he was exempted, not from death, but from the penalties a conviction would have brought upon his descendants, those through whom he lived on. By refusing trial and thereby avoiding conviction, he held on to both his property and his good name, avoiding the forfeiture of his lands and the attaint of his person or "corruption of blood" that barred his descendants from inheritance "even to the twentieth generation."[75] Withstanding the will of the state by withholding consent to trial, the suspect retained a will or testament of his own—the right to bequeath to his descendants an untainted name and intact property. *Peine forte et dure* enacts a contest between the Crown and the arraigned, specifically over voice: if the Crown succeeds in extorting it, a trial follows; if the arraigned succeeds in retaining it, his inheritance and name will pass successively to his descendants.

In addition to "penance for standing mute," England had

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[73] On the discrepancy in theory and practice on the issue of torture in England, see LANGBEIN, *supra* note 51, at 73-74 and Hanson, *supra* note 52, at 56-62.

[74] 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *322. Until 1772, a trial by jury could not proceed without the consent of the accused. LANGBEIN, *supra* note 51, at 75. In 1827, the refusal to plead was entered as a plea of not guilty. *See* LEVY, *supra* note 50, at 18.

[75] 4 BLACKSTONE, *supra* note 74, at *381.

another method of coercing words, not through instruments of torture but through a strategy of inquisition. While requiring no physical torture, the method exacted involuntary confession in cases of heresy and sedition through what was termed the oath *ex officio*. Instituted by the Crown in the ecclesiastical courts as an instrument for maintaining religious uniformity, the oath required the accused to swear to tell the truth before the inquisitorial process began, without knowing either the identity of his accusers or the nature of the accusation.[76] The procedure was calculated to result in self-condemnation whether the prosecuted refused to take the oath (a refusal interpreted as guilt) or whether he took it and was forced either to incriminate himself by telling the truth or else to perjure himself by lying. Like coerced confession and pressing to death, the *ex officio* accusation worked to induct the accused's voice into the juridical process.

The oath *ex officio* is of particular importance to our subject in that it was to protest this oath that the right against compulsory self-incrimination was urgently raised. Religious dissenters, the Puritans and particularly the Levellers, appealed to the common law principle "nemo tenetur seipsum prodere" ("no man is bound to accuse himself"), tracing the right as far back as the Magna Carta.[77] Levy is certainly correct in his *Origins of the Fifth Amendment* to discuss these sixteenth and seventeenth century appeals as precedents for the Fifth Amendment. It must be noted, however, that the right was not invoked in the name of individual sovereignty but, rather, in the name of religious faith.[78] Certain similarities dim a radical difference. Both the "nemo tenetur" and the Fifth Amendment claim a right to a private inner sanctum secure from state intervention. But that sanctum in the former case sheltered non-conformist faith, while in the latter it

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76 The procedure was used to prosecute Catholics, *cf.* Hanson, *supra* note 52, at 68-77, but also identified with Catholic prosecution of Protestants, as in the exceptionally popular JOHN FOXE, BOOK OF MARTYRS. *See* LEVY, *supra* note 50, at 79. Donna Hamilton discusses the relevance of the oath in relation to issues of privacy in SHAKESPEARE AND THE POLITICS OF PROTESTANT ENGLAND (forthcoming 1992). The oath was declared illegal in 1641 with the abolition of the ecclesiastical Court of High Commission. *See* LEVY, *supra* note 50, at 281-82.

77 *Id.* at 246-47. *See also* Levy, *supra* note 53.

78 Talmudic law has also been considered a precedent for the right against compulsory self-incrimination. *See generally* LEVY, *supra* note 50, at 433-41. But it appears to have forbidden such testimonies not out of respect for the rights of the accused, but rather, either because it deemed the accused incompetent to bear witness (as too much "his own relative," *id.* at 438) or because it considered no one to be entitled to dispose of what did not belong to him (while he could dispossess himself of the goods and estate which properly belonged to him, "his life is not his private property" to dispose). *Id.* at 439.

protected individual autonomy. In the earlier instance, heterodoxy claimed against orthodoxy the right to freedom of religion or conscience; in the latter, the individual asserted against government the right to self-defense. The distinction is crucial for the "nemo tenetur" was evoked to sanction not the personal sovereignty of the accused (his relation to himself, as it were) but rather what the accused believed to be transpersonal truth (his relation to God)—the truth of a dissident faith.

