

Herbert v. Lando: The Supreme Court's Infidelity to *New York Times Co. v. Sullivan*

*This note analyzes the United States Supreme Court's decision in *Herbert v. Lando* permitting a defamed public figure plaintiff in a defamation action to discover the thought processes and editorial decisions of a media defendant. Under the pretext of extending the protection afforded the press by *New York Times Co. v. Sullivan*, *Herbert* may, in fact, seriously chill the press in the performance of its newsgathering and reporting functions. This note details the *Herbert* ruling's deleterious impact on the print and broadcast media and proposes methods to mitigate its potential harm.*

INTRODUCTION

In 1964, United States Supreme Court Justice Arthur Goldberg warned his brethren that their decision in *New York Times Co. v. Sullivan*¹ would allow liability in a defamation action brought by a public official to rest solely upon a jury's evaluation of the speaker's state of mind.² Fifteen years later, in *Herbert v. Lando*,³ the Court gave judicial life to that prophecy. Six justices held that a defamed public figure may inquire into the thought processes and editorial decisions of a media defendant.⁴

This note examines the *Herbert* decision against the background of the *New York Times* line of libel cases. It explores the probable impact of the *Herbert* ruling and proposes methods of minimizing the decision's chilling effect on the press.

I. FACTUAL BACKGROUND

In March, 1971, Army Lieutenant Colonel Anthony Herbert formally charged his superiors with covering up war crimes in

¹ 376 U.S. 254 (1964).

² Justice Goldberg stated: "[T]he real issue presented by this case . . . is whether that freedom of speech which all agree is constitutionally protected can be effectively safeguarded by a rule allowing the imposition of liability upon a jury's evaluation of the speaker's state of mind." 376 U.S. 254, 300 (1964) (Goldberg, J., concurring). The Court in *St. Amant v. Thompson*, 390 U.S. 727 (1968) also noted that the *New York Times* ruling permits liability to be determined by the defendant's testimony concerning his state of mind. *Id.* at 731.

³ 441 U.S. 153 (1979).

⁴ *Id.* at 169-75.

Vietnam.⁵ After unfavorable efficiency reports, Colonel Herbert was relieved of his duties as battalion commander.⁶ Amid much publicity, the late Representative F. Edward Hebert, then chairman of the House Armed Services Committee, persuaded the Army to purge Herbert's military record of the unfavorable reports.⁷ After investigating Herbert's charges, however, the Army exonerated one of his superiors.⁸ Only then did print and broadcast journalists begin to question the veracity of Herbert's initial story.⁹ Colonel Herbert subsequently resigned from the Army.¹⁰

Barry Lando, then associate producer of the CBS Weekend News, interviewed Herbert for a report which was televised on July 4, 1971.¹¹ One year later, as producer of a CBS "60 Minutes" documentary, Lando began research for a more comprehensive broadcast on the Herbert controversy.¹² His investigation revealed discrepancies between the Army's story and that of Colonel Herbert.¹³ These discrepancies were aired in a "60 Minutes" segment, "The Selling of Colonel Herbert," narrated by correspondent Mike Wallace.¹⁴

⁵ Herbert v. Lando, 568 F.2d 974, 980 (2d Cir. 1977). The officers Herbert formally charged were Brigadier General John W. Barnes and Colonel J. Ross Franklin. *Id.*

⁶ *Id.* at 980. Colonel Herbert's removal was attributed to efficiency reports authored by Colonel J. Ross Franklin which accused Herbert of having "no ambition, integrity, loyalty, or will for self-improvement." *Id.*

⁷ *Id.* at 981.

⁸ The Army exonerated General Barnes. *Id.*

⁹ Much media attention accompanied Herbert's initial claims. *See id.* at 981. For examples of press coverage, *see* Wooten, *Colonel Herbert Tried to Go By the Book in Vietnam; How a Supersoldier Was Fired From His Command*, NEW YORK TIMES MAGAZINE, Sept. 5, 1971, at 10; *Colonel Herbert v. the Army*, TIME, Nov. 22, 1971, at 24; *Compounding the Tragedy*, TIME, Mar. 22, 1971, at 16; Truscott, *Good Soldiers*, NATION, Nov. 22, 1971, at 517; *Importance of Colonel Herbert*, NAT. REV., Dec. 31, 1971, at 1454; McGrory, *Is This Justice?*, AMERICA, Oct. 30, 1971, at 337; *Maverick*, NEWSWEEK, Nov. 22, 1971, at 40; *More Atrocities*, NEWSWEEK, Mar. 22, 1971, at 26; *Notes and Comment; News Coverage of Firing*, NEW YORKER, Oct. 23, 1971, at 35.

¹⁰ Herbert stated that his reason for resigning was harassment by the military because of his disclosures. Herbert v. Lando, 568 F.2d 974, 981 (2d Cir. 1977).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 981-82.

¹⁴ The show was broadcast on February 4, 1973. *Id.* at 982. For a thorough account of the research and interviewing that went into the broadcast, *see id.* at 981-82.

This broadcast, and a subsequent *Atlantic Monthly* article by Lando,¹⁵ cast doubt on Herbert's story by featuring accounts of witnesses who rebutted the officer's version of various incidents.¹⁶ Lando's magazine article concluded that the press had been misled by Colonel Herbert's story.¹⁷

Herbert responded with a defamation suit against Lando, CBS, Wallace and *Atlantic Monthly*.¹⁸ He claimed \$44,725,000 in damages to his reputation and to the literary value of his book "Soldier."¹⁹ Herbert accused Lando of deliberate distortion of the record through selective research, one-sided interviewing and skillful editing.²⁰ He contended that *Atlantic Monthly* editors published Lando's article knowing it was false.²¹

Herbert commenced discovery pursuant to Rule 26 of the Federal Rules of Civil Procedure, which permits discovery of any unprivileged information which is relevant to the subject matter of the suit.²² The deposition of Lando — taken during twenty-six sessions lasting over a year — produced 240 exhibits and a 2,903-page transcript.²³ Lando answered questions about what he had seen, what he knew, whom he interviewed and the contents of his interviews and conversations with sources. He supplied transcripts of his interviews, volumes of notes which he deciphered and explained, videotapes of interviews, a series of drafts of the telecast, the contents of some of the conversations between himself and Wallace and their reactions to documents during research.²⁴

¹⁵ See Lando, *Herbert Affair*, ATLANTIC MONTHLY, May, 1973, at 73. For comments on Lando's article, see ATLANTIC MONTHLY, July, 1973, at 28.

¹⁶ *Herbert v. Lando*, 568 F.2d 974, 982 (2d Cir. 1977).

¹⁷ *Id.* at 982.

¹⁸ Jurisdiction was based on diversity of citizenship. *Herbert v. Lando*, 441 U.S. 153, 156 (1979). The district court opinion is reported at *Herbert v. Lando*, 73 F.R.D. 387 (S.D.N.Y. 1977).

¹⁹ *Herbert v. Lando*, 568 F.2d 974, 982 (2d Cir. 1977). See A. HERBERT & J. WOOTEN, *SOLDIER*, (1973) and reviews of same by Marshall, NAT. REV., Mar. 16, 1973, at 321; Ewing, NATION, Apr. 9, 1973, at 473; Woods, NEW REPUB., Feb. 24, 1973, at 24; Clemmons, NEWSWEEK, Jan. 29, 1973, at 69; King, SAT. REV. OF SOCIETY, Feb., 1973, at 63; Larsen, TIME, Feb. 12, 1973, at 74.

²⁰ *Herbert v. Lando*, 568 F.2d 974, 982 (2d Cir. 1977).

²¹ *Id.* at 982.

²² Rule 26(b) provides for discovery of any admissible evidence and of evidence which "appears reasonably calculated to lead to the discovery of admissible evidence." FED. R. CIV. P. 26(b)(1). The Supreme Court construes the deposition-discovery rules broadly. See *Schlagenhauf v. Holder*, 379 U.S. 104, 114-15 (1964); *Hickman v. Taylor*, 329 U.S. 495, 501, 507 (1947).

²³ *Herbert v. Lando*, 568 F.2d 974, 982 (2d Cir. 1977).

