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First Amendment -- Defamation -- Editorial Privilege: Herbert v. Lando

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First Amendment—Defamation—Editorial Privilege: *Herbert v. Lando* [1]—In March, 1971, Colonel Anthony Herbert, a highly decorated career soldier, formally charged his superior officers with covering up reports of war atrocities in Viet Nam.[2] Herbert's story fascinated the American public which had become increasingly disillusioned with the war in Viet Nam. His accusations received widespread media attention.[3] In 1973, Herbert again became the center of controversy after CBS broadcast a segment of the news documentary program "Sixty Minutes" entitled "The Selling of Colonel Herbert." The segment, produced by Barry Lando and narrated by Mike Wallace, cast serious doubts upon Herbert's veracity and concluded that the press had been deluded by Herbert's story.[4] Herbert responded to the broadcast by bringing a defamation action against Lando, Wallace, and CBS claiming nearly $45,000,000 in damages to his reputation and to the literary value of his book about his experiences.[5] After filing suit, Herbert initiated extensive discovery and Lando answered numerous questions about facts he had learned, who he had interviewed, and the content of the interviews. Lando balked, however, when asked questions relating to his beliefs, intent and conclusions in preparing the program.[6] Herbert then filed a motion to compel Lando to respond to his questions.[7]

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[1] 441 U.S. 153 (1979).

[2] Herbert v. Lando, 568 F.2d 974, 980-81 (2d Cir. 1977). Herbert claimed that he witnessed numerous war atrocities while commanding a combat battalion. He further alleged that he reported these atrocities to his commanding officers Colonel Franklin and General Barnes. According to Herbert, neither was interested in investigating and when Herbert insisted on pursuing the issue he was removed from his command. *Id.* at 980.

[3] *Id.* For example, Herbert was the subject of favorable articles in *Life* magazine and the *New York Times* and was interviewed on a national talk show by Dick Cavett. *Id.*

[4] *Id.* at 981-82. Lando taped interviews with several Army officers, including Barnes and Franklin, who denied Herbert's claims. In addition, the segment pinpointed several inconsistencies in Herbert's story—the most damaging of which involved the events of February 14, 1969. Herbert claimed that on that day he witnessed the brutual murder of four prisoners of war by South Vietnamese soldiers while an American advisor callously looked on. Herbert stated that he immediately reported the event to his superior Colonel Franklin. Franklin denied receiving such a report and claimed that he was returning from Hawaii on that date. Lando produced evidence, including a hotel receipt, confirming that Franklin had been in Hawaii on February 14, 1969. The general impression conveyed by the broadcast was that Herbert had concocted the stories of reporting war crimes as an excuse for his relief from command. *Id.*

[5] *Id.* at 982. *See* A. HERBERT & J. WOOTEN, SOLDIER (1973).

[6] 568 F.2d at 982-83. The court of appeals grouped the questions which were objected to 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; (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; and (5) Lando's intentions as manifested by his decision to include or exclude certain material. *Id.* at 983.

[7] *Id.* FED. R. CIV. P. 37(a)(2).

The district court granted Herbert's motion.[8] In reaching its decision to compel discovery, the district court reasoned that Herbert should be afforded the benefit of a liberal interpretation of the rules of discovery in view of the heavy burden of proof imposed by the *New York Times v. Sullivan*[9] standard.[10] A divided, three-judge court of appeals reversed,[11] holding that the editorial process is protected by the first amendment and is privileged from discovery in a defamation action brought by a public figure.[12] The Supreme Court, by a 6-3 majority, reversed the court of appeals,[13] and held that the first amendment does not protect the editorial process from discovery by defamation plaintiffs.[14] The Court stated that the concept of an editorial privilege was inconsistent with the Court's prior defamation decisions.[15] Further, the Court found no clear and convincing reasons for changing existing constitutional doctrine.[16]

As the first Supreme Court decision to discuss the concept of an editorial privilege, this case is significant for two reasons. First, it reflects the Supreme Court's continued retrenchment from the protection provided to the press in *New York Times*. Thus, *Herbert* has theoretical implications for the balance to be struck by future courts between the competing interests of compensating victims of defamation, and promoting uninhibited debate of public issues. Second, the case represents a setback for the press on a practical as well as a theoretical level. The Court's decision could have a "chilling effect" on the editorial decision making process, as editors realize that their conversations are open to public disclosure.

Accordingly, this casenote will examine the first amendment implications of the *Herbert* Court's refusal to grant an editorial privilege. It will briefly discuss *New York Times v. Sullivan*, the first case to impose constitutional restraints on the law of defamation. The casenote will then explain the reasoning of the *Herbert* Court in refusing to grant a privilege and will present a critical analysis of the *Herbert* decision. The casenote will conclude that the importance of protecting the editorial integrity of the press warrants the increased burden which the privilege would place on defamation plaintiffs.

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[8] Herbert v. Lando, 73 F.R.D. 387 (S.D.N.Y. 1977).

[9] 376 U.S. 254 (1964). In *New York Times*, the Court held that a public official can recover defamation damages only upon proving that the defendant published with "actual malice"—that is, with knowledge of falsity or with reckless disregard for the truth. *Id.* at 279-80. See discussion of *New York Times* in text at notes 29-33 *infra*. The "actual malice" standard was extended to cover defamation actions brought by public figures in Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967). See text at note 34 *infra*. For purposes of this case Herbert was conceded to be a public figure. 73 F.R.D. at 391. Consequently, he will be required to meet the standard of "actual malice" in order to prevail at trial.

[10] 73 F.R.D. at 394.

[11] 569 F.2d 974 (2d Cir. 1977).

[12] *Id.* at 975.

[13] Herbert v. Lando, 441 U.S. 153 (1979).

[14] *Id.* at 155, 175.

[15] *Id.* at 169. See notes 79 & 81 *infra*.

[16] *Id.* at 169-170.

I. THE *NEW YORK TIMES V. SULLIVAN* BALANCE

Prior to 1964, the law of defamation was governed strictly by state law. The Supreme Court had repeatedly refused to impose constitutional restraints on the ground that the first amendment did not protect libelous statements.[17] In *New York Times v. Sullivan*,[18] however, the Court reversed its earlier position and concluded that state laws infringing free expression are not immune from constitutional scrutiny merely because the affected speech is characterized as "libelous."[19]

New York Times was a defamation action brought by L. B. Sullivan—a city commissioner in Montgomery, Alabama.[20] Sullivan alleged that an advertisement published by the New York Times had contained defamatory statements concerning his official conduct.[21] The Alabama Supreme Court upheld a jury verdict in Sullivan's favor of $500,000.[22] Thus, the issue before the United States Supreme Court was the extent to which the constitutional protection for speech and press limits the states' power to award damages in a libel action brought by a public official.[23] The Court held that the rule of law imposed by the Alabama court[24] was constitutionally deficient for failing to provide sufficient safeguards for freedom of speech and of the press.[25] In reaching its decision, the Court noted that error in free debate is inevitable.[26] Further, the Court recognized that requiring the press to guarantee the accuracy of every publication or else face financial punishment would result in self-censorship and suppression of truthful statements.[27] The Court found that such a chilling effect on truthful publication is inconsistent with the first amendment and that a higher degree of protection should be afforded—at least in those cases in which the plaintiff is a public official and the defama-

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[17] *See, e.g.*, Konigsberg v. State Bar of California, 366 U.S. 36, 49 n.10 (1961); Times Film Corp. v. City of Chicago, 365 U.S. 43, 48 (1961); Roth v. United States, 354 U.S. 476, 486-87 (1957); Beuharnais v. Illinois, 343 U.S. 250, 266 (1952); Pennekamp v. Florida, 328 U.S. 331, 348-49 (1946); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942); Near v. Minnesota, 283 U.S. 697, 715 (1931).

[18] 376 U.S. 254 (1964).

[19] *Id.* at 269.

[20] *Id.* at 256.

[21] *Id.* The advertisment—entitled "Heed Their Rising Voices"—presented a description of the alleged actions of the Montgomery Police during civil rights marches. The ad complained of "terror" tactics against the demonstrators and particularly against their leader Dr. Martin Luther King. Several of the allegations in the ad turned out to be incorrect. Mr. Sullivan was the city commissioner in charge of supervising the activities of the Montgomery police. *Id.* at 256-57.

[22] New York Times Co. v. Sullivan, 273 Ala. 656, 687, 144 So. 2d 25, 52 (1962).

[23] 376 U.S. at 256.

[24] *Id.* at 267. Under Alabama law if a publication was libelous *per se*, the plaintiff simply needed to show that the defendant published the libelous statement concerning the plaintiff. No evidence of injury was necessary as damages were presumed. In addition, the defendant bore the burden of proving that the publication was true. *Id.*

[25] *Id.* at 264.

[26] *Id.* at 271-72 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).

