

Tulsa Law Review

Volume 13
Number 4 *National Energy Forum 1978:
Government- Helping or Hurting?*

Volume 13 | Number 4

1978

Defamation and the First Amendment: Editorial Process Found Privileged in *Herbert v. Lando*

Tyrus V. Dahl Jr.

Follow this and additional works at: <https://digitalcommons.law.utulsa.edu/tlr>



Part of the [Law Commons](#)

Recommended Citation

Tyrus V. Dahl Jr., *Defamation and the First Amendment: Editorial Process Found Privileged in Herbert v. Lando*, 13 *Tulsa L. J.* 837 (1978).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol13/iss4/22>

This Casenote/Comment is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Tulsa Law Review by an authorized editor of TU Law Digital Commons. For more information, please contact megan-donald@utulsa.edu.

DEFAMATION AND THE FIRST AMENDMENT: EDITORIAL PROCESS FOUND "PRIVILEGED" IN *HERBERT V. LANDO*

I. INTRODUCTION

The question of the sanctity of the editorial process and its protection from judicial inquiry under the first amendment in defamation cases has received little attention from either the courts or the commentators.¹ However, this subject was recently considered by the Court of Appeals for the Second Circuit in *Herbert v. Lando*,² a case of national first impression.³ The court characterized it as having "broad implications"⁴ and as breaking "new ground in an area of utmost importance."⁵ The issue before the court was whether, and to what extent, a public figure bringing an action for libel may inquire into an editor's thoughts, beliefs, opinions, and conclusions held at the time he was preparing for publication.⁶

The fact that this question has not arisen before, in light of the United States Supreme Court's standard for defamation of a public figure laid down in *New York Times Co. v. Sullivan*,⁷ is notable. Under the dictates of that decision, a public figure plaintiff must show that the alleged defamation was made with actual malice.⁸ In this con-

1. See generally Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422 (1975) [hereinafter cited as Anderson]; Eaton, *The American Law of Defamation through Gertz v. Robert Welch, Inc. And Beyond: An Analytical Primer*, 61 VA. L. REV. 1349 (1975); Comment, *Calculated Misstatements of Fact Not Protected by First Amendment Guarantees of Free Speech and Press*, 1969 UTAH L. REV. 118 [hereinafter cited as *Calculated Misstatements Not Protected*].

2. 568 F.2d 974 (2d Cir. 1977).

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

4. 568 F.2d at 975.

5. *Id.* at 984.

6. *Id.* at 974.

7. 376 U.S. 254 (1964). Justice Douglas has criticized the *New York Times* standard as inadequate and unworkable. He argued:

If the common law tests had been too elusive to protect First Amendment interests then the actual-malice test has proved neither to be more precise nor to be a better guardian. Proof of knowledge that a statement is false requires slippery proof of a mental state, as does a showing of reckless disregard. Seldom is evidence clear on these issues and a local jury asked to "weigh all the circumstances" can continue under this evanescent test to penalize unpopular speech.

Dun & Bradstreet, Inc. v. Grove, 404 U.S. 898, 902 (Douglas, J., dissenting), *denying cert. to* 438 F.2d 433 (3d Cir. 1971).

8. This is distinguished from common law malice which involves ill motive or evil intent.

text, actual malice means that the defendant either had knowledge that the publication was false or acted with "reckless disregard" for whether it was true.⁹ Such a state of mind requirement would first seem to permit inquiry into subjective editorial motives in order to determine one's actual knowledge of falsehood; while, the latter "reckless disregard" portion of the test may be interpreted as an objective probation.¹⁰ However, *Herbert* establishes an absolute first amendment privilege against disclosure of a journalist's exercise of editorial control and judgment.¹¹

The Second Circuit offered alternative theories to support the advancement of an editorial privilege. First, it asserted that selective judicial inquiry into the thought processes of an editor presented an impermissible chilling effect upon the first amendment freedom of the press.¹² The court found that the press did not merely mirror and mimic the world at large. Rather, it was concluded that the acts of gathering, processing, and disseminating the myriad of daily events, necessarily required that numerous editorial judgments be made.¹³ The court noted that if those judgments were susceptible to selective inquiry and analysis by a plaintiff allegedly defamed, editors would be

Cantrell v. Forest City Publishing Co., 419 U.S. 245, 251-52 (1974); W. PROSSER, THE LAW OF TORTS §§ 113, 118 (4th ed. 1971) [hereinafter cited as W. PROSSER].

9. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). The *New York Times* decision has been generally well received. But it has also been characterized as the sort of ringing pronouncement that might have been expected of a young nation shortly after the revolution wherein a climate would be encouraged which would permit the infant press to grow. Indeed, the press has grown to such proportions that in many cases it rivals the corporate giants in influence, strength, and resources. Hence, given the ability to distribute among its constituents the costs of defamation, some have questioned the utility of sweeping protections for the press preferring to apply a strict liability. Such proponents believe that people's eagerness for news would permit them to pay more for it from which the press would distribute the costs of defamation with a minimum of self-censorship. Shapo, *Media Injuries To Personality: An Essay on Legal Regulation of Public Communication*, 46 TEX. L. REV. 650, 656-57 (1968); see generally Cohen, *A New Niche for the Fault Principle: A Forthcoming Newsworthiness Privilege in Libel Cases?*, 18 U.C.L.A. L. REV. 371 (1970).

10. See notes 68-105 *infra* and accompanying text.

11. 568 F.2d at 974. At common law, two defenses, or, more precisely, privileges, developed to balance the benefits of free speech against the harm to reputation. An absolute privilege was bestowed upon the participants of legislative, administrative, and judicial proceedings for expeditious reasons realizing the possibility of defamatory statements. Secondly, a qualified privilege existed which conditioned immunity upon such considerations as a reasonable manner of publication, a proper purpose, and the like. It applied to defamatory statements in material published for the protection of legitimate interests or to one capable of acting in that interest, reports of public proceedings, fair comment on matters of public concern, and even good faith falsehoods. *Calculated Misstatements Not Protected*, *supra* note 1, at 118-19 n.5. See also W. PROSSER, *supra* note 8, §§ 114-115; Recent Decisions, *Libel—Constitutional Privilege—Why Not an Absolute Privilege?—Rosenbloom Doctrine in Washington*, 7 GONZAGA L. REV. 344 (1972).

