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CONSTITUTIONAL LAW—FIRST AMENDMENT—DEFAMATION—PUBLIC FIGURES—DISCOVERY—EDITORIAL PROCESS—PRIVILEGE—The United States Supreme Court has held that there is no first amendment privilege against discovery into the editorial process of a media defendant in a defamation action by a public figure.

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

On February 4, 1973, The Columbia Broadcasting System, Inc. (CBS) presented a series of filmed interviews with retired Army Lieutenant Colonel Anthony Herbert as part of the network's news program "60 Minutes." In the segment,[1] which was produced and edited by Barry Lando, Correspondent Mike Wallace interviewed Herbert regarding his highly publicized accusations that commanding officers in Vietnam had covered up reports of wartime atrocities. Although Herbert previously had been the object of considerable media attention, he later contended that the CBS broadcast falsely and maliciously portrayed him as a liar who made war-crimes charges to explain his relief from command.[2] Based on these contentions, Herbert sued Lando, Wallace, CBS, and *Atlantic Monthly* Magazine[3] in United States District Court for the Southern District of New York.[4] Herbert conceded that because he was a public figure, the rule established by *New York Times v. Sullivan*[5] would preclude recovery against the media defendants unless he could prove that the broadcast statements were false and defamatory and that the defendants had published the falsehoods with knowledge that they were false or with a reckless disregard for their truth.[6] He requested damages for injury to his reputation and to the literary value of a book he published recounting his experiences.[7] The defendants responded that the televised production was an accurate and fair account of public proceedings, had been broadcast without malice, and was therefore protected by the first and

1. The title of the segment was "The Selling of Colonel Herbert." Herbert v. Lando, 568 F.2d 974, 982 (2d Cir. 1977), *rev'd*, 441 U.S. 153 (1979).

2. Herbert v. Lando, 441 U.S. 153, 156 (1979). Herbert alleged that CBS conducted the interview in a setting that put him at a disadvantage, and then manipulated the editing of the film to make him seem evasive. 568 F.2d at 980-81.

3. The magazine published an article written by Lando concerning the production of the program. *See* Lando, *The Herbert Affair*, ATLANTIC MONTHLY, May, 1973, at 73.

4. Herbert v. Lando, 73 F.R.D. 387, 391 (S.D.N.Y. 1977).

5. 376 U.S. 254 (1964).

6. 441 U.S. at 156.

7. The book was entitled *Soldier*. Herbert sought a total of $44,725,000 in damages. 568 F.2d at 982.

fourteenth amendments to the United States Constitution.[8]

During the course of an extensive discovery process,[9] producer Barry Lando refused to answer questions involving his mental processes while he was editing the program. Lando was also reluctant to respond to questions regarding conversations with Wallace about what should be included in or excluded from the broadcast.[10] Lando contended that the first amendment protected the editorial process from inquiry. In granting Herbert's motion to compel discovery,[11] the federal district court applied the standards of Federal Rule of Civil Procedure 26(b)[12] and ruled that Lando's state of mind was of central importance to the issue of malice in Herbert's case.[13] The district court rejected the defendant's claims of constitutional privilege and held that nothing in first amendment jurisprudence[14] required an increase in the already heavy burden of proving actual malice borne by a public figure plaintiff in a defamation action.[15] The case was certified for an interlocutory

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8. U.S. CONST. amend. I directs that "Congress shall make no law . . . abridging the freedom of speech, or of the press." The first amendment prohibitions were extended to the states through the fourteenth amendment. *See, e.g.*, Near v. Minnesota, 283 U.S. 697, 707-08 (1931); Gitlow v. New York, 268 U.S. 652 (1925).

9. Lando's deposition alone required twenty-six sessions, lasted more than a year, and produced a transcript of nearly 3,000 pages. 568 F.2d at 982.

10. The court of appeals classified the inquiries to which Lando objected into five categories: First, Lando's conclusions about which leads to pursue based on his investigations; second, Lando's impressions of facts gathered from interviewees and his conclusions about their veracity; third, the basis of his conclusions; fourth, conversations with Wallace about what should be included in the program; and fifth, Lando's intentions as manifested by his editorial decisions. 441 U.S. at 157 n.2.

11. FED. R. CIV. P. 37(a)(2) provides that a party may move for an order to compel a deponent to respond to his questions.

12. FED. R. CIV. P. 26(b)(1) provides in pertinent part that:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

13. 73 F.R.D. at 395-96.

