LIBEL AND SLANDER—PRIVILEGE—NEWSPERSONS HAVE ABSOLUTE PRIVILEGE UNDER NEW JERSEY SHIELD LAW NOT TO DISCLOSE EDITORIAL PROCESSES IN CIVIL LIBEL ACTIONS—*Maressa v. New Jersey Monthly*, 89 N.J. 176, 445 A.2d 376, *cert. denied*, 103 S. Ct. 211 (1982).

In *Maressa v. New Jersey Monthly*,[1] a public figure[2] who alleged he had been libeled found himself without legal redress following the New Jersey Supreme Court's holding that newspersons have an absolute privilege not to disclose their editorial processes. The controversy began with the publication of an article entitled "Rating the Legislature"[3] in the October 1979 issue of *New Jersey Monthly (NJM)*.[4] Described as the second biennial feature of this type,[5] the article grouped and rated members of the New Jersey Legislature in a forthright, breezily sarcastic manner.[6] Under the two main categories, "The Best" and "The Worst", a small picture of each lawmaker listed was followed by a description of his putative triumphs achieved or blunders committed in office during the term of the legislature.[7] Senator Joseph Maressa, a Democrat from Waterford Township,[8] in addition to being called "sneaky, self-interested, and basically unprin-

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[1] 89 N.J. 176, 445 A.2d 376, *cert. denied*, 103 S. Ct. 211, 211-12 (1982).

[2] See Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) for libel rules applicable to public officials and public figures.

[3] 89 N.J. at 182, 445 A.2d at 379; *see* Carpenter, Fisher & Narus, *Rating the Legislature*, N.J. MONTHLY, Oct. 1979, at 53.

[4] 89 N.J. at 182, 445 A.2d at 379. *NJM*, published 12 times a year as its title implies, was established in November of 1976 and deals exclusively with people and events in New Jersey. The magazine claimed a circulation of 105,000 in 1981. 1981 WRITER'S MARKET 477 (J. Brady & P.J. Schemenaur eds.).

[5] Carpenter, *supra* note 3, at 53. The first article appeared in the October 1977 issue of the magazine. *See* Fisher, Carpenter, Niemann, Advokat & Miles, *Rating the Legislature*, N.J. MONTHLY, Oct. 1977, at 39. Maressa was on "The Worst" list, although the tone of the segment describing him was less acerbic than that of the 1979 article. *Id.* at 45-46.

[6] 89 N.J. at 182, 445 A.2d at 379. The lawmakers were categorized as "The Best," "The Worst," "The Comers," "Noteworthy," "Not Worthy," and "The Drones." Carpenter, *supra* note 3. Senator Maressa was included as one of the worst. 89 N.J. at 182, 445 A.2d at 379. Among other things, "The Worst" list was called "a guide to . . . anyone who actively sabotaged the legislative process." Carpenter, *supra* note 3, at 53.

[7] 89 N.J. at 182, 445 A.2d at 379. New Jersey's 198th Legislature was officially convened in January of 1979. According to the article, however, most of the legislators who earned a place on the lists did so by virtue of actions taken during the summer of 1979, when an apparently large number of bills supported by Governor Byrne were passed. Carpenter, *supra* note 3, at 53.

[8] Carpenter, *supra* note 3, at 57.

cipled"[9] and "a pompous moralist,"[10] was portrayed generally as a somewhat fatuous, careless legislator[11] with a "tendency to bend rules to his own advantage."[12]

On December 12, 1979, Senator Maressa filed a libel action, naming *NJM's* owner, publisher, editor-in-chief, executive editor, and the article's authors as defendants.[13] Aside from asserting that they had published[14] defamatory falsehoods, Maressa claimed the defendants' failure to assess properly the veracity of the published information constituted reckless disregard of the truth.[15] To substantiate this allegation, Maressa sought the identities of all the reporters' sources, as well as copies of any documents pertaining to the editorial decisions made in the course of preparing the article, through the use of interrogatories and depositions.[16] The defendants, relying on the New Jersey Shield Law,[17] replied that the answers to those questions were

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[9] 89 N.J. at 182, 445 A.2d at 379 (quoting Carpenter, *supra* note 3, at 57).

[10] Carpenter, *supra* note 3, at 61. The barbs directed at other members of the legislature, although less numerous than those directed at Senator Maressa. were no less keen: Rep. Kenneth Gewertz, D-Deptford: "loud-mouthed, boorish and crass . . . a raving demagogue," *id.* at 56-57; Sen. Angelo Errichetti, D-Camden: "a small-time hack," *id.* at 61; Rep. Thomas Gallo, D-Hoboken: "conspicuously non-descript," *id.* at 105; Sen. Walter Sheil, D-Jersey City: "another of those durable Hudson lackeys," *id.* at 106; Rep. Mary Scanlon, D-Newark: "does not belong in the state legislature." *Id.* at 111.

[11] *Id.* at 56-57. The authors observed, for example, that after vehemently voicing his opposition to setting the age of sexual consent at 13 years, Senator Maressa inadvertently cast the swing vote in the Senate Judiciary Committee in favor of the proposal. *Id.*

[12] *Id.* at 57. The *Maressa* court noted that the article stated that Senator Maressa lied to the sergeant at arms in order to sneak a lobbyist onto the Senate floor during debate, and that he was called before the Legislative Ethics Committee on an unrelated matter. 89 N.J. at 182, 445 A.2d at 379.

[13] 89 N.J. at 182, 445 A.2d at 379.

[14] *Id.* at 183, 445 A.2d at 379. The term "publication" is used here in a dual sense, both as "a business term meaning printing and distribution of written materials and [as] a legal term meaning communication of libelous matter to a third person." BLACK'S LAW DICTIONARY 1105 (rev. 5th ed. 1979) (citing Applewhite v. Memphis State Univ., 495 S.W.2d 190, 192 (Tenn. 1973)).

[15] 89 N.J. at 183, 445 A.2d at 379. Maressa admitted that as a public figure suing to recover damages for libel, he would have to prove "reckless or willful disregard of the truth." 89 N.J. at 183 n.1, 445 A.2d at 379 n.1; *see infra* notes 59-68 and accompanying text.

[16] 89 N.J. at 183, 445 A.2d at 380. Specifically, he requested the names and addresses of all persons supplying information, a summary of what they had told the defendants, and copies of all memos, notes, rough drafts, or questions written in relation to the article. *Id.*

[17] N.J. R. EVID. 27 (codified at N.J. STAT. ANN. § 2A:84A-21 (West Cum. Supp. 1982-1983)) provides in pertinent part:

> Subject to Rule 37, a person . . . employed by news media for the purpose of gathering, . . . compiling, editing, or disseminating news for the general public . . . has a privilege to refuse to disclose, . . .
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> a. The source, author, means, agency or person from or through whom any information was procured, obtained, supplied, furnished, gathered, transmitted, compiled, edited, disseminated, or delivered; and

"privileged."[18] The trial court, however, did not share this interpretation of the statute, and on June 27, 1980 granted the plaintiff's request for an order compelling more specific answers to the interrogatories and deposition questions.[19] Once more, through supplemental interrogatories, the questionable questions were asked, and again the defendants declined to respond.[20] Consequently, on October 15, 1980, the defendants faced the prospect of judicial sanctions if they failed to give more specific replies to Senator Maressa's queries within twenty days.[21] Their appeal of that disclosure order was pending before the appellate division when the New Jersey Supreme Court directly certified the dispute on its own motion.[22] The supreme court held that the Shield Law affords newspersons an absolute privilege not to disclose either their sources or their editorial processes during discovery in a civil libel action.[23]

Libel actions are subsumed under the law of defamation.[24] Defamation jurisprudence has been described as imposing "broad liability for the publication of false matters which tend to injure the reputation of others,"[25] and as embodying "the important public policy that individuals . . . should generally be free to enjoy their reputations unimpaired by false and defamatory attacks."[26] At common law, privileges to publish without liability for defamation reflect the belief that at times, society's interest in free expression outweighs an individual's interest in his reputation.[27] If society's interest is strong enough,

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b. Any news or information obtained in the course of pursuing his professional activities whether or not it is disseminated.

Id. [hereinafter cited to N.J. STAT. ANN. without cross reference to N.J. R. EVID.].

[18] 89 N.J. at 183, 445 A.2d at 380.

[19] *Id.* The law division ruled alternatively: The information which Maressa sought was not privileged, and even if it were, that privilege had been waived. *Id.*; *see infra* note 126.

[20] 89 N.J. at 183, 445 A.2d at 380.

[21] *Id.*; *see* N.J. CT. R. 4:23.

[22] 89 N.J. at 183, 445 A.2d at 380; *see* N.J. CT. R. 2:12-1 which provides that "[t]he Supreme Court may on its own motion certify any action or class of actions for appeal."

[23] 89 N.J. at 181-82, 445 A.2d at 379.

[24] *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 111 (1971). Defamation encompasses both libel, which is written or printed words, and slander, which is oral publication. *See id.* § 112. This distinction has been blurred with the advent of motion picture and television communications. *Id.*

[25] Rainier's Dairies v. Raritan Valley Farms, Inc., 19 N.J. 552, 557, 117 A.2d 889, 891 (1955); *see also* W. PROSSER, *supra* note 24, § 111. The term "publication" does not necessarily refer to the printing process, nor to a result of that means of production. *See supra* note 14.

