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### A Reprise on Herbert v. Lando and the Law of Defamation

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# A Reprise on *Herbert v. Lando* and the Law of Defamation

BY HOWARD O. HUNTER\*

## INTRODUCTION

Three and a half years ago, in an article<sup>1</sup> published in a symposium issue of the *Kentucky Law Journal* focusing on the first amendment, I examined the United States Supreme Court decision of *Herbert v. Lando*.<sup>2</sup> The Court held that reporters, editors and publishers are not protected by any "editorial privilege" from "state of mind" inquiries during discovery in a defamation case governed by the standard of liability set forth in *New York Times Co. v. Sullivan*.<sup>3</sup> The Supreme Court decision in *Lando* stirred a mild flurry of academic comment,<sup>4</sup> partly because it reversed the Second Circuit's broad ruling in favor of an editorial privilege.<sup>5</sup> More interestingly, the case aroused a widespread

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<sup>1</sup> Hunter, *Editorial Privilege and the Scope of Discovery in Sullivan—Rule Libel Actions*, 67 Ky. L.J. 789 (1978-79).

<sup>2</sup> 441 U.S. 153 (1979). Lt. Col. Anthony Herbert was a highly decorated Army veteran who was suddenly removed from his command of an airborne battalion in Vietnam. His case became a "cause celebre" when he charged that his removal was part of an attempt to cover up war crimes. His charges received a great deal of publicity, much of which was favorable to Herbert. Some time later the results of further investigation cast doubt on Herbert's credibility and the publicity became much less favorable. His defamation suit was based on a segment of the CBS television program *Sixty Minutes* and a magazine article, Lando, *The Herbert Affair*, ATL. MONTHLY, May 1973, at 73. See generally Hunter, *supra* note 1, at 789-92.

<sup>3</sup> 376 U.S. 254 (1964).

<sup>4</sup> See, e.g., Ashdown, *Editorial Privilege and Freedom of the Press: Herbert v. Lando in Perspective*, 41 U. COLO. L. REV. 303 (1980); Barron, *The Rise and Fall of a Doctrine of Editorial Privilege: Reflections on Herbert v. Lando*, 47 GEO. WASH. L. REV. 1002 (1979); Franklin, *Reflections on Herbert v. Lando*, 31 STAN. L. REV. 1035 (1979).

<sup>5</sup> See *Herbert v. Lando*, 568 F.2d 974 (2d Cir. 1977), *rev'd*, 441 U.S. at 153. While the case was pending before the Supreme Court, one of the Second Circuit judges in the majority published a law review article explaining, expanding upon and justifying that court's decision. See Oakes, *Proof of Actual Malice in Defamation Actions: An Unsolved*

howl of indignation from the press which passionately suggested that *Lando* had undermined the foundations of the first amendment.<sup>6</sup> The academic commentators, including me, generally did not consider *Lando* to be an exceptional case, nor was there much concern that *Lando* would adversely affect media defendants in defamation suits.<sup>7</sup>

The purpose of this essay is to examine *Lando* in retrospect. Was it an important case? Did it substantially affect defamation cases? Were members of the press right to be concerned about its impact and its implications? After reading a number of post-*Lando* decisions, my conclusion is that *Lando* was not an important case and that it has had little, if any, discernible effect on the law of defamation. Instead, *Lando* fits rather neatly into the Supreme Court's own line of defamation decisions and is another example of the Court's reluctance to carve out separate institutional protection for the press.<sup>8</sup> Nevertheless, *Lando* and subsequent cases leave open a number of questions about the current state of defamation law. These questions, to which the remainder of this article is addressed, are: 1) What effect, if any, did the *Lando* decision have upon the actual malice/reckless disregard test of *New York Times Co. v. Sullivan*? 2) Did *Lando* affect the application by courts of the discovery rules in defamation cases?

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*Dilemma*, 7 HOFSTRA L. REV. 655 (1979). See also Bezanson, Herbert v. Lando, *Editorial Judgment, and Freedom of the Press: An Essay*, 1978 U. ILL. L.F. 605.

<sup>6</sup> Some of the more passionate responses (by rather well-known figures and institutions) were collected and commented upon by Justice Brennan in an address given at Rutgers University at the dedication ceremonies for the S.I. Newhouse Center for Law and Justice. Address by William J. Brennan, Jr., Associate Justice of the United States Supreme Court (Oct. 17, 1979), reprinted in 32 RUTGERS L. REV. 173, 178-81 (1979). See also Franklin, *supra* note 4.

<sup>7</sup> The one exception to the calm scholarly comment was Professor Ashdown, who saw *Lando* as another in a series of anti-press decisions handed down by the Burger Court beginning with *Branzburg v. Hayes*, 408 U.S. 665 (1972). See Ashdown, *supra* note 4. Another commentator voiced concern about the Court's understanding of "relevancy" for discovery purposes and the potential in the Court's opinion for more, rather than fewer, discovery disputes, but his concerns had little to do with the basic first amendment arguments made in the case. See Friedenthal, *Herbert v. Lando: A Note on Discovery*, 31 STAN. L. REV. 1059 (1979).

<sup>8</sup> See Bezanson, *The New Free Press Guarantee*, 63 VA. L. REV. 731 (1977); Lewis, *A Preferred Position for Journalism?*, 7 HOFSTRA L. REV. 595 (1979); Nimmer, *Introduction—Is Freedom of the Press a Redundancy: What Does It Add to Freedom of Speech?*, 26 HASTINGS L.J. 639 (1975); Stewart, "Or of the Press," 26 HASTINGS L.J. 631 (1975).

and 3) What relationship, if any, is there between the *Lando* decision and cases involving the assertion of a confidential source privilege by journalists?

## I. THE ACTUAL MALICE STANDARD

Public officials<sup>9</sup> and public figures,<sup>10</sup> to be successful plaintiffs in defamation actions, must plead and prove that the statements of which they complain were published with “actual malice” or with a “reckless disregard” of the truth. A plaintiff who is neither a public official nor a public figure only needs to meet a negligence standard of proof under the ruling of *Gertz v. Robert Welch, Inc.*<sup>11</sup> Because public officials and public figures usually lose their defamation actions due to the difficulty of proving actual malice/reckless disregard, the most critical inquiry in such libel cases is usually directed toward identifying the plaintiff’s status. Indeed, public officials and public figures usually lose on summary judgment.<sup>12</sup>

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<sup>9</sup> *New York Times Co. v. Sullivan*, 376 U.S. at 254.

<sup>10</sup> *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). In *Rosenbloom v. Metro-media, Inc.*, 403 U.S. 29 (1971), a plurality adopted a rule applying the actual malice/reckless disregard standard to plaintiffs who were involved in an incident of general public concern, regardless of status. This approach was rejected three years later in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), when the Court returned its focus to the status of the plaintiff and limited the actual malice/reckless disregard test to cases involving plaintiffs who are either “public officials” or “public figures.” Subsequently, there has been considerable debate about who is a “public figure” and under what circumstances. See *Wolston v. Reader’s Digest Ass’n*, 443 U.S. 157 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Fitzgerald v. Penthouse*, 8 MEDIA L. REP. (BNA) 2340 (4th Cir. 1982); *Hoffman v. Washington Post Co.*, 433 F. Supp. 600 (D.D.C. 1977), *aff’d*, 578 F.2d 442 (D.C. Cir. 1978); Note, *Constitutional Protection of Critical Speech and the Public Figure Doctrine: Retreat by Reaffirmation*, 1980 WIS. L. REV. 568.

