1-1-1986

Judicial Misapplication of State of Mind Discovery in Media Libel Cases: The Actual Malice Standard Betrayed

John T. Schreiber

Follow this and additional works at: http://digitalcommons.law.scu.edu/lawreview

Part of the Law Commons

Recommended Citation

JUDICIAL MISAPPLICATION OF STATE OF MIND DISCOVERY IN MEDIA LIBEL CASES: THE ACTUAL MALICE STANDARD BETRAYED

I. INTRODUCTION

Defamation law developed over the past six centuries as a means of protecting individuals from unjustified attacks on their reputations. The law of defamation slowly evolved into a highly complex set of rules, as it travelled from English seignorial courts, to ecclesiastical courts and the Star Chamber, and finally into common law courts. Common law defamation eventually crossed the Atlantic Ocean with the colonists and made its way into the United States. In America, defamation law has always been within the province of state courts.

One form of defamation law is libel. Libel law protects individuals from unjustified written attacks upon their reputations. Several different types of libel suits currently exist. For instance, there are suits between government officials and media defendants, government officials and non-media defendants, famous people and media defendants, famous people and non-media defendants, private individuals and media defendants, and private individuals and non-media defendants.

At common law, the strict liability standard of proof applied in all libel cases, regardless of the status of the plaintiff or the category of the defendant. Today, different standards apply depending upon who is the plaintiff.

The courts devised these differing standards in reaction to the major tensions that run through American libel law. One tension exists between preserving the constitutional protections of the first
amendment rights of free speech and press, and accommodating the state interest in protecting its citizens' reputations. Another tension exists regarding the amount of protection that should be available to protect the reputations of individuals in the "public eye" as opposed to ordinary citizens. These conflicts have long existed in the law of defamation and continue to exist today. These competing interests are especially acute when the defendant is a member of the media. However, until 1964, American jurisdictions applied common law principles to libel cases including those involving media defendants. The result was that media defendants received no constitutional protection in defamation cases.

In 1964, the Supreme Court created a constitutional privilege for media defendants in New York Times Co. v. Sullivan. The New York Times Court held that in cases involving a public official plaintiff and a media defendant, the public official may recover for a defamatory falsehood related to his official conduct only if he proves that the media defendant made the statement with actual malice. The Court defined actual malice as knowledge that a statement is false or reckless disregard of whether it is true or false. This standard relieves the media defendant from having to prove the truth of all the facts of a statement. In 1968, the Court defined actual malice as a subjective standard, a harder standard to prove, in order to further protect first amendment guarantees of free speech and press.

Over the next eighteen years, the Court extended this media protection by holding that various classes of plaintiffs had to prove actual malice before a media defendant would be liable.

---


8. These interests are particularly critical in such situations because the media is greatly responsible for disseminating information to the public and thereby generating public debate.


10. A public official may be defined as a government employee who has, or appears to have, substantial responsibility for, or control over conduct of government affairs. The position must also be one which would invite public scrutiny of the person holding it, apart from scrutiny generated by the controversy. RESTATEMENT (SECOND) OF TORTS §580A comment b (1977).

11. 376 U.S. at 279-80.

12. Id. at 280. In other words, a media defendant will not be liable for publishing a false statement unless actual malice can be proven. Id.


In its attempt to balance the constitutional and state interests, however, the Supreme Court created a potentially dangerous imbalance. The original purpose for adopting the subjective standard of actual malice was to safeguard first amendment concerns. The current Supreme Court has distorted this purpose by using it to allow "state of mind discovery" into the editorial process. Unfortunately, such uninhibited discovery inhibits the media's exercise of its first amendment rights. Unlimited state of mind discovery is particularly dangerous because the courts give wide latitude to the parties in discovery, requiring only that relevant evidence be obtained. It is necessary in media libel cases to establish consistent guidelines, including standards of proof and pretrial discovery. Consistency is vital to these cases because of the constitutional implications involved. However, because trial judges may differ in their opinion regarding what constitutes "relevant" evidence, consistent application of the relevance standard is an elusive goal.

This comment will first discuss the development of libel law with a focus on the law as it relates to media defendants. The Supreme Court's current use of the actual malice standard, which seems to contradict the original purpose of the standard, will then be examined. The comment will then discuss the result of this misapplication of the standard: the lack of guidelines to pretrial discovery in

private figure); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (distinction between public figures who must prove actual malice and private figures who must prove at least negligence); Herbert v. Lando, 441 U.S. 153 (1979) (allowing state of mind discovery of the editorial process); Dun & Bradstreet, Inc. v. Greenmoss Builders, 105 S. Ct. 2939 (1985) (recovery of presumed and punitive damages permitted for proof of less than actual malice where the defamatory statements do not involve matters of public concern); Philadelphia Newspapers v. Hepps, 54 U.S.L.W. 4373 (1986) (private figure plaintiffs must show statements are false when statements are a matter of public concern).


