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Aftermath of Herbert v. Lando: Will Lower Courts Create Another Qualified Newsman's Privilege?

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AFTERMATH OF *HERBERT v. LANDO:* WILL LOWER COURTS CREATE ANOTHER QUALIFIED NEWSMAN'S PRIVILEGE?

A participatory democracy thrives on the marketplace of ideas, the free exchange of comment. In *Herbert v. Lando,*[1] a case of first impression,[2] the United States Supreme Court faced the difficult task of striking a workable balance between two diametrically opposed interests: the right of a defamed plaintiff to a remedy and the constitutionally protected function of a free press. Although superficially compatible, these two important social interests have collided since the advent of the printed page.[3]

This Comment will review the Supreme Court's holding in *Herbert,* as seen through the prism of libel law founded on *New York Times v. Sullivan*[4] and developed in subsequent cases.[5] By

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

2. The *Herbert* majority did not view the case as one of first impression. The Court "erroneously concluded that constitutional and common law precedent had already considered and rejected an editorial process privilege." *The Supreme Court, 1978 Term,* 93 HARV. L. REV. 153 (1979). *See also* Herbert v. Lando, 73 F.R.D. 387, 390 (S.D.N.Y. 1977). The *Herbert* Court reviewed what it termed the "deeply rooted" basis for its rejection of state of mind privilege. 441 U.S. 161 (1979); *see* notes 126-129 *infra* and accompanying text.

3. Gutenberg's first type-printed book, commonly known as the Gutenberg Bible was published in 1456. W. DURANT, THE REFORMATION, VI THE STUDY OF CIVILIZATION (3d ed. 1957). Even before that, the Statute of Edward I, *De Scandalum Magnatum* of 1275 concerned the spreading of "false gossip" which could be done through written expression. As early as the 15th century, the English Star Chamber regularly heard written defamation cases. Lovell, *The "Reception" of Defamation By the Common Law,* 15 VAND. L. REV. 1051, 1059-61 (1962). For a discussion of common law libel *see generally* Merin, *Libel and the Supreme Court,* 11 WM. & MARY L. REV. 371 (1969).

4. 376 U.S. 254 (1964).

5. Time, Inc. v. Firestone, 424 U.S. 448 (1976); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Rosenbloom v. Metromedia, 403 U.S. 29 (1971); Greenbelt Coop. Publishing Ass'n, Inc. v. Bresler, 398 U.S. 6 (1970); St. Amant v. Thompson, 390 U.S. 727 (1968); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); Garrison v. Louisiana, 379 U.S 64 (1964). *See generally,* Brosnahan, *From Times v. Sullivan to Gertz v. Welch: Ten Years of Balancing Libel Law and the*

rejecting an absolute privilege, which would have precluded discovery of editorial discussion and of journalists' "state of mind,"[6] the *Herbert* decision expanded the scope of discovery in defamation actions and signaled an acceleration of the Supreme Court's retreat from the rigors of the *New York Times* doctrine. In response, lower courts might: 1) consider applying a qualified privilege balancing first amendment considerations, 2) bifurcate libel proceedings to delay intrusive discovery demands, or 3) limit defamation discovery altogether. The strongest possibility, suggested by *Branzburg v. Hayes*[7] and its progeny, is the creation of a qualified privilege. In addition, absent the imposition of lower court limitations on the holding of *Herbert*, the press might be forced to consider effective methods of self-regulation.

I. BACKGROUND

A. LIBEL LAW

Prior to *New York Times v. Sullivan*, a publisher was strictly liable for its defamatory publications.[8] At common law, the plaintiff was simply required to establish a prima facie case that the defendant published the defamatory remark to others.[9] The publisher's sole defenses were truth,[10] consent,[11] or privilege.[12]

In the seminal decision of *New York Times v. Sullivan*, the Supreme Court held that the law of defamation was subject to first amendment scrutiny.[13] The Court unanimously recognized

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First Amendment, 26 HASTINGS L. REV. 777 (1975).

6. 441 U.S. at 169-70.

7. 408 U.S. 665 (1972).

8. W. PROSSER, HANDBOOK OF THE LAW OF TORTS, 772-73 (4th ed. 1971).

9. Eaton, *American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond; An Analytical Primer*, 61 VA. L. REV. 1349, 1353 (1975). *See also* RESTATEMENT (SECOND) OF TORTS § 613 (1977), which reads: "[u]nder the common law of defamation a defendant who relied upon the truth of the defamatory matter published by him has consistently had the burden of proving it." *Id.* at 310.

10. W. PROSSER, *supra* note 8, at 796-97.

11. RESTATEMENT SECOND OF TORTS, § 583 (1977).

12. A conditional privilege within a narrow "public interest" defense was available at common law. *See generally* Brosnahan, *supra* note 5, at 778-79.

13. 376 U.S. 254, 269-83 (1964). For general discussions of the *New York Times* decision, see Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965); Kalven, *The* New York Times *Case: A Note on "The Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191; Pierce, *The Anatomy of An Historic Decision:* The New York Times Co. v. Sullivan, 43

that the press required a degree of insulation from libel actions brought by public officials.[14] Otherwise "would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true, because of doubt whether it can be proved in court or fear of the expense of having to do so."[15] The *New York Times* Court held that for a public official to recover for defamation, he or she must show "actual malice."[16]

N.C. L. REV. 315 (1964).

14. 376 U.S. 254 (1964) (per Brennan, J., joined by Warren, C.J., and White, Clark, Stewart, and Harlan, JJ.; Black, J., concurring and Goldberg, J., concurring, joined by Douglas, J.) For a survey of the law of defamation prior to *New York Times*, see *Developments in the Law-Defamation*, 69 HARV. L. REV. 875 (1956).

In *New York Times*, the plaintiff, an elected official of Montgomery, Alabama, alleged that he was defamed by a newspaper advertisement appearing in *The Times*, including charges that state authorities padlocked a dining hall at Alabama State College in an attempt to starve students into submission in a civil rights demonstration. 376 U.S. at 256-58. The *New York Times* Court emphasized the indispensable position that the freedoms of speech and publication hold in a democratic society. *Id.* at 269. The Court considered the "case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials," *id.* at 270, and concluded that the defense of truth was an *inadequate* safeguard for the first amendment rights of the press. *Id.* at 278-79.

Prior to *New York Times*, the Court held that the Constitution did not protect libelous publications. Times Film Corp. v. City of Chicago, 365 U.S. 43, 48 (1960); Roth v. United States, 354 U.S. 476, 482-83 (1957); Beauharnais v. Illinois, 343 U.S. 250, 266 (1952); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942); Near v. Minnesota, 283 U.S. 697, 707-08 (1931).

15. 376 U.S. at 279. Consequently, the Court felt that critics "tend to make . . . statements which 'steer far wider of the unlawful zone.' " *Id. quoting* Speiser v. Randall, 357 U.S. 526 (1957). The *New York Times* Court recoiled at the spectre of self-censorship by the press potentially brought about by fear of libel judgments. *Id.* at 278.

16. 376 U.S. at 283. The Supreme Court extended the *New York Times* burden of proof to apply to public figures in *Curtis Publishing Co. v. Butts*, 383 U.S. 130 (1967). The Court subsequently expanded, then contracted, the class of "public figures" subject to *New York Times* first amendment scrutiny. Rosenbloom v. Metromedia, 403 U.S. 29, 44 (1971) (extending public figure standard to apply to individuals included in discussions of matters of general public concern); Gertz v. Robert Welch, 418 U.S. 323, 351 (1974) (private citizen must voluntarily inject himself into a "particular public controversy" to be considered a "public figure"); Time, Inc. v. Firestone, 424 U.S. 448 (1976) (socialite Mary Firestone's divorce from Russell Firestone, heir to the tire company fortune, does not automatically make her a public figure); Wolston v. Reader's Digest, 443 U.S. 157 (1979)(criminal conduct does not automatically create a public figure for comment on limited issues relating to his conviction since "[a] private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention" *id.* at 167); Hutchinson v. Proxmire, 443 U.S. 111 (1979)(research scientist who applied for federal grants and published articles in professional journals does not qualify as a public figure in a suit against a U.S. Senator who publicized him as the recipient of wasteful government spending). The state of flux of what constitutes a "public figure" is epitomized by a footnote to *Hutchinson* where the court, in dicta, questioned an expansive definition of who qualifies as a public

The Justices defined what has come to be known as "*New York Times* malice" as statements made with knowledge of their falsity or in reckless disregard of the truth.[17] Four years later, in *Saint Amant v. Thompson,*[18] the Court clarified the "recklessness" standard by requiring a plaintiff to show that "the defendant in fact entertained serious doubts as to the truth of his publication."[19] This has resulted in a difficult burden for a public figure to meet,[20] since many lower courts have held that the decision in *Saint Amant* requires an inquiry into a newsman's subjective state of mind.[21] One result of *Saint Amant* is that courts have often granted summary judgments against *New York Times* plaintiffs.[22] There are two reasons: first, as a practical matter, the plaintiff's burden of proof appears to be so onerous as to be insurmountable; second, the "chilling effect" on the press would be highly undesirable on policy grounds as expressed by the Court in *New York Times.*[23] However, the Supreme Court has recently expressed doubt as to the efficacy of granting summary judgments in defamation cases.[24] Moreover,

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figure. *Id.* at 119 n.8. *See generally* Brosnahan, *supra* note 5; Collins and Drusall, *The Reaction of the State Courts to* Gertz v. Robert Welch, Inc., 28 CASE W. RES. L. REV. 306 (1978); Note, *The Editorial Function and the* Gertz *Public Figure Standard,* 87 YALE L.J. 1723 (1978).

17. The *New York Times* malice standard represented a shift from common law malice which included hostility, ill will and evil intent. *See* W. PROSSER, *supra* note 6, at 794-95; *The Supreme Court, 1978 Term,* 93 HARV. L. REV. 151 n.18 (1979), and notes 9-12 *supra* and accompanying text.

18. 390 U.S. 727 (1968).

19. *Id.* at 731.

20. Even if a public official were able to establish falsity, it would be difficult for him or her to recover under the *New York Times* malice test because of the additional requirement of showing either that the defendants knew that their charges were false, or alternatively, that the defendants suspected their allegation may have been false and published them without verification.

21. The prevailing point of view at this time is that a newsgatherer's motivations are relevant in defamation actions involving *New York Times* malice. In *Gertz v. Robert Welch,* the Court spoke of a "subjective awareness of probable falsity." 418 U.S. at 334-35 n.6. The use of the word "subjective" implies that an individual's motivation is a component. However, in the same paragraph in *Gertz* the Court spoke of "emphasizing the distinction between the *New York Times* test . . . and 'actual malice' in the traditional sense of ill-will." *Id.* at 334-35, n.6.

22. *See, e.g.,* Tretler v. Meredith Corp., 455 F.2d 255 (8th Cir. 1972); Gospel Spreading Church v. Johnson Publishing Co., 454 F.2d 1050 (D.C. Cir. 1971); Bon Air Hotel, Inc. v. Time, Inc., 426 F.2d 858 (5th Cir. 1970); Thompson v. Evening Star Newspaper Co., 394 F.2d 774 (D.C. Cir.), *cert. denied,* 393 U.S. 884 (1968); Washington Post Co. v. Keough, 365 F.2d 965 (D.C. Cir. 1966), *cert. denied,* 385 U.S. 1011 (1967).

23. *See* notes 14 and 15 *supra* and accompanying text.