<sup>11</sup> 418 U.S. 323 (1974). The Court in *Gertz* said that states could not impose liability without fault even in private plaintiff cases. 418 U.S. at 347. This has generally been interpreted to be a negligence standard. *Phillips v. Eening Star Co.*, 424 A.2d 78, 94 n.10 (D.C. 1980) (collecting state holdings), M. FRANKLIN, *MASS MEDIA LAW* 141 (2d ed. 1982).

<sup>12</sup> Studies of defamation actions by the Libel Defense Resource Center have shown that defendants prevail in three of four summary judgment motions. By way of comparison, media defendants lost 90% of the cases tried to a jury, although 80% of these adverse judgments which were appealed were later reduced or reversed by the appellate courts. See Hunter, *supra* note 1, at 795 n.35 (cases requiring the plaintiff to meet a “clear and convincing standard” of proof at summary judgment level); *but cf.* *Clark v. ABC*, 8 MEDIA L. REP. (BNA) 2049 (6th Cir. 1982).

What is often confusing to lawyers, litigants, judges, jurors and commentators is that the actual malice/reckless disregard standard is neither a malice test, as that term has been understood at common law, nor a truth test. Instead, it is a test of the publisher's state of mind as to the accuracy of what is being published. If the publisher reasonably believes a story to be accurate and has neither recklessly failed to take contradictory information into account nor relied upon a source of clearly dubious credibility,<sup>13</sup> the publication is protected even if it is false and defamatory. Actual malice can be shown if the publisher knew at the time of publication that the statement in question was untrue.<sup>14</sup> If such knowledge cannot be shown, the "reckless disregard" test applies. Under the reckless disregard standard a much greater showing than that required by a negligence standard is necessary. In the words of the Supreme Court:

[R]eckless 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.<sup>15</sup>

In *Lando*, Lt. Col. Anthony Herbert's lawyers conceded before trial that he was a "public figure."<sup>16</sup> Therefore, discovery was directed toward meeting the actual malice/reckless disregard standard. In so doing, Lando's attorneys tried to learn what editorial decisions had been made, and how they were made, regarding the content of a segment on the CBS program *Sixty Minutes* which he alleged to be defamatory. Defense lawyers objected to these inquiries, arguing that the questions intruded into areas of constitutional protection. In rejecting a constitutional privilege for the editorial process, the Supreme Court determined

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<sup>13</sup> *Fitzgerald v. Penthouse*, 8 MEDIA L. REP. (BNA) at 2342-43.

<sup>14</sup> *New York Times Co. v. Sullivan*, 376 U.S. at 279-80.

<sup>15</sup> *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

<sup>16</sup> *Herbert v. Lando*, 73 F.R.D. 387, 391 (S.D.N.Y. 1977), *rev'd* 568 F.2d at 974, *rev'd*, 441 U.S. at 153.

that state of mind inquiries were mandated by the very nature of the actual malice/reckless disregard test.<sup>17</sup>

Even though the Court reaffirmed the *New York Times Co. v. Sullivan* test for public official/figure plaintiffs, I expressed some concern in a previous article for the way in which it was done.<sup>18</sup> Justice White's majority opinion cited a host of pre-*Sullivan* cases in support of the Court's commitment to the actual malice standard.<sup>19</sup> However, the *Sullivan* standard is constitutionally based and is fundamentally different from the common law tort understanding of malice.<sup>20</sup> This aspect of Justice White's opinion suggested either a misunderstanding of the *Sullivan* test or a subtle attempt to tinker with its foundations. In the body of the *Lando* opinion, however, the majority did not hint at any change in the *Sullivan* test.

The Supreme Court has not since addressed the status of the *Sullivan* rule,<sup>21</sup> but the lower courts, for the most part, seem to have agreed that *Lando* did not affect the substance of the actual

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<sup>17</sup> 441 U.S. at 153. The Court stated, "*New York Times* and its progeny made it essential to proving liability that the plaintiff focus on the conduct and state of mind of the defendant . . . . Inevitably, unless liability is to be completely foreclosed, the thoughts and editorial processes of the alleged defamer would be open to examination." *Id.* at 160. In fact, state of mind evidence has been used defensively; the *Lando* defendants themselves seemed to contemplate using such evidence. See Hunter, *supra* note 1, at 806-07.

<sup>18</sup> See Hunter, *supra* note 1, at 808-09.

<sup>19</sup> 441 U.S. at 165 n.15. Professor Barron, on the other hand, seemed to believe that the Court had made no attempt to change the standard, even indirectly. Barron, *supra* note 4, at 1014.

<sup>20</sup> In his dissent, Justice Stewart made this point:

[M]alice as used in the *New York Times* opinion simply does not mean malice as that word is commonly understood. In common understanding, malice means ill will or hostility, and the most relevant question in determining whether a person's action was motivated by actual malice is to ask "why." As part of the constitutional standard enunciated in the *New York Times* case, however, "actual malice" has nothing to do with hostility or ill will, and the question "why" is totally irrelevant.

441 U.S. at 199 (Stewart, J., dissenting) (footnote omitted). Although I do not wholly agree with Justice Stewart's analysis, his discussion of the distinction between the common law rule and the constitutional privilege is on point. See Hunter, *supra* note 1, at 807-08.

<sup>21</sup> Libel defense lawyers have a powerful tool under *Sullivan*. Whatever the shortcomings of that constitutional standard, there is probably a reluctance to press the issue too much since the result may turn out to be an expansion of the types of cases governed by the negligence standard of *Gertz* and a reduction in the number governed by the much more restrictive standard of *Sullivan*.

malice test.<sup>22</sup> A showing of common law malice has been held to be admissible and probative of *Sullivan*-rule actual malice,<sup>23</sup> but standing alone it is insufficient to meet the test. The Kansas Supreme Court, however, seemed to confuse the common law and constitutional malice tests in *Gleichenhaus v. Carlyle*.<sup>24</sup> In *Gleichenhaus*, the court allowed the discovery of information concerning prior articles and editorials in which the plaintiff was not even mentioned, because a showing of "a reckless indifference to the rights and reputations of others may furnish a basis for an inference that the publication in controversy was malicious."<sup>25</sup>

Repeated publication of stories of dubious validity may be relevant to show sloppy or indifferent procedures, and may be circumstantial evidence probative of reckless disregard, but it also might tend to emphasize the wrong issue. The only real question in a *Sullivan*-rule case is whether the publisher knew the statements to be untrue or whether he or she published with reckless disregard of their truth. Poor procedures in other publication decisions might cumulatively show a pattern of negligent behavior (and therefore be especially pertinent to a private figure case), but they do little to prove actual malice or reckless disregard in a public official/figure case if the defendant can show a good faith belief in the truth of the publication. Opinions of the publisher about the plaintiff or about persons who are the subjects of other articles or editorials are not centrally relevant to an actual malice/reckless disregard analysis.<sup>26</sup> This type of confusion in dealing with the *Sullivan* standard suggests that some under-

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<sup>22</sup> See, e.g., *Ryan v. Brooks*, 634 F.2d 726 (4th Cir. 1980); *Uhl v. CBS, Inc.*, 476 F. Supp. 1134 (W.D. Pa. 1979); *Mobile Press Register, Inc. v. Faulkner*, 372 So. 2d 1282 (Ala. 1979); *MacGuire v. Harrisclope Broadcasting Co.*, 612 P.2d 830 (Wyo. 1980).