16. State of mind discovery is defined as discovery into the state of mind of the defendant at the time he made the decision to publish the defamatory statement.

17. Herbert, 441 U.S. 153 (1979). The Court in Herbert provides no definition of the editorial process. The questions that the defendant Lando objected to, however, provide information as to what the process entails. See infra note 53. Logically the process would involve those measures used to prepare an article or broadcast for publication. See also Hunter, Editorial Privilege and the Scope of Discovery in Sullivan-Rule Libel Actions, 67 Ky. L. J. 787 (1979) (the article discusses Herbert v. Lando, supports the Court's holding and provides further relevance guidelines for trial courts in public figure libel cases).

18. See Fed. R. Civ. P. 26(b), which allows discovery of any matter "relevant to the subject matter involved in the pending action" if it would either be admissible in evidence or "appears reasonably calculated to lead to the discovery of admissible evidence." Herbert, 441 U.S. at 157.
media libel cases and the resultant danger to the media's continued exercise of its first amendment rights.

The author will then present two proposals which would assure consistent discovery guidelines and limit the possibility of judges mistakenly abusing the actual malice standard by employing lax notions of relevancy. The first proposal re-emphasizes the use of objective evidence to prove actual malice. The second proposal creates a limited discovery privilege for the editorial process in order to protect first amendment concerns.

II. HISTORICAL BACKGROUND OF DEFAMATION AND LIBEL LAW

A. Traditional Approach

There are two forms of defamation: libel and slander. At common law, libel was defined as a written statement made in public which was intended to injure the reputation of another by exposing him to hatred, contempt, or ridicule. Libel is now defined as a written statement or communication that tends to harm the reputation of another in the eyes of the community or to deter third parties from associating or dealing with that person. The purpose of libel law is to protect citizens' reputations from groundless written attacks.

In common law defamation suits, strict liability was the applicable standard. The plaintiff established his prima facie case by entering the allegedly defamatory statement into evidence and then proving that the defendant made the statement. If the plaintiff met this light burden of proof, the defendant could only escape liability by proving the truth of the communication or by asserting a recog-

19. Slander differs from libel in that slander is an oral statement while libel is a written statement. RESTATEMENT (SECOND) OF TORTS § 568(2) (1977). A discussion of slander is beyond the scope of this comment.
23. Eaton, supra note 1, at 1353.
24. Id. The plaintiff was not required to prove that the statement was false, that the defendant knew it was false, or that the defendant would have discovered it to be false in the exercise of reasonable care. The plaintiff did not even have to prove that he suffered any actual injury to his reputation as a result of the defamatory statement. Injury to reputation was irrebuttably presumed as a matter of law, and the plaintiff was given the benefit of a rebuttable presumption that the statement was false. Id.
nized privilege.  

Until 1964, the Supreme Court left the formulation of libel law to the states. Although the Court held that the first amendment applied to the states through the fourteenth amendment in 1925, it resisted creating a constitutional privilege covering defamatory statements by the media. The Court recognized a strong legitimate state interest in protecting the reputations of its citizens and upheld the constitutionality of state libel laws imposing strict liability for defamatory falsehoods. The Supreme Court in Chaplinsky v. New Hampshire stated that libelous statements have never been thought to raise constitutional problems. The Court found that “it has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” The Court held this view until 1964 when it created a constitutional privilege for media defendants in New York Times Co. v. Sullivan.  


The Court in New York Times established a constitutional privilege protecting media defendants in cases involving allegedly defamatory published statements regarding the official conduct of public
officials. The Court held that under the first and fourteenth amendments a public official may not recover damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with actual malice. The Court defined actual malice as knowledge of the falsity of the statement or reckless disregard of whether the statement was true or false.

The Court based its holding on the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." The majority emphasized that the fundamental concern was to protect first amendment rights and quoted Justice Brandeis' statement in Whitney v. California:

Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope, and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason through public discussion, they eschewed silence coerced by the law - the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the constitution so that free speech and assembly should be guaranteed.

