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First Amendment; Freedom of The Press; Erosion of New York Times Co. v. Sullivan; Herbert v. Lando

Edward Howlett

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two factors set out in the Cort test as well as other considerations such as references to the remedial purposes of the 1934 Act enunciated in Borak.

It can be argued that this approach is more reflective of actual Congressional intent. That is, another direction could have been taken where an implied remedy might have been found on nothing more than a judicially promulgated concept of what one court may have considered the purpose of the Act to be, the inadequacy of the mode of enforcement, the policies that the legislature sought to effectuate, and so on.

However, the Redington Court took a traditional stance concerning the separation of powers and refused to engage in supererogatory conduct.

JAMES L. MILLER

CONSTITUTIONAL LAW

First Amendment • Freedom of the Press • Erosion of New York Times Co. v. Sullivan

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

IN Herbert v. Lando1 the Supreme Court announced that the first amendment does not require a constitutional privilege foreclosing direct inquiry into the editorial process. While the decision may seem correct in its overturning of the absolute privilege afforded to the editorial process by the Second Circuit,2 nevertheless, by refusing to grant even a qualified privilege to the editorial process the Court may have upset the delicate balance between an individual's interest in his reputation and society's interest in a free flow of information recognized in New York Times Co. v. Sullivan.3

Anthony Herbert, a retired United States Army Colonel, attracted the attention of the news media in March 1971 when he filed charges with the United States Army Criminal Investigation Division accusing his superior officers of covering up war crimes in Vietnam.4 Herbert alleged that he had witnessed numerous atrocities while serving in Vietnam and that he had duly reported these atrocities to his superiors. According to

4 In July 1971 Herbert was interviewed by LIFE MAGAZINE. In September the New York Times carried an article entitled How a Supersoldier was Fired from his Command. Herbert also appeared on the Dick Cavett Television Show. 568 F.2d at 981.
Herbert, his superiors were not interested in his reports, and his persistence in pressing these charges resulted in his abrupt relief of command.5

On February 4, 1973, the Columbia Broadcasting Company (CBS) televised "The Selling of Colonel Herbert" on its documentary news program "60 Minutes." The segment was produced and edited by Barry Lando and narrated by Mike Wallace. Lando later published an article in Atlantic Monthly magazine recounting his research for the "60 Minutes" segment.

Herbert brought an action for defamation against Lando, CBS, Wallace and Atlantic Monthly in Federal District Court. Herbert alleged over forty million dollars in damages for injury to his reputation and impairment of his book SOLDIER,6 an account of his military experiences. Herbert contended that as a result of selective interviewing and "skillful" editing the "60 Minutes" segment and the Atlantic Monthly article falsely and maliciously portrayed him as a liar and left the impression that he had fabricated war crime charges to explain his relief from command. These charges were denied by the defendants.

Herbert conceded that he was a "public figure" and was, therefore, required to establish "actual malice"7 before he could recover in a defamation action.8 In preparation for trial Herbert conducted extensive discovery.9 On a number of occasions during his deposition Lando refused to answer questions posed by Herbert. These questions concerned Lando's opinions, beliefs, intentions, and conclusions in his preparation of the "60 Minutes" segment.10 Lando claimed that these areas were protected by the first

5 Army records explained Herbert's removal as a result of a poor efficiency report which portrayed Herbert as lacking "ambition, integrity, loyalty or will for self-improvement." 568 F.2d at 980.
7 "The constitutional guarantees require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'-that is with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. 297-80.
9 "The deposition of Lando required twenty-six sessions and lasted for over a year. The sheer volume of the transcript-2,903 pages and 240 exhibits- is staggering." 568 F.2d at 982.
10 The Second Circuit grouped these inquiries into five categories:
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;
2. Lando's conclusion 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.
amendment. On Lando's refusal to answer, Herbert sought an order compelling disclosure.13

The district court rejected Lando's assertion of a first amendment privilege.12 Reasoning that "public figure" plaintiffs were entitled to a liberal interpretation of the discovery rules13 and that a defendant's state of mind was of "central importance" to the issue of actual malice, the district court allowed the discovery under Rule 26(b).14

The Second Circuit Court of Appeals agreed to review the district court's finding after it was certified for an interlocutory appeal.15