<sup>23</sup> See, e.g., *Curtis v. Southwestern Newspapers Corp.*, 8 MEDIA L. REP. (BNA) 1651 (5th Cir. 1982) (per curiam); *Schaefer v. Lynch*, 406 So. 2d 185 (La. 1981); *Pasculli v. Jersey Journal*, 7 MEDIA L. REP. (BNA) 2574 (N.J. Super. Ct. App. Div. 1981), *certification denied*, 446 A.2d 152 (N.J. 1982); *Ferguson v. Dayton Newspapers*, 7 MEDIA L. REP. (BNA) 2502 (Ohio Ct. App. 1981).

<sup>24</sup> 597 P.2d 611 (Kan. 1979).

<sup>25</sup> *Id.* at 614.

<sup>26</sup> On the other hand, one can argue that a showing of personal animus may help in finding that a publisher was not as open to the truth as he or she might otherwise have been.



stand the actual malice test to include an element of personal animus; undoubtedly, it would have been better had the Court in *New York Times Co. v. Sullivan* used a different word.

The Kansas Supreme Court in *Gleichenhaus* certainly did not suggest that the *Sullivan* test had been abandoned in public official/figure cases, even though it did not apply the test in a manner entirely favorable to libel defendants. All other cases since *Lando* have adhered to the *Sullivan* test, suggesting that my concern about a subtle abandonment of the actual malice test in *Lando* may have been incorrect. The Kansas Supreme Court's confusion in its application does indicate, however, that some re-thinking of the test is in order.

The incomprehensibility of the test to the untrained mind<sup>27</sup> was made apparent in the recent victory scored by William Tavoulareas of Mobil Oil against the *Washington Post*.<sup>28</sup> Tavoulareas and his son sued the *Post* concerning an article which suggested that he had improperly furthered his son's career. The *Post* tried the case before a jury, which awarded a substantial sum to Mr. Tavoulareas but not to his son. A reporter for *The American Lawyer*, a monthly magazine about attorneys, interviewed the six jurors about their deliberations.<sup>29</sup> The jurors told the reporter that they understood the judge's instructions (which were boiler plate public official/figure instructions) to mean that the *Post* had to prove the truth of its story, not that the plaintiffs had to prove that the *Post* knew the story to be untrue or acted with reckless disregard.<sup>30</sup> In fact, the jurors thought that the *Post* story was probably true and that the reporters had acted responsibly, but a seed of doubt about the ultimate truth of the story remained.<sup>31</sup> This misunderstanding stands the *New York Times Co. v. Sullivan* case on its head. A federal district court in Texas has said: "Since *New York Times* the issue in cases like this has

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<sup>27</sup> I mean "untrained" in the sense of not being trained in that special way of thinking which sometimes seems to afflict lawyers who otherwise exhibit fairly good common sense.

<sup>28</sup> *Tavoulareas v. Washington Post*, Civ. A. No. 80-3032 (D.D.C. July 30, 1982).

<sup>29</sup> Brill, *Inside the Jury Room at the Washington Post Libel Trial*, AM. LAW., Nov. 1982, at 1.

<sup>30</sup> *Id.* at 93.

<sup>31</sup> *Id.*

shifted from the truth of what was published to the state of mind of the publisher.”<sup>32</sup> The *Tavoulaareas* jurors, by contrast, seemed to say that the state of mind of the publishers was one of reasonable belief, but the publishers still lost because they had not proven truth beyond a reasonable doubt. Ultimate truth, not the publisher’s state of mind, was the touchstone of their verdict.<sup>33</sup>

The *Tavoulaareas* case might be dismissed as an aberration—one of those circumstances involving an odd chemistry of lawyers, litigants, jurors and judge—but for the studies of the Libel Defense Resource Center. These studies reveal 1) an abnormally high success rate for *Sullivan*-rule defendants on motions for summary judgment; 2) an abnormally poor success rate for defendants in cases tried to a jury; and 3) an abnormally high reversal rate for jury verdicts adverse to a libel defendant.<sup>34</sup> With some reluctance,<sup>35</sup> a number of courts favor summary disposal of libel cases.<sup>36</sup> Also, the public official/figure plaintiff generally has been required to prove his or her case by a “clear and convincing” showing rather than simply by a preponderance of the evidence.<sup>37</sup>

Judicial application of this standard during motion hearings and on appeals has resulted in a high degree of protection for defendants in such suits,<sup>38</sup> but such solicitude apparently has not carried over to juries. The great disparity between decisions by

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<sup>32</sup> *Adams v. Maas*, 7 MEDIA L. REP. (BNA) 1188, 1190 (S.D. Tex. 1981).

<sup>33</sup> The jurors also were confused about the public figure issue. They decided not to award the son anything because he was a private figure. The father, a public figure, won a large judgment because he was “famous” and damage to his reputation was worth more. Brill, *supra* note 29, at 94.

<sup>34</sup> The *Post*’s lawyers in the *Tavoulaareas* case relied on a study showing a high sympathy level for the *Post*, as opposed to that shown for Mobil Oil, among the pool of potential jurors when deciding to go with a jury trial. *Id.* at 90. They must have disregarded the findings of the Libel Defense Resource Center, discussed in note 12 *supra*.

<sup>35</sup> *See, e.g., DiLorenzo v. New York News*, 432 N.Y.S.2d 483, 484 (N.Y. App. Div. 1981) (“Concern for the First Amendment should not be transformed into a requirement that the plaintiff prove actual malice to the motion court”).

<sup>36</sup> Hunter, *supra* note 1, at 795 n.35.

<sup>37</sup> *Id.* at 795 n.34.

<sup>38</sup> *See, e.g., Tavoulaareas v. Piro*, 527 F. Supp. 676 (D.D.C. 1981); *Tavoulaareas v. Piro*, 93 F.R.D. 11 (D.D.C. 1981); *Tavoulaareas v. Piro*, 93 F.R.D. 24 (D.D.C. 1981); *Tavoulaareas v. Piro*, 93 F.R.D. 35 (D.D.C. 1981). *See generally* Franklin, *Suing Media for Libel: A Litigation Study*, 1981 AM. B. FOUND. RESEARCH J. 795.

judges and juries can only be partially explained by circumstantial factors such as the relative local importance of or level of respect for the litigants, by lawyers' tactics and by the fact that defendants who lose summary judgment motions are the ones who go to trial. More significant is the fact that the actual malice/reckless disregard test is confusing in its terminology and unclear in its application. It goes against much of our common, shared experience. The concept of negligence is deeply ingrained in our culture and conflicts with the notion that a reporter can spread defaming lies with impunity so long as the reporter has not been reckless in his or her disregard for the truth.<sup>39</sup> The actual malice test also may go against ordinary sensibilities in suggesting that the defamed victim prove that the defamer was reckless, rather than that the defamer prove he or she was not reckless.