24. Hutchinson v. Proxmire, 443 U.S. 111 (1979). In dicta, Chief Justice Burger stated, "we are constrained to express some doubt about the so called 'rule [of granting

in *Herbert* the Supreme Court ultimately addessed the extent to which both editorial discussion and a journalist's state of mind could be probed by a defamation plaintiff during pretrial discovery for the purpose of proving recklessness under the *Saint Amant* standard.

B. The Role of the Newsmedia

The Supreme Court has repeatedly recognized the indispensable and constitutionally protected role of an aggressive press.[25] The *New York Times* decision stands as a forceful and sweeping interpretation of the first amendment, containing broad language highly protective of freedom of speech and freedom of publication.[26] Justice Potter Stewart has theorized that the press is a constitutionally recognized institution, having a profound impact on government similar to a "fourth estate."[27] In a now famous address given at Yale Law School,[28] Mr. Justice Stewart stated that:

> [t]he Free Press guarantee is, in essence, a *structural* provision of the Constitution. Most of the other provisions in the Bill of Rights protect specific liberties or specific rights of individuals . . . In contrast, the Free Press Clause extends protection to an institution. The publishing business is, in short, the only organized private business that is given explicit constitutional protection.[29]

Professor Randall Bezanson analyzed the Supreme Court's theory of freedom of the press as resting on two fundamental principles:[30]

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summary judgment].' The proof of 'actual malice' calls a defendant's state of mind into question, and does not readily lend itself to summary disposition." *Id.* at 120 n.9 (citations omitted). *See* Church of Scientology of Cal. v. Siegelman, 475 F. Supp. 950 (S.D.N.Y. 1979). The impending demise of the summary judgment remedy may be traced in part to the Supreme Court's *Herbert* decision, which Justice Burger cited as precedent for his conclusion. 99 S.Ct. at 2680 n.9.

25. *See, e.g., Branzburg v. Hayes*, 408 U.S. 665, 681 (1972); Curtis v. Butts, 388 U.S. 130, 150 (1967); New York Times v. Sullivan, 376 U.S. 254, 269-70 (1964).

26. 376 U.S. 254 at 269-70 (1964); Note, *Privilege to Republish Defamation*, 64 Colum. L. Rev. 1102, 1118-20 (1964). *See also* note 13 *supra*.

27. Stewart, *Or of the Press*, 26 Hastings L.J. 631, 634-35 (1975).

28. *Or of the Press* is excerpted from an address delivered by Justice Stewart at the Yale Law School on November 2, 1974. *Id.* at 631.

29. *Id.* at 633.

30. Bezanson, *The New Freedom Press Guarantee*, 63 Va. L. Rev. 731 (1977).

> First, the press clause effects a separation of press from government, . . . [which] is designed to insure the independence of the press . . . [second,] the protected first amendment interests of the press are distinct from the interests of the public . . . . The license of a free press is the license to advocate a position, rightly or wrongly, with or without a balanced presentation of fact or opinion, in order that the press may independently monitor private and public centers of power and influence within society. Implicit in this privilege is the judgment that, in the long run, a wholly independent press will best ensure individual rights of informed speech.[31]

The rationale which underlies press protections is clear. Only an informed populace is fit for self-rule; the free flow of information, generated by the press, is a prerequisite to the robust internal debate necessary for informed self-government by a democratic society.[32] This view was also expressed by Professor Alexander Meikeljohn: "[s]elf-government can exist only insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express."[33] Accordingly, "[p]ublic discussions of public issues must have a freedom unabridged by our agents. Though they govern us, we, in a deeper sense, govern them. Over our governing, they have no power. Over their governing we have sovereign power."[34] The *New York Times* Court supported this view. The majority opinion stated that "maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."[35]

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31. *Id.* at 732.

32. *See generally*, A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT (1st ed. 1948); Sowle, *Defamation and the First Amendment: The Case For a Constitutional Privilege of Fair Report*, 54 N.Y.U.L. REV. 469 (1979). For pre-*New York Times* Supreme Court decisions expressing this view, *see* Roth v. United States, 354 U.S. 476, 484 (1957); Associated Press v. United States, 326 U.S. 1, 20 (1945); Thornhill v. Alabama, 310 U.S. 88 (1940); Grosjean v. American Press Co., 297 U.S. 233, 250 (1936).

33. Meiklejohn, *The First Amendment Is An Absolute*, 1961 SUP. CT. REV. 245, 255.

34. *Id.* at 257.

35. 376 U.S. at 269, *quoting* Stromberg v. California, 283 U.S. 359, 369 (1930).

Justice Harlan reiterated the central thesis of *New York Times* in *Curtis v. Butts,*[36] in which the Court extended the "public official" doctrine to include persons deemed to be "public figures."[37] The Court stated that "[t]he guarantees of freedom of speech and press were not designed to prevent 'the censorship of the press merely, but any actions of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential.' "[38] In order to guarantee this right of free discussion, the Supreme Court has consistently held that the Constitution tolerates libelous utterances.[39] This principle is rooted in the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks . . . ."[40] The *New York Times* majority used this rationale to reject the assertion that the defense of truth adequately safeguards the press from vexatious libel actions. "Erroneous statement is inevitable in free debate . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they need . . . to survive."[41]

The Court in *New York Times* repeated James Madison's view that "some degree of abuse is inseparable from the proper use of everything; and in no instance is this more true than in

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36. 388 U.S. 130 (1967).

37. *See* note 16 *supra* and accompanying text.

38. 388 U.S. at 150, quoting 2 COOLEY, CONSTITUTIONAL LIMITATIONS, 886 (8th ed. 1927). A contrary view was angrily expressed by Justice Fortas, dissenting from the Supreme Court's ruling in *Saint Amant:*

> The First Amendment is not so fragile that it requires us to immunize . . . reckless, destructive invasion of the life, even of public officials, heedless of their interests and sensitivities. The First Amendment is not a shelter for the character assassinator, whether his action is heedless and reckless or deliberate. The First Amendment does not require that we license shotgun attacks on public officials in virtually unlimited open season. The occupation of public officeholder does not forfeit one's membership in the human race. The public official should be subject to severe scrutiny and to free and open criticism. But if he is needlessly, heedlessly, falsely accused of crime, he should have a remedy at law. *New York Times* does not preclude this minimal standard of civilized living."

390 U.S. at 734 (1968)(Fortas, J., dissenting).

39. Speiser v. Randall, 357 U.S. 513, 525 (1958).

40. 375 U.S. 254, 270 (1964).

41. *Id.* at 271-72, *quoting* NAACP v. Button, 371 U.S. 415, 433 (1962).

that of the press."[42] The opinion went so far as to make the point that "even a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.' "[43] The Court has held to this view throughout its subsequent decisions in defamation cases. In *Gertz v. Robert Welch,*[44] the majority stated that "[u]nder the first amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."[45]

II. *HERBERT v. LANDO*—ANALYSIS AND CRITIQUE

In March of 1971, during a period of mounting public cynicism over America's military involvement in the Indochinese War, Lt. Col. Anthony Herbert attained national prominence when he formally charged his superior officers with failing to investigate his eyewitness reports of American war crimes in Vietnam.[46] Col. Herbert, a highly decorated career officer,[47] had been abruptly relieved of command on the grounds of inefficiency nearly two years prior to formally filing charges.[48] The news

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42. *Id.* at 274, *quoting* 4 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 571 (1876).

43. 376 U.S. at 279 n.13 *quoting* J. MILL, ON LIBERTY 15 (1947).

44. 418 U.S. 323 (1974).

45. *Id.* at 338-40.

46. During this time Colonel Herbert was serving in Vietnam as Acting Inspector General for the 173rd Airborne Brigade. 568 F.2d 974, 980. Herbert brought formal charges with the U.S. Army Criminal Investigation Division (C.I.D.) at Fort McPherson, Georgia. Petition for a Writ of Certiorari at 4, Herbert v. Lando, 441 U.S. 153 (1979). Herbert's superior officers were Brigadier General John W. Barnes and Colonel J. Ross Franklin, who was Deputy Commander of the 173rd Airborne Brigade. In the words of Chief Judge Kaufman's Second Circuit opinion: "[t]he most horrifying [incident] involved the murder of four prisoners of war by South Vietnamese police in the presence of an American advisor, who callously failed to intervene. Since those killings allegedly occured on February 14, 1969, Herbert dubbed them the 'St. Valentine's Day Massacre.' " 568 F.2d at 980.

47. During the Korean War Herbert had been publicized by the Army as the "most decorated enlisted man," A. HERBERT & J. WOOTEN, SOLDIER, 60-61 (1972). While serving in Vietnam he had earned one silver and three bronze stars and was recommended to receive the Distinguished Service Cross. 568 F.2d at 980-81 (1977).

48. Herbert attributed his "poor efficiency report," written by Colonel Franklin, to his persistence in pressing for an investigation of the alleged incidents. In the report, Franklin accused Herbert of having "no ambition, integrity, loyalty or will for self-improvement." *Id.* at 980. Herbert claimed to have reported the atrocities immediately after they occurred to Col. Franklin and Gen. Barnes. "But," Herbert alleged, "neither

media quickly focused on this contradictory figure, who on the one hand was the prototype of military propriety, yet on the other, cast himself in the role of dissenting idealogue.

After a period of intense media exposure favorable to Herbert,[49] the Army exonerated his superiors from any complicity in war crimes or their subsequent cover-up.[50] Citing harassment by the military because of his disclosures, Herbert announced his retirement from the service. Reporters began to scrutinize Herbert's allegations more critically. On February 4, 1973, the Columbia Broadcasting System's documentary program "60 Minutes" aired "The Selling of Colonel Herbert." Produced by Barry Lando and reported by Mike Wallace, the program consisted of interviews juxtaposing Herbert's allegations with statements of those who contradicted his story.[51] The program cast doubt upon Herbert's charges, implying that he was motivated by a desire to avenge his relief from command.[52] Included was a charge that Herbert himself had "countenanced the commission of war crimes."[53] Lando subsequently wrote an article for the *Atlantic Monthly*,[54] based upon his research for the broadcast, which "concluded that the American press had

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[officer] was interested in investigating the incidents." *Id.*

49. Initially, the media was responsive to Herbert's cause. In June, 1971, defendant Lando produced a complimentary report aired by C.B.S. News. In July of the same year, Herbert was featured in Life Magazine. *Id.* at 981. By September, New York Times writer James Wooten authored a laudatory article entitled "How a Supersoldier Was Fired From His Command," *Id.* Herbert's favorable press exposure reached its peak when he was featured on "The Dick Cavett Show," an episode watched by more viewers than any of the previous Cavett telecasts. *Id.*

50. In October of 1971 the Army C.I.D. dismissed the charges against Herbert's superiors. *Id.*

51. The evidence most damaging to Herbert involved the alleged "St. Valentine's Day Massacre." *See* note 46 supra.

> Herbert claimed that he told his superior, Colonel Ross Franklin, of the killings that very day. In his interview with narrator Mike Wallace, however, Franklin claimed that he was returning from a trip to Hawaii on the day in question. C.B.S. found that Franklin had indeed been registered at a hotel in Hawaii until the afternoon of the 14th, already the 15th in Vietnam. Franklin produced his signed, cancelled check for the hotel bill dated the 14th.

Comment, Herbert v. Lando: *Reporter's Privilege From Revealing The Editorial Process In a Defamation Suit*, 78 COLUM. L. REV. 448, 451, n.15 (1978) [hereinafter *Reporter's Privilege*].

52. 568 F.2d at 982.

53. *Id.* at 981.

