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Constitutional Law--Self-Censorship after Herbert v. Lando: The Need for Special Pre-Trial Procedure in Defamation Action

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NOTES

Constitutional Law—Self-Censorship After *Herbert v. Lando*: The Need for Special Pre-Trial Procedure in Defamation Action

In its landmark 1964 decision in *New York Times v. Sullivan*,[1] the Supreme Court found an inherent conflict between the protection of private reputational interests through the defamation action and the right to freedom of the press under the first amendment. Although it was settled that the first amendment did not protect false publications, the Court found that the fear of huge damage judgments under state defamation law caused potential defamation defendants to refrain from publishing statements they believed in good faith to be true. The Court refused to abolish defamation actions to prevent this self-censorship, but it also refused to ignore the infringement of the first amendment caused by the threat of such actions. To balance reputational and first amendment interests, the Court added subjective fault—knowing or reckless disregard of the truth—as a constitutionally required essential element of state defamation actions.[2]

Fifteen years later, in *Herbert v. Lando*,[3] the Supreme Court considered the conflict of reputational and first amendment interests inherent in pre-trial discovery requests precipitated by defamation actions. In *Herbert*, the United States Court of Appeals for the Second Circuit held that in a defamation action the first amendment requires an absolute privilege against discovery of a journalist's thoughts, opinions, conclusions, and editorial conversations concerning the allegedly defamatory publication.[4] Thus, the court deprived plaintiff of the most direct evidence of the journalist's subjective fault,[5] or reckless disregard

1. 376 U.S. 254 (1964).

2. *Id.* at 277-83.

3. 568 F.2d 974 (2d Cir. 1977), *rev'd*, 99 S. Ct. 1635 (1979). The decision is noted at 66 CAL. L. REV. 1127, 78 COLUM. L. REV. 448, 9 Cum. L. Rev. 277, 47 GEO. WASH. L. REV. 286, 73 NW. L. REV. 583, 13 TULSA L. REV. 837, 47 U.MO.-K.C.L. REV. 273, 31 VAND. L. REV. 375. *See* Bezanson, *Herbert v. Lando, Editorial Judgment and Freedom of the Press: An Essay*, 1978 U. ILL. L.F. 605.

4. 568 F.2d at 975.

5. In St. Amant v. Thompson, 390 U.S. 727 (1968), the United States Supreme Court defined the defamation fault standard in actions by public figures, *see* note 4 *infra*, as the defendant's "entertaining serious doubts as to the truth of his publication." *Id.* at 731. Thus, the defendant's thoughts and opinions are the most conclusive evidence on the issue of fault. Subjective fault in defamation actions is traditionally termed "actual malice." New York Times Co. v. Sullivan, 376

of the truth, which a public figure defamation plaintiff is constitutionally required to prove.[6] The court allowed plaintiff to discover only objective evidence of the journalist's awareness of falsity, from which plaintiff could build a circumstantial case.[7] On appeal, the United States Supreme Court reversed the Second Circuit and allowed complete discovery of defamation defendants within the traditional limits of the Federal Rules of Civil Procedure.[8] Because the Second Circuit privilege made defamation recovery unlikely, the Court found it inconsistent with the commitment to the vitality of the defamation action

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U.S. 254 (1964). Because "actual malice" commonly means ill will or spite, however, the term has caused significant confusion. Herbert v. Lando, 99 S. Ct. 1635, 1661 (1979) (Stewart, J., dissenting).

6. The Supreme Court in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), held that a public official must prove knowing or reckless disregard of the truth to prevail in a defamation action. The *Times* rule was extended to "public figures" in Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967). Plaintiff Herbert conceded his status as a public figure. Herbert v. Lando, 73 F.R.D. 387, 391 (1977), *rev'd*, 568 F.2d 974 (1977), *aff'd*, 99 S. Ct. 1635 (1979). In Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), the Court held that those who are not public figures must prove at least negligence to recover in a defamation action. In *Herbert*, the Court did not reach the question of editorial privilege in *Gertz* actions. 99 S. Ct. at 1651. Because evidence of the defendant's thoughts and opinions is not as crucial to a negligence case, *Herbert* might not have ruled out the Second Circuit's privilege or a similar first amendment protection in *Gertz* actions.

7. The Second Circuit said plaintiff

> has already discovered what [defendant] Lando knew, saw, said and wrote during his investigation. As we noted before, the deposition of Lando produced a massive transcript documenting in minute detail the course of Lando's research. The jury is free to infer from Lando's use and application of the extensive materials discovered, and, equally important, from the failure to heed certain contradictory information. If it chooses to do so . . . , it can find that Lando acted with actual malice or reckless disregard of the truth.

568 F.2d at 984.

By contrast, "direct discovery" is exemplified by the following questions cited by the Supreme Court in *Herbert*:

> Did you ever come to a conclusion that it was unnecessary to talk to Capt. Laurence Potter prior to the presentation of the program on February 4th?
>
> Did you ever come to the conclusion that you did not want to have a filmed interview with Sgt. Carmon for the program?
>
> When you prepared the final draft of the program to be aired, did you form any conclusion as to whether one of the matters presented by that program was Col. Herbert's view of the treatment of the Vietnamese?
>
> Do you have any recollection of discussing with anybody at CBS whether that sequence should be excluded from the program as broadcast?
>
> Prior to the publication of the Atlantic Monthly article, Mr. Lando, did you discuss that article or the preparation of that article with any representative of CBS?