To the extent, then, that the goal of the actual malice/reckless disregard test is to advance certain first amendment values by promoting critical examination of public figures and officials, that goal is met largely through the intervention of judges in the litigation process.<sup>40</sup> Undoubtedly, the *New York Times Co. v. Sullivan* decision has operated much to the benefit of the press. And, even though *Gertz* applies a negligence standard for private plaintiffs, its limitations on damage recoveries<sup>41</sup> and its apparent

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<sup>39</sup> People may accept the fact that lies *are* spread; they may have more difficulty letting the liar go free when caught, even if he did not actually know he was a liar.

<sup>40</sup> This observation tends to support an argument made in a somewhat different context by my colleague, William Mayton, that judges are the primary governmental guardians of first amendment values. Mayton, *Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine*, 67 CORNELL L. REV. 245, 250-53 (1982). Although I do not wholly agree with him, defamation cases of the last eighteen years seem to have proved his argument in that area. Hunter, *Toward a Better Understanding of the Prior Restraint Doctrine: A Reply to Professor Mayton*, 67 CORNELL L. REV. 283, 287-92 (1982).

<sup>41</sup> *Gertz* does not allow punitive damages in negligence cases, but it leaves the issue open for those cases involving proof of actual knowledge or reckless disregard. 418 U.S. at 350. The size of some recent awards has led one commentator to suggest that further limitations on damage awards may be in the offing. See M. FRANKLIN, *supra* note 11, at 171. See also *Wheeler v. Green*, 593 P.2d 777 (Ore. 1979) (punitive damages in defamation actions violate state constitutional equivalent of the first amendment); Franklin, *supra* note 38.

disavowal of libel per se<sup>42</sup> show a judicial solicitude for defamation defendants.

The point to be gleaned from *Lando* and subsequent cases is quite simple—although neither the Supreme Court nor lower courts have consciously tried to change the actual malice/reckless disregard test, all courts seem, at times, to be confused about what the test entails and exactly how it is to be applied. This confusion increases costs for everyone involved in defamation cases. On the other hand, a slight reworking of the test would retain its substance, reflect its application over the past eighteen years and clarify its meaning. Simply eschewing the word “malice” would be helpful. The following test might resolve the confusion:

- A. If the plaintiff in a libel action is a public official or a public figure, he must prove
  - i) That the statement complained of is false; *and*
  - ii) That the statement is injurious to him; *and*
  - iii) That the publisher knew at the time of publication that the statement was false *or* that the publisher, considering all the circumstances,<sup>43</sup> acted in reckless disregard of whether the statement was true or false.
- B. If the defendant moves for summary judgment with supporting materials denying the third part of the test (whether or not the first and second parts are denied), the burden is on the plaintiff to respond with proof sufficient to show a reasonable likelihood of eventual success on the merits.

Part A simply restates the *New York Times Co. v. Sullivan* test without using the term “actual malice.” There is no reason to confuse a test directed toward determining a publisher’s state of

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<sup>42</sup> Justice Powell, writing for the Court, said that states may develop their own liability standards for private figure plaintiffs “so long as they do not impose liability without fault.” 418 U.S. at 347. *But cf.* *Hogan v. Herald Co.*, 8 MEDIA L. REP. (BNA) 2567 (N.Y. Ct. App. 1982).

<sup>43</sup> One of the critical circumstantial elements is whether the statement is “hot” news. *See, e.g.*, *Associated Press v. Walker*, 388 U.S. 130 (1967); *DiLorenzo v. New York News*, 432 N.Y.S.2d at 486. *See also* Schaefer, *Defamation and the First Amendment*, 52 COLO. L. REV. 1 (1980) (criticizing the “hot news” justification).

mind as to truth with language that implies a concern with a publisher's attitudes. Part B reflects the prevailing practice of placing a heavy burden on the plaintiff at the motion hearing and avoids use of language such as "clear and convincing proof" which implies a standard more appropriate to a criminal case. Instead, this proposal uses the standard applied in requests for preliminary injunctions.<sup>44</sup> Using the standard for injunctions offers the advantage of an existing body of law where analogies may readily be found. At the same time, it maintains a high standard at the motion level which should adequately protect defendants from the lengthy prosecution of public official/figure cases of dubious ultimate merit.

## II. DISCOVERY

Barry Lando was deposed in twenty-six sessions and the transcript of his testimony ran nearly 3,000 pages.<sup>45</sup> He objected to relatively few questions compared to the extent of the entire discovery process.<sup>46</sup> In my earlier article I suggested that the real problem for libel defendants thus may be the open-ended nature of discovery, not the specific questions directed to the reporter's state of mind,<sup>47</sup> because a victory on the merits may seem hollow if it follows extensive, time-consuming, expensive discovery. In order to minimize disruptive and intrusive effects of discovery in defamation cases, I suggested that no new privileges need be created.<sup>48</sup> Rather, all that is required is sensitive application of existing discovery rules and oversight by the trial judge.<sup>49</sup>

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<sup>44</sup> See, e.g., FED. R. CIV. P. 65(a) [hereinafter cited as FRCP]; *Brown v. Chote*, 411 U.S. 452, 456 (1973); *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977).

<sup>45</sup> *Herbert v. Lando*, 568 F.2d at 982.

<sup>46</sup> See *Herbert v. Lando*, 73 F.R.D. at 392.

<sup>47</sup> *Hunter*, *supra* note 1, at 819.

<sup>48</sup> *Id.* at 820.

<sup>49</sup> Sometimes the supervisory power available to a trial judge through the proper use of FRCP 26 is overlooked. The onus may be on a litigant to bring the judge to action since he or she may have other things on his or her mind, but the power is there to be used. Judge Oakes, for instance, bewails the abuses possible through the misuse of the liberal standards of the discovery rules, but fails to address adequately the trial court's supervisory authority. Oakes, *supra* note 5, at 672-73. Professor Ashdown, on the other hand, recog-

In several post-*Lando* cases, the courts have exhibited the recommended sensitivity to the first amendment interests which might be implicated by untrammelled discovery.<sup>50</sup> No court has attempted to re-create an “editorial privilege” such as the one rejected by the Supreme Court, but attempts to afford some protection to the editorial process have been made. Although the case also involved a confidential source problem, the approach of a Massachusetts district court is typical:

In exercising control over requested discovery a judge . . . must be particularly sensitive to prevent exposure “for the sake of exposure” . . . or any other use of discovery as a means of harassing a reporter or other potential witness by forcing the needless disclosure of confidential relationships . . . . A protective order, for example, would be required if the requested discovery were sought purely as retribution for a written or broadcast news story, or if discovery were sought to “chill” a particular point of view. Furthermore, the same account must be taken of any particular hardship or inconvenience which discovery may impose on a given reporter as is regularly taken of the analogous difficulties confronted by any other potential witness.<sup>51</sup>

In an early stage of the *Tavoulaareas* litigation, the District Court for the District of Columbia limited a discovery request by the plaintiff after weighing his need for discovery against the defendant’s first amendment interests.<sup>52</sup> The availability of the information from other sources was especially important to the court, which relied on the “least restrictive alternative analysis” of *Nebraska Press Association v. Stuart*.<sup>53</sup> The plaintiff was en-

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nizes the possible utility of FRCP 26, but fears that the number of judges is so great that standards will vary too much and that only a constitutional privilege will suffice. Ashdown, *supra* note 4, at 325. Professor Friedenthal seems to be of a similar mind. Friedenthal, *supra* note 7, at 1063.

