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Citation

HUNTER, Howard. Editorial Privilege and the Scope of Discovery in Sullivan Rule Libel Actions. (1979). *Kentucky Law Journal*. 67, 789-822.

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Editorial Privilege and the Scope of Discovery in Sullivan-Rule Libel Actions

BY HOWARD O. HUNTER*

INTRODUCTION

The war in Vietnam was the source of a great deal of social, political, and legal controversy. The impact of that war on our society was significant and substantial, but most students of the experience would probably not have predicted that the war's events would produce a lawsuit¹ that could have a significant effect on the common law tort of defamation. The intriguing saga of Lt. Colonel Anthony Herbert, however, set the stage for the decision of a case that was almost as important to libel litigants as *New York Times Co. v. Sullivan*² and *Gertz v. Robert Welch, Inc.*³

I. THE FACTUAL BACKGROUND

Lt. Colonel Anthony Herbert was a highly decorated Army veteran in 1969 when he took command in Vietnam of the Second Battalion, 173rd Airborne Brigade. Herbert had joined the Army when he was seventeen, had seen a great deal of action in Korea, had been chosen to go on a goodwill tour as an example of one of the Army's finest soldiers, had been an instructor in the Army's prestigious Ranger School, had been qualified as a member of the elite Special Forces ("Green Berets"), and had received almost perfect efficiency reports. His advancement from raw recruit to field grade officer had been extraordinarily rapid. To all outward appearances, it was a surprise when General John Barnes, Commander of the 173rd,

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¹ *Herbert v. Lando*, 99 S. Ct. 1635 (1979).

² 376 U.S. 254 (1964).

³ 418 U.S. 323 (1974).

relieved Herbert of his command on April 4, 1969.⁴ Herbert appealed the decision to Army Headquarters in Saigon, and officers there considered the matter serious enough to conduct a full scale investigation. Upon the completion of the investigation, the decision was affirmed and Colonel Herbert was posted back to the United States.⁵ Following his dismissal from the 173rd Airborne Brigade, Colonel Ross Franklin, Deputy Commander of the 173rd and Herbert's immediate superior, filed a poor efficiency rating on Herbert.⁶ Subsequently, two promotion review boards considered Herbert for promotion to full colonel, and each board passed him over.⁷ After two unsuccessful reviews, he was forced to retire by operation of Army regulations.⁸ This might have all passed as a somewhat surprising conclusion to an apparently successful career had it not been for very serious charges leveled by Colonel Herbert against his superiors.

In September 1970, almost eighteen months after his relief from command, Colonel Herbert filed formal war crime charges with the Criminal Investigation Division of the Army.⁹ He alleged that he had witnessed several atrocities committed by American soldiers or by Vietnamese in the presence of Americans. He later stated that he had attempted to file such charges while he was still in Vietnam but had been unsuccessful in getting anyone to pay any attention to him and to process the allegations. In March, 1971, he expanded his charges to include allegations that Colonel Franklin and General Barnes had been informed by Herbert of the war crimes and atrocities, that they had failed and refused to investigate them, and that they had attempted to cover up his allegations. He further contended that Colonel Franklin and General Barnes relieved him of command not for any dereliction of duty but because they were

⁴ The career history of Col. Herbert is described in Lando, *The Herbert Affair*, 231 THE ATLANTIC MONTHLY 73 (May 1973) [hereinafter cited as *The Herbert Affair*], in petitioner Herbert's brief to the Supreme Court, 99 S. Ct. 1635 (1979) and in Herbert v. Lando, 568 F.2d 974 (2d Cir. 1977).

⁵ See *The Herbert Affair*, *supra* note 4, at 74.

⁶ *Id.*

⁷ *Id.* at 73.

⁸ A.R. 635-120, ch. 11.

⁹ *The Herbert Affair*, *supra* note 4, at 74; Brief for Petitioner at 5, 99 S. Ct. 1635 (1979).

annoyed by his attempts to prod them to conduct an investigation.¹⁰

Herbert's charges soon came to the attention of the American press and were the subject of a good deal of news coverage. The publicity was generally favorable to Herbert and tended to cast him in the role of a hero. The Army did not publicly respond to the charges other than to say that they were under investigation. The story told in the newspapers and over television and radio was essentially the story of Colonel Herbert alone.¹¹

Meanwhile, the Army was conducting its own investigation. The CID issued a report in October, 1971, which completely exonerated both Colonel Franklin and General Barnes from the charges leveled against them by Herbert. The Army's report on the matter did not deny the possibility that war crimes or other atrocities might have occurred, but it did directly refute Colonel Herbert's allegations that he had reported such crimes and that his superiors had failed to investigate them.¹²

Barry Lando, who had interviewed Herbert for the CBS Evening News in the summer of 1971, became interested in doing a follow-up story. He was curious about the Army's report and he was interested in hearing from persons other than Herbert.¹³ By this time, Lando was a producer for the CBS documentary program, *60 Minutes*. He arranged for and conducted a great number of interviews, including ones with the principals, Herbert, Franklin, and Barnes, and did a significant amount of other research. Interviews to be telecast were conducted by Mike Wallace, one of the correspondents for *60 Minutes*. The work of Lando and Wallace became the basis for

¹⁰ *Id.*

¹¹ See *Herbert v. Lando*, 568 F.2d 974, 981-82 (2d Cir. 1977); *The Herbert Affair*, *supra* note 4.

¹² *The Herbert Affair*, *supra* note 4, at 75; Brief for Petitioner at 5, 99 S. Ct. 1635 (1979). At no time during this entire controversy has it been denied that some atrocities probably did take place. The discrepancies have arisen with respect to Herbert's claims about his charges and the alleged failure of his superiors to respond to them. For instance, a particularly gruesome incident allegedly occurred on February 14, 1969, and Herbert said he made an immediate report to Col. Franklin. There was evidence, however, that Franklin was in Hawaii on the 14th. See *The Herbert Affair*, *supra* note 4, at 74, 77-78.

¹³ *Id.* at 75. See also *Herbert v. Lando*, 568 F.2d 974, 981 (2d Cir. 1977).

a segment on *60 Minutes*, entitled *The Selling of Colonel Herbert*, which was broadcast February 4, 1973. The general thrust of the program was that Colonel Herbert had not been telling the whole truth. There may have been war crimes, but there were significant questions of fact as to whether Colonel Herbert had reported them prior to September 1970. In fact, there was some evidence that Herbert might have participated in war crimes himself. Herbert was one of the persons interviewed and he stood by his charges as they had been made. The program also contained some critical discussion of Herbert's book, *Soldier*, which had recently been published.¹⁴ A few months later Barry Lando published an article in *The Atlantic Monthly* which repeated and elaborated on the basic points covered in the *60 Minutes* program.

In response to the *60 Minutes* show and *The Atlantic Monthly* article, Herbert filed a defamation action against Lando, Mike Wallace, CBS, and *The Atlantic Monthly*. He claimed damages for injury to his own reputation and to his book *Soldier* as a literary property.¹⁵

The discovery process began but soon became ensnarled in discovery disputes. During the course of Barry Lando's deposition, his counsel instructed him not to answer questions pertaining to the exercise of editorial judgment by himself and his colleagues at CBS.¹⁶ There were several grounds of objection to

¹⁴ One of the ironies of the *Herbert* litigation is that Herbert's publisher, Holt, Rinehart & Wilson, is a subsidiary of CBS.

¹⁵ See *Herbert v. Lando*, 568 F.2d 974, 982 (2d Cir. 1977).

¹⁶ Quoting from defendants' brief, the district court summarized the areas of dispute as follows:

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

the questions,¹⁷ the most significant being that Lando was constitutionally privileged to refuse to answer questions directed toward the exercise of editorial discretion. The plaintiff's lawyer moved to compel answers to the disputed questions. The trial court granted the motion,¹⁸ but certified the issue for an interlocutory appeal to the Second Circuit,¹⁹ which reversed.²⁰ Herbert then successfully petitioned the United States Supreme Court for certiorari,²¹ and the Supreme Court reversed the decision of the Second Circuit.²²

The issue posed by the *Herbert* case was deceptively simple: Does a journalist in a *Sullivan*-rule libel case²³ have a first amendment right to refuse to answer pre-trial discovery questions directed toward the exercise of judgment in the editorial process?²⁴ The thirteen²⁵ judges who have thus far considered

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). Categories one through five are the ones particularly pertinent to the editorial privilege question. *Id.* at 395.

¹⁷ Lando's objections were premised on first amendment "editorial privilege," and on grounds of relevance, 73 F.R.D. at 395-97.

¹⁸ *Id.* at 387-88.

¹⁹ Unreported order issued February 22, 1977. A copy is attached as Appendix C to Herbert's Petition for Writ of Certiorari to the Supreme Court.

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

²¹ The Court granted certiorari on March 20, 1978, 435 U.S. 922 (1978), and the case was argued October 31, 1978. 99 S. Ct. 1635 (1979).

²² 99 S. Ct. at 1640.

²³ A *Sullivan*-rule libel case is an action in which the plaintiff is a public official or a public figure and must prove "actual malice" in order to recover. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *St. Amant v. Thompson*, 390 U.S. 727 (1968); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Garrison v. Louisiana*, 379 U.S. 64 (1964); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). See generally *Eaton, The American Law of Defamation through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349 (1975); *Hill, Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205 (1976); *Keeton, Defamation and Freedom of the Press*, 54 TEX. L. REV. 1221 (1976); *Robertson, Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 TEX. L. REV. 199 (1976).