²⁴ *Id.* at 982.

Lando refused, however, to answer questions directed to his state of mind during preparation of the program.²⁵ He argued that the first amendment protects against inquiry into the state of mind of those who edit, produce or publish, and prevents invasion of the editorial process.²⁶ Herbert sought an order compelling Lando to answer the interrogatories.²⁷ The district court granted the order, reasoning that state-of-mind evidence is relevant and necessary to prove "actual malice," the standard of liability to be proven by public figure plaintiffs in defamation actions.²⁸ On appeal the Second Circuit Court of Appeals reversed. In an opinion by Chief Judge Kaufman, the court ruled that the first amendment protects both the editorial process and a reporter's state of mind from inquiry.²⁹ The United States Supreme Court

²⁵ *Id.* at 982-83. The district court adopted the defendant's categorization of the questions Herbert sought to compel Lando to answer:

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

Herbert v. Lando, 73 F.R.D. 387, 392 (S.D.N.Y. 1977). Samples of the actual questions asked appear in Herbert v. Lando, 441 U.S. 153, 201 n.2 (1979) (Stewart, J., dissenting).

²⁶ Herbert v. Lando, 568 F.2d 974, 983 (2d Cir. 1977).

²⁷ *Id.* at 983. For a discussion of the "actual malice" standard, see notes 33-39 and accompanying text *infra*.

²⁸ Herbert v. Lando, 73 F.R.D. 387, 406 (S.D.N.Y. 1977).

²⁹ Herbert v. Lando, 568 F.2d 974, 984 (2d Cir. 1977). See Comment, *Herbert v. Lando: Reporter's Privilege From Revealing the Editorial Process in a Defamation Suit*, 78 COLUM. L. REV. 448 (1978); Note, *Herbert v. Lando: Journalist's Editorial Immunity*, 47 U.M.K.C. L. REV. 273 (1978); Note, *Defamation and the First Amendment: Editorial Process Found "Privileged" in Herbert v. Lando*, 13 TULSA L.J. 837 (1978); Note, *The First Amendment Guarantee of a Free Press Protects Against Compelled Disclosure of a Journalist's Exercise of*

granted certiorari.³⁰

II. THE *Herbert* OPINIONS

A. *The Majority Opinion*

Justice White wrote the six-member majority opinion for the Court. He characterized the Court's holding in *Herbert* as an extension of the doctrine announced in *New York Times Co. v. Sullivan*,³¹ a case which "was widely perceived as essentially protective of press freedoms."³² The *New York Times* line of defamation cases requires that a public official or public figure plaintiff show "actual malice" on the part of the defendant,³³ and requires that plaintiffs prove their cases with "convincing clarity."³⁴ Plaintiff Herbert, by conceding that he was a public figure, triggered the application of the *New York Times* "actual malice" standard.³⁵

Editorial Control and Judgment, 31 VANDERBILT L. REV. 375 (1978); Note, *Herbert v. Lando: New Impediments to Libel Suits Brought by Public Figures*, 73 NW. U. L. REV. 583 (1978); Note, *Herbert v. Lando: State of Mind Discovery and the New York Times v. Sullivan Libel Balance*, 66 CALIF. L. REV. 1127 (1978).

³⁰ 435 U.S. 922 (1978).

³¹ 376 U.S. 254 (1964), cited at *Herbert v. Lando*, 441 U.S. 153, 169-71 (1979).

³² *Herbert v. Lando*, 441 U.S. 153, 169 (1979). Prior to *New York Times*, "[l]ibelous utterances [were not] within the area of constitutionally protected speech." *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952). The accepted view was that the imposition of liability for defamatory publications abridged neither freedom of speech nor freedom of the press. *Herbert v. Lando*, 441 U.S. 153, 158-59 (1979). A majority of jurisdictions made publishers liable regardless of intent. *Id.* at 159 n.4. The *New York Times* Court, recognizing that the common law gave "insufficient protection to the First Amendment guarantees of freedom of speech and freedom of press," changed both the standard of liability and the standard of proof. *Id.* at 159.

³³ *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

³⁴ *Id.* at 285-86.

³⁵ *Herbert v. Lando*, 441 U.S. 153, 156 (1979). *New York Times* applied the "actual malice" standard to public officials. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). The "actual malice" standard was later extended to "public figures." *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 154-55 (1967).

A plurality of the Court in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 44 (1971), would have extended the "actual malice" standard to private persons who are involved in issues of public interest. However, in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Court abandoned the *Rosenbloom* "public interest" test and established standards for determining when a person becomes a "public figure" for purposes of the "actual malice" standard. *Id.* at 351-52. For recent applications of the "public figure" standard, see *Wolston v. Reader's*

The Supreme Court defined "actual malice" as requiring that the publication be made with knowledge of its falsity or in reckless disregard of its falsity.³⁶ Reckless disregard of falsity exists where the defendant "in fact entertained serious doubts as to the truth of his publication."³⁷ Awareness of probable falsity is judged by a subjective standard³⁸ and can be shown where "there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports."³⁹ Thus, the *Herbert* majority reasoned, in order to prove "actual malice" it is essential that the plaintiff "focus on the conduct and state of mind of the defendant."⁴⁰

The *Herbert* majority stressed that allowing state-of-mind inquiries is not inconsistent with prior practice. In a footnote, the Court catalogued numerous cases in which plaintiffs have inquired into the thought processes of media defendants, and in

Digest Ass'n, 99 S. Ct. 2701 (1979); *Hutchinson v. Proxmire*, 99 S. Ct. 2675 (1979); *Time, Inc. v. Firestone*, 424 U.S. 448 (1976).

For discussion and criticism of the *Gertz* standard, see Prager, *Public Figures, Private Figures and Public Interest*, 30 STAN. L. REV. 157 (1977); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, 638-41 (1978).

³⁶ *New York Times* precludes liability unless the plaintiff shows "that the statement was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

³⁷ *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). The Court specified:

Th[e] cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

Id. at 731.

³⁸ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 334-36 n.6 (1974).

For example, in *New York Times Co. v. Sullivan*, the Court held that the advertising personnel responsible for making the judgment whether or not to publish would be judged on the basis of what they actually knew concerning the falsity of the advertisement. They would not be judged on information contained in the *Times*' files which they could have looked at to verify or discount the incidents alleged in the advertisement. *New York Times Co. v. Sullivan*, 376 U.S. 254, 287 (1964). For further discussion of the facts in *New York Times*, see note 128 *infra*.

³⁹ *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968).

⁴⁰ *Herbert v. Lando*, 441 U.S. 153, 160 (1979). The *Herbert* majority refused to "plac[e] beyond the plaintiff's reach a range of direct evidence relevant to proving knowing or reckless falsehood . . . elements that are critical to plaintiffs such as *Herbert*." *Id.* at 169-70. The Court also stressed the plaintiff's added burden of "convincing clarity." *Id.* at 170.

which media defendants have volunteered such evidence in an attempt to prove good faith and lack of malice.⁴¹

The majority also found its ruling consistent with *Miami Herald Publishing Co. v. Tornillo*⁴² and *CBS, Inc. v. Democratic National Committee*,⁴³ cases on which the Second Circuit relied heavily in finding a constitutional privilege against discovery.⁴⁴ The *Herbert* Court stated that a prohibition against governmental control over the contents of publication, as mandated by *CBS* and *Tornillo*, does not dictate or imply that the editorial process "is immune from any inquiry whatsoever."⁴⁵

The media defendants in *Herbert* argued that direct inquiry into a reporter's state of mind and scrutiny of the editorial process impose such onerous burdens on the press as to violate the freedom of speech and freedom of press clauses of the first amendment.⁴⁶ They warned that allowing the discovery sought by Her-

⁴¹ *Id.* at 165-67 n. 15. Thus the Court found support for a rule of constitutional law in a discovery practice which had previously been voluntary, informal and uncontested. Although the cases cited by the Court in footnote 15 are state cases, the Court emphasized that its own cases are consistent, *citing* *Time, Inc. v. Firestone*, 424 U.S. 448, 465-66, 467-470, 467 n.5 (1976); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); and *New York Times Co. v. Sullivan*, 376 U.S. 274 (1964). *Herbert v. Lando*, 441 U.S. 153, 168 n.17 (1979). However, a careful reading of those cases indicates that they are of little precedential value for the type of discovery allowed in *Herbert*, which focuses on Lando's mental processes in terms of his thoughts, feelings and conclusions, rather than his attempts to ascertain the truthfulness of assertions about Herbert. For further discussion of the relevance of motive to proof of "actual malice," see notes 124-32 and accompanying text *infra*.