Contrary to the district court's finding of no privilege for the editorial process a divided Second Circuit found that the first amendment required an absolute privilege in this area.16

Chief Judge Kaufman began his decision on the premise that "the Supreme Court has never hesitated to forge specific safeguards to insure the continued vitality of the press."17 The work of the press could be divided into three functions: "(1) acquiring information, (2) 'processing' that information and (3) disseminating that information."18 If any of these three areas are hindered "the free flow of information inevitably ceases."19 For the Chief Judge the safeguards established for both the acquisition of information20 and the dissemination of that information21

12 FED. R. CIV. P. 37(a)(2).
14 Judge Haight stated:
If the malicious publisher is permitted to increase the weight of the injured plaintiff's already heavy burden of proof by a narrow and restricted application of the discovery rules, . . . the law in effect provides an arras behind which malicious publication may go undetected and unpunished. Nothing in the first amendment requires such a result.

Id. at 394.
15 FED. R. CIV. P. 26(b) states in part:
Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.


17 568 F.2d at 976.
18 Id.
19 Id.

"inevitably lead the Supreme Court to recognize that the editorial process must be equally safeguarded." This protection could be found in the Court's decisions in *Miami Herald Publishing Co. v. Tornillo* and *Columbia Broadcasting System v. Democratic National Committee.* Judge Kaufman read these decisions as a warning that "we must encourage, and protect against encroachment, full and candid discussion within the newsroom itself."

After establishing this background Judge Kaufman held that developments in the law of libel and freedom of the press "permit only those procedures which least conflict with the principle that debate on public issues should be robust and uninhibited." Since Herbert's discovery requests "strike to the heart of the vital human component of the editorial process" Judge Kaufman felt that they should not be allowed.

Judge Oakes, writing in a concurring opinion, believed that the principles underlying the prior restraint cases applied to Herbert's discovery requests. Since broad discovery would have a chilling effect in the newsroom, editorial judgment "is in as much jeopardy as if the court had restrained publication ab initio." For this reason, Judge Oakes felt that an additional procedural rule was necessary to ensure a free press. There are theoretically three different levels of protection. The first level, according to Judge Oakes, would allow discovery into every aspect of the defendant's state of mind. The second level would allow discovery only of "highly" relevant "direct" evidence which cannot be otherwise obtained.
The final level would afford an absolute privilege to the editorial process.

Out of these three areas Judge Oakes felt that the interests in a free press required an absolute privilege. Unlimited discovery would have a chilling effect on the editorial process which would exceed that contemplated by *New York Times Co. v. Sullivan*.\(^{31}\) The compromise position would also suffer from this defect. Although the chill here would not be as great as that caused by unrestrained discovery, it would still exceed that contemplated by *New York Times*. This would follow because of the inability of an editor to predict what a court will consider “highly” relevant or “direct” evidence.

In a dissenting opinion, Judge Meskill stated that discovery into the editorial process will have no greater chilling effect than that caused by the *New York Times* decision. Agreeing with the district court, Judge Messkill stated, “[t]he Supreme Court has shown no enthusiasm for the creation of new constitutional privileges, particularly where, as here, they are based on claims of chilling effect that depend on the imagination of judges rather than proof supplied by the parties.”\(^{32}\)

Judge Meskill’s words proved prophetic. In a six to three decision,\(^{33}\) the Supreme Court reversed the decision of the Second Circuit. The Court based its decision on three basic premises. Under the first premise the Court felt that “an absolute privilege (for) the editorial process . . . is not required, authorized or presaged by our prior cases, and would substantially enhance the burden of proving actual malice, contrary to the expectations of *New York Times*, *Curtis Publishing Co. v. Butts*, and similar cases.”\(^{34}\) Secondly, a defamation plaintiff’s “important” interests in opposing an editorial privilege cannot be overcome on the ground that disclosure of editorial conversations and of the editor’s conclusions, beliefs, intentions, and opinions will have a chilling effect on the editorial process. And finally, the Court felt the present requirement of relevancy\(^{35}\) in discovery matters offers adequate protection to the media libel defendant.

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\(^{32}\) 568 F.2d at 998.

\(^{33}\) Justice White wrote the majority opinion which was joined by Chief Justice Burger, and Justices Blackmun, Powell, Rehnquist and Stevens. Justice Powell wrote a concurring opinion to elaborate on a portion of the majority opinion. Justices Stewart, Brennan, and Marshall dissented.