²⁴ The Second Circuit defined the problem as follows:

The seemingly narrow issue before us—the scope of protection afforded by the First Amendment to the compelled disclosure of the editorial process—has broad implications. Called upon to decide whether, and to what extent, a public figure bringing a libel action may inquire into a journalist's thoughts, opinions and conclusions in preparing a broadcast, we must address initially the fundamental relationship between the First Amendment guarantee of a free press and the teaching of *New York Times v. Sullivan*. . . . In accommodating both these interests within our constitu-

the issue have written nine separate opinions.²⁶ The plethora of opinions certainly suggests that the question is not as simple as it may seem. The importance of the issue in libel litigation can only be understood in the context of the evidentiary requirements imposed on plaintiffs in *Sullivan*-rule cases.

A public official or a public figure (Herbert is concededly a public figure)²⁷ bringing a libel action must prove that the defendant published a defamatory falsehood with "actual malice."²⁸ The meaning of "actual malice" is different from the common law usage in that the phrase is not defined in terms of personal animus, ill-will, hatred, or contempt.²⁹ Instead, the actual malice standard for libel suits is related to the state of mind of the defendant as to the truth or falsity of the statement complained of, at the time it is published.³⁰ If a plaintiff can

tional scheme, we find that due regard to the First Amendment requires that we afford a privilege to disclosure of a journalist's exercise of editorial control and judgment.

Herbert v. Lando, 568 F.2d 974, 975 (2d Cir. 1977).

²⁵ Nine members of the Supreme Court, three members of the Second Circuit Court of Appeals and one federal district judge.

²⁶ Justice White wrote the majority opinion for the Supreme Court and Justice Powell wrote a concurrence. 99 S. Ct. 1635, 1650. Justice Brennan wrote an opinion dissenting in part. *Id.* at 1651. Justices Stewart and Marshall each wrote dissents. *Id.* at 1661, 1663. Judges Kaufman, Oakes, and Meskill of the Second Circuit all wrote opinions. 568 F.2d 974, 975, 984, 995 (2d Cir. 1977). Judge Haight, the trial judge, also published an opinion. 73 F.R.D. 387 (S.D.N.Y. 1977).

²⁷ See 73 F.R.D. at 391.

²⁸ The actual malice test was applied to public official libel plaintiffs in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). It was extended to "public figures" in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). Plaintiffs who are neither public officials nor public figures have to meet less stringent standards. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). For a time the focus was on the nature of the event giving rise to a publication rather than on the status of the plaintiff. See *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971). As to who is a "public figure," see, e.g., *Hutchinson v. Proxmire*, ___ U.S. ___, 47 U.S.L.W. 4827 (June 26, 1979); *Wolston v. Reader's Digest Ass'n, Inc.*, ___ U.S. ___, 47 U.S.L.W. 4840 (June 26, 1979); *Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Hoffman v. Washington Post Co.*, 433 F. Supp. 600 (D.D.C. 1977), *aff'd*, 578 F.2d 442 (D.C. Cir. 1978); *Forrest v. Lynch*, 347 So.2d 1255 (La. Ct. App. 1977), *cert. denied*, 435 U.S. 971 (1978).

²⁹ *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 251-52 (1974); *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). One commentator has suggested that the Supreme Court was not altogether certain that it was redefining malice. Eaton, *supra* note 23, at 1370 n.91.

³⁰ *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). See also *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971); *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 153-54 (1967); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964).

show that a defendant had actual knowledge at the time of publication that the statement complained of was untrue, he may recover. Absent such a showing, the plaintiff must prove the defendant published a defamatory falsehood with "reckless disregard" for the truth or falsity of the statement.³¹ Courts have repeatedly held that "reckless disregard" implies much more than negligence.³² The publisher must have entertained serious doubts as to the truth of the statement at the time of publication.³³

Proof problems for the plaintiff in trying to meet the actual malice test are compounded because the courts require actual malice to be established not merely by a preponderance of the evidence, but by clear and convincing proof.³⁴ Some courts have held that the clear and convincing evidence standard must be applied even at the summary judgment level.³⁵ Thus, if a libel defendant moves for summary judgment, he is entitled to prevail unless the plaintiff shows by clear and convincing evidence that actual malice exists. This is a significantly stricter standard than normally applied in summary judgment

³¹ *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

³² In *St. Amant v. Thompson*, 390 U.S. 727-31 (1968), the Court said: [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.

See also *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264 (1974); *Greenbelt Coop. Publishing Ass'n v. Bresler*, 398 U.S. 6 (1970); *Reliance Insurance Co. v. Barron's*, 442 F. Supp. 1341 (S.D.N.Y. 1977); *Dickey v. CBS, Inc.*, 441 F. Supp. 1133 (E.D.Pa. 1977).

³³ See, e.g., *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Kidder v. Anderson*, 354 So.2d 1306 (La. 1978).

³⁴ See, e.g., *Edwards v. National Audubon Soc'y, Inc.*, 556 F.2d 113 (2d Cir.), cert. denied, 434 U.S. 1002 (1977); *Dickey v. CBS, Inc.*, 441 F. Supp. 1133 (E.D. Pa. 1977) *aff'd* 4 Media L. Rptr. (3rd Cir. 1978); *Hoffman v. Washington Post Co.*, 433 F. Supp. 600 (D.D.C. 1977) *aff'd* 578 F.2d 442 (D.C. Cir. 1978); *Wolston v. Reader's Digest Ass'n, Inc.*, 429 F. Supp. 167 (D.D.C. 1977) *aff'd*, 578 F.2d 427 (D.C. Cir. 1978); *Nader v. DeToledano*, 3 Media L. Rptr. 1233 (D.C. Super. Ct. 1977); *Keeton, supra* note 23, at 1228; *Eaton, supra* note 23, at 1374.

³⁵ *Wolston v. Reader's Digest Ass'n, Inc.*, 429 F. Supp. 167, 179 (D.D.C. 1977); *Nader v. DeToledano*, 3 Media L. Rptr. 1233, 1234 (D.C. Super. Ct. 1977); Note, *Public Official and Actual Malice Standards: The Evolution of New York Times v. Sullivan*, 56 IOWA L. REV. 393, 401-02 (1970).

proceedings.³⁶ The imposition of this strict burden of proof on the plaintiff has been justified as necessary to protect robust debate on public issues and to avoid a chilling effect on the press and other persons engaged in the discussion of issues of public interest.³⁷ Whatever the justifications, there is no doubt the libel plaintiff in a *Sullivan*-rule case has a tremendous burden of proof.³⁸

The plaintiff's position in *Herbert* was that direct testimony from the defendants was necessary for the determination of the subjective state of mind of the publishers (Wallace, Lando, and their respective employers), as to the truth or falsity of the statements published.³⁹ Herbert argued that selective editing was done by Lando and Wallace to cause both the television show and the article to portray him as a liar.⁴⁰ He also contended that his own interview was edited so that questions and answers were taken out of context.⁴¹ Herbert alleged that the purpose of the program was to "get Herbert."⁴² He argued that decisions about what to include in the program, what order to show the material, what methods to use in interviewing, and the publisher's own motives were all relevant to the question of actual malice.⁴³

The defendants argued that there was a constitutional privilege protecting the editorial process from intrusions by

³⁶ See generally 6 MOORE'S FEDERAL PRACTICE ¶ 56.15 (2d ed. 1976).

³⁷ Note, *supra* note 35, at 401. See also T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970).

³⁸ At least one court has suggested that in addition to all other hurdles, the plaintiff must convince the judge and the jury of actual malice. Thus a jury finding of actual malice based on the evidence adduced at trial would not be enough for a plaintiff to prevail. The judge must make a separate determination as a matter of law whether the evidence supports a finding of actual malice. *Wasserman v. Time, Inc.*, 424 F.2d 920, 922-23 (D.C. Cir. 1970) (Wright, J., concurring), *cert. denied*, 398 U.S. 940 (1970). The Ninth Circuit has expressly rejected this approach. *Alioto v. Cowles Communications, Inc.*, 519 F.2d 777, 780 (9th Cir. 1975), *cert. denied*, 423 U.S. 940 (1975).

³⁹ Brief for Petitioner at 9-19, 99 S. Ct. 1635 (1979).

⁴⁰ See, e.g., Herbert's complaint ¶¶ 26, 27, 28, 29.

⁴¹ See, e.g., Herbert's complaint ¶¶ 26, 27, 28. Apparently it is a serious breach of journalistic ethics to cut and splice so as to broadcast an answer to question "X" as if it were a response to question "Y". See *Widener v. Pacific Gas & Electric Co.* 142 Cal. Rptr. 304, 311 (1977).

⁴² See, e.g., Herbert's complaint ¶ 26(e).

⁴³ Brief for Petitioner at 9-17, Petitioner's Reply Brief at 26, 99 S. Ct. 1635 (1979).

third parties.⁴⁴ They contended that malice could be proven by circumstantial evidence without direct inquiry into the editorial process.⁴⁵ Such an inquiry, they argued, would have a chilling effect on the free exchange of ideas and would tend to make editors overly cautious in their exercise of discretion. This would be an unconstitutional interference with open debate, free comment, and freedom of the press.⁴⁶

II. THE DECISIONS

A. *The Second Circuit Opinion*

By a vote of 2-1, the Second Circuit decided that Barry Lando did have a privilege to refuse to answer questions inquiring into the editorial process, and thereby reversed the trial court's order compelling answers to the questions in dispute.⁴⁷ The two judges forming the majority were in general agreement on basic principles, but they filed separate opinions and their rationales differed in significant ways.