⁴² 418 U.S. 241 (1974). In *Tornillo*, the Court unanimously held that states may not compel newspapers to print editorial replies. The Court recognized that a right-of-reply statute would unconstitutionally burden an editor's exercise of judgment, both in deciding what to print, and in shaping news coverage of public issues and officials. *Id.* at 258.

⁴³ 412 U.S. 94 (1973). In *CBS*, the Court held that broadcasters were not required to accept paid political advertisements. Chief Justice Burger stated:

[I]t would be anomalous for us to hold, in the name of promoting the constitutional guarantees of free expression, that the day-to-day editorial decisions of broadcast licensees are subject to the kind of restraints urged by respondents. To do so in the name of the First Amendment would be a contradiction.

Id. at 120-21.

⁴⁴ *Herbert v. Lando*, 568 F.2d 974, 978-79 (2d Cir. 1977). The Second Circuit reasoned that it would be inconsistent with these two cases to allow scrutiny of the editorial process, because the cases protect an editor's right to exercise his unfettered judgment, and "newsgathering and dissemination can be subverted by indirect, as well as direct, restraints." *Id.* at 979.

⁴⁵ *Herbert v. Lando*, 441 U.S. 153, 168 (1979).

⁴⁶ *Id.* at 171; See also *Herbert v. Lando*, 568 F.2d 974, 982-83 (2d Cir. 1977).

bert would have a chilling effect on the publication of controversial news.⁴⁷ The *Herbert* majority replied that it is proper to discourage libelous publications, for there "is no constitutional value in false statements of fact."⁴⁸ Furthermore, the Court argued, *New York Times* provides adequate protection for publication of controversial news by limiting liability to instances where a degree of culpability is present.⁴⁹ Direct inquiry into the state of mind of the actor will produce more accurate results which, in turn, will protect constitutional values by insuring that only knowing or reckless error is punished.⁵⁰

The media defendants voiced concern that frank discussion among reporters and editors would be chilled if such informal behavior is subject to courtroom dissection.⁵¹ They stressed that such exchanges are crucial to sound editorial decisions.⁵² Acknowledging the importance of the relationship between open discussion and sound decisions, the majority nonetheless felt that its ruling would not be detrimental to that relationship.⁵³ Given the media's interest in avoiding liability for defamation, the Court reasoned, it will devise suitable "prepublication precautions."⁵⁴ The Court did not think it unreasonable to expect the broadcast and publishing industry to invoke "whatever procedures may be practicable and useful" to avoid knowing or reckless error.⁵⁵ Nor was the Court worried that a jury would misconstrue frank discussion as evidence of "actual malice."⁵⁶

The *Herbert* defendants asserted that extended discovery requires media defendants to devote substantial time, energy and resources to evidentiary matters rather than to their proper function of gathering, structuring and disseminating the news.⁵⁷ Al-

⁴⁷ *Herbert v. Lando*, 441 U.S. 153, 171-74 (1979).

⁴⁸ *Id.* at 171, quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).

⁴⁹ *Herbert v. Lando*, 441 U.S. 153, 171-72 (1979).

⁵⁰ *Id.* at 172-73.

⁵¹ *Id.* at 173.

⁵² *Herbert v. Lando*, 441 U.S. 153, 173 (1979); See also *Herbert v. Lando*, 568 F.2d 974, 980 (2d Cir. 1977).

⁵³ *Herbert v. Lando*, 441 U.S. 153, 173-74 (1979).

⁵⁴ *Id.* at 174.

⁵⁵ *Id.*

⁵⁶ *Id.* See also notes 124-33 and accompanying text *infra*.

⁵⁷ *Herbert v. Lando*, 441 U.S. 153, 176 n.25 (1979). For a discussion of the reporter's task, see *Herbert v. Lando*, 568 F.2d 974, 976 (2d Cir. 1977). For a discussion of the burdens of extended discovery and the practical effects of those burdens, see notes 23-24 and accompanying text *supra*, and notes 141-48 and accompanying text *infra*.

though recognizing the already significant burdens of discovery on all defendants, the Court rejected their plea for relief.⁵⁸ The majority observed that the “mushrooming” costs of pre-trial discovery are not limited to the defamation field, and stressed that Congress (not the Court) is responsible for fashioning a remedy to the problem of “undue and uncontrolled” discovery.⁵⁹ Nevertheless, the Court stated that “reliance must be had on what in fact and in law are ample powers of the district judge to prevent abuse” of the discovery process.⁶⁰

B. Justice Powell's Concurrence

Justice Powell wrote separately to concur in the result reached by the majority and to stress the existing powers of the district courts to control discovery.⁶¹ While Justice Powell did not feel that discovery in *Herbert* was “uncontrolled” he admitted that the process was protracted and expensive.⁶² Both he and Justice White⁶³ emphasized that only the issue of constitutional privilege was before the Court. The Court was not asked to decide, and did not decide, whether the trial judge properly applied the ordinary rules of discovery.⁶⁴ In the majority opinion, Justice White spoke only of the media's interest in limiting discovery.⁶⁵ Justice Powell, however, recognized the “public interest in a free flow of news and

⁵⁸ *Herbert v. Lando*, 441 U.S. 153, 176 (1979).

⁵⁹ *Id.* at 176, 177. In his *Herbert* dissent, Justice Marshall deemed this deference to congressional judgment an abdication of judicial responsibility. *Id.* at 205 (Marshall, J., dissenting). The Court's deference is at the least ironic, as the broad and liberal discovery now accorded plaintiffs was created in part by judicial mandate in *Schlagenhauf v. Holder*, 379 U.S. 104, 114-15 (1964) and *Hickman v. Taylor*, 329 U.S. 495, 501, 507 (1947). See discussion of this point at notes 161-63 and accompanying text *infra*.

⁶⁰ *Herbert v. Lando*, 441 U.S. 153, 177 (1979). The Court emphasized that FED. R. CIV. P. 1 requires that discovery be “construed to secure the just, *speedy*, and *inexpensive* determination of every action” (emphasis in original), that Rule 26(b)(1) allows discovery of only relevant matter, and that Rule 26(c) provides that discovery be restricted where “justice requires [protection for] a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . .” *Id.* at 177. In this passage, the *Herbert* Court may have created a means by which district courts can limit discovery in *Herbert*-type situations. See notes 155-60 and accompanying text *infra*.

⁶¹ *Herbert v. Lando*, 441 U.S. 153, 177-78 (1979) (Powell, J., concurring)

⁶² *Id.* at 179 n.3 (Powell, J., concurring).

⁶³ *Id.* at 177. See discussion at note 60 *supra*.

⁶⁴ *Herbert v. Lando*, 441 U.S. 153, 178 (Powell, J., concurring).

⁶⁵ *Id.* at 169.

commentary,"⁶⁶ stressing the trial judge's duty to consider that interest when weighing demands which arguably impinge on first amendment concerns.⁶⁷

C. Justice Brennan's Dissent

Justice Brennan agreed with the majority that a media defendant's thought processes are relevant and discoverable, but dissented to indicate that the editorial process stands on a different footing.⁶⁸ He felt that the constitution shields only processes which are susceptible of chilling.⁶⁹ Since a reporter cannot be chilled in the very process of thought without ceasing to work altogether, Justice Brennan believed no harmful chilling would result from disclosure.⁷⁰

Yet "predecisional communications" during the editorial process — discussions vital to editorial accuracy, thoroughness and profundity — are susceptible of chilling.⁷¹ Thus, Justice Brennan would have fashioned a limited privilege for the editorial process which would yield only upon a prima facie showing of defamatory falsehood.⁷² Such a privilege would protect the press from

⁶⁶ *Id.* at 179-80 (Powell, J., concurring). Justice Powell cites *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 781-83 (1978) and *Saxbe v. Washington Post Co.*, 417 U.S. 843, 862-63 (1974). For discussions of the public's interest, see Justice Brennan's dissent (*Herbert v. Lando*, 441 U.S. 153, 187-89 (1979)), Justice Marshall's dissent (*Id.* at 203, 209) and Judge Kaufman's opinion (*Herbert v. Lando*, 568 F.2d 974, 977 (2d Cir. 1977)).