\(^{34}\) 441 U.S. 169 (1979).

\(^{35}\) FED. RULE CIV. PROC. 26(b)(1).
By relying on these three premises the Court ignored both the first amendment guarantee of freedom of the press and the realities of modern day discovery.

I. FREEDOM OF THE PRESS

Contained within the enumerated protected areas of the first amendment are two freedoms which are considered essential to a democratic society; freedom of speech and freedom of the press. The importance of a free press in a democratic society can never be overstated. Indeed, James Madison, the originator of the first amendment considered it "the most important freedom of all." And yet, although the importance of a free press is widely acknowledged, and it is a separately enumerated area within the first amendment, the Court has consistently dealt with freedom of the press as coterminous with freedom of speech. "Nowhere has the Supreme Court's failure to discern or articulate a distinction between the freedoms of speech and the press been more evident than in the libel cases."

In *New York Times* the Court established that a public official was required to show actual malice before he could recover in a defamation action. This actual malice requirement was later extended to public figure libel plaintiffs in *Butts*. The actual malice test established in *New York Times* was grounded on the proposition that "freedom of expression on public questions is secured by the first amendment." In *Lando* the Court was asked to go beyond the actual malice test which protects "freedom of expression." It was Lando's contention that "freedom of the press" required more protection than that afforded to the "freedom of expression." In Lando's view freedom of the press required not only the protection of the actual malice test, but also required the additional protection of an editorial privilege. Thus, Lando was asserting that freedom of the press is an area distinct from and, possibly, more important than freedom of speech.

While recognizing exactly what Lando was asserting, the majority of the Court did not approach the creation of an editorial privilege as a problem focusing specifically on the Freedom of the Press Clause. Instead,
the Court again chose to view freedom of the press and freedom of speech as a distinction without a difference. Speaking of New York Times and its progeny Justice White said:

These cases rested primarily on the conviction that the common law gave insufficient protection to the First Amendment guarantees of freedom of speech and freedom of the press . . . . (emphasis added). Thus, the Court acknowledged that freedom of speech and freedom of the press have been treated as coterminus. The majority managed to avoid the free press issue by stating that New York Times (despite the free expression language) "was widely perceived as essentially protective of press freedoms . . . ." Since the Court chose to continue to view freedom of speech and freedom of the press together its conclusion that "an absolute privilege to the editorial process of a media defendant in a libel case is not required, authorized, or presaged by our prior cases . . . ." is certainly correct. The question that remains, however, is an editorial privilege required, authorized or presaged by the Court's prior cases if freedom of the press is treated as an entity in itself?

By viewing freedom of the press as distinct from freedom of speech the Court could have found sufficient grounds for the creation of an editorial privilege. This approach was taken by Judge Oakes at the appellate level and led him to conclude that an absolute privilege was required. By using a similar approach Justice Brennan concluded that there were grounds for a qualified privilege.

In his concurring opinion at the appellate level, Judge Oakes relied on Justice Stewart's reasoning that freedom of the press is a "structural" guarantee. Under this view the press is accorded more freedom than that given to the individual under the Free Speech Clause. The Free Press Clause is seen as creating "a fourth institution outside the Government by viewing freedom of the press as distinct from freedom of speech the Court could have found sufficient grounds for the creation of an editorial privilege. This approach was taken by Judge Oakes at the appellate level and led him to conclude that an absolute privilege was required. By using a similar approach Justice Brennan concluded that there were grounds for a qualified privilege.

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43 441 U.S. at 159.
45 44 U.S. at 169.
46 "[T]he Free Press Clause extends protection to an institution. The publishing business is, . . . 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 . . . ." Stewart, Or of the Press, 26 HASTINGS L.J. 631, 633-34 (1975) quoted at 568 F.2d at 988 (Oakes, J. concurring). Justice Stewart chose to base his dissent in Lando on a finding that discovery into the editorial process "is simply not relevant in a libel suit brought by a public figure against a publisher." 441 U.S. at 199.
[acting] as an additional check on the three official branches."