[27] 376 U.S. at 279.

tion related to the performance of public duties.[28] Thus, the Court held that, when the plaintiff is a public official, recovery is possible only if it is shown with convincing clarity that the defendant published the defamatory statement with "actual malice."[29] The Court defined "actual malice" as either knowledge that the publication was false, or reckless disregard of whether the publication was false or not.[30] Later cases refined this definition and made clear that "reckless disregard" referred to situations where the defendant entertained serious doubts as to the truth of the publication.[31]

The purpose of the "actual malice" standard as set out in *New York Times* is to strike a balance between the conflicting interests involved in the defamation context. On one hand, the strong interest in promoting a candid, robust and uninhibited debate of public issues demands protection from state libel laws.[32] On the other hand, the state's legitimate interest in protecting an individual's reputation from unwarranted harm requires a means of compensation for defamation.[33] Through imposition of the "actual malice" standard, the Court balanced the competing interests by providing increased protection to first amendment values while still maintaining a cause of action for a defamed public official in limited circumstances.

The "actual malice" standard, adopted in *New York Times,* was extended by the Court to cover defamation actions brought by public figures in *Curtis Publishing Co. v. Butts.*[34] The Court in *Butts* noted that, in many situations, policy determinations which were traditionally channeled through governmental institutions are now originated and implemented by the private sector.[35] Additionally, the Court noted that private individuals who do not hold public office are often intimately involved in the resolution of important public issues or, by reason of their fame, influence events in areas of concern to the society at large.[36] Such individuals, the Court stated, like public officials, play an important role in shaping policy and the public has a legitimate interest in

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[28] *Id.* at 279-80.

[29] *Id.*

[30] *Id.*

[31] *See* St. Amant v. Thompson, 390 U.S. 727, 731 (1968). *See also* Gertz v. Robert Welch, Inc., 418 U.S. 323, 334-35 n.6 (1974); Garrison v. Louisiana, 379 U.S. 64, 74 (1964).

[32] New York Times v. Sullivan, 376 U.S. 254, 278 (1964): "Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive." *Id.*

[33] Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974):

> "The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood. We would not lightly require the state to abandon this purpose for . . . the individual's right to the protection of his own good name reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty . . . ."

Id. (quoting Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring)).

[34] 388 U.S. 130 (1967).

[35] *Id.* at 163-64.

[36] *Id.* at 164.

the conduct of such persons.[37] The Court concluded that uninhibited and robust debate of the involvement of such public figures in public issues and events is as crucial as in the case of public officials.[38]

Following *Butts,* the Court reached the highwater mark in its protection of the press from libel awards in *Rosenbloom v. Metromedia, Inc.*[39] In *Rosenbloom,* the Court concluded in a plurality opinion that the *New York Times* standard of knowing or reckless falsity applied to an action brought by a private individual if the defamatory statement concerned the plaintiff's involvement in an event of public interest.[40] The Court, thus, changed its focus from the question of whether an individual was a public person to the question of whether the story concerned a matter of public interest.

Since the *Rosenbloom* decision, however, the Court has steadily retrenched on the protection afforded to the press from state libel laws. While the "actual malice" standard articulated in *New York Times* has remained unchanged, the Court, in a series of decisions, has constricted the number of potential plaintiffs to whom the standard will apply. In *Gertz v. Robert Welch Inc.,*[41] the Court retreated from the *Rosenbloom* plurality opinion and restricted the "actual malice" standard to those cases brought by public officials or public figures. The Court held that in actions brought by private figures the standard for recovery was to be left to the state[42]—provided the state did not allow recovery without fault[43] and provided the state did not allow punitive damages unless the *New York Times* standard was met.[44] Two years later, in *Time, Inc. v. Firestone,*[45] the Court gave a very restrictive definition to "public figures," holding that a well known wealthy socialite was a private figure even though she subscribed to a newspaper clipping service and had held press conferences.[46] Recently the Court further contracted the public figure definition in *Hutchinson v. Proxmire*[47] and *Wolston v. Reader's Digest Ass'n.*[48] In *Hutchinson* the Court held that a scientist who had received federal grants for research was a private figure.[49] In *Wolston* the Court concluded that a person who pleaded guilty to contempt charges during an espionage investigation was a private figure.[50] The Court continues to emphasize the language from *Gertz v. Robert Welch, Inc.*[51] that in order to become a public figure one must thrust himself into the forefront of a public controversy for the purpose of influenc-

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[37] *Id.*
[38] *Id.*
[39] 403 U.S. 29 (1971).
[40] *Id.* at 43-44.
[41] 418 U.S. 323 (1974).
[42] *Id.* at 347.
[43] *Id.*
[44] *Id.* at 350.
[45] 424 U.S. 448 (1976).
[46] *Id.* at 453-54, 485.
[47] 443 U.S. 111 (1979).
[48] 443 U.S. 157 (1979).
[49] 443 U.S. at 114.
[50] 443 U.S. at 161.
[51] 418 U.S. 323.

ing the resolution of issues involved.[52] In *Wolston,* Mr. Justice Blackmun noted with disapproval that the Court seemed to say that someone could only become a public figure by literally or figuratively mounting a rostrum to advocate a particular view.[53]

Although the Court has severely limited the number of people to whom the "actual malice" standard applies, the Court has not retreated from the standard itself. When the "actual malice" standard is invoked it provides a significant degree of constitutional protection to the press. In order for a public figure or public official to recover, the plaintiff must show with convincing clarity[54] that the defendant either knew the story was false or published with reckless disregard for the truth.[55] It is no longer enough for the public person to merely show that the publisher was negligent. The effect of the "actual malice" standard has been to revolutionize the law of defamation.[56] The focus in defamation actions has shifted from the defendant's attitude toward the plaintiff, to the defendant's degree of knowledge of the statement's probable falsity.[57] This change in focus, however, left open the question of how far a defamation plaintiff can intrude into the editorial decision making proc-

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[52] *Id.* at 345. The dual standard of liability created by *New York Times* and *Gertz* has led to considerable litigation over the definition of public officials, public figures and private figures. *See, e.g.,* Wolston v. Readers' Digest Ass'n, Inc., 443 U.S. 157 (1979) (individual convicted of contempt of court during hearings on communist spies held not a public figure); Hutchinson v. Proxmire, 443 U.S. 111 (1979) (scientist using federal grant for research held not a public official nor a public figure); Time, Inc. v. Firestone, 424 U.S. 448 (1976) (wife of a member of a wealthy industrial family held not a public figure); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (attorney in highly publicized case held not a public figure); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) (college football coach held a public figure); Appleyard v. Transamerican Press, Inc., 539 F.2d 1026 (4th Cir. 1976) (truckdriver who attempted to change I.C.C. regulations conceded to be a public figure); Jenoff v. Hearst Corp., 453 F. Supp. 541 (D. Md. 1978) (undercover police informant held neither a public figure nor a public official); Logan v. District of Columbia, 447 F. Supp. 1328 (D.D.C. 1978) (hoodlum attempting to get a job as a "hit man" with a police "fencing" operation held a public figure); Chuy v. Philadelphia Eagles Football Club, 431 F. Supp. 254 (E.D. Pa. 1977) (professional football player held a public figure); Rosanova v. Playboy Enterprises, Inc., 411 F. Supp. 440 (S.D. Ga. 1976) (individual with extensive, well publicized ties to underworld figures held a public figure); Foster v. Laredo Newspapers, Inc., 541 S.W.2d 809 (Tex. 1976) (civil engineer engaged in consulting for county government held not a public official nor a public figure).

[53] 443 U.S. at 169.

[54] New York Times v. Sullivan, 376 U.S. 254, 285-86 (1964).

[55] *Id.* at 279-80.

[56] At common-law the plaintiff merely needed to show that the defendant published a defamatory statement concerning the plaintiff. Strict liability was the standard; no showing of negligence or recklessness was necessary. Evidence was unnecessary on damages as they were presumed. The defendant could avoid liability by proving that the statement was conditionally privileged. The plaintiff could overcome such a privilege by introducing evidence of "common-law malice"—spite or ill-will towards the plaintiff. *See generally* W. PROSSER, THE LAW OF TORTS § 114, at 776, § 115 at 794-95 (4th ed. 1971); Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer,* 61 VA. L. REV. 1349 (1975).