Even in regard to the clearest precedent for the Fifth Amendment, then, it is unclear that any special legal privilege shielded a subject's voice before the eighteenth century. Juridical torture, *peine forte et dure*, and the oath *ex officio* were all procedures by which the voice, through the instruments of torture or stratagems of inquisition, was legitimately seized by the state. The state, it appears, was entitled to demand and then coerce, ask and then take, the voice of its subjects, legitimately wresting voice from the subject's body in order to press it into the service of the body politic. Nor have all vestiges of this prerogative disappeared from our present court system. Indeed, the earlier coercive procedures might be seen as extreme versions of the swearing ceremony by which the court enlists the voices of all trial participants. The oath by which witnesses are sworn to tell the truth binds their voices to the objectives of justice, and any departures from that truth are penalized as perjury or contempt of court.

There is one extraordinary exception, however. By constitutional provision, witnesses and defendants are entitled to withhold speech in self-defense even when it blocks the interest of justice.[79] The Fifth Amendment offers indemnity from its own proceedings to a witness at risk of self-incrimination. The witness is entitled, by law, to withhold the evidence that it is the court's function to obtain—evidence, it might be added, of the most conclusive order. For unlike circumstantial evidence, a confession or self-accusation amounts to conviction. Ironically, to prevent the accused from self-accusation, the law legislates against itself, offering refuge to the very voice it would procure.[80]

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[79] In the interest of protecting its own proceedings, the court can grant a witness immunity, require testimony, and charge him or her with contempt of court for refusing to give it. Such a procedure, in the terms of this paper, looks like Indian-giving: the court gives a witness control over his voice through the Fifth Amendment and then takes it back.

[80] In his entry on the *Right Against Self-Incrimination*, Levy notes the possible tension between the claims of justice and of the defendant on this issue: "Law should encourage, not thwart, voluntary confessions" and "History surely exalts the right . . . .

Regardless of the court's objectives, voice remains the individual's domain, exclusively under his or her control—so exclusively that it complies with Blackstone's comprehensive definition of private property: "[Property is] that sole and despotic dominion which one man claims and exercises over the external things of the world in total exclusion of the right of any other individual in the universe."[81] Indeed, the right against self-incrimination is even more exclusive, for it excludes appropriation not only by "any other individual in the universe" but by any power whatsoever, including that of the state.

V

We have come a long way from the *Masson* rulings, having jumped centuries, continents, regimes, and disciplines. Yet always in sight has been the issue of voice. At a certain historical point, grammar and law track each other in placing sanctions on individual voice, as if to protect it from appropriations which were before then customary and legal. A transfer of property appears to have taken place: at one time the possession of cultural or political authority, voice later becomes the inalienable property of the autonomous individual. Quotation marks and the Fifth Amendment attend the transfer, offering voice asylum in writing on the page and in testifying at court respectively.

Having remarked this shift in proprietorship, we return to *Masson* with a new vantage. If quotations mark off the exclusive verbal property of another, would it not have been possible to consider a suit, over what does and does not belong in quotes, not as a libel case but as a property dispute, an intellectual property dispute? Encouraging the reclassification is the fact that copyright legislation privileging the author emerged at the same time as quotation marks privileging the utterer.[82] Copyright functions like quotation marks writ large to guarantee correct assignment and accurate reproduction. Furthermore, in copyright,

History does not, however, exalt the right against the claims of justice." LEVY, *supra* note 53, at 1576-77.

81 2 BLACKSTONE, *supra* note 74, at *2.

82 As Martha Woodmansee has demonstrated in relation to Germany, and Mark Rose has demonstrated in relation to England, it is in the last decades of the eighteenth century that the author becomes the legal proprietor of his work. Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the "Author,"* 17 EIGHTEENTH-CENTURY STUD. 425 (1984); Rose, *supra* note 59, at 51-85. For a discussion of quotation marks in the context of copyright, see DE GRAZIA, SHAKESPEARE VERBATIM, *supra* note 54, at 214-19. Both copyright and quotation are ascriptive practices that fasten the work to the author—a function crucial to the modern conception of authorship and the hermeneutic on which traditional literary criticism is based.

as well as in quoting, misattribution and misrepresentation constitute violations. In Blackstone's seminal formulation, the author has the exclusive "right to dispose of that identical work as he pleases, and any attempt to take it from him [to misattribute], or vary the disposition he has made of it [to misrepresent], is an invasion of his right of property."[83] When another takes credit for an author's work, it is *plagiarism*; when another's work is credited to an author, it is *forgery*.[84] If Malcolm had quoted Masson without crediting him, she would have been plagiarizing; when she misquoted him and credited him, she forged. Forgery would then be her "crime of writing," to borrow Susan Stewart's recent category.[85] Indeed the lower courts's defense of her misquotations as inferences or extrapolations drawn from what he did in fact say could be used to defend a forgerer: though the author (be it Shakespeare, Ossian or Hitler) *did not write* the counterfeited work, he *might have* (as correspondences and continuities with his authentic works would indicate).[86]

There may have been too many complications for the courts to have treated misquotation as an intellectual property violation rather than libel.[87] (To begin with, Masson never committed his

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[83] 2 BLACKSTONE, *supra* note 74, at *405.