Thus, in order to protect free and open public discussion, the first

31. Id. at 283. Justices Black, Douglas, and Goldberg agreed with the result in the case but stated that there should be an absolute immunity from libel suits of this kind. Id. at 293 (Black, J., concurring); id. at 298 (Goldberg, J., concurring).

32. Id. at 279-80. Precedent for this holding came from Coleman v. MacLennan, 78 Kan. 711, 98 P. 281 (1908). Coleman recognized a conditional privilege for good faith misstatements of fact made to the public about matters of vital public interest. See Eaton, supra note 1, at 1362, 1366-67.

33. 267 U.S. at 280. The Court established "clear and convincing" evidence as the requisite standard of proof for finding actual malice, a much higher standard than a "preponderance" of the evidence. Id. at 285-86.

34. Id. at 270.

35. Id. at 269-79.

36. 274 U.S. 357 (1927) (Brandeis, J., concurring) (upholding a state criminal syndicalism statute).

37. 376 U.S. at 270 (quoting Whitney, 274 U.S. at 377).
amendment protects some published statements which are erroneous. With the new constitutional privilege, the courts imposed the actual malice standard in place of the strict liability standard. The plaintiff now had a heavier burden of proof to bear. The free press, on the other hand, no longer had the burden of proving that all the particulars of an alleged defamatory statement were true. The Court had feared that the cost of litigation and the difficulties of proving the truth of the statement would deter the would-be critic from making controversial statements. In this way, the free exchange of ideas which is protected by the first amendment could be repressed. The Court designed the constitutional privilege to alleviate the chilling effects of this burden and to guarantee first amendment freedoms.

Subsequently the Court extended the actual malice standard to cases involving public figure plaintiffs. Eventually the Court adopted a two-tiered approach to media libel cases in Gertz v. Robert Welch, Inc. In Gertz the majority held that the actual malice standard applied to public figures, but for private figure plaintiffs the states were free to adopt negligence as a minimum standard of liability. The Court in Gertz based its decision on the rationale that private parties are more vulnerable to harm from defamatory falsehoods than public figures. Because of this increased vulnerability, the Court found that preserving the first amendment values of

38. 376 U.S. at 270-73.
39. Id. at 279.
40. Id. at 278-79.
41. Id.
42. Id. at 279.
45. Id. at 347. The Court in Gertz defined a public figure as one who has achieved such general fame or notoriety that he becomes a public figure in all contexts, or one who voluntarily thrusts himself into a particular public controversy. Id. at 345. The public/private figure distinction has caused numerous difficulties because of the lack of a clear distinction between the two categories of plaintiffs. Unfortunately the problems resulting from the distinction are beyond the scope of this comment. For several excellent discussions of these problems, see Anderson, Libel and Press Self-Censorship, 53 Tex. L. Rev. 422 (1975) [hereinafter cited as Anderson]; Ashdown, Gertz and Firestone: A Study in Constitutional Policy-Making, 61 Minn. L. Rev. 645 (1977); Del Russo, Freedom of the Press and Defamation: Attacking the Bastion of New York Times v. Sullivan, 25 St. Louis U.L.J. 501 (1981) [hereinafter cited as Del Russo].
46. The Court reasoned that private figures lack the access to the media that public figures supposedly have and that such access may be needed to combat such falsehoods. Gertz, 418 U.S. at 343-46.
free speech and free press had to yield to the state's interest in protecting its citizens.⁴⁷

Prior to Gertz, the Court in St. Amant v. Thompson⁴⁸ explicitly defined actual malice as a subjective standard in order to protect the exercise of first amendment rights.⁴⁹ The St. Amant Court found that the public's right to be informed about public business and the conduct of public officials is so essential that the defense of truth would not adequately protect against self-censorship by the press.⁵⁰ Similarly, a standard of ordinary care would not adequately protect first amendment rights.⁵¹ Thus, to ensure that the truth about public affairs is vigorously investigated and published, the Court concluded that the first amendment had to protect some erroneous published statements as well as true ones.⁵²

In 1979, the Supreme Court in Herbert v. Lando⁵³ examined

⁴⁷. Id.
⁴⁹. Id. at 731-32. A subjective standard gives more protection to the defendant because the plaintiff must in this situation show that the defendant was actually aware of the falsity of the statement, rather than merely show what a reasonable person should have known.
⁵⁰. Id. at 731.
⁵¹. Id. at 731-32.
⁵². Id. at 732.
⁵³. 441 U.S. 153 (1979). Plaintiff Herbert was a retired Army officer who served for a long period in Vietnam. In 1969-70, he attracted widespread media attention when he accused his superiors of covering up war crimes and other "atrocities." In 1973, co-defendant CBS broadcast a television program on Herbert and his accusations. Defendant Lando produced the show and later wrote a magazine article that was published in Atlantic Monthly magazine. Herbert then sued Lando, commentator Mike Wallace, CBS, and the Atlantic Monthly for defamation. Herbert alleged that the program and the article "falsely and maliciously portrayed him as a liar and a person who made war-crime charges to explain his relief from command." Id. at 156.