The vital role played by the editor in processing gathered information for dissemination places him in the center of this fourth institution. Because of the importance of the press under this view of the Free Press Clause, and the editor's importance to the press, Judge Oakes concluded:

To the extent that the independent exercise of editorial functions is threatened by governmental action, the very foundations of the architectural masterpiece that is our form of government are shaken, the supporting columns weakened.

Thus, under the view taken by Judge Oakes the Free Press Clause when treated separately from the Free Speech Clause establishes a basis for the granting of an editorial privilege. The reasoning for creating such a privilege would be analogous to the reasons for the executive privilege. The press is placed in a position whereby it protects individuals from abuses in the official branches by exposing those abuses to society. Governmental interference with the editorial process is rejected as a limitation on the checking function of the press. Viewed in this manner the protection offered to freedom of expression is an inadequate protection for the press.

A privilege for the editorial process is also required if the press is viewed in its functional capacity. In New York Times the Court stated that the purpose of the first amendment is "to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people." With this purpose in mind the Court concluded that "debate on public issues should be uninhibited, robust, and wide open . . . ." Contained within these statements is a realization of the principle that a democratic society is based on the decisions of its people. In order to make reasoned decisions the people must have information available to them. Undoubtedly, freedom of speech is necessary to serve this information function, but in modern day society it is the press which plays the vital role in creating an informed people. What Judge Cooley said about newspapers in 1903 is certainly true regarding the newsmedia of today:

The newspaper is . . . one of the chief means for the education of the people. The highest and lowest in the scale of intelligence resort
to its columns for information; it is read by those who read nothing else, . . . Upon politics it may be said to be the chief educator of the people; its influence is potent in every legislative body; it gives tone and direction to public sentiment on each important subject as it arises; . . . .

Although the newsmedia of today is accorded more protection than the newspaper of 1903 because of the greater protection afforded to freedom of expression, the remainder of Judge Cooley's statement is also applicable today:

And yet it may be doubted if the newspaper, as such, has ever influenced at all the current of common law, in any particular important to the protection of publishers . . . the publisher of the daily paper occupies today the position in the courts that the village gossip and retailer of scandal occupied two hundred years ago, with no more privilege and no more protection.

Given the purpose of the first amendment is to assure the unfettered exchange of ideas greater protection for the press may also be grounded on the proposition that the press plays a greater role in the informative area than does the individual through his speech.

Justice Brennan, the author of the New York Times decision, used this functional approach as the basis of his dissent in Lando. He viewed the first amendment from its instrumental aspect. Viewed in this fashion "the first amendment serves to foster the values of a democratic self-government." Justice Brennan examined the creation of an editorial privilege to determine if it would further any of the values of First Amendment. At the outset of this examination Justice Brennan focused on the importance of the press in serving the informative function:

[I]t is relevant to note that respondents are representatives of the communications media, and that the 'press and broadcast media' . . . have played a dominant and essential role in serving the 'informative function' . . . .

By focusing on this "informative function" Justice Brennan recognized that the creation of an editorial privilege is a question which affects not only the editor, but has ramifications on the public right to information.

56 Id.
57 441 U.S. at 185. Justice Brennan's "instrumental approach seems to be similar though not as strong as the "structural guarantee" approach. One of the values served by the first amendment is that "(t)he amendment shields those who would censure the State or expose its abuses." Id.
58 Id. at 186 (citations omitted).
59 "An editorial privilege would thus not be merely personal to respondents, but would shield the press in its function "as an agent of the public at large. . . ." 441 U.S. at 189 (citation omitted).
Acknowledging the importance of the media in serving the informative function enabled Justice Brennan, contrary to the majority, to find adequate precedent for an editorial privilege based on the public's right to information. Justice Brennan also recognized the importance that the editor plays in the informative function:

Through the editorial process expression is composed; to regulate the process is therefore to regulate the expression . . . The print and broadcast media . . . cannot exist without some form of an editorial process.

While agreeing with the majority that there was "no direct governmental regulation of respondents' editorial process," Justice Brennan did recognize that "disclosure of the editorial process of the press will increase the likelihood of large damage judgments in libel actions, and will thereby discourage participants in that editorial process." Due to this Justice Brennan observed that the editorial process must be examined to determine if the exposure of that process would have an adverse effect on the first amendment value served by the press, the public's right to information.