[26] Rainier's Dairies v. Raritan Valley Farms, Inc., 19 N.J. 552, 557, 117 A.2d 889, 891 (1955).

[27] *Id.* at 557-58, 117 A.2d at 891.

the privilege is absolute.[28] Qualified or conditional privileges arise when the defendant can show "a recognized public or private interest which would justify the utterance of the words,"[29] but the privilege is lost if he acted with malice.[30] The publication of "fair comment" on topics of general concern, for example, is protected by the qualified privilege.[31] The fair comment privilege was often claimed by reporters in libel actions.[32]

There was, however, no New Jersey common-law privilege allowing a newsperson not to reveal his sources of information.[33] The need for such protection was recognized in 1933 with the enactment of New Jersey's first Shield Law.[34] Basically, under that statute's provisions, persons associated with a newspaper could not be compelled to disclose in any judicial or quasi-judicial proceeding the source of any information which they had obtained and published.[35] In response to narrow judicial interpretation of the law,[36] in 1960 the

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[28] *Id.* at 558, 117 A.2d at 891-92. Statements made during judicial proceedings are afforded absolute protection because of the importance of candor and complete latitude of expression on the part of parties, witnesses, judges, jurors, and attorneys. *See* La Porta v. Leonard, 88 N.J.L. 663, 97 A. 251 (Ct. Err. & App. 1915).

[29] Coleman v. Newark Morning Ledger Co., 29 N.J. 357, 376, 149 A.2d 193, 203 (1959) (quoting W. PROSSER, HANDBOOK OF THE LAW OF TORTS 629 (2d ed. 1955)).

[30] Rainier's Dairies v. Raritan Valley Farms, Inc., 19 N.J. 552, 558, 117 A.2d 889, 892 (1955). Malice is implied by law whenever it is shown that an intentional defamatory publication has been made. W. PROSSER, *supra* note 24, § 113, at 771-72. This is distinct from express malice, which connotes ill will or wrongful motive on the part of the defendant. Bock v. Plainfield Courier-News, 45 N.J. Super. 302, 312, 132 A.2d 523, 528 (App. Div. 1957); *see also* Sokolay v. Edlin, 65 N.J. Super. 112, 167 A.2d 211 (App. Div. 1961).

[31] Leers v. Green, 24 N.J. 239, 131 A.2d 781 (1957). The court in *Leers* identified the following factors to be considered in determining whether a statement constitutes fair comment: (a) the facts on which the statement is based must be true, (b) any imputation of corrupt or dishonorable motives must be warranted by the facts, and (c) the statement must be the honest expression of the writer's opinion. *Id.* at 254-55, 131 A.2d at 788-89; *see also* Neigel v. Seaboard Fin. Co., 68 N.J. Super. 542, 173 A.2d 300 (App. Div. 1961); Merrey v. Guardian Printing & Publishing Co., 79 N.J.L. 177, 74 A. 464 (Sup. Ct. 1909), *aff'd*, 81 N.J.L. 632, 80 A. 331 (Ct. Err. & App. 1911).

[32] *See* Leers v. Green, 24 N.J. 239, 131 A.2d 781 (1957); Bock v. Plainfield Courier-News, 45 N.J. Super. 302, 132 A.2d 523 (App. Div. 1957). *But cf.* Kotlikoff v. Community News, 89 N.J. 62, 444 A.2d 1086 (1982) (suggesting fair comment defense obsolete in light of recent United States Supreme Court decisions).

[33] *In re* Grunow, 84 N.J.L. 235, 85 A. 1011 (Sup. Ct. 1913); *cf.* Branzburg v. Hayes, 408 U.S. 665 (1972) (newspaper reporter not afforded constitutional testimonial privilege to withhold facts relevant to grand jury criminal investigation).

[34] N.J. REV. STAT. § 2:97-11 (1933) (current version at N.J. STAT. ANN. § 2A:84A-21 (West Cum. Supp. 1982-1983)).

[35] *Id.*

[36] The statute was judicially construed only once between 1933 and 1956. *See* State v. Donovan, 129 N.J.L. 478, 486, 30 A.2d 421, 426 (Sup. Ct. 1943) (common-law rights should prevail over legislative restrictions unless legislative restrictions are clearly expressed).

legislature expanded its protection to include not only the source, but also the "author, means, agency or person from or through whom any information published . . . was procured, obtained, supplied, furnished, or delivered."[37] Thus, the identities of those assisting in the newspaper person's collection of confidential information which was later published were protected from disclosure.

The statute was again controversially interpreted in 1972. In *In re Bridge*,[38] Peter Bridge, a reporter for the Newark Evening News, was held in contempt of court for refusing to answer a grand jury's questions regarding information which he may have acquired in researching an article about an apparent attempt to bribe a city housing official.[39] The appellate division held that under N.J. Evid. R. 37,[40] Bridge had waived the Shield Law's protection of nondisclosed information which he possessed by naming his source and by using information acquired from that source in his newspaper article.[41]

Following *Bridge*, the New Jersey Legislature amended the Shield Law, creating separate privileges for sources and for information so that disclosure of either would not constitute a waiver of the privilege protecting the other.[42] Significantly, the revision extended the privilege to "[a]ny news or information obtained in the course of pursuing . . . professional activities, whether or not it is disseminated,"[43] so that even nonpublished information which was not acquired through a confidential source was now protected.[44]

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[37] N.J. STAT. ANN. § 2A:84A-21 (West 1960) (current version at *id.* (West Cum. Supp. 1982-1983)) provided: "Subject to Rule 37, a person engaged on, connected with, or employed by, a newspaper has a privilege to refuse to disclose the source, author, means, agency or person from or through whom any information published in such newspaper was procured, obtained, supplied, furnished, or delivered." *Id.*; *see also* Beecroft v. Point Pleasant Printing & Publishing Co., 82 N.J. Super. 269, 197 A.2d 416 (Law Div. 1964) (1960 amendments designed to circumvent *Donovan* ruling).

[38] 120 N.J. Super. 460, 295 A.2d 3 (App. Div. 1972), *cert. denied*, 410 U.S. 991 (1973).

[39] *Id.* at 464, 295 A.2d at 5.

[40] N.J. R. EVID. 37 (codified at N.J. STAT. ANN. § 2A:84A-29 (West 1976)) [hereinafter cited to N.J. STAT. ANN. without cross reference to N.J. R. EVID.]. The first paragraph of the rule provides that one waives the privilege by disclosing "any part of the privileged matter." *Id.* This is qualified by the second paragraph of the rule, which provides that no waiver results from a disclosure that is itself privileged. *Id.*

[41] 120 N.J. Super. at 466, 295 A.2d at 5-6. The court relied only on the first paragraph of the rule in reaching its decision. *See id.* The second paragraph of the rule could not apply since the 1960 Shield Law only protected sources. *See In re* Vrazo Subpoena, 176 N.J. Super. 455, 423 A.2d 695 (Law Div. 1980).

[42] *In re* Vrazo Subpoena, 176 N.J. Super. 456, 423 A.2d 695 (Law Div. 1980); *see also supra* note 41.

[43] N.J. STAT. ANN. § 2A:84A-21 (West 1977) (current version at *id.* (West Cum. Supp. 1982-1983)). *Id.* § 2A:84A-21a(h) (West Cum. Supp. 1982-1983) defines "in the course of pursuing professional activities" as any situation in which information is obtained for the purpose of dissemination. *Id.*

[44] *In re* Vrazo Subpoena, 176 N.J. Super. 456, 423 A.2d 695 (Law Div. 1980). Additionally, the 1977 amendments made the Shield Law applicable to all news media and enumerated the

The latest changes to the Shield Law were enacted in response to the decision of the New Jersey Supreme Court in *In re Farber*.[45] Myron Farber, a reporter for the New York Times, had done extensive investigation into the circumstances surrounding the mysterious deaths of patients in a New Jersey hospital.[46] The resulting newspaper articles were apparently instrumental in the state's decision to prosecute Dr. Mario E. Jascalevich for murder.[47] During that trial, a subpoena *duces tecum* was issued directing Farber and/or the New York Times to provide Jascalevich with certain documents and materials compiled in the course of Farber's investigation.[48] Their refusal to comply with the subpoena and with a subsequent order directing production of the materials for *in camera* inspection resulted in civil and criminal contempt citations for both Farber and the Times.[49]

The Supreme Court of New Jersey in *Farber* affirmed the contempt convictions, holding that the newsperson's Shield Law privilege must give way to a defendant's right to compulsory process for obtaining witnesses under article 1, paragraph 10 of the New Jersey Constitution.[50] The United States Supreme Court also denied the Times and Farber a stay of their contempt sentences.[51] In rejecting defendants' stay requests, both Courts relied upon *Branzburg v. Hayes*,[52] in which the United States Supreme Court rejected a reporter's claim that compelling his testimony before a grand jury interfered with his first amendment rights.[53]

The New Jersey Supreme Court in *Farber* was careful to point out, however, that a shield law was not present in *Branzburg*, and

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proceedings in which the privilege could be invoked. N.J. STAT. ANN. § 2A:84A-21 (West 1977) (current version at *id.* (West Cum. Supp. 1982-1983)); *cf.* N.J. REV. STAT. § 2:97-11 (1933) (current version at N.J. STAT. ANN. § 2A:84A-21 (West Cum. Supp. 1982-1983)) (1977 amendments reinstated representative list of proceedings appearing in 1933 statute in which privilege was applicable, inexplicably omitted from 1960 version).