12. 568 F.2d at 984. See notes 27-51 *infra* and accompanying text.

13. See notes 27-38 *infra* and accompanying text.

chilled in the very function of their duties, and this the first amendment would not permit.¹⁴

In the alternative, the court looked to the structure of the first amendment and the seeming redundancy of granting a freedom specifically to the press even though the guarantee of freedom of speech would certainly apply as well to the press without the need to mention it specifically.¹⁵ From this premise it was reasoned that the constitutional framers intended the press to serve a special function akin to a fourth branch of government, albeit removed therefrom.¹⁶ As such, it would acquire and require a privilege similar to that of the administrative, legislative, and judicial branches of government in order to adequately fulfill its role.¹⁷

The adoption of this privilege by the Second Circuit is significant in that it expands upon first amendment protections, although it does present a dilemma under the *New York Times* actual malice test. It would seem at first blush that the knowing falsehood requirement is thwarted if inquiry into opinions, thoughts, beliefs, and conclusions of an editor is precluded. Although the Second Circuit did not address this conflict in its holding, it is submitted that the decision is reconcilable with the *New York Times* rule while providing an additional safeguard for press freedom. The United States Supreme Court has granted certiorari on the question,¹⁸ and its opinion should provide additional clarification of the requirements necessary to establish defamation under *New York Times*. Accordingly, an analysis of the decision of the Second Circuit follows. It is concluded that the holding is sound, consistent with *New York Times*, and that the Supreme Court should affirm.

II. THE *HERBERT* Case

The action for defamation was brought by former Army Lieutenant Colonel Anthony Herbert against Columbia Broadcasting System, Inc., its news correspondent Mike Wallace, and its news producer Barry Lando. There was no dispute that Herbert was a public figure¹⁹

14. 568 F.2d at 984. See notes 63-105 *infra* and accompanying text.

15. *Id.* at 988.

16. *Id.*

17. See generally Stewart, *Or of the Press*, 26 HASTINGS L. J. 631 (1975) [hereinafter cited as Stewart] and notes 106-16 *infra* and accompanying text.

18. *Herbert v. Lando*, 98 S. Ct. 1483 (1978).

19. 568 F.2d at 979 n.15, 985 n.2.

within the meaning of *Curtis Publishing Co. v. Butts*.²⁰ Herbert was the subject of much publicity in the early 1970's following his charge that his superior officers engaged in war crimes and atrocities in Vietnam. Relieved of his command, he soon retired stating that he had been harassed into doing so by the Army as a direct result of his disclosures. Herbert recounted his experiences in a book, *Soldier*.

In February, 1973, in a segment of its "60 Minutes" series, Columbia Broadcasting System aired a program entitled "The Selling of Colonel Herbert" which cast doubt upon the veracity of the colonel's allegations and generally portrayed him in a disfavorable light.²¹ Thereafter, Herbert filed suit for defamation charging that Lando, as news producer, had "deliberately distorted the record through selective investigation, 'skillful' editing, and one-sided interviewing,"²² alleging damages to his reputation and the impairment of his book as literary property in excess of forty-four million dollars. The deposition of Lando covered twenty-six sessions over a period of more than a year and involved 2903 pages of transcript and 240 exhibits. Lando balked, however, regarding questions concerning his beliefs, opinions, intent, and conclusions held when preparing the program,²³ claiming that the first amendment immunized his thought processes from discovery.

The trial court, observing the issue to be one of first impression, ordered Lando to respond to the questions. The court concluded that the necessarily subjective nature of the libel standard justified a broad and unrestricted inquiry into a journalist's state of mind.²⁴ Referring to the "critical importance of the issue,"²⁵ the Second Circuit granted

20. 388 U.S. 130, 162 (1967).

21. Documents already obtained through discovery indicate that Lando's stated premise was that Herbert was a liar and that Lando would not do the story at all unless he could debunk Herbert, convincingly portray him as the "bad guy" and destroy his credibility. 568 F.2d at 993 n.30.

22. *Id.* at 982.

23. *Id.* at 982-83. The questions were grouped into five categories as follows:

1. Lando's conclusions during his research and investigations regarding people or leads to be pursued, or not to be pursued, in connection with the "60 Minutes" segment and the Atlantic Monthly article [which Lando had written, also a subject of the suit];
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 concerning the veracity of persons, information or events;
4. Conversations between Lando and Wallace about matter to be included or excluded from the broadcast publication; and
5. Lando's intentions as manifested by his decision to include or exclude certain material.

24. 73 F.R.D. at 394-96.

25. 568 F.2d at 983.

an immediate interlocutory review.²⁶

III. ANALYSIS

The Role of the Press: Finding an Editorial Privilege

The court initiated its review of the first amendment and its application to defamation with the premise that an unrestrained press plays a vital role in the marketplace of ideas and the survival of a democracy.²⁷ The function of the press²⁸ was viewed as a tripartite operation which involved (1) the acquisition of information, (2) the processing of that information, and (3) its dissemination through publication.²⁹ The Supreme Court has been aware that any break in this chain results in cutting off the free flow of information.³⁰

The court discussed news dissemination in light of the criteria established by a number of prior cases,³¹ finding that the Supreme Court had zealously guarded the right of the press to distribute news without the fettering of prior restraints. The first stage, the right of the press to gather information, was viewed as logically antecedent to the effective exercise of the right of news distribution.³² Protection of this exercise

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

27. *Id.* at 975, citing *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964); *Stromberg v. California*, 283 U.S. 359, 369 (1931); *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring); A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 88-89 (1948):

The primary social fact which blocks and hinders the success of our experiment in self-government is that our citizens are not educated for self-government. We are terrified by ideas, rather than challenged and stimulated by them. Our dominant mood is not the courage of people who dare to think. It is the timidity of those who fear and hate whenever conventions are questioned. . . .

Meiklejohn, *The First Amendment is Absolute*, *MASS MEDIA AND THE SUPREME COURT* 48, 54 (1971) reprinted from *THE SUPREME REVIEW*, 253 (1961).

28. The term "press" rather than "media" is used herein because reference is intended to cover legitimate news operations of all forms. The term media, being broader, includes numerous forms of expression beyond the scope of this article. That "press" includes the broadcast media is established. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496-97 (1975); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 394 (1969).

29. 568 F.2d at 976.