In another case, Chief Justice Burger stated: "[b]eyond question, the role of the media is important; acting as the 'eyes and ears' of the public, they can be a powerful and constructive force, contributing to remedial action in the conduct of public business." *Houchins v. KQED*, 438 U.S. 1, 8 (1977).

⁶⁷ *Herbert v. Lando*, 441 U.S. 153, 180 (1979) (Powell, J., concurring).

⁶⁸ *Id.* at 181 (Brennan, J., dissenting).

⁶⁹ *Id.* at 192-95 (Brennan, J., dissenting).

⁷⁰ *Id.* at 192 (Brennan, J., dissenting). Judge Kaufman had maintained that if courts permitted discovery of a journalist's state of mind, reporters "would be chilled in the very process of thought." *Herbert v. Lando*, 568 F.2d 974, 984 (2d Cir. 1977).

⁷¹ *Herbert v. Lando*, 441 U.S. 153, 193-94 (Brennan, J., dissenting). Justice Brennan agreed with Judge Oakes of the Second Circuit that "[i]deas expressed in conversations, memoranda, handwritten notes and the like, if discoverable, would in the future 'likely' lead to a more muted, less vigorous and creative give-and-take in the editorial room." *Herbert v. Lando*, 568 F.2d 974, 993-94 (2d Cir. 1977) (Oakes, J., concurring), quoted in *Herbert v. Lando*, 441 U.S. 153, 193 (1979) (Brennan, J., dissenting). For further discussion of this point see notes 90-93, 117 and 136-39 and accompanying text *infra*.

⁷² *Herbert v. Lando*, 441 U.S. 153, 181, 197-98 (1979) (Brennan, J., dissent-)

“general claims of damaged reputation.”⁷³ In a manner analogous to the executive privilege,⁷⁴ such an editorial privilege would shield the policy-making process — “advisory opinions, recommendations, and deliberations”⁷⁵ — in order to promote the candor necessary to sound decisionmaking.⁷⁶

D. Justice Stewart's Dissent

Justice Stewart's dissent concluded that evidence of editorial process and state of mind is not discoverable because it is simply not relevant.⁷⁷ He stated:

The gravamen of such a lawsuit thus concerns that which was in fact published. What was *not* published has nothing to do with the case. And 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.⁷⁸

ing). Justice Brennan advocates an *ad hoc* balancing approach whereby allowance of discovery would depend on the particular circumstances of each case. This approach is similar to that applied when claims of executive privilege, informer's privilege, or the attorney work product privilege are asserted. *Id.* at 196-97 (Brennan, J., dissenting). Legislation was recently proposed in Congress which adopted Justice Brennan's approach to discovery in *Herbert* situations. See note 163 *infra*.

⁷³ *Herbert v. Lando*, 441 U.S. 153, 197 (1979) (Brennan, J., dissenting). In certain situations it is important to shield publishers from general claims of damaged reputation. See notes 88, 146-48 and accompanying text *infra*.

⁷⁴ *Herbert v. Lando*, 441 U.S. 153, 193 (1979) (Brennan, J., dissenting). See note 76 *infra*.

⁷⁵ *Herbert v. Lando*, 441 U.S. 153, 193 (1979) (Brennan, J., dissenting). Justice Brennan's privilege would not shield “merely ‘factual’ matter.” It is difficult to tell what “non-factual” material would be covered by Justice Brennan's proposed privilege, but he did state that “conversations between Lando and Wallace about matter to be included or excluded from the broadcast” would be privileged. *Id.* at 198 (Brennan, J., dissenting).

⁷⁶ *Id.* at 193 (Brennan, J., dissenting). See also *id.* at 209 (Marshall, J., dissenting) (“As we recognized in *United States v. Nixon* [418 U.S. 683, 705 (1974)], ‘those who expect public dissemination of their remarks may well temper candor with a concern for appearances . . . to the detriment of the decision-making process’” (footnote and citation omitted)).

⁷⁷ *Herbert v. Lando*, 441 U.S. 153, 199 (1979) (Stewart, J., dissenting). Only relevant matter is discoverable under FED. R. Civ. P. 26(b).

⁷⁸ *Herbert v. Lando*, 441 U.S. 153, 200 (1979) (Stewart, J., dissenting). Justice Marshall disagreed that evidence of state of mind is irrelevant. He stated, “under the ‘broad and liberal’ standard of *Hickman*, surely disclosure of what was known to a journalist but ‘was not published’ will often be germane to whether that individual proceeded with deliberate or reckless disregard for the truth.” [Citation omitted.] *Id.* at 205-06 n.4 (Marshall, J., dissenting).

Justice Stewart echoed Judge Kaufman's judgment⁷⁹ that the evidence already produced in *Herbert* — evidence of "what Lando knew, saw, said, and wrote during the investigation"⁸⁰ — was more than sufficient to enable a jury to find the presence or absence of "actual malice."⁸¹

E. Justice Marshall's Dissent

In Justice Marshall's view, the *Herbert* majority purported to maintain the accommodation of interests struck by *New York Times* but was "unresponsive to the constitutional considerations underlying that opinion."⁸² Justice Marshall characterized libel actions as a public forum which serves to vindicate reputational injuries and to discourage press abuses by holding the media accountable for material which compromises personal dignity.⁸³

In Justice Marshall's view, society also has an important interest in "promoting unfettered debate on matters of public importance"⁸⁴ and in avoiding the self-censorship which would result if critics were made to guarantee the truth of every statement.⁸⁵ Because society must tolerate some margin of error, *New York Times* shielded the press from liability for assertions about public figures unless the media was clearly at fault.⁸⁶ However, Justice Marshall argued that the *New York Times* standard afforded insufficient protection for the press. He stated:

Yet [the *New York Times*] standard of liability cannot of itself accomplish the ends for which it was conceived. Insulating the press from ultimate liability is unlikely to avert self-censorship so long as any plaintiff with a deep pocket and a facially sufficient complaint is afforded unconstrained discovery of the editorial process. If the

⁷⁹ *Herbert v. Lando*, 568 F.2d 974, 984 (2d Cir. 1977).

⁸⁰ *Id.* at 984, quoted in *Herbert v. Lando*, 441 U.S. 153, 202 (1979) (Stewart, J., dissenting).

⁸¹ *Herbert v. Lando*, 441 U.S. 153, 202 (1979) (Stewart, J., dissenting).

⁸² *Id.* (Marshall, J., dissenting).

⁸³ *Id.* at 203 (Marshall, J., dissenting). For a similar analysis, see Prager, *supra* note 35.

⁸⁴ *Herbert v. Lando*, 441 U.S. 153, 203 (1979) (Marshall, J., dissenting). For discussions of the public interest, see note 66 and accompanying text *supra*, and notes 100-04 and accompanying text *infra*.

⁸⁵ *Herbert v. Lando*, 441 U.S. 153, 203 (1979) (Marshall, J., dissenting). Self-censorship stems not from fear of inaccuracy, but from "doubt whether [truthfulness] can be proved in court or fear of the expense of having to do so." *Id.* at 203 (Marshall, J., dissenting), quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964). See discussion at note 141 *infra*.