Chief Judge Kaufman used the following argument to reach the conclusion that Lando was protected by an editorial privilege: (1) The Constitution protects the acquisition and dissemination of information;⁴⁸ (2) The editorial process must be safeguarded because the human judgment as to what information should be acquired and disseminated is inextricably related to these two constitutionally protected functions;⁴⁹ (3) Inquiries into the editorial process may restrain full and candid discussions and thereby unconstitutionally restrict debate and the dissemination of news.⁵⁰ In Judge Kaufman's view, discov-

⁴⁴ Brief for Respondent at 26-57, 99 S. Ct. 1635 (1979).

⁴⁵ *Id.* at 63-66.

⁴⁶ *Id.* at 29-57.

⁴⁷ *Herbert v. Lando*, 568 F.2d 974, (2d Cir. 1977).

⁴⁸ 568 F.2d at 976-78. Judge Kaufman was not on solid ground with respect to the acquisition of information. Dissemination is certainly protected even if the means of acquisition are questionable. *See, e.g., Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978). No case, however, has held that there is a constitutional right of acquisition. Indeed, some decisions have clearly limited acquisition. *See, e.g., Houchins v. KQED, Inc.*, 438 U.S. 1 (1978); *Pell v. Procunier*, 417 U.S. 817 (1974); *Zemel v. Rusk*, 381 U.S. 1 (1965).

⁴⁹ 568 F.2d 978-79.

⁵⁰ *Id.* at 980. The fear is that editors and reporters would not be frank and would tend to be overly cautious if they knew that their comments and decisions might be subjected to later judicial review.

ery procedures should be carefully limited to allow only those which "least conflict with the principle that debate on public issues should be robust and uninhibited."⁵¹ He was also of the opinion that the malice issue might be determined from circumstantial evidence,⁵² in which case there would be no compelling need for direct inquiry into the editorial process.

Judge Oakes concurred with the conclusion and the general approach of Judge Kaufman,⁵³ but he explicitly based his opinion on the idea of a "structural" protection for the press derived from the free press clause of the first amendment.⁵⁴ He concluded that a court order requiring Lando to answer questions would be a government-sponsored interference with the press function.⁵⁵ As such, it could only be justified in the most extreme circumstances. In the context of *Herbert*, Judge Oakes believed that such an order could lead to self-censorship in the editorial process and could be as damaging to the dissemination function as a prior restraint.⁵⁶

Judge Oakes also relied on certain cases dealing with the asserted right of reporters to maintain the confidentiality of sources.⁵⁷ Although no court has gone so far as to say there exists an absolute privilege to refuse to identify sources,⁵⁸ there have been a number of cases in which courts have recognized a qualified privilege to protect the identity of confidential sources.⁵⁹ The courts generally consider two factors in deciding

⁵¹ *Id.*

⁵² *Id.* at 984.

⁵³ *Id.* at 984.

⁵⁴ *Id.* at 988.

⁵⁵ *Id.* at 990.

⁵⁶ *Id.* at 990-95. Prior restraints on publications can be justified only in limited and extreme circumstances. *See, e.g.,* *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Near v. Minnesota*, 283 U.S. 697 (1931).

⁵⁷ *See, e.g.,* *Branzburg v. Hayes*, 408 U.S. 665 (1972); *Baker v. F. & F. Investment*, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); *Loadholtz v. Fields*, 389 F. Supp. 1299 (M.D. Fla. 1975).

⁵⁸ Earl Caldwell, a reporter for the *New York Times*, argued that he should not even have to appear in response to a grand jury subpoena. This argument was rejected by the trial court, which did recognize a qualified testimonial privilege. Application of Caldwell, 311 F. Supp. 358 (N.D. Cal. 1970). The Ninth Circuit's reversal of the trial court in *Caldwell v. United States*, 434 F.2d 1081 (9th Cir. 1970), was subsequently reversed by the Supreme Court in *Branzburg v. Hayes*, 408 U.S. 665 (1972).

⁵⁹ *See, e.g.,* *Apicella v. McNeil Laboratories, Inc.*, 66 F.R.D. 78 (E.D.N.Y. 1975); *Loadholtz v. Fields*, 389 F. Supp. 1299 (M.D. Fla. 1975); *Democratic Nat'l Comm. v.*

whether reporters should be allowed to refuse to name their sources: (1) the importance of the information requested; and (2) the availability of the information from other sources.⁶⁰

Both Chief Judge Kaufman and Judge Oakes relied on *Miami Herald Publishing Co. v. Tornillo*⁶¹ and *CBS v. Democratic National Committee*,⁶² two cases in which the Supreme Court made it clear that the government cannot directly interfere with the basic editorial decision about what to publish and what not to publish. Both *Tornillo* and *CBS* involved direct attempts to require the publication of certain material. In *Tornillo*, the Court invalidated a Florida right to reply statute.⁶³ The Court held in *CBS* that the government was prohibited by the first amendment from requiring television licensees to accept paid political advertisements.⁶⁴

Judge Haight, the trial judge who ordered Lando to answer the questions in the controversy, focused primarily on the heavy burden placed on the libel plaintiff and decided to follow the usual approach of applying discovery rules liberally.⁶⁵ Moreover, he believed that direct testimony about the editorial judgments of the defendants was particularly relevant to a determination of their states of mind as to the truth or falsity of the statements when published,⁶⁶ even if requiring such testimony might interfere with the editorial process.

Judge Meskill, of the Second Circuit, dissented from the majority result and basically followed the trial court's line of reasoning. He elaborated on Judge Haight's rationale by argu-

McCord, 356 F. Supp. 1394 (D.D.C. 1973); *Morgan v. State*, 336 So.2d 691 (Fla. 1975); *Laughlin v. State*, 323 So.2d 691 (Fla. 1975).

⁶⁰ See, e.g., *Silkwood v. The Kerr-McGee Corp.*, 563 F.2d 443 (10th Cir. 1977); *Gulliver's Periodicals, Ltd. v. Chas. Levy Circulating Co.*, 455 F. Supp. 1197 (E.D. Ill. 1978); *Altomose Constr. Co. v. Bldg. and Constr. Trades Council*, 443 F. Supp. 492 (E.D.Pa. 1977); *State v. Stoney*, No. 74-227, (11th Cir. Ct. Fla. 1974).

⁶¹ 418 U.S. 241 (1974).

⁶² 412 U.S. 94 (1973).

⁶³ See 418 U.S. at 256-58.

⁶⁴ 412 U.S. at 126-32.

⁶⁵ *Herbert v. Lando*, 73 F.R.D. 387, 394 (S.D.N.Y. 1977).

⁶⁶ Where, as here, the defendant's state of mind is of central importance to a proper resolution of the merits, it is obvious that these lines of inquiry may lead, directly or indirectly, to admissible evidence. . . . The publisher's opinions and conclusions with respect to veracity, reliability, and the preference of one source of information over another are clearly relevant.

Id. at 395.

ing that a libel suit is specifically intended to explore the subjective state of mind of a publisher and, therefore, questions such as those posed to Lando are central to proof of the plaintiff's case.⁶⁷ He admitted that such inquiries might have a chilling effect on the exercise of editorial discretion, but, he argued, the very purpose of a libel action is to chill the publication of defamations.⁶⁸ He did not believe that allowing discovery of an editor's state of mind would have any appreciably greater chilling effect on the dissemination of news and information than allowing libel suits in the first place.⁶⁹ He specifically rejected Judge Oakes' argument that the press is protected as an institution by the Constitution. He stated two reasons: (1) There is little, if any, case law precedent for the proposition;⁷⁰ and (2) It would be dangerous to set such a precedent because the institutional rights afforded to certain business firms engaged in journalistic activities might be greater than personal individual rights otherwise protected by the Constitution or the common law.⁷¹ Finally, Judge Meskill argued that *Tornillo* and *CBS* only afford journalists editorial protection from governmental attempts to control the subject matter of publications; therefore, such cases simply do not support the argument that a *Sullivan*-rule libel plaintiff cannot discover the basis for certain editorial decisions.⁷²

B. *The Supreme Court Decision*

Judge Meskill's opinion presaged the Supreme Court's decision in the *Herbert* case. By a margin of 6-3,⁷³ the Court reversed the decision of the Court of Appeals and rejected the arguments in support of the recognition of an editorial privilege in libel suits. Justice White, who wrote the Court's opinion, reasoned that the *New York Times* standard of actual malice necessitates inquiries directed toward establishing the pub-

⁶⁷ *Herbert v. Lando*, 568 F.2d 974, 995-96 (2d Cir. 1977) (Meskill, J., dissenting).

⁶⁸ *Id.* at 995.

⁶⁹ *Id.* at 995-97.

⁷⁰ *Id.* at 996-97.

⁷¹ *Id.* at 997.

⁷² *Id.*

⁷³ The majority was comprised of Chief Justice Burger and Justices White, Blackmun, Powell, Rehnquist, and Stevens. Justices Brennan, Stewart, and Marshall dissented.

lisher's subjective state of mind.⁷⁴ Further, he noted that evidence regarding the editorial process had been proffered and admitted on behalf of both defendants and plaintiffs in many libel actions, both before and after *New York Times*.⁷⁵ He agreed with Judge Meskill that *Tornillo* and *CBS* were inapposite,⁷⁶ and he was concerned that the recognition of the asserted privilege would create almost insurmountable problems of defining its parameters.⁷⁷ Finally, he argued that the rules of procedure grant to trial judges sufficient authority to prevent abuses by limiting inquiries into the editorial process to those which are clearly relevant.⁷⁸ Justice Powell concurred in the Court's opinion and judgment but added a short opinion to emphasize that a trial court should take first amendment considerations into account in ruling upon discovery disputes, especially in deciding upon the relevance of specific inquiries.⁷⁹

Justice Brennan, who dissented in part, argued for the recognition of a qualified editorial privilege that could be overcome if a *Sullivan*-rule plaintiff were able to make a prima facie showing of defamatory falsehood.⁸⁰

Justice Stewart dissented because he did not believe that the Supreme Court or the Court of Appeals had addressed the central question of whether the inquiries were relevant. In his opinion, questions concerning the editorial process were simply not relevant in *Sullivan*-rule cases:

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,

⁷⁴ . . . *New York Times* and its progeny made it essential to proving liability that plaintiffs focus on the conduct and state of mind of the defendant Inevitably, unless liability is to be completely foreclosed, the thought and editorial processes of the alleged defamer would be open to examination.