54. *Lando, The Herbert Affair*, ATLANTIC MONTHLY, May 1973, at 73.

been deluded by Herbert's story."[55]

Herbert responded by initiating a defamation action for damages to his personal reputation and the dimunition in value of his book, *Soldier,* as a literary property.[56] He alleged that Lando "deliberately distorted the record through selective investigation, 'skillful' editing . . . one-sided interviewing, and . . . deliberately depicted [Herbert] as evasive in the interview."[57] The defendants responded that "the publications represented a fair and accurate report of public proceedings, broadcast in good faith without malice, and . . . that the program and the article were protected by the First and Fourteenth amendments."[58]

During the discovery phrase of the action Lando provided Herbert with voluminous notes, transcripts, drafts, and viedotapes.[59] Lando's deposition required twenty-six sessions and lasted over a year: he "answered innumerable questions about what he knew, or had seen; whom he interviewed; intimate details of his discussions with interviewees; and the form and frequency of his communication with his sources."[60] Lando refused, however, to respond to a number of questions regarding his beliefs, intentions, opinions, and conclusions in preparing the telecast.[61] He asserted that a newsgatherer's editorial process

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55. 568 F.2d at 982.

56. Herbert sued the Columbia Broadcasting System, Barry Lando, Mike Wallace, and the Atlantic Monthly, alleging $44,725,000 in damages. *Id.* SOLDIER was co-authored by Herbert and Wooten, and chronicled Herbert's military career; it was published by Holt, Reinhart and Winston in November of 1972. See note 47 *supra*. Interestingly, Holt, Reinhart & Winston is a subsidiary of the Columbia Broadcasting System.

57. 568 F.2d at 982.

58. *Id.*

59. *Id.* The transcript included 240 exhibits and 2,903 pages.

60. *Id.* Judge Kaufman's majority opinion for the Second Circuit Court of Appeals characterized Lando's testimony as revealing "a degree of helpfulness and cooperation between the parties and counsel that is to be commended in a day when procedural skirmishing is the norm." *Id.*

61. Judge Kaufman classified the objectionable questions 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 Minute' segment and the Atlantic Monthly article;
> 2. Lando's conclusions about facts imparted by interviewees and his state of mind with respect to the veracity of persons interviewed;
> 3. The basis for conclusions where Lando testified that he

was protected by the first amendment. The questions which Lando refused to answer fall into two broad categories: "state of mind" and "editorial process" evidence. The state of mind questions referred to Lando's personal thoughts and intentions. The editorial process questions referred to conversations between Lando and his editors regarding what would or would not be included in the broadcast—editorial discussions and conclusions.

The district court granted Herbert's motion for an order compelling discovery.[62] District Judge Haight rejected Lando's assertion of a constitutional privilege protecting a newsman's editorial process.[63] The court reasoned that since Herbert was required under *New York Times*[64] to meet the heavy burden of proving that Lando knew or should have known that the broadcast material was false, evidence of editorial process and state of mind was critical.[65]

On an interlocutory appeal,[66] a divided panel of the Second Circuit Court of Appeals reversed the district court's decision.[67] Chief Judge Kaufman, writing for the majority, held that in defamation actions, the first amendment provided an absolute privilege forbidding the compelled disclosure of a defendant journal-

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did reach a conclusion concerning the veracity of persons, information or events;

4. Conversations between Lando and Wallace about matter to be included or excluded from the broadcast publication; and

5. Lando's intentions as manifested by his decision to include or exclude certain material.

Id. at 983.

62. His motion was made pursuant to FED. R. CIV. P. 37(a)(2).

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

64. Herbert conceded that he was a "public figure" under the standard articulated in Curtis v. Butts, 388 U.S. 130 (1967) and Gertz v. Robert Welch, 418 U.S. 323 (1974), having thrust himself to the "forefront of particular public controversies in order to influence the resolution of the issues involved." *Id.* at 345. Herbert v. Lando, 73 F.R.D. at 391 (S.D.N.Y. 1977). *See* note 16 *supra* and accompanying text.

65. Judge Haight's rationale was that "[i]f 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 plaintiffs 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." 73 F.R.D. at 394.

66. Pursuant to 28 U.S.C. § 1292(b)(1976).

67. 568 F.2d at 974-75 (per Kaufman, C.J., Oakes, J., concurring; Meskill, J., dissenting).

ist's "thoughts, opinions, and conclusions."[68] The court feared a chain-reaction effect: if it allowed a libel plaintiff to inquire into the editorial process, self-censorship would result, chilling the press' vital function of disseminating news.[69] Such a ruling would "consume the very values which the *[New York Times v.] Sullivan* landmark decision sought to safeguard."[70]

The Chief Judge's decision relied heavily on the Supreme Court's rulings in *Miami Herald v. Tornillo*[71] and *Columbia Broadcasting System v. Democratic National Committee (CBS).*[72] In *Miami Herald,* the court struck down a Florida "right of reply" statute.[73] In *CBS,* the court found that a network policy which refused all editorial advertisements fell within the exercise of "editorial control and judgment" and did not violate the first amendment rights of advertisers.[74] Both of these cases protected a publisher or broadcaster's right to maintain "editorial control" over the choice of material published. They rejected a blanket "right of access" to organs of the newsmedia, yet they did not create an inviolate "editorial process" which insulates the press from any form of inquiry. In his dissent from the Second Circuit's ruling in *Herbert,* Judge Meskill wrote that "if such a privilege were really necessary to protect the editorial function, we would have heard about it long before now."[75] Both jurists and commentators have suggested that Judge Kaufman erred in trying to apply *Miami Herald* and *CBS* to the facts of *Herbert.*[76] Judge Oakes' concurrence in *Herbert* relied primarily

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68. *Id.* at 984.
69. *Id.* at 980.
70. *Id.* at 984.
71. 418 U.S. 241 (1974).
72. 413 U.S. 94 (1973).
73. 418 U.S. at 258.
74. 412 U.S. at 124.
75. 568 F.2d 988 (Meskill, J., dissenting).
76. *Reporter's Privilege, supra* note 51, at 454-56; Note, *Constitutional Law—First Amendment—In A Public Figure Libel Action, An Absolute First Amendment Privilege Forbids Compelled Disclosure Of a Defendant Newsman's Editorial Process,* 47 GEO. WASH. L. REV. 286, 311-17 (1978) [hereinafter *First Amendment*]; Note, Herbert v. Lando: *State of Mind Discovery and the* New York Times v. Sullivan *Libel Balance,* 66 CAL. L. REV. 1127, 1134-37 (1978). Judge Oakes' concurrence agreed with Judge Kaufman's conclusions stating: "*Tornillo* and *Columbia Broadcasting* recognize the inviolability of the editorial function." 568 F.2d at 988 (Oakes, J., concurring). Justice White's majority opinion for the Supreme Court bluntly rejected the circuit court's analysis: "[i]t is incredible to believe that the Court in *Columbia Broadcasting System* or in *Tornillo* silently effected a substantial contraction of the rights preserved to defamation plaintiffs

on the free press clause of the first amendment,[77] drawing on Justice Potter Stewart's thesis[78] of an "institutional differentiation between freedom of speech and freedom of the press."[79] Judge Oakes contended that inquiry into the editorial process was a form of prior restraint.[80] Both opinions warned of the "chilling effect"[81] a contrary ruling would have had on the press,[82] and while their analysis was faulty, their conclusions were justified in light of the critical demands of the first amendment.

A. The Supreme Court's Holding in *Herbert*

In *Herbert v. Lando*,[83] the Supreme Court continued its fifteen year struggle to ease the constitutional tensions between the rights of libel plaintiffs and the first amendment interests of media defendants.[84] The Justices, in a six-to-three vote,[85] flatly rejected an absolute first amendment protection for the press against compelled disclosure of state of mind and editorial process. The *Herbert* majority reflected a Court that was mindful of the heavy burden of proof libel plaintiffs bear. The Justices refused to enhance a standard which already represented an onerous burden by recognizing the absolute privilege asserted by defendant Lando.[86] The *Herbert* opinion described state of mind

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in *Sullivan, Butts,* and like cases." 411 U.S. at 168.

77. 568 F.2d at 986 (Oakes, J., concurring). Subsequent to the Second Circuit's ruling in *Herbert,* Judge Oakes wrote an article discussing actual malice in defamation actions as well as his *Herbert* opinion. Oakes, *Proof of Actual Malice In Defamation Actions: An Unsolved Dilemma,* 7 Hofstra L. Rev. 655 (1979).

78. *See* notes 27-29 *supra* and accompanying text.

79. 568 F.2d at 986 (Oakes, J., concurring).

80. *Id.* at 989. Judge Oakes' strained analogy of *Herbert* to a prior restraint appears illogical and has, in fact, been criticized as "rather remarkable," *Reporter's Privilege, supra* note 51, at 457.

81. *See* note 14 *supra* and accompanying text.

82. 568 F.2d at 977-80, 984, 993-94.

83. 441 U.S. 153 (1979).

84. Justice Powell, writing for the majority in *Gertz v. Robert Welch,* 418 U.S. 323 (1974), observed that "[t]his Court has struggled for nearly a decade to define the proper accommodation between the law of defamation and the freedom of speech and press protected by the First Amendment." *Id.* at 325.

85. Justice White's majority opinion was joined by Chief Justice Burger and Associate Justices Blackmun, Rehnquist and Stevens. Justice Powell wrote a concurring opinion which stressed the role of first amendment values. 441 U.S. at 177-80 (Powell, J., concurring). Justices Stewart and Marshall wrote separate dissents. *Id.* at 199-202 (Stewart, J., dissenting); *Id.* at 202-10 (Marshall, J., dissenting), and Justice Brennan dissented in part. *Id.* at 180-99. (Brennan, J., dissenting in part).

86. *Id.* at 176. "The question [presented] here is whether [the first and fourteenth]

evidence as a "critical element" of a libel plaintiff's cause of action,[87] without which an "impenetrable barrier" would be created "completely foreclos[ing a libel plaintiff's] recovery."[88] To support the statement that state of mind evidence is necessary to establish liability under *New York Times,* Justice White reviewed the "deeply rooted" common law notions of malice.[89] The opinion pointed to the showing of "ill will, spite, and intent to injure [found] in *Curtis Publishing v. Butts'*"[90] and cited forty-one cases[91] where evidence of the editorial process was admitted "without encountering constitutional objection."[92] The Court reviewed the holdings in *Butts* and *Gertz v. Welch* and found that they contained no language which could be construed to restrict the sources from which a defamation plaintiff could obtain the evidence necessary to his or her cause of action.[93]

The majority opinion categorically rejected the circuit court's assertion that *Miami Herald*[94] and *CBS*[95] "silently effected a contraction of the rights preserved to defamation plaintiffs in *Sullivan, Butts,* and like cases."[96] The High Court distinguished these cases as simply protecting the press from any form of compelled publication.[97] In further support of their denial of an absolute privilege, the majority recited a myriad of administrative difficulties that would arise from assertions of such privilege.[98] The opinion, stating that "[t]he outer boundaries of the

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amendments should be construed to provide further protection for the press when sued for defamation than has hitherto been recognized." *Id.* at 155.

87. *Id.*

88. *Id.* at 160.

89. *Id.* at 161.

90. *Id. quoting* Curtis Publishing v. Butts, 388 U.S. at 165-66 (1967). *See also* notes 15, 18, & 19 *supra* and accompanying text.

91. 441 U.S. at 165-67 n.15.

92. *Id.* at 165.

93. *Id.* at 160.

94. 418 U.S. 241 (1974).

95. 412 U.S. 94 (1973).