14. *Id.* at 394. The district judge found only one case that dealt with a discovery issue similar to that presented in *Herbert*. In Buckley v. Vidal, 50 F.R.D. 271 (S.D.N.Y. 1970), a libel plaintiff's motion for production of publication-related documents under FED. R. CIV. P. 34 was granted by a district judge who commented that such discovery was appropriate in view of the stringent burden of proof on public figures. 73 F.R.D. at 394.

15. 73 F.R.D. at 394. The "actual malice" standard was adopted by the Supreme Court in New York Times Co. v. Sullivan, 376 U.S. 254 (1964). The standard requires a public official suing for damages for a defamatory falsehood relating to his official conduct to prove that the statement was made with knowledge that it was false or with reckless regard of whether it was false or not. *Id.* at 279-80. The Court in Curtis Publ. Co. v. Butts, 388 U.S. 130 (1967), placed a similar burden of proof on public figures.

appeal[16] and a divided panel of the United States Court of Appeals for the Second Circuit reversed the district court's decision.[17]

In separate but overlapping opinions, two of the three court of appeals judges concluded that Lando's state of mind and editorial conversations were protected by an absolute constitutional privilege not to answer. Chief Judge Kaufman relied heavily on *Miami Herald Publishing Co. v. Tornillo*[18] and *Columbia Broadcasting System, Inc. v. Democratic National Committee*[19] for the proposition that the judiciary had a constitutional duty to resist governmental encroachment on the editorial process.[20] Inquiry by a defamation plaintiff into an editor's thoughts and opinions would, in the chief judge's view, subvert free press values that *New York Times* sought to protect and could be equated with impermissible legislative attempts to force a journalist to justify his decision.[21] Concurring Judge Oakes saw additional support for an editorial process privilege in what he termed the Supreme Court's evolving recognition of the special status of the press.[22] The United States Supreme Court granted certiorari[23] and reversed the decision of the Second Circuit,[24] holding that the first amendment did not protect the editorial process from discovery.[25]

Justice White, delivering the opinion for a majority of the Court,[26] stated that the decisions of *New York Times Co. v. Sullivan*[27] and *Cur-*

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16. 28 U.S.C. § 1292(b) (1976) provides that an order otherwise not appealable may be appealed if the district judge making the order is of the opinion that it involves a controlling question of law as to which there is substantial ground for difference of opinion and that immediate appeal from the order may materially advance termination of the litigation. The hearing of such appeals is discretionary with the court of appeals.

17. 568 F.2d at 984.

18. 418 U.S. 241 (1974).

19. 412 U.S. 94 (1973).

20. 568 F.2d at 979 (Kaufman, C.J.)

21. *Id.* at 984.

22. *Id.* at 986 (Oakes, J., concurring). In particular, Judge Oakes relied on remarks made by Justice Stewart to the effect that the press is given unique constitutional protection because of its institutional role as a fourth branch of the government. *See* Stewart, *"Or of the Press"*, 26 HASTINGS L.J. 631 (1975).

23. 435 U.S. 922 (1978).

24. 441 U.S. at 177.

25. *Id.* at 169, 176-77.

26. Chief Justice Burger and Justices Blackmun, Rehnquist, and Stevens joined in the majority opinion. Justice Powell filed a concurring opinion, Justice Brennan dissented in part, and Justices Stewart and Marshall dissented.

27. 376 U.S. 254 (1964) (first and fourteenth amendments prohibit a public official from recovering damages for publication of an allegedly libelous statement absent proof that it was published with knowledge that it was false or with reckless disregard of whether it was false).

tis Publishing Co. v. Butts[28] drastically changed civil libel law in order to provide more protection for the press by requiring public officials and public figures to prove knowing or reckless falsehood as a prerequisite to the imposition of liability. The majority noted that these decisions[29] were founded upon the belief that the common law of libel gave insufficient protection to the first amendment guarantees of freedom of speech and of the press.[30] To avoid self-censorship and constitutional infringement the *New York Times* Court held that liability for damages was conditioned upon a showing of culpable conduct of those who had published damaging falsehoods.

The *Herbert* Court stated, however, that the controlling case law did not suggest any constitutional restriction on the sources from which the defamation plaintiff could prove the critical elements of his cause of action. The Court emphasized that *New York Times* made it essential to focus on the defendant's state of mind, and unless liability was to be completely foreclosed, the recent defamation cases indicated that the thoughts and editorial processes of the alleged defamer must remain open to examination.[31] It was likewise untenable to conclude, according to Justice White, that plaintiffs could not directly ask the defendant if he knew or had reason to suspect that the publication was erroneous. The *Herbert* Court noted that although the editorial process was subjected to close examination in *Butts*, this did not compel the Court to find that the proof of actual malice in that case was constitutionally defective.[32]

The majority then distinguished the cases upon which the court of appeals had based its conclusion of unequivocal protection for the press from state of mind inquiry. The Court stated that *Miami Herald Publishing Co. v. Tornillo*[33] involved a Florida law obligating a newspaper to print a political candidate's reply to press criticism, while *Columbia Broadcasting System, Inc. v. Democratic National Committee*[34] concerned a requirement that a television network air editorial advertisements. Justice White noted that although in both

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28. 388 U.S. 130 (1967) (*New York Times* standard applies to defamation action by public figure).