⁷⁵ 99 S. Ct. 1635, 1641.

⁷⁶ *Id.* at 1641-43, nn.6, 7, 8, 10, 12, 15.

⁷⁷ *Id.* at 1644-45.

⁷⁸ *Id.* at 1646. In addition, Justice White noted that evidentiary privileges were generally disfavored. *Id.* at 1648.

⁷⁹ *Id.* at 1649.

⁸⁰ *Id.* at 1650-51 (Powell, J., concurring).

⁸¹ *Id.* at 1651 (Brennan, J., dissenting in part).

not at all upon his motivation in publishing it—not at all, in other words, upon actual malice as those words are ordinarily understood.⁸¹

Justice Marshall argued for the recognition of an absolute privilege, but one which was considerably narrower in scope than that recognized by the Second Circuit. He agreed that individual “state of mind” inquiries were almost mandated by the actual malice standard in *Sullivan*-rule cases, but he thought that editorial discussions and processes themselves should be protected from detailed examinations allowed by liberal use of the discovery rules.⁸²

Several general observations can be made about the Court’s opinion and its possible ramifications: (1) The refusal to recognize an editorial privilege was consistent with existing case law and that refusal is itself unlikely to have any significant impact on libel defendants unless the Court has subtly changed the actual malice standard; (2) The Court rejected again an opportunity to accord special institutional privileges to the news media under the free press clause; (3) The Court, nevertheless, did not adequately consider the constitutional implications of the kind of discovery processes in dispute in the *Herbert* litigation. The following discussion elaborates upon these general observations and suggests an alternate model for the protection of the editorial process during discovery proceedings in libel cases.

III. PROOF OF ACTUAL MALICE AFTER *Herbert*

The defendants in *Herbert* took a position that can be charitably described as extreme. The burden of proving actual malice is so great that *Sullivan*-rule plaintiffs almost invariably lose.⁸³ Indeed, few public official/public figure plaintiffs survive a summary judgment motion.⁸⁴ The recognition of a

⁸¹ *Id.* at 1661 (Stewart, J., dissenting).

⁸² *Id.* at 1663-66 (Marshall, J., dissenting).

⁸³ See Eaton, *supra* note 23, at 1375.

⁸⁴ *Id.*; Frakt, *The Evolving Law of Defamation: New York Times Co. v. Sullivan to Gertz v. Robert Welch, Inc. and Beyond*, 6 RUT.-CAM. L. REV. 471, 478-79 (1975). Summary judgment is the preferred method for disposing of libel suits. See, e.g., Hutchinson v. Proxmire, 579 F.2d 1027 (7th Cir. 1978); Bon Air Hotel v. Time, Inc., 426 F.2d 858 (5th Cir. 1970); Martin Marietta Corp. v. Evening Star Newspaper Co.,

new and uncharted editorial privilege immunizing defendants from discovery in certain significant areas could effectively eliminate many such libel actions. Perhaps the first amendment demands the elimination of public official/public figure defamation actions; some respected authorities have so argued.⁸⁵ But, if such actions are to be eliminated, they should be ended forthrightly and for reasons of adequately justified substantive law. They should not be eliminated in fact or in law by the imposition of discovery restraints which make the proof of actual malice unjustifiably difficult. The defendants did not argue for any change in the substantive law of libel. They sought, instead, a special evidentiary privilege that would foreclose major areas from investigation and would thereby remove from the case evidence that could be central to the issues.

In a proper case malice may be proven with evidence extrinsic to the editorial process. Certainly in *Herbert*, the plaintiff does have alternative sources of information which he may tap when the case begins again at the trial level. The plaintiff could begin with the telecast and the article in question and could interrogate every person mentioned or quoted. From those depositions or interviews he could learn the nature of the inquiries made by the defendants and could compare the responses of those persons to the attributions appearing in the article or on the telecast. The plaintiff could also question any other persons who might have knowledge of the factual background of the controversy. In this particular case, Colonel Herbert should not have much difficulty in identifying witnesses, although that could be a problem for some *Sullivan*-rule plaintiffs. Upon proper request, the defendants should also produce copies of unedited tapes or transcripts of interviews.⁸⁶ From such sources, and from his own knowledge, Herbert and his

417 F. Supp. 947 (D.D.C. 1976); *Stern v. Time, Inc.*, 324 F. Supp. 1201 (W.D. Pa. 1971).

⁸⁵ See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 355-60 (1974) (Douglas, J., dissenting); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 57 (1971) (Black, J., concurring); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 170-72 (1967) (Black, J., concurring and dissenting); *New York Times Co. v. Sullivan*, 376 U.S. 254, 293 (1964) (Black, J., concurring).

⁸⁶ Objections might be raised if the tapes included confidential information or the names of persons who did not want to be identified.

lawyers could prepare an overall history which could be compared with the final product. This task would no doubt be burdensome, but a comparison of available data with published data could go a long way toward establishing the plaintiff's case.⁸⁷

Nevertheless, the actual malice test is stiff, and in some cases more than circumstantial evidence may be necessary. A comparison of available data with published information may support a prima facie case of negligence, even gross negligence, but may be insufficient to show malice.⁸⁸ Assume, for instance, that Lando interviewed Smith and Jones, who were favorable to Herbert, but neither Smith nor Jones was mentioned on *60 Minutes* or in the *Atlantic* article. Assume further that Lando did not interview Jackson or Thompson, both of whom support Herbert's version of the facts. Herbert could prove the foregoing by deposing Smith, Jones, Jackson, and Thompson and by introducing their testimony together with the article and the telecast. That evidence could support a case for negligence or even indifference to truth, but may not be "clear and convincing proof of reckless disregard for the truth"⁸⁹ because it must be shown that the publisher entertained a serious doubt *himself* as to truth at the time of publication.⁹⁰

⁸⁷ Although the failure to follow leads and contact available sources is not usually enough by itself to prove malice, such evidence is admissible and relevant. *See, e.g., Stevens v. Sun Publishing Co.*, 240 S.E.2d 812 (S.C. 1978), *cert. denied*, 436 U.S. 945 (1978); *Widener v. Pacific Gas & Electric Corp.*, 142 Cal. Rptr. 304 (Ct. App. 1977), *cert. denied*, 436 U.S. 918 (1978); *Akins v. Altus Newspapers 3 Media L. Rptr.* 1449 (Okla. 1977). In some cases, circumstantial evidence of this sort may be enough to prove malice. *See, e.g., Cochran v. Indianapolis Newspaper, Inc.*, 372 N.E.2d 1211 (Ind. Ct. App. 1978); *Weaver v. Pryor Jeffersonian*, 569 P.2d 967 (Okla. 1977); *Sprouse v. Clay Communications, Inc.*, 211 S.E.2d 674, (W.Va.), *cert. denied*, 423 U.S. 882 (1975).

⁸⁸ *See, e.g., Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1967); *Reliance Ins. Co. v. Barron's*, 442 F. Supp. 1341, 1349, 1351 (S.D.N.Y. 1977), *Chapadeau v. Utica Observer-Dispatch, Inc.*, 341 N.E.2d 569 (N.Y. Ct. App. 1975).

⁸⁹ *New York Times Co. v. Sullivan*, 376 U.S. 254, 285-86 (1964).

⁹⁰ *See, e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974); *Stone v. Essex County Newspaper, Inc.*, 330 N.E.2d 161, 173-75 (Mass. 1975); *RESTATEMENT (SECOND) OF TORTS*, 23 (Tent. Draft No. 21, 1975).

In at least one case, however, the cumulative effect of essentially circumstantial evidence was enough to support a finding of malice. *Alioto v. Cowles Communications, Inc.*, 430 F. Supp. 1363 (N.D. Cal. 1977). For earlier history of this litigation, see 519 F.2d 777 (9th Cir.), *cert. denied*, 423 U.S. 930 (1975). *But cf. Dickey v. CBS, Inc.*, 441

Whether malice may or may not be provable with extrinsic evidence, evidence as to the publisher's state of mind, the procedures followed in researching and editing a story, editorial policy, and the publisher's attitude toward the plaintiff have been introduced to prove or disprove actual malice in a variety of cases.⁹¹ In *Curtis Publishing Co. v. Butts*,⁹² for instance, there was evidence that the *Saturday Evening Post* had recently changed its editorial policy to one of "sophisticated muckraking,"⁹³ and that at the time of publication it was engaged in litigation with one of the principal figures in the disputed article.⁹⁴ There was also evidence that the *Post* assigned a staff writer to the story who was unfamiliar with the subject and that the *Post* conducted virtually no independent investigation, although it was not operating under any tight deadline.⁹⁵

The plaintiff in *Weaver v. Pryor Jeffersonian*,⁹⁶ a 1977 decision of the Oklahoma Supreme Court, successfully opposed a motion for summary judgment on the basis of proof which included evidence of a strained relationship between plaintiff and publisher as well as sloppy editorial procedures.⁹⁷ The de-

F. Supp. 1133 (E.D. Pa. 1977) (failure to investigate, plus apparent indifference as to truth was insufficient to show malice).