96. 441 U.S. at 168. While Chief Judge Kaufman's legal analysis has been questioned for utilizing *Miami Herald* and *C.B.S.* in his Second Circuit opinion, Justice White appears to have gone out of his way to criticize the lower court's reasoning. *Id.* at 166-69.

97. *Id.* at 167-68. "[H]oldings that neither a State nor the Federal Government may dictate what must or must not be printed neither expressly or impliedly suggest that the editorial process is immune from any inquiry whatsoever." *Id.* at 168. *See* notes 73-78 *supra.*

98. 441 U.S. at 170-71.

editorial privilege now urged are difficult to perceive,"[99] voiced the fear that this defense might even go so far as to prevent inquiry into a reporter's admissions to third parties outside of a newsroom.[100] Yet, the Court was primarily concerned with the right of an individual to preserve his or her reputation within the community.[101] Throughout the Court's discussion of the *New York Times* doctrine, the majority commented that plaintiffs must be allowed to prove the necessary elements of malice, by either direct or indirect evidence.[102] Justice White recognized the potential "chilling effect" engendered by granting absolute access to evidence of state of mind and editorial process.[103] Yet the majority viewed this inhibition of the news media as "precisely what *New York Times* and other cases have held to be consistent with the First Amendment."[104]

The majority opinion concluded with an abstact and somewhat disingenuous discussion of federal discovery provisions,[105] invoking, by rote, the mandate of *Hickman v. Taylor*[106] that discovery rules should be liberally construed.[107] But the Court then acknowledged the concomitant costs and burdens of such broad discovery upon civil litigants: "[i]t is suggested that the press needs constitutional protections from these burdens if it is to perform its task, which is indispensable in a system such as ours."[108] But "creating a constitutional privilege . . . would not cure this problem for the press . . . . Only complete immunity from defamation would effect this result . . . ."[109] Justice Powell's brief concurrence solely addresses the abuses of discovery.[110] His opinion directs trial judges to strike a balance between a broad reading of discovery rules and first amendment

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99. *Id.* at 170.

100. *Id.* at 171. The opinion also asserted that by denying access to state of mind evidence, discovery of a defendant newsman's objective knowledge may be placed beyond a plaintiffs' reach. *Id.* at 170-71.

101. *Id.* at 169.

102. *Id.* at 169-71.

103. *Id.* at 171.

104. *Id.*

105. *Id.* at 177. The majority refers to rules 26(b)(1) and 26(c) of the FED. R. CIV. P.

106. 329 U.S. 495 (1947).

107. *Id.* at 501, 507.

108. 441 U.S. at 176.

109. *Id.*

110. *Id.* at 177-80 (Powell, J., dissenting).

protection of the press.[111] Justices Brennan and Marshall in separate dissents argued for a privilege preventing the discovery of "editorial communications," but not "state of mind."[112] Dissenting also, Justice Stewart thought the majority had hopelessly entangled common law with *New York Times* malice, and that evidence of both state of mind and editorial process was irrelevant.[113]

B. Criticism of the Court's Analysis—*New York Times* Malice Redefined

Although the Supreme Court's holding is superficially consistent with the *New York Times* balance, the refusal to preclude any discovery of state of mind or editorial process does violence to the *New York Times* standard. In *New York Times v. Sullivan* and its progeny, the Supreme Court painstakingly distinguished "actual malice" from common law malice: "actual malice" meaning statements made with knowledge of their falsehood, or in reckless disregard of their probable falsity; while common law "malice" was defined as ill will, evil intent, or a desire to injure.[114] Although the definition of *New York Times* malice has been criticized as being illusory and imprecise,[115] the *Herbert* Court professed loyalty to its standard.[116] Nevertheless, the Court resurrected common law notions of malice and introduced them into the *New York Times* standard.[117]

The Court's reliance on *Curtis v. Butts*[118] is misleading. The

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111. *Id.*

112. *Id.* at 181 (Brennan, J., dissenting in part); *Id.* at 206-10 (Marshall, J., dissenting).

113. *Id.* at 199-202 (Stewart, J., dissenting).

114. *See* notes 17, 20, 21, & 22 *supra.*

115. In his concurrence in *New York Times,* Justice Black wrote that malice "even as defined by the Court, is an elusive, abstract concept, hard to prove and hard to disprove. The requirement that malice be proved provides at best an evanescent protection for the right critically to discuss public affairs and certainly does not measure up to the sturdy safeguard embodied in the First Amendment." 376 U.S. 293 (1964). *See also* Herbert v. Lando, 568 F.2d at 991 n.26 (Oakes, J., concurring). *See generally,* T. Emerson, The System of Freedom of Expression 518-43 (1st ed. 1970).

116. Justice White wrote that the *New York Times* doctrine "has been repeatedly affirmed as the appropriate First Amendment standard applicable in libel actions brought by public officials and public figures." 441 U.S. at 169 (1979).

117. *Id.* at 160-61. Justice Stewart's *Herbert* dissent accused the majority of an "unstated misapprehension of the meaning of *New York Times* actual malice." *Id.* at 201 (Stewart, J., dissenting).

118. 388 U.S. 130 (1967).

Herbert opinion represents *Curtis* as upholding a damage award conditioned upon a showing of "ill will, spite, hatred and an intent to injure . . . ."[119] But the citation was to a concurrence in *Curtis* where Chief Justice Warren was reciting the trial court's instructions to the *Curtis* jury. These jury instructions were formulated *before* the Supreme Court decided *New York Times v. Sullivan.* Also, when read in their entirety, the instructions defined actual malice as "denoting 'wanton or reckless indifference or culpable negligence with regard to the rights of others' . . . ."[120] Justice Warren's analysis in *Curtis* concluded that "[w]ith the jury's attention thus focused on this threshold requirement of falsity, the references . . . to wanton or reckless indifference and *culpable* negligence most probably resulted in a verdict based on the requirement of reckless disregard for the truth of which we spoke in *New York Times.*"[121] Chief Justice Warren determined that since the *Curtis* instructions included the essential elements of *New York Times* malice, although tinged with references to ill will, the jury's award should not be upset:

> Unquestionably, in cases tried after our decision in *New York Times* we should require strict compliance with the standard we established. We should not, however, be so inflexible in judging cases tried prior thereto, especially when, as here, the trial judge . . . recognized the essential principle and conformed with it to a substantial degree.[122]

The *Herbert* majority clearly misrepresented the *New York Times* test as utilized in *Curtis.* Well established case law which explicitly held that "instructions which permit a jury to impose liability on the basis of the defendant's hatred, ill will, or desire to injure are clearly inadmissible"[123] was ignored by the *Herbert* Court. In *Greenbelt Cooperative Publishing Association v. Bresler,*[124] the Supreme Court held that jury instructions which

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119. 441 U.S. at 162-63.

120. 388 U.S. at 165-66 (Warren, C.J., concurring).

121. *Id.* at 166 (emphasis in original).

122. *Id.* at 166-67.

123. Old Dominion Branch 469, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 281 (1974). *See also* Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 82 (1967); Henry v. Collins, 380 U.S. 356, 357 (1965).

124. 398 U.S. 6 (1970).

defined *New York Times* malice as "spite, hostility or deliberate intent to harm," constituted "error of constitutional magnitude."[125] By quoting *Curtis* out of context, Justice White appears to have injected ill will into the *New York Times* standard of malice. Having done so, it was simple for the Court to hold that subjective state of mind is critical to a showing of malice. With little effort the Court struck down its own straw man. Yet, to bolster this reformulation of the *New York Times* standard, Justice White's opinion in *Herbert* stated that "long before *New York Times* was decided certain qualified privileges had developed to protect a publisher from liability for libel unless the publication was made with malice."[126] Undoubtedly true in the nineteenth century, the opinion cited century-old defamation texts,[127] but ignored the explicit holding of *New York Times,* decided just fifteen years earlier.

Justice White stated that "courts across the country have long been accepting evidence going to the editorial processes of the media without encountering constitutional objections."[128] But this proposition skirts the real issue. *Herbert* did not address the *admissibility* of state of mind evidence, but rather privilege from its *compelled* disclosure. Prior to *Herbert* some journalists provided such evidence; now, all journalists are forced to do so. The opinion misuses over forty cases in which evidence of state of mind was admitted.[129] In each instance, the case antedated the *New York Times* decision. Use of such cases to uphold or modify propositions relating to the current standard of proof of malice is both inappropriate and illogical.

Dissenting in *Herbert,* Justice Stewart stated that " '[a]ctual malice' has nothing to do with hostility or ill will,"[130] and thus the majority opinion "follow[s] a false trail."[131] Fur-

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125. *Id.* at 10. *See also* Rosenblatt v. Baer, 383 U.S. 75, 83-84 (1965); and *Reporter's Privilege, supra* note 51, at 448 n.15.

126. 441 U.S. at 163 (1969)(footnote omitted).

127. *Id.* at 165, n.13 & 14. The texts cited by Justice White are 99 and 162 years old, respectively.

128. *Id.* at 165 (footnote omitted).

129. *Id.* at 165-67, n.15.

130. *Id.* at 199 (Stewart, J., dissenting).

131. *Id* at 201. The Court's "misapprehension is reflected . . . by such phrases as 'improper motive,' 'intent or purpose with which the publication was made,' 'ill will,' and by lengthy footnote discussion about the spite or hostility required to constitute malice at common law." *Id.*

thermore, "liability ultimately depends upon the publisher's state of knowledge of the falsity of what he published, not at all upon his motivation in publishing it—not at all, in other words, upon actual malice as those words are ordinarily understood."[132] The Justice's dissent concluded that "[o]nce our correct bearings are taken, however, and it is firmly recognized that a publisher's motivation in a case such as this is irrelevant, there is clearly no occasion for inquiry into the editorial process as conceptualized in this case."[133]

Whether or not the *Herbert* majority intended to alter the elements of "actual malice," its language will certainly lead to confusion in the lower courts as to what elements of proof were contemplated in *New York Times* and subsequent libel cases. By redefining "actual malice" the Court invited formulations by lower courts utilizing what formerly was neither dispositive nor relevant in defamation cases. Garbled interpretations by the lower courts have already begun to appear, introducing ill will and evil intent into the *New York Times* test.[134] This has sub-

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132. *Id.* at 200.

133. *Id.* at 201.

134. Mobile Press Register Inc. v. Faulkner, 372 So.2d 1282 (Ala. 1979) (as corrected on denial of rehearing), reprinted in 5 MEDIA L. REP. 1108 (1979). The Alabama Supreme Court has issued a corrected opinion of its earlier ruling in *Faulkner*, which deleted the following sentence "[h]ostility, ill will, and evil intent are immaterial to a recovery under the [New York Times v.] Sullivan test." 5 MEDIA L. REP. at 1112. A concurring opinion in *Faulkner* was rewritten to include the observation that "even though hostility, ill will, and evil intent are not the equivalent of Sullivan malice, proof of them could be relevant and material on the issue of Sullivan malice." 372 So.2d at 1288 (Maddox, J., concurring). In Vidal v. Capote, 5 MEDIA L. REP. 1721 (1979), a New York court denied Capote summary judgment:

> Capote asserts that Vidal has failed to point to any evidence which would permit a finding of the requisite malice. Such assertion is without merit. As has been recently stated by the Supreme Court in Herbert v. Lando, "[m]alice was defined in numerous ways, but in general depended upon a showing that the defendant acted with improper motive. This showing, in turn, hinged upon the intent or purpose with which the publication was made, the belief of the defendant in the truth of his statement, or upon the ill will which the defendant might have borne toward the defendant . . . . It is further to be noted that the relationship between Vidal and Capote over the years has been a rather unsatisfactory one and that there has been a 'feud' going on between them for years."