99 S. Ct. at 1662 n.2 (Stewart, J. dissenting).

8. Herbert v. Lando, 99 S. Ct. 1635 (1979). The Court reiterated its commitment, expressed in Schlagenhauf v. Holder, 379 U.S. 104, 114-15 (1964) and Hickman v. Taylor, 329 U.S. 495, 501, 507 (1947), to a liberal construction of the Federal Rules of Civil Procedure pertaining to discovery. The Court noted, however, that the relevancy standard of Rule 26(b)(1) should be "firmly applied" and that district court powers to curtail abusive discovery should not be neglected. 99 S. Ct. at 1649; *see* FED. R. CIV. P. 26(c).

displayed in *New York Times v. Sullivan*.[9]

Although rejection of the Second Circuit privilege is consistent with *New York Times*, the failure of the Supreme Court to fashion another remedy for the first amendment chills caused by unfettered discovery clearly betrays the *New York Times* commitment to "uninhibited, robust and wide-open" debate.[10] *Herbert v. Lando* differs from *New York Times* only in that the self-censorship challenged in *Herbert* resulted from the threat of defamation discovery, while in *New York Times* self-censorship resulted from the threat of defamation judgments. As *New York Times* brought to light the substantive chill on first amendment rights resulting from strict liability, *Herbert* puts in issue the procedural chill resulting from unfettered discovery. Thus, adherence to the *New York Times* principle requires a remedy to dispel that procedural chill. As in *New York Times* that remedy cannot destroy protection of reputational interests but must nonetheless ensure the vigorous exercise of first amendent rights. This Note explores the need for a special pre-trial procedure that would balance conflicting reputational and first amendment interests in defamation actions and then outlines the mechanics of the procedure.

Plaintiff in *Herbert v. Lando*, Colonel Anthony Herbert, rose to national prominence[11] when, after being relieved of his duties in Vietnam, he publicly accused superior officers of covering up war crimes and atrocities he claimed to have witnessed in Vietnam and reported to the proper authorities.[12] In 1972, CBS aired a segment of its regular news program "60 Minutes" recounting the Herbert incident and challenging the veracity of Herbert's story.[13] Barry Lando produced and Mike Wallace narrated the show. Lando also published an article in

9. 376 U.S. 254 (1964).

10. 376 U.S. at 270.

11. Herbert's story fascinated an American public that was increasingly becoming disenchanted by the Viet Nam War. In July 1971, he was interviewed by Life Magazine; that September, James Wooten of the New York Times wrote an article favorable to Herbert entitled "How a Super-soldier was Fired from His Command." Interviews with television personality Dick Cavett followed which, according to Cavett, elicited a level of viewer response unmatched by any other single program. In October 1971, Congress became embroiled in the 'Herbert affair' when Rep. F. Edward Heber, Chairman of the Armed Services Committee, convinced the Army to remove Herbert's poor efficiency report from his military record.

568 F.2d at 981.

12. *Id.* at 980-81. Herbert was apparently dismissed because of his persistence in urging an investigation. Ultimately the investigation exonerated General Barnes, the brigade commander Herbert charged with ignoring his reports. *Id.*

13. The segment was entitled "The Selling of Colonel Herbert." *Id.* at 982.

Atlantic Monthly based on the information gathered for the show.[14]

Herbert brought a $44 million defamation action against Lando, Wallace, CBS, and *Atlantic Monthly* for damages to his reputation and to the value of his own account, *Soldier*.[15] Herbert alleged that "the program and the article maliciously portrayed him as a liar, one who had committed acts of brutality and atrocities in Viet Nam and an opportunist seeking to use the war crimes issue to cover his own alleged failures in the Army."[16]

Herbert engaged in massive pre-trial discovery. "Lando's deposition alone continued intermittently for over a year, filled 26 volumes containing nearly 3,000 pages and 240 exhibits."[17] Nonetheless, Lando refused to answer "a small number of questions relating to his beliefs, opinions, intent and conclusions in preparing the program," including those he previously expressed to Wallace.[18] The district court ordered Lando to answer the disputed questions because "the defendant's state of mind is of central importance to a proper resolution of the merits."[19]

On interlocutory review, a split panel of the Second Circuit reversed the district court order on the ground that it would chill the exercise of first amendment rights.[20] Because the defamation fault standard is defined as the defendant's "entertaining serious doubts as to the truth of his publication,"[21] the court reasoned that defendants would be foolish to discuss candidly the accuracy of the potential

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14. *Id.*

15. *Id.*

16. Herbert v. Lando, 73 F.R.D. 387, 391 (S.D.N.Y. 1977), *rev'd*, 568 F.2d 974 (1977), *aff'd*, 99 S. Ct. 1635 (1979).

17. 99 S. Ct. at 1649 n.25.

18. 568 F.2d at 982-83.

These assertedly objectionable inquiries can be grouped into five categories:

1. Lando's conclusions during his research and investigations regarding people or leads to be pursued, or not to be pursued, in connection with the '60 Minutes' segment and the Atlantic Monthly article;
2. Lando's conclusions about facts imparted by interviewees and his state of mind with respect to the veracity of persons interviewed;
3. The basis for conclusions where Lando testified that he did reach a conclusion concerning the veracity of persons, information or events;
4. Conversations between Lando and Wallace about matter to be included or excluded from the broadcast publication; and
5. Lando's intentions as manifested by his decision to include or exclude certain material.

Id.

19. 73 F.R.D. at 395.

20. 568 F.2d 984. Chief Judge Kaufman and Judge Oakes, writing separate opinions, formed the majority. Judge Meskill dissented.

21. St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

story.[22] The court considered the interchange of editorial judgment, however, to be the "*sine qua non* of responsible journalism," which should, therefore, be protected by an absolute privilege.[23] Second, the court found the prospect of extensive defamation discovery likely to discourage aggressive journalism: "Faced with the possibility of such an inquisition . . . [journalists] would be chilled in the very process of thought . . . . The tendency would be to follow the safe course of avoiding contention and controversy."[24] The court relied heavily on recent cases forbidding governmental interference with prepublication editorial decision-making.[25] The court found that by allowing defamation discovery, which is costly and intrusive, the state encourages self-censorship and accomplishes indirectly what it is not allowed to accomplish directly.[26]

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22. 568 F.2d at 980.