⁹¹ This fact was noted and cited in support of the Supreme Court's majority opinion. 99 S. Ct. 1635, 1643.

⁹² 388 U.S. 130 (1967).

⁹³ *Id.* at 158.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ 569 P.2d 967 (Okla. 1977).

⁹⁷ The plaintiff was involved in a hotly contested run-off election for sheriff. The newspaper defendant printed a letter to the editor accusing plaintiff of misdeeds and criminal acts during a previous term as sheriff. There was no attempt to verify the allegations. The court said the fact of a strained relationship "taken together with the content of the publications, the time of their publication with regard to the election, the fact that appellee [was related by marriage to plaintiff's opponent] and the total failure of appellees to make any inquiry into the truth of the inherently improbable statements" was enough to preclude the grant of defendant's summary judgment motion. *Id.* at 974. *But cf.* *Guthrie v. Annabel*, 365 N.E.2d 1367 (Ill. Ct. App. 1977) (summary judgment for defendant, owner and publisher of a newspaper, for printing his own letter inaccurately accusing plaintiff, a political candidate, of grand theft). *See also* *Edwards v. Nat'l Audubon Soc'y, Inc.* 556 F.2d 113 (2d Cir. 1977), *cert. denied sub nom.* *Edwards v. New York Times Co.*, 434 U.S. 1002 (1977); *Krauss v. Champaign News Gazette*, 375 N.E.2d 1362 (Ill. Ct. App. 1978); *Orr v. Lynch*, 401 N.Y.S.2d 897 (App. Div. 1978); *Dudley v. Farmer's Branch Daily Times*, 550 S.W.2d 99 (Tex. Civ. App. 1977); *O'Brian v. Franich*, 575 P.2d 258 (Wash. Ct. App. 1978).

fendant prevailed in *Reliance Insurance Company v. Barron's*,⁹⁸ but the court considered evidence detailing the editorial procedures involved in the publication of the questioned article.⁹⁹ Editorial policy and editorial procedures formed the core of plaintiff's successful action in *Sprouse v. Clay Communications, Inc.*,¹⁰⁰ a 1977 decision of the West Virginia Supreme Court which the United States Supreme Court refused to review. In a number of other cases precisely the kind of evidence which Lando claimed to be constitutionally privileged has been presented by both sides.¹⁰¹

In fact, the defendants themselves seemed to admit the relevance of inquiries into the editorial process and the publisher's "state of mind" in the *Herbert* case. The answers of Mike Wallace, CBS, and Barry Lando all contained affirmative defenses asserting that the television program and the *Atlantic* article were based on information from reliable sources, that they were "fair and accurate," that the publishers believed them to be accurate, and that they were published "in good faith without malice."¹⁰² Such assertions, on their face,

⁹⁸ 442 F. Supp. 1341 (S.D.N.Y. 1977).

⁹⁹ *Id.* at 1344-46.

¹⁰⁰ 211 S.E.2d 674 (W.Va.), *cert. denied*, 423 U.S. 882 (1975). For a sharp criticism of *Sprouse*, see Anderson, *A Response to Professor Robertson: The Issue Is Control of Press Power*, 54 *Tex. L. Rev.* 271 (1976).

¹⁰¹ See, e.g., *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968); *Associated Press v. Walker*, 388 U.S. 130 (1967); *Dixson v. Newsweek, Inc.*, 562 F.2d 626 (10th Cir. 1977); *Lake Havasu Estates, Inc. v. Reader's Digest Ass'n Inc.*, 441 F. Supp. 489 (S.D.N.Y. 1977); *Ryder v. Time, Inc.*, 3 *Media L. Rptr.* 1170 (D.D.C. 1977); *Widener v. Pacific Gas and Electric Co.*, 142 *Cal. Rptr.* 304 (Ct. App. 1977). See the evidence suggested as relevant in *Goldwater v. Ginzburg*, 261 F. Supp. 284 (S.D.N.Y. 1966).

¹⁰² The Answer of Mike Wallace and CBS included as an affirmative defense the following:

The matter complained of was based on information communicated to defendants by reliable persons and from reliable sources and was believed by defendants to be true and a fair and accurate report of public and official proceedings. Said matter was published by defendants in good faith, without malice.

Answer of Defendants Mike Wallace and Columbia Broadcasting System, Third Defense, ¶ 25. Barry Lando's answer contained the following affirmative defense:

The publications charged to be defamatory were based on information communicated to defendant Lando by reliable persons and from reliable sources and were believed by defendant to be true and a fair and accurate report regarding the course and conduct of public and official proceedings, published by defendant Lando in good faith without malice, and said publica-

seem to set forth a subjective state of mind defense which, one presumes, might be proven by way of direct evidence. An affirmative defense of this sort, arguably, amounts to a waiver of objections to inquiry into matters relevant to the defense.¹⁰³ The recognition of an editorial privilege might have been of little practical utility or benefit so long as defendants asserted similar defenses to those of Lando and his colleagues. Certainly most courts would take a jaundiced view of an argument that plaintiff could not ask about "X" because of a privilege but that defendant could use "X" freely in his defense.¹⁰⁴

So long as a public official or a public figure plaintiff must prove actual malice as defined in *New York Times v. Sullivan*, evidence concerning the process by which the article was published and the publisher's state of mind as to truth or falsity will be relevant and should generally be subject to the discovery process. Justice Stewart argued strongly that such evidence was not relevant:

As I understand the constitutional rule of *New York Times v. Sullivan*, . . . inquiry into the broad "editorial process" is simply not relevant in a libel suit brought by a public figure against a publisher. . . . The gravamen of such a lawsuit

tions are therefore privileged.

Answer of Barry Lando, Third Defense, ¶ 36.

¹⁰³ Professor Moore has considered the question in an analogous context: Thus assume that plaintiff sues on the alleged slanderous statement that defendant had called him a Communist; the defendant pleads truth as an affirmative defense; and on the taking of the plaintiff's deposition plaintiff pleads his privilege against incrimination to a properly framed and relevant question as to plaintiff being a Communist. Does not fairness demand that defendant's affirmative defense be taken as true for the purpose of the action?

4 MOORE'S FEDERAL PRACTICE ¶ 26.60[6] at 26-252 (2d ed. 1976). Professor Moore answered his rhetorical question in the affirmative and cited as support *Independent Productions Corp. v. Loew's, Inc.*, 22 F.R.D. 266 (S.D.N.Y. 1958), where a private antitrust plaintiff was not allowed to assert a fifth amendment testimonial privilege because, the court reasoned, he had waived that privilege by bringing the suit.

¹⁰⁴ Indeed, it can become dangerous to carry such an argument too far. During pre-trial discovery proceedings in an Idaho libel case, a newspaper defendant refused to identify some of its sources for the article in controversy and asserted the reporter's privilege. Some sources were identified, but the trial court ruled that the refusal to testify was evidence of malice, struck the newspaper's defenses, and entered a default judgment for almost \$2,000,000. *Sierra Life Ins. Co. v. Magic Valley Newspapers*, 4 Media L. Rptr. 1689 (Idaho 1978).

concerns that which was in fact published. What was *not* published has nothing to do with the case.¹⁰⁵

Justice Stewart was simply wrong. If what was not published contradicts what *was* published, and the publisher had knowledge of or ready access to the contradictory material, such evidence would be directly probative of actual malice or reckless disregard.

Nevertheless, Justice Stewart's dissenting opinion did make one very important point. The term "actual malice" is very confusing because it has a different meaning in a libel action from its meaning at common law.¹⁰⁶ Questions which are aimed at showing hostility toward the plaintiff on the part of the publisher are *not* relevant to proof of the defendant's state of mind as to the truth or falsity of the publication. Great care must be taken, therefore, to insure that discovery directed toward the editorial process and the publisher's state of mind remains within the parameters of actual malice as defined in *New York Times v. Sullivan*.¹⁰⁷ It is not altogether clear that Justice White was as careful as he should have been in making this distinction in *Herbert*. For instance, Justice White stated that, "it is evident that the courts across the country have long been accepting evidence going to the editorial processes of the media without encountering constitutional objections."¹⁰⁸ In support of this statement he included a footnote citing a large number of cases,¹⁰⁹ but every one of the cases cited antedated *New York Times v. Sullivan*. Prior to *Sullivan*, libel cases were decided by distinctly different standards. Whether or not pre-*Sullivan* cases accepted evidence such as that at issue in

¹⁰⁵ 99 S. Ct. 1661 (Stewart, J., dissenting).

¹⁰⁶ *Id.*

¹⁰⁷ Justice Stewart stated:

. . . "Malice" 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.

99 S. Ct. 1661 (Stewart, J., dissenting).

¹⁰⁸ *Id.* at 1643.

¹⁰⁹ *Id.*, n. 15.

Herbert would seem to be irrelevant unless there were some close connection between the tests of liability employed before and after *Sullivan*. One is left with the somewhat uncomfortable feeling that the current Supreme Court's understanding of the *Sullivan* rule may be different from that of the Warren Court. If that be so, then Justice Stewart's concerns are justified. The "actual malice" standard of *Sullivan* may be far from perfect. It certainly seems to mandate inquiries into editorial matters that at least the defendants in *Herbert* found to be intrusive. The test has, however, provided a strong shield to publishers from libel suits. If the test is to be changed, even subtly, to something more akin to common law malice, then much more intrusive questioning might be countenanced and publishers could be put in the position of trying to defend their beliefs and opinions, not just the veracity of their reporting.