<sup>50</sup> See, e.g., *In re Roche*, 411 N.E.2d 466 (Mass. 1980); *Ward v. Peabody*, 405 N.E.2d 973 (Mass. 1980).

<sup>51</sup> 411 N.E.2d at 475 (citations omitted).

<sup>52</sup> *Tavoulaareas v. Piro*, 93 F.R.D. at 36.

<sup>53</sup> 427 U.S. 539 (1976). The *Tavoulaareas* court also cited *Heffron v. International Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981). Neither of these cases had anything to do with defamation, but they both focused on the question of the extent to which restrictions on protected speech may be permitted. One test of a regulation is whether the

titled to some of the information requested, despite the defendant's assertion of first amendment concerns; however, the court refused to compel disclosure of materials related to unpublished articles because the defendant's first amendment interests outweighed the marginal relevance of the information.

A similar balancing approach has been used in other kinds of lawsuits and in third party witness disputes. In a Title VII suit against the *New York Times*, the court balanced the plaintiff's need for information about areas involving the exercise of editorial judgment against the defendant's assertion of first amendment interests.<sup>54</sup> The court relied upon Justice Powell's statement in his concurring opinion in *Lando* that "when a discovery demand arguably impinges on First Amendment rights a district court should measure the degree of relevance required in light of both the private needs of the parties and the public concern implicated."<sup>55</sup>

One of the more interesting recent cases on this issue was *SEC v. McGoff*,<sup>56</sup> which involved a Securities and Exchange Commission investigation of a reporter. The court narrowed the scope of an SEC subpoena so as to exclude any documents relating to editorial or newsgathering processes.<sup>57</sup> Although it recognized that the Supreme Court had rejected press privilege claims in *Branzburg v. Hayes*,<sup>58</sup> *Zurcher v. Stanford Daily*<sup>59</sup> and *Lando*,<sup>60</sup> the *McGoff* court found in those cases suggestions that some balancing may be necessary when first amendment interests are implicated.<sup>61</sup> On this basis, the discovery was limited despite the court's recognition that the information sought was clearly relevant to the SEC investigations.<sup>62</sup>

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state interest involved, if legitimate, may be served by a regulation which is less restrictive of speech interests.

<sup>54</sup> *Rosario v. New York Times Co.*, 84 F.R.D. 626, 631 (S.D.N.Y. 1979).

<sup>55</sup> 441 U.S. at 179 (Powell, J., concurring).

<sup>56</sup> 647 F.2d 185 (D.C. Cir.), *cert. denied*, 452 U.S. 963 (1981).

<sup>57</sup> 647 F.2d at 191.

<sup>58</sup> 408 U.S. at 665.

<sup>59</sup> 436 U.S. 547 (1978).

<sup>60</sup> 441 U.S. at 153.

<sup>61</sup> 647 F.2d at 191.

<sup>62</sup> *Id.*

*Branzburg* also has been used to justify limiting discovery directed to a third party witness (a magazine) in an antitrust case.<sup>63</sup> In reaching its decision, the court considered the nature of the suit, whether the information sought was central to the claim, whether alternative sources had been exhausted and the extent of first amendment interests involved.<sup>64</sup> Although this case might be read as simply another in the line developing a qualified privilege for protection of confidential sources,<sup>65</sup> more was at issue than the disclosure of a source. The magazine also was concerned about inquiries into its editorial processes.<sup>66</sup>

In a criminal case, the Third Circuit held that nonparty journalists should not be required to disclose unpublished information even for *in camera* inspection by the court unless a showing is made that the material is not available from another source and that it is "centrally relevant."<sup>67</sup> This standard applies whether or not a confidential source is involved.

These cases hardly amount to an overwhelming rush to use limitations on the discovery process as a means of protecting first amendment interests, but they do show some sensitivity to the problems that open-ended discovery can create for defamation defendants. Two commentators, however, have taken issue with the use of discovery rules to protect first amendment interests. Professor Ashdown apparently does not believe that protective orders and other devices provide enough protection for a process of constitutional importance.<sup>68</sup> Professor Friedenthal is concerned with the potential for a whole new series of discovery disputes if the relevancy standard is balanced against other inter-

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<sup>63</sup> *In re Consumers Union*, 6 MEDIA L. REP. (BNA) 1681 (S.D.N.Y. 1981).

<sup>64</sup> *Id.* at 1682-83.

<sup>65</sup> For a discussion concerning qualified privileges, see notes 79-110 *infra* and accompanying text.

<sup>66</sup> 6 MEDIA L. REP. (BNA) at 1682.

<sup>67</sup> *United States v. Cuthbertson*, 630 F.2d 139, 148 (3d Cir. 1980), *cert. denied sub nom.* *Cuthbertson v. CBS, Inc.*, 449 U.S. 1126 (1981). This should, of course, be compared with the *Myron Farber* case, *In re Farber*, 394 A.2d 330 (N.J.), *cert. denied sub nom.* *New York Times Co. v. New Jersey*, 439 U.S. 997 (1978). See also *Florida v. Peterson*, 7 Media L. Rep. (BNA) 1090 (Fla. Cir. Ct. 1981) (party requesting discovery must show that the information is material and relevant, such information is not available from unprivileged sources, discovery from other less disruptive sources was unsuccessful and the defendant's constitutional rights would be violated without the evidence).

<sup>68</sup> Ashdown, *supra* note 4, at 324-25.



ests.<sup>69</sup> Both make points worth considering, but each seems to fly a bit wide of the mark.

Ashdown disagreed with the result in *Lando* because he fears that intrusion into the editorial process will necessarily have an adverse effect on the ultimate publication.<sup>70</sup> The problem with his line of argument is that, absent a fundamental change in the actual malice/reckless disregard standard, inquiries into the state of mind of the publisher will almost always be allowed.<sup>71</sup> Therefore, it is unlikely that the editorial process will be excluded as a substantive area of discovery exploration. Furthermore, without the creation of an editorial privilege—which might have the de facto effect of wiping out public official/figure libel actions—sensitivity to the first amendment interests of defendants demands that something be done to limit discovery fishing expeditions. Ashdown may be correct in arguing that a balancing approach in discovery might not be entirely effective from a defendant's standpoint, but perfect efficiency from the defendant's perspective is not the goal.

Friedenthal's article is much less concerned with first amendment issues. Instead, his criticism is of what he perceives to be attacks on the relevancy standard in discovery.<sup>72</sup> He opposes the use of other "rights" as counterweights to relevancy for fear that such

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<sup>69</sup> Friedenthal, *supra* note 7, at 1062-63.

<sup>70</sup> Professor Ashdown states:

The exercise of editorial judgment free of the demands of the marketplace means that the checking and informing system will operate proficiently only if governmental interference is also kept to an essential minimum. Any governmental regulation or influential restraint imposed on the analysis stage of the publication process necessarily affects both the quantity and quality of the finished product. Expression is the product of the editorial process. The regulation of the process is therefore the regulation of the expression.

Ashdown, *supra* note 4, at 314 (footnotes omitted). There is, however, a significant difference between allowing a discovery request in a libel case and regulating publications.