[45] 78 N.J. 259, 394 A.2d 330, *cert. denied*, 439 U.S. 997 (1978).

[46] *Id.* at 277-78, 394 A.2d at 339.

[47] *Id.* at 264, 394 A.2d at 332.

[48] *Id.* at 263-64, 394 A.2d at 332.

[49] *Id.* at 264, 394 A.2d at 332.

[50] *Id.* at 274, 394 A.2d at 337 (citing N.J. CONST. art. 1, para. 10); *see, e.g.*, Washington v. Texas, 388 U.S. 14 (1967) (compulsory process clause of sixth amendment prevails over testimonial privilege created by state statute); *cf.* U.S. v. Nixon, 418 U.S. 683 (1974) (need for properly functioning criminal justice system may override executive privilege).

[51] New York Times Co. v. Jascalevich, 439 U.S. 1301 (1978) (opinion of White, J., in chambers). Justice White declared that newsmen have no constitutional privilege to withhold documents subpoenaed in the prosecution or defense of a criminal case. *Id.* at 1302 (opinion of White, J., in chambers).

[52] 408 U.S. 665 (1972).

[53] New York Times Co. v. Jascalevich, 439 U.S. 1301, 1302 (1978) (opinion of White, J., in chambers); *Farber*, 78 N.J. at 265-66, 394 A.2d at 333; *see Branzburg*, 408 U.S. at 707-09.

that it considered New Jersey's law to evince a legislative intent "to protect the confidential sources of the press as well as information so obtained. . . to the greatest extent permitted by the Constitution of the United States and that of the State of New Jersey."[54] In deference to that intent, the court enunciated certain criteria that had to be met for enforcement of a subpoena of a newsperson's materials in a criminal prosecution.[55] The person seeking enforcement must show by a preponderance of the evidence that there is a reasonable probability that the material is relevant to his defense, that there is no less intrusive source of the information, and that he has a valid need to see and use the material.[56]

The 1979 Shield Law amendments relating to the subpoena of documents incorporated these standards into the law, and also added the requirement that one seeking disclosure show that disclosure of the requested information outweighs the newsperson's privilege.[57] The New Jersey Supreme Court applied these new provisions shortly after their enactment, characterizing them as consistent with what it perceived to be a legislative "intent to provide newspeople with as broad a privilege against disclosure as can be reconciled with a defendant's Sixth Amendment rights."[58]

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[54] 78 N.J. at 270, 394 A.2d at 335. The court stated that the legislative intent behind the Shield Law was to protect "confidential sources . . . as well as information so obtained." *Id.* Justice Mountain's use of the word "so" apparently excluded from protection information not received from a confidential source. Thus, he recognized a legislative intent to protect a narrower class of information than was covered by the Shield Law. *See In re* Vrazo Subpoena, 176 N.J. Super. 455, 423 A.2d 695 (Law Div. 1980). To what extent the legislature intended to protect nonprivileged information was thus left unresolved by the *Farber* court.

[55] 78 N.J. at 274, 394 A.2d at 337.

[56] *Id.* at 276-77, 394 A.2d at 338.

[57] N.J. STAT. ANN. § 2A:84A-21.3(b) (West Cum. Supp. 1982-1983). The amended portion of the Shield Law provides in pertinent part:

> To overcome . . . a prima facie showing . . . the party seeking enforcement of the subpena shall show by clear and convincing evidence that the privilege has been waived . . . or by a preponderance of the evidence that there is a reasonable probability that the subpenaed materials are relevant, material and necessary to the defense, that they could not be secured from any less intrusive source, that the value of the material sought as it bears upon the issues of guilt or innocence outweighs the privilege against disclosure, and that the request is not overbroad. . . . Publication shall constitute a waiver only as to the specific materials published.

Id. But cf. Branzburg, 408 U.S. at 703-06 (constitutional newsmen's privilege denied partly because of need for preliminary determinations of materiality and unavailability similar to those called for by 1979 Shield Law amendments).

[58] State v. Boiardo, 82 N.J. 446, 458, 414 A.2d 14, 20 (1980). The court held that the criminal defendant had failed the "less intrusive source" portion of the statutory test and so denied his request for enforcement of a subpoena *duces tecum*. *Id.* at 461-62, 414 A.2d at 22.

The New Jersey Shield Law has thus evolved from the relatively narrow statute of 1933, which covered only a newspaper reporter's original sources, into its present form wherein persons connected with all news media are accorded a privilege not to disclose their sources—original or otherwise—and any information acquired in the course of pursuing their professional activities. Waiver of the privilege has been made more difficult, and procedural safeguards have been added to ensure that the privilege is not unduly circumscribed in the course of determining whether or not it must yield to a criminal defendant's sixth amendment rights. Clearly, the trend in the development of the New Jersey Shield Law has been toward greater protection against the compelled disclosure of information gathered by newspersons, or of the identities of their confidential sources.

In addition to the statutory protection of media sources and information, newspersons have been accorded enhanced protection against defamation suits brought by public officials since the landmark decision of the United States Supreme Court in *New York Times Co. v. Sullivan.*[59] In that case, the Court denied relief in a libel action against the defendant New York Times because the plaintiff had failed to establish that the allegedly defamatory falsehoods were published with "actual malice."[60] The Court held that this standard was applicable to public officials suing for libel regarding their official conduct,[61] and that it required plaintiffs to prove, with "convincing clarity,"[62] that the statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not."[63] Justice Brennan, writing for the majority, reasoned that the common law did not prevent undesirable self-censorship by newspersons fearful of the difficulty and expense of having to prove the truth of their

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[59] 376 U.S. 254 (1964).

[60] *Id.* at 279-80. Sullivan, an elected Commissioner of Public Affairs, claimed that descriptions appearing in the *Times* of how the Montgomery, Alabama authorities handled certain racial disturbances constituted defamatory falsehoods regarding his official conduct. *Id.* at 256-58.

[61] *Id.* at 283.

[62] *Id.* at 285-86; *see also* Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974) (describing *New York Times* as requiring "clear and convincing" proof); J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 782-83 (1978) (noting that "convincing clarity" probably means more than a "preponderance," but less than "beyond a reasonable doubt"). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 12-13 (1978).

[63] 376 U.S. at 279-80; *see* Garrison v. Louisiana, 379 U.S. 64, 74 (1964) (reckless disregard for truth present if "false statements [are] made with . . . high degree of awareness of their probable falsity"); *see also* St. Amant v. Thompson, 390 U.S. 727, 731 (1968); *cf.* W. PROSSER, *supra* note 24, § 18, at 821-22 (suggesting that focus on defendant's knowledge of falsity makes actual malice standard more akin to scienter, than to common-law malice).

publications when confronted with a libel action.[64] The guarantee of freedom of expression on public matters embodied in the first amendment[65] required that public officials bear the burden of proving knowing or reckless publication of falsity before they could recover damages for libelous statements regarding their official conduct.[66] The Court reasoned that the deterrent effect of libel actions on prospective critics of official conduct would thereby be greatly lessened,[67] and "the principle that debate on public issues should be uninhibited, robust, and wide-open" would be preserved.[68]

Later cases extended this actual malice requirement to libel actions brought by public figures,[69] and clarified the dimensions of the actual malice standard.[70] It was held that reckless disregard for truth cannot be shown by the defendant's mere negligence, nor by his failure to properly investigate,[71] but rather requires "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."[72] Thus, a plaintiff subject to the *New York Times* rule bears the heavy burden of proving, with convincing clarity, the defendant's state of mind regarding the veracity of his information or sources prior to publication.[73]

The United States Supreme Court in *Herbert v. Lando*,[74] recognizing the substantial nature of a *New York Times* plaintiff's burden,[75]

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[64] 376 U.S. at 279.

[65] The first amendment provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I.

[66] 376 U.S. at 279-80.

[67] *Id.*

[68] *Id.* at 270-72, 279-80.

[69] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967). The *Gertz* Court defined public figures as those who "have assumed roles of especial prominence in the affairs of society," or who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Gertz*, 418 U.S. at 345.

[70] *See infra* notes 71-86 and accompanying text.

[71] *See* St. Amant v. Thompson, 390 U.S. 727, 731, 733 (1968).

[72] *Id.* at 731.