Id. at 1723 (citations omitted). The *Vidal* and *Faulkner* courts based their rulings on the common law elements of malice, and were led to that inappropriate standard by Justice White's ambiguous malice discussion in *Herbert*.

stantially undermined the result contemplated by the framers of the original doctrine of insulating the media from suit by public figures.

III. THE IMPACT OF UPSETTING THE *NEW YORK TIMES* BALANCE

The Supreme Court's decision of *Herbert v. Lando* received a great deal of publicity. Segments of the news media, stung by the holding in *Herbert* and fearful of what they perceived to be an ongoing anti-press bias harbored by the Burger Court,[135] reacted with predictable outrage.[136] More surprisingly, in a rare departure from judicial etiquette, Justice Marshall, in a reference to the *Herbert* decision, publicly criticized his fellow justices for providing "insufficient protection to constitutional rights."[137] The Justice astounded his audience by declaring that "[i]ll-conceived reversals [by the United States Supreme Court] should be considered as no more than temporary interruptions."[138]

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135. Commentators, journalists, media analysists and publishers pointed to the recent United States Supreme Court rulings of Gannett Co. v. DePasquale, 99 S. Ct. 2898 (1979)(members of the press can be excluded from preliminary hearings); Wolston v. Reader's Digest Ass'n, Inc., 99 S. Ct. 2701 (1979)(class of defamation plaintiffs who must meet the New York Times standard narrowed); Zurcher v. Stanford Daily, 436 U.S. 547 (1978) (the first amendment does not bar the government from conducting searches of newspaper offices, even if the newspaper is not suspected of any complicity in the crime being investigated); Houchins v. KQED Inc., 438 U.S. 1 (1978); Pell v. Procunier, 417 U.S. 817 (1974)(press does not have a special right of access to state prisons or county jails); Saxbe v. Washington Post Co., 417 U.S. 843 (1974)(press does not have a special right to interview prison inmates); Branzburg v. Hayes, 408 U.S. 665 (1972), *see* notes 168-76 *infra* and accompanying text. *See generally,* Note, *Sunlight in the County Jail:* Houchins v. KQED, Inc. *and Constitutional Protection For Newsgathering,* 6 HASTINGS CONST. L.Q. 933 (1979); Denniston, *Without a Champion,* THE QUILL, Sept. 1978; Zion, *High Court vs. The Press,* N.Y. TIMES, Nov. 16, 1979, § 6, at 76 (Magazine).

136. HIGH COURT TERM REPORT: ADVANCES IN CIVIL RIGHTS, N.Y. Times, July 9, 1979, §A, at 15, col. 2. *"First Amendment Watch,"* Inquiry, July 9 and 23, 1979, p.9-11; Hentoff, *Colonel Herbert's Fateful Conquest of the First Amendment,* VILLAGE VOICE, June 25, 1979 at 22-24; *Publish and Be Damned,* NEW WEST, July 2, 1979, at 32-47; *A Dry Spell of Doubt For Reporters,* TIME, July 16, 1979, at 71, col.1; *Editorial Process are Opened,* News Media and the Law, May-June 1979, at 2-3; Zion, *supra* note 135 at 76, 138, 140, 144-48, 150-51.

137. In *Rare Attack, Justice Marshall Says Court Erred,* N.Y. Times, May 28, 1979, § A, at 6, col.1. Justice Marshall delivered his speech to the Second Circuit Judicial Conference held at Buck Hill Falls, Pa. on May 27, 1979. *Id.* at 6, col.1, & at 11, col. 2.

138. *Id.* at 11, col. 2. The Supreme Court's rulings in *Herbert* and Gannett v. Depasquale, 99 S. Ct. 2898 (1979) resulted in public comment by six Supreme Court justices, a reaction "totally unprecedented, at least in this century." *Justices Speak Out on Press,* THE NEWS MEDIA & THE LAW, Nov.- Dec. 1979, p.5.

A. The Shift In Standards

The purpose of the *New York Times* balance was to ensure that the press will supply society with information about public officials that is needed to make informed choices in our democracy. The opening paragraph of *Herbert* declared the Court's reluctance to extend "further protection" to the news media in defamation actions.[139] Admittedly, by foreclosing discovery of state of mind and editorial process, the Court would have tipped the scales toward further insulation of the media from liability. But by compelling discovery of this type of evidence, the Court significantly lessened protection of the press. Under *Herbert*, it is far easier for defamation plaintiffs to prove "actual malice" since the editorial process is freely subject to discovery and the originally strict standard has been largely emasculated. While giving lip service to the principles embodied in *New York Times*, the Court perceptibly shifted its attention away from free press concerns to those of defamation plaintiffs.

For over 15 years, the Supreme Court has carefully honed the fragile *New York Times* balance. The Court has sought "in various ways, to fashion a set of protective rules that will discourage the bringing of libel actions where the alleged defamatory statements relate to matters in the public arena. [It has] correspondingly sought to encourage that degree of confidence which is a precondition to a decision to publish."[140] The *Herbert* majority stressed the desire of the Court to be "consistent with the balance struck by our prior decisions."[141] The Court stated that the *New York Times* doctrine "has been repeatedly affirmed as the appropriate First Amendment standard applicable in libel actions brought by public officials and public figures."[142]

However, two recent defamation cases have also cut back on press protection by circumscribing the definition of public figure. *Hutchinson v. Proxmire*[143] held that a research scientist who applied for federal grants and published in professional journals was not a public figure subject to the *New York Times*

139. 441 U.S. at 155.
140. Brosnahan, *supra* note 5, at 783.
141. 441 U.S. at 172.
142. *Id.* at 169.
143. 443 U.S. 111 (1979). *See* note 16 *supra* and accompanying text.

standard. *Wolston v. Reader's Digest*[144] held that a person who engaged in criminal conduct was not automatically subject to first amendment scrutiny. Both *Hutchinson* and *Wolston* significantly narrowed the class of defamation plaintiffs who must meet the stringent proof requirement established by *New York Times*. *Herbert* has made it still easier for this limited group of public figure plaintiffs to recover. Since the group that is subject to the *New York Times* standard has shrunk, lessening the burden that these plaintiffs must satisfy has unnecessarily strained the delicate *New York Times* balance.[145]

B. The Chilling Effect

In *Herbert*, the Court rejected the defendant's assertion that denial of an evidentiary privilege would have an "intolerable chilling effect on the editorial process and editorial decisionmaking."[146] The Court found that "if the claimed inhibition flows from the fear of damages liability for publishing knowing or reckless falsehoods, those effects are precisely what *New York Times* and other cases have held to be consistent with the First Amendment."[147] That *New York Times* contemplates some "permissible" degree of chill is obvious—the press has never been entirely insulated from defamation actions.[148] But exposing the exchange of ideas and observations in the newsgathering process to unrestricted discovery substantially enlarges the limited chill sanctioned by *New York Times*. Moreover, the incursion of compulsory discovery into editorial decisionmaking has the potential of being extremely damaging. For instance, it holds

144. 443 U.S. 157 (1979). *See* note 16 *supra* and accompanying text.

145. In referring to the aggregate impact of *Herbert, Hutchinson*, and *Wolston, The New York Times* wrote these "decisions will make it easier . . . to bring successful libel suits." High Court Term Report, N.Y. Times, July 9, 1979, § A, at 15, col.2. *See also* Goodale, *The 1970's: Review Shows Reasons For "Over-reaction" by the Press*, Nat'l L.J., Feb. 4, 1980, at 30, col.1, which states that *Time, Inc. v. Firestone, Hutchinson* and *Wolston* have "limited the definition of a public figure [in such a way] that there will be fewer plaintiffs who have the burdens of *Sullivan*." *Id.* at 31, col.1 (citations omitted). *See also The Supreme Court, 1978 Term*, 93 Harv. L. Rev. 155-57 (1979).

146. 441 U.S. at 171.

147. *Id.*

148. Justices Black and Douglas, concurring in New York Times v. Sullivan, asserted the absolutist view that the first amendment provides complete immunity for the press "to criticize officials and discuss public affairs with impunity." 376 U.S. at 296. The concurrence concluded "[a]n unconditional right to say what one pleases about public affairs is what I consider to be the minimum guarantee of the First Amendment." *Id.* at 297. This constitutional construction has never been adopted by the full Court.

journalists and their editors liable for opinions and beliefs expressed at even preliminary stages of news investigation. Nat Hentoff, a journalist and lawyer, posited the following hypothetical: "[a]t C.B.S., as at The *[Village] Voice* and the *[New York] Times,* a reporter comes back from an interview, and an editor says, 'Is that yo-yo still lying?' It's what the editor thinks at the time. Facts can change his mind. But before a jury, that line would be devastating [to the press]."[149] Evidence of this kind might be totally irrelevant to the question of defamation. Editors and reporters could be held liable for what they said or thought in private, not for what they finally published. Justice Stewart's dissent in *Herbert* stated that "[w]hat was *not* published has nothing to do with the case."[150] The prejudice produced by this kind of evidence would certainly outweigh its probative value.

Expressing a related analysis, Justice Brennan stated in *Herbert* that the chill engendered by the compulsory production of evidence of editorial process might lead to less accurate reporting:

> the possibility of future libel judgments might well dampen full and candid discussion among editors of proposed publications. . . . [M]uted discussion during the editorial process will affect the quality of resulting publications. Those editors who have doubts might remain silent; those who would prefer to follow other investigative leads might be restrained; those who would otherwise counsel caution might hold their tongues.[151]

Justice Marshall agreed: "[i]f prepublication dialogue is freely discoverable, editors and reporters may well prove reluctant to air their reservations or to explore other means of presenting information and comment."[152] Justice Marshall's dissent concluded that "[t]o preserve a climate of free interchange among journalists, the confidentiality of their conversation must be guaranteed."[153] Although split over the issue of discovery of the editorial process, the Court unanimously rejected the asser-

149. Hentoff, *supra* note 136 at 24, col.3-4.
150. 441 U.S. at 200 (Stewart, J., dissenting)(emphasis in original).
151. *Id.* at 194 (Brennan, J., dissenting in part).
152. *Id.* at 208-09 (Marshall, J., dissenting).
153. *Id.* at 209.

tion that exploration of a journalist's state of mind would discourage the publication of controversial news items. Justices Brennan and Marshall found that any resultant inhibition of the thought process was directly traceable to the *New York Times* decision. *Herbert*-type discovery, they felt, would be merely incremental to that effect.[154]

Commentators have also pointed out the dubious value of state of mind evidence.[155] "[D]efendants are unlikely," one has argued, "to reveal anything suggesting that they published with doubts about the truth of their stories."[156] But the compelled disclosure of evidence of state of mind poses dangers beyond libel law in the broader context of first amendment rights. If thought process evidence is freely discoverable in defamation cases, perhaps the same interrogatory tool might be employed in congressional investigations,[157] administrative hearings, judicial

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154. *Id.* at 192-203 (Brennan, J., dissenting in part); *id.* at 207 (Marshall, J., dissenting).

155. *See* note 156 *infra* and accompanying text.