[57] *Cf.* Cantrell v. Forest City Publishing Co., 419 U.S. 245, 252 (1974) (newspaper publishing story showing plaintiff in a "false light" found liable for invasion of privacy).

ess in attempting to meet his burden of establishing "actual malice." This issue was presented directly in *Herbert v. Lando.*[58]

II. The *Herbert* Decision

A. *The Lower Courts*

In *Herbert* the district court[59] was confronted with the narrow issue of the appropriate boundaries of discovery in a defamation action brought by a public figure. After noting that the case was substantially one of first impression,[60] the court concluded that the questions asked by Herbert were permissible.[61] In reaching its decision, the court found that questions as to the defendant's subjective state of mind were crucially important to the plaintiff's case.[62] The court rejected the defendant's claim of constitutional protection stating that it found nothing in the first amendment which required it to increase the plaintiff's already heavy burden of proof by creating barriers behind which malicious publication may go undetected.[63] The district court certified the case to the court of appeals[64] for interlocutory appeal[65] and a divided, three-judge court reversed. The appellate court concluded that granting Herbert's discovery request would permit an unacceptable chilling intrusion into the editorial process.[66]

Both Chief Judge Kaufman, in the opinion of the court, and Judge Oakes, in a concurring opinion, placed great emphasis on the so called "right of access" cases: *Miami Herald Publishing Co. v. Tornillo,*[67] and *Columbia Broadcasting System, Inc. v. Democratic National Committee.*[68] *Tornillo* struck down a "right to reply" statute which gave any political candidate who had been criticized by a newspaper the right to free space in the newspaper to print a reply.[69] *CBS* upheld a network policy to arbitrarily refuse all editorial advertisements.[70] In both cases, the Supreme Court held that the choice of material to be published (or broadcast) constitutes the exercise of editorial judgment and that governmental regulation of this process would be inconsistent with the first amendment.[71] The appellate court in *Herbert* reasoned that the *Tornillo* and *CBS* cases supported the proposition that governmental interfer-

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[58] 441 U.S. 154 (1979).

[59] 73 F.R.D. 387 (S.D.N.Y. 1977).

[60] *Id.* at 393-94. The court noted that only one other case, Buckley v. Vidal, 50 F.R.D. 271 (S.D.N.Y. 1970), had considered the appropriate boundaries of discovery in a public figure defamation action. *Id.*

[61] 73 F.R.D. at 395.

[62] *Id.* at 393.

[63] *Id.* at 394.

[64] 568 F.2d 974 (2d Cir. 1977).

[65] 28 U.S.C. § 1292(B) (1948).

[66] 568 F.2d at 984.

[67] 418 U.S. 241 (1974).

[68] 412 U.S. 94 (1973).

[69] 418 U.S. at 247, 258.

[70] 412 U.S. at 114, 121.

[71] 418 U.S. at 258, 412 U.S. at 120-21.

ence with the editorial judgment process through intrusive discovery would also violate the first amendment.[72]

The privilege envisioned by the court of appeals protected essentially two facets of the editorial process, the prepublication decision making process, and the mental process of the journalist in formulating a story. The court of appeals suggested that a privilege covering the first component of the editorial process—the prepublication editorial decision making process—was one which would protect discussions among editors, reporters, and other members of the media organization in deciding which sources to believe and which material to publish.[73] Applied to the *Herbert* case, the privilege would cover questions directed to the conversations between Lando and Wallace concerning the material to be included or excluded from the broadcast.[74] Additionally, the court of appeals suggested that a privilege covering the second component of the editorial process—the journalist's mental process in formulating a story—was one which would shield the journalist's motivation, conclusions, and his basis for reaching conclusions.[75] Applied to the *Herbert* case, the privilege would cover Lando's conclusions regarding leads to be pursued; his conclusions as to the veracity of people interviewed; the basis for his conclusions regarding the veracity of people interviewed; and his motivation for including or excluding certain material.[76]

B. *The Supreme Court—Majority Opinion*

In reversing the court of appeals, the Supreme Court directly addressed the issue of whether the first amendment precludes discovery of the editorial process and mandates the application of an editorial privilege.[77] The Court concluded that such a privilege is not required, authorized or presaged by the Court's prior cases.[78] In its discussion, the Court noted that cases decided both before and after *New York Times* had allowed defamation plaintiffs to prove the necessary state of mind by direct inquiry into the editorial process.[79]

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[72] 568 F.2d at 978-79 (Kaufman, C.J.) & 994-95 (Oakes, J., concurring).

[73] *Id.* at 980, 993-94.

[74] In other words, the privilege would cover category number four based on the grouping of the court of appeals. See note 6 *supra*.

[75] *See* 568 F.2d at 980, 984 (Kaufman, C.J.) & 995 (Oakes, J., concurring). Basically, it would cover the "why" questions but not factual questions of the who, what, when, where type. 441 U.S. at 171 n.19.

[76] Thus, the privilege would cover categories 1, 2, 3 and 5 based on the grouping of the court of appeals. See note 6 *Supra*.

[77] 441 U.S. at 155. In its discussion, the Supreme Court recognized that the privilege envisioned by the court of appeals would protect essentially two facets of the editorial process—the prepublication editorial decisionmaking process and the journalist's mental process in formulating a story. *Id.* at 158, 181 (Brennan, J., dissenting), and 206 (Marshall, J., dissenting); *see* 568 F.2d at 980 and 995.

[78] 441 U.S. at 169.

[79] *Id.* at 165, 158-60. For examples of common law cases which accepted evidence going directly to the editorial process, *see, e.g.*, Johnson Publishing Co. v. Davis, 271 Ala. 474, 498, 124, So. 2d 441, 461, (1960); Freeman v. Mills, 97 Cal. App. 2d 161, 169, 217 P.2d 687, 693 (1950). *See also* Sandora v. Times Co., 113 Conn. 574, 155 A. 819 (1931); Scott v. Times-Mirror Co., 181 Cal. 345, 184 P. 672 (1919).

For example, the Court observed that plaintiffs in common law defamation cases frequently had to prove improper motivation on the part of the publisher in order to overcome a conditional privilege.[80] Similarly, plaintiffs in cases decided under the *New York Times* standard must establish the subjective state of mind of the defendant.[81] The Court noted that none of these cases suggested that the first amendment prohibited proving the requisite state of mind by direct inquiry into the editorial process.[82]

After determining that prior defamation cases did not mandate an editorial privilege, the Court reviewed the "right of access cases"[83] which the court of appeals had relied upon in granting the privilege. The Court noted that the "right of access" cases had dealt with the issue of government control of material to be published or broadcast.[84] In those cases the Court had refused to allow such control because it constituted a prior restraint on the content of publications.[85] The *Herbert* Court concluded that the bar to government control of program selection was not tantamount to a holding that the editorial process was completely immune from inquiry.[86]

Despite the lack of precedential support for the privilege, the respondents argued that the important first amendment values to be served by the privilege warranted a modification of existing first amendment doctrine. The Court disagreed, however, and found both practical and theoretical problems with the proposed privilege. On a practical level, the Court noted that the privilege would seriously hinder the ability of a defamation plaintiff to establish "actual malice."[87] Specifically, the plaintiff would be precluded from proving knowledge of falsity or reckless disregard for the truth by direct evidence. Instead, the plaintiff would be forced to rely completely on circumstantial evidence.[88] Although the Court acknowledged that the plaintiff would rarely prove his case from the defendant's own statements, the Court observed that such direct evidence would be extremely relevant.[89] Moreover, the Court reasoned that the boundaries of the proposed editorial privilege would be difficult to define.[90] For example, the Court stated it would be

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[80] 441 U.S. at 165.

[81] *Id.* at 1641. For a case decided after *New York Times* which accepted evidence going directly to the editorial process, see Time, Inc. v. Hill, 385 U.S. 374, 391-94 (1967). *See also* Curtis Publishing co. v. Butts, 388 U.S. 130, 158-59 (1967).

[82] 441 U.S. at 160.

[83] *Id.* at 166-67. *See* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974); Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973).

[84] 441 U.S. at 167.

[85] *Id.* at 167-68.

[86] *Id.* at 168. In addition, the Court noted that the *Tornillo* case and Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), were decided on the same day. In *Gertz*, the Court recapped the recent developments in the relationship between the first amendment and the law of defamation. Yet *Gertz* did not mention the establishment of an editorial privilege in a companion case that would severely restrict the ability of a defamation plaintiff to prove "actual malice." 441 U.S. at 168.

[87] 441 U.S. at 170.

[88] *Id.*

[89] *Id.*

[90] *Id.* Although the *Herbert* Court did not discuss the extent of the proposed editorial privilege, the Court did refer to the privilege as an absolute privilege. 441

unclear whether the privilege would extend to cover conversations between reporters and third parties.[91] Also, the boundary would be difficult to draw between a reporter's beliefs, which would be privileged, and a reporter's knowledge, which would not be privileged.[92]

In addition to these practical problems, the Court found no persuasive theoretical basis on which to uphold the privilege. The Court rejected the contention that the privilege was necessary to prevent an unacceptable "chilling effect" on the editorial process.[93] Instead, the Court concluded that allowing plaintiffs to establish their cases by direct evidence was consistent with the balance struck in its prior decisions allowing a public figure plaintiff to recover upon establishing the requisite degree of culpability.[94] Furthermore, the Court stated it was difficult to see why establishing liability through direct evidence would produce a "chilling effect" while establishing liability by circumstantial evidence would not.[95] On the contrary, the Court concluded that direct evidence would lead to more accurate results as it would allow the defendant to explain why he relied upon a particular source.[96] The Court acknowledged the relationship between frank prepublication discussion and sound decision making, but concluded that exposure to liability in cases of knowing or reckless error would encourage the media to resort to prepublication precautions.[97]

After deciding the constitutional question, the Court reviewed the issue of discovery abuse in defamation cases. The Court noted that discovery costs had soared in all areas of the law, not merely in libel litigation.[98] In addition, the

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U.S. at 158, 169. In addition, it appears that the court of appeals envisioned an absolute privilege that would apply at trial as well as in discovery. Judge Kaufman, in the opinion of the Court, referred only to an editorial privilege, but the "chilling effect" rationale which his opinion was based upon would seem to require that the privilege be absolute and that it be extended to trial. 568 F.2d at 980. Judge Oakes, in a concurring opinion, stated in dictum that the privilege would apply both during discovery and at trial. 568 F.2d at 995 n.38.