29. In addition to *New York Times* and *Butts*, the Court cited Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (nonpublic figures must demonstrate some fault on the defendant's part).

30. 441 U.S. at 159. Prior to *New York Times*, the generally accepted rule of law was that libelous utterances were not constitutionally protected speech. *See, e.g.*, Beauharnais v. Illinois, 343 U.S. 250 (1952).

31. 441 U.S. at 160.

32. *Id.*

33. 418 U.S. 241 (1974).

34. 412 U.S. 94 (1973).

cases the court rejected governmental attempts to preempt editorial decision, there was no express or implied suggestion that the editorial process was to be immune from inquiry.[35]

According to the majority, the suggested editorial process privilege required a modification of firmly established constitutional doctrine since it would place a range of relevant and direct evidence of knowing and reckless falsity outside the reach of a defamation plaintiff.[36] Justice White stated that recognition of such a privilege would interfere with the plaintiff's ability to establish the elements of culpability as defined in *New York Times* because direct inquiry into the critical area of reckless disregard would be precluded, thus forcing the plaintiff to prove the ultimate fact by objective evidence and inference. The Court noted that the relevance of the evidence could not be doubted, since media defendants offer the same evidence to prove their good faith belief in the truth of the statements published.[37]

The majority next rejected the contention that inquiry into the editorial process would chill editorial decisionmaking. Justice White stated that a chill generated by fear of liability for publishing knowing or reckless falsehoods was consistent with *New York Times* because, as established in *Gertz v. Robert Welch, Inc.*,[38] the dissemination of false communications is not constitutionally protected.[39] However, *New York Times* and similar decisions recognized the inevitability of error, and the potential for undue self-censorship. Therefore, liability was limited to cases where there was a degree of culpability. The imposition of liability was not intended merely to compensate injury but was also designed to deter libelous publications. Justice White concluded

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35. 441 U.S. at 168. Justice White observed that *Tornillo* had been announced on the same day as *Gertz*, and that the latter decision's overview of recent first amendment and libel law developments contained no hint that a companion case had narrowed the evidence available to a defamation plaintiff. *Id.*

36. *Id.* at 169-70.

37. *Id.* at 170. The Court also found that it would be difficult to determine the outer boundaries of the proposed privilege. *Id.* As an illustration of the confusion, the Court referred to the disparities between the privilege as proposed in oral argument and the kinds of questions Lando had agreed to answer on deposition. The respondents' proposal that internal editorial communications be immunized from inquiry was also questioned, since the Court indicated that it was unclear whether communications to third parties not participating in the editorial process would also be immune. *Id.* at 170-71. The Court had considered similar difficulties in defining the perimeter of a proposed privilege in Branzburg v. Hayes, 408 U.S. 665 (1972). Among the reasons given for refusing to recognize a privilege for news reporters to protect their sources' identity was the practical difficulty of determining who legitimately could be called a reporter and thus be entitled to assert the privilege. *Id.* at 703-05.

38. 418 U.S. at 340.

39. 441 U.S. at 171.

that the use of direct evidence by plaintiffs was consistent with the *New York Times* balance in that any resulting discouragement of publication of knowing or reckless falsehoods would not abridge first amendment freedoms or go beyond the contemplation of prior defamation decisions.[40]

The majority then turned to the argument that discovery into the editorial process would dampen frank editorial discussion and thus endanger sound editorial judgments.[41] The Court stated that exposure to liability for knowing or reckless error would provide more incentive to take precautions and frankly to exchange facts and opinions. Liability for error and the examination of the editorial process in the small percentage of cases where error is claimed would not, in Justice White's view, stifle error-avoiding procedures.[42] The Court expressed its disfavor of evidentiary privileges in general, noting that in *United States v. Nixon*,[43] the Court had held that even in presidential policy-making communications, confidentiality could yield to demonstrated and specific need for evidence. The Court repeated its *Nixon* contention that evidentiary privileges should neither be created nor construed liberally because they detract from the search for truth.[44]

Finally, the majority considered the problem of rising costs of discovery. In its view, *New York Times* and subsequent decisions considerably expanded the burden on defamation plaintiffs who, as a result, are likely to resort to more extensive discovery with consequent increases in cost.[45] However, the Court rejected the suggestion that the press needed constitutional protection from such increased burdens. The Court acknowledged the concern for undue and uncontrolled use of discovery, but until changes are made in discovery rules, parties must rely on the powers of district judges to prevent abuse.