23. *Id.* While Judge Kaufman emphasized the accuracy of the editorial product, Judge Oakes offered yet another rationale. He noted that the free speech clause protects the expression—the product of the journalistic endeavor—but the free press clause also protects the institutional process whereby the press fulfills its informational and critical function. Judge Oakes relied primarily on Justice Stewart's seminal article, "*Or of the Press*," 26 HASTINGS L.J. 631 (1975):

> The structural or institutional aspect of the Free Press guarantee is not, as Justice Stewart points out, some filigree added at the final stages of the design by the architects of the Constitution. Rather it is at the core of the construct, vital to the tensile integrity of our government . . . . To the extent that the independent exercise of editorial functions is threatened by governmental action, the very foundations of the architectural masterpiece that is our form of government are shaken, the supporting columns weakened.

568 F.2d at 988. In dissent, Judge Meskill pointed out that the Supreme Court has called freedom of the press a fundamental personal right and thus considers the two clauses identical. 568 F.2d at 997. The Supreme Court did not broach the free press clause issue in *Herbert*. The Court's holding, however, showed that it would protect the editorial process only when absolutely necessary to protect the editorial product. *See, e.g.*, note 45 *infra*.

24. 568 F.2d at 984.

25. In Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), the Court unanimously held that the state could not force a newspaper to publish replies to its editorial expressions. In Columbia Broadcasting System v. Democratic Nat'l Comm., 412 U.S. 94 (1973), the Court had previously held that the first amendment does not require broadcasters to accept paid political advertising. The Court observed, "For better or worse, editing is what editors are for; and editing is selection and choice of material." *Id.* at 420-21. Thus, censorship is state interference in choice and selection of editorial material. *See* note 26 *infra*.

26. "It is clear . . . that newsgathering and dissemination can be subverted by indirect, as well as direct, restraints." 568 F.2d at 979. The Second Circuit's position was that self-censorship caused by state defamation actions is state interference with the editorial process. "The broad discovery order in this case operates *after* publication to deter free editorial choice concerning *subsequent* publications." *Id.* at 989 n.18 (Oakes, J., concurring) (emphasis in original).

The Second Circuit position is analagous to the holding of the Supreme Court in *New York Times* that strict liability defamation actions abridge the first amendment because they operate after publication to deter free editorial choice in subsequent publications. *See* notes 182 and accompanying text *supra*. The *Times* Court also reasoned that a state may not accomplish indirectly what it is forbidden to do directly. However, rather than beginning with the premise that governmental prior restraint is unconstitutional, *see* note 25 *supra*, the Court premised its holding on the presumed unconstitutionality of the Sedition Act of 1798, 1 Stat. 596, which forbade defa-

Unpersuaded by the Second Circuit's reasoning, the Supreme Court reversed. Writing for the majority of six,[27] Justice White gave three reasons for rejecting the absolute privilege delineated by the Second Circuit. First, he pointed out that *New York Times* and successive cases[28] had allowed free inquiry into the editorial process and, therefore, had impliedly held discovery of the editorial process to be consistent with the first amendment.[29] Rejecting the Second Circuit's holding that recent prior restraint cases implied the unconstitutionality of editorial discovery, Justice White wrote, "it is incredible to believe that the Court [in the prior restraint cases] silently effected a substantial contraction of the rights preserved to defamation plaintiff's in *Sullivan*, *Butts* and like cases."[30] Second, Justice White expressed concern that the boundaries of the Second Circuit privilege would be difficult to define. Such an amorphous concept, he feared, might be stretched to include virtually all discovery by the defamation plaintiff and destroy his chance of recovery.[31]

Justice White's primary criticism was that the privilege, even if narrowly defined, would be an overwhelming obstacle to recovery by the defamation plaintiff, whom he considered handicapped enough by having to prove, with convincing clarity,[32] knowing and reckless disregard of the truth. Although Justice White acknowledged the importance of the first amendment rights that are affected by a defamation action, he noted that "the individual's interest in his reputation is also a basic concern . . . . [and] it is plain enough that the suggested privilege for the editorial process would constitute a substantial interference with

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mation of the United States government and provided criminal penalties therefore. "What a state may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel." 376 U.S. at 273-79. Of course, self-censorship caused by threat of criminal penalty is an "indirect" governmental restraint as compared to the true "prior restraints" discussed at note 25 *supra*.

27. Justices Brennan, Marshall and Stewart dissented.

28. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

29. The Court stated: "In *Butts*, for example, it is evident from the record that the editorial process had been subjected to close examination and that direct as well as indirect evidence was relied on to prove that the defendant magazine had acted with actual malice." 99 S. Ct. at 1641. The Court also pointed out that *Gertz* was announced simultaneously with *Tornillo*, which was relied on by the Second Circuit, *see* note 25 *supra*, and "there was no hint that a companion case had narrowed the evidence available to a defamation plaintiff. Quite the opposite inference is to be drawn from the *Gertz* opinion, since it, like prior First Amendment libel cases, recited without criticism the facts of record indicating that the state of mind of the editor had been placed at issue." 99 S. Ct. at 1645.

30. 99 S. Ct. at 1645; *see* note 29 *supra*.

31. 99 S. Ct. at 1646.

32. New York Times Co. v. Sullivan, 376 U.S. 254, 285-86 (1964).

the ability of the defamation plaintiff to establish the ingredients of malice [subjective fault] as required by *New York Times*."[33] Thus, Justice White apparently embraced the trial court's position that if the "plaintiff is denied discovery into areas which in the nature of the case lie solely with the defendant, then the law in effect provides an arras behind which malicious publication may go undetected and unpunished."[34]

Justice White did not consider the two "chills" found by the Second Circuit to be worthy of a remedy. Although he conceded the Second Circuit's correlation of editorial interchange and accurate news accounts, he did not concede that discovery of editorial conversation would decrease accuracy. Rather, he felt that a strong defamation action enhanced by plaintiff's access to editorial conversation would ensure accuracy. "[G]iven exposure to liability when there is knowing or reckless error, there is even more reason to resort to prepublication precautions, such as frank interchange of fact and opinion."[35]

In response to the Second Circuit's finding that defamation discovery forces journalists to avoid contention and controversy, Justice White found that direct discovery of subjective fault was no more chilling than indirect discovery.