The only court to consider the issue under the appellate court decision found the privilege to apply at trial. Reliance Ins. Co. v. Barron's, 442 F. Supp. 1341, 1359 (S.D.N.Y. 1977) (on reargument). *See also* Comment, *Herbert v. Lando: Reporter's Privilege from Revealing the Editorial Process in a Defamation Suit,* 78 COLUM. L. REV. 448, 453 n.24 (1978).

[91] 441 U.S. at 171.

[92] *Id.* at 170. As previously noted, the privilege envisioned by the court of appeals would cover the journalist's beliefs, motivations and thought process but would not cover factual material in the journalist's possession. See text at note 75 *supra.* For purposes of this note, the court of appeals' definition of "editorial privilege" is adopted.

[93] *Id.* at 171-73.

[94] *Id.* at 172.

[95] *Id.*

[96] *Id.* at 172-73. For example, the Court noted that if a reporter has two contradictory reports about the plaintiff, one of which is false and damaging, and only the false one is published, the reporter would want to testify to explain why the false report was published. As support for this point, the Court noted that in many defamation cases (including *New York Times*) it is the defendant who first presents direct evidence about the editorial process in order to establish good faith. *Id.* at 173 n.21.

[97] *Id.* at 173.

[98] *Id.* at 176.

Court stated that, in view of the increased burden of proof imposed by *New York Times,* it was not surprising that defamation plaintiffs resorted to increased discovery.[99] The Court concluded that an editorial privilege would not shield the press from the high cost of litigation—indeed only a complete immunity from libel actions would accomplish this.[100] Further, the Court noted that district courts already have the necessary tools to prevent discovery abuse, and that a separate directive to limit discovery in libel actions is unnecessary.[101]

C. *The Dissents*

Mr. Justice Brennan filed an opinion dissenting in part from the majority opinion. Although Justice Brennan agreed that a privilege was not necessary to protect the journalist's mental processes, he strongly favored the creation of a qualified privilege covering prepublication editorial discussions.[102] Justice Brennan began his analysis by noting that the Court had in the past recognized evidentiary privileges in order to promote significant public policy goals.[103] He further noted that the press had served a historically important role in disseminating information and in checking government abuse.[104] Justice Brennan argued that the editorial privilege would act as a shield for the press in carrying out its function and would therefore benefit the public at large.[105]

While Justice Brennan favored the concept of some form of editorial privilege, he rejected the idea that the privilege should extend to cover the journalist's mental process. Justice Brennan found "implausible" the appellate court's conclusion that journalists would be "chilled in the very process of thought."[106] He noted that *New York Times* called for proof of the publisher's subjective state of mind. Any chilling effect, he concluded, would emanate from the substantive standard of *New York Times* and not from the means by which the publisher's state of mind was established.[107]

Although Justice Brennan was not persuaded that it was necessary to protect the journalist's mental process, he found the reasoning for a privilege protecting the exchange of ideas between newsmen compelling.[108] Justice

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[99] *Id.*

[100] *Id.*

[101] *Id.* at 177. In a separate concurring opinion Justice Powell agreed that an editorial privilege was not warranted. Justice Powell added, however, that in weighing the relevance of discovery requests the district courts should give careful consideration to the impact such requests have on first amendment values. *Id.* at 177-80.

[102] *Id.* at 181.

[103] *Id.* at 183. Brennan noted, for example, that Hickman v. Taylor, 329 U.S. 495 (1947), established a privilege for the attorney's work product and Roviaro v. United States, 353 U.S. 53 (1957), recognized a qualified informer's privilege.

[104] *Id.* at 188-89 (quoting First Nat'l Bank v. Bellotti, 435 U.S. 765, 781 (1978)). *See, e.g.*, Branzburg v. Hayes, 408 U.S. 665, 705 (1972); Time, Inc. v. Hill, 385 U.S. 374, 389 (1967); Grosjean v. American Press Co., 297 U.S. 233, 250 (1936).

[105] 441 U.S. at 189.

[106] *Id.* at 192 (quoting Herbert v. Lando, 568 F.2d 974, 984 (2d Cir. 1977)).

[107] 441 U.S. at 193.

[108] *Id.* at 195.

Brennan analogized such a privilege to the executive privilege. He argued that the rationale supporting the executive privilege—to foster a more candid interchange of ideas in the policy making process—applies as well to the editorial decision making process.[109] Although Justice Brennan would have granted a privilege to the editorial decision making process, he argued that the privilege should be qualified and give way if the plaintiff established a prima facie case of defamation. This would lessen the burden on defamation plaintiffs while still providing some degree of protection to the press.[110]

In a separate dissenting opinion Mr. Justice Stewart observed that courts frequently have confused the distinction between actual malice (knowledge of falsity or reckless disregard for the truth) and common law malice (spite, ill-will or hostility).[111] Justice Stewart concluded that the majority in *Herbert* fell victim to this error. Although the Court recited the correct constitutional standard, Justice Stewart stated that the result in *Herbert* could only be reached by confusing the two meanings of malice.[112] Justice Stewart argued that the editorial privilege question need not be reached by the Court because the discovery requests in dispute were clearly irrelevant to the case and therefore could have been denied on nonconstitutional grounds.[113]

Mr. Justice Marshall also wrote a separate dissenting opinion. He noted that insulating the press from ultimate liability in defamation actions is not enough to avert self censorship if the courts allow unrestrained discovery.[114] Rather, the courts must consider modern day procedural realities in attempting to maintain the balance struck in *New York Times*.[115] While acknowledging that discovery abuse exists in several areas of the law, Justice Marshall observed that discovery abuse is of particular concern in defamation cases for two reasons. First, abuse is more likely to occur because plaintiffs are often motivated by the desire for revenge rather than by the prospects for success.[116] Second, the result of unrestrained discovery in defamation cases is

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[109] *Id.* at 197.

[110] *Id.* at 197-98. In applying these principles to the facts of the case, Justice Brennan found that only questions falling into category number four—conversations between Lando and Wallace about the matter to be included or excluded from the program—would be covered by the privilege. Brennan would have remanded the case to the district court for a determination whether the respondents had waived the privilege by previously answering questions within the protected category. If not, the district court would determine if Herbert could overcome the privilege by making a prima facie showing of defamatory falsehood. *Id.* at 198-99.

[111] *Id.* at 199-200. *See, e.g.*, Greenbelt Coop. Publishing Ass'n v. Bresler, 398 U.S. 6 (1970) (in public figure defamation suit trial judge instructed jury plaintiff could recover if defendant published with spite, hostility or deliberate intention to harm). *Id.* at 10. *Cf.* National Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 281 (1974) (lower court mistakenly defined actual malice as hatred, spite, ill will or desire to injure).

[112] 441 U.S. at 200-01.

[113] *Id.* at 201-02. Justice Stewart would have remanded the case to the district court with a direction to strictly review the relevance of the discovery requests in view of the constitutional criteria set out in *New York Times*.

[114] *Id.* at 204.

[115] *Id.*

[116] *Id.*

more severe than in other contexts because it impacts on first amendment values.[117] Justice Marshall argued that such abuse may impose a degree of self-censorship on the press as publishers refrain from publishing truthful information in order to avert the expense and intrusion of roving discovery.[118]

Justice Marshall charged that the Court had abdicated its responsibility by failing to take action.[119] While acknowledging the problem of discovery abuse in defamation cases, the court left the *Hickman*[120] directive, which calls for a broad and liberal interpretation of discovery rules, unqualified. Justice Marshall would have directed the district courts to use a strict standard of relevance in reviewing discovery requests in defamation cases.[121] In addition to placing strictures on discovery, Justice Marshall contended that some form of editorial privilege was warranted. He agreed with Justice Brennan that the journalist's mental process need not be shielded as the discovery of this information would have no incremental chilling effect over that contemplated by *New York Times*.[122] In Justice Marshall's view the editorial decision making process, however, warranted protection, because exposure of such conversations would inhibit the candid exchange of ideas.[123] In contrast to Justice Brennan, Justice Marshall argued that this should be an absolute privilege. Otherwise, journalists would not know in advance whether their discussions would be subject to discovery and the "chilling effect" would not be averted.[124]