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40. *Id.* Justice White allowed that the issue would be quite different if inquiry into the editorial process suppressed publication of truthful information as well as false, but added that since *New York Times* necessarily contemplates examination of the editorial process, he could not see how direct inquiry would stifle truthful publication if indirect inquiry did not have that effect. Moreover, to Justice White, direct inquiry would contribute to the accuracy of a court's determination by providing it with more information. *Id.* at 172.

41. *Id.* at 173 n.22. Respondents cited United States v. Nixon, 418 U.S. 683 (1974), in which the Court expressed concern that potential dissemination of conversation would motivate persons involved in decisionmaking to remain silent. *Id.* at 705.

42. 441 U.S. at 173-74. Justice White added that editorial discussions are constitutionally protected from casual inquiry conducted merely to satisfy curiosity or general public interest. He also observed, however, that where there is a specific claim of knowing or reckless conduct, no such problem exists. *Id.* at 174.

43. 418 U.S. 683 (1974). *See* note 41 *supra.*

44. 441 U.S. at 175. *See* 418 U.S. at 710.

45. 441 U.S. at 175-76.

The *Herbert* majority noted that while discovery rules are to be given a liberal interpretation to serve the policy of informing litigants,[46] the rules must also be applied to promote speedy and inexpensive trials.[47] The Court stated that to effectuate these policies, the rules required not only that the material sought on discovery be relevant,[48] but also that the district judges should restrict discovery where necessary to avoid undue hardship.[49]

Justice Powell, in his concurring opinion, emphasized the duty of a district judge to control the scope of discovery.[50] He noted that the issue before a court when considering a discovery request is one of relevance and suggested that when discovery demands could impinge upon first amendment rights the trial judge should measure relevance in light of the public's interest in maintaining the free flow of news as well as the needs of parties. Justice Powell concluded his concurrence by noting that it was his understanding that the district court would weigh first amendment values carefully when considering the relevance of requested discovery information.[51]

Justice Brennan,[52] dissenting in part, agreed with the majority insofar as it rejected absolute immunity from inquiry into the mental processes of the defendant.[53] However, in his view, qualified protection should exist for predecisional communications among editors in order to avoid dampening frank discussion during the decisionmaking process. Acknowledging that the Court has been reluctant to create evidentiary privileges unless the interests to be protected are of significant social importance,[54] Justice Brennan contended that important first amendment values were involved in an inquiry into the editorial process. In particular, Justice Brennan feared that a lack of

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46. The Court relied on Schlagenhauf v. Holder, 379 U.S 104 (1964) and Hickman v. Taylor, 329 U.S. 495 (1947) for this proposition.

47. FED. R. CIV. P. 1 states that the rules "shall be construed to secure the just, speedy, and inexpensive determination of every action."

48. *See* note 12 *supra.*

49. 441 U.S. at 177. FED. R. CIV. P. 26(c) allows a court to restrict discovery upon motion and for good cause shown where required by justice "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . ."

50. 441 U.S. at 177-78 (Powell, J., concurring). Justice Powell expressed concern that discovery techniques have become highly developed arts which could be exploited to the disadvantage of justice. For a more detailed discussion of this point, *see* ACF Indus. v. EEOC, 439 U.S. 1081, 1086-88 (1979) (Powell, J., dissenting from denial of certiorari).

51. 441 U.S. at 180.

52. Justice Brennan was the author of the majority opinion in *New York Times.*

53. 441 U.S. at 181 (Brennan, J., dissenting in part).

54. *Id.* at 183 (Brennan, J., dissenting in part). Justice Brennan cited as an example the qualified privilege for attorney's work product established because of its importance to the legal profession. *See* Hickman v. Taylor, 329 U.S. 495, 511 (1947).

protection would have a detrimental effect upon the quality of the published product, since editors would protect themselves by remaining silent.[55] He asserted that the privilege should be applied as a part of a two-stage adjudication in which inquiry into newsroom communications would be allowed only after a prima facie showing that the published statement was in fact false and defamatory. This, he concluded, would protect the editorial process in all but the most necessary cases.[56]