30. *Id.* See also Note, *The Rights of the Public and the Press to Gather Information*, 87 *HARV. L. REV.* 1505 (1974); Note, *Freedom of Information: The Statute and the Regulations*, 56 *GEORGETOWN L.J.* 56 (1967).

31. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976) ("gag" orders permissible only in extreme circumstances); *New York Times v. United States*, 403 U.S. 713 (1971) (no prior restraints); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936) (tax on newspaper advertisements graduated to reflect circulation struck down); *Near v. Minnesota*, 283 U.S. 697 (1931) (prior restraint of the press is impermissible).

32. 568 F.2d at 977, citing Note, *The Right of the Press to Gather Information*, 71 *COL. L. REV.* 838 (1971). *But see Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974) (the press has no constitutional right to information the access to which is not generally available).

of freedom of the press has sometimes been used to permit journalists to conceal the identity of confidential sources under certain circumstances.³³ The court expressed concern that the flow of information would be inhibited if confidential sources remained silent through fear that their identities would be revealed.³⁴ It cannot be said, however, that any general, or even conditional, constitutional privilege exists.³⁵

It was concluded that the "constitutional protections afforded the dissemination and acquisition of information has [sic] inevitably led the Supreme Court to recognize that the editorial process must equally be safeguarded."³⁶ The court correctly observed that the press is not a mere conduit of raw information senselessly spewed forth. Rather, throughout the steps of acquisition, processing, and dissemination of information, there was the active utilization of human judgment, characterized as the editorial process.³⁷ This judgment, however, is part of the state of mind wherein actual malice must be found, if at all, and, hence, the quandary of the court in *Herbert*.³⁸

The court relied upon two recent Supreme Court decisions in determining that protections of the editorial process abide in the first amendment: *Miami Herald Publishing Co. v. Tornillo*³⁹ and *Columbia Broadcasting System v. Democratic National Committee*.⁴⁰ Both cases deal with statutes or regulations which purported to specify what a newspaper or broadcasting station had to print or say, and held that

33. *Branzburg v. Hayes*, 408 U.S. 665 (1972), cited by the court, in fact required a reporter to reveal his sources. The sources were protected, however, in *Apicella v. McNeil Laboratories, Inc.*, 66 F.R.D. 78 (E.D.N.Y. 1975) (where it was not shown that the information was not available from other sources) and *Baker v. F & F Investment*, 470 F.2d 778 (2d Cir.), *cert. denied*, 411 U.S. 966 (1972) (where the confidential source was of questionable materiality and the information could be obtained by other means). See also *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 436-38 (10th Cir. 1977); *Caldero v. Tribune Publishing Co.*, 98 Idaho 288, —, 562 P.2d 791, 801 (1977); *Goodale*, *Branzburg v. Hayes and the Developing Privilege for Newsmen*, 26 HASTINGS L.J. 709 (1975); Comment, *Newsmen's Privilege Against Compulsory Disclosure of Sources in Civil Suits—Toward an Absolute Privilege?*, 45 U. COLO. L. REV.173 (1973).

34. 568 F.2d at 978.

35. See, e.g., *Carey v. Hume*, 492 F.2d 631 (D.C. Cir.), *cert. dismissed*, 417 U.S. 938 (1974) and *Garland v. Torre*, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958) (both involving allegedly libelous statements based on confidential sources). See also *Herbert v. Lando*, 568 F.2d 974, 996 (2d Cir. 1977) (Miskill, J., dissenting); W. PROSSER, *supra* note 8, § 115.

36. 568 F.2d at 978.

37. *Id.* A journal does not merely print facts, it sets them in context. It involves interpretation and selection and even editorial suppression. The state cannot dictate that an editor abstain from discrimination in the news without dictating selection. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 n.24 (1974).

38. The interlocutory nature of this appeal should not be forgotten. All the cases upon which the court is forced to rely are appeals from final judgments on the merits, hence, analogies must be drawn to apply to pre-trial discovery.

39. 418 U.S. 241 (1974) (newspaper could not be compelled to accept editorial replies).

40. 412 U.S. 94 (1973) (broadcasters not required to accept paid advertisements).

such an intrusion upon editorial judgment was impermissible.⁴¹

In *Tornillo*, the Court found that a compulsory "right to reply" statute was an intrusion into the functions of editors which failed to clear first amendment barriers. The Court observed the following as to editorial function:

The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.⁴²

The press is not a public utility subject to "reasonable" governmental regulation in matters affecting editorial judgment, and the Court remains intensely skeptical about those measures that would allow the government to intrude into the editorial rooms of this nation's press.⁴³

In *Columbia Broadcasting System v. Democratic National Committee*,⁴⁴ it was noted that "for better or worse, editing is what editors are for; and editing is selection and choice of material."⁴⁵ Certainly the editorial decision must reside somewhere, and wherever that may be it is subject to abuse.⁴⁶ In another case, in upholding a bar

41. The trial court summarily dismissed these cases as having "nothing to do with the boundaries of pre-trial discovery in a defamation suit alleging malicious publication." 73 F.R.D. at 396. This is erroneously quoted as "malicious prosecution" in *Herbert v. Lando*, 568 F.2d 974, 983 n.21 (2d Cir. 1977).

42. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

43. *Id.* at 259. Mr. Justice White, in a concurring opinion in *Tornillo*, is adamant that while the press is not always accurate, fair or even responsible, that is a risk society must take. *Id.* at 260. It is an elementary proposition of the first amendment that government may not compel a newspaper "to print copy which, in its journalistic discretion, it chooses to leave on the newsroom floor." "[W]e have never thought that the first amendment permitted public officials to dictate to the press the contents of its news columns or the slant of its editorials." *Id.* at 261. But Mr. Justice White also defends a citizen's right to an action for libel. The citizen may not force the press to tell his side of the story or even to print a retraction, yet he should have a remedy for falsehood. *Id.* at 261-62. It is a "near absurdity to so deprecate individual dignity . . . and to leave the people at the complete mercy of the press, at least in this stage of our history when the press . . . is steadily becoming more powerful and much less likely to be deterred by threats of libel suits." *Id.* at 263. For a persuasive argument contra Mr. Justice White's last contention, see *Anderson, supra* note 1, at 430-41.

44. 412 U.S. 94 (1973).