IV. MEDIA AND NON-MEDIA LIBEL DEFENDANTS— THE PROBLEM OF DIFFERENT TREATMENT

The Supreme Court in *Gertz v. Robert Welch, Inc.*¹¹⁰ made several references to journalist defendants.¹¹¹ These references created the impression that *Gertz* might be read as indicating a judicial tendency to treat press defendants differently from non-press defendants in libel actions. This implication, combined with the developing idea of a separate institutional protection for journalists derived from the free press clause of the first amendment rather than from the free speech clause,¹¹² gave Judge Oakes of the Second Circuit the basis for his decision to recognize an editorial privilege.¹¹³ Although Judge Kaufman did not go so far as to adopt the rationale of Judge Oakes, the result of the Second Circuit's opinion was, in effect, to create a separate protection for press defendants not available

¹¹⁰ 418 U.S. 323 (1974).

¹¹¹ *Id.* at 325, 347, 350.

¹¹² See, Bezanson, *The New Free Press Guarantee*, 63 VA. L. REV. 731 (1977); 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). But see L. LEVY, *LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY* (1960); Lange, *The Speech and Press Clauses*, 23 U.C.L.A. L. REV. 77 (1975).

¹¹³ *Herbert v. Lando*, 568 F.2d 974, 986-91 (2d Cir. 1977) (Oakes, J., concurring).

to non-press defendants. An individual defendant simply does not have "editorial privilege" to protect.

Basing the creation of a privilege on a separate institutional protection for the press is unwise and without sound precedent. First, the determination of who is entitled to assert a press privilege may often be difficult.¹¹⁴ More importantly, the focus in *Sullivan*-rule cases has been on the protection of the free flow of communications rather than on the protection of specified categories of defendants.¹¹⁵ The press is certainly one important means of communication, but it is not the only one. Individuals and other non-media defendants obviously may have comments to make from time to time about public officials and public figures which are just as deserving of protection as are news articles. Furthermore, a number of significant libel cases have involved individual defendants. Four of the defendants in *Sullivan* were individuals.¹¹⁶ Both *St. Amant*

¹¹⁴ The recognition of a qualified privilege for the protection of reporters' sources has already created such problems. See *United States v. John Doe* (Appeal of Samuel L. Popkin), 460 F.2d 328 (1st Cir. 1972); *Richards of Rockford, Inc., v. Pacific Gas and Electric Co.*, 71 F.R.D. 388 (N.D. Cal. 1976); *United States v. John Doe* (*In re Grand Jury Subpoena Served upon Leonard Rodberg*), 332 F. Supp. 930 (D. Mass. 1971); *United States v. John Doe* (*In re Grand Jury Subpoena Served upon Richard Falk*), 332 F. Supp. 938 (D. Mass. 1971), *aff'd*, 445 F.2d 753 (1st Cir.), *rev'd sub nom.* *Gravel v. United States*, 408 U.S. 606 (1972); Note, *Academic Researchers and the First Amendment: Constitutional Protection for their Confidential Sources?*, 14 SAN DIEGO L. REV. 876 (1977); Note, *The Public Scholar and the First Amendment: A Compelling Need for Compelling Testimony?*, 40 GEO. WASH. L. REV. 995 (1972).

¹¹⁵ The justification for the *Sullivan* rule has usually been stated in terms of protecting communications rather than specific communicators. For instance, in *St. Amant v. Thompson*, 390 U.S. 727 (1968), the Supreme Court said:

But *New York Times* and succeeding cases have emphasized that the stake of the people in public business and the conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement First Amendment policies. Neither lies nor false communications serve the ends of the First Amendment, and no one suggests their desirability or further proliferation. But to insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones. We adhere to this view and to the line which our cases have drawn between false communications which are protected and those which are not.

Id. at 731-32. See also *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971).

¹¹⁶ The four were civil rights activists in Alabama who were responsible, in large measure, for the placement and content of the advertisement in question. The Supreme Court made no distinction between them and the *New York Times* in the application of the constitutional privilege.

*v. Thompson*¹¹⁷ and *Garrison v. Louisiana*¹¹⁸ involved individual defendants. More recently, the *Sullivan* rule was applied by the California Court of Appeals in *Widener v. Pacific Gas & Electric Company*¹¹⁹ to the benefit of non-media defendants in an action brought by, ironically, a media plaintiff.¹²⁰ Both precedent and the underlying rationale of the *Sullivan* line of cases support the proposition that media defendants are not entitled to any greater protection than non-media defendants.¹²¹

In addition, developments since *Lando* suggest that the separate press freedom argument rests on shaky foundations. Much of the recent comment in the area was sparked by an address Justice Stewart delivered at the Yale Law School Sesquicentennial Convocation in 1974, which was later published in the *Hastings Law Journal*.¹²² Justice Stewart's views¹²³ came

¹¹⁷ 390 U.S. 727 (1968).

¹¹⁸ 379 U.S. 64 (1964).

¹¹⁹ 142 Cal. Rptr. 304 (Ct. App. 1977).

¹²⁰ The plaintiff was a television documentary producer who had been in charge of preparing a documentary program on nuclear power plants. Engineers and officials of a utility company, who were displeased with the way their company appeared in the program, wrote a number of letters and conducted something of a campaign to discredit the producer. He brought suit on the basis of some of the charges made against him, and found himself faced with the hurdles of the *Sullivan* rule.

¹²¹ See Frakt, *supra* note 84, at 507-12. Non-media defendants have been afforded the protection of the *Sullivan-Gertz* series in the following cases: *Maheu v. Hughes Tool Co.*, 569 F.2d 459 (9th Cir. 1978); *Bryan v. Brown*, 339 So.2d 577 (Ala. 1976), *cert. denied*, 431 U.S. 954 (1977); *Williams v. Trust Co.*, 230 S.E.2d 45 (Ga. Ct. App. 1976); *Michaud v. Inhabitants of Town of Livermore Falls*, 381 A.2d 1110 (Me. 1978); *Marchesi v. Franchino*, 387 A.2d 1129 (Md. Ct. App. 1978); *Jacron Sales Co. v. Sindorf*, 350 A.2d 688 (Md. Ct. App. 1976); *Hirman v. Rogers*, 257 N.W.2d 563 (Minn. 1977); *Rogozinski v. Airstream by Angell*, 377 A.2d 807 (N.J. Super Ct. Law Div. 1977); *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 401 N.Y.S.2d 78 (App. Div. 1978). But the applicability of *Gertz* and its predecessors to non-media defendants has been questioned. See, e.g., *Roemer v. Retail Credit Co.*, 119 Cal. Rptr. 82 (Ct. App. 1975); *Retail Credit Co. v. Russell*, 218 S.E.2d 54 (Ga. 1975); *Devlin v. Greiner*, 371 A.2d 380 (N.J. Super. Ct. Law Div. 1977); *Foster v. Laredo Newspapers, Inc.* 541 S.W.2d 809 (Tex. 1976); *Calero v. Del Chemical Corp.*, 228 N.W.2d 737 (Wis. 1975). These cases and others are collected and briefly summarized in PRACTICING LAW INSTITUTE, COMMUNICATIONS LAW 1978, at 19-66 (1978).

¹²² Stewart, *supra* note 112.

¹²³ The essence of his argument is contained in the following passage:

[T]he Free Press guarantee is, in essence, a *structural* provision of the Constitution. Most of the other provisions in the Bill of Rights protect specific liberties or specific rights of individuals: freedom of speech, freedom of worship, the right to counsel, the privilege against compulsory self-

under sharp attack in cases decided during the Supreme Court term completed in the summer of 1978.

One of the significant decisions from the 1977 term was *First National Bank of Boston v. Bellotti*¹²⁴ in which the Court held that corporations are entitled to first amendment protection as "persons." It was argued that only corporations engaged in the communications business were entitled to first amendment protections,¹²⁵ but the Court rejected that argument and noted that individual corporations might have important views to share with the voters on matters of particular interest to them, matters about which a news corporation might have no better information than anyone else.¹²⁶ The Court's opinion did not go so far as to suggest there was no basis for a separate institutional status for press corporations or newspapers in gen-

incrimination, to name a few. In contrast, the Free Press Clause extends protection to an institution. The publishing business is, in short, the only organized private business that is given explicit constitutional protection. . . .

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 633-34.

¹²⁴ 435 U.S. 765 (1978). Justice Stewart voted with the majority. Justice White filed a dissenting opinion in which Justices Brennan and Marshall joined, *id.* at 802, and Justice Rehnquist dissented separately, *id.* at 822.

¹²⁵ At issue was a Massachusetts law which prohibited corporations from engaging in various political activities that were clearly within the area of permissible activities for individuals. Massachusetts argued that first amendment rights had only been afforded to corporations engaged in the communications business and that a statutory provision allowing comment on matters "materially affecting" a company was the common denominator with the press cases. *Id.* at 781. In rejecting this argument, the Supreme Court said:

The press cases emphasize the special and constitutionally recognized role of that institution in informing and educating the public, offering criticism, and providing a forum for discussion and debate. . . . [T]he press does not have a monopoly on either the First Amendment or the ability to enlighten. . . . Similarly, the court's decision involving corporations in the business of communications or entertainment are based not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate and the dissemination of information and ideas.

Id. at 780-83. For an article exploring the effects of *Bellotti* written by lead counsel for the *Bellotti* appellants, see Fox, *Corporate Political Speech: The Effect of First National Bank of Boston v. Bellotti Upon Statutory Limitations on Corporate Referendum Spending*, 67 Ky. L.J. 75 (1978).

¹²⁶ 435 U.S. 765, 782, n.18 (1978).

eral. It simply said that corporations, as such, were entitled to first amendment rights as if they were individual citizens. The implication, however, is that being in the communications business does not in and of itself justify additional or particular constitutional protections not afforded to other citizens.