Justice Stewart, in a dissenting opinion, contended that *New York Times* made broad inquiry into the editorial process irrelevant in a libel suit brought by a public figure against a publisher, and consequently, such an inquiry was impermissible under the Federal Rules of Civil Procedure.[57] The dissenter argued that the constitutional standard enunciated in *New York Times*, which was called actual malice in that case, had nothing to do with hostility or ill will and that the motivation of a media defendant was therefore totally irrelevant. To him, the only pertinent area of investigation in a defamation action by a public figure concerned that which in fact was published. In his view, the majority misconstrued the proper constitutional standard resulting in an unnecessary inquiry into the editorial process.[58]

Justice Marshall dissented from the majority opinion in the belief that some constraints on discovery are necessary to ensure the kind of public debate contemplated in *New York Times*.[59] He disagreed with the majority's assertion that trial judges have sufficient powers to protect against discovery abuse. Instead, he would draw a strict relevancy standard from *New York Times* to protect the press from unnecessarily protracted inquiry,[60] and also would favor an absolute privilege for editorial conversation. The dissenter asserted that an absolute privilege would not preclude recovery by a plaintiff with a valid claim

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55. 441 U.S. at 194 (Brennan, J., dissenting in part).

56. *Id.* at 197-98 (Brennan, J., dissenting in part). The majority dismissed this proposal in a footnote, suggesting that if Justice Brennan intended a bifurcated trial, such a process would be too burdensome. Alternatively, if he intended merely a showing of falsity by affidavit, the majority was reluctant to give that procedure a constituional basis. *Id.* at 174 n.23.

57. *Id.* at 199 (Stewart, J., dissenting). *See* note 12 *supra.*

58. Justice Stewart stated that courts had been led astray by the actual malice standard before, as illustrated in Greenbelt Coop. Publ. Ass'n v. Bresler, 398 U.S. 6 (1970) (trial judge's instruction that "malice" means "spite, hostility, or deliberate intention to harm" was constitutional error). Justice Stewart would have remanded the case to the district court with instructions to determine if each proposed discovery question was consistent with the scope of inquiry necessary to determine the existence of actual malice. 441 U.S. at 202. (Stewart, J., dissenting).

59. 441 U.S. 202-03 (Marshall, J., dissenting).

60. *Id.* at 204-08 (Marshall, J., dissenting).

because culpability could still be established from a variety of unprotected evidence to establish culpability. However, if some plaintiffs with marginal claims would be precluded from recovery because of an absolute privilege, Justice Marshall contended that this would be an acceptable price to pay for the preservation of a conducive editorial climate.[61]

Since the United States Supreme Court's seminal decision in *New York Times Co. v. Sullivan*,[62] the law of defamation requires a public official plaintiff to prove that the defendant publisher had knowledge of the falsity of the statement at issue or acted in reckless disregard for its truth or falsity. Subsequently, the actual malice standard[63] for public official plaintiffs defamed in their public roles was extended to public figures in *Curtis Publishing Co. v. Butts*.[64] The standard is the result of balancing the public's interest in the individual right to protection from injury to reputation and the societal interest in a free flow of information.[65] Prior to *New York Times* all defamatory statements were relegated to a position outside first amendment protection. This lack of constitutional protection was shared with obscenities, fighting words, and other utterances of such slight social value that any benefit derived from them was deemed outweighed by the interest in maintaining social order.[66] But the *New York Times* Court concluded that at least some defamatory comment regarding public officials should enjoy a first amendment shield in order to promote robust debate on public issues.[67] The Court recognized that error

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61. *Id.* at 209-10 (Marshall, J., dissenting).

62. 376 U.S. 254 (1964).

63. Although the Court called the standard "actual malice," the common law definition of that phrase included spite or ill will. In Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: Analytical Primer*, 61 VA. L. REV. 1349, 1370-71 (1975) [hereinafter cited as Eaton], the author notes that the use of the phrase by the Court has caused confusion in its application by lower courts, since spite or ill will is not part of the requirement. *See also* 441 U.S. at 200 (Stewart, J., dissenting); note 74 *infra*.

64. 388 U.S. 130 (1967).

65. Rosenblatt v. Baer, 383 U.S. 75, 86 (1966); Wright, *Defamation, Privacy, and the Public's Right to Know: A National Problem and a New Approach*, 46 TEX. L. REV. 630, 633-34 (1968). Judge Wright urges that in balancing the interests presented in *New York Times*, it is society's interest in a plaintiff's ability to protect his reputation, not merely his individual interest, that is to be weighed against the public's right to know. *See also* Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 217 (1964).

66. *See, e.g.*, Beauharnais v. Illinois, 343 U.S. 250 (1952); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).