[73] Herbert v. Lando, 441 U.S. 153 (1979); *see also* Brosnahan, *From* Times v. Sullivan *to* Gertz v. Welch: *Ten Years of Balancing Libel Law and The First Amendment*, 26 HASTINGS L.J. 777, 782-84 (1975) (combination of need to prove defendant's state of mind and convincing clarity standard creates heavy burden for *New York Times* plaintiffs); Eaton, *The American Law of Defamation Through* Gertz v. Robert Welch, Inc. *and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1375 n.113 (1975) (listing of only 17 cases in 11 years following *New York Times* wherein plaintiffs succeeded in proving actual malice).

[74] 441 U.S. 153 (1979).

[75] *Id.* at 174. The Court stated: "The evidentiary burden . . . to prove at least reckless disregard for the truth is substantial indeed." *Id.*; *see also supra* note 73.

refused to recognize a newsperson's privilege not to disclose editorial processes during discovery in libel actions brought by public figures or officials.[76] The plaintiff, a retired Army officer, became a public figure as the result of extensive media coverage he had received in 1969-1970 when he alleged that his superior officers in Viet Nam had concealed reports of war crimes.[77] Herbert claimed that a television segment later produced and edited by Lando falsely portrayed him as having made those charges dishonestly, and so brought a libel action for damages.[78]

During the course of discovery, Lando refused to answer questions regarding his state of mind, arguing that the first amendment prohibited inquiries into the editorial process.[79] This argument was rejected by the district court, which reasoned that such a limitation on discovery would unduly increase the public figure libel plaintiff's burden of proof.[80] That decision was overturned on appeal to the United States Court of Appeals for the Second Circuit.[81] Chief Judge Kaufman's plurality opinion viewed such discovery as an invasion of the first amendment rights of newspersons holding "grave implications for the vitality of the editorial process."[82]

The United States Supreme Court reversed the Second Circuit court's decision and held that denying discovery of a defendant's editorial process "would constitute a substantial interference with the ability of a defamation plaintiff to establish the ingredients of malice as required by *New York Times*."[83] The majority reasoned that dis-

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[76] 441 U.S. at 155.

[77] *Id.* at 155-56.

[78] *Id.* at 156.

[79] *Id.* at 157. The Court of Appeals for the Second Circuit categorized the objectionable questions as those dealing with Lando's conclusions as to people or leads to be pursued, the veracity of his sources, and the basis for his belief in their reliability. Editorial conversations were also sought. Herbert v. Lando, 568 F.2d 974, 983 (2d Cir. 1977), *rev'd*, 441 U.S. 153 (1979).

[80] Herbert v. Lando, 73 F.R.D. 387 (S.D.N.Y.), *rev'd*, 568 F.2d 974 (2d Cir. 1977), *rev'd*, 441 U.S. 153 (1979). The district court stated:

> If the malicious publisher is permitted to increase the weight of the injured plaintiff's already heavy burden of proof by a narrow and restricted application of the discovery rules, so that 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. Nothing in the First Amendment requires such a result.

Id. at 394.

[81] Herbert v. Lando, 568 F.2d 974 (2d Cir. 1977), *rev'd*, 441 U.S. 153 (1979).

[82] *Id.* at 984. Chief Judge Kaufman stated that the court's task, in light of the recent trend in the law of libel toward greater freedom of expression, was to allow discovery only when it would minimally restrict robust debate on public issues. *Id.* at 980.

[83] 441 U.S. at 170.

covery could only chill the publication of knowing or reckless falsehoods, as intended by *New York Times* and its progeny,[84] and that the threat of liability, rather than restricting the editorial process, should result in even more careful editorial examination of information to be published.[85] Justice White pointed out, however, that the editorial process is not open to perfunctory examination, and implied that it would only be discoverable when it is alleged that the defendant published either knowing that the statement was false or with reckless disregard for its truth, and that a specific injury thereby resulted.[86]

It was against this historical background that *Maressa* was decided. Justice Pashman, writing for the majority, initially observed that New Jersey's Supreme Court recently had held the newsperson's privilege provided by the Shield Law to be less than absolute when it conflicts with a criminal defendant's constitutional right to compel the production of witnesses on his or her behalf.[87] The court was also careful, however, to reassert the *Farber* holding that the Shield Law is to be construed as protecting the news media's confidential information "to the greatest extent permitted by the Constitution of the United States and that of the State of New Jersey."[88] The court stated that the issue was whether newspersons sued for libel may, under the Shield Law, refuse to divulge both their sources and the editorial processes which led to the purportedly defamatory publication.[89] The proper inquiry was whether the effect of the shield law is to be circumscribed by some conflicting constitutional right.[90]

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[84] *See supra* notes 59-73 and accompanying text.

[85] *Id.* at 173-74.

[86] *Id.* at 174. Justice Brennan dissented in part based on his view that editorial processes consist of two elements: the defendant's mental processes, and communications among editors. *Id.* at 192-93 (Brennan, J., dissenting in part). The editor's thought processes could not be chilled by the threat of discovery, noted Justice Brennan, since thought is essential to a newsperson's work. *Id.* at 192 (Brennan, J., dissenting in part). Moreover, since the *New York Times* malice test depends upon proof of the defendant's state of mind, he stated that "[i]t 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." *Id.* As for communications between newspersons, Justice Brennan observed that they should receive a qualified privilege, similar to the executive privilege, *id.* at 193-94 (Brennan, J., dissenting in part), that could be overcome if the plaintiff makes a *prima facie* showing that the defendant had published a defamatory falsehood. *Id.* at 197 (Brennan, J., dissenting in part).

[87] 89 N.J. at 181, 445 A.2d at 379; *see* State v. Boiardo, 82 N.J. 446, 414 A.2d 14 (1980); *In re* Farber, 78 N.J. 259, 394 A.2d 330, *cert. denied*, 439 U.S. 997 (1978).

[88] 89 N.J. at 181, 445 A.2d at 379 (quoting *Farber*, 78 N.J. at 270, 394 A.2d at 335).

[89] *Id.*

[90] *Id.* at 181-82, 445 A.2d at 379.

Justice Pashman noted that the newsperson's privilege in New Jersey was based on a 1933 statute,[91] and that these protections are codified as the result of a legislative judgment that society's interest in full disclosure is subordinate to the public interest served by the statutory privilege enacted.[92] The newsperson's privilege was seen by the court as having a constitutional basis, and *Branzburg* was cited for the proposition that a reporter's information gathering is accorded at least some first amendment protection.[93] The court noted, however, that this privilege is only qualified, as demonstrated by both *Branzburg* and *Lando*, and characterized *Lando* as holding that "the First Amendment does not preclude a plaintiff's inquiries into . . . editorial processes."[94]

The court next focused specifically on the development of the Shield Law. The 1977 and 1979 amendments to the Shield Law, according to the majority, were reactions to narrow judicial interpretations of that statute, and were intended "[t]o buttress the constitutional protection for news gathering."[95] Specifically, the court observed that in *In re Bridge*, the New Jersey Supreme Court held that the disclosure of the name of a reporter's source and some of the information received from that source effected a waiver of the statutory privilege, thus leading to the 1977 amendments.[96] In addition to altering the statute so as to preclude a finding of waiver in future cases similar to *Bridge*, the *Maressa* court stated that the amendments "thoroughly revamped the newsperson's privilege to make it more comprehensive," and revealed a legislative intent "to provide comprehensive protection for all aspects of news gathering and dissemination."[97]

The 1979 amendments inspired by *Farber* codified procedural criteria for judicial enforcement of subpoenas in this sensitive area.

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[91] *Id.* at 184, 445 A.2d at 380.

[92] *Id.*

[93] *Id.*; *see also* Nimmer, *Is Freedom of the Press A Redundancy: What Does it Add To Freedom of Speech?*, 26 HASTINGS L.J. 639 (1975); Stewart, *"Or of the Press,"* 26 HASTINGS L.J. 631 (1975). The court noted that a number of lower federal courts had extended *Branzburg's* first amendment protection of news gathering to the use of confidential sources. 89 N.J. at 184, 455 A.2d at 380; *see, e.g.*, Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583, 594-95 (1st Cir. 1980); Gulliver's Periodicals, Ltd. v. Chas. Levy Circulating Co., 455 F. Supp. 1197, 1202 (N.D. Ill. 1978); *see also* Lindberg, *Source Protection in Libel Suits*, 81 COLUM. L. REV. 338 (1981).

[94] 89 N.J. at 185, 445 A.2d at 381; *see supra* notes 52 & 53, 74-86 and accompanying text.

[95] 89 N.J. at 185, 445 A.2d at 381.

[96] *Id.* at 186, 445 A.2d at 381.