⁸⁶ *Herbert v. Lando*, 441 U.S. 153, 203 (1979) (Marshall, J., dissenting).

substantive balance of interests struck in *Sullivan* is to remain viable, it must be reassessed in light of the procedural realities under which libel actions are conducted.⁸⁷

Because of the potential for abuse of the discovery process as a "tool for harassment and delay,"⁸⁸ Justice Marshall would hold the editorial process completely privileged.⁸⁹ He believed that without such a privilege, the decisionmaking process itself would be chilled.⁹⁰ Justice Marshall believed that "[s]ociety's interest in enhancing the accuracy of coverage of public events is ill-served by procedures tending to muffle expression of uncertainty."⁹¹ Just as the executive privilege protects predecisional communication in order to insure the accuracy of that process,⁹² so would the editorial privilege encourage the "creative verbal testing, probing, and discussion of hypotheses and alternatives which are the *sine qua non* of responsible journalism."⁹³

Like Justice Brennan,⁹⁴ Justice Marshall found no need to protect a journalist's thoughts from discovery,⁹⁵ because "it is unclear how journalists faced with the possibility of such questions can be 'chilled in the very process of thought.'"⁹⁶

⁸⁷ *Id.* at 204 (Marshall, J., dissenting).

⁸⁸ *Id.* at 204-05 (Marshall, J., dissenting). Justice Marshall suggested that "many self-perceived victims of defamation are animated by something more than a rational calculus of their chances of recovery. Given the circumstances under which libel actions arise, plaintiff's pretrial maneuvers may be fashioned more with an eye to deterrence or retaliation than to unearthing germane material." *Id.* (footnote omitted). Justice Marshall asserted that such abuse would chill the press. *Id.* at 205 (Marshall, J., dissenting).

⁸⁹ *Id.* at 209 (Marshall, J., dissenting).

⁹⁰ *Id.* at 208 (Marshall, J., dissenting). Justice Brennan and Judges Kaufman and Oakes agreed with this point. *See id.* at 193 (Brennan, J., dissenting); *Herbert v. Lando*, 568 F.2d 974, 984 (2d Cir. 1977); *Id.* at 993-94 (Oakes, J., concurring).

⁹¹ *Herbert v. Lando*, 441 U.S. 153, 209 (1979) (Marshall, J., dissenting).

⁹² *Id.* at 209 (Marshall, J., dissenting). *See* quote from Justice Marshall at note 76 *supra*.

⁹³ *Herbert v. Lando*, 568 F.2d 974, 980 (2d Cir. 1977).

⁹⁴ *Herbert v. Lando*, 441 U.S. 153, 192 (1979) (Brennan, J., dissenting). Justice Brennan's rationale is explored at notes 68-71 and accompanying text *supra*.

⁹⁵ *Herbert v. Lando*, 441 U.S. 153, 207 (1979) (Marshall, J., dissenting). Like Justice Brennan, Justice Marshall did not feel that thoughts were susceptible of chilling: "Journalists cannot stop forming tentative hypotheses, but they can cease articulating them openly. If 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." *Id.* at 208-09 (Marshall, J., dissenting).

⁹⁶ *Id.* at 207 (Marshall, J., dissenting), *citing* *Herbert v. Lando*, 568 F.2d 974,

III. ANALYSIS OF THE MAJORITY OPINION

A. Analytical Deficiencies

The majority opinion characterized its *Herbert* ruling as a mere extension of the *New York Times* holding.⁹⁷ Its logic is simple; in order to prove *New York Times* "actual malice" the plaintiff must have access to evidence of the defamer's state of mind and the workings of the editorial process.⁹⁸ But this simplistic approach overlooks the purposes behind the *New York Times* rule and permits the *Herbert* majority to avoid careful analysis of the pragmatic effects of its holding.⁹⁹

The *New York Times* Court, balancing the respective interests of the press and defamed individuals, allowed the public interest in a free flow of news to tip the scales in favor of the press.¹⁰⁰ The Court believed the press' constitutional protections to be an outgrowth of the public's right to receive diverse information,¹⁰¹ and the public's consequent duty to consider that information in order to make informed choices.¹⁰² But the *Herbert* Court rejected this analytical framework. The majority opinion nowhere mentioned the public interest, balancing only the press' interests against that of defamed individuals.¹⁰³ The *Herbert* Court did not consider the public's interest in minimizing media chilling, an interest which the *New York Times* Court deemed crucial.¹⁰⁴

984 (2d Cir. 1977).

⁹⁷ *Herbert v. Lando*, 441 U.S. 153, 169-70 (1979).

⁹⁸ *Id.* For a discussion of the practical effects of the *Herbert* majority's philosophy see notes 125-35 and accompanying text *infra*.

⁹⁹ See Justice Marshall's criticism at note 82 and accompanying text *supra*. For a brief discussion of the evolution of the *New York Times* standard, see note 35 *supra*.

¹⁰⁰ *New York Times Co. v. Sullivan*, 376 U.S. 254, 269-73 (1964).

¹⁰¹ For an extensive discussion of the public's rights and duties, see *id.* Recently, commentators have proposed the existence of a constitutional right of the public to receive information. See Comment, *The Constitutional Right to Know*, 4 HASTINGS CONST. L.Q. 109 (1977).

¹⁰² See note 101 *supra*.

¹⁰³ *Herbert v. Lando*, 441 U.S. 153, 169 (1979). Justice Brennan asserted: "It is a great mistake to understand this aspect of the First Amendment solely through the filter of individual rights." *Id.* at 187 (Brennan, J., dissenting).

The Court's omission of the public interest signifies a departure from the view that the guarantees of the first amendment "are not for the benefit of the press so much as for the benefit of all of us. A broadly defined freedom of the press assures the maintenance of our political system and an open society." *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967). For a discussion of the public interest, see note 66 and accompanying text *supra*.

¹⁰⁴ *New York Times Co. v. Sullivan*, 376 U.S. 254, 271-72, 278 (1964).

The *Herbert* Court's infidelity to *New York Times* is manifested by its preoccupation with accuracy of published information. Against claims that inquiry into editorial conclusions would threaten suppression of information,¹⁰⁵ the *Herbert* majority replied that it was concerned with protecting only accurate information, finding no constitutional value in false statements.¹⁰⁶ This view is diametrically opposed to the spirit of the *New York Times* opinion, which recognized "[t]hat erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'"¹⁰⁷ The *New York Times* Court indicated that even false statements at times have value insofar as they sharpen the public's perception of what is in fact accurate.¹⁰⁸

The *Herbert* Court's preoccupation with accuracy ignores another significant aspect of *New York Times*. The *New York Times* Court found it crucial that diverse points of view be presented and tolerated — even encouraged — as a prerequisite for the maintenance of a democracy.¹⁰⁹ "[P]ublic men are, as it were, public property," and the "right, as well as the duty, of criticism must not be stifled."¹¹⁰ The Court recognized that in order to

¹⁰⁵ See *Herbert v. Lando*, 441 U.S. 153, 171-72 (1979); *id.* at 191-92, 194 (Brennan, J., dissenting); *id.* at 203 (Marshall, J., dissenting); *Herbert v. Lando*, 568 F.2d 974, 980 (2d Cir. 1977); *id.* at 993-94 (Oakes, J., concurring).

¹⁰⁶ *Herbert v. Lando*, 441 U.S. 153, 171-72 (1979). See notes 48-50 and accompanying text *supra*.

¹⁰⁷ *New York Times Co. v. Sullivan*, 376 U.S. 254, 271-72 (1964).

¹⁰⁸ *Id.* at 279 n.19. Cf. *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968).

¹⁰⁹ *New York Times Co. v. Sullivan*, 376 U.S. 254, 269-70 (1964).

For a discussion of the role of the press in a democracy, see Justice Stewart's speech to Yale Law School, *reprinted in Stewart, Or Of the Press*, 26 HASTINGS L.J. 631 (1975). Justice Stewart believed that only in the last 10 years has the press begun to serve the advocacy and investigative function intended for it by the Framers. He stated:

It is also a mistake to suppose that the only purpose of the constitutional guarantee of a free press is to insure that a newspaper will serve as a neutral forum The primary purpose of the constitutional guarantee of a free press was . . . to create a fourth institution outside the Government as an additional check on the three official branches.