67. 376 U.S. at 270. *See also* Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964) ("speech concerning public affairs is more than self-expression; it is the essence of self-government").

in public debate is inevitable, and that fear of penalty for inadvertant falsehoods would cause potential critics to avoid threatened liability by keeping silent. To discourage self-censorship,[68] the Court devised a standard, that of actual malice, which affords protection from liability for erroneous statements honestly made.[69] However, calculated falsehoods and those made in reckless disregard of truth or falsity retain their pre-*New York Times* vulnerability because they are at odds with the premises of democratic government and interfere with the orderly manner in which social change is to be effected.[70]

The actual malice standard is a formidable barrier to the public figure defamation plaintiff who, as a result of the judicial encouragement of uninhibited comment, must prove the existence of a high level of culpability if he is to establish that the published statement is outside constitutional protection.[71] The knowing plubication of falsehoods is the more clearly defined of the two mental states which may lead to liability since to meet the burden, the plaintiff must show that the defendant knew the statement was false but published it anyway.[72] Reckless disregard has been defined as publishing despite a high degree of awareness of probable falsity[73] or the entertainment of

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68. 376 U.S. at 271-72, 279. *See also* St. Amant v. Thompson, 390 U.S. 727, 732 (1968) (neither the defense of truth nor standard of ordinary care can provide protection from self-censorship).

69. Similar consideration led to the adoption of the standard for public figure cases in *Butts*. Chief Justice Warren wrote that "our citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of 'public officials.' " 388 U.S. at 164 (Warren, C.J., concurring).

70. Gertz v. Robert Welch, Inc., 418 U.S. at 339-40; Garrison v. Louisiana, 379 U.S. at 75. Justices Black and Douglas espoused the absolutist view that the actual malice standard was insufficient protection from self-censorship. They would have extended complete immunity from liability to the press in defamation cases. *See, e.g.*, Curtis Publ. Co. v. Butts, 388 U.S. at 170-72 (Black, J., joined by Douglas, J., concurring in part and dissenting in part); New York Times Co. v. Sullivan, 376 U.S. at 293-97 (Black, J., joined by Douglas, J., concurring).

71. The *New York Times* Court also required that the proof of actual malice be clear and convincing. 376 U.S. at 285-86. This level of proof has been described as between "preponderance of the evidence" and "beyond a reasonable doubt." Stone v. Essex County Newspapers, Inc., 367 Mass. 849, 330 N.E.2d 161 (1975); *c.f.* Gertz v. Robert Welch, Inc., 418 U.S. at 342-43 (many deserving plaintiffs, including some intentionally injured, will be unable to overcome the actual malice standard). *See also* Eaton, *supra* note 63, at 1373 (*New York Times* privilege has practical effect of near immunity from judgment).

72. *See, e.g.*, Goldwater v. Ginzburg, 414 F.2d 324, 339-40 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970); Sprouse v. Clay Communications, Inc., 211 S.E.2d 674, 690-92, *cert. denied*, 423 U.S. 882 (1975).

73. Garrison v. Louisiana, 379 U.S. at 74. *Accord*, Beckley Newspaper Corp. v. Hanks, 389 U.S. 81 (1967).

serious doubts as to the truth of the publication.[74]

Against this background, the holding of the Court in *Herbert v. Lando* is not entirely consistent with the teachings of the cases that form the body of constitutional defamation law. The decision required a more painstaking balance of the social interests which were the foundation for the extension of constitutional protection in *New York Times*. It is questionable whether the proposed editorial privilege would have threatened the public interest in the plaintiff's ability to recover for harm to his reputation since both direct and indirect evidence is available to establish the defendant's state of mind.[75] Direct evidence in an actual malice case would include evidence from the publisher himself as to what he thought or knew at the time of publication and testimony regarding conversations between the publisher and his associates which might reveal the publisher's mental state. It was from this form of evidence that Lando sought protection.[76] If Lando had succeeded, Herbert would have been forced into building his case on inferences drawn from indirect evidence, a task which the Court held to be a substantial interference with his ability to prove actual malice.[77] However, the reliance on inference is not unique in litigation[78] and many post-*New York Times* defamation cases indicate that actual malice can be proven by the accumulation of indicia from sources external to the editorial process.[79] In *St. Amant v. Thompson* the Court

74. St. Amant v. Thompson, 390 U.S. at 731. The public figure or public official must show that the defendant is more than negligent. Mere failure to investigate what a prudent editor would question is not actual malice. *Id.* Additionally, because actual malice in the *New York Times* sense is not the same as ill will, evidence of ill will or intent to injure, without more, is insufficient to allow recovery. Rosenblatt v. Baer, 383 U.S. 75, 84 (1966).

75. 441 U.S. at 170. The difference between the two forms of evidence approximates the distinction between testimonial and circumstantial evidence. I J. WIGMORE, EVIDENCE §§ 24-25 (3d ed. 1940).