[97] *Id.*

Justice Pashman observed that in applying those amendments in *State v. Boiardo*,[98] the Supreme Court of New Jersey reiterated the *Farber* view that the Shield Law privilege "was intended by the Legislature to be as *broad as possible*."[99] The combination of the two amendments to the Shield Law, and the two supreme court decisions broadly interpreting their import, led the *Maressa* majority to conclude that unless there is a contravening constitutional right, an absolute privilege not to reveal confidential information is provided to newspersons by the New Jersey Shield Law.[100]

The court rejected the plaintiff's contention that, because editorial processes are not specifically listed in the statute, they are not protected from disclosure.[101] Referring to this argument as "simplistic," Justice Pashman reasoned that the "exhaustive list"[102] of protected activities in the statute clearly demonstrated a legislative intent "to afford complete and pervasive security against disclosure . . . [to] all significant news-gathering activities," including, by implication, editorial processes.[103] The court relied on Justice Brennan's dissent in *Lando* for the proposition that discovery of editorial processes is particularly damaging because reporters will curtail their "creative verbal testing, probing, and discussion of hypotheses and alternatives"[104] in apprehension of later having to reveal the character and content of such conversations in a court of law.[105] Although the United States Supreme Court in *Lando* held that there is no first amendment privilege not to disclose editorial processes, the *Maressa* court found *Lando* inapposite because there was no shield law involved in that case.[106] The court reasoned that since *Branzburg* did not affect the ability of state courts to recognize a newsperson's privilege, "either qualified or absolute," derived from their own constitutions,[107] there is an equivalent power to construe and enforce a newsperson's privilege created by

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[98] 82 N.J. 446, 414 A.2d 14 (1980).

[99] 89 N.J. at 187, 445 A.2d at 382 (quoting *Boiardo*, 82 N.J. at 457, 414 A.2d at 20) (emphasis added by *Maressa* court).

[100] *Id.* at 187, 445 A.2d at 382.

[101] *Id.* at 188, 445 A.2d at 382.

[102] *Id.* See *supra* note 17.

[103] 89 N.J. at 188, 445 A.2d at 382.

[104] *Id.* at 189, 445 A.2d at 383 (quoting *Lando*, 441 U.S. at 193 (Brennan, J., dissenting in part) (quoting Herbert v. Lando, 568 F.2d 974, 980 (2d Cir. 1977), *rev'd*, 441 U.S. 153 (1979)). Justice Brennan, however, did not see this concern as compelling the creation of an absolute newsperson's privilege. *See supra* note 86.

[105] 89 N.J. at 189, 445 A.2d at 383.

[106] *Id.*; *see also* Branzburg v. Hayes, 408 U.S. 665 (1972).

[107] *Branzburg*, 408 U.S. at 706; *see infra* note 186 and accompanying text.

statute.[108] The *Maressa* court proceeded to hold that the Shield Law affords newspersons an absolute privilege against disclosure of either confidential sources or editorial processes, unless there is a contrary constitutional right of the plaintiff involved.[109] Thus the *Maressa* court considered whether a plaintiff's right to sue to recover damages for defamation is constitutionally protected.[110]

Initially, Justice Pashman's analysis of this issue acknowledged the general rule that the purpose of defamation actions is the protection of reputations from false, injurious attacks.[111] He noted, however, that as a creation of state tort law, defamation actions can be limited or even eliminated through the creation of testimonial privileges as long as no constitutional rights are thereby infringed.[112] *Paul v. Davis*,[113] which held that a plaintiff's interest in his reputation is not a liberty or property interest protected by the fourteenth amendment's due process guarantee,[114] was cited by the majority for the proposition that this interest "is simply one of a number which the State may protect against injury by virtue of its tort law."[115] Absent a constitutional guarantee for defamation actions,[116] the *Maressa* court observed that any federal interest other than that in protecting indi-

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[108] 89 N.J. at 189, 445 A.2d at 383; *cf.* State v. Alston, 88 N.J. 211, 440 A.2d 1333 (1982) (standing to challenge search and seizure protected by New Jersey Constitution); State v. Schmid, 84 N.J. 535, 423 A.2d 615 (1980) (free speech rights protected by New Jersey Constitution). *See generally* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

[109] 89 N.J. at 189, 445 A.2d at 383.

[110] *Id.* at 188-89, 445 A.2d at 383.

[111] *Id.* at 190, 445 A.2d at 384; *see* Herbert v. Lando, 441 U.S. 153 (1979); New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Brogan v. Passaic Daily News, 22 N.J. 139, 123 A.2d 473 (1956); Rainier's Dairies v. Raritan Valley Farms, Inc., 19 N.J. 552, 117 A.2d 889 (1955).

[112] 89 N.J. at 190-91, 445 A.2d at 384; *see* Mazzella v. Philadelphia Newspapers, Inc., 479 F. Supp. 523 (E.D.N.Y. 1979).

[113] 424 U.S. 693 (1976).

[114] 89 N.J. at 190 n.7, 445 A.2d at 384 n.7. The plaintiff in *Paul* was suing local law enforcement authorities for falsely labeling him an active shoplifter in a flyer distributed to retail merchants in his community. *Paul*, 424 U.S. at 694-96. The plaintiff was denied relief because the Court, speaking through Justice Rehnquist, did not accept "that reputation alone . . . is either 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause." *Id.* at 701.

[115] 89 N.J. at 190, 445 A.2d at 384 (quoting *Paul*, 424 U.S. at 712); *see also* Goss v. Lopez, 419 U.S. 565 (1975) (in addition to impairing property interest in attending school, suspension of student impaired liberty interest in reputation); Wisconsin v. Constantineau, 400 U.S. 433 (1971) (due process must be afforded individual whose good name suffered as result of being publicly labeled problem drinker by authorities).

[116] 89 N.J. at 191, 445 A.2d at 384; *accord* Steaks Unlimited, Inc. v. Deaner, 623 F.2d 264 (3d Cir. 1980) (Pennsylvania Constitution does not create constitutional interest in defamation).

viduals from arbitrary or irrational state action has been held subordinate to the interest of a state in establishing its own tort law rules.[117]

The majority also rejected the argument, advanced in Justice Schreiber's dissent, that defamation actions are constitutionally guaranteed by article 1, paragraph 6 of the New Jersey Constitution,[118] which states that "[e]very person may freely speak, write and publish his sentiments on all subjects, *being responsible for the abuse of that right.*"[119] The majority construed the italicized phrase not as an affirmative grant of a right to sue in libel, but rather as an admonition that libel suits were not to be precluded by the paragraph's apparently sweeping protection of speech.[120] One justification the majority offered for not construing defamation as having a constitutional source was that a constitutional amendment would then be required in order to effect what the court understood the legislature to have intended: complete protection for sources or editorial processes.[121] When this result is brought about through statutory interpretation, the majority reasoned, the legislature can always adjust the court's perception of its intent, if erroneous, by subsequently changing the law.[122]

Since the court recognized neither a federal nor a state constitutional basis for defamation actions, it quickly disposed of the plaintiff's contention that denying him discovery infringed his right to due process.[123] Absent such a basis, the court found that the plaintiff's right would be subject to the legislature's balancing of the competing interests involved.[124] Because the legislature had enacted a compre-

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[117] 89 N.J. at 191, 445 A.2d at 384; *see* Martinez v. California, 444 U.S. 277 (1980). The court cited the privileges accorded statements made in judicial and administrative agency proceedings as other nonarbitrary, rational limitations on the tort of defamation. 89 N.J. at 191, 445 A.2d at 384.

[118] 89 N.J. at 192, 445 A.2d at 384-85.

[119] N.J. CONST. art. 1, para. 6 (emphasis added).

[120] 89 N.J. at 192, 445 A.2d at 385. Justice Pashman expressed the opinion that "[h]ad the framers intended . . . [to create a right to sue for damages in libel] . . . , they surely would have expressed that intent more directly." *Id.*

[121] *Id.* at 192-93, 445 A.2d at 385.

[122] *Id.*

[123] *Id.* at 193, 445 A.2d at 385. The court observed that Maressa had cited the passage from Brogan v. Passaic Daily News, 22 N.J. 139, 123 A.2d 473 (1956), stating that "construction of the [Shield Law] permitting the deprivation of a party's right of cross-examination on vital issues of his cause of action could create constitutional difficulty or infirmity." 89 N.J. at 193, 445 A.2d at 385 (citing *Brogan*, 22 N.J. at 154, 123 A.2d at 481). Although the court dismissed this obvious allusion to a potential due process deprivation as dictum, *Brogan* was nonetheless specifically overruled to the extent that it disagrees with the majority's finding of an absolute newsperson's privilege. *Id.* at 194 n.8, 445 A.2d at 385 n.8.

[124] 89 N.J. at 193-94, 445 A.2d at 385.

hensive privilege without any limiting statutory language, the court determined that it had clearly intended an absolute newsperson's privilege in libel cases.[125]

After discussing the waiver of a newsperson's Shield Law privilege[126] and the proper role of summary judgment in libel cases,[127] the majority opinion concluded by stressing both the importance of a free press to our form of government, and the power of the legislature to limit nonconstitutional interests in order to preserve freedom of the press.[128] Justice Pashman recognized, in dictum, the compensatory value of libel judgments, but considered the relative worth of free speech, as our "national currency," to be greater.[129] The court, however, repeated that it was merely enforcing a legislative enactment, the result of a weighing of competing interests, that had already struck the balance in favor of freedom of speech.[130]

In his dissent, Justice Schreiber observed that the common law did not view libelous utterances as constitutionally protected speech,[131] but that this rule was modified somewhat by the *New York Times* holding that newspersons would not be liable for defamatory statements concerning public officials unless the plaintiff showed that they had been made with actual malice.[132] This increased burden, observed the dissent, created a problem for *New York Times* plaintiffs in securing evidence of the defendant's state of mind.[133] Justice Schreiber argued that the United States Supreme Court in *Lando* had

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[125] *Id.*

[126] *Id.* at 194-96, 445 A.2d at 385-86. Maressa's argument that the defendants had waived their Shield Law protection by the partial disclosure of their sources was refuted by Justice Pashman's majority opinion. He noted that the 1977 Shield Law amendments had created separate information and source privileges, which made a finding of waiver more difficult. *Id.* at 195, 445 A.2d at 386.