Id. at 634. For other opinions on the role of the press, see *Houchins v. KQED, Inc.*, 438 U.S. 1, 8-9 (1977); A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT*, 88-89 (1948); *Stromberg v. California*, 283 U.S. 359, 369 (1931); *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

¹¹⁰ *New York Times Co. v. Sullivan*, 376 U.S. 254, 268 (1964) *citing Beauharnais v. Illinois*, 343 U.S. 250, 263-64, 263 n.18 (1952). The *New York Times*

afford an opportunity for "vigorous advocacy"¹¹¹ debate must be "uninhibited, robust, . . . wide open"¹¹² including occasional "vehement, caustic, [and] unpleasantly sharp attacks" on public persons.¹¹³ Because it believed that free communication is the "guardian of every other right,"¹¹⁴ the *New York Times* Court was willing to tolerate these attacks.¹¹⁵ In the words of Judge Learned Hand, the *New York Times* majority felt 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 upon it our all."¹¹⁶ By contrast, the *Herbert* Court would apparently side with the "many."

Moreover, the method by which the *Herbert* Court sought to promote accuracy may fail to do so. By issuing a ruling which discourages frank editorial discussion, the Court may actually foster inaccuracy. Accuracy of judgment depends on the testing of alternatives and hypotheses; absent such probing, the likelihood of error increases.¹¹⁷

majority stated: "[I]t is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions." *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964), quoting *Bridges v. California*, 314 U.S. 252, 270 (1941).

¹¹¹ *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964).

¹¹² *Id.* at 270.

¹¹³ *Id.*

¹¹⁴ *Id.* at 274, quoting Virginia Resolutions of 1798, 4 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 553-54 (1876).

¹¹⁵ *New York Times Co. v. Sullivan*, 376 U.S. 254, 270-71 (1964). For an exposition of the theory behind the *Times* Court's tolerance, see the quote from *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940) in *New York Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964).

The *New York Times* Court wished to promote "the widest possible dissemination of information from diverse and antagonistic sources" (*Id.* at 266, quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945)) and the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people." (*New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964), quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

¹¹⁶ *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943).

¹¹⁷ See Judge Kaufman's discussion, *Herbert v. Lando*, 568 F.2d 974, 980 (2d Cir. 1977) and Judge Oakes' discussion, *id.* at 993-94 (Oakes, J., concurring). Compare the majority discussion, *Herbert v. Lando*, 441 U.S. 153, 172-74 (1979) with Justice Brennan's dissent, *id.* at 193 (Brennan, J., dissenting), and Justice Marshall's dissent, *id.* at 208-09 (Marshall, J., dissenting) ("[I]t is precisely those instances in which the risk of error is significant that frank discussion is most valuable").

The *Herbert* Court's analytical divergence from the *New York Times* Court is perhaps most apparent in their respective approaches to the problem of chilling. To avoid chilling speech or the press, the *New York Times* Court enacted a constitutional rule raising the standard of liability for defamation of public officials.¹¹⁸ The *Herbert* Court, while technically retaining the standard inherited from *New York Times*,¹¹⁹ nevertheless undercut that protection by refusing, against a showing of potential chilling,¹²⁰ to expand the privilege to protect journalists' state of mind and the editorial process.¹²¹ The majority preferred instead to delegate the responsibility for any possible extension to the discretion of the trial judge applying ordinary rules of procedure.¹²²

B. Pragmatic Effects of the *Herbert* Ruling

Real consequences flow from the *Herbert* Court's analytical divergence from *New York Times*. That is, the ruling creates practical problems which the decision made no attempt to resolve: for example, it may dampen editorial discussion, dissuade the press from presenting controversial news and unfairly burden smaller publishers.¹²³

¹¹⁸ *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). For a description of the situation prior to the *New York Times* ruling, see note 32 *supra*.

¹¹⁹ *Herbert v. Lando*, 441 U.S. 153, 169-70 (1979).

¹²⁰ See, e.g., Justice Marshall's discussion of the potential of the *Herbert* ruling for chilling the press, *id.* at 208-09 (Marshall, J., dissenting). See also note 105 and accompanying text *supra*.

¹²¹ *Herbert v. Lando*, 441 U.S. 153, 169-70 (1979).

¹²² *Id.* at 177; *id.* at 179 (Powell, J., concurring). See notes 59-60 and 64 and accompanying text *supra*, and notes 155-59 and accompanying text *infra* for a more extensive discussion of this point.

¹²³ An exploration of the *Herbert* ruling's effect on small publishers is contained at notes 146-48 and accompanying text *infra*.

The media's response to the *Herbert* ruling has not been favorable. It has been characterized as subjecting reporters to an "Orwellian invasion of the mind" (Ralph Otwell, editor, Chicago Sun Times, in *Editors, Broadcasters Warn of Chilling Effect of Court Ruling*, Los Angeles Times, Apr. 19, 1979, § 1 at 16, col. 2) and as signifying a "wholesale attempt to repeal the First Amendment" (CBS newsperson Dan Rather, in Kirsch, *Publish and Be Damned*, NEW WEST, July 2, 1979, 32, 36).

See also Pressman, *The California Split Between Judges and Reporters*, CALIFORNIA JOURNAL, Aug. 1979, 279, 280; Hentoff, *A Reckless Disregard for a Free Press*, INQUIRY, July 9, 1979, at 9; Neier, *Malicious Minds*, THE NATION, May 5, 1979, 485; Mann, *Libel Suit Queries of Editorial Process OK'd*, Los Angeles Times, Apr. 19, 1979, § 1, at 1, col. 5; Brennan, *The Symbiosis Between*

On remand of the *Herbert* case and in similar litigation, the *Herbert* ruling could create confusion in the mind(s) of the trier of fact over the meaning of "actual malice."¹²⁴ The choice of that term is unfortunate for defendants, for it implies that evidence of spite, ill will or improper motive (i.e., common law malice) is relevant to a finding of liability.¹²⁵ As Justice Stewart noted, the *Herbert* Court did little to clarify this ambiguity.¹²⁶

Part of the *Herbert* Court's justification for allowing state-of-mind discovery in *Herbert* included an inference that the *New York Times* Court itself allowed such evidence to be introduced.¹²⁷ However, the state-of-mind probe in *New York Times* was directed at ascertaining the advertising official's knowledge of the truth of the allegedly defamatory advertisement published.¹²⁸ The state-of-mind evidence sought in *Herbert* is aimed much more directly at discovering Lando's malice in the common law sense of motive.¹²⁹

The distinction between motive and state of knowledge may become a crucial issue in the *Herbert* case. Documents prepared by Army officers after interviews with Lando indicate the producer was interested in information with which to "debunk" *Herbert*.¹³⁰ According to these documents, Lando indicated that he

the Press and the Court, NATIONAL LAW JOURNAL, Oct. 29, 1979, at 15.

For legal commentary on the case, see Hunter, *Editorial Privilege and the Scope of Discovery in Sullivan-Rule Libel Actions*, 67 KY. L.J. 789 (1978-79); Franklin, *Reflections on Herbert v. Lando*, 31 STAN. L. REV. 1035 (1979); Friedenthal, *Herbert v. Lando: A Note on Discovery*, 31 STAN. L. REV. 1059 (1979).

¹²⁴ See note 41 and accompanying text *supra*.

¹²⁵ *Herbert v. Lando*, 441 U.S. 153, 161-65 (1979).

¹²⁶ In his *Herbert* dissent, Justice Stewart chronicled cases in which even lawyers and judges have confused legal malice with ordinary common law malice. *Id.* at 200-01 (Stewart, J., dissenting).

¹²⁷ *Id.* at 173 n.21.

¹²⁸ The allegedly defamatory publication in *New York Times* was a paid, full-page political advertisement printed by the Times which alleged certain official acts against the civil rights movement and the late Dr. Martin Luther King, Jr. The text was signed by 64 persons, and was submitted to the Times with a letter from A. Philip Randolph, chairman of the sponsoring committee. The advertising department employee approving the advertisement did so because the letter bore the names of persons whose reputations he had no reason to question. *New York Times Co. v. Sullivan*, 376 U.S. 254, 256-61 (1964).

¹²⁹ The types of deposition questions at issue in the *Herbert* case are listed at note 25 *supra*.