45. *Id.* at 124. "[T]hat [first amendment] guarantee gives every newspaper the liberty to print what it chooses and reject what it chooses, free from the intrusive editorial thumb of Government." *Id.* at 145 (Stewart, J., concurring) (emphasis in the original).

46. "From the very nature of things, the absolute right of decision, in the last resort, must rest somewhere—wherever it may be vested it is susceptible of abuse." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 345 (1816).

against stating male and female preferences in employment advertising, the Supreme Court was careful to reaffirm, without equivocation, the protection afforded to editorial judgment and to free expression of views on any issue, however controversial.⁴⁷

The dangers posed by supplanting editorial judgment with judicial judgment are clearly illustrated by *Sprouse v. Clay Communications Inc.*⁴⁸ There the court objected to the choice of certain headline words which it deemed misleading, as well as the size of the type in which they were set. Even though the stories were *true* and the court cited no evidence of any intention by the newspaper to mislead readers or injure the plaintiff, the court imposed substantial liability.⁴⁹ The holding, in effect, stated that first amendment protections extended only to journalistic styles of which judges approve and not to members of the press who use intemperate terms or headlines which a given judge may think too large.⁵⁰ This is typical of the meddling which the *Herbert* court seeks to prevent through the protection of the first amendment.⁵¹

Defamation of a Public Figure

*New York Times Co. v. Sullivan*⁵² first applied constitutional principles to the realm of common law defamation and held that a public official may vindicate his reputation in an action for libel if he is able to establish that the statements involved were known to be false or made in reckless disregard for the truth.⁵³ The public official concept was later expanded to cover public figures,⁵⁴ followed by an extension to

47. *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 391 (1973). While this case was not cited by Judge Kaufman, it lends further credence to the sanctity of the editorial domain. See also *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, —, 366 N.E.2d 1299, 1308, 397 N.Y.S.2d. 943, 952 (1977) (following the lead of *Tornillo*) and *Associates & Aldrich Co. v. Times Mirror Co.*, 440 F.2d 133, 136 (9th Cir. 1971) (affirming newspaper's editorial rights over paid advertisements).

48. 211 S.E.2d 674 (W. Va. 1975), *cert. denied*, 423 U.S. 882 (1975).

49. *Id.* at 682. The court reduced the award from \$750,000 to \$250,000. *Id.* at 692-93.

50. Anderson, *A Response to Professor Robertson: The Issue is Control of Press Power*, 54 TEX. L. REV. 271, 280 (1976). "[P]ermittting judges and juries to decide what the press may or may not publish, on pain of paying a libel judgment, is governmental control of the press, just as surely as would be a system permitting the executive to prohibit publication upon pain of paying a fine." *Id.* at 271.

51. "It is . . . manifest that the vitality of the editorial process can be sapped . . . if we are not vigilant. The unambiguous wisdom of *Tornillo* and *CBS* is that we must encourage, and protect against encroachment, full and candid discussion within the newsroom itself." 568 F.2d at 979.

52. 376 U.S. 254 (1964). See also Kurland, *The Supreme Court, 1963 Term*, 78 HARV. L. REV. 143, 201-05 (1964); Pierce, *The Anatomy of an Historic Decision: New York Times Co. v. Sullivan*, 43 N.C. L. REV. 315 (1965).

53. *Id.* at 279-80.

54. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 162-65, 170-72 (1967) (football coach). See

include discussion and communication involving all matters of public concern.⁵⁵ The scope was restricted by *Gertz v. Robert Welch, Inc.*⁵⁶ such that the "public or general interest" test was found wanting⁵⁷ where a private citizen has not voluntarily thrust himself into the vortex of a public issue or engaged the public's attention therein to influence the outcome.⁵⁸

The actual malice test remains firmly in force, and a highly subjective inquiry into the defendant's state of mind is necessary to satisfy the formula. It is an elusive and abstract concept difficult of application,⁵⁹ and requires knowledge of falsehood or a high degree of awareness of probable falsehood, such that intent to harm is shown.⁶⁰ The court in *Herbert* noted two recent decisions which held that expressions of personal opinions are vital to vigorous debate and not the basis for recovery in a libel action⁶¹ and that a newspaper is incapable of libel for neutral reportage of newsworthy material.⁶²

The foregoing, then, sets the stage for the *Herbert* court's determination that procedures in libel actions must be narrowly defined so as to least conflict with the hallowed principle of robust and uninhibited

also *Greenbelt Coop. Publishing Ass'n, Inc. v. Bresler*, 398 U.S. 6 (1970) (prominent real estate broker); *Perry v. Columbia Broadcasting Sys., Inc.*, 499 F.2d 797 (7th Cir.), *cert. denied*, 419 U.S. 883 (1974) (black actor); *Time, Inc. v. Johnston*, 448 F.2d 378 (4th Cir. 1971) (retired professional basketball player); *Dacey v. Florida Bar, Inc.*, 427 F.2d 1292 (5th Cir. 1970) (author of book on avoiding probate). Held not to be public figures were, *e.g.*, a corporate brokerage firm dealing in bricks and tiles, *Grove v. Dun & Bradstreet, Inc.*, 438 F.2d 433 (3d Cir.), *cert. denied*, 418 U.S. 909 (1971) and a neighborhood pharmacist, *Afro-American Publishing Co. v. Jaffe*, 366 F.2d 649 (D.C. Cir. 1966).

55. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 43-45 (1971) (plurality opinion) (distributor of nudist magazines). See generally *Medina v. Time, Inc.*, 319 F. Supp. 398 (D.C. Mass. 1970) (killing unarmed civilians in Vietnam); *Bon Air Hotel, Inc. v. Time, Inc.*, 295 F. Supp. 704 (S.D. Ga. 1969) (accommodations prices during a golf tournament); *United Medical Laboratories, Inc. v. Columbia Broadcasting Sys., Inc.*, 404 F.2d 706 (9th Cir. 1968), *cert. denied*, 394 U.S. 921 (1969) (mail order business of medical testing laboratory). For an analysis of cases through *Rosenbloom*, see Keeton, *Some Implications of the Constitutional Privilege to Defame*, 25 VAND. L. REV. 59 (1972); Comment, *The Expanding Protection for the News Media from Liability for Defamation: Predictability and the New Synthesis*, 70 MICH. L. REV. 1547 (1972).