[127] *Id.* at 196-200, 445 A.2d at 386-89. Justice Pashman discussed at some length the importance of using summary judgment procedures, when appropriate, to expedite libel litigation and thus avoid the "chilling" of press freedom that may result if protracted, meritless actions against media defendants are allowed to become commonplace. While admitting that the newsperson's privilege "may burden some libel plaintiffs who will not survive a summary judgment motion without discovery," the court nonetheless endorsed it as another burden, like the *New York Times* actual malice rule, which is properly placed upon plaintiffs in the interest of protecting libel defendants. *Id.* at 198, 445 A.2d at 387.

[128] *Id.* at 200-02, 445 A.2d at 389-90.

[129] *Id.* at 201, 445 A.2d at 389.

[130] *Id.* at 201-02, 445 A.2d at 389-90.

[131] *Id.* at 203, 445 A.2d at 390 (Schreiber, J., dissenting); *see* Roth v. United States, 354 U.S. 476, 482-83 (1957); Beauharnais v. Illinois, 343 U.S. 250 (1952).

[132] 89 N.J. at 203, 445 A.2d at 390 (Schreiber, J., dissenting); *see also supra* notes 59-73 and accompanying text.

[133] 89 N.J. at 204, 445 A.2d at 391 (Schreiber, J., dissenting).

clearly recognized that discovery of a newsperson's editorial processes was essential to proving actual malice under the *New York Times* rule.[134] The dissent stressed the *Lando* Court's concern that prohibiting discovery might so limit an individual's cause of action for defamation that the newsperson's immunity from liability would be all but absolute.[135] Such a result would be, in the view of the *Lando* majority, "an untenable construction of the First Amendment."[136]

Justice Schreiber next opined that an individual's right to a defamation action, although not protected at the federal level,[137] nonetheless is guaranteed by article 1, paragraph 6 of the New Jersey Constitution.[138] In both the 1844 and 1947 constitutions, that paragraph provided: "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right."[139] It is not clear what the framers of the 1844 constitution intended by the latter clause,[140] but the dissent cited a number of authorities which indicated that the freedoms of speech and of the press were generally regarded as being qualified by the responsibility to answer in defamation for their abuse.[141] Justice Schreiber thus concluded that this language was inserted in the 1844 Constitution to protect persons from defamation by acknowledging that responsibility, thereby creating a constitutional right to sue in libel.[142] Justice Schreiber maintained that the absolute Shield Law privilege protecting disclosure of editorial processes created by the majority in most cases would prevent a *New York Times* plaintiff from proving actual

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[134] *Id.* at 205, 445 A.2d at 391 (Schreiber, J., dissenting).

[135] *Id.* In *Lando*, the majority interpreted *New York Times* and its progeny as intending that, "unless liability is to be completely foreclosed, the thoughts and editorial processes of the alleged defamer would be open to examination." *Lando*, 441 U.S. at 160.

[136] 89 N.J. at 205, 445 A.2d at 391 (Schreiber, J., dissenting) (quoting *Lando*, 441 U.S. at 176).

[137] *Id.* at 206, 445 A.2d at 392 (Schreiber, J., dissenting); *see* Paul v. Davis, 424 U.S. 693 (1976) (no federal right to redress for defamation in absence of interest conferred on individual by state).

[138] 89 N.J. at 206, 445 A.2d at 392 (Schreiber, J., dissenting).

[139] N.J. CONST. art. 1, para. 6.

[140] 89 N.J. at 207, 445 A.2d at 392 (Schreiber, J., dissenting); *see* 2 NEW JERSEY WRITERS' PROJECT 144 (1942). There is no mention in the proceedings of the constitutional convention of 1844 of the exact meaning of the phrase "being responsible for the abuse of that right." *Id.*

[141] 89 N.J. at 207-08, 445 A.2d at 392-93 (Schreiber, J., dissenting); *see* Commonwealth v. Blanding, 20 Mass. 304, 311 (1825) ("[t]he liberty of the press was to be unrestrained, but he who used it was to be responsible in case of its abuse"); King v. The Dean of St. Asaph, 3 TR 657, 661 (1784) ("[t]he liberty of the press consists in printing without any previous license, subject to the consequence of law"); W. ODGERS, A DIGEST OF THE LAW OF LIBEL AND SLANDER 111 (1881) ("[a]ny man is free to speak or to write and publish whatever he chooses of another, subject only to this, that he must take the consequences").

[142] 89 N.J. at 208, 445 A.2d at 393 (Schreiber, J., dissenting).

malice, and thus effectively destroy this constitutionally protected cause of action.[143]

Justice Schreiber also took issue with the majority on its statutory interpretation. Since the Shield Law specifically refers not to the newsperson's impressions, conclusions, or intentions regarding privileged information, but only to its source, the dissent stated that it could not reasonably be interpreted to cover editorial processes.[144] Justice Schreiber noted that there was no support for such a construction in the legislative history.[145] He suggested that it would be more appropriate to assess the lawmakers' intent in light of their presumed knowledge of the common-law bias against evidentiary privileges as being in derogation of the search for truth,[146] than to assume that they intended to create "an absolute privilege to resist the most direct form of inquiry into the precise matter the plaintiff is required to prove with 'convincing clarity.' "[147]

In *Maressa* the majority followed a simple, two-part line of reasoning. Justice Pashman first interpreted the language and history of the New Jersey Shield Law as indicating a legislative intent to accord newspersons an absolute privilege not to disclose their confidential sources and editorial processes.[148] This limitation on libel actions was permissible, since the court decided that one had no constitutional right to maintain a libel action.[149] Had there been such a right, the court would had to have weighed the rights of the plaintiff against the ends served by the privilege, much as in the Shield Law cases involving criminal defendants.[150] Thus, a finding that there was no constitutional right to bring a libel suit was essential to the court's

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[143] *Id.* at 208-09, 445 A.2d at 393 (Schreiber, J., dissenting).

[144] *Id.* at 210, 445 A.2d at 394 (Schreiber, J., dissenting). Specifically, Justice Schreiber pointed out that subsection (a) of the statute, which lists for protection "[t]he source, author, means, agency or person from or through whom any information was procured, obtained, supplied, furnished, gathered, transmitted, compiled, edited, disseminated or delivered," N.J. STAT. ANN. § 2A:84A-21(a) (West Cum. Supp. 1982-1983), focuses on "the identity of the third person who acted as a conduit of the information." 89 N.J. at 210, 445 A.2d at 394 (Schreiber, J., dissenting).

[145] 89 N.J. at 210, 445 A.2d at 394 (Schreiber, J., dissenting).

[146] *Id.* at 211, 445 A.2d at 394 (Schreiber, J., dissenting); *see* United States v. Nixon, 418 U.S. 683 (1974); Elkins v. United States, 364 U.S. 206 (1960); *see also* 8 J. WIGMORE, EVIDENCE § 2912 (J. McNaughton rev. ed. 1961).

[147] 89 N.J. at 210-11, 445 A.2d at 394 (Schreiber, J., dissenting); *see Lando*, 441 U.S. at 192 (Brennan, J., dissenting in part).

[148] *See supra* notes 95-117 and accompanying text.

[149] *See supra* notes 118-30 and accompanying text.

[150] *See* State v. Boiardo, 82 N.J. 446, 414 A.2d 14 (1980); *In re* Farber, 78 N.J. 259, 394 A.2d 330 (1978); *supra* notes 45-58 and accompanying text.

sole reliance for its decision on the legislative intent behind the Shield Law.

Since there is clearly no right to sue in libel guaranteed by the Federal Constitution,[151] the determinative language must be found in article 1, paragraph 6 of the New Jersey Constitution. The *Maressa* majority acknowledged that the phrase "being responsible for the abuse of that right" was an allusion to libel actions, but disagreed with Justice Schreiber's conclusion that this phrase created a constitutional right to sue.[152] Rather, Justice Pashman determined that this phrase merely limited the broad rights of speech granted in article 1 by not precluding libel actions.[153] The distinction between "creating" a right to sue and "not precluding" that right is difficult to make with any certainty. There is no explication of this phrase in the record of the constitutional proceedings,[154] and the arguments advanced by both the majority and by Justice Schreiber seem at first glance to be equally plausible.