156. Comment, Herbert v. Lando: *State of Mind Discovery and the New York Times v. Sullivan Libel Balance,* 66 CAL. L. REV. 1127, 1144 (1978). *See* UHL v. Columbia Broadcasting Systems, Inc., 476 F. Supp. 1134 (W.D. Pa. 1979) Chief Judge Weber addressed the practical difficulties of wrestling self-incriminating statements directly from the lips of the alleged defamer either in a deposition or at trial. In rejecting defendant CBS' assertion that *Herbert* requires a libel plaintiff to produce proof of the defendant's subjective state of mind by "clear and convincing evidence," the Chief Judge wrote: "[This] court had fleeting visions of deponents, surrounded by lawyers, with psychoanalysts at their elbows, and wired to polygraph machines while being so interrogated." *Id.* at 1141. "The implication of this argument. . .[is] that a poor man or even a man of some means has no business bringing litigation in court unless he can afford the services of a large double-breasted law firm with platoons of young credit card-carrying associates who can fan out all over the country on a search-and-depose mission." *Id.*

157.
> *The Chairman:* [Senator Joseph McCarthy] Have you been making attacks upon J. Edgar Hoover in the editorial columns of your paper?
> *Mr. Wechsler:* Sir, the *New York Post* has, on a couple of occasions, carried editorials critical of the Federal Bureau of Investigation. We do not regard any Government agency as above criticism, I assume your committee doesn't either. . . .
> *The Chairman:* Have you ever, in your editorial columns over the last 2 years, praised the FBI?
> *Mr. Wechsler:* Well, Sir, I would have to go back and read our editorials for the last 2 years. I did not understand that I was being called down here for a discussion of *Post* editorial policy. I have tried to say to you what we have said editorially about the FBI.
> *The Chairman:* Is your answer that you do not recall at this time any praise of the FBI, but you do recall editorializing

inquiries, grand jury investigations, and presidential inquiries. If *Herbert* becomes a trend, the potential for abuse of such discovery is staggering.

While the *Herbert* decision does not represent a wholesale reconstruction of substantive libel law, it does indicate the Supreme Court's dissatisfaction with the current state of the *New York Times* doctrine. The Court's impatience with the institutional frailties and imperfections of news reporting are manifest. Justice White and his colleagues in the majority have attempted to quietly inch away from the *New York Times* standard of malice, and towards holding the press to a far stricter degree of accountability. Yet the questionable value of evidence of state of mind and editorial process coupled with the dangers of exposing newsgatherers' thoughts, opinions, and conversations to courtroom scrutiny should lead to the consideration of less intrusive alternatives. The ability of a defamation plaintiff to prove "recklessness"[158] could be preserved without disregarding the institutional needs of the press. The *Herbert* majority conceded that "proof of the necessary state of mind could be in the form of objective circumstances from which the

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against the FBI?
Mr. Wechsler: The statement that I made was not a criticism of the FBI. . . .
The Chairman: Have you always been very critical of the heads of the Un-American Activities Committee? You have always thought they were pretty bad men, have you not?
Mr. Wechsler: Well, you would have to tell me whom we were talking about. . . .
The Chairman: . . . Have you consistently criticized the chairman of the House Un-American Activities Committee, whose task it is to expose Communists, or have you ever found one of them that you thought was a pretty good fellow, that you praised or that you could praise as of today—a chairman?
Mr. Wechsler: Well, if you are asking me my position on the activities of the Velde committee, my answer is that I have been editorially critical of those activities, as have many other newspapers.
The Chairman: . . . Do you think Bill Jenner is doing a good job?
Mr. Wechsler: I am not an enthusiast of Senator Jenner's.

Respondent's Brief at 32-34, Herbert v. Lando, 441 U.S. 153 (1979), *quoting State Department Information Program—Information Centers: Hearings on S. Res. 40 before the Permanent Subcomm. on Investigations of the Senate Comm. on Government Operations,* 83d Cong., 1st. Sess. 260-63 (1953).

158. For a definition of the "recklessness" standard in defamation suits, see notes 19-21 *supra* and accompanying text.

ultimate fact could be inferred."[159]

By reversing the Second Circuit,[160] the Supreme Court disrupted the balance struck by *New York Times* and subsequent cases. The result might be to force lower courts to create a form of evidentiary privilege which will not conflict with *Herbert,* but will protect the press from the self-censorship found so undesirable in *New York Times v. Sullivan.* The *Herbert* decision, viewed in its narrowest sense, simply denied the press an absolute immunity from compelled discovery. The Court held that "the present construction of the First Amendment should not be modified by creating the evidentiary privilege the respondents now urge."[161] Since *Lando* claimed only an absolute immunity, the Court did not explicitly foreclose the possibility of a qualified privilege.

Justice Potter Stewart viewed government as a four-tiered, internally competitive system incorporating the press as a "Fourth Estate" which acts as a watchdog over the three "official" branches of government.[162] Qualified privileges protecting the decision-making processes of the government have been recognized by the Supreme Court.[163] A qualified privilege for the individual thought process and editorial decision-making of the media would appear to be consonant with this perspective.

The public policy which formed the basis for the decision in *New York Times v. Sullivan* is as critical today as it was when that unanimous decision was handed down in 1964.[164] *Herbert* implicitly recognized the central thesis of *New York Times* that

159. 441 U.S. at 160.

160. 568 F.2d 974.

161. 411 U.S. at 175.

162. Stewart, *supra* note 27 at 634-35.

163. The Supreme Court has recognized a qualified evidentiary privilege for the executive, legislative, and judicial branches. See United States v. Nixon, 418 U.S. 683, 708 (1973)(a qualified executive privilege is "fundmental to the operation of government and inextricably rooted in the separation of powers under the Constitution"); Gravel v. United States, 408 U.S. 606, 617 (1972) (speech and debate clause "prevent[s] intimidation of legislators by the Executive and accountability before a possibly hostile judiciary") United States v. Morgan, 313 U.S. 409, 422 (1941)(in reaffirming their bar against probing into the "mental processes" of decision-makers, as announced in Morgan v. U.S., 304 U.S. 1 (1938), the Supreme Court declared, "[j]ust as a Judge cannot be subjected to such [state of mind] scrutiny . . . .").

164. 376 U.S. 254 (1964).

self-censorship by the press is highly undesirable in a self-governing society.[165] Although the Supreme Court meticulously unraveled the Second Circuit's holding in *Herbert*,[166] this task was easily accomplished. The circuit court's ruling had been roundly criticized as being doctrinally unsound and poorly reasoned. The final result of this case demonstrates that in order to restore the constitutional balance struck by *New York Times*[167] and to protect the public from the dangers of an emasculated press, the Court's ruling in *Herbert v. Lando* should be modified.

One possible alternative might be the development of a qualified evidentiary privilege resting squarely on the free press notions embraced by the *New York Times* Court. This privilege would restore the *New York Times* balance; would protect the news media's vital functions; and, at the same time, would substantially preserve the recently elevated rights of defamation plaintiffs. With such a modification, *Herbert* would remain consistent with the *New York Times* line of cases. An analogy can be drawn to the qualified privilege that lower courts developed in the aftermath of *Branzburg v. Hayes*.[168]

C. *Branzburg v. Hayes*

In *Branzburg v. Hayes*, the Supreme Court held that newsmen are not absolutely privileged under the first amendment from testifying before a grand jury.[169] In its plurality opinion, the Court ruled that the interest in having a grand jury consider all information relevant to a possible crime prevails over the constitutional objections raised by defendant newsmen.[170] What

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165. *Id.* at 277-79. *See* Curtis Publishing Co. v. Butts, 388 U.S. at 164-65 (Warren, C.J., concurring in result); Brosnahan, *supra* note 5 at 781.

166. 568 F.2d at 975.

167. 441 U.S. at 169. *See* notes 80 & 94-96 *supra* and accompanying text.

168. 408 U.S. 665 (1972). Branzburg v. Hayes was a consolidation of four lower court cases involving three reporters, each subpoenaed before separate grand juries; Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970); Branzburg v. Pound, 461 S.W.2d 345 (Ky., 1970); Branzburg v. Meigs, 503 S.W.2d 748 (Ky. Ct. App. 1971); and In re Pappas, 358 Mass. 604, 266 N.E.2d 297 (1971).

169. 408 U.S. at 690. The Court framed the issue before them in the narrow context of exploring "the obligation of reporters to respond to grand jury subpoenas as other citizens do and to answer questions relevant to an investigation into the commission of a crime." *Id.* at 682. Justice White authored the Court's opinion. *Id.* at 667. Justice Powell wrote a concurring opinion. *Id.* at 709. Justice Douglas wrote a dissent, *id.* at 711, as did Justice Stewart, *id.* at 725, whose dissent was joined by Justices Brennan and Marshall.

170. 408 U.S. at 690-91.

this meant, primarily, was that newsmen could not refuse to reveal the identify of their sources. As a result, the *Branzburg* ruling prevented a newsgatherer from promising confidentiality to their sources, seriously hampering the media's ability to receive tips, investigate leads, and expose misdeeds. However, the *Branzburg* decision recognized some degree of first amendment insulation: "Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated."[171] Justice Powell, in a "singularly opaque"[172] concurring opinion, supplied the decisive majority vote.[173] The Powell opinion has been described as "an effort to articulate the qualified newsman's privilege actually favored by a numerical majority of the Court."[174] Moreover, the dissenters in *Branzburg,* Justices Stewart, Brennan and Marshall, specifically urged adoption of what amounts to a qualified privilege.[175] Justice Douglas, the fourth dissenter, held the extreme view that newsmen have an absolute right not to testify before grand juries.[176] Justice Powell's opinion was addressed to the "balance of . . . vital constitutional and societal interests [which should be measured] on a case-by-case basis [in accord] with the tried and traditional way of adjudicating such questions."[177]

In order to avoid the harshness of *Branzburg's* denial of an absolute privilege, lower courts developed a qualified testimonial privilege for newsmen to protect the confidentiality of their

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171. *Id.* at 681.

172. Goodale, Branzburg v. Hayes *and the Developing Qualified Privilege For Newsmen,* 26 HASTINGS L.J. 709 (1975).

173. Three other Justices joined Justice White's opinion. Justice Powell's concurrence therefore supplied the fifth and majority vote.

174. Goodale, *supra* note 172 at 709. Justice Powell stated that he wrote to "emphasize the limited nature of the Court's holding. The Court does not hold that newsmen . . . are without constitutional rights with respect to the gathering of news or in safeguarding their sources." 408 U.S. at 709 (Powell, J., concurring).

175. *Id.* at 743 (Stewart, J., dissenting).

176. *Id.* at 712 (Douglas J., dissenting). Justice Douglas wrote that *"The New York Times* . . . takes the amazing position that First Amendment rights are to be balanced against other needs or conveniences of government. My belief is that all of the 'balancing' was done by those who wrote the Bill of Rights. By casting the First Amendment in absolute terms, they repudiated the timid, watered-down, emasculated versions of the First Amendment which both the Government and the New York Times advance in this case." *Id.* at 713 (footnote omitted).