Although an editorial privilege may seem unnecessary when the Free Speech Clause and the Free Press Clause are grouped together under the heading "freedom of expression," a separate treatment of the Free Press Clause either as a fourth institution or as the primary server of the informative function strengthens the case for such a privilege. If the free press guarantee is treated as a separate guarantee it is entitled to more weight when it is balanced against the libel plaintiff's interest in his reputation. Instead of simply balancing the right of free expression guaranteed by the Free Speech Clause there is the added weight of the public's right to know which arises from a recognition of the importance of the press in serving the informative function. This added weight is not present when freedom of the press is treated as coterminous with free speech. Although it cannot be denied that libel plaintiffs have an important interest at stake and that there must be some control over the press, the Court's finding

60 In recognition of the social values served by the First Amendment, our decisions have referred to 'The right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences,' Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 390 (1969); and to the circulation of information to which the public is entitled in virtue of the constitutional guarantees,' Grojean v. American Press Co., 297 U.S. 233, 250 (1936). "In Time, Inc. v. Hill, 385 U.S. 374 (1967), we stated that the guarantees of the First Amendment 'are not for the benefit of the press so much as for the benefit of us all . . .';" 441 U.S. at 188 (emphasis by Justice Brennan).

61 Id. at 190.

62 Id. at 191.

63 "But the sheer mass of available information, the certain knowledge that part of what may pass for information is misinformation, false and sometimes mischievous, clogging the rational processes of public debate and threatening unwarranted damage to individuals, calls for some mechanism to secure a minimum standard of responsibility in the transmission of information." Pendrick, Freedom of the Press and the Law of Libel: The Modern Revised Translation, 49 CORN. L. REV. 581 (1964).
in *Lando* that the interests of the plaintiff weighed heavier than those of the press is rendered questionable by a failure to adequately assess the weight of the free press guarantee. It may be true that "evidentiary privileges in litigation are not favored." But as Justice Brennan pointed out:

We have in the past, however, recognized evidentiary privileges in order to protect interests and relationships which . . . are regarded as of sufficient social importance to justify some incidental sacrifice of sources of fact needed in the administration of justice.  

By treating the free press guarantee as something different than the free speech guarantee the Court would have been able to see that the added weight of the people's right to know is of sufficient social importance to justify a privilege.

II. DISCOVERY AND THE EDITORIAL PROCESS

Discovery abuses are prevalent in our legal system. As one commentator put it:

[T]he field of cases in which discovery is subject to abuse is limited only in terms of number of filings . . . The complaints in this area are that unnecessary and irrelevant depositions are employed, . . . that information is sought for embarrassment . . . that the discovery process is used indefinitely in support of a mere hunch or suspicion of a cause of action or defense.

In light of present day discovery abuses *Lando* had argued that the large cost of defending against libel suits would lead to self-censorship. This would be caused by the editor's overcautiousness in trying to avoid substantial legal fees. The *Lando* Court, however, felt that the only way to prevent this was to end liability for defamation. Since this position has been found to be untenable, and the high cost of litigation is "not peculiar to the libel and slander area," the media's protection in this area is to come from a firm application of the Rule 26(b) (1) requirement that the material sought be relevant.

Justice Powell wrote a concurring opinion to elaborate on this latter portion of the Court's decision. Justice Powell felt that "the district court must ensure that the values protected by the first amendment, though entitled to no constitutional privilege in a case of this kind, are weighed carefully in striking a proper balance."

64 441 U.S. at 175.
65 Id. at 183. (citations omitted).
67 441 U.S. at 176 n.25.
68 441 U.S. at 176.
70 441 U.S. at 180.
It is important to note that the criticisms leveled at modern day discovery tactics\textsuperscript{71} are valid now while the Rule 26(b) (1) requirement of relevancy is in full force. It is indeed disheartening to be informed by the Court that protection for a first amendment guarantee is to come from a source that has already proven ineffective. By failing to critically evaluate the ineffectiveness of the relevancy requirement in protecting first amendment guarantees, the Court ignored the realities of modern day discovery.