56. 418 U.S. 323 (1974); Note, *Constitutional Law—Media Freedom of Speech and Press—Defamation*, 1974 WIS. L. REV. 1167.

57. 418 U.S. 323, 337-39 (1974).

58. *Id.* at 351-52. For a well-reasoned proposed reformation of the law of defamation which would eliminate the public/private distinction for plaintiffs and the media/non-media classification for defendants giving the constitutional qualified privilege to all, see Yasser, *Defamation as a Constitutional Tort: With Actual Malice for All*, 12 TULSA L.J. 601, 619-26 (1976) [hereinafter cited as Yasser].

59. *New York Times Co. v. Sullivan*, 376 U.S. 254, 293 (1964) (Black, J., concurring).

60. *Silbowitz v. Lepper*, 55 Misc. 2d 443, —, 285 N.Y.S.2d. 456, 459 (Sup. Ct. 1967), *citing Henry v. Collins*, 380 U.S. 356 (1965).

61. *Buckley v. Littell*, 538 F.2d 882 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977).

62. *Edwards v. National Audubon Soc'y, Inc.*, 556 F.2d 113 (2d Cir. 1977).

public debate. Selective review of a journalist's editorial judgments and thought processes would endanger a constitutionally protected realm, and thereby unquestionably put a freeze on the free exchange of ideas within the newsroom.⁶³ "Indeed," the court concluded, "the *ratio decidendi* for *Sullivan's* restraints on libel suits is the concern that the exercise of editorial judgment would be chilled."⁶⁴

It is this editorial process itself which the court was asked to scrutinize. Through discovery, Herbert determined what Lando knew, saw, said, and wrote during his investigation of Herbert. However, he further pursued an inquiry into Lando's thoughts, opinions, and conclusions which the court refused to permit:

The answers he [Herbert] seeks strike to the heart of the vital human component of the editorial process. Faced with the possibility of such an inquisition, reporters and journalists would be reluctant to express their doubts. Indeed, they would be chilled in the very process of thought. [T]he tendency would be to follow the safe course of avoiding contention and controversy—the antithesis of the values fostered by the First Amendment.

We cannot permit inquiry into Lando's thoughts, opinions and conclusions to consume the very values which the *Sullivan* landmark decision sought to safeguard . . . [Such an] invasion on [*sic*] First Amendment rights [holds] grave implications for the vitality of the editorial process which the Supreme Court and this court have recognized must be guarded zealously.⁶⁵

The court's logic in defining the chilling effect which such an inquiry would produce is inescapable. However, the court's holding must be sharply defined to avoid confusion at this point: the court permitted discovery of what an editor knew, said, saw, and wrote—but not an inquiry into his "judgmental" process. Further, the court concluded that, from these discoverable facts, the jury would be free to *infer* from an editor's use of certain material or his failure to heed contradictory material whether he acted with actual malice.⁶⁶ This is the truly delicate aspect of *Herbert*. In relying on inferences based upon

63. "Selective inquiry into the reporter's thoughts can be far worse than the discovery of all aspects of his mental process. In plumbing only particular facets of the reporter's mind, the libel plaintiff is more likely to distort the nature of the editorial process." 568 F.2d at 984 n.23.

64. *Id.* at 980. "[T]he lifeblood of the editorial process is human judgment. The journalist must constantly probe and investigate; he must formulate his views and, at every step, question his conclusions, tentative or otherwise." *Id.* at 983-84.

65. *Id.* at 984.

66. *Id.*

external facts, the court appears to have adopted an objective test for actual malice. However, as will be seen in the materials which follow,⁶⁷ case law indicates that a subjective test of the state of mind is appropriate. Therefore, it is submitted that the court in *Herbert* did not in fact preclude subjective inquiry into an editor's *state of mind*, rather it extended first amendment protection only to the *editorial function*. This subtle distinction is vital to consistency between this new privilege and the highly subjective inquiry as to actual malice which the Supreme Court has required in prior holdings.

The Actual Malice Requirement: Objective vs. Subjective

The *New York Times* actual malice standard is not synonymous with the common law concept of malice which involves a sense of spite, improper motive, ill will or the like.⁶⁸ Although the "knowing falsehood" element is reasonably straightforward, the element of "reckless disregard" has never been encompassed within an infallible definition.⁶⁹ Still, the Supreme Court in *St. Amant v. Thompson*⁷⁰ makes it clear that the test is *not* whether a reasonably prudent person would have published or would have investigated before publishing. Rather, there must be sufficient evidence to reach the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.⁷¹ The Court implies that the issue of actual malice focuses on the defendant's subjective attitudes regarding the truth or falsity of the material being published.⁷² It is clearly established that innocent falsehoods are protected under the mantle of the first amendment.⁷³

Early Supreme Court decisions discussed both privileged communications⁷⁴ and statements concerning public officers⁷⁵ indicating that

67. See notes 68-105 *infra* and accompanying text.

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

69. *Local 496, National Ass'n of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264, 281, (1974). See also *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974); *Beckley Newspaper Co. v. Hanks*, 389 U.S. 81 (1967).

70. 390 U.S. 727, 730 (1968). See also *Garrison v. Louisiana*, 379 U.S. 64 (1964).

71. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). See generally Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 TEX. L. REV. 199 (1976) [hereinafter cited as Robertson].

72. See *Hoffman v. Washington Post Co.*, 433 F. Supp. 600, 605 (D.C. Cir. 1977).

73. *New York Times Co. v. Sullivan*, 376 U.S. 254, 271-72 (1964). See also *Time, Inc. v. Pape*, 401 U.S. 279, 292 (1971); *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 301 (1971) (White, J., concurring); *Garrison v. Louisiana*, 379 U.S. 64, 73 (1964); *Goldwater v. Ginzburg*, 414 F.2d 324, 335 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970).

74. *White v. Nicholls*, 44 U.S. (3 How.) 266 (1844).

75. *Gandia v. Pettingill*, 222 U.S. 452 (1912).

such publications were not actionable absent "express malice."⁷⁶ The leading decision of *Coleman v. MacLennan*,⁷⁷ cited by the Court in *New York Times*,⁷⁸ applied the requirement of actual malice in a situation involving a newspaper attack upon a public figure and candidate for office. The court in *Coleman*, through an elucidating examination of history and precedent, determined that such writings are conditionally privileged and the plaintiff must prove malice, defined as "actual evil-mindedness," or fail.⁷⁹ However, that court held that actual malice may be sufficiently established through objective externalities.⁸⁰

Calculated falsehoods have been considered by the courts as beyond the pale of first amendment protection. The reasoning is that honestly believed utterances, even if inaccurate, further the interests of free speech in the marketplace of ideas, but a lie, knowingly and deliberately published, makes no such contribution to the social order.⁸¹ How, then, are determinations of a publisher's knowledge of the falsity of his words or the presence of serious doubts as to their truthfulness⁸² to be made?