III. Analysis of the Court's Opinion and its Impact

A. Herbert *and the* New York Times *Balance*

The Court concluded that an editorial privilege protecting the editorial decision making process would be inconsistent with the Court's prior decisions.[125] An analysis of the editorial privilege's effect on the interests promoted and protected in the *New York Times v. Sullivan*[126] case, however, reveals that the privilege would in fact have been consistent with the first amendment values articulated in *New York Times* of promoting a robust and uninhibited debate of public issues. The *New York Times* Court sought to strike a balance between an individual's right to protect his reputation and the first amendment interest in freedom of speech. In reaching this balance, the Court observed that the interest in guaranteeing an uninhibited debate was of paramount importance.[127] Yet the protection from ultimate liability provided by the *New York Times* standard is insufficient to prevent a "chilling effect" on

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[117] *Id.* at 205.
[118] *Id.*
[119] *Id.*
[120] *See* Hickman v. Taylor, 329 U.S. 495, 507 (1947).
[121] 441 U.S. at 206.
[122] *Id.* at 207.
[123] *Id.* at 208-09.
[124] *Id.* at 209.
[125] 441 U.S. at 169.
[126] 376 U.S. 254 (1964).
[127] *Id.* at 270.

the press if newsroom discussions are revealed through the discovery process. If editors and newsmen are aware that their thoughts, discussions and notes are open to discovery, they may well be less candid in discussions among themselves. For example, in *Herbert* several witnesses presented diametrically opposed versions of the same story. It would be natural in such a case for the journalist and the editor to express reservations among themselves as to the truth of all sources, including the one they finally decided to adopt. Allowing these initial reservations to come out in court will be extremely damaging on the issue of actual malice, even though the editor eventually made a good faith determination that the source was reliable. Therefore, if an editor has doubts as to the veracity of a source of a story, the editor will be wise after *Herbert* to remain silent.

Such reticence on the part of editors will ultimately interfere with the first amendment interest in promoting an accurate news media.[128] The Court in *Herbert* acknowledged the relationship between prepublication editorial discussion and a more accurate press.[129] However, the Court concluded that exposing the editorial process to discovery would have no effect on prepublication precautions.[130] Instead, the Court reasoned that because there could be liability for knowing or reckless error there was an incentive for newsmen to engage in prepublication precautions.[131] However, the Court's statement "given exposure to liability when there is knowing or reckless error, there is even more reason to resort to prepublication precautions, such as a frank interchange of fact and opinion,"[132] says little more than that the *New York Times* standard promotes prepublication precautions. This does not appear to be the case. In any balancing situation, sacrifices are made to accommodate competing interests. One of the sacrifices involved with the *New York Times* standard is that it does not encourage a thorough editorial decision making process. Under the "actual malice" standard, negligence is not punished and diligence is not rewarded, but rather liability turns solely on the subjective knowledge of falsity or probable falsity on the part of the publisher.[133] The

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[128] *See, e.g.*, 441 U.S. at 194 (Brennan, J., dissenting) (quoting Saxbe v. Washington Post Co., 417 U.S. 843, 863 (1974) (Powell, J., dissenting)): "The [first] amendment embraces the public's interest in accurate and effective reporting by the news media."

[129] 441 U.S. at 173.

[130] *Id.* at 174.

[131] *Id.*

[132] *Id.*

[133] The courts have consistently held that reckless disregard for the truth is not a "super negligence" standard. Instead the term has been defined as publication with a "high degree of awareness of . . . probably falsity." Garrison v. Louisiana, 379 U.S. 64, 74 (1964), or publication when "the defendant in fact entertained serious doubts as to the truth of his publication." St. Amant v. Thompson, 390 U.S. 727, 731 (1968). *See, e.g.*, Dickey v. Columbia Broadcasting System, Inc., 583 F.2d 1221, 1227 (3d Cir. 1978); Rusack v. Harsha, 470 F. Supp. 285, 299 (M.D. Pa. 1978); Lorentz v. Westinghouse Electric Corp., 472 F. Supp. 946, 952 (W.D. Pa. 1979); Adams v. Frontier Broadcasting Co., 555 P.2d 556, 564 (Wyo. 1976). *But see* Goldwater v. Ginzburg, 414 F.2d 324, 343 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970): "Recklessness is, after all, only negligence raised to a higher power." *Id.*

Supreme Court, in fact, acknowledged in *St. Amant v. Thompson*[134] that the "actual malice" standard may not promote a thorough editorial process, but determined that this sacrifice was necessary so that more protection could be afforded to first amendment rights than would be possible under a mere negligence standard.[135] The effect of the actual malice standard, however, is that the more editors resort to prepublication precautions the more likely they are to obtain the subjective state of mind necessary to comprise "actual malice." Consequently, through discovery of the editorial process, the responsible journalist employing vigorous precautionary procedures, may be placed in a more vulnerable position than a less conscientious journalist. For example, if a newspaper prints a story defaming a public figure based solely upon an unverified source[136] and with no discussion among editors as to possible falsity, there would probably be no liability. This was, in fact, the situation in *St. Amant v. Thompson*[137] where the defendant published a statement accusing the plaintiff of accepting bribes.[138] The publisher had relied solely on the affidavit of a union official and the record was silent as to the union official's reputation for truthfulness.[139] The publisher did not verify the statement with people in the union office who might have known the facts, nor did he give any consideration to whether or not the statements defamed Thompson.[140] Nevertheless, the Court held that this combination of circumstances did not constitute reckless disregard for the truth.[141]

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[134] 390 U.S. 727 (1968).

[135] *Id.* at 731-32:

> It may be said that such a test puts a premium on ignorance, encourages the irresponsible publisher not to inquire, and permits the issue to be determined by the defendant's testimony that he published the statement in good faith and unaware of its probable falsity. Concededly the reckless disregard standard may permit recovery in fewer situations than would a rule that publishers must satisfy the standard of the reasonable man or the prudent publisher. But *New York Times* and succeeding cases have emphasized that the stake of the people in public business and the conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement First Amendment policies.

Id.

[136] Failure to verify sources does not by itself constitute reckless disregard for the truth. This is assuming that the source is not patently unreliable (such as an anonymous telephone caller) and that the story is not inherently improbable. St. Amant v. Thompson, 390 U.S. at 732-33. *See also* New York Times v. Sullivan, 376 U.S. 254 (1946) (failure by publisher to verify content of advertisement when there was contradictory information in publisher's own files held not reckless disregard); Beckley Newspapers Corp. v. Hanks, 389 U.S. 81 (1967) (on the record before the Court, failure to make prior investigation did not constitute reckless disregard); Dickey v. Columbia Broadcasting System, Inc., 583 F.2d 1221 (3d Cir. 1978) (failure of publisher to verify story not reckless disregard).

[137] 390 U.S. 727 (1968).

[138] *Id.* at 728-29.

[139] *Id.* at 730.

[140] *Id.*

[141] *Id.*

Similarly, in *Adams v. Frontier Broadcasting Co.*[142] a public figure plaintiff brought an action against a local radio station for broadcasting a defamatory falsehood on a talk-show.[143] The defamatory statement was made by an anonymous caller into the program.[144] The plaintiff alleged reckless disregard on the part of the broadcaster in failing to use an electronic delay system whereby the station could evaluate callers' remarks.[145] The court held that Adams could not recover because the broadcaster had deprived itself of the opportunity to evaluate the information published and to form a conclusion as to falsity or a doubt with respect to truth.[146] The court held that the legal effect of this was to preclude a finding of actual malice.[147]

These cases reveal that the irresponsible publisher can often avoid liability merely by failing to engage in prepublication precautions. On the other hand, if a newspaper prints a story such as the one in *St. Amant,* yet prior to publication the editors engage in vigorous prepublication precautions, there could be a finding of liability. The editorial discussions would be open to discovery and these discussions could prove very damaging—particularly if the editors had discussed among themselves the possibility that the source of the story may be inaccurate. This leaves the anomalous situation whereby the least responsible journalist is the least likely to suffer a defamation judgment. Such a situation will discourage the verbal testing, probing, and discussion of hypotheses and alternatives engaged in by responsible journalists. Further, such an inhibition on candid editorial decision making may lead to a less accurate press. This result—a "chilling effect" on editorial decision making and a less accurate press—is exactly what the *New York Times* standard was designed to prevent.[148] Thus, the Court in *Herbert,* by refusing to grant protection to the editorial decision making process, ignored both the first amendment values which led to the adoption of the *New York Times* standard and the inherent problems which have developed under the *New York Times* standard.

B. Herbert *and the Access Cases*

The court of appeals decision in *Herbert,* which mandated an editorial privilege, relied heavily on two Supreme Court decisions protecting a publisher's right to select material to be published. These are the so-called "right of access cases," *Miami Herald Publishing Co. v. Tornillo*[149] and *Columbia Broadcasting System, Inc. v. Democratic National Committee.*[150] The *Tornillo* case involved a statute requiring newspapers to give a politican, who the paper had criticized, the right to reply. The *CBS* case raised the question of whether a broadcaster could unilaterally refuse to accept paid political advertisements.

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[142] 555 P.2d 556 (Wyo. 1976).
[143] *Id.* at 557-58.
[144] *Id.*
[145] *Id.* at 558.
[146] *Id.* at 564.
[147] *Id.*
[148] 376 U.S. at 706.
[149] 418 U.S. 241 (1974).
[150] 412 U.S. 94 (1973).