The threat of abuse that modern day discovery procedures pose to the first amendment guarantee of freedom of the press and the majority's refusal to afford the press any more protection than the requirement of relevancy caused Justice Marshall to dissent. Justice Marshall stated:

Insulating the press from ultimate liability is unlikely to avert self-censorship so long as any plaintiff with a deep pocket and a facially sufficient complaint is afforded unconstrained discovery of the editorial process. If the substantive balance of interests struck in \emph{Sullivan} is to remain viable, it must be reassessed in light of the procedural realities under which libel actions are conducted.\textsuperscript{72}

Justice Marshall then went on to point out that in any civil action discovery devices can become "tactics of attrition." But, "many self-perceived victims of defamation are animated by something more than a rational calculus of their chances of recovery."\textsuperscript{73} Of even more importance, however, is that if discovery into the editorial process is not properly restrained "editors may well make publication judgments that reflect less the risk of liability than the expense of vindication."\textsuperscript{74} Such a result would implicate the First Amendment. Since it is the responsibility of the Court to protect the guarantees of the amendment, Justice Marshall felt that "by leaving the directives of \emph{Hickman} and \emph{Schlagenhauf}\textsuperscript{75} unqualified with respect to libel litigation, the Court has abdicated that responsibility."\textsuperscript{76}

Since the first amendment and the inadequacies of the discovery rules, contrary to the thinking of the \emph{Lando} majority, do require an editorial privilege the question becomes what should be the scope of that privilege?

\section*{III. The Editorial Privilege}

The editorial process as assessed by the Second Circuit, and considered by the Supreme Court was subdivided into two separate aspects: 1) the editor's thought process, encompassing his intentions, beliefs, and con-

\textsuperscript{71} See note 66 \textit{supra} and accompanying text.

\textsuperscript{72} 441 U.S. at 204.

\textsuperscript{73} Id.

\textsuperscript{74} Id. at 205.

\textsuperscript{75} \emph{Hickman} v. \emph{Taylor}, 329 U.S. 495 (1947), held that the rules of discovery should be given a "broad and liberal" scope. \emph{Schlagenhauf} v. \emph{Holder}, 379 U.S. 104 (1964), reaffirmed the \emph{Hickman} discovery mandate.

\textsuperscript{76} 441 U.S. at 205.
clclusions, and 2) pre-publication communications among the editors and reporters." The Second Circuit found that the first amendment required an absolute privilege in both of these areas. The \textit{Lando} majority, however, found that neither area required a privilege. There is undoubtedly a large area for compromise in the two opinions. An absolute privilege with respect to both aspects of the editorial process would undoubtedly upset the balance between a free press and an individual’s interest in his reputation. Indeed, under an absolute privilege approach the balancing of the two interests ceases to exist. While freedom of the press is undoubtedly a very important interest in a democratic society, recent Court decisions have correctly pointed out that the law of defamation also protects a very important interest.

In much the same way, however, a complete absence of an editorial privilege also upsets the balance of competing interests when freedom of the press is given the weight it deserves. The majority in \textit{Lando} found the argument of “a chilling effect” in both aspects of the editorial process unconvincing. Justice Brennan and Justice Marshall, while agreeing that a privilege was necessary to protect pre-publication communications, felt that the concept of a chill in the editor’s thought process was “implausible.” The Court has recognized, however, that inquiries into the mental process can have a “chilling effect.” In \textit{Hickman v. Taylor}\textsuperscript{329} inquiry into the thoughts and opinions of attorneys was forbidden because it would be “demoralizing.” Certainly this demoralizing effect should be recognized where the first amendment is implicated.

The majority in \textit{Lando} refused to extend a privilege to this aspect of the editorial process since “\textit{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.”\textsuperscript{31} The Court, therefore, felt that any chilling effect on an editor’s thought process would be a result of the substantive aspect of \textit{New York Times}. Justice Brennan and Justice Marshall also

\textsuperscript{77} See note 10, supra.


\textsuperscript{79} 441 U.S. at 207.

\textsuperscript{80} 329 U.S. at 495 (1947). In \textit{Hickman} the Court stated: Proper preparation of a client’s case demands that he (the attorney) assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference . . . This work is reflected . . . in interviews, statements, memoranda, correspondence . . . mental impressions, personal beliefs and countless . . . ways . . . Were such materials open . . . on mere demand, much of what is now put in writing would remain unwritten. An attorney’s thoughts, heretofore inviolate, would not be his own . . . The effect on the legal profession would be demoralizing. 329 U.S. at 511. Notice the striking similarity between the attorney’s preparation and the function played by the editor.