<sup>71</sup> Even Judge Oakes recognized this fact, asking, "How else could a plaintiff prove 'actual malice,' defined as knowledge of falsity or reckless disregard of truth or falsity, if not by the closest inquiry into the mind of the alleged defamer?" Oakes, *supra* note 5, at 659 (footnote omitted). This statement leads one to the inevitable conclusion that Judge Oakes really meant to attack the actual malice standard in his proposal for the recognition of an editorial privilege. See Franklin, *supra* note 4, at 1055.

<sup>72</sup> Friedenthal, *supra* note 7, at 1062.

use will create a multitude of new discovery disputes and lead to forum shopping for more liberal rules.<sup>73</sup> His fears seem overstated. Although the relevancy standard of the Federal Rules of Civil Procedure is indeed a liberal one, courts regularly must decide whether a particular line of inquiry is relevant at all and, if so, whether its relevance is of sufficient importance to outweigh other factors such as costs of production, delays in litigation, business confidentiality and personal privacy. Also, too many other factors are involved in deciding whether to initiate an action. A given court's understanding of the substantive constitutional standards or the public/private figure distinction might well have much more to do with a plaintiff's choice of forum than the same court's application of the discovery rules.<sup>74</sup>

Undoubtedly, courts may appear to use significantly different balancing tests and thus create the appearance of a lack of uniformity. This should be expected, however, when the application of a balancing approach depends primarily upon the contextual dynamics of a given case. The real problem is not one of efficiency, but rather of justification. If a constitutional editorial privilege is not to be created, why should a defamation defendant be treated differently from any other defendant who complains about the burden of the discovery process? Wouldn't this be an attempt to give the press<sup>75</sup> a special institutional status despite the Supreme Court's refusal to do so?<sup>76</sup>

The answers seem fairly straightforward. First, as long as non-media libel defendants are afforded the same constitutional protections as media defendants, the problem of creating a spe-

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<sup>73</sup> *Id.* at 1062-64.

<sup>74</sup> Defamation is a state tort action; thus, many libel cases will originate in state courts anyway. Because not all states have procedural rules similar to the federal ones, what is said about federal discovery applies only by way of analogy in many cases.

<sup>75</sup> Arguably, libel defendants other than the press also should be treated differently. See Hunter, *supra* note 1, at 809-15; Note, *Mediaocracy and Mistrust: Extending New York Times Defamation Protection to Nonmedia Defendants*, 95 HARV. L. REV. 1876 (1982).

<sup>76</sup> See *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978); *Zurcher v. Stanford Daily*, 436 U.S. at 547; *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 795 (1978) (Burger, C.J., concurring); Van Alstyne, *The First Amendment and the Free Press: A Comment on Some New Trends and Some Old Theories*, 9 HOFSTRA L. REV. 1, 23 (1980) (arguing that while it is not "infeasible" to define a class of journalists" and to give them special first amendment protection, it would be a mistake to do so).

cial caste of defendants, most of whom would be journalists, does not exist. Second, the substantive justifications for the *Sullivan* rule and for other limitations on the defamation tort are directed toward protecting constitutional rights. Therefore, it is reasonable to argue that the procedural rules should be subject to some limitations designed to insure that the substantive constitutional protections accorded to defamation defendants are not unreasonably invaded. Third, there is absolutely no reason why a court should not balance the degree of relevancy of the information sought against the interests that might be affected by its production whenever the defendants in libel cases or other cases have interests, constitutional or otherwise, which they want to protect against overly intrusive discovery inquiries.<sup>77</sup> Fourth, despite the ultimate constitutional justification for a careful examination of relevancy in a libel case, using the nonconstitutional procedures available in the discovery process employs existing rules with which lawyers are familiar and does not involve the creation of a new privilege of uncertain scope.<sup>78</sup>

### III. CONFUSING THE ASSERTION OF A CONFIDENTIAL SOURCE PRIVILEGE WITH THAT OF AN EDITORIAL PRIVILEGE

The Supreme Court has never explicitly recognized a privilege for the protection of a confidential news source,<sup>79</sup> but lower courts have created and recognized a qualified privilege.<sup>80</sup> Some

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<sup>77</sup> Two collateral goals also might be served: 1) the parties may be forced to focus on the real theory of the case at an earlier stage and to channel their energies more efficiently, and 2) the judge may be encouraged to exert greater control to insure that a case does not become hopelessly bogged in a morass of discovery. As a practical matter, defendants can often use discovery as a means to avoid and to delay consideration of the case on the merits. The expense and delay attendant on taking the *Lando* discovery dispute to the Supreme Court exemplifies the problem of sidetracking.

<sup>78</sup> This would satisfy a criticism made by Professor Franklin: "In their efforts to obtain relief from the logical sweep of *New York Times*, the media have put themselves in the position of asking for what appear to be special constitutional rules—and have failed to pursue more promising nonconstitutional substantive and procedural relief." Franklin, *supra* note 4, at 1049.

<sup>79</sup> In fact, the Court has rejected the privilege in the only case in which it faced the issue. See *Branzburg v. Hayes*, 408 U.S. at 665.

<sup>80</sup> See generally Goodale, *Branzburg v. Hayes and the Developing Qualified Privilege for Newsmen*, 26 *HASTINGS L.J.* 709 (1975); Hill, *Testimonial Privilege and Fair Trial*, 80 *COLUM. L. REV.* 1173 (1980).

states have enacted statutes which also create a source privilege.<sup>81</sup>

The editorial privilege asserted in *Lando* is fundamentally different from the confidential source privilege.<sup>82</sup> The issue in *Lando* was whether the editing process, including conversations, memoranda, outtakes, states of mind and so on (whether confidential or not) could be immunized from discovery. The source privilege focuses on one discrete aspect of the process—the acquisition of information from a person who does not want to disclose his or her identity. The decision about the use of information from a confidential source is part of the editorial process and is properly subject to discovery even if the identity of the source is not. Inquiries into the editorial process may have some effect on free-ranging discussions, and they may make reporters more aware of the possibility that their editing decisions might be subjected to hindsight review, but the forced disclosure of a confidential source can have the more serious effect of cutting off an avenue for the acquisition of news and information.

Some courts have confused the different privilege issues, with mixed results for journalists. Courts in Minnesota, Pennsylvania and New Jersey have construed the shield laws of those states to create an *editorial* privilege similar to the privilege rejected by the Supreme Court in *Lando*. In *Aerial Burials, Inc. v. Minneapolis Star & Tribune Co.*,<sup>83</sup> the defendant refused to disclose notes and interview transcripts which related to unpublished material. The court upheld the defendant's position by construing the Minnesota "free flow of information" act<sup>84</sup> to prevent the forced disclosure of unpublished information even when the source was known. Interestingly, the statute expressly exempted from its coverage evidence relevant to the issue of actual malice in a *Sullivan*-rule libel case.<sup>85</sup> The court, in accepting what the defendant must have known was a bootstrap argument, held

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<sup>81</sup> State "shield" laws vary in the degree of protection granted. For a partial listing of state shield laws, see Note, *Shield Statutes: A Changing Problem in Light of Branzburg*, 25 WAYNE L. REV. 1381, 1386 n.40 (1979).