In both cases, the Supreme Court held that governmental control over the selection of material to be published would violate the first amendment. While the access cases presented a somewhat different legal issue than the question of editorial privilege, the court of appeals noted that they nevertheless stand for the proposition that the editorial decision making process warrants some degree of protection from governmental interference.[151]

The Supreme Court, in rejecting the reasoning of the appellate court, stated that the holdings of the "access" cases, that the government could not dictate what material must or must not be printed, neither expressly nor impliedly suggested that the editorial process is immune from any inquiry whatsoever.[152] Thus, the Court in *Herbert* appears to have unduly limited the access cases to their factual settings and to have impliedly rejected language in the opinions which called for a broader interpretation. For example, in *Tornillo* the Court stated:

> The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitutes the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with first amendment guarantees of a free press . . . .[153]

This language would certainly indicate that the editorial process was entitled to some degree of protection from government intrusion. Such intrusion may take the form of legislative action, as in *Tornillo,* or judicial action, as in the present case.[154]

In the access cases the government was not allowed to make the judgment as to the content of material to be published because such a judgment would be an impermisible intrusion on the decision making function of the editors. The compelled disclosure of editorial conclusions, opinions and contentions, however, may result in as great a degree of government intrusion. The journalist will be forced through the discovery process to publicly justify why a difficult decision was made as it was. The press is then left in the position of explaining the rationale and the good faith of a judgment which the trier of fact knows turned out to be wrong. Thus, the disclosure of the journalist's thoughts, opinions and conclusions may result in a distortion of the editorial process and an unwarranted finding of "actual malice."

The potential for distortion of the journalist's judgment process is particularly acute in the situation where the press has taken an unpopular stand and the plaintiff is a powerful public official or popular public figure.[155] In

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[151] 568 F.2d at 979, 990.

[152] 441 U.S. at 168.

[153] 418 U.S. at 258.

[154] 568 F.2d at 987.

[155] The facts of the *Herbert* case present a classic example. Herbert's allegations that his superior officers had covered up war crimes were sympathetically received by a large portion of the American public. The country was increasingly disillusioned with the war in Viet Nam and Herbert became an instant hero with the press and the public. The viewpoint expressed by "Sixty Minutes", that the Army had been telling

such cases the press may be discouraged from taking an unpopular position for fear of liability resulting from a distortion of the editorial process. Thus, the judicial intrusion into the editorial decision making process through forced discovery may result in an indirect control over the content of material to be published which is similar in effect to the government intrusion rejected in *Tornillo* and *Columbia Broadcasting*.

C. *Discovery Abuse*

After deciding the constitutional question, the court reviewed the problems of discovery abuse in defamation litigation. Ever since the Supreme Court in *Hickman v. Taylor*[156] directed that the discovery rules be given a broad and liberal interpretation, an increasing problem with discovery abuse has existed.[157] A plaintiff with a facially sufficient complaint can tie up a defendant indefinitely in expensive, time consuming discovery. The Court correctly noted that discovery abuse is certainly not restricted to the law of defamation, but the Court failed to note that a qualitative difference exists between discovery abuse in defamation cases which serves to promote self-censorship and discovery abuse in other areas of the law. There is increased cause for concern when the harassment interferes with fundamental first amendment rights.[158]

In addition, the Court failed to recognize that libel litigation is particularly susceptible to such abuse. As Justice Marshall pointed out,[159] the plaintiff may often be pursuing the suit for punitive reasons rather than out of a de-

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the truth all along and that Herbert had duped the American public, was not a very popular position to take. In light of the *Herbert* decision, the thoughts, conclusions, and opinions of the program's editors will be open to review. If the allegations of "Sixty Minutes" turn out to be false, it may well be difficult to keep the prejudicial effect of the context from distorting a review of the editorial judgment process.

[156] 329 U.S. 495 (1947). "[T]he deposition-discovery rules are to be accorded a broad and liberal treatment." *Id.* at 507. *Accord,* Schlagenhauf v. Holder, 379 U.S. 104, 114-15 (1964).

[157] *See, e.g.,* Burger, *Agenda For 2000 A.D.—A Need for Systematic Anticipation,* 70 F.R.D. 83, 95-96 (1976); Erickson, *The Pound Conference Recommendations: A Blueprint For The Justice System in the Twenty-First Century,* 76 F.R.D. 277, 288-90 (1978); Pollack, *Discovery—Its Abuse and Correction,* 80 F.R.D. 219 (1979).

[158] Courts have often made the distinction between statutes infringing on fundamental rights as opposed to property rights. For example, the district court in Harris v. Younger, 281 F. Supp. 507 (C.D. Cal. 1968), *rev'd on other grounds,* 401 U.S. 37 (1971), in holding a statute unconstitutionally vague stated: "[W]e have learned that statutes seeking to regulate in the area of the First Amendment are held to a more stringent standard of clarity and precision than is required of statutes that undertake to lay down rules for the marketplace." 281 F. Supp. at 511. Similarly, the courts have imposed a stricter standard of review in equal protection analysis when the state action infringes on fundamental rights as opposed to property rights. *See,* L. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 16-2, 16-6, 16-7 (1978). For a commentary critical of the fundamental interest, property right dichotomy, see Gunther, *Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1, 8-10, 37-48 (1972).

[159] 441 U.S. at 204.

sire to be compensated for a loss.[160] Therefore, even the knowledge that the defendant will ultimately prevail on motion for summary judgment may not deter a plaintiff from pursing a suit brought both for retaliation and deterrence.[161] Moreover, such retaliatory tactics are undoubtedly effective. The cost of defending a defamation action is substantial and the action cannot be taken lightly, no matter how frivolous the claim, in view of the dollar amounts often involved. A public figure or public official may well believe that a publisher who has been forced to defend a publication in a defamation action will think twice about publishing another critical article. Consequently, the mere pendency of a defamation suit may often serve a plaintiff's purposes regardless of the chances for ultimate success. The courts have repeatedly recognized this principle, and, consequently, have made liberal use of summary judgment procedures in defamation actions.[162] The fact that the publisher can eventually resort to summary judgment procedures, however, is insufficient protection if the plaintiff is allowed to harass the publisher through unrestrained discovery.[163] For example, in the present case the deposition of Lando alone has taken over a year. Lando has been deposed twenty-six times.

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[160] *See, e.g.*, Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422, 435 (1975).

[161] A possible example of such retaliatory tactics is Reliance Ins. Co. v. Barron's, 442 F. Supp. 1341 (S.D.N.Y. 1977). In that case, Barron's, a weekly financial magazine, published a critical analysis of an upcoming public stock offering by Reliance. Reliance responded by filing a defamation action against Barron's for $37,500,000. *Id.* at 1344-45. Barron's eventually prevailed on a motion for summary judgment. *Id.* at 1353. This suit appears to have been baseless and a reasonable inference is that it was brought solely to deter Barron's from publishing future articles critical of Reliance Insurance Co. This type of retaliation tactic may, in fact, have instigated the Herbert suit. When Herbert first came out with his story he was an instant celebrity and received very sympathetic treatment from the press. Later, however, when the Army cleared Herbert's superiors from the charges of a coverup, the press began to probe further and question Herbert's charges. This probing ultimately led to the "Sixty Minutes" segment and subsequently to Herbert's suit. Since Herbert instituted the suit, the press has treated Herbert more sympathetically. For an example of such sympathetic treatment, see Boston Globe, Nov. 9, 1979, at 2, Col. 1. Once again, it would be reasonable to infer that the press has been reluctant to criticize Herbert's story in view of the fate which has befallen "Sixty Minutes."

[162] *See, e.g.*, Washington Post Co. v. Keough, 365 F.2d 965, 968 (D.C. Cir. 1966):

> In the First Amendment area, summary procedures are even more essential. For the stake here, if the harassment succeeds, is free debate. One of the purposes of the *Times* principle . . . is to prevent persons from being discouraged in the full and free exercise of their First Amendment rights with respect to the conduct of their government . . . . 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. See also, Davis v. National Broadcasting Co., 320 F. Supp. 1070, 1073 (E.D. La. 1970) (failure to dismiss a libel suit might necessitate long and expensive trial proceedings and result in chilling effect of litigation); Kidder v. Anderson, 354 So. 2d 1306, 1310 (La. 1978) (to allow defamation plaintiff to avoid summary judgment by putting forth minimum of evidence would be to invoke the "chilling effect" of trial).

[163] Of course, publishers may resort to suits for malicious prosecution as a remedy for frivolous libel actions.