177. *Id.* at 710 (Powell, J., concurring).

sources.[178] Some have pointed to the Powell concurrence as controlling[179] while others have utilized Justice White's tacit acknowledgement of the first amendment rights of newsgatherers.[180] In creating this qualified privilege, the lower courts have balanced the investigatory function of a grand jury against the confidentiality necessary for a reporter to uncover controversial news stories.[181]

Because of the same first amendment concerns expressed in *Branzburg* and its progeny, *Herbert* might also be modified—at least insofar as an "editorial process" privilege is concerned.[182] Four members of the *Herbert* Court evinced support for some form of protection: Justice Brennan explicitly urged the creation of a qualified evidentiary privilege;[183] Justice Stewart thought that any inquiry into the editorial process was "simply not relevant" and should be barred;[184] Justice Marshall proposed an absolute evidentiary privilege shielding editorial communications;[185] and Justice Powell's broad concurrence included

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178. Silkwood v. Kerr McGee Corp., 563 F.2d 433, 437 (10th Cir. 1977) (a qualified privilege is "no longer in doubt"); Farr v. Pritchess, 522 F.2d 464 (9th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976); Carey v. Hume, 492 F.2d 631 (D.C. Cir. 1974), *cert. denied*, 417 U.S. 938 (1974); Baker v. F. & F. Inv., 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); United States v. Liddy, 478 F.2d 586 (D.C. Cir. 1972); Cervantes v. Times, Inc., 464 F.2d 986 (8th Cir. 1972); Mize v. McGraw Hill, Inc., 5 MEDIA L. REP. 1156 (S.D. Tex. 1979); Gulliver's Periodicals Ltd. v. Chas. Levy Cir. Co., 455 F. Supp. 1197 (N.D. Ill. 1978); Apicella v. McNeil Laboratories, Inc., 66 F.R.D. 78 (E.D.N.Y. 1975); State v. Peter, 132 Vt. 266, 315 A.2d 254 (1974); Brown v. Commonwealth, 214 Va. 755, 204 S.E.2d 429 (1974), *cert. denied*, 419 U.S. 966 (1974); Rosato v. Superior Court, 51 Cal. App. 3d 190, 124 Cal. Rptr. 427 (1975).

179. Carey v. Hume, 492 F.2d 631, 636 (D.C. Cir. 1974) ("[i]ndeed, the *Branzburg* result appears to have been controlled by the vote of Justice Powell."); United States v. Liddy, 478 F.2d 586 (1972). "[T]he Branzburg decision is controlled in the last analysis by the concurring opinion of Justice Powell as the fifth justice of the majority." *Id.*

180. *See, e.g.*, Mize v. McGraw Hill, Inc., 5 MEDIA L. REP. 1156 (S.D. Tex. 1979).

181. *See, e.g.*, Silkwood v. Kerr McGee Corp., 563 F.2d 433, 438 (10th Cir. 1977) ("compulsory disclosure in the course of a 'fishing expedition' is ruled out in [a] First Amendment case,"); and Gilbert v. Allied Chem. Corp., 411 F. Supp. 505, 508 (E.D. Va. 1976) ("Information lost to the press is information lost to the public; unnecessary impediments to a newsman's ability to gather facts, follow leads and assimilate sources can restrict the quality of the news as effectively as censorship activities.")

182. 441 U.S. at 169-75. Modification would not be inconsistent with the ruling in *Herbert* because the decision simply rejects absolute protection, but does not address qualified privilege. *Id.*

183. *Id.* at 183 (Brennan, J., dissenting in part) ("The justifications for an editorial privilege may well support only a qualified privilege.")

184. *Id.* at 199 (Stewart, J., dissenting) ("And if such an inquiry is not relevant, it is not permissible.").

185. *Id.* at 209 (Marshall, J., dissenting)("I would foreclose discovery in defamation

language which could be utilized to create a balancing test.[186]

IV. METHODS TO ADMINISTER A QUALIFIED PRIVILEGE

A. THE MODEL OF *Garland v. Torre*

One model which might be utilized to "balance" the competing interests of defendants and plaintiffs is *Garland v. Torre*.[187] In *Garland* the Second Circuit affirmed a lower court decision to compel the disclosure of a reporter's confidential source.[188] This 1958 holding, which arose from an action brought by entertainer Judy Garland, antedated both *New York Times* and *Branzburg*. The opinion, written by then Circuit Judge Potter Stewart, employed a balancing test to consider "whether the interest to be served by compelling the testimony of the witness [in such a case] justifies some impairment of [a newsman's] First Amendment freedom."[189] The *Garland* decision explicitly recognized the first amendment protections afforded to newsgathering. "Freedom of the press, hard-won over the centuries by men of courage, is basic to a free society."[190] Yet the Court held that "basic too are courts of justice, armed with the power to discover truth. The concept that it is the duty of a witness to testify in a court of law has roots fully as deep in our history as does the guarantee of a free press."[191] In assessing the proper constitutional accomodation, Judge Stewart recognized three factors which subsequent cases have weighed to determine the efficacy of discovery against first amendment objections by the press.[192] They are: 1) whether the plaintiff had made a "reasonable" effort to find the requested information by alternative means;[193] 2) whether the "information sought was of obvious materiality and relevance" to the action;[194] and 3) whether discovery went to the "heart" of the plaintiff's claim.[195] Without a

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cases as "to the substance of editorial conversation.") (footnote omitted).

186. *Id.* at 178-80 (Powell J., concurring).

187. 259 F.2d 545 (2d Cir.), *cert. denied* 358 U.S. 910 (1958).

188. *Id.* at 551.

189. *Id.* at 548.

190. *Id.* at 549-51.

191. *Id.*

192. *Id.* at 551.

193. *Id.*

194. *Id.*

195. *Id.* at 550. This formula was considered and rejected by Judge Oakes in the Second Circuit Court of Appeals ruling in *Herbert*, 568 F.2d at 994 (1977) (Oakes J.,

proper showing under these three indices, there is no compelling interest in forcing a journalist's testimony.

The three-part *Garland* test is still utilized by the courts.[196] In *Carey v. Hume,*[197] the Court of Appeals for the District of Columbia stated that the Supreme "Court's continuing post-*Sullivan* citations of *Garland* . . . strongly suggests the continuing vitality of the latter case . . . ."[198] The *Carey* court ruled that in civil litigation, one must "look to the facts on a case-by-case basis in the course of weighing the need for the testimony in question against the claim of a newsman that the public's right to know is impaired."[199]

B. A Bifurcated Proceeding

Another method of administering a qualified privilege would be the utilization of a bifurcated proceeding. A bifurcated trial would insulate journalists from pro forma discovery demands directed to their state of mind and the editorial process. During the first stage, the burden would be on the plaintiff to establish the falsity of the alleged defamatory remark. Once falsity has been established, discovery demands may then go to evidence of state of mind and editorial process. Requiring a plaintiff to make a prima facie showing "avoids needless interference with the workings of the media. If the plaintiff fails to prove falsity, there would be no discovery or trial on the issue of defendant's state of mind, thereby avoiding pointless intrusions into the editorial process."[200]

In his dissent in *Herbert,* Justice Brennan, the author of the *New York Times* opinion, urged the creation of a qualified privilege which would bar exploration of editorial communications in the absence of a prima facie showing: "[t]his privilege [would]

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concurring). "The knowledge that in a certain number of cases the editorial process will be discoverable is itself likely to chill that process, because no editor can predict when a court will consider relevancy to be 'high' or evidence to be 'direct' or 'otherwise unobtainable.' " *Id.* at 994.

196. *See, e.g.,* Silkwood v. Kerr McGee Corp., 563 F.2d 433, 438 (10th Cir. 1977); Gulliver's Periodicals, Ltd. v. Chas. Levy Co., 455 F. Supp. 1197, 1203 (N.D. Ill. 1978).

197. 492 F.2d 631 (D.C. Cir.), *cert. denied,* 417 U.S. 938 (1974).

198. *Id.* at 635.

199. *Id.* at 636.

200. *Reporter's Privilege, supra* note 51, at 466. *See also* Friedenthal, *Herbert v. Lando: A Note On Discovery,* 31 Stan. L. Rev. 1059, 1066-67 (1979).

yield if a public figure is able to demonstrate to the prima facie satisfaction of a trial judge that the libel in question constitutes a defamatory falsehood."[201] Justice Brennan concluded that a "public-figure plaintiff will thus be able to redress attacks on his reputation, and at the same time the editorial process will be protected in all but the most necessary cases."[202] Justice Powell also hinted that a bifurcated proceeding might be proper: "[i]t might be appropriate for [a] district court to delay enforcing a discovery demand, in the hope that the resolution of issues through summary judgment or other developments in discovery might reduce the need for the material demanded."[203] Furthermore, Justice Powell noted that Lando had not moved for summary judgment and had "not argued that discovery should be postponed until other issues on which liability depend are resolved."[204]

One difficulty with a bifurcated trial was illustrated in Justice Marshall's dissent.[205] A journalist in the process of investigating a story would be unable to know whether his thoughts, remarks, or editorial meetings would be protected from exposure in a subsequent defamation action.[206] Additionally, plaintiffs are frequently able to show some degree of falsity, and thus libel trials would often move on to the "malice" part of the bifurcated proceeding. Nonetheless, this approach would extend more protection to the newsgathering process than is presently available under the *Herbert* decision.

C. Limitation of Discovery

Each of the opinions in *Herbert* explicitly stated or implied that trial judges could apply protective measures to curtail dis-

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201. 441 U.S. at 197 (Brennan J., dissenting in part). Justice Brennan wrote: "In the area of libel, the balance struck by New York Times between the values of the First Amendment and society's interest in preventing and redressing attacks upon reputation must be preserved. This can best be accomplished if the privilege functions to shield the editorial process from general claims of damaged reputation." *Id.*

202. *Id* at 198.

203. 441 U.S. at 108 n.4 (Powell, J., concurring).

204. *Id.*

205. Id. at 209 (Marshall, J., dissenting). "Unless a journalist knows with some certaintude that his misgivings will enjoy protection, they may remain unexpressed." *Id. See* note 195 *supra.*

206. The threat of subpoena engenders a response by journalists which has a "significant detrimental effect on the quality of news coverage." Blase, *The Newsman's Privilege: An Empirical Study,* 70 Mich. L. Rev. 229, 270 (1971).

covery in *Herbert*-type proceedings.[207] This is enigmatic as the issue of discovery abuse was collateral to Lando's arguments. Yet the great length of Lando's deposition—twenty-six sessions, requiring 3,000 pages[208]—is a factual thread which weaves through all five *Herbert* opinions.[209] Lando's attorneys argued, as media defendants invariably do in defamation suits,[210] that high litigation costs can bankrupt a newspaper—whether the action has merit or not.[211] The *Herbert* majority took the position that, although this fear may be well-founded, only "complete immunity" from liability would alleviate this problem.[212] Nevertheless, the opinion embarked on a vague discussion of "mushrooming litigation costs."[213] The opinion juxtaposed the mandate of *Hickman v. Taylor*—[214] requiring "broad and liberal treatment" of discovery rules—with the requirement that the Federal Rules of Civil Procedure should "be construed to secure the just, *speedy,* and *inexpensive* determination of every action."[215]

In dicta, the majority directed federal trial judges to "firmly" apply the relevancy requirement of Rule 26(b)(1).[216] The opinion indicated that discovery could also be restricted pursuant to Rule 26(c) which provides that "justice requires [protection for] a party or person from annoyance, embarrassment, oppression, or undue burden or expense."[217] While noting that the issue of relevancy was not before them, Justice White

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207. 441 U.S. at 177 (Powell, J., concurring), *id.* at 180 (Brennan, J., dissenting in part), 183, 199 & 202-03 (Stewart, J., dissenting), *id.* at 204-06 (Marshall, J., dissenting).

208. *See* notes 59 & 60 *supra* and accompanying text.

209. 441 U.S. at 176 n.25, 179 (Powell, J., concurring); *id.* at 202, 204-06 (Marshall, J., dissenting). The length of Lando's deposition was also a focal point of Judge Kaufman's analysis of *Herbert* in the Second Circuit Court of Appeals ruling. 568 F.2d at 982, 984.