As previously indicated,⁸³ the actual malice standard appears to permit both a subjective determination through its knowing falsehood provision and an objective analysis through its reckless disregard element.⁸⁴ Because this bifurcated process causes problems in *Herbert*,

76. *Id.* at 457-58. *White v. Nicholls*, 44 U.S. (3 How.) 266, 291 (1844). Express malice has been termed actual malice; malice in fact; ill will or wrongful motive; a deliberate intention to commit an injury, *evidenced by external circumstances*. BLACK'S LAW DICTIONARY 1109 (revised 4th ed. 1968) (emphasis added) *citing* *Sparf v. United States*, 156 U.S. 51 (1895) (homicide); *Weir v. McEwan*, 94 N.J.L. 92, —, 109 A. 355, 356 (1920) (libel); *People v. Scalisi*, 324 Ill. 131, —, 154 N.E. 715, 722 (1926) (homicide).

77. 78 Kan. 711, 98 P. 281 (1908).

78. *New York Times Co. v. Sullivan*, 376 U.S. 254, 280-82 (1964). *See also* the authority and scholarly opinion cited therein. *Id.* at 280 n.20.

79. *Coleman v. MacLennan*, 78 Kan. 711, —, 98 P. 281, 292 (1908).

80. The court in *Coleman* proposes an interpretation of the writing, its malignity or intemperance, tending to show recklessness in making the charge; pernicious activity in the publication or circulation of the statements; their falsity; the situation and relationship of the parties; the facts and circumstances surrounding the publication; and other evidence appropriate to a charge of bad motives as in other cases. Inquiry into the editorial process is not suggested. *Id.*

81. *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

82. *St. Amant v. Thompson*, 390 U.S. 727, 730-31 (1968).

83. *See* notes 68-73 *supra* and accompanying text.

84. The trial court in *Herbert*, however, reached the opposite conclusion:

These constitutionally unprotected creatures are obviously of different species. Knowledge of falsity is a necessary element of the first; that is not so in respect of [sic] the second. Identification of the first species turns upon an objective question of fact: did the defendant know the statement was false? Either he did or he did not; if he did he is cast in damages; if he did not, he is exonerated.

The second species of unprotected false statement is at once more subtle, more complex and subjective. The concept of "reckless disregard for the truth" inevitably carries

some attention must be given to the Supreme Court's approach to the problem of subjective knowledge in this and similar areas.

In *Smith v. California*,⁸⁵ the court ruled that a seller of allegedly obscene books must be shown to have had subjective knowledge of the books' content in order to support a conviction. Thus, by eliminating the burden of self-censorship, public access to the printed word is not inhibited.⁸⁶ The Court went further in disavowing a reasonable person standard under the first amendment in *Monitor Patriot Co. v. Roy*.⁸⁷ While such a standard admirably serves an essential function of setting an objective and socially acceptable limit on the freedom of the individual to act in relation to others, it was reasoned that to impose liability on all statements which were deemed "unreasonable" by a jury would eviscerate the first amendment.⁸⁸ Indeed, in *New York Times* itself the Court indicated that the mere presence of news stories in the paper's files was insufficient to show that the *Times* "knew" the advertisement was false. The state of mind required by actual malice would have to be established subjectively for the persons having responsibility for publication of the advertisement.⁸⁹

However, the Supreme Court has been neither clear nor consistent in its interpretations and has, on at least one occasion, adopted the objective analysis. In *Curtis Publishing Co. v. Butts*,⁹⁰ the Court held that a public figure could recover damages where the substance of the defamatory falsehood makes substantial danger to reputation apparent to the publisher defendant, thereby indicating an extreme departure from the standards of investigating and reporting ordinarily adhered to by

the trier of the facts into the thought processes of the defendant: the evaluation and balancing he made of conflicting information available to him; the misgivings he may have suppressed when deciding to publish.

73 F.R.D. at 393 (emphasis in the original). The author submits that while the thrust of the "second species" may be subjective, it is determined through the existence of external evidence and is therefore an objective standard.

85. 361 U.S. 147 (1959) cited in *New York Times Co. v. Sullivan*, 376 U.S. 254, 278 (1964).

86. 361 U.S. at 153-54.

87. 401 U.S. 265 (1971) (involving statements made in the course of a political campaign).

88. *Id.* at 275. For a lower court decision requiring a subjective standard as opposed to inquiry into what a reasonable publisher would have done, see *Wolston v. Reader's Digest Ass'n, Inc.*, 429 F. Supp. 167, 169 (D.C. Cir. 1977). The court also points out that reasonable people might differ as to the amount of time, money, and manpower necessary to verify a fact thereby increasing litigation. *Id.* at 178. "[R]eckless disregard of the truth [means] subjective awareness of probable falsity: 'There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.'" *Hotchner v. Castillo-Puche*, 551 F.2d 910, 913 (2d Cir. 1977) (alterations by the court) citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 335 n.6 (1974) quoting *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

89. *New York Times Co. v. Sullivan*, 376 U.S. 254, 287 (1964).

90. 388 U.S. 130 (1967).

responsible publishers.⁹¹ The objective standard has also been adopted by a number of lower courts in approaching the actual malice requirement.⁹² Similarly, the RESTATEMENT (SECOND) OF TORTS embraces this objective approach and suggests that the media should be judged primarily by professional custom as deduced by expert testimony and that factors under consideration include deadline pressures, the nature of the interests the defendant was seeking to further, and the degree of damage to the reputation or sensibilities of the plaintiff.⁹³

Proof of subjective awareness raises evidentiary problems of substantial magnitude since direct evidence thereof is generally fortuitous, making capricious results inevitable.⁹⁴ On the other hand, inference of subjective knowledge by the jury is also capricious and exacerbates the problem of jury discrimination against unpopular publishers, ideas,⁹⁵ or plaintiffs. The dilemma presented by *Herbert* is that subjective inquiry has been limited and only the inference of the subjective state of mind of the defendant editor is discoverable.⁹⁶

The reckless disregard test presents many of the same problems as a standard of proof.⁹⁷ The test amounts to negligence raised to a higher power and requires that the publication be made with a high degree of awareness of probable falsehood.⁹⁸ The publisher must in fact have entertained serious doubts as to the truth and accuracy of his

91. *Id.* at 155. Note however, that "a responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated." *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974).