His testimony covers nearly 3,000 pages of transcript and he has provided 240 exhibits.[164] Yet the Court has required him to answer still more questions. The attorneys' fees associated with defending such an action are staggering. Faced with such costs—rising attorneys' fees, time spent away from work, and exposure of sensitive information—many editors may make publication judgments based not on the potential for liability but rather on the expense of vindication. Even though confident of their ability to prevail at trial or on motion for summary judgment, editors may steer far wide of the unlawful zone.[165]

While acknowledging that discovery abuse exists in defamation cases, the *Herbert* Court did not conclude that an editorial privilege was necessary to cure such abuse. Instead, the Court concluded that: 1) an editorial privilege would not cure the abuse—only complete immunity from libel would solve the problem;[166] 2) the district court judges already have sufficient tools to cure discovery abuse;[167] and 3) a remedy lies elsewhere in major changes in the rules of civil procedures.[168] The Court's reasoning in all three instances is partially correct but ultimately unpersuasive. First, while it is true that the privilege would not completely solve the problem of discovery abuse in defamation cases, it would be a major step in that direction. The privilege would considerably lessen the discovery burden on publishers; the reason for this is obvious. A defamation action under the *New York Times* standard requires the plaintiff to prove four basic elements: a defamatory statement; publication; falsity; and actual malice.[169] The only one of these elements requiring the plaintiff to receive a substantial amount of information from the defendant is "actual malice." If the Court had adopted the privilege, the plaintiff would have had to prove "actual malice" by circumstantial evidence. The defendant would then only be required to supply the plaintiff with factual material in the defendant's possession.

The Court's second assertion—that the district courts have sufficient tools to solve the problem—is also questionable. Physical limitations prevent the courts from taking a major role in superintending discovery proceedings.[170] Further, the broad *Hickman* directive requiring a liberal interpretation of discovery rules would appear to limit the district courts' ability to deny discovery requests. Finally, the Court's third reason for refusing to take action to curb discovery abuse—that a solution lies elsewhere—is equally unpersuasive.[171]

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[164] 568 F.2d at 982.

[165] 376 U.S. at 279.

[166] 441 U.S. at 176.

[167] *Id.* at 177.

[168] *Id.*

[169] *Id.* at 199.

[170] *See, e.g.*, Lasker, *The Court Crunch: A View From The Bench*, 76 F.R.D. 245 (1978).

[171] As Justice Marshall noted, 441 U.S. at 205, the Court's assertion that the district courts have sufficient tools to solve the problem seems somewhat inconsistent with the Court's further assertion that a solution to the problem lies elsewhere. If, as the Court stated, the district courts have the necessary tools to solve the problem, there would seem to be no need to look to major reforms to the rules of civil procedure for relief.

The fact that the Court acknowledged a serious problem with discovery abuse, which in defamation cases has an impact on the first amendment, suggests that the Court should take a leadership role in finding a solution. This is particularly true in view of the fact that the Federal Rules of Civil Procedure were adopted and are interpreted by the Court.[172]

Mr. Justice Marshall, in his dissent, charged that by failing to take action to stem discovery abuse the Court was abdicating its leadership responsibility.[173] Justice Marshall recommended that the Court instruct the district courts to disregard the *Hickman* directive in defamation cases.[174] He argued that, instead of allowing broad discovery under *Hickman,* the district courts should employ a strict standard of relevance in reviewing discovery requests in defamation cases.[175] Since Justice Marshall's approach offers the press increased protection from roving discovery, it is preferable to the approach of the *Herbert* majority. However, even Justice Marshall's approach presents some practical problems. First, the district courts would have to become involved to a greater extent than they presently are in the discovery process. Already the dockets of district courts are overburdened.[176] Increasing delay is experienced in gaining access to the court system.[177] Any time that district court judges spend supervising the discovery process is time taken away from hearing cases. Conversely, a privilege for the editorial process would not require the courts to get involved to as great a degree in discovery. After the boundaries of the privilege were defined by the courts, the discovery process would continue to operate in defamation cases without judicial supervision. A second problem with Marshall's approach is that a directive to use a stricter standard of relevance in measuring discovery requests would not help to resolve the lingering confusion over the question of what is relevant in proving "actual malice." The question of relevance in determining "actual malice" has become so clouded that judges frequently reach diametrically opposed viewpoints on the same question. For example, on the issue of "actual malice" in the *Herbert* case consider the variance of opinions of Justice White ("the relevance of answers to such inquiries . . . can hardly be doubted")[178] and Justice Stewart ("inquiry into the broad 'editorial process' is simply not relevant").[179] These statements reveal that there is considerable confusion even on the Supreme Court as to what is relevant in proving "actual malice." Consequently, a directive to the courts to judge discovery requests by a stricter standard of relevance would make the degree of protection afforded entirely too dependent on the subjective judgment of the district court. Thus, the confusion over the term "actual malice" weighs against Marshall's approach in curbing discovery abuse.

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[172] *See generally* Clark and Moore, *A New Federal Civil Procedure,* 44 YALE L.J. 387 (1935).

[173] 441 U.S. at 205.

[174] *Id.* at 206.

[175] *Id.*

[176] *See, e.g.,* Lasker, *The Court Crunch: A View From The Bench,* 76 F.R.D. 245 (1978).

[177] *Id.* at 250.

[178] 441 U.S. at 170.

[179] *Id.* at 199.

D. *Actual Malice and the Editorial Process*

In addition to undercutting Jusice Marshall's argument, the confusion over the term "actual malice" highlights an independent problem with the majority decision in *Herbert*. The Court in *Herbert* found the questions addressd to Lando's motivation to be of undoubted relevance. However, once the meaning of "actual malice" is ascertained, it becomes clear that questions directed at the editorial process are aimed at showing common law malice and are of only marginal relevance to the issue of "actual malice." Further, such questions which reveal the defendant's personal feelings about the plaintiff are highly prejudicial to the jury. If the jury hears testimony that the defendant disliked the plaintiff and that the defendant's publication was false, the jury may be unduly influenced in determining the issue of "actual malice."

Much of the confusion in this area stems from the Court's unfortunate choice of such terms of art as "actual malice" and "reckless disregard for the truth" to describe the requisite subjective knowledge of probable falsity. As Justice Stewart noted in his dissent, judges have often been led astray by the "actual malice" standard of *New York Times*.[180] Many have confused "actual malice" with common law malice which entails spite, hostility, or deliberate intention to harm. While the Supreme Court has repeatedly stated that "actual malice" is not the same as common law malice,[181] the question has not been resolved as to what the relationship is between the two. Some courts have allowed the plaintiff to introduce evidence that the publisher harbored ill will towards the plaintiff provided that is not the only evidence of "actual malice."[182] Other courts have held that the publisher's feelings toward the plaintiff are irrelevant.[183]

While there apparently is a tenuous relationship between "actual malice" and common law malice, the evidentiary value of admitting evidence of common law malice is outweighed by the prejudicial effect that such evidence would have on the trier of fact. If a publisher dislikes an individual he may be more likely to print a defamatory story about the person, knowing that it is false, then if the publisher was neutral. Therefore, there is some evidentiary value in allowing the inference to be drawn that because a publisher harbored ill-will the publication was made with "actual malice." The question is—how valid an inference is this? Is it fair to infer that because a publisher disliked an individual and because a defamatory falsehood was published, that the

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[180] *Id. See, e.g.*, Greenbelt Coop. Publishing Ass'n v. Bresler, 398 U.S. 6, 10 (1970) (reversing jury award for plaintiff based on trial court judge's instruction that actual malice means spite, hostility or intentional harm); Mobile Press Register Inc. v. Faulkner, 372 So. 2d 1282, 1287 (Ala. 1979) (holding reversible error a jury instruction which charged actual malice could be shown by evidence of ill will, hostility, rivalry or threats).

[181] Greenbelt Coop. Publishing Ass'n v. Bresler, 398 U.S. 6, 10 (1970).

[182] *See, e.g.*, Goldwater v. Ginsberg, 414 F.2d 324, 342 (2d Cir. 1969); Airlie Foundation, Inc. v. Evening Star Newspaper Co., 337 F. Supp. 421, 429 (D.D.C. 1972); Indianapolis Newspapers, Inc. v. State, 254 Ind. 219, 250, 259 N.E.2d 651, 664, *cert. denied*, 400 U.S. 930 (1970).

[183] *See, e.g.*, Adams v. Frontier Broadcasting, 555 P.2d 556 (Wyo. 1976); Polzin v. Helmbrecht, 54 Wis. 2d 578, 588, 196 N.W.2d 685, 691 (1972).

publisher knew the story was false? To the contrary, it does not necessarily follow that any critical commentary concerning a public official whom the publisher disliked was made with knowledge of probable falsity. Yet to allow in evidence of the publishers spite and hostility towards the plaintiff is likely to be very prejudicial.

Once it is recognized that evidence of improper motivation is of only marginal relevance in determining actual malice, it becomes clear that the court in *Herbert* fell victim to the common error of confusing the two types of malice. In the *Herbert* case most of the questions directed at Lando's judgment process appear to be calculated to show that Lando was improperly motivated in pursuing certain sources and in presenting certain viewpoints.[184] Such questions were only tangentially relevant to the real issue in the case—whether Lando knew that the story was false—and a privilege preventing the plaintiff from exploring this area, contrary to the court's opinion, would have given up little of real evidentiary value.