Chief Justice Burger, who concurred in the *Bellotti* opinion and judgment, filed a separate opinion in which he discussed his understanding of the free press clause.¹²⁷ His discussion was not necessary to the decision, but it clearly pointed out his disagreement with Justice Stewart and others who argue that there is a separate institutional protection for the press. He perceived two fundamental difficulties in establishing any institutional privilege. First, he was unable to find anything in the history of the amendment or prior cases to prove that it was the framers' intention to grant the press any greater rights than those generally covered by the speech clause.¹²⁸ Second, he argued that it would be extraordinarily difficult to define the scope of the status.¹²⁹ Such a determination, he contended, would necessarily involve government officials, particularly judges, in analyses of the content of speech, the method or manner of expression, the operation of a particular business, and other matters which would intrude most dangerously into areas of protected expression and would be more damaging to free speech than the failure to recognize a special status.¹³⁰

Shortly thereafter, the Court decided *Zurcher v. Stanford Daily*¹³¹ and dealt a serious blow to the argument in favor of a separate institutional privilege for the press. Following a clash between police and demonstrators at a local hospital, a story, accompanied by photographs, appeared in the Stanford student newspaper. The police obtained a search warrant to look in the newspaper's offices for photographs and negatives of suspects. There was no indication that anyone connected with the paper was involved with the demonstration other than by way of observation. The newspaper filed an action against the police and the district attorney to enjoin the search on constitu-

¹²⁷ *Id.* at 795.

¹²⁸ *Id.* at 798-801.

¹²⁹ *Id.* at 801-02.

¹³⁰ *Id.*

¹³¹ 436 U.S. 547 (1978).

tional grounds.¹³² The district court granted relief to the plaintiffs, holding: (1) a search warrant may not be issued as against a third party not suspected of the crime unless there is probable cause to believe that a subpoena *duces tecum* would be impracticable and (2) where the innocent party is a newspaper, the first amendment makes a search permissible only when there is a clear prior showing that, despite a restraining order, materials will be destroyed or removed from the jurisdiction.¹³³ The Court of Appeals affirmed¹³⁴ and the Supreme Court, in an opinion by Justice White, reversed.¹³⁵ Before the Supreme Court, the newspaper asserted that searches would be physically disruptive to its operation, that confidential sources of information would tend to dry up, that reporters would be deterred from recording and preserving their recollections, that the processing of news and its dissemination would be chilled, and that the press would resort to self-censorship.¹³⁶ Stating that the general requirement of probable cause was a sufficient protection against abuses, the Court determined that the warrants were properly issued.¹³⁷ With respect to the first amendment arguments, Justice White concluded:

The fact is that respondents and amici have pointed to only a very few instances in the entire United States since 1971 involving the issuance of warrants for searching newspaper premises. This reality hardly suggests abuse; and if abuse occurs, there will be time enough to deal with it. Furthermore, the press is not only an important, critical, and valuable asset to society, but it is not easily intimidated — nor should it be.¹³⁸

Justice Powell created the majority necessary for reversal in *Zurcher* by filing a separate concurring opinion.¹³⁹ He took pains to point out that, unlike Justice Stewart, he did not

¹³² *Stanford Daily v. Zurcher*, 353 F. Supp. 124 (N.D. Cal. 1972).

¹³³ *Id.* at 135.

¹³⁴ 550 F.2d 464 (9th Cir. 1977) (*per curiam*).

¹³⁵ 436 U.S. 547 (1978).

¹³⁶ *Id.* at 563-64. The same considerations would apply in a case such as *Lando*.

¹³⁷ *Id.* at 563-67.

¹³⁸ *Id.* at 566. That there have been few abuses in the past is, of course, an insufficient justification standing alone for a refusal to protect against possible abuses in the future.

¹³⁹ *Id.* at 568-70.

believe there is a structural privilege for the press.¹⁴⁰ His conclusion was based on essentially the same arguments as those advanced by Chief Justice Burger in *Bellotti*.¹⁴¹ Only Justices Stewart and Marshall clearly advocated the recognition of an institutional protection.¹⁴²

The *Zurcher* decision was a clear setback for Justice Stewart's argument. The shift toward the Burger view, as expressed in *Bellotti*, was also evident in several other decisions from the spring of 1978.¹⁴³ Of particular interest was *Houchins v. KQED, Inc.*,¹⁴⁴ in which the Court decided there is no constitutional right of access to public information. None of these cases has eliminated the argument that the press is entitled to institutional protection, but they do suggest that the precedential support for the proposition is less than overwhelming. Coupled with basic policy arguments against treating media and non-media defendants differently in *Sullivan*-rule libel actions, the absence of general support for the position advanced by Judge Oakes made it a tenuous basis on which to support the result reached by the Second Circuit in the *Lando* case.

¹⁴⁰ *Id.* at 568, 570 n.3. It is important to note, however, that Justice Powell did not say that the first amendment was wholly without application.

While there is no justification for the establishment of a separate Fourth Amendment procedure for the press, a magistrate asked to issue a warrant for the search of press offices can and should take cognizance of the independent values protected by the First Amendment—such as those highlighted by Mr. Justice Stewart—when he weighs such factors.

Id. at 570.

¹⁴¹ 435 U.S. at 795 (Burger, C.J., concurring).

¹⁴² 436 U.S. at 570 (Stewart, J., dissenting). Justice Marshall joined in Justice Stewart's opinion.

¹⁴³ One was *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978). In *Nixon*, the Supreme Court denied the press access to the tapes used in the Watergate trial of John Mitchell. In an opinion by Justice Powell (in which Justice Stewart joined), the Court ruled that: (1) the common law right of access is not absolute but is subject to the discretion of the trial judge in the management of a trial, and here the Presidential Recordings and Materials Preservation Act was an alternative statutory procedure for gaining access; and (2) neither the first nor the sixth amendment compels access. The Court specifically rejected the argument that the press has any greater right of access than the public at large. *Id.* at 609.

¹⁴⁴ 438 U.S. 1 (1978).

V. AN ALTERNATIVE MODEL FOR THE PROTECTION OF THE EDITORIAL PROCESS

A. *Defendant's Constitutional Interests*

Although the Supreme Court's decision in *Herbert* is consistent with the standards of *New York Times v. Sullivan*, the Court could have given more consideration to the protection of the editorial process without unduly complicating the plaintiff's problems of proof.

Editing is one of the most important functions in the publication process. The pervasiveness of editing in the process points out a significant problem: How would an editorial privilege be reasonably defined? Would associate producers and television commentators be entitled to a privilege not available to cub reporters? What about free-lance writers or stringers in remote areas? What about the publisher of a political tract? To ask these questions illustrates the dangers inherent in the fragmentation of the publication process and the attachment of a constitutional privilege to some fragments but not to others. To say that editorial discretion is privileged may imply that other parts of the process are not so privileged.¹⁴⁵ That implication would be an unduly restrictive interpretation of the scope of the first amendment's protection. Instead of centering on one aspect, the focus of concern should be on the entire process from the first lead to final publication.¹⁴⁶

Because the ultimate writing or broadcast is protected by the first amendment, the process by which that writing or broadcast is put together should also be protected. It would effectively destroy the protection afforded the publication were

¹⁴⁵ This point is similar to the concern expressed by Judge Meskill about recognizing a structural privilege for the press. See note 71 *supra*. Unless it is assumed that the editorial process pervades the whole publication process, the recognition of such a privilege does necessarily imply the creation of a hierarchy of interests. That is certainly true in a case such as this where Lando willingly allowed massive discovery of his activities, interviews, research and so on, but objected to discovery concerning the editorial process.

¹⁴⁶ This approach is consistent with a comprehensive theory of the first amendment in which individual expression and all the necessary components thereof are the general focus of protection. The *means* of expression may raise more serious questions of regulation, *e.g.*, talking as opposed to picketing. See, *e.g.*, *Hudgens v. NLRB*, 424 U.S. 507 (1976). This approach is generally consistent with the theories advanced by Professor Emerson. See T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* (1970).

the government allowed, directly or indirectly, to interfere with the process, including acquisition, writing, editing, revising, deciding on lay-outs and headlines, and publishing. The television program and the article which are the basis of Herbert's suit were put together by many different people doing many different jobs. The work of them all was important to the creation of a constitutionally protected product. Lando and Wallace may have been the principals, but their involvement was only one aspect of the overall process necessary to the creation of the program.

The recognition of a general constitutional protection for the publication process does not mean that it is or should be free from all governmentally sponsored intrusions.¹⁴⁷ Actual publications are not so protected. The publication of obscene materials may be prohibited.¹⁴⁸ A newspaper may be held liable for publication of a defamation,¹⁴⁹ or a story which invades personal privacy.¹⁵⁰ Similarly, a reporter may be punished for engaging in an illegal act to acquire information (*e.g.*, breaking and entering), although the publication of illegally acquired information may not be punished.¹⁵¹ The existence of a constitutional privilege, however, creates a presumption that intrusions by government are improper and that they can only be justified by a showing of compelling need.¹⁵² A protection for the whole process would protect the editorial functions which are the concern of Barry Lando and would also protect other functions without creating a hierarchy of confusingly defined privileges attached to various functions. Such a model would also incorporate the protection of confidential sources.

¹⁴⁷ Despite the arguments of Justice Black to the contrary, *see, e.g.*, *New York Times Co. v. Sullivan*, 376 U.S. at 293-97 (Black, J. concurring); *Rosenbloom v. Metro-media, Inc.* 403 U.S. 29, 57 (Black, J., concurring), the Supreme Court has never adopted an absolutist view of the first amendment.