> [O]ur cases necessarily contemplate examination of the editorial process to prove the necessary awareness of probable falsehood, and if indirect proof of this element does not stifle truthful publication and is consistent with the First Amendment, as respondents seem to concede, we do not understand how direct inquiry with respect to the ultimate issue would be substantially more suspect.[36]

Further, said Justice White, even if a general discovery chill were established, it would be the result of discovery abuse "not peculiar to the libel and slander area."[37] Such a chill could be remedied either by "major changes in the present rules of civil procedure which are beyond the power of the judiciary to effect," or by "complete immunity from liability [for] defamation,"[38] a position rejected in *New York*

33. 99 S. Ct. at 1645-46. The Court was so loath to infringe further on reputational interests that it stated that it would put additional burdens on the defamation plaintiff only if a "clear and convincing case were made." *Id.* at 1646. Even though "it may be that plaintiffs will rarely be successful in proving awareness of falsehood from the mouth of the defendant himself," *id.*, the Court believed the negative impact on reputational interests would not be outweighed by the positive impact on first amendment interests afforded by the privilege.

34. 73 F.R.D. at 394.

35. 99 S. Ct. at 1648.

36. *Id.* at 1647.

37. *Id.* at 1649.

38. *Id.* Justice Powell, concurring, and Justices Marshall and Stewart in dissent offered self-

Times. Simply stated, Justice White's analysis was that in defamation actions such as *Herbert* there is no first amendment chill at all, or in the alternative, there is a chill irremediable in defamation actions alone. The absolute privilege accorded defendants in such actions by the Second Circuit, therefore, is either an unnecessary remedy or an inadequate one for an imperfection in our system of civil procedure.

The Supreme Court's rejection in *Herbert* of the absolute editorial privilege is merely the logical result of the *New York Times* decision to preserve the defamation action as a protector of the individual's interest in his reputation. In *New York Times*, concurring Justices Black, Goldberg, and Douglas[39] argued strongly that public officials should have no recourse to defamation actions, except to vindicate themselves from attacks related solely to their private affairs, because the framers of the first amendment conceived of the Fourth Estate as a check on the other three.[40] Public officials accept this unfettered criticism as a condition of the office.[41] Moreover, public officials, as newsmakers, have access to the news media for self-help.[42] Implicit in the concurring justices' argument was the assumption that the national interest in journalistic criticism of government outweighs the interests of public officials in their reputations. In allowing a defamation action, however,

censorship remedies between these two extremes. Powell wrote "to emphasize the additional point that, in supervising discovery in a libel suit by a public figure, a district court has a duty to consider First Amendment interests as well as the private interests of the plaintiffs." *Id.* at 1650. Because of the "widespread abuse of discovery," *id.* at 1650, Powell believed that "when a discovery demand arguably impinges on First Amendment rights a district court should measure the degree of relevance required in light of both the private needs of the parties and the public concerns implicated." *Id.* at 1651. Justice Marshall would have required, "to protect the press from unnecessarily protracted or tangential inquiry . . . , a strict standard of relevance." To accomplish "some constraints on roving discovery," Marshall would have held that "the broad discovery principles . . . are inapposite in defamation cases." *Id.* at 1664-65. Justice Stewart would have lessened the discovery burden on the plaintiff by holding that evidence sought to show defendant's motivation or reasons for publishing is irrelevant. *Id.* at 1661.

39. Justices Black and Goldberg wrote concurring opinions, and Justice Douglas joined in both. 376 U.S. at 293-305.

40. *Id.* at 295-97, 304. None of the Justices believed the subjective fault standard would allow the vigorous criticism guaranteed by the first amendment. Calling the Court's holding a "stopgap measure," *id.* at 295, Justice Black wrote that

> "Malice," even as defined by the Court, is an elusive, abstract concept, hard to prove and hard to disprove. The requirement that malice be proved provides at best an evanescent protection for the right critically to discuss public affairs and certainly does not measure up to the sturdy safeguard embodied in the First Amendment.

Id. at 293. Justice Goldberg added, "If liability can attach to political criticism because it damages the reputation of a public official as a public official, then no critical citizen can safely utter anything but faint praise against the government or its officials." *Id.* at 304.

41. *Id.* at 296 (Black, J., concurring).

42. *Id.* at 304-05 (Goldberg, J., concurring).

the *New York Times* majority refused to sacrifice the reputations of public officials and instead compromised first amendment rights.

In *Herbert*, the Court reasoned that if the defamation action is to be a potent protector of reputational interests it must offer a chance for recovery sufficient to entice plaintiffs to use it. Although it is unclear just how much an absolute privilege diminishes recovery chances,[43] it is clear that an absolute privilege would make the defamation action unattractive to a potential plaintiff. As Justice Brennan pointed out in his dissent in *Herbert*, "It would be anomalous to turn substantive liability on a journalist's subjective attitude and at the same time to shield from disclosure the most direct evidence of that attitude."[44]

The Supreme Court's refusal to remedy the chill on editorial conversation found by the Second Circuit in *Herbert* is also consistent with the *New York Times* commitment to the vitality of the defamation action. Given a choice between promoting accuracy of publication either by privileging a defendant's editorial conversations or by arming a plaintiff with evidence from editorial interchange, the Court chose the latter. The Court was not concerned with the effect of its choice on the editorial product because it assumed that the accuracy of the editorial product would be the same either way.[45] Even if candid interchange is curbed, a strong defamation action remains a powerful incentive for journalists to find other ways to ensure accuracy.[46]

While the *Herbert* Court's treatment of the absolute privilege and the editorial conversation chill is at least consistent with *New York Times*, its analysis of the first amendment chill caused by the discovery

43. The majority admitted that the plaintiff might prove "awareness of falsehood from the mouth of the defendant himself" only on rare occasions. 99 S. Ct. at 1646.