IV. The Effect of an Editorial Privilege on Defamation Actions

As previously indicated, the *Herbert* Court's failure to recognize an editorial privilege may have a substantial effect on the press—discovery abuse will remain unchecked, newsroom discussions will be discouraged, and the common law/actual malice distinction will remain confused. Of course, in evaluating the concept of an editorial privilege, the benefits of the privilege—a more accurate, uninhibited press and a reduction in discovery abuse—must be balanced against what would be lost by granting a privilege to the editorial process. There would be some evidence, relevant to the case, and helpful to the plaintiff's cause, which would be unavailable to the plaintiff. Discussions between journalists may show knowledge of falsity or reckless disregard for the truth. Thus, granting a privilege might result in some cases where the plaintiff would not be able to develop sufficient evidence by other sources to show "actual malice." In addition, assuming that the privilege would apply at trial as well as in discovery,[185] the plaintiff would lose the opportunity to question the defendant directly on the issue of "actual

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[184] For an example of specific questions objected to by Lando, see Note, *Herbert v. Lando: State of Mind Discovery and the New York Times v. Sullivan Balance*, 66 Cal. L. Rev. 1127, 1130 (1978), listing questions from defendant's memo of law in opposition to plaintiff's Rule 37 application Appendix A, at 1.

> Q. Were you interested in showing a balanced viewpoint as to Col. Herbert's treatment of the Vietnamese?
>
> Q. What was the basis on which you decided to conduct an interview with Bruce Potter three times and to conduct no interviews with Laurence Potter?
>
> Q. By failing to mention the Donovan statements in the broadcast did you intend to influence the impression created by the program as to whether Col. Herbert had reported any war crimes to Brigade headquarters while he was still in the 173d Airborne Brigade?

Id. at 2. *See also* questions listed by Mr. Justice Stewart, 441 U.S. at 201 n.2.

[185] See note 90 *supra*.

malice" unless the defendant waived the privilege. There is some question, however, as to how much of a loss this would really be. It is doubtful that a defendant would admit to any knowledge of falsity. Nevertheless, the plaintiff would lose the opportunity of cross-examining the defendant on the issue and having the jury observe the defendant's demeanor.

The privilege would not, however, as some courts and commentators have claimed,[186] completely eliminate a cause of action for a defamed public official. There are a number of ways of establishing the required state of mind through the use of circumstantial evidence. The plaintiff could show by the cumulative effect of a number of factors that the defendant entertained serious doubts as to the truth of the story. For example, if the privilege was fashioned after the executive privilege, it would protect only the "deliberative or policymaking process" not "factual" material.[187] The *Herbert* Court's assertion in this regard, that the outer perimeters of the privilege would be difficult to discern,[188] is unfounded. Although the extent of the privilege would have to be worked out on a case-by-case basis, it is clear that the executive privilege as embodied in Exemption 5 of the Freedom of Information Act,[189] and the cases decided thereunder, could serve as an effective framework. Only predecisional communications between journalists would be protected. Factual material such as conversations with people interviewed would not be protected.[190] Therefore, the plaintiff could discover what facts the journalist had in his possession.[191] The jury could infer "actual malice" from the defendant's use and application of the facts in his possession and from the failure to heed contradictory information.[192] The plaintiff could also show that a story was the complete fabrication of the journalist,[193] or that the publisher had been put on notice as to the story's probable falsity.[194] Further, the plaintiff could show that the story was inherently implausible or that the source of the story was obviously unreliable.[195]

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[186] *See* Note, *Herbert v. Lando: New Impediments to Libel Suits Brought by Public Figures,* 73 Nw. U.L. Rev. 583,598 (1978). *See also* Reliance Ins. Co. v. Barron's, 442 F. Supp. 1341, 1359 (S.D.N.Y. 1977) (on reargument).

[187] EPA v. Mink, 410 U.S. 73, 89 (1973) (executive privilege protects policymaking process, it does not cover factual material).

[188] 441 U.S. at 170.

[189] 5 U.S.C. § 552(b)(5) (1976).

[190] *See, e.g.,* National Courier Ass'n v. Board of Governors of Fed. Reserve Sys., 516 F.2d 1229 (D.C. Cir. 1975) (factual material not covered by Exemption #5); Montrose Chem. Corp. of Cal. v. Train, 491 F.2d 63 (D.C. Cir. 1974) (interagency memorandum consisting solely of factual material not exempt from disclosure); Bristol-Myers Co. v. FTC, 424 F.2d 935 (D.C. Cir. 1970), *cert. denied,* 400 U.S. 824 (1970) (exemption #5 does not apply to purely factual reports).

[191] *See, e.g.,* Herbert v. Lando, 568 F.2d 974, 984 (2d Cir. 1977).

[192] *Id.*

[193] *See, e.g.,* Carson v. Allied News Co., 529 F.2d 206, 213 (7th Cir. 1976) (actual malice found based on story being a complete fabrication of journalist).

[194] *See, e.g.,* Curtis Publishing Co. v. Butts, 388 U.S. 130, 169-70 (1967) (Warren, C.J., concurring) (fact that plaintiff informed editors prior to publication of story's inaccuracy was evidence of actual malice).

[195] In Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), the *Saturday Evening Post* published an article alleging that University of Georgia football coach Wally Butts had "thrown" a game by disclosing the team's strategies, plays and formations to Uni-

In addition to the alternative methods of proof available, it is probable that in many cases the press would not claim the privilege. The privilege envisioned would be an evidentiary privilege which the defendant could waive. In many instances it is the defendant in a libel action who first introduces evidence of the editorial process in order to establish that it was a good faith publication.[196] In those cases, the privilege would be waived and the plaintiff would have access to the editorial discussions. The fact that the privilege would often be waived in no way detracts from the importance of the privilege to the press. One rationale underlying the privilege is to encourage candid discussions among editors. If the privilege is later waived it will still have accomplished its purpose of eliminating any "chilling effect" in the pre-publication stage.

Finally, it must be re-emphasized that the editorial privilege sought in *Herbert* would have applied only to defamation actions brought by public officials and public figures. As previously noted,[197] the Court has restricted this class of individuals to those who hold public office or who have sought to influence the resolution of public issues. The Court noted in *Gertz v. Robert Welch, Inc.*[198] that such people exercise enormous influence in our society and to some extent have voluntarily exposed themselves to increased risk of injury from defamatory falsehood due to their position or influence.[199] Indeed, the Court in *New York Times* maintained only a limited cause of action for the defamed public plaintiff in order to promote an uninhibited debate of the conduct of public individuals.[200] Thus, the editorial privilege would be consistent with the balance struck between the competing interests of protecting the individual's reputation and promoting an uninhibited debate of public issues and the people influencing the resolution of those issues.

The privilege would advance the first amendment values articulated in *New York Times* by promoting a robust and uninhibited press while still allowing room for a defamation action in cases of journalistic excess. Additionally, it would advance the first amendment interest of providing a more accurate news media. The rationale for the privilege is analogous to the rationale supporting the executive privilege: a decision making process which is open to public review does not produce the most accurate news media. The burden imposed on defamation plaintiffs by such a privilege would not be debilitating. The plaintiff would be able to establish "actual malice" by a number of methods employing circumstantial evidence. There perhaps would be margin-

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versity of Alabama coach Paul Bryant. The sole source for the story was a convicted criminal who allegedly heard through an accidental foul-up in the telephone lines Butts' conversation with Coach Bryant. *Id.* at 135-36, 157. Despite the unreliability of the source and the sheer improbability of the story, the *Post* failed to investigate the convict's charges before publishing. The Court ruled that "reckless disregard" could be inferred from those facts. *Id.* at 167-68. *See also* St. Amant v. Thompson, 390 U.S. 727, 732 (1968) (listing ways to prove actual malice).

[196] 441 U.S. at 173 n.21.

[197] See text at note 45 *supra*.

[198] 418 U.S. 323 (1974).

[199] *Id.* at 345.

[200] 376 U.S. at 270.

al cases where the plaintiff would not prevail because of the privilege, but this would be a minimal price to pay in order to promote the first amendment interest in a free and uninhibited press.

CONCLUSION

In *Herbert,* the Court was faced with the novel concept, arising out of the *New York Times* case and its progeny, of providing a privilege to protect the editorial decision making process and the thought processes of the journalist from intrusive discovery. The Court correctly determined that such a privilege was not established by prior case law. In reviewing the rationale for creating such a privilege, however, the Court did not give full consideration to the important first amendment interests involved. An editorial privilege would have protected the editorial decision making process from being opened to the public. This protection would have promoted the dual first amendment goals of an uninhibited and a more accurate press. Further, the privilege would have drastically reduced the opportunity for retaliatory discovery abuse tactics by defamation plaintiffs. The cost of providing the privilege to the press would have been to increase the public official plaintiff's burden in proving "actual malice." The plaintiff would, however, still have been able to establish "actual malice" through the use of circumstantial evidence. In view of these important first amendment goals which would be served at a minimal increase in the defamation plaintiff's burden of proof, and in view of the unpersuasive reasoning of the *Herbert* decision, the concept of an editorial privilege warrants reexamination.

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