[84] In conversation, Peter Jaszi has suggested an unusually apt analogy to the difference between plagiarism and forgery in the two categories of "reversed passing off": when a new product passes itself off as a patented one (e.g. a new soda bottled as Coke) or when a patented product passes itself off as a new one (e.g. Coke bottled as a new soda).

[85] SUSAN STEWART, CRIMES OF WRITING: PROBLEMS IN THE CONTAINMENT OF REPRESENTATION (1991).

[86] Both the district court and the court of appeals found the passages at issue nonactionable, not because Masson said them, but because taking into account what he *did* say, he *might* have said them: "In light of the many egotistical and boastful statements that Masson made in tape-recorded comments . . . ." Masson v. New Yorker Magazine, 686 F. Supp. 1396, 1406; "Given . . . the many provocative, bombastic statements indisputably made by Masson." Masson v. New Yorker Magazine, 895 F.2d 1535, 1541.

[87] Peter Jaszi has referred me to a possible precedent to *Masson* which was tried as a literary property violation, Hemingway v. Random House, Inc., 23 N.Y.2d 341, 244 N.E.2d 250, 296 N.Y.S.2d 771 (1968). The Hemingway Estate claimed that Hemingway's biography contained lengthy quotations his biographer noted and remembered from conversations with Hemingway that by common-law copyright belonged to the author (and his estate): "[H]is directly quoted comment, anecdote and opinion were [Hemingway's] 'literary creations', his 'literary property', and [the biographer] only performed the mechanics of recordation." *Id.* at 345, 244 N.E.2d at 253, 296 N.Y.S.2d at 776. The complaint was denied on the grounds that Hemingway in no way indicated "that he intended to mark off the utterance in question from the ordinary stream of speech, that he meant to adopt it as a unique statement and that he wished to exercise control over its publication." *Id.* at 349, 244 N.E.2d at 256, 296 N.Y.S.2d at 779. In other words, there are no conventions in conversation like those of writing to mark off private property; compare John Oswald's similar observation on musical performance: "Musical language has an extensive repertoire of punctuation devices but nothing equivalent to literature's "quotation marks," " quoted in Sanjek. John Oswald, *Bettered by the Borrower: The Ethics of Musical Debt*, WHOLE EARTH REV., Winter 1987, at 106, *quoted in*

comments to the tangible or fixed form required for copyright protection.[88]) For heuristic purposes, however, the possibility is worth entertaining, for it suggests still broader implications to the Supreme Court's decision. If misquotation is considered libel, the guidelines for quotation have important consequences for public figures and for the press, setting limits on how the latter can represent the former. Considered as intellectual property, however, their importance may bear on the principles of liberal democracy itself. For like any form of property arbitration, quoting involves drawing lines between *meum* and *suum*; between what belongs to Masson (his words) and what belongs to Malcolm (her words). Furthermore, the settlement they effect stakes out graphically not only one individual's claim against another's, but also any private discursive lot against the free and open public domain. The relation of quotations to copyright fully emerges here, for copyright arises precisely to mediate the conflicting claims between the individual (whose work needs protection in order to be profitable) and the public (which thrives on free access to discourse). In discussing how various kinds of "property in information" resolve tensions between the private and public, James Boyle has hailed copyright as "a *tour de force* of ideological mediation" because it deftly divides a work between the two contenders, offering *expression* to the private author and *ideas* to the public domain.[89] The same arbitration is maintained through quotation marks that close off the exclusive utterance while leaving open the common field of discourse. By insisting on the unique status of words within quotes, the Supreme Court has put linguistic property boundaries securely back in place—

David Sanjek, *"Don't Have to DJ No More": Sampling and the "Autonomous" Creator*, 10 CARDOZO ARTS & ENT. L.J. 607 (1992). In spoken presentation, "scare quotes" have been devised to supply this need.

88 The current copyright statute (17 U.S.C. §§ 101-810 (1988 & Supp. II)) vests copyright in eligible works the moment they are fixed in tangible form. The Copyright Act of 1976 extended tangibility, formerly limited to sheet music and scores, to include sound recording, but it was Malcolm who committed Masson's words to tangible form, on tape (later transcribed) and in notes (subsequently destroyed). Such a division of labor might require ownership to be divvied up as it is among song writers, performers, and technical producers in the case of recordings. On these issues, see JANE GAINES, CONTESTED CULTURE: THE IMAGE, THE VOICE, AND THE LAW (1991). Additional problems with charging Malcolm with intellectual property violation, briefly considered in *Hemingway*, 23 N.Y.2d at 341, 244 N.E.2d at 250, 296 N.Y.S.2d at 771, include undue restriction on freedoms of speech and press. *Hemingway* mentions, for example, the inhibiting effect protecting conversation as property would have on such historical and biographical works as Boswell's *Life of Johnson*. *Id.* at 347, 244 N.E.2d 255, 296 N.Y.S.2d 777-78. Another difficulty lies in discriminating between a self-sufficient (and original) contribution to a conversation from a responsive (and therefore derivative) one.