210. *See generally,* Kramer and Wright, *A Little Insurance,* FEED/BACK 26 (Summer 1979). "The use of lawsuits as a means of harrassment or intimidation is a well-known and widespread practice." *Id.* at 29. The authors conclude, "the small newspaper is at the mercy of the compromise because its checkbook isn't always as big as its principles." *Id.*

211. "It is urged that the large costs of defending lawsuits will initimidate the press and lead to self-censorship, particularly where smaller newspapers and broadcasters are involved." 411 U.S. at 176 n.25; see *id.* at 205 (Marshall, J., dissenting).

212. *Id.* at 176.

213. *Id.* at 176-77.

214. 329 U.S. 495, at 501, 507 (1947).

215. 441 U.S. at 177 (emphasis in original), *citing* FED. R. CIV. P. 1.

216. *Id.* at 177.

217. *Id.*, citing FED. R. CIV. P. 26(c).

concluded that "with this authority at hand, judges should not hesitate to exercise appropriate control over the discovery process."[218] It is difficult to precisely understand the import of these remarks. While noting that they "appear to be no more than a gratuitous general request," one commentator has suggested that the Court may have "narrowed the traditional scope of discovery."[219]

Justice Powell's dissent, which solely addressed the majority's discovery discussion, extends the rationale for narrowing discovery to first amendment principles: "in supervising discovery in a libel suit by a public figure, a district court has a duty to consider First Amendment interests as well as the private interests of the plaintiffs."[220] Justice Powell's view was that "[w]hen a discovery demand arguably impinges on First Amendment rights, a district court should measure the degree of relevance in light of both the private needs of the parties and the public concerns implicated."[221] This language has already been cited with approval by one district court as the "appropriate rule of law."[222]

Recently, many courts have evidenced concern with abuse of the discovery process.[223] The *Herbert* opinions indicated that

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218. *Id.* at 177.

219. Friedenthal, *supra* note 200 at 1061.

220. 441 U.S. at 178 (Powell, J., concurring).

221. *Id.* at 179.

222. Walther v. Federal Election Comm'n, 82 F.R.D. 200, 202 (D.C. Cir. 1979) (district court denied discovery request made on a labor union as an "unwarranted intrusion into . . . political activities . . . [which would] curb or otherwise interfere with . . . legitimate political activity." The discovery request was denied on first amendment grounds). In Rosario v. New York Times Co., 48 U.S.L.W. 2406 (1979), the U.S. District Court for Southern New York upheld a first amendment editorial privilege while denying a discovery request made upon the New York Times in an unlawful discrimination case. The court held that "the class claimants' interest in the requested discovery must be balanced with the First Amendment." *Id.* at 2407. The *Rosario* court cited Justice Powell's concurrence in *Herbert*. *Id.*

223. *See* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 740-41 (1975)("*in terrorem*" discovery); AFC Indus., Inc. v EEOC, 439 U.S. 1081, 1086 (1979)(Powell, Stewart, and Rehnquist, JJ., dissenting from a denial of certiorari)("Widespread abuse of discovery . . . is a prime cause of delay and expense in civil litigations."); Cine 42d St. Theatre Corp. v. Allied Artists Interstate Corp., 602 F.2d 1062 (2d Cir. 1979), Judge Kaufman, writing again for the Second Circuit Court of Appeals, cited Justice Powell's *Herbert* concurrence for the position that "[a]n undertaking on the scale of the large contemporary suit brooks none of the dilation, posturing and harassment once expected in litigation." *Id.* at 1067-68; Maheu v. Hughes Tool Co., 569 F.2d 459, 462 (9th Cir.

the Supreme Court is growing impatient with unlimited discovery in civil suits. The more liberal members of the Court conceded the existence of this problem, but appear to have attempted to limit any change in the discovery rules to first amendment cases.[224] "Not only is the risk of *in terrorem* discovery more pronounced in the defamation context, but the societal consequences attending such abuse are of special magnitude."[225] Therefore, Justice Marshall wrote that

> I would hold that the broad discovery principles enunciated in Hickman and Schlagenhauf are inapposite in defamation cases. More specifically, I would require that district courts superintend pretrial disclosure in such litigation so as to protect the press from unnecessarily protracted or tangential inquiry. To that end, discovery requests should be measured against a strict standard of relevance.[226]

Given the unanimity of the Court's concern, and keeping in mind the proclivity of Justice Powell's concurrences to later emerge as precedent,[227] either Justice Powell's or Justice Marshall's test might be adopted as a method to curtail *Herbert*-type discovery requests in future defamation proceedings.

1977) ("Something in the Federal civil procedure has gone very much awry. Where now is speedy and inexpensive determination?"); Franchise Realty, Etc. v. S.F. Loc. Joint Exec. Bd., 542 F.2d 1076, 1083 (1976) ("The Supreme Court seems now to be aware of the fact long known to practitioners. The liberal rules of the Federal Rules of Civil Procedure offer opportunities for harassment, abuse, and vexatious imposition of expense . . . .").

224. Justice Marshall wrote:

> Where First Amendment rights are critically implicated, it is incumbent on this Court to safeguard their effective exercise. By leaving the directives of Hickman and Schlagenhauf unqualified with respect to libel litigation, the Court has abdicated that responsibility.
>
> In my judgment, the same constitutional concerns that impelled us in Sullivan to confine the circumstances under which defamation liability could attach also mandate some constraints on roving discovery.

441 U.S. at 205-06 (Marshall, J., dissenting).

225. *Id.* at 205 (emphasis in original) (Marshall J., dissenting).

226. *Id.* at 206 (Marshall, J., dissenting).

227. *See* Branzburg v. Hayes, 408 U.S. 665, 709 (1972)(Powell, J., concurring), and notes 168-86 *supra* and accompanying text. Justice Powell's *Herbert* concurrence has been characterized as "strongly reminiscent of his earlier special concurrences in press cases," *The Supreme Court, 1978 Term*, 93 HARV. L. REV. 153 (1979). *See also* Zurcher v. Stanford Daily, 436 U.S. 547, 568 (1978)(Powell, J., concurring).

One commentator has suggested that if this procedure were adopted, "courts would need not grapple with the imprecise parameters of the 'editorial process' nor have to follow a rigid objective-subjective test."[228]

D. SELF-REGULATION

Public climate is ripe for the imposition of limitations on newsgatherers.[229] The press is, in many ways, disdained and chastised by many segments of society. Over the last two decades, American institutions and values have been subjected to intense scrutiny. All branches of government, organized religion, the nuclear family, even educational systems, have been under harsh attack, culminating in widespread disillusionment. It is a time of increasing tension between the press, the government, and the people. The media, as an institution, is cast in an adversary role by definition; debunking, probing, and cynical, it is a conduit of such bad news as Watergate.

The media has, at times, been irresponsible and, indeed, has sometimes abused its enormous institutional powers.[230] Yet, Walter Lippman has compared the press to "a beam of a searchlight that moves restlessly about, bringing one episode and then another out of darkness into vision. Men cannot govern society by episodes, incidents and eruptions. It is only when they work by a steady light of their own, that the press, when it is turned upon them, reveals a situation intelligible enough for a popular decision. The trouble lies deeper than the press and so does the remedy."[231] Many commentators, news-gatherers and media analysts[232] indicate that in order to reduce public disillusionment and eliminate the necessity for governmental restraint,[233]

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228. *First Amendment, supra* note 76 at 317-18.

229. According to a Gallup Poll released on January 17, 1979, approximately four Americans in ten say that the present curbs on the press are "not strict enough." *Journalists Told 4 Out of 10 in Poll Favor Stronger Limits on the Press,* N.Y. Times, January 18, 1979, § A, at 10, cols. 5 and 6.

230. Nat Hentoff has written that the press has apparently forgotten that "the First Amendment is a shield, increasingly battered, against state interference with the press' functions. It was not intended to be blunt instrument against individual citizens who would be strewn about in the wake of journalists gathering news." Hentoff, *Privacy and the Press—Is Nothing Sacred?* SATURDAY REV., July 21, 1979, at 22.

231. W. LIPPMAN, PUBLIC OPINION 229 (1922).

232. Goodale, *supra* note 145 at 31.

233. Between 1975 and 1979 the Ford Foundation spent over one million dollars sponsoring a series of conferences between editors, lawyers, and judges, and funded a

the press must be self-policing.

The English Press Council provides a model for media self-regulation. Adopted in 1946[234] to further "the free expression of opinion through the press and the greatest practicable accuracy in the presentation of news," the British Press Council consists of approximately 20 journalists, editors and publishers, and five "lay members."[235] In this country, the State of Minnesota and the City of Honolulu have instituted their own Councils, and the National News Council Task Force Report[236] proposed the creation of local Press Councils as devices to deal with clearly "delineated powers of monitorship, evaluation, and publication."[237] Such councils could serve as a device to intercept litigation-bound disputes, thereby side-stepping the courts. A National News Council has already been established by the Twentieth Century Fund and is headquartered in New York City. The Council maintains a grievance committee which investigates complaints from individuals and organizations concerning the inaccuracy or unfairness of a news report. As of this publication, leading newspapers such as the *Washington Post* and *The New York Times* have not joined the Council, a fact which has hampered the Council's effectiveness.

The *Herbert* ruling, in its broadest sense, might be read to confirm the general observation that the Court has shifted its focus from the first amendment to concern for a libelled individual's right of redress. Other libel cases of the 1979 term also point in this direction, as the class of *New York Times* defamation plaintiffs shrinks and the use of summary judgment motions to insulate the press from vexatious libel suits is discouraged. These cases indicate the Court's desire to redefine the scope of protection afforded the press in libel actions. This is an ominous movement; it imperils the integrity of the press' critical role as a conduit of news and information.

The press, pursued, in Justice Marshall's description, by

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program at Yale Law School designed to promote a better understanding of the tensions between individual rights and the first amendment. Hentoff, *supra* note 230 at 21.

234. H. KREIGHBAUM, PRESSURES ON THE PRESS 220 (1973).

235. *Id.*, citing a motion in the House of Commons.

236. NATIONAL NEWS COUNCIL, A FREE AND RESPONSIVE PRESS 36 (1973).

237. *Id.*

"many self-perceived victims of defamation [who] are animated by something more than a rational calculus of their chances of recovery,"[238] and wary of the undefined scope of judicial intrusion into editorial thought and conversation, may respond with an instinct for self-preservation, resulting in self-censorship of the news. This, in turn, would snap an essential link in a participatory democracy—the dynamic of the marketplace of ideas. The spectre of such events evokes Judge Learned Hand's eloquent observation that the first amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked our all upon it."[239]

CONCLUSION

In *Herbert v. Lando,* the Supreme Court exposed state of mind evidence and editorial discussion for the benefit of public figure defamation plaintiffs. In so doing, Justice White and his colleagues in the majority rejected the first amendment principles enunciated in *New York Times* and embraced the cause of those who mistrust the press and seek to hold the media more accountable. In the final analysis, the true import of the decision may be largely symbolic: a triumph of style over substance. Accordingly, the impact of *Herbert* remains to be seen.

For practical and jurisprudential reasons, lower courts should alter the "rule" of *Herbert.* Although *Branzburg v. Hayes* does not provide a precedential basis for modification, it is strongly analogous. The three-pronged test of *Garland v. Torre* could be used as a model to develop another qualified newsman's privilege. It appears that some limitation of the discovery provisions of the Federal Rules of Civil Procedure is now being considered by the Supreme Court. A "balancing test" between the needs of the first amendment and discovery demands could be created. One or all of these methods may be employed by lower courts to modify the surface harshness of the Supreme Court's ruling in *Herbert v. Lando.*

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238. 441 U.S. at 204 (Marshall, J., dissenting).

239. United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943).