44. *Id.* at 1657.

45. The court's handling of the editorial conversation chill is a prime example of the importance of the debate, *see* note 23 *supra*, over the meaning of the free press clause. If the free press clause protects the editorial process without regard to an analysis of the effect an intrusion would have on the editorial product, then the inhibition of editorial conversation violates the first amendment per se.

46. Justice Brennan called this a "curious observation," 99 S. Ct. at 1659, and added, "Because such 'prepublication precautions' will often prove to be extraordinarily damaging evidence in libel actions, I cannot so blithely assume such 'precautions' will be instituted, or that such 'frank interchange' as now exists is not impaired by its potential exposure in such actions." *Id.* Doubting the majority's premise, both Brennan and Marshall argued that editorial conversations deserve a privilege analogous to executive privilege. *Id.* at 1658, 1666. Brennan would have allowed a qualified privilege, *id.* at 1660, while Marshall argued that only an absolute privilege would be effective, *id.* at 1666.

Beyond the question of accuracy, a rule that forces journalists to testify against each other might well be a disincentive to their pursuing controversial cases that might put them in this dilemma. The resulting self-censorship is similar to that caused by other potential costs of discovery such as time and money. *See* text accompanying notes 49-54 *infra*.

process is not. The *New York Times* Court held strict liability defamation actions unconstitutional because they tended to cause self-censorship of the truth.[47] The gravamen of the Second Circuit's rationale in *Herbert* was that the prospect of abusive defamation discovery tends to cause self-censorship of the truth.[48] As one commentator has put it, "The trouble with the *Times* privilege is that it operates at the wrong end of the litigation. In order to effectively prevent self-censorship, it would have to operate at the beginning, protecting the press not only from the threat of eventual liability, but also from expensive litigation."[49]

Self-censorship is produced by the journalist's fear of two related but distinct costs of defamation discovery—time and money. As evidenced by Lando's lengthy deposition,[50] the journalist's personal involvement in defamation discovery can be quite substantial. A journalist contemplating publication of a controversial story must consider the time that litigation may take away from the advancement of his career through the pursuit of other stories. If the journalist is self-employed or his employer cannot or will not pay his salary while he appears in court, his livelihood is jeopardized. Finally, legal fees and other pre-trial litigation costs raise the ante for the enterprising journalist or news medium that prints a controversial story.[51]

The costly nature of defamation discovery allows the plaintiff with a spurious claim to punish the journalist and news medium that criticizes him.[52] Self-censorship is particularly likely in the case of the

47. *See* notes 1 & 2 and accompanying text *supra.*

48. *See* notes 20-26 and accompanying text *supra.*

49. Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422, 437 (1975). The "full extent [of self-censorship] is impossible to determine. Much of it is inherently unmeasurable; it occurs whenever a reporter or editor omits a word, a passage, or an entire story, not for journalistic reasons but because of the possible legal implications." *Id.* at 430-31.

50. *See* text accompanying note 17 *supra.*

51. The cost of defending a full-fledged libel suit probably begins at about $20,000 and can run much higher; the successful defense of Rosenbloom v. Metromedia, Inc. is reported to have cost nearly $100,000. . . . It is the magnitude of this financial burden, more than any other factor, that makes libel a threat to the press today.

Anderson, *supra* note 49, at 435-36. The courts have taken notice of the threat of litigation costs to the first amendment. In Time, Inc. v. McLaney, 406 F.2d 565, 566 (5th Cir.), *cert. denied*, 395 U.S. 922 (1969), the court recognized that "a libel suit might necessitate long and expensive trial proceedings, which, if not really warranted, [would have a] chilling effect."

52. "[P]otential libel plaintiffs are motivated by something more than a rational calculus of their chances of recovery; believing they have been wronged, they seek to clear their names and perhaps to retaliate, and they may be able to accomplish those objectives even if they fail to collect damages." Anderson, *supra* note 49, at 435. Of course, harassment suits are not necessarily irrationally motivated. A plaintiff could employ harassment as a valuable deterrent to future criticisms. In Washington Post Co. v. Keogh, 365 F.2d 965 (D.C. Cir. 1966), the court recognized the

small publisher who would criticize the well-heeled public figure, who in turn can use litigation costs to whip the publisher into line. Recently, [MORE] magazine, a small opinion journal, reported that it had deleted much controversial material from an article for fear of litigation costs. Counsel for the magazine advised that, although [MORE] would likely prevail on the merits, the costs of a suit would bankrupt the magazine.[53] Although financial ramifications are a lesser influence when the journalist making the decision works for a prosperous corporate employer, the journalist will remain tempted to avoid the tremendous personal involvement inherent in defamation discovery. Both in terms of his personal development and the optimal use of his time for his employer, pursuit of the story less likely to generate litigation can be the journalist's more rational choice.[54]

The *Herbert* Court, however, implicitly denied that a first amendment chill analagous to the one prohibited in *New York Times* was in issue when it said, "if inquiry into editorial conclusions threatens the suppression not only of information known or strongly suspected to be unreliable but also of truthful information, the issue would be quite different."[55] The Court avoided the issue by reasoning that direct discovery of subjective fault—questioning what the defendant thought—is no worse than indirect discovery of subjective fault—questioning what the defendant did in preparing the story.[56] Both forms of discovery, however, provide opportunities for harrassment. While direct discovery entails inquiry into the journalist's "beliefs, opinions, intent and

threat of harassment suits. "For the stake here, if harassment succeeds, is free debate. . . . Unless persons, including newspapers, desiring to exercise their First Amendment rights are assured freedom from the harassment of lawsuits, they will tend to become self-censors." *Id.* at 968. Granting summary judgment to defendant, the court in Yiamouyiannis v. Consumers Union, [1979] 5 MEDIA L. REP. 1174 (B.N.A.) (S.D.N.Y. May 30, 1979), characterized plaintiff's motive as harassment. "In light of the clear and weighty precedent rejecting such an approach, . . . the suggestion is strong that plaintiff's object in bringing this action is to use this court to discourage the publication of opposing views." *Id.* at 1175.