¹³⁰ The documents were prepared by Lieutenant Colonel F.B. Reed, Jr. after pre-broadcast interviews between Lando, Reed, Colonel Ross J. Franklin, and a Major General Sidle. Reed stated that Lando "persist[ed] in [his] conten-

would not broadcast the show unless he could amass a significant number of incidents which prove Herbert was lying.¹³¹ Although this evidence could mean that Lando harbored ill feelings or spite toward Herbert, it could as easily indicate that Lando saw no news value in his story if Herbert were not lying.¹³² In its ambiguity lies a potential for misuse; the persuasive effect of such testimony on a jury could be devastating to Lando's defense.¹³³ Similarly, evidence of newsroom wisecracks made in the normal give-and-take of the working situation can be perceived as ordinary malice, rather than the necessary *New York Times* "actual malice."¹³⁴ In the aftermath of the *Herbert* ruling, legal counsel to newspapers have begun to caution reporters against using language which could come back to haunt or embarrass them in court.¹³⁵

An editor or reporter's doubts voiced about the accuracy of a source can be damaging to the media defendant at trial, yet candor in voicing doubts is essential to sound, contemporaneous decisions about whether and what to publish.¹³⁶ As a result of allow-

tion that he is interested in debunking Herbert . . ." and later:

indicated that his peice [sic] is aimed at debunking Herbert in his long fight against the Army. Further Lando indicated that he would focus some attention on the failure of the media to check out Herbert's story prior to 'puffing him up.' [Sic.] He plans to focus on four of five events whcih [sic] are contained in Herberts [sic] book and factually destroy Herbert's credibility.

Herbert v. Lando, 568 F.2d 974, 993 n.30 (2d Cir. 1977) (Oakes, J., concurring).

¹³¹ Reed's account asserted that "Lando's stated premise is that Herbert is a liar and he has stated that if he can't develop a sufficient number of incidents in which Herbert's account can not [sic] be debunked, then there will be no story . . ." and "Lando asserts that he has [the] final decision on the segment and it will not go unless he can convincingly portray Herbert as the bad guy." *Id.* at 993, n.30.

¹³² Part of Reed's account stated: "After the interview [Lando] informed me that Mike Wallace has agreed to do the narration and is equally convinced *that the story is in debunking Herbert* (emphasis added)." *Id.*

¹³³ Justice Goldberg in his concurring opinion in *New York Times*, in the passage quoted at note 2 *supra*, stated: "If individual citizens may be held liable in damages for strong words, which a jury finds false and maliciously motivated, there can be little doubt that public debate and advocacy will be constrained." *New York Times Co. v. Sullivan*, 376 U.S. 254, 300 (Goldberg, J., concurring).

¹³⁴ See Hentoff, *supra* note 123, at 9. Author Jonathan Kirsch stated: "Libel defense lawyers would shudder if they knew what a reporter often says out loud . . . before embarking on a story that might otherwise reach Pulitzer standards of fairness." Kirsch, *supra* note 123, at 38.

¹³⁵ Hentoff, *supra* note 123, at 9.

¹³⁶ Judge Kaufman stated: "A reporter or editor, aware that his thoughts

ing discovery of evidence of articulated doubts, prudent editors may well sacrifice candor for the sake of appearances — all to the detriment of the decisionmaking process.¹³⁷ The *Herbert* majority indicated that the media should take whatever “prepublication precautions” are necessary to avoid publishing defamatory or inaccurate information.¹³⁸ Yet this admonition will backfire if the result of the majority’s ruling is the suppression of doubts.¹³⁹

The danger, recognized by the *New York Times* Court,¹⁴⁰ always exists that editors, when faced with the prospect of escalating attorney’s fees and diversion of time from researching and reporting activities, will “steer far wid[e] of the unlawful zone” and choose not to publish controversial news.¹⁴¹ This danger is especially pronounced when the source of a controversial article is unsavory.¹⁴² Much investigative reporting begins with or depends upon just such sources.¹⁴³ Regardless of the fact that the reporter may confirm the information gleaned from the source before using it,¹⁴⁴ the specter of a zealous plaintiff’s attorney cross-examining a reporter on the identity and background of his

might have to be justified in a court of law, would often be discouraged and dissuaded from the creative testing, probing, and discussion of hypotheses and alternatives which are the *sine qua non* of responsible journalism.” *Herbert v. Lando*, 568 F.2d 974, 980 (2d Cir. 1977).

¹³⁷ See notes 90-93 and accompanying text *supra*.

¹³⁸ *Herbert v. Lando*, 441 U.S. 153, 174 (1979).

¹³⁹ “Unless a journalist knows with some certitude that his misgivings will enjoy protection, they may remain unexpressed And by hypothesis, it is precisely those instances in which the risk of error is significant that frank discussion is most valuable.” *Id.* at 209 (Marshall, J., dissenting).

¹⁴⁰ *New York Times Co. v. Sullivan*, 376 U.S. 254, 278 (1964).

¹⁴¹ *Id.* at 279, *citing* *Speiser v. Randall*, 357 U.S. 513, 526 (1958). Some editors, however, claim not to be deterred by the *Herbert* ruling. Los Angeles Times editor Bill Thomas stated: “I can’t think of a single story that we have not run, and I can’t think of a single story that we have significantly altered because of legal considerations.” Kirsch, *supra* note 123, at 39.

¹⁴² One day after the *Herbert* decision was announced, a newspaper stopped investigation into a story about organized crime, because the source was “not always very savory,” and the editor saw problems of proof in a potential libel action. Hentoff, *supra* note 123, at 9.

¹⁴³ The same editor, quoted in note 142 *supra*, stated that many of the sources for stories on organized crime and corruption are unappealing or nefarious characters. *Id.*

¹⁴⁴ See, e.g., David Halberstam’s account of Washington Post reporters Carl Bernstein and Robert Woodward’s struggles to verify and double-check information during their expose of the Watergate scandal. D. HALBERSTAM, *THE POWERS THAT BE* 678 (1979).

primary sources may persuade an editor not to publish the story at all.¹⁴⁵

Another practical problem with the *Herbert* ruling is its disproportionate impact on smaller publishers. Smaller, less-established or special-interest publishers — often those most likely to espouse a divergent or unpopular point of view¹⁴⁶ — may be deterred by the prospect of committing vast amounts of staff time and resources to defending a libel suit.¹⁴⁷ The expanded discovery mandated by the *Herbert* ruling adds significantly to the burden imposed upon smaller publishers.¹⁴⁸ Many small publishers simply lack the resources to do what CBS did in *Herbert* — back its reporters all the way through appeals to the Supreme Court.¹⁴⁹ Thus, the day-to-day impact of *Herbert* will be felt most directly and immediately by small-town newspapers and radio stations.¹⁵⁰

¹⁴⁵ Hentoff, *supra* note 123, at 9.

¹⁴⁶ Kirsch, *supra* note 123, at 39.

¹⁴⁷ Morton Mintz, who covers the Supreme Court for the Washington Post, said:

The Herbert decision may not cause serious problems for CBS or the Washington Post, but the word has now gone forth that plaintiffs with deep pockets can harass a paper like the Point Reyes Light beyond the limits they previously thought were possible — and this can be devastating to a small enterprise.

Id. at 39. The Point Reyes Light, a small weekly newspaper operated by Catherine and David Mitchell, was awarded the 1979 Pulitzer Prize for Public Service for its investigative reporting on the Synanon religious and rehabilitation organization. New York Times, Apr. 18, 1979, at 14, col. 1.

¹⁴⁸ For a discussion of the discovery allowed in the *Herbert* case (absent the further discovery imposed by the *Herbert* majority's ruling) see notes 23-24 and accompanying text *supra*.

¹⁴⁹ While the Los Angeles Times or CBS may be willing to financially back its reporters, smaller but nonetheless substantial enterprises such as the San Francisco Examiner and the Sacramento Union have withdrawn from the defense of certain of their reporters. Kirsch, *supra* note 123, at 39-40. See Hammarley v. Superior Court, 89 Cal. App. 3d 388, 153 Cal. Rptr. 608 (3d Dist. 1979), *hearing denied*. (Hammarley was a Union reporter who resisted turning over confidential information to be used in a murder trial). McCoy v. The Hearst Corp., ##714-677, 714-678, 714-679, Sup. Ct., County of San Francisco, judgment entered Apr. 19, 1979, *appeal pending* (*McCoy* involves Examiner reporters Bergman and Ramirez who are being sued for libel in three separate actions, which were consolidated for appeal. The reporters are being sued for \$750,000 apiece by three separate plaintiffs). Both the Examiner and the Union withdrew from their reporters' legal defense.