\textsuperscript{81} 441 U.S. at 160.
agreed with this position. Creating an editorial privilege for this area under the view taken by the Court is seen as an impermissible addition to the plaintiffs burden of proof. But on closer analysis it can be seen that the chill which adheres from an exposure of the editors thoughts comes from the discovery not from the actual malice test, and that creation of an editorial privilege would not add to a libel plaintiffs burden of proof. This is so since the actual state of mind of a media defendant in a libel action is not dispositive.

The actual malice test of New York Times allows recovery to the plaintiff if he can establish that the defendant published a statement with knowledge of its falsity, or with reckless disregard of whether it was false or not. The knowing falsity requirement of this test by definition is a subjective test. That is the plaintiff must establish that the defendant knew in his own mind that the statement was false. The reckless disregard test, while at first glance a seemingly objective standard has been construed by the Court as also requiring subjective awareness. Theoretically, there are two possible ways in which a plaintiff in a libel action can prove the subjective awareness required by the actual malice test. The first method, which was the matter in dispute in Lando, is by a direct examination of the defendant. The second method is to prove through circumstantial evidence that the defendant had the required knowledge. Realistically, however, the plaintiffs ability to recover under the actual malice test depends solely on his ability to prove knowledge by the second method. The reason for this is obvious. The defendant is simply not going to admit to liability by informing the plaintiff that he had the requisite knowledge. This is true regardless of the defendant's actual state of mind. Discovery into this area is likely to be prolonged from the defendants standpoint and fruitless from that of the plaintiff. As the Court acknowledged, "[i]t may be that plaintiffs will rarely be successful in proving awareness of falsehood from the mouth of the defendant himself." The chill that adheres from a discovery of the editors thoughts comes from a fear of the time and expense incurred in the fruitless discovery of the editor's thought process. The editor is certainly not chilled by the idea of liability being found. The editor has the total control over this since the damning statements would have to come from his own lips. The editor does fear that which he cannot control; the

82 "(T)his inhibition would emanate principally from Sullivan's substantive standard, not from the incremental effect of such discovery. So long as Sullivan makes state of mind dispositive, some inquiry as to the manner in which editorial decisions are made is inevitable." 441 U.S. at 207 (Marshall, J. dissenting).

83 Garrison v. Louisiana, 379 U.S. 64, 74 (1964), (only those false statements made with a high degree of awareness of probable falsity); St. Amant v. Thompson, 390 U.S. 727, 731 (1967), (There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication); See also, Gertz v. Robert Welch, Inc., 418 U.S. 323, 332 (1974), (quoting Garrison and Thompson with approval).

84 441 U.S. at 170.
time and expense that he must expend until the opposing party concedes that the discovery is fruitless.

In the Court's view, however, the difficulty in proving the requisite knowledge through circumstantial evidence justified allowing the direct inquiry. On the surface proving subjective knowledge through circumstantial evidence appears to be a difficult task. This difficulty arises from the fact that a jury is in a different position under a subjective test than it is under an objective test. Under an objective test the jury is told that if a reasonable person would have the required knowledge, the defendant would also know it. The jury is then given facts. If the jury concludes that a reasonable person would have the knowledge from these facts, they then find that the defendant also had knowledge. By contrast, a subjective test shifts the focus from a reasonable man to that of the defendant. Thus, the jury may find that a reasonable person would have the knowledge, given the facts supplied, but they are not required to draw the inference that this particular defendant also had the knowledge. This fact, that the jury is not required to draw the inference, is what gives the plaintiff his substantial burden. But, any subjective test is a de facto objective test. Given sufficient circumstantial evidence from which to draw an inference of subjective knowledge, a jury will in all probability draw that inference. This is especially true when the defendant is someone considered as having above average intellectual capacities, such as an editor. It is extremely difficult to perceive a jury that would find that a reasonable person would have knowledge, but an editor would not. The reality of this situation was observed by the Court itself in a prior decision dealing with the actual malice standard.