Justice Pashman suggested that if the framers had intended to create a right to sue in libel, they would have done so more directly.[155] It may be argued, however, that the inclusion of a qualifying phrase whose clear meaning was that speakers and writers were subject to libel suits[156] did directly create the right to sue. Rather than stating that "every person shall have the right to sue in libel," the framers qualified the granted speech rights by using a phrase commonly accepted as having that very meaning. That the rights of a speaker were commonly accepted as being limited by the corresponding right of those adversely affected by that speech may be seen by an examination of the case law in existence at the time the New Jersey Constitution was written.[157]

The majority further asserted that the disputed phrase was only a caveat intended to ensure that the protection of speech was not absolute.[158] In order to have any force as a limitation on a constitutional right, however, would it not have to receive the same constitutional protection as the right modified? Had the framers not so intended, the

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[151] Paul v. Davis, 424 U.S. 693 (1976). *Contra id.* at 719 n.6 (Brennan, J., dissenting) (due process denial when plaintiff who sues for damages to reputation is denied cause of action).

[152] 89 N.J. at 192, 445 A.2d at 384-85.

[153] *Id.*

[154] *See supra* notes 139-41 and accompanying text.

[155] 89 N.J. at 192, 445 A.2d at 385.

[156] *Id.* at 207-08, 445 A.2d at 392-93 (Schreiber, J., dissenting).

[157] *See supra* note 141 and accompanying text.

[158] 89 N.J. at 192, 445 A.2d at 385.

right of action implied by this caveat might at any time be modified or removed by statute,[159] and the limitation would thus have been entirely devoid of true content or effect. Assuming that the phrase was not a vain addition to article 1, then, requires the conclusion that the libel actions to which it referred were intended to be constitutionally equivalent to the liberties of speech and of the press.[160] It thus seems that there is at least as strong an argument in favor of that clause creating a right to sue in defamation as there is to the contrary.

The court stated that the 1977 amendments to the Shield Law made it clear that the legislature intended "to provide comprehensive protection for *all aspects* of news gathering and dissemination."[161] An examination of those changes, however, reveals that the same aspects of news gathering are protected in the new law as in the old: sources and information.[162] The legislature did create separate privileges for each so that a finding of waiver would be more difficult,[163] but that only evidences an intent to give more complete protection to those aspects already covered by the prior enactment.

It is also true that the law was updated in 1977 to expand the applicability of the privilege to persons working in all news media, rather than just for newspapers.[164] That change did not alter the scope of the substantive protection afforded; it merely enlarged the class of persons benefited by the statute. Similarly, the addition in 1977 of an enumeration of the types of proceedings in which the privilege could be invoked[165] was simply a clarification of where and when the news-

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[159] *Id.* at 190-91, 445 A.2d at 384; *see* Mazzella v. Philadelphia Newspapers, Inc., 479 F. Supp. 523, 528 (E.D.N.Y. 1979) (absent any constitutional deprivation, state may restrict or eliminate cause of action it has created).

[160] This conclusion is consistent with the widely accepted view that "[n]o statute is to be construed as altering the common law, further than its words import." Shaw v. North Pa. R.R., 101 U.S. 557, 565 (1879); *see also* 3 C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 61.01 (4th ed. 1974).

[161] 89 N.J. at 186, 445 A.2d at 381 (emphasis added).

[162] *Compare* N.J. STAT. ANN § 2A:84A-21 (West 1977) (current version at *id.* (West Cum. Supp. 1982-1983)) (describing privileged matter in two subsections—one covering sources, other relating to information "obtained in the course of pursuing . . . professional activities") *with id.* (West 1960) (current version at *id.* (West Cum. Supp. 1982-1983)) (listing source and information privileges in one sentence, and limiting privileged information to that which was published).

[163] *See supra* notes 42-44 and accompanying text; *see also In re* Vrazo Subpoena, 176 N.J. Super. 455, 423 A.2d 695 (Law Div. 1980) (partial disclosure of information by reporter did not effect waiver of other information by operation of statute).

[164] *See supra* note 17.

[165] N.J. STAT. ANN. § 2A:84A-21 (West 1977) (current version at *id.* (West Cum. Supp. 1982-1983)) defines the types of proceedings as "any legal or quasi-legal proceeding . . . , including

person would be protected, but did not in any way change what information was privileged. The most striking substantive change enacted in 1977 was to make the information privilege applicable to *all* information, whether or not disseminated, that was "obtained in the course of pursuing . . . professional activities."[166] Again, however, this was the apparent result of a legislative intent to make the two privileges as waiver-proof as possible by carefully defining two discrete categories of protected subject matter.[167] The legislature's intent not to change the essential nature of the information privileged under the statute is evidenced by its defining "in the course of professional activities" to mean only those situations where "a reporter obtains information *for the purpose of disseminating it* to the public."[168] A newsperson's editorial processing—thoughts regarding the information received, beliefs as to the veracity of sources, prepublication memos, and discussions with other newspersons about the handling of a particular story[169]—is composed of mostly subjective elements, and clearly is not information obtained for dissemination to the public. Thus the legislature, in so defining the information privileged under the statute, has implicitly excluded the very type of information the majority found it had an intention to protect.

The New Jersey Supreme Court in *Farber*, cited by the majority as recognizing a strong legislative intent to protect newspersons,[170] did not deal with the question of editorial processes, and in fact only recognized in the 1977 amendments a legislative intent to protect "confidential sources . . . as well as information so obtained."[171] Thus *Farber*'s recommendation of a liberal construction of the intended protection did not extend to a general application of the Shield Law,

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. . . any court, grand jury, petit jury, administrative agency, the Legislature or legislative committee, or elsewhere." *Id.*; *see also supra* note 44.

[166] N.J. STAT. ANN. § 2A:84A-21a(h) (West 1977) (current version at *id.* (West Cum. Supp. 1982-1983)); *see In re* Vrazo Subpoena, 176 N.J. Super. 455, 423 A.2d 695 (Law Div. 1980). The *Vrazo* court maintained that the legislature was probably aware that the changes extended the information privilege to all information, even if received from a nonprivileged source. The original bill read: "(b) any news or information so obtained in the course of pursuing his professional activities whether or not it is disseminated." When the word "so" was deleted, the information covered by the privilege was no longer limited to that obtained from the sources protected by subsection (a) of the statute.

[167] *See supra* note 42 and accompanying text; N.J.A. 97, 200th Leg., 1st Sess. § 1 (1982).

[168] N.J. STAT. ANN. § 2A:84A-21a(h) (West 1977) (current version at *id.* (West Cum. Supp. 1982-1983)) (emphasis added).

[169] Herbert v. Lando, 73 F.R.D. 387 (S.D.N.Y.), *rev'd*, 568 F.2d 974 (2d Cir. 1977), *rev'd*, 441 U.S. 153 (1979).

[170] 89 N.J. at 186-87, 445 A.2d at 382.

[171] *Farber*, 78 N.J. at 270, 394 A.2d at 335.

but was rather confined to situations involving confidential sources and information obtained from them.[172] The statement from *Boiardo* characterizing *Farber* as holding "that the privilege created by N.J.S.A. 2A:84A-21, was intended by the Legislature to be as broad as possible,"[173] must be read in light of that limitation. It must be remembered, too, that both cases dealt with the need of a criminal defendant for a newsperson's confidential information, and not with requests for discovery of editorial processes in civil actions.[174]

The *Maressa* majority nonetheless concluded that a strong legislative intent to protect confidential sources and information from disclosure *a fortiori* implied the same intent to protect editorial processes.[175] No attempt, however, was made to explain why the two categories of information were so similar, or the policy reasons for according them privileges so analogous, that the protection of one by the legislature should necessarily imply the additional intent to protect the other.[176] If the plaintiff's argument that editorial processes are not protected because not enumerated by the statute is "simplistic,"[177] then Justice Pashman's interpretation is equally faulty as being overbroad. He finds a legislative intent to protect "all significant news-gathering activities" in the fact that the statute contains an "exhaustive list" of activities.[178] Those activities appear in N.J. Stat. Ann. § 2A:84A-21(a), however, which refers specifically to "source[s]. . . through whom" a newsperson receives information.[179] The paragraph does not extend protection to the activities, but to the identities of the persons who engage in them.[180] It thus matters little whether editorial pro-

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[172] *Id.; see* Central N.J. Jewish Home v. New York Times Co., 183 N.J. Super. 445, 449, 444 A.2d 80, 82-83 (Law Div. 1981); *see also infra* note 174.

[173] *Boiardo*, 82 N.J. at 457, 414 A.2d at 20.

[174] *See id.; In re* Farber, 78 N.J. 259, 394 A.2d 330 (1978); *see also* Central N.J. Jewish Home v. New York Times Co., 183 N.J. Super. 445, 444 A.2d 80 (Law Div. 1981) (libel action in which court refused to find that broad Shield Law interpretation called for by *Farber* and *Boiardo* be extended to editorial processes).

[175] 89 N.J. at 187-88, 445 A.2d at 382.

[176] The majority stated that discovery of editorial processes was detrimental to a free press because it "inhibits the exchange of ideas." *Id.* at 188, 445 A.2d at 383. No comparison to the motivations underlying the desire to protect confidential sources or information was made. *See generally* Note, *Source Protection in Libel Suits After* Herbert v. Lando, 81 COLUM. L. REV. 338, 359-61 (1981).

[177] 89 N.J. at 188, 445 A.2d at 382.