76. 441 U.S. at 157 n.2, 170-71.

77. *Id.* at 170.

78. For example, a plaintiff charging conspiracy in restraint of trade in violation of the Sherman Act, 15 U.S.C. § 1 (1974), likely will be limited by circumstances to using indirect evidence of agreement. *See* Interstate Circuit, Inc. v. United States, 306 U.S. 208, 221 (1939).

79. *See, e.g.*, Goldwater v. Ginzburg, 414 F.2d 324 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970) (article concerning mental fitness of presidential candidate based on careless investigatory techniques and statistically invalid poll, when combined with apparent defamatory plan inferred from defendants' letters to survey respondents, found to be published with actual malice); Alioto v. Cowles Communications, Inc., 430 F. Supp. 1363 (N.D. Cal. 1977) (evidence that veracity of informant should have been doubted by magazine publisher warranted finding of reckless disregard); Bindrim v. Mitchell, 92 Cal. App. 3d 61, 155 Cal. Rptr. 29 (1979) (disparity between defendant's published account of therapy sessions and plaintiff's tape recording of same sessions constituted clear and convincing evidence of actual malice in view of fact that defendant had attended sessions and

stated that publication of a story that is inherently improbable, or based solely on an unverified anonymous telephone call, or published despite obvious reasons to doubt the credibility of the informant or his story is unlikely to survive a defamation action.[80] In each of these circumstances, actual malice would be established without inquiry into the editorial process itself. Any additional information that direct inquiry into the editorial process would provide is problematical, as the *Herbert* Court acknowledged, since a defendant publisher is unlikely to admit culpability.[81] Thus the practical effect of placing direct evidence of the editorial process outside the plaintiff's reach would be minimal.

Central to the Court's reasoning in its defamation and invasion of privacy cases is recognition of the press as an essential agent in the promotion of public dialogue,[82] and that robust debate about the functioning of American government is necessary.[83] The limitation on these functions posed by a defamation action is the potential for self-censorship because of a proclivity to avoid controversy and resultant liability or the expense of proving non-liability.[84] Whether the absence of the proposed privilege will induce the disdained self-censorship[85] depends upon the source of the purported chill on publication. If the chill generated by the prospect of discovery stems from fear that the plaintiff will learn something that will establish the defendant's culpability, such a chilling effect would seem to be within the contemplation of *New York Times*.[86]

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thus was in a position to know the falsity of her account); Akins v. Altus Newspapers, Inc., 3 MEDIA L. REP. (BNA) 1449 (Okla. 1977) (reporter's failure to personally contact any of the parties involved in alleged "police kidnapping" incident supports finding of reckless disregard); Hodges v. Oklahoma Journal Publ. Co., 4 MEDIA L. REP. (BNA) 2492 (Okla. Ct. App. 1979) (repeated use of provocative headlines unsupported by facts in accompanying articles inferentially prove actual malice); Stevens v. Sun Publ. Co., 270 S.C. 65, 240 S.E.2d 812, *cert. denied*, 436 U.S. 945 (1978) (failure to investigate report from admittedly unreliable, biased source was evidence of reckless disregard). *See also* Uhl v. CBS, Inc., 476 F. Supp. 1134 (W.D. Pa. 1979) (plaintiff in invasion of privacy case is not required to inquire directly of publisher as to his state of mind, but may build case completely on indirect evidence).

80. 390 U.S. 727, 732 (1968).

81. 441 U.S. at 170.

82. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491-92 (1975); Time, Inc. v. Hill, 385 U.S. 374, 389 (1967).

83. New York Times Co. v. Sullivan, 376 U.S. at 270.

84. 376 U.S. at 279.

85. *But see* Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422, 427-28 (1975) (*New York Times* Court did not seek to eliminate all self-censorship since only an absolute privilege could accomplish that result) [hereinafter cited as Anderson].

86. 376 U.S. at 279-80.

However, a chill on publication may also emanate from the process of discovery itself rather than from the product of the process. Although the potential for liability may have been diminished by the actual malice standard, the prospect of expensive and time-consuming litigation remains a formidable barrier to the goal of preventing self-censorship.[87] The privilege proposed in *Herbert* would have provided protection against some of the litigation costs attributable to discovery. More important, if correctly fashioned, it might have protected the press from abusive discovery undertaken solely to burden the adverse party.[88] The first amendment considerations of *New York Times* and its progeny would have been better effectuated by a comprehensive solution to the self-censorship potential of abusive discovery. Instead, the *Herbert* Court's solution to the problem is to rely on the discretion of district judges and the provisions in the Federal Rules of Civil Procedure which limit discovery.[89] The discovery rules are founded upon the principle that, because mutual knowledge of all relevant facts is essential to proper litigation,[90] relevant evidence is discoverable unless specifically exempted or unless discovery is so ill-fitted to the issues involved that it will result in annoyance, embarrassment, oppression, or undue burden or expense.[91] Given the standard of actual malice, inquiry into the state of mind of the defendant publisher is always relevant in a public figure defamation action.[92] It is thus questionable that the Federal Rules of Civil Procedure provide the required protection to the press and equally questionable that society's interest in a press, free from self-censorship, is adequately protected.