Because the actual malice test is a de facto objective test the thoughts and opinions of the editor should be afforded a qualified privilege to protect against the chill caused by discovery into these areas. This privilege like the attorney's privilege should yield on a showing of need. Thus, if the libel plaintiff has unavailable to him objective evidence from which the jury could infer knowledge, and the plaintiff had other information tending to show defamatory intent, the privilege should yield. Evidence of "common law malice" such as ill will, spite, or hatred should be sufficient to

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85 "The test of actual malice is subject to the very same defects that led the majority of the Court to reject broader tests of liability ... all the surrounding circumstances are put before the jury and it is asked to draw an inference from the total situation. In the end the requirement that malice be proved adds little or nothing to the requirement that mere falsity be shown ... ." T. Emerson, THE SYSTEM OF FREEDOM OF EXPRESSION 535 (1970).

86 In St. Amant v. Thompson, 390 U.S. 727 (1967), the Court stated: Professions of good faith will be unlikely to prove persuasive ... where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them into circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.

390 U.S. at 732.
show the need for further inquiry. 

A privilege thus established would give the district courts better rein over the discovery process, and lessen the chilling effect on the editor's thought processes.

Since the actual malice test of *New York Times* is in reality a *de facto* objective test, creation of an editorial privilege for prepublication communications would add to a libel defendant's burden of proof. A privilege in this area would not, however, substantially add to that burden of proof. The privilege would certainly diminish the evidence on which a jury could draw the inference of knowledge. In some cases it may even be that the plaintiff would uncover memoranda in which the defendant admits that he knew the information was false. Thus, such a privilege does have some effect on the plaintiff's burden of proof, making for a stronger argument against a privilege in this area.

However, the possibility of a chilling of the press is also much stronger in this area. The majority in *Lando* acknowledge this. Because of this direct confrontation a balance must be struck between the competing interests. The *Lando* majority felt that the interest of the plaintiff in reaching this evidence weighed heavier than those of the press. As stated before, however, this finding is suspect by a failure to adequately assess the weight of the press. A recognition of the true weight of the press, however, and the necessity of pre-publication communication tips the balance in favor of establishing the privilege. Both Justice Brennan and Justice Marshall by recognizing the importance of the press and the necessity of pre-publication communications reached the conclusion that a privilege in this area was required. Quoting from *U.S. v. Nixon*, Justice Brennan clearly demonstrated the need for protection of pre-publication communications:

Human experience teaches that those who expect public dissemination of their remarks may well tamper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process.

Justice Marshall also realized the necessity for a privilege in this area:

Society's interest in enhancing the accuracy of coverage of public

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87 "Spite may have some evidentiary value in proving constitutional fault." Morris, Modern Defamation Law 36 (Al-Aba Torts Practice Hndbook 1978). A publisher or editor who thinks ill of a public figure may possibly prove reckless in his reporting on that figure. This proposition, while not enough to establish actual malice, Henry v. Collins, 380 U.S. 356 (1965) (per curiam), should be enough to overcome an evidentiary privilege when the only possible way for the plaintiff to prove defendants knowledge is from the lips of the defendant.

88 "We do not doubt the direct relationship between consultation and discussion on the one hand and sound decisions on the other." 441 U.S. at 173.

89 The Court's assurance that the press will discover a method to assure sound decisions without frank discussions is also questionable. See 441 U.S. at 174.


events is ill served by procedures tending to muffle expression of uncertainty.92

Justice Brennan felt that this privilege should yield to a prima facie showing of falsity. Justice Marshall felt that this privilege should be absolute.

An editorial privilege for pre-publication communications should be granted because society’s interests in information also requires some type of guarantee that that information is accurate. It is clear that the only means of ensuring this accuracy is through candid discussion among editors. As with the privilege recommended for the editors thought processes, a privilege for pre-publication communications should yield upon a showing of a lack of circumstantial evidence and common law malice. Such a privilege would maintain the balance between the libel plaintiff’s interests and the interests of the press by adequately shielding communications among editors, but not completely foreclosing a relevant area of discovery to the libel plaintiff.

IV. CONCLUSION

In Lando the majority of the Court continued to read the Free Speech Clause and the Free Press Clause as coterminous. By doing so they failed to adequately assess the weight of the press as measured against the competing interests of a libel plaintiff. Society’s interest in a free flow of accurate information may be better served by the granting of a qualified privilege to the editorial process. Since the actual malice test of New York Times is in reality a de facto objective test the failure of the Court to recognize an editorial privilege does little to aid the libel plaintiff and much to harm the free flow of information which is vital to a democratic society.

Edward Howlett