[178] *Id.*

[179] N.J. STAT. ANN. § 2A:84A-21(a) (West Cum. Supp. 1982-1983).

[180] *See* Central N.J. Jewish Home v. New York Times Co., 183 N.J. Super. 445, 444 A.2d 80 (Law Div. 1981). This case was virtually the converse of *Maressa*, yet there is no evidence of any action by the legislature to amend the Shield Law in response thereto. That fact seemingly

esses are included in the list or not, since newspersons are not even the subject of that particular provision. There is likewise no indication that "information obtained in the course of pursuing . . . professional activities" was meant to be so broad as to include the editorial process. In fact, as noted above, the definition of "in the course of pursuing professional activities" indicates that it was aimed solely at the narrower category of information gathered for dissemination. Thus, the *Maressa* majority understood a legislative intent to protect the entire news-gathering process to arise from language clearly encompassing only two carefully defined categories: sources and information.

Aside from the means by which the majority reached its conclusion, the propriety of granting an absolute editorial process privilege must be seriously questioned. The United States Supreme Court in *Lando* firmly rejected a claim that such a privilege arose from the first amendment.[181] Justice Pashman found *Lando* inapplicable because "[t]here was no Shield Law at issue in the case."[182] Earlier in the majority opinion, however, the Shield Law was said "[t]o buttress the constitutional protection for news gathering,"[183] referring to the recognition in *Branzburg* that a newsperson's gathering of information is entitled to some protection under the first amendment.[184] It seems strange that a statute fortifying a constitutional protection should, by the very fact of its enactment, become a vehicle for expanding the scope of that protection beyond the limits set by the Supreme Court. The *Maressa* majority found its authority for doing so in the statement by the Supreme Court in *Branzburg* that "we are powerless to bar state courts from . . . construing their own constitutions so as to recognize a newsman's privilege, either qualified or absolute."[185] That case, however, dealt with a newsperson's privilege not to disclose confidential information to grand juries, and the above-quoted passage referred to the creation of an absolute privilege in that specific context.[186] Indeed, it has been suggested that the creation of absolute

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implies the legislature's approval of an interpretation of the Shield Law precisely opposite to that of Justice Pashman. That conclusion is bolstered by the fact that in June of 1982, a bill proposing to amend the Shield Law to specifically exclude editorial processes from the privilege was introduced in the New Jersey Senate. *See* N.J.S. 1519, 200th Leg., 1st Sess. (1982).

[181] *Lando*, 441 U.S. at 158.

[182] 89 N.J. at 189, 445 A.2d at 383.

[183] *Id.* at 185, 445 A.2d at 381.

[184] *Id.* at 184, 445 A.2d at 380.

[185] *Branzburg*, 408 U.S. at 706.

[186] *Id.* This is evident when the quoted passage is read together with the immediately preceding sentence:

> There is also merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards *in light of the conditions and problems with respect to*

privileges for newspersons in other contexts might be inherently unconstitutional.[187] It thus seems that the use of *Branzburg* to justify dismissing *Lando* as inapposite has at least questionable validity. Justified or not, the decision not to apply that holding carries a number of implications for both newspersons and for future *New York Times* libel plaintiffs in New Jersey.

Perhaps the most obvious result of an absolute privilege against disclosure of the editorial process is that a number of *New York Times* plaintiffs will almost certainly be unable to prove actual malice, and thus will not be able to recover for defamation.[188] The corollary to this, however, may be even more disturbing: Some newspersons will thus be exempt from answering in libel for false, defamatory statements that may have been intentionally published. One commentator has suggested that a perception that newspersons are somehow above the law might result in efforts to regulate the news media, which would ultimately cause more disruption than would the discovery of editorial processes.[189] In addition, there is the chance that the plaintiff's reliance solely on circumstantial evidence to prove actual malice may bring about more erroneous judgments against newspersons than would result if the editorial process were discoverable.[190]

Justice Brennan's partial dissent in *Lando* suggests a reasonable answer to whether to permit newspersons an absolute privilege against disclosure of their editorial processes in libel actions. His proposal was to allow discovery of a newsperson's mental processes since this information may be crucial to the plaintiff's proof of actual malice, and yet its disclosure would probably not result in any chilling

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> *the relations between law enforcement officials and press* in their own areas. It goes without saying, of course, that we are powerless to bar state courts from responding in their own way and construing their own constitution so as to recognize a newsman's privilege, either qualified or absolute.

Id. (emphasis added).

[187] *See Boiardo*, 82 N.J. at 456 n.8, 414 A.2d at 20 n.8. That note provides in pertinent part:

> While it is logical to assume that a state may cut back on rights or privileges for itself, it is another matter indeed to suggest that a state can shrink the constitutionally guaranteed rights of an individual, i.e., to fair trial. . . . Such a reduction of individual rights . . . would seem to suffer from inherent constitutional infirmity.

Id.

[188] 89 N.J. at 200, 445 A.2d at 389; *see Lando*, 441 U.S. at 160.

[189] Bezanson, Herbert v. Lando, *Editorial Judgment, And Freedom Of The Press: An Essay*, 1978 U. ILL. L. F. 605, 630. The author suggested that once a movement was afoot to legislate press accountability, the press would be forced into an active political role. *Id.*

[190] *Lando*, 441 U.S. at 172-73. Justice White stated that "direct inquiry . . . which affords the opportunity to refute inferences that might otherwise be drawn from circumstantial evidence, suggests that more accurate results will be obtained by placing all . . . of the evidence before the decision-maker." *Id.*

of the newsperson's thought process.[191] Before any objective editorial processes such as newsroom conversations and memos could be discovered, however, Justice Brennan would require the plaintiff to make a *prima facie* showing that a defamatory falsehood had been published.[192] Such an approach balances the public need for vigorous, probing pressroom dialogue against the individual need for a means of proving actual malice when one's reputation has in fact been harmed.[193]

This compromise approach, allowing as it does for the interests of both newspersons and libel plaintiffs, seems far preferable to the result reached by Justice Pashman. One may take issue with the court's interpretation of the New Jersey Constitution, with its construction of the Shield Law, or with the conceptual grounds on which it rejected *Lando*, but the most telling observation is a simple one: The *Maressa* majority has created an absolute privilege which appears to be unnecessary to the protection of either the freedom or the efficacy of the news media.

The disclosure of a newsperson's editorial processes, unlike the revelation of confidential sources or information, will not impair the news-gathering process by silencing potential informers wary of exposure, since the newspersons are the original sources of the information sought. Neither should newsroom discussions be restricted by the possibility of their later discovery, since newspersons will still have a strong interest in accurate reporting because of potential liability for the publication of knowing or reckless falsehoods.[194] Such discovery would certainly not chill the thought processes of newspersons either, for as Justice Brennan suggested in his *Lando* partial dissent, one who stopped thinking would no longer be a newsperson.[195]

Thus, an absolute privilege is not needed to assure the continued freedom of newspersons to gather and prepare the news. Justice Brennan's requirement that a *New York Times* libel plaintiff make a *prima*

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[191] *Id.* at 192 (Brennan, J., dissenting in part).

[192] *Id.* at 197 (Brennan, J., dissenting in part).

[193] Once this *prima facie* showing has been made, however, the possibility remains that the plaintiff will abuse the broad scope of discovery by requesting massive amounts of information from the media defendant. Justice Marshall has suggested that, in recognition of the constitutional interests at stake, discovery requests in libel suits "should be measured against a strict standard of relevance," in order to prevent these excesses. *Id.* at 206 (Marshall, J., dissenting). Justice White voiced a similar concern, calling for stricter application of the "relevance" standard of FED. R. CIV. P. 26(b)(1), and for broader use by judges of their power to restrict oppressive discovery under FED. R. CIV. P. 26(c). *Lando*, 441 U.S. at 177.

[194] *Lando*, 441 U.S. at 173-74.

[195] *Id.* at 192 (Brennan, J., dissenting in part).

facie showing of defamatory falsehood before being allowed discovery of the objective aspects of the editorial process would ensure that even this slight intrusion into the media news process was entirely justified. The threat of burdensome discovery could be virtually eliminated by applying a strict relevancy standard to discovery requests in libel suits against the news media, as suggested by Justice Marshall, and proceedings could be quickly terminated by the granting of summary judgments whenever possible.[196]

If these procedures were adopted, the newsperson's editorial processes and the news media's freedom and vitality could be preserved without the necessity of further limiting the ability of a public figure or official to recover in libel. The *New York Times* actual malice standard was evidently considered by the Court in *Lando* as the proper balance between the needs of a robust press, and those of an allegedly defamed individual. Denying discovery of the editorial process to plaintiffs who must bear the burden of proving the defendant's state of mind unwisely tips that balance toward actual or perceived press immunity to libel actions. The *Lando* Court maintained the *New York Times* equilibrium by refusing to recognize an absolute privilege against disclosure of a newsperson's editorial processes. If not the letter, then at least the logic of that decision should have been adopted by New Jersey's highest court in *Maressa*.

Robert W. Smith

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[196] 89 N.J. at 196-200, 445 A.2d at 386-89; *see also supra* note 127 and accompanying text.