<sup>82</sup> See M. FRANKLIN, *supra* note 11, at 585 (noting the possibility of confusion, but arguing that the two problems are fundamentally different).

<sup>83</sup> 8 MEDIA L. REP. (BNA) 1653 (Minn. Dist. Ct. 1982).

<sup>84</sup> MINN. STAT. ANN. §§ 595.021-.025 (West 1973).

<sup>85</sup> *Id.* § 595.025.

that the information was not relevant because the defendant testified that it had not been relied upon.<sup>86</sup>

The Pennsylvania shield law<sup>87</sup> is substantially the same as that of Minnesota. The Third Circuit Court of Appeals in *Steaks Unlimited, Inc. v. Deaner*<sup>88</sup> stated that the Pennsylvania statute protects all unpublished material even when the identity of the source is known. The court justified this conclusion by reasoning that the protection of unpublished information from a nonconfidential source is necessary to protect possible secondary sources who might thereby be revealed. The court presumed confidential secondary sources might exist without requiring the defendant to offer any evidence of their existence and without undertaking any *in camera* review.<sup>89</sup> Unlike the Minnesota court, the Third Circuit did recognize that the unpublished information might be relevant to the libel plaintiff's claim.<sup>90</sup> The court noted that the Supreme Court in *Lando* had rejected an editorial privilege in part because it would substantially reduce the opportunities for a libel plaintiff to meet the actual malice standard, but stated that the *Lando* decision did not preclude a state from adopting a different approach.<sup>91</sup> Thus, the court felt free to apply the Pennsylvania shield law in a way that creates an almost insurmountable obstacle for libel plaintiffs.<sup>92</sup>

In a 1982 decision the New Jersey Supreme Court construed the state's shield law to create an absolute privilege from disclosure of editorial processes.<sup>93</sup> The defendant had asserted affirmative defenses of good faith, truth and absence of malice. It had

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<sup>86</sup> 8 MEDIA L. REP. (BNA) at 1654.

<sup>87</sup> 42 PA. CONS. STAT. ANN. § 5942(a) (Purdon 1982). This is a recodification of 28 PA. CONS. STAT. ANN. § 330 (Purdon 1958), the shield law in effect at the time the trial court rendered its decision in *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264 (3d Cir. 1980).

<sup>88</sup> 623 F.2d at 264.

<sup>89</sup> *Id.* at 279.

<sup>90</sup> The court recognized that "comparison of the material actually published and other material, possibly favorable to the plaintiff, that was in the defendants' possession but omitted from the publication or broadcast is probably the most common method of proving that the defendants acted with knowing or reckless disregard of the truth." *Id.* at 277 n.62.

<sup>91</sup> *Id.* at 279 n.74.

<sup>92</sup> *Id.* at 277-79.

<sup>93</sup> *Maressa v. New Jersey Monthly*, 445 A.2d 376, 383 (N.J. 1982). *Cf. In re Farber*, 394 A.2d at 330.

also provided the names of nonconfidential sources, but the court said that none of this amounted to a waiver of its protection under the shield law.<sup>94</sup> The New Jersey court reasoned, as had the Third Circuit, that the limitation which the shield law placed on the prosecution of a libel action was a matter of state law and that the *Lando* case was essentially irrelevant.<sup>95</sup>

The results in states without shield laws also are mixed. The New Hampshire Supreme Court, for instance, has held that a defendant does not have an absolute privilege to refuse to disclose confidential sources when the latter are essential to the plaintiff's case.<sup>96</sup> That alone would not be surprising; the rule has been much the same for about twenty-five years.<sup>97</sup> But the court went on to say, citing *Lando*, that the "Supreme Court has indicated that to meet the *New York Times* standard, any press privilege must give way before the First Amendment."<sup>98</sup> This was an obvious misunderstanding of the difference between the source privilege and the overall editorial privilege rejected in *Lando*.<sup>99</sup> The court said that a refusal to disclose a source would justify a presumption that the defendant had no source and, therefore, that the publication complained of was baseless.<sup>100</sup> Needless to say, this approach could put a libel defendant in a bit of a quandry.

The Fifth Circuit Court of Appeals, in *Miller v. Transamerican Press, Inc.*,<sup>101</sup> displayed a greater understanding of the distinctions between the confidential source problem and the editorial privilege issue. The court explicitly recognized a qualified privilege not to disclose a source, but stated that the privilege

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<sup>94</sup> 445 A.2d at 382-83. See also *Resorts Int'l, Inc. v. NJM Associates*, 445 A.2d 395 (N.J. 1982). At some point, a defendant's assertion of certain defenses should open it to appropriate inquiry. See Hunter, *supra* note 1, at 806-07.

<sup>95</sup> 445 A.2d at 394. See also *Martinez v. California*, 444 U.S. 277 (1980); *Paul v. Davis*, 424 U.S. 693 (1976).

<sup>96</sup> *Downing v. Monitor Publishing Co.*, 415 A.2d 683 (N.H. 1980).

<sup>97</sup> See *Garland v. Torre*, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958).

<sup>98</sup> 415 A.2d at 686.

<sup>99</sup> The court did agree that there must be a dispute about falsity before disclosure would be ordered. *Id.*

<sup>100</sup> *Id. Accord DeRoburt v. Gannett Co.*, 507 Supp. 880 (D. Hawaii 1981).

<sup>101</sup> 621 F.2d 721 (5th Cir.), *opinion supplemented and reh'g denied*, 628 F.2d 932 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981).

could be overcome by a showing that the identity of the source is relevant and critical to the claim, that the information is not available from other sources and that the claim is meritorious.<sup>102</sup> In *Miller*, the court noted that the Supreme Court had determined in *Lando* that discovery of the editorial process would not have a chilling effect (or at least not enough to justify creating a constitutional privilege), but the court went on to reason that the disclosure of confidential sources might well limit the ability of the defendant to gather news.<sup>103</sup> Thus the confidential source question should be separated from the general editorial privilege issue.

In comparison, a Connecticut trial court utterly rejected first amendment arguments advanced by a television station defendant in connection with certain discovery inquiries made by a public official plaintiff.<sup>104</sup> The defendant sought protection for confidential sources and for its notes, memoranda, videotapes and other records pertaining to the allegedly libelous broadcast. Citing *Branzburg* for the proposition that “the law is entitled to every man’s testimony,” the court compelled full disclosure.<sup>105</sup>

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<sup>102</sup> 621 F.2d at 725. In adopting this approach the court relied upon *Carey v. Hume*, 492 F.2d 631 (D.C. Cir.), *appeal dismissed*, 417 U.S. 938 (1974); *Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973); *Garland v. Torre*, 259 F.2d at 545.

<sup>103</sup> 621 F.2d at 725. *Accord Mize v. McGraw-Hill, Inc.*, 86 F.R.D. 1 (S.D. Tex. 1980). *See also Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583 (1st Cir. 1980) (recognizing a qualified source privilege and adopting a similar three-part test for overcoming the privilege but adding a burden on the defendant to establish a need for preserving the confidence); *Riley v. City of Chester*, 612 F.2d 708 (3d Cir. 1979) (privilege derived from common law, not the Constitution); *Seneary v. Daily Journal-American*, 641 P.2d 1180 (Wash. 1982). *Contra Rancho La Costa v. Penthouse Int'l*, 6 MEDIA L. REP. (BNA) 1249 (Cal. Super. Ct. 1980) (*Herbert v. Lando* “rules out” a source privilege). *See generally Comment, Source Disclosure in Public Figure Defamation Actions: Towards Greater First Amendment Protection*, 33 HASTINGS L.J. 623 (1982).