¹⁵⁰ Journalist Jonathan Kirsch suggested that if it wishes to see the chilling effect of its decisions, the Supreme Court "must look beyond the Times and the

As *New York Times* recognized, large damage awards may produce a chilling effect. The Court warned that such judgments could devastate some enterprises and would certainly chill others.¹⁵¹ The danger posed by the *Herbert* ruling is that it allows the introduction of potentially damaging evidence of newsroom conversation;¹⁵² the likelihood of large damage awards is increased if the jury misconstrues that evidence as probative of common law malice, rather than *New York Times*-type state of knowledge.¹⁵³

Finally, the dangers posed by *Herbert* could be exasperated by the justifiable fear of plaintiffs' attorneys that failure to seek discovery of state-of-mind and editorial process evidence may constitute grounds for a malpractice action. The increased frequency with which such evidence is requested will, in turn, contribute significantly to the already extensive chilling effect of the *Herbert* decision.

IV. PROPOSED SOLUTIONS TO AVOID THE CHILLING EFFECTS OF THE *Herbert* RULING

The *Herbert* majority itself suggested a possibility for relief from the harsh effect of its decision. Both the majority opinion¹⁵⁴ and Justice Powell's concurrence¹⁵⁵ emphasized the discretion of the trial judge and the judge's duty to supervise the discovery proceedings to avoid undue burden or oppression as well as to secure the "just, speedy, and inexpensive" determination of such an action.¹⁵⁶ They stressed that only "relevant" information is discoverable¹⁵⁷ and explicitly declined to decide whether the trial judge in *Herbert* properly applied the rules of discovery.¹⁵⁸ This

Post to the small-town papers and rip-and-read radio stations of the heartland and hinterland." Kirsch, *supra* note 123, at 39.

¹⁵¹ The *New York Times* Court warned: "Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment cannot survive." *New York Times Co. v. Sullivan*, 376 U.S. 254, 278 (1964).

¹⁵² *Herbert v. Lando*, 441 U.S. 153, 170, 171 (1979). *See id.* at 191 n.11 (Brennan, J., dissenting); *Cf. id.* at 207-08 n.5 (Marshall, J., dissenting).

¹⁵³ *Id.* at 171-73. *See* related discussion at notes 124-35 and accompanying text *supra*.

¹⁵⁴ *Herbert v. Lando*, 441 U.S. 153, 177 (1979).

¹⁵⁵ *Id.* at 180 (Powell, J., concurring).

¹⁵⁶ *Id.* at 177-80.

¹⁵⁷ *Id.* at 177; *id.* at 179 (Powell, J., concurring).

¹⁵⁸ *Id.* at 177; *id.* at 178 (Powell, J., concurring).

suggests that trial judges in similar situations would be within their discretion in limiting discovery if they based that decision on discovery principles, rather than on an asserted privilege, which both opinions clearly preclude.¹⁵⁹ Indeed, the Court of Appeals for the District of Columbia relied on the language of Justice Powell's *Herbert* concurrence to deny a discovery request which arguably impinged on first amendment rights to freedom of speech in the political activity context.¹⁶⁰

The ultimate responsibility for durable and consistent solutions falls to Congressional or state legislative action.¹⁶¹ Reform of the federal discovery rules, as urged by the *Herbert* majority,¹⁶² would alleviate the burdens on media defendants in Lando's situation as well as other litigants. Alternatively, tailored protection for the press in the form of a federal privilege exempting the editorial process and a media defendant's state of mind from discovery would address the *Herbert* dilemma without intruding on other established fields of law.¹⁶³

The final possibility is state-by-state enactment of laws specifically shielding the press in defamation cases. These statutes would protect defamation defendants prosecuted under state law.¹⁶⁴ State privilege statutes would also trigger protection in the

¹⁵⁹ *Id.* at 175; *id.* at 180 (Powell, J., concurring).

¹⁶⁰ *Walther v. Federal Election Commission*, 82 F.R.D. 200, 202 (D.D.C. (1979)). The *Herbert* majority opinion was cited in another recent district court libel action, in the context of removal to federal court. *See Lewis v. Time Inc.*, 83 F.R.D. 455, 461 n.5 (E.D. Cal. 1979). *See also Racine Ed. Ass'n v. Racine Unified Sch. Dist.*, 82 F.R.D. 461, 463 (E.D. Wis. 1979); *Hutchinson v. Proxmire*, 99 S. Ct. 2675, 2680-81 n.9 (1979).

¹⁶¹ For criticism of the federal discovery rules and proposed changes, *see The Pound Conference Recommendations: A Blueprint for the Justice System in the Twenty-First Century*, 76 F.R.D. 277 (1977).

¹⁶² "There have been repeated expressions of concern about undue and uncontrolled discovery, and voices from this Court have joined the chorus." *Herbert v. Lando*, 441 U.S. 153, 176 (1979).

¹⁶³ If a federal privilege were enacted, defamation actions brought in or into federal court would be subject to the federal privilege. *See* FED. R. EVID. 501.

Representative Robert Matsui (D.-Cal.) has recently introduced legislation in Congress which is specifically tailored to protect journalists in the *Herbert* situation. The bill is modeled after Justice Brennan's dissent. H.R. 6224, 96th Cong., 1st Sess. (introduced Dec. 20, 1979).

¹⁶⁴ Such legislation would need to be very specifically worded to apply only to the libel situation, and not those circumstances in which a newsmen's shield statute comes into conflict with a defendant's right to a fair trial. *See generally* Woodman, *State-by-State Analysis of Press Shield Laws: The "Reporter's Privilege,"* National Law Journal, Dec. 24, 1979, at 14-15. *See, e.g.,*

federal diversity arena in cases involving questions of state law, as in *Herbert*.¹⁶⁵

CONCLUSION

In ruling that a defamed plaintiff may discover the thought processes and editorial decisions of a media defendant the *Herbert* majority has seriously eroded the constitutional protections inherent in the *New York Times Co. v. Sullivan* ruling. Technically an extension of the *New York Times* ruling, the *Herbert* decision runs roughshod over the delicate balance of interests that the *New York Times* Court established, thereby hampering the press' ability to cover controversial news and impinging on the public's "right to know."

The *Herbert* majority suggested that the chilling effect of its ruling might be mitigated through a trial judge's exercise of discretion to control the discovery process. Should this remedy prove ineffective, Congress and state legislatures may be compelled to enact privileges for media defendants in libel actions. Such a privilege would not only protect the press; it would benefit the public generally since "[a] broadly defined freedom of the press assures the maintenance of our political system and an open society."¹⁶⁶

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Hammarley v. Superior Court, 89 Cal. App. 3d 388, 153 Cal. Rptr. 608 (3d Dist. 1979); *In Re Farr*, 36 Cal. App. 3d 577, 111 Cal. Rptr. 649 (2d Dist. 1974); *In Re Farber*, 78 N.J. 259, 394 A.2d 330 (1978), *app. for stay den.*, 439 U.S. 1301 (1978) (White, J.), *re-app. for stay den.*, 439 U.S. 1304 (1978) (Marshall, J.), *app. for stay den.*, 439 U.S. 1317 (1978), *re-app. for stay den.*, 439 U.S. 1331 (1978) (Marshall, J.), *pet. for stay den.*, 439 U.S. 886 (1978) (Stewart, J.), *cert. den.*, 439 U.S. 886 (1978).

¹⁶⁵ Federal Rule of Evidence 501 provides in pertinent part: "However, in civil actions and proceedings, with respect to an element of a claim or defense to which State law supplies the rule of decision, the privilege of a witness, person, government, State or political subdivision thereof shall be determined in accordance with State law." FED. R. EVID. 501. There is no federal cause of action for libel. *Herbert v. Lando*, 441 U.S. 153, 182 (1979) (Brennan, J., dissenting).

¹⁶⁶ *Herbert v. Lando*, 441 U.S. 153; 188 (Brennan, J., dissenting), *quoting Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967).