¹⁴⁸ *See, e.g.*, *Miller v. California* 413 U.S. 15 (1973); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973).

¹⁴⁹ *See, e.g.*, *Time, Inc. v. Firestone* 424 U.S. 448 (1976); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

¹⁵⁰ *See, e.g.*, *Cantrell v. Forest City Publishing Company*, 419 U.S. 245 (1974); *Daily Times Democrat v. Graham*, 162 So.2d 474 (Ala. 1964); *Barber v. Time, Inc.*, 159 S.W.2d 291 (Mo. 1942).

¹⁵¹ *See, e.g.*, *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978); *Pearson v. Dodd*, 410 F.2d 701 (D.C. Cir. 1969).

¹⁵² *See Time, Inc. v. Hill*, 385 U.S. 374 (1967); *New York Times v. Sullivan*, 376 U.S. 254 (1964).

B. *Application of the Discovery Rules*

Assuming that a rule of generalized protection were employed in the *Herbert* case, what would be the proper scope of plaintiff's discovery of the defendants? The Federal Rules of Civil Procedure give trial judges great discretion in the control of discovery. A litigant is entitled to very broad discovery subject to a general requirement of relevance.¹⁵³ Rule 26(b), however, specifically identifies four categories of information which are not usually discoverable, even if relevant.¹⁵⁴ The two most important in the current context are: (1) Information subject to a recognized privilege¹⁵⁵ and (2) Information "otherwise" protected "by order of court."¹⁵⁶ The first category applies to traditionally recognized privileges such as those for communications between husband and wife, attorney and client, physician and patient, or priest and penitent.¹⁵⁷ There has been little indication of a movement to broaden these categories,¹⁵⁸ but the reporter's privilege to protect sources has received some judicial recognition as a privilege within the contemplation of Rule 26(b).¹⁵⁹ A trial judge has broad authority under Rule 26(c) to issue protective orders placing limits on discovery, even in the absence of a recognized privilege.¹⁶⁰ Thus, a trial

¹⁵³ See FED. R. CIV. P. 26(b)(1) for the threshold criteria of relevance.

¹⁵⁴ The four categories excepted from the general discovery requirements are: (1) information protected by a traditional privilege such as that between attorney and client, *id.* at 26(b)(1); (2) trial preparation materials, *id.* at 26(b)(3); (3) information obtained in a physical or mental examination unless specifically authorized in exceptional cases, *id.* at 26(b)(4); and (4) the discovery of information which is "otherwise limited by order of court," *id.* at 26(b).

¹⁵⁵ *Id.* at 26(b)(1).

¹⁵⁶ *Id.* at 26(b).

¹⁵⁷ See 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 2020 (1970 ed.).

¹⁵⁸ *Id.* at 178.

¹⁵⁹ See, e.g., *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977); *Baker v. F. & F. Investment Co.*, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); *Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973); *Gilbert v. Allied Chemical Corporation*, 411 F. Supp. 505 (E.D. Va. 1976); *Apicella v. McNeil Laboratories, Inc.*, 66 F.R.D. 78 (E.D.N.Y. 1975).

¹⁶⁰ FED. R. CIV. P. 26(c). See 8 C. WRIGHT & A. MILLER, *supra* note 157, §§ 2007, 2036. Whether a judge would use this authority is, of course, a different question altogether. Merely arguing that the information is available from other sources may not be enough, for instance, to justify a protective order. See *Blankenship v. Hearst Corp.*, 519 F.2d 418 (9th Cir. 1975); *Wright v. Patrolmen's Benev. Ass'n*, 72 F.R.D. 161 (S.D.N.Y. 1976).

judge has the authority under the Federal Rules of Civil Procedure to control discovery so that it is not unreasonably burdensome and does not unduly intrude into the process of publication.

Although libel plaintiffs are entitled to fairly extensive discovery because of their onerous burden of proof, they are not entitled to discover anything and everything about the publication process from the defendants themselves. The *Sullivan* rule is intended to protect open and robust debate by freeing publishers from the fear of libel suits by public officials and figures except in egregious circumstances.¹⁶¹ That purpose is defeated if a *Sullivan*-rule plaintiff is given free rein to wander through the files of a newspaper, to take reporters off their jobs for days at a time, and to cause defendants to suffer the costs of enormous legal fees.

Proof of actual malice is so difficult that a defendant in a *Sullivan*-rule case will usually win on the merits.¹⁶² The victory may be a Pyrrhic one, however, if discovery procedures have been disruptive and expensive. The mere threat of litigation, with its attendant costs in time, energy, and money, may have a significant chilling effect even if a victory on the merits is likely and even if no direct inquiries into editorial decision-making are allowed.¹⁶³ On the other hand, libel defendants cannot simply be immunized from discovery. A balance must be struck between giving the plaintiff a fair chance to try to prove his case and protecting the publication process from unreasonably and unnecessarily chilling invasions.¹⁶⁴

¹⁶¹ *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

¹⁶² See *Eaton*, *supra* note 17, at 1375.

¹⁶³ Cf. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975) (analogous "chilling effect" in the securities area); 4 J. MOORE, *FEDERAL PRACTICE* ¶ 26.02 (2d ed. 1976); Note, *The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions*, 91 HARV. L. REV. 1033 (1978); Comment, *Tactical Use and Abuse of Depositions Under the Federal Rules*, 59 YALE L.J. 117 (1949).

¹⁶⁴ The balancing is between freedom of speech and freedom from speech which are placed at odds in the context of an adversarial system. As one commentator has noted:

Gertz, like all of the *New York Times* series of decisions, attempts to reconcile mutually irreconcilable values: the polity's interest in free and full interchange of potentially useful information and ideas, and the citizen's interest in freedom from destructive invasions of his reputation, relationships and personality. Each time the law furthers one of these inherently incompatible

So long as the test for malice remains the same, the protection of the publisher's, as well as the plaintiff's, interest must be accomplished through a careful and reasonably sophisticated application of the discovery rules by the trial judge. The invocation of the general rule that liberal discovery is to be allowed is not enough. In order to protect the publishing process courts must focus on the entire process by which the finished product is created. The focus on that process should not, however, be fragmented or narrow. The *whole* process is important to the creation of the publication. In a given case an inquiry directed toward editorial policy might be considerably less intrusive and disruptive than inquiries directed toward the means of acquisition, including the identification of sources. The role of a headline writer or a layout editor may be important to one case but not to another. There may be plenty of extrinsic evidence available to one plaintiff, but another's case may be premised almost entirely on the exercise of editorial discretion by a publisher as to the content, timing, and placement of a particular story. Necessarily there must be varying approaches, but courts could follow general guidelines such as the following:

- 1) The process of publication from the earliest stages of acquisition through actual dissemination is generally entitled to constitutional protection.
- 2) The plaintiff's discovery in a *Sullivan*-rule libel action should be directed first toward the accumulation of third-party and objective information, the acquisition of which does not interfere with the publication process.
- 3) Some inquiry into the publication process may be routinely allowed. For instance, unless there are confidentiality problems, the publisher should be expected to provide the names of sources and other information such as unedited interview transcripts or tapes, copies of the publications or broadcast films or tapes in question, and similar items essential to a consideration of the principal issues. Usually, requests for such materials would not be unduly burdensome.
- 4) Discovery of other than "routine" information should not

values the other suffers.

Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 Tex. L. Rev. 199, 200-01 (1976).

be allowed unless the court determines that alternative sources are unavailable *and* that the information requested is central to proof of the plaintiff's case or unless the defendant uses such information defensively.

In many *Sullivan*-rule cases the discovery of matters generally covered by what Lando asserts as an editorial privilege would be allowed under the foregoing guidelines. The actual malice standard makes such a result almost inevitable. The only alternative (if libel suits are to be allowed at all) is to change the test so that it is related more to objective rather than subjective concerns. It may be argued that the real concern should be with individual protection against careless publication procedures. An ignorant or an indifferent publisher is now protected equally with the most careful one, and in fact, the latter may be in greater danger if he has done enough research to have sown a few seeds of doubt. Nevertheless, there could be real dangers for journalists in moving to a more objective test. Allowing juries to draw inferences from circumstantial evidence could lead to uncertainties and the possible *de facto* application of a negligence-based test. The subjectivity of the current *Sullivan* test does provide libel defendants with substantial protection from liability for the good faith publication of statements later determined to be erroneous.¹⁶⁵

CONCLUSION

The subjective nature of the *Sullivan* test may often necessitate some inquiries into the exercise of editorial discretion during discovery, but the test does provide defamation defendants with significant and important protections. The Supreme Court was right to reject the editorial privilege created by the Second Circuit. It could have unnecessarily fragmented the entire publication process. There is adequate flexibility in the discovery rules for a trial judge to afford all necessary pro-

¹⁶⁵ If a defendant submits affidavits or other evidence in support of a good faith defense, the burden shifts to the plaintiff to *disprove* by clear and convincing evidence the defendant's prima facie case of no malice. *See, e.g.*, *Hutchison v. Proxmire*, 579 F.2d 1027 (7th Cir. 1978); *Hoffman v. The Washington Post Co.*, 433 F. Supp. 600 (D.D.C. 1977); *Wolston v. Reader's Digest Ass'n, Inc.*, 429 F. Supp. 167 (D.D.C. 1977); *Nader v. DeToledano*, 3 Media L. Rptr. 1233 (D.C. Super. Ct. 1977); *Kidder v. Anderson*, 354 So.2d 1306 (La. 1978).

tections to a libel defendant without the necessity of creating a new uncharted privilege. Nonetheless, courts should always bear in mind that publishing—and all that goes with it—is constitutionally favored and should be accorded the greatest possible deference consistent with the protection of other individual interests.