During pretrial discovery, Herbert deposed Lando for over a year. The deposition filled twenty-six volumes. It was nearly 3,000 pages long and contained 240 exhibits. Plaintiff admitted that he was a public figure. Id. at 157, n.2 (quoting Herbert v. Lando, 566 F.2d 974, 983 (2d Cir. 1977)).

The inquiries to which Lando objected were 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;
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 matters 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.

Id. at 157, n.2 (quoting Herbert v. Lando, 568 F.2d 974, 982 (2d Cir. 1977)).

The District Court directed Lando to respond to the questions pursuant to a Fed. R. Civ.
the subjective nature of the actual malice standard. In doing so, however, the Court moved away from the Court’s concerns in *New York Times*. The Court in *Herbert* held that there is no absolute privilege that protects the editorial process of a media defendant in a libel case. Under this rule, a defendant in a libel suit who participates in the editorial process must answer discovery questions about his state of mind during the editorial process. The extent of discovery into the defendant’s state of mind is limited only by the standards of relevance in the Federal Rules of Civil Procedure.

The Court found that because actual malice is a subjective standard, the plaintiff must be able to inquire into the defendant’s state of mind to find out whether the defendant actually doubted the truth of the statement when he published it. According to the *Herbert* Court, the judiciary has traditionally permitted discovery of any evidence relevant to the defendant’s state of mind in order to defeat a conditional privilege. The majority further asserted that state courts have long admitted evidence about the media’s editorial process without encountering constitutional objections. In addition, the Court concluded that *Gertz* did not provide any constitutional discovery privilege nor indicate any intent to narrow the scope of discovery available to a libel plaintiff.

The Court finally determined that the actual malice standard was difficult to meet, and that it therefore put a heavy burden on the plaintiff. If the media claimed an absolute privilege, this would unreasonably limit the plaintiff to objective proof, from which a jury could only infer actual malice. To ease this burden, the Court stated that the plaintiff should have the right to investigate the be-

P. 37(a) discovery request. 73 F.R.D. 397. 394 (S.D.N.Y.), rev’d, 568 F.2d 974, 983-84 (2d Cir. 1977), rev’d., 441 U.S. 153, 177 (1979). The court of appeals reversed the district court order on the grounds that such discovery was an impermissible intrusion into the editorial process and would cause an intolerable chilling effect on the media’s exercise of its first amendment rights. 568 F.2d at 983, rev’d, 441 U.S. 153 (1979).

54. See supra notes 17 & 25.
55. 441 U.S. at 169.
56. Id. at 169-77.
57. See St. Amant, 390 U.S. at 731-32.
58. *Herbert*, 441 U.S. at 160.
59. Id. at 165. It should be noted, however, that the malice that traditionally overcomes a conditional privilege is described as ill-will, not as the Court defined the term in *New York Times Co. v. Sullivan*. See *Herbert*, 441 U.S. at 201 (Stewart, J., dissenting).
60. 441 U.S. at 165.
61. Id. at 168. A constitutional privilege could be, for example, a privilege protecting the editorial process from discovery in a public figure libel suit. See infra notes 82-86 and accompanying text.
62. 441 U.S. at 170.
liefs, thoughts, and knowledge of the defendant.\textsuperscript{63}

In \textit{Herbert v. Lando}, the Supreme Court balanced first amendment rights with discovery principles\textsuperscript{64} because of concern for the plaintiff’s heavy burden of proof.\textsuperscript{65} The Court considered the safeguards protecting free press to be a discovery issue, and found these safeguards to be an obstacle to the plaintiff’s discovery of the truth. The Court concluded that first amendment safeguards must yield in such circumstances.\textsuperscript{66} Thus \textit{Herbert} chipped away the constitutional privilege for media defendants.