92. *See, e.g., Weaver v. Prior Jeffersonian*, 569 P.2d. 967, 974 (Okla. 1977); *Gobin v. Globe Publishing Co.*, 216 Kan. 223, —, 531 P.2d. 76, 84 (1975) (involving a private as opposed to public plaintiff). *Cf. Goldwater v. Ginzburg*, 414 F.2d 324, 343 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970).

93. RESTATEMENT (SECOND) OF TORTS § 580B, comments *f* & *g* (Tent. Draft No. 21, 1975). *See generally* Robertson, *supra* note 71.

94. Robertson, *supra* note 71 at 238. *Buckley v. Littel*, 394 F. Supp. 918 (S.D.N.Y. 1975) involves a situation in which a writer/editor's thoughts, beliefs, and conclusions were applied to his statements in the determination of actual malice. It is not clear that actual malice could have been found therein absent direct evidence of those beliefs.

95. Robertson, *supra* note 71 at 238. In one case the jury inferred actual malice from a predetermined attitude where the defendant added innuendos to certain quoted statements and quoted others out of context to support a predetermined result based on defendant's biased attitude. *Goldwater v. Ginzburg*, 414 F.2d 324, 337 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970). In a close case, such considerations may in fact constitute permissible editorial judgment.

96. Doubt may still exist as to whether this is a blessing or a curse. Editorial thought may still be chilled where it is recognized that externalities may be damaging or ambiguous. In such an instance, the editorial process, upon waiver of the privilege, may constitute the primary defense.

97. *See* note 84 *supra* in which the trial court in *Herbert* characterizes this element as highly subjective.

98. *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). *See also* *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 153 (1967). For a detailed, mathematically precise, practically imprecise exploration of the difficulties of the reckless disregard standard, see Note, *Constitutional*

statements, such that publication in the face of those doubts demonstrates a reckless disregard for the truth and, therefore, actual malice.⁹⁹ The surface level problem with such a test is that it may encourage publishers not to investigate since the less an editor knows the better.¹⁰⁰ Nevertheless, the Supreme Court has declared that this is the price to be paid for first amendment protections.¹⁰¹ Finally, it should be noted that lower courts have interpreted the reckless disregard standard as being contrasted with the protected utterances honestly believed. As such, statements made in reckless disregard for the truth potentially must be the equivalent of a calculated falsehood¹⁰²—a very high standard indeed.

From the foregoing, the clear call for a subjective state of mind requirement of actual malice is not without contradiction but the weight of authority supports it. As such it appears to collide with the decision in *Herbert*. On the one hand, actual malice is determined by a subjective state of mind; on the other, direct inquiry into the workings of that state of mind is precluded by the new editorial process privilege. But this collision may be more imaginary than real. A careful reading of the case indicates that the *facts* which give rise to a state of mind are fully discoverable. It is the manner and the journalistic environment in which those facts are *edited* that are immune from judicial second-guessing. To do otherwise would be to chill the most vital and elemental constituent of the press.

The dissent objects to this analysis. Indeed, it holds that the whole purpose of a libel action is to expose the defendant's subjective state of mind to the light of judicial review. It was noted that "obviously such a review will have a chilling effect. It is supposed to. The publication of lies should be discouraged."¹⁰³ The dissent contends that the attempt of the majority to reduce the chill of judicial inquiry is not supportable in either precedent or logic.¹⁰⁴ As to the former, the

Law—Torts—Defamation and the First Amendment: The Elements and Application of the Reckless Disregard Test, 50 N.C. L. REV. 390 (1972).

99. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

100. See Robertson, *supra* note 71 at 240.

101. *St. Amant v. Thompson*, 390 U.S. 727, 731-32 (1968). See also *Garrison v. Louisiana*, 379 U.S. 64, 79 (1964).

102. *Pauling v. National Review, Inc.*, 49 Misc. 2d. 975, —, 269 N.Y.S.2d. 11, 19 (Sup. Ct. 1966). Compare *Time, Inc. v. Pape*, 401 U.S. 279 (1971) in which *Time's* deliberate editorial choice to omit the word "allegedly" did not rise to the level of reckless disregard for the truth. *Id.* at 290-92.

103. 568 F.2d at 995. The dissent adds that discovery of an editor's state of mind will not chill freedom of the press any more than is currently being done under *New York Times*. *Id.*

104. *Id.* at 995-97.

dissent is correct. It is a case of first impression. The careful and narrow reading by the dissent of the cases relied upon by the majority supports the view that no court has ever found an editorial privilege prior to *Herbert*. However, the dissent cites no authority for its own pronouncements nor for its conclusion that judicial review of an editor's thought processes is the purpose of a libel action which, further, *should* chill the exercise of editorial judgment.¹⁰⁵

An Alternative Approach to the Editorial Privilege

The concurring opinion details an alternative approach, also through first amendment analysis, to reach the same conclusion. The concurrence cites at the outset the familiar landmarks of limitations on some forms of discovery as applied to the press¹⁰⁶ as well as the guiding principles of the first amendment. Thereafter, the analysis differs from that of the foregoing opinion.

Relying upon a rationale proposed by Mr. Justice Stewart,¹⁰⁷ the concurrence noted a trend in first amendment interpretation which is characterized by a structural, institutional differentiation between freedom of speech and freedom of the press.¹⁰⁸ It is the press as a constitu-

105. *Id.* at 997.

106. First under the general "oppression" or "undue burden" provision of FED. R. CIV. P. 26(c), and secondly using the qualified limitations on discovery of confidential sources. *Id.* at 986.

107. Stewart, *supra* note 17.

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-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.

This basic understanding is essential, I think, to avoid an elementary error of constitutional law. It is tempting to suggest that freedom of the press means only that newspaper publishers are guaranteed freedom of expression. They *are* guaranteed that freedom, to be sure, but so are we all, because of the Free Speech Clause. If the Free Press guarantee meant no more than freedom of expression, it would be a constitutional redundancy. . . .