In rejecting the protective privilege, the Court relied on its policy disfavoring evidentiary privileges. Evidentiary limitations are allowed only when significant interests overcome the interest in utilizing all

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87. *See* Anderson, *supra* note 85, at 430-34. Anderson observes that although many media defendants have the financial ability to absorb litigation costs, they have little economic incentive to publish fearlessly at the risk of incurring a libel suit. *Id.* at 433.

88. *See* Erickson, *The Pound Conference Recommendations: A Blueprint for the Justice System in the Twenty-first Century*, 76 F.R.D. 277, 288 (1978) (discovery procedures are being used unfairly as levers toward settlement; discovery is often a costly "fishing expedition").

89. *See* notes 47 & 49 *supra*.

90. Hickman v. Taylor, 329 U.S. 495, 507 (1947).

91. F. JAMES & G. HAZARD, CIVIL PROCEDURE § 6.8 at 193 (2d ed. 1977) (discussing FED. R. CIV. P. 26(c)).

92. It may also be possible for a non-public figure to gain access to the editorial process by requesting punitive damages which, under Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974), would require proof of actual malice.

rational means for ascertaining the truth.[93] The *Herbert* majority concluded that the benefits of the proposed editorial process privilege were outweighed by the societal interest in having all the information necessary to reach the truth. While it may be that this is a matter upon which reasonable persons may differ,[94] the conclusion that the search for truth must prevail does not require the total rejection of a privilege for editorial protection. The Court dismissed a compromise alternative that could have accommodated the interests of both the press and the public figure plaintiff without interfering with the search for truth. The qualified privilege proposed by Justice Brennan,[95] like the attorney's work product privilege established in *Hickman v. Taylor*,[96] would yield upon a showing of a necessity to reach the protected evidence.[97] To gain discovery, the public figure plaintiff would have been required to establish the prima facie falsity of the alleged defamatory statement. In this manner, insubstantial claims against media defendants could have been terminated prior to the time-consuming and potentially chilling discovery process. The qualified privilege would have merely required proof of falsity and defamatory character earlier in the litigation process than is now required.[98] Thus, the *Herbert* majority's conclusion that this two-step process would be burdensome to the courts[99] is tenuous since only the timing of the proof required under established defamation law would have been altered.

The purpose of the actual malice standard was to encourage as much fearless public discussion as possible, consistent with the interest of protecting personal reputation. Thus, self-censorship induced by anything other than the fear of liability for knowingly or recklessly publishing falsehoods is to be discouraged. If the elimination of a source of self-censorship would affect the ability of a public figure plaintiff to recover for defamation, there must be another balancing much like the evaluation of interests in *New York Times*. Although the *Herbert* Court appears to have overstated the increased burden an editorial process privilege would have placed on a plaintiff,[100] it should

93. *See* United States v. Nixon, 418 U.S. at 709-10. *See also* Elkins v. United States, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting).

94. *See* Brennan, *Press and the Court: Is the Strain Necessary?*, EDITOR AND PUBLISHER, Oct. 27, 1979, at 34.

95. *See* note 56 and accompanying text *supra*.

96. 329 U.S. 495 (1947).

97. *Id.* at 511-12.

98. Proof of the falsity and defamatory nature of the statement is required under the *New York Times* standard. 376 U.S. at 279-80. *See also* RESTATEMENT (SECOND) OF TORTS § 558(a) (1977).

99. 441 U.S. at 174 n.23.

100. *See* note 79 and text accompanying notes 80 & 81 *supra*.

be conceded that in some cases indirect evidence might be unavailable. Nevertheless, even given those possibilities, the Court deviated from the spirit of *New York Times* by rejecting a qualified protection that would have removed the threat of self-censorship caused by the prospect of abusive discovery but would have allowed a plaintiff with a valid claim to reach the information he needs. The *Herbert* Court's willingness to rely upon the first amendment sensitivities of trial judges is inconsistent with the subtle balancing of interests involved in the *New York Times* decision. Adoption of a qualified privilege would have been consistent with the intricate balance previously established without impinging upon the interests of the plaintiff.

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