\section*{III. THE PROBLEM WITH THE CURRENT STANDARDS OF STATE OF MIND DISCOVERY: THE ACTUAL MALICE STANDARD CHILLS THE EDITORIAL PROCESS}

The Supreme Court adopted the standard of actual malice in \textit{New York Times Co. v. Sullivan}\textsuperscript{67} to protect the media first amendment guarantees of free speech and free press.\textsuperscript{68} To further protect media defendants, the Court later defined actual malice as a subjective standard of proof.\textsuperscript{69} This standard required the plaintiff to prove the defendant’s actual state of mind, a heavier burden, in order to establish actual malice.\textsuperscript{70}

In \textit{Herbert}\textsuperscript{71} however, the Supreme Court used the actual malice standard to ease the public figure plaintiff’s burden of proof.\textsuperscript{72} The Court eased this burden by allowing a plaintiff to depose the media defendant about his state of mind\textsuperscript{73} during the editorial process.\textsuperscript{74} Such information is important because the actual malice standard focuses on whether “the defendant in fact entertained serious doubts to the truth of his publication.”\textsuperscript{75} Since the defendant’s actual
knowledge or belief is the key issue, the Court found that it was appropriate to allow inquiry into the defendant's state of mind during the editorial process.76 According to the Court, objective proof of actual malice77 did not sufficiently allow the plaintiff to overcome the heavy burden of proving actual malice.78

In reaching its decision, the Court in *Herbert* focused on a number of factors. First, it noted that courts have traditionally admitted relevant state of mind evidence that is necessary to overcome a conditional privilege or to enhance damages.79 Such rules of evidence are applicable to both media and non-media defendants, and as the Court pointed out, there were no constitutional objections to such rules.80 The Court seemed surprised that the defendant was objecting to such questioning, especially since the defendant admitted that the questions he objected to were the easiest to answer.81

A second factor that the Court emphasized was that there was no hint of an absolute editorial discovery privilege in either of the two Supreme Court cases that the *Herbert* court of appeals cited in its opinion. The two cases, *Miami Herald Publishing Co. v. Tornillo*82 and *CBS v. Democratic National Comm.*,83 taken together stand only for the proposition that neither a state nor the federal government may dictate what must or must not be printed.84 Furthermore, the *Tornillo* and *Gertz v. Robert Welch, Inc.*85 cases were released the same day, and although *Gertz* contained a survey of recent developments regarding the tension between the first

76. *Herbert*, 441 U.S. at 160, 172.
77. Objective proof of actual malice could consist of evidence that would undercut the defendant's claims of a good faith belief in the truth of the statement. This could be done by presenting such claims as so inherently improbable that only a reckless man would have published them. *St. Amant*, 390 U.S. at 732.

A plaintiff could also objectively prove actual malice by providing obvious reasons to doubt the veracity of the informant or the accuracy of the report. *Id.* See also *Herbert*, 441 U.S. at 210 (Marshall, J., dissenting) (providing additional examples of objective proof of actual malice).
78. *Herbert*, 441 U.S. at 172.
79. *Id.* at 165.
80. *Id.*

81. *Id.* at 172 & n.20. The defendant stated that "[t]hey are set-up questions for our side. . . . [T]hese are not difficult questions to answer." *Id.*

82. 418 U.S. 241 (1974) ("[G]overnment compulsion on a newspaper to publish that which reason tells it should not be published is unconstitutional." *Id.* at 241).
83. 412 U.S. 94 (1973) (broadcasters not required to accept paid editorial advertisements).
84. This is the *Herbert* Court's interpretation of the two cases. *Herbert*, 441 U.S. at 168 n.16 (citing *Tornillo*, 418 U.S. at 255-56).
amendment and the policies supporting libel law, it did not indicate that "a companion case had narrowed the evidence available to a defamation plaintiff." Therefore, one major reason the Herbert Court rejected the proposed privilege is that it went too far without being supported by judicial authority.

The most important reason that the Court refused to uphold the privilege was that it placed too great an evidentiary burden on the plaintiff to show actual malice. Given the subjective nature of the actual malice standard and the requirement in New York Times that libel plaintiffs prove knowing or reckless falsehoods with "convincing clarity," the Court determined that a libel plaintiff already faces a substantial evidentiary burden. Consequently, closing off direct evidence through inquiry into the publisher's thoughts, opinions, and conclusions regarding the defendant's alleged reckless disregard of the truth would erect too high a barrier for the plaintiff to overcome. The privilege would have meant that a plaintiff could only introduce objective evidence of actual malice, and the Court determined that such evidence would not be nearly as effective for the plaintiff as direct evidence obtained through state of mind discovery.