It is also a mistake to suppose that the only purpose of the constitutional guarantee of a free press is to insure that a newspaper will serve as a neutral forum for debate, a "market place for ideas," a kind of Hyde Park corner for the community. A related theory sees the press as a neutral conduit of information between the people and their elected leaders. These theories, in my view, again give insufficient weight to the institutional autonomy of the press that it was the purpose of the Constitution to guarantee. . . .

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. *But see* First Nat'l Bank v. Bellotti, 98 S. Ct. 1407, 1426-1429 (1978) (Burger, C.J., concurring) (arguing against this interpretation).

108. In short, the press is akin to a fourth branch of government and would have privileges of the nature afforded those branches. Yasser, *supra* note 58, at 623 n.119.

tionally mandated fourth branch of government which the concurrence sees emerging from the primary cases relied upon by the court, namely, *Miami Herald Publishing Co. v. Tornillo*¹⁰⁹ and *Columbia Broadcasting System, Inc. v. Democratic National Committee*.¹¹⁰ Freedom of the press is recognized as central to the integral operations of government,¹¹¹ and *Tornillo* and *Columbia Broadcasting* reflect the inviolability of the editorial function in that process.¹¹² The rationale behind the firmly entrenched doctrine against prior restraints¹¹³ is seen as equally applicable to all restraints of the crucial process of editorial judgement.¹¹⁴ Ultimately, it is the looming threat of self-censorship by the press that forces the majority to reject any compromise short of an absolute editorial process privilege against discovery.¹¹⁵ The end product of that *process* is fully discoverable, but the full scope of the editorial *judgment* which produced it is free from judicial scrutiny.¹¹⁶

The dissent questions the concurring judge's distinction between personal liberties of free speech and institutional liberties of freedom of the press.¹¹⁷ Moreover, the dissent is loathe to see the recognition of a privilege for the press similar to that which exists for the executive, legislative, and judicial branches of government, based on the structural theory of the first amendment which finds the press analogous to a fourth branch of government.¹¹⁸ This reluctance to grant such consti-

109. 418 U.S. 241 (1974).

110. 412 U.S. 94 (1973).

111. *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring); *United States v. National Comm. for Impeachment*, 469 F.2d 1135, 1142 (2d Cir. 1972).

112. 568 F.2d at 988.

113. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *Near v. Minnesota*, 283 U.S. 697 (1931).

114. 568 F.2d at 990. "A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to . . . 'self-censorship.'" *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964). See generally Anderson, *supra* note 1.

115. 568 F.2d at 992-95.

116. *Id.* at 993. In 1971, a Congressional House subcommittee subpoenaed CBS notes and "outtakes" involved in the production of their network documentary, "The Selling of the Pentagon." CBS News President Frank Stanton refused on first amendment grounds, pointing out that the issue at hand was one of news judgments and editing. If they were subject to subpoena actions by the federal government who licenses the broadcasters, the effect would be particularly chilling. The subcommittee threatened Stanton with contempt of Congress but it was not forthcoming. Devol, *Prior Restraint, MASS MEDIA AND THE SUPREME COURT*, 20, 30-31 (1971).

117. "'Freedom of the press is a 'fundamental personal right' which encompasses 'the right of the lonely pamphleteer who uses carbon paper or a mimeograph' as well as that of 'the large metropolitan publisher who utilizes the latest photo-composition methods.'" 568 F.2d at 997, quoting *Branzburg v. Hayes*, 408 U.S. 655, 704 (1972) quoting *Lovell v. Griffin*, 303 U.S. 444, 450 (1938). However, the concurrence denies drawing such a distinction between an individual and institutional "press." *Id.* at 994 n.34.

118. *Id.*

tutional privileges is supported by a comparison of *Branzburg v. Hayes*¹¹⁹ with *NAACP v. Alabama*¹²⁰ by which the dissent concludes that constitutional privileges must be supported by explicit proof of chilling and not the imagination of judges.¹²¹ But having already admitted the chilling effect which would be present upon the press where editorial discretion is subject to judicial review, the dissent proves (or at least pleads) too much when it denies as imaginary its own admission.¹²²

IV. CONCLUSION

The United States Supreme Court wisely granted certiorari upon the important issue of the editorial process privilege found in *Herbert*. Thereunder, a plaintiff may discover what an editor knew, said, saw, and wrote. But the plaintiff may not seek through discovery the opinions, thoughts, beliefs, and conclusions held by that editor as he sought to meld the underlying facts into that which we know as news. The editorial process privilege, according to the court in *Herbert*, is born of and nurtured by the first amendment protection of freedom of the press. The Supreme Court has never found an evidentiary privilege for members of the press residing in the first amendment, but it is submitted that the instant case is compelling in that regard.

The Court must once again rule on the *New York Times* actual malice rule in defamation. It is submitted that the Supreme Court will recognize the soundness of the decision in *Herbert* and affirm, for, in the final analysis, editorial judgment and the processes involved therein are the most basic and elemental ingredients of the press. The press could survive without presses or cameras; it could survive without tablets or tabloids; it could even survive without reporters. But it could not survive without the judgmental process known as editing. Whether it occurs in paneled board rooms, at the city desk or in the mind of some modern-day Thomas Paine, the editorial process *is* the first amendment. Protection from judicial inquiry must, therefore, rise to the stature of a constitutional privilege to prevent chilling by selective inquiry. To preserve a free and robust press, an editor must be free to probe, to hypothesize, to challenge, to critique, and to postulate alternatives without the fear that the lens of judicial scrutiny will focus

119. 408 U.S. 665, 693-95 (1972).

120. 357 U.S. 449, 462 (1958).

121. 568 F.2d at 998.

122. See note 103 *supra* and accompanying text.

upon the elements of the editorial process. To do otherwise would chill the press intolerably. The press is responsible for its publications; not for the copy on the newsroom floor or for the internal machinations or inner-most thoughts of an editor in the process of editing.

An affirmance by the Supreme Court will do much to insure the autonomy of editorial thought while attaching protections to the most necessary component of the journalistic enterprise. The free exchange of ideas in the newsroom and their unencumbered evaluation in the mind of an editor is wisely afforded constitutional protection.

Tyrus V. Dahl, Jr.