89 James Boyle, A Theory of Law and Information: Copyright, Spleens, Blackmail and Insider Trading (1991) (unpublished manuscript, on file with author).

assuring through graphic markers that what belongs to *him* remains distinct from what belongs to *her*, and that what belongs to *each* remains apart from what belongs to *everyone*—a conservative measure, to be sure, quite literally so.

And yet those first two court rulings, as we saw, came so close to disturbing this settlement, in effect preparing the way for the collapse between words inside and words outside quotation marks. If held to no stricter standards than unquoted words, quoted words might have lost their special status as accurate and authoritative utterances. No longer functioning as proprietary signs, they might have become superfluous ciphers—distracting page ornaments perhaps. Property divisions, then, would have ceased to be so clear-cut: one person's words would have run into another's, private plots and the public domain would have coalesced, and the page would have turned into an uncharted no-man's-land. The possibility of such a page brings to mind the question cited repeatedly in post-structuralism, appropriately without quote marks, unascribed, and in several variants: What does it matter who is speaking? We conventionally think that the origin of words is important and assign credit and blame accordingly. But post-structuralism does away with origins, positing all verbal formulations in the ubiquitous realm of the *always already*. Thus, writing can be nothing more than a tissue of quotations, a pastiche of passages possessing no authorial affiliation and therefore belonging to no one. To quote Roland Barthes (and advisedly): "The quotations from which a text is constructed are anonymous, irrecoverable and yet *already read*: they are quotations without quotation marks."[90] Needless to say, such a theory would pose radical problems for a regulatory system that protects original rather than derivative works.[91]

It would be bizarre to suggest that the decision of the California Court and Court of Appeals is even remotely, much less causally, connected to post-Heideggerian Continental theory. Yet a plausible link may be found in another more concrete area of contemporary activity: the new technologies of reproduction. Photography, tapes, videos, and xerography have blurred, if not dissolved, proprietary boundaries, allowing for the ready appro-

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90 ROLAND BARTHES, THE RUSTLE OF LANGUAGE 49 (Richard Howard trans., 1989). For an extraordinary book that might be considered a 406 page elaboration on, and demonstration of, this passage, see COMPAGNON, *supra* note 60. "Toute ecriture est glose et entreglose, toute enonciation repete. Telle est la premisse de ce livre, qu'il met a l'epreuve de la citation, la forme simple de la repetition, l'amorce du livre." *Id.* at 9.

91 *See* Woodmansee, supra note 82 (discussing how the Romantic construction of authorial originality justified the claim to property in an author's work).

priation of materials. These technologies have quite literally turned "borrowing" and "lifting" into an art, the Postmodernist aesthetic of eclecticism that makes no pretense of inventing or creating its components and instead unabashedly draws them from elsewhere. Indeed, the terms "borrowing" and "lifting" prove anachronistic here, belonging to an earlier Modernist aesthetic whose appropriations—whether quotations, allusions, or echoes—remained in some sense identifiable as such, if not acknowledging their original context at least bearing its recuperable traces. Fredric Jameson, in his formative discussion of Postmodernist art, substitutes for "quotation" terms of "incorporation" and even "cannibalism" to describe more accurately processes that absorb the very materials they compile—themselves originating, as it were, in the very materials of their own unoriginal constituents.[92] Pastiche, therefore, emerges as the "well-nigh universal practice today,"[93] a form of imitation which, unlike modernist parody, presupposes no model. In referring to the present age as "the culture of the simulacrum,"[94] Jameson makes assimilative imitations the defining symptom of the age, manifested first and foremost by an architecture that builds itself by pillaging past edifices, but also in films and in novels that constitute the present out of the past and in music that snatches at dead styles, or at what used to be termed "styles" before their sheer and absolute imitability called for their reclassification as codes.[95] The wide availability of instruments for reproducing images, sounds, and words—to consumers as well as producers of culture—raise tremendously complex issues of how to commodify products that are partially or entirely derivative of other products. In an age of mechanical and electronic reproduction, voice, like any other property, is subject to various appropriative tactics—modern forms of exaction and coercion—that raise in their own way questions of ownership. In the context of such technologies, the strict upholding of quotation marks might appear quaint and outmoded, an anxious gesture against an onrushing future.

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92 FREDRIC JAMESON, POSTMODERNISM OR, THE CULTURAL LOGIC OF LATE CAPITALISM (1991).

93 *Id.* at 16.

94 *Id.* at 18.

95 *Id.* at 15-17.