53. Anderson, *supra* note 49, at 431 (citing Hume, *The Mayor, the Times, and the Lawyers*, [MORE], August 1974, at 17).

54. Richard Salant, then President of CBS News, expressed these concerns in reaction to the *Herbert* decision. *The Mind of a Journalist*, TIME, April 30, 1979, at 53-54. These disincentives are effective because "[t]he press has virtually no economic incentive to publish anything that might lead to a libel suit." Anderson, *supra* note 49, at 433.

55. 99 S. Ct. at 1647.

56. Since the defendants neither challenged indirect discovery nor offered a compelling distinction between direct and indirect discovery, the Court considered their position inherently flawed. *See* text accompanying note 36 *supra*. Despite the defendants' tactical decision not to challenge indirect discovery, however, the Second Circuit position clearly implicates all discovery of subjective fault.

conclusions in preparing the program,"[57] indirect discovery requires painstaking scrutiny[58] of each step in the preparation of the program and thus demands from the defendant journalist considerable time, energy, and finances.[59] Nonetheless, the Court refused to confront the important question whether indirect discovery chills the exercise of first amendment rights.

The Court also maintained that, even assuming the existence of some first amendment chill at the discovery stage, there is no effective method for countering that chill short of abolishing the defamation action—a course rejected in *New York Times*—or making a major procedural reform.[60] A special procedure for defamation discovery, however, can be fashioned to protect first amendment interests without harming reputational interests and without radically altering the structure of civil litigation. First, defamation discovery should be bifurcated. Upon stating a claim for relief, a plaintiff should be allowed only that discovery necessary to establish defamatory falsehood.[61] During this first round of discovery, a plaintiff should be allowed to discover only objective evidence on the issue of defamatory falsehood; he should not be allowed to canvass a defendant's thoughts, opinions, or conclusions.[62] Furthermore, a plaintiff should not, as a general rule, be allowed to depose a defendant journalist.[63] After this first round of discovery, a plaintiff should be required to build a prima facie case on the issue of defamatory falsehood before he is allowed plenary discovery on the issue of subjective fault.

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57. 568 F.2d at 982-83.

58. *See* note 7 *supra.*

59. *See e.g.*, text accompanying note 18 *supra.*

60. 99 S. Ct. at 1649. Because the first amendment chill is the result of an imperfection in our system of civil procedure, the Court reasoned that it should be remedied by a major procedural reform. *Id.* There are two reasons, however, for creating a special procedure to remedy the first amendment chill. First, a major procedural reform might take many years. Something should be done to protect the exercise of first amendment rights from mushrooming discovery in the long interim period. Second, efforts to counter the first amendment chill should provide healthy experimentation with the problem of discovery abuse. Techniques successful in protecting the defamation defendant might find more general application later.

61. To recover, the plaintiff must show that the defendant published a defamatory falsehood concerning the plaintiff. RESTATEMENT (SECOND) OF TORTS §§ 558, 613 (1977); *see* note 69 *infra.*

62. A limitation on the term "objective evidence" is necessary because the defendant's thoughts and opinions are relevant to the question of falsity under FED. R. EVID. 401 and admissible under FED. R. EVID. 701.

63. Despite the inadmissibility of the defendant's opinions on the issue of falsity, *see id.*, plaintiffs' attorneys might still depose journalists to examine them about the facts that they uncovered. Allowing such examinations is an invitation to the time-consuming "inquisitions" decried by the Second Circuit. *See* text accompanying note 24 *supra.* The potential for harassment in such examinations far exceeds their probative value. *See* notes 66 & 67 and accompanying text *infra.*

The suggested procedure[64] eliminates the two major drawbacks of

64. In his *Herbert* dissent, Justice Brennan suggested that a plaintiff be required to make a prima facie showing of defamatory falsehood before he discovers any editorial conversations. Justice Brennan was primarily concerned with maintaining an atmosphere conducive to a sound editorial process and accurate journalism. *See* note 46 *supra*. The procedure proposed in this Note accomplishes Brennan's goals, but goes further to prevent self-censorship caused by the threat of extensive discovery. In response to Justice Brennan's suggestion, the Court ruled out two possible procedural changes. First, the Court considered Brennan's suggestion in its most extreme application—bifurcated trial—and concluded, apparently on judicial notice, that such a procedure would be too inefficient. "If this suggestion contemplates a bifurcated trial, first on falsity and then on culpability and injury, we decline to subject libel trials to such burdensome complications and intolerable delay." 99 S. Ct. at 1648 n.23. Next, the court treated Brennan's suggestion in its most nominal manifestation—a mere repetition of assertion made in the complaint:

> On the other hand, if, as seems more likely, the prima facie showing does not contemplate a mini-trial on falsity, no resolution of conflicting evidence on this issue, but only a credible assertion by the plaintiff, it smacks of a requirement that could be satisfied by an affidavit or a simple verification of the pleadings. We are reluctant to imbed this formalism on the Constitution.