<sup>104</sup> *Rubera v. Post-Newsweek Stations*, 8 MEDIA L. REP. (BNA) 2293 (Conn. Super. Ct. 1982).

<sup>105</sup> *Id.* at 2295. In a strange passage, the court said: “The individual citizen should and does have much greater rights than government . . . . The people are not restricted by the First Amendment to the United States Constitution—government is.” *Id.* This rationale was used to support the plaintiff’s argument for access to defendant’s information. The judge seemed oblivious to the fact that the tort action was created and enforced by the state, that the discovery rules were written and are enforced by the state, and that by siding with the plaintiff he, as an officer of the state, was putting all the power, authority and prestige of the state behind the plaintiff. Of course, it is true that direct inquiries by

Recognizing a qualified source privilege for news reporters undoubtedly has some value. Journalists, at least, perceive the privilege to be valuable even though they may disagree about the utility of statutory protections.<sup>106</sup> Arguments against an absolute privilege and for limitations on the exercise of a qualified privilege also have merit. The danger is in confusing the narrow purpose served by the confidential source privilege—the protection of a means for the acquisition of information—with the broader purpose of protecting the editorial process in general from discovery.

For the reasons discussed briefly in this essay and at greater length in my earlier article,<sup>107</sup> I believe that the overall *publication* process—from the acquisition of information to its actual publication—is suffused with constitutional interests which should be taken into account whenever there is a state-supported review or inquiry. Some aspects of that process are entitled to, and have traditionally been afforded, extraordinary constitutional protection. For instance, governmental restriction of the content of the actual publication is limited. Likewise, the government can do little to prevent or to regulate the acquisition of information by lawful means (breaking and entering is not protected by the first amendment), although the government itself may refuse to be a source.<sup>108</sup> In other areas, the obligations of citizenship provide some counterweight to the rights of speech and press which may be involved in a particular activity; paying taxes may burden a publisher, but not unconstitutionally if fairly allocated.<sup>109</sup> Simple fairness dictates that similar balancing between

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agencies of government may have the potential for a greater chilling effect than intrusions resulting from discovery in a private tort action. See Lewis, *supra* note 8, at 624.

<sup>106</sup> See Dixon, *The Constitution is Shield Enough for Newsmen*, 60 A.B.A. J. 707 (1974); O'Neil, *Shield Laws: Partial Solution to a Pervasive Problem*, 20 N.Y.L.F. 515 (1975); Paul, *Why a Shield Law?*, 29 U. MIAMI L. REV. 459 (1975).

<sup>107</sup> Hunter, *supra* note 1, at 816-17.

<sup>108</sup> *Houchins v. KQED, Inc.*, 438 U.S. at 1. Cf. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). *But cf.* *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979). See also *Board of Educ., Island Trees Union Free School District No. 26 v. Pico*, 102 S. Ct. 2799 (1982).

<sup>109</sup> Compare *Giragi v. Moore*, 64 P.2d 819 (Ariz. 1937), *appeal dismissed*, 301 U.S. 670 (1937) (state excise tax on gross proceeds from business of publication of newspapers held constitutional) with *Grosjean v. American Press Co.*, 297 U.S. 233 (1936) (state li-



first amendment concerns and those of the plaintiffs are in order in defamation cases. Since the defendant's rights have a constitutional dimension, it is certainly appropriate to weight the scales more heavily in that direction, although there may be arguments about precisely where to place the balance. Within the litigation context, this can often and most simply be handled through the reasonable application of discovery rules which are already in place.

### CONCLUSION

The extreme reaction to the *Lando* case resulted, most likely, from journalists' tendencies to overemphasize the importance of decisions relating to speech and press issues and to magnify the adversarial nature of conflicts with governmental bodies. The reaction certainly is natural. Anyone whose personal or business interests are involved in a lawsuit will tend to view the decision as particularly important. This perception is distorted when the press is involved because its concerns are widely disseminated. Nevertheless, the press probably did overreact to *Lando*, especially since the Court reaffirmed the *New York Times Co. v. Sullivan* test which, despite its inherent ambiguities, has served the press extraordinarily well in defamation cases.

In reviewing the *Lando* decision and the cases decided subsequently, my conclusions remain that *Lando* was correctly decided so long as the *Sullivan* rule is unchanged, and that it was a relatively unimportant decision. It will probably become a minor footnote in the history of the defamation tort. The only real problem it has spawned is that of some confusion about the difference between the newspaper's confidential source privilege and the more generalized assertion of an editorial privilege.

The more critical areas of concern from the perspective of the press which remain after *Lando* are:

- 1) *The public figure/private figure distinction.* The *Gertz* decision created a substantial advantage for the private figure plaintiff, and some plaintiffs of decided notoriety have been

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cense tax only applicable to newspapers having a circulation of more than 20,000 copies per week held unconstitutional).

treated as private figures.<sup>110</sup> Limited use of the “public figure” category will reduce the utility of the *Sullivan* case.

2) *Clarification of the Gertz liability and damage standards.* Does *Gertz* actually do away with per se libel?<sup>111</sup> If *Gertz* limits plaintiffs to actual damages unless the actual malice/reckless disregard test is met, are courts silently allowing the award of punitive damages? Some recent awards have been quite large.<sup>112</sup>

3) *Clarification of the actual malice standard.* How can the test be retained in substance but made more readily understandable? There is something fundamentally confusing about a test which when applied by judges almost always favors defendants and when applied by juries almost always favors plaintiffs. The danger for the press is that revisions may diminish the value of the test as a shield for defamation defendants.

4) *Possibly greater use of the privacy tort.* Since a “private facts” plaintiff<sup>113</sup> need not prove falsity, that cause of action can be a useful supplement to the basic defamation action. The public/private figure distinction also is critical in these cases.

5) *Control of the discovery process.* Large corporate defendants, such as CBS or the *New York Times*, can afford to spend enormous amounts of money on litigation—even to the point of taking discovery disputes to the Supreme Court. For small newspapers, small radio stations and individuals, the costs of litigation can be prohibitive, especially if discovery is wide open. This problem is shared by all kinds of litigants, but it can have a pernicious effect on the first amendment freedoms of less well-off defendants.

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<sup>110</sup> See, e.g., *Time, Inc. v. Firestone*, 424 U.S. at 448. According to Professor Franklin, “General public figures have been few and far between since *Gertz*.” M. FRANKLIN, *supra* note 11, at 165.

<sup>111</sup> *Gertz* prohibits the imposition of “liability without fault.” 418 U.S. at 347.

<sup>112</sup> See Franklin, *supra* note 38, at 805.

<sup>113</sup> For a recent discussion of the privacy tort in an unsuccessful attempt by a shopping center developer to use it as an adjunct to a defamation action, see *Goodrich v. Waterbury Republican-American*, 8 MEDIA L. REP. (BNA) 2329 (Conn. 1982) (also recognizing a common law right of action for invasion of privacy).