Id. The majority, however, misread Justice Brennan's dissent. Brennan apparently contemplated a scheme somewhere between the poles of Justice White's *reductio ad absurdum*. He clearly implied that a plaintiff would have to submit evidence to the judge—more than an affidavit or a verification—when he said "discovery should be adequate to acquire the relevant evidence of falsehood" to make the prima facie showing. 99 S. Ct. at 1660. Finally, as the procedure proposed here shows, Brennan's suggestion does not necessarily lead to bifurcated trial. Justice Brennan's suggestion inspired The Radio and Television News Directors Association to submit to the Federal Judicial Conference an amendment to the Federal Rules of Civil Procedure. The text of that amendment, which would establish a procedure similar to that developed in this Note, was submitted November 29, 1979 as follows:

PROPOSED AMENDMENTS TO THE FEDERAL RULES
OF CIVIL PROCEDURE AND THE FEDERAL RULES OF EVIDENCE

*Federal Rules of Civil Procedure**

Rule 26

* * *

(g) *Defamation and Privacy Cases.* (1) Prior to the commencement of discovery in any case in which the plaintiff seeks to inquire into matters relevant to the element of "actual malice" in a defamtion or privacy case, the plaintiff shall so inform the court prior to the commencement of any discovery, and the court shall direct the attorneys for the parties to appear before it for an initial conference on the subject of discovery. Before the conference is convened, the attorney for each party shall file and serve upon the attorneys for the other parties a discovery proposal containing:

(a) A specific statement of the issues presented by the case as they then appear;

(b) A proposed plan and schedule of discovery consistent with Rule 26(g)(2); and

(c) Any additional proposed limitations or other orders with respect to discovery.

Following the discovery conference, the court shall issue an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any; and determining such other matters, including the allocation of expenses, as are necessary for the prompt management of discovery in the action.

(2) Unless the defendant agrees to a plaintiff's request for discovery on the issue of actual

* If the proposed Rule 26(f) is not finally adopted, the following proposed Rule 26(g) would be redesignated Rule 26(f) and the reference therein to Rule 26(g)(2) would be changed to rule 26(f)(2). *See* Proposed Amendments, 80 F.R.D. 323, 330-32 (1979), recommended to the Supreme Court by the Judicial Conference of the United States on September 20, 1979.

defamation discovery. First, the requirement of a prima facie showing screens out litigants with spurious claims before they have the opportunity to run up costs.[65] Second, the procedure minimizes the involvement of journalists in defamation discovery. If a plaintiff does not make a prima facie showing of defamatory falsehood, he cannot engage in the painstaking process of discovering the entire editorial process step by step. Furthermore, the objective nature of the first round of discovery makes depositions generally unnecessary. Unlike the subjective issues inherent in a defamation action, the objective issues do not require inquiry into facts peculiarly within the knowledge of a defendant. As a result, a plaintiff's need for deposing a defamation defendant on the objective issues is far less pressing than the need for such a deposition on the subjective issues that concerned the court in *Herbert*. There will be times, however, that a defamation defendant alone has reasonable access to the evidence necessary for the plaintiff's case on even the objective issues. Such legitimate needs can be met through the use of interrogatories and documentary discovery.[66] Given the objective nature of the inquiry, the advantages of direct examination over less personal forms of discovery generally would not merit the personal involvement of the defendant at this early stage.[67] Thus, depositions can justifiably be denied as a general rule, making it impossible for

malice or the defendant requests discovery on that issue, all discovery shall initially be limited to material relevant to issues other than actual malice. Following completion of such discovery and upon request by the plaintiff, the court shall evaluate the material adduced through discovery and any other material in the possession of the plaintiff. If that material would be sufficient, if presented at trial, to constitute prima facie evidence of all elements of a cause of action, except the element of actual malice, the court shall permit further discovery upon the issue of actual malice concerning the defendant's state of mind and/or the editorial process leading to the publication at issue, so long as the material sought is not otherwise privileged.

65. *See* note 51 *supra*.

66. The documents contemplated here are not a journalist's work product, which would be evidence of subjective fault, but rather documents bearing on the issue of falsity—for instance, the diary of a third party that implicates the defendant in the activity and that inspired the allegedly defamatory publication. Of course, it is questionable whether a journalist's work product should be discoverable even on the issue of subjective fault. Because interrogatories and document requests can also be used to harrass, the court should allow them only when the plaintiff has no other reasonable way of obtaining the information.

67. "The greatest advantage that an oral deposition has over other methods of discovery is the flexibility it affords in probing a witness by requiring immediate, on-the-spot answers to oral questions. . . . The greatest disadvantage of the oral deposition is the expense." F. JAMES & CO. HAZARD, CIVIL PROCEDURE § 6.3 (2d ed. 1977). When the defendant does not have peculiar knowledge of the facts, the costs of the oral deposition on the objective issues clearly outweigh the benefits in a first amendment case. Although a defendant is always loath to help a plaintiff build his case, the incentive to prevaricate or obfuscate is virtually removed when the defendant knows the plaintiff can prove the facts sought by some other means. The potential for a prejury conviction or severely damaged credibility at trial is sufficient to ensure the accuracy of forms of discovery other than oral depositions. *See* text accompanying note 75 *infra*.

plaintiffs with spurious claims to harass journalists by prying unnecessarily into the news-gathering process.

The proposed procedure also satisfies the three criteria applied by the *Herbert* Court in rejecting the absolute privilege—sureness of administration, compatibility with the vitality of the defamation action, and precedential support.[68] First, the procedure is neither unworkably vague nor too difficult to implement. The component parts—bifurcation of discovery, summary judgment practice, and the directed verdict standard— are all in use already. Second, the procedure does not significantly threaten the ability of the good faith defamation plaintiff to win a judgment. Unlike the absolute privilege, the procedure does not rob the plaintiff of any evidence crucial to his case. Also, as Justice Brennan pointed out in his dissent in *Herbert*, "Requiring a public figure plaintiff to make a prima facie showing of defamatory falsehood will not constitute an undue burden, since he must eventually demonstrate these elements as part of his case-in-chief."[69] Finally, there is significant precedent supporting the validity of the proposed procedure. Bifurcation of discovery, which is within the discretion of the trial judge to grant,[70] has been employed to protect defendants from abusive discovery even when no constitutionally favored activity is implicated.[71] The suggested procedural change would merely make bifurcation available to the defamation defendant as a matter of law.

Use of the directed verdict standard of a prima facie showing in the summary proceeding that is the prerequisite of further discovery in the proposed bifurcated process is consistent with the summary judgment burden placed on the defamation plaintiff by leading federal circuits. Recognizing the first amendment chills caused by extensive discovery and harrassment suits, federal courts have reflexively increased the summary judgment burden on the plaintiff.[72] The sug-

68. *See* text accompanying notes 28-33 *supra*.

69. 99 S. Ct. at 1660 (Brennan, J. dissenting). The Supreme Court has not explicitly shifted the burden of proving falsity to the plaintiff, Cox Broadcasting Co. v. Cohn, 420 U.S. 469 (1975) (reserving the question), but the practical effect of requiring the plaintiff to prove subjective fault is that he must also show falsity. RESTATEMENT (SECOND) OF TORTS § 613, comment j (1977).

70. Justice Powell recognized bifurcation of discovery as a possible remedy in his concurrence. "In some instances it might be appropriate for the district court to delay enforcing a discovery demand, in the hope that the resolution of issues through summary judgment or other developments in discovery might reduce the need for material demanded." 99 S. Ct. at 1651 n.4.

71. *E.g.*, River Plate Corp. v. Forestal Land, Timber & Ry. Co., 185 F. Supp. 832 (S.D.N.Y. 1960).

72. Traditional summary judgment doctrine requires the moving party, even if he does not have the trial proof burden, to prove that he could win a directed verdict at trial. *See* FED. R. CIV. P. 56(c); C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: *Civil* § 2713 (1973).

gested procedure, however, is a refinement of the use of summary disposition at the pretrial stage as a first amendment safeguard. The Supreme Court recently commented that the routine granting of summary judgment against the defamation plaintiff may be inappropriate because the issue of subjective fault needs full adversarial treatment at trial.[73] The Court's concerns are apparently the same ones that have caused it to caution against summary judgment in antitrust conspiracy actions. Considering such an action in *Poller v. Columbia Broadcasting System, Inc.*,[74] the Court said:

> We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised.[75]

The proposed procedure avoids these problems because disposition of objective issues does not depend on evidence peculiarly within the knowledge of the defendant.[76]

Thus, the moving defendant must prove that no reasonable person could find in favor of the plaintiff's claim, and the plaintiff need make no showing at all until the defendant discharges his burden. In first amendment cases, however, the trend in the federal courts has been to require some showing on the part of the non-moving plaintiff even though the defendant does not discharge his heavy burden. C. Wright & A. Miller, *supra*, § 2730. Some leading circuits have shifted the burden to the non-moving plaintiff to prove he could pass a directed verdict at trial. In Wasserman v. Time, Inc., 424 F.2d 920 (D.C. Cir.), *cert. denied*, 398 U.S. 940 (1970). Judge Wright explained in a concurrence:

> In my judgment New York Times Co. v. Sullivan makes actual malice a constitutional issue to be decided in the first instance by the trial judge applying the *Times* test of actual knowledge or reckless disregard of the truth. Unless the court finds, on the basis of pretrial affidavits, depositions, or other documentary evidence, that the plaintiff can prove actual malice in the *Times* sense, it should grant summary judgment for the defendant.

Id. at 922 (Wright, J., concurring) (citations omitted). In Yiamouyiannis v. Consumers Union, [1979] 5 MEDIA L. REP. 1174 (BNA) (S.D.N.Y. May 30, 1979), the court said, "On these motions, the burden is squarely on plaintiff, an admitted public figure, to establish, by clear and convincing evidence, at least a genuine issue of fact as to whether the articles were published with 'actual malice' within the meaning of *New York Times Co. v. Sullivan*." *Id.* The purpose for the shift of the burden is discussed at note 52 *supra*. Placing the burden of making a prima facie showing on the non-moving plaintiff merely brings summary judgment burdens into line with trial proof burdens. In his analysis of the allocation of summary judgment burdens, Professor Louis argues that summary judgment burdens should be consistent with trial proof burdens in all civil actions regardless of first amendment implications. Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 YALE L.J. 745 (1974).

73. Hutchinson v. Proxmire, 99 S. Ct. 2675, 2680 n.9 (1979).

74. 368 U.S. 464 (1962).

75. *Id.* at 473.

76. Differentiation between the treatment of subjective and objective issues on a motion for summary judgment is generally accepted. "[T]he motion often is granted when the case can be resolved on issues that do not involve subjective states of mind." C. WRIGHT & A. MILLER, *supra* note 72, § 2730 (1977). The writer does not mean to imply that he agrees with Hutchinson v.

Extensive defamation discovery, sanctioned by the Supreme Court in *Herbert v. Lando*, causes self-censorship analogous to that which the Court had previously held unconstitutional in *New York Times*. As in *New York Times*, a remedy should be fashioned to counteract such self-censorship. The remedy may be tailored by integrating familiar concepts of civil procedure—bifurcation of discovery, summary judgment practice, and the directed verdict standard. By allowing discovery on the issue of subjective fault only after a prima facie showing on the objective issues in a defamation action, litigation costs can be kept to a minimum and harassment of journalists avoided. This protective device satisfies all the criteria for a workable remedy set forth by the Court in *Herbert* and is a logical compromise between the competing goals of ensuring the vigorous debate the first amendment was designed to guarantee and affording good faith defamation plaintiffs the opportunity for recovery that the Court sought to preserve in *New York Times*.

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Proxmire, 99 S. Ct. 2675, 2680 n.9 (1979), see text accompanying note 73, nor that adoption of the proposed procedure should be coupled with a relaxation of the plaintiff's summary judgment burden on the issue of subjective fault. The proposed procedure may be followed by a motion for summary judgment on the issue of subjective fault.