Courts in subsequent cases have echoed the concern that an absolute privilege would increase the plaintiff's burden in a manner inconsistent with New York Times and its progeny. These courts, along with the Herbert Court, have rejected the argument that such discovery would induce a chilling effect on the publisher's exercise of first amendment rights. The courts have concluded that the actual malice standard itself provides sufficient room for error for the press. As the Supreme Court stated in Calder v. Jones, "the potential chill

---

86. Herbert, 441 U.S. at 168.
87. Id. at 169-77.
88. St. Amant, 390 U.S. at 731-32.
89. 376 U.S. at 285-86.
90. Herbert, 441 U.S. at 174.
91. Id. at 170.
92. Id. See also Westmoreland v. CBS, 97 F.R.D. 703, 706 (S.D.N.Y. 1983) ("Although it is true that plaintiff can acquire certain relevant information by other forms of discovery, there are important relevant issues on which the Benjamin Report is the best, if not the only available source." Id.). See infra note 120 for the facts of Westmoreland.
on protected first amendment activity stemming from libel and defamation actions is already taken into account in the constitutional limitations on the substantive law governing such suits. The district court in *Sharon v. Time, Inc.* stated that "the Supreme Court [in *New York Times*] has already weighed all the considerations . . . and has chosen alternative means [the actual malice standard] for protecting the strong interest in encouraging publication of views relating to official conduct." Thus, according to the Court in *Herbert* and the other cases, the actual malice standard renders any additional constitutional protection unnecessary.

To a point, the various courts' reasoning on this point is logical. Because of the subjective nature of the actual malice standard it seems reasonable that the plaintiff should be able to inquire into the thoughts, beliefs, knowledge, and conclusions of the publisher. Permitting such discovery with only the relevance limitation to act as a protection, however, is another matter.

Allowing unlimited discovery into the editorial process and the state of mind of the media defendant creates serious problems. First, the holding in *Herbert* fails to acknowledge the importance of objective proof in proving actual malice. When the *St. Amant* Court defined actual malice as a subjective standard, it warned that a defendant's claims of good faith belief in the truth of the statement would not automatically ensure a "favorable verdict." The *St. Amant* Court required objective proof of the defendant's good faith belief by stating:

> The finder of fact must determine whether the publication was indeed made in good faith. 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 inher-

---

94. 104 S. Ct. at 1488.
96. Id. at 554.
97. The *Herbert* Court explained:

> [T]he defendant's reckless disregard of the truth, a critical element, could not be shown by direct inquiry into the thoughts, opinions, and conclusions of the publisher, but could be proved only by objective evidence from which the ultimate fact could be inferred . . . . To erect an impenetrable barrier to the plaintiff's use of such evidence on his side of the case is a matter of some substance, particularly when defendants themselves are prone to assert their good faith belief in the truth of their publications, and libel plaintiffs are required to prove knowing or reckless falsehood with "convincing clarity."

441 U.S. at 170.
ently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.\textsuperscript{98}

Objective evidence therefore either substantiates or refutes the defendant's stated subjective belief. Without objective evidence, there is no way to show a defendant's good faith belief in the truth of a statement. Objective proof is important because it illustrates the defendant's subjective intent in publishing the statement. Therefore objective proof makes a subjective standard possible. By placing so little reliance on the need for objective evidence, the \textit{Herbert} Court put too much emphasis on the use of subjective evidence to prove actual malice.\textsuperscript{99} Because of this misplaced emphasis, the Court implicitly approved a broader scope of discovery into the defendant's state of mind than is really required. This wide scope is the major flaw in the Court's holding in \textit{Herbert}.

\textit{Herbert} applies to cases using the actual malice standard. Under \textit{Herbert}, a plaintiff's discovery into the media's editorial process is limited only by the trial judge's firm application of the relevance standards set forth in the Federal Rules of Civil Procedure.\textsuperscript{100} The policy behind the evidentiary rules concerning discovery is to allow the parties to have access to all direct or indirect relevant evidence.\textsuperscript{101} The Supreme Court has repeatedly confirmed that discovery rules are to be given "a broad and liberal treatment"\textsuperscript{102} and scoffed at the argument that such treatment results in a "fishing expedition."\textsuperscript{103}

However, because of the constitutional values at stake in media libel cases, normal discovery policy should not apply in such situations.\textsuperscript{104} Determining the scope of discovery available to the plaintiff

\textsuperscript{98} 390 U.S. at 732 (emphasis added).
\textsuperscript{99} 441 U.S. at 170.
\textsuperscript{100} \textit{Id.} at 177. State statutes setting forth relevance standards apply when the state sets the standard of proof in libel cases.
\textsuperscript{102} \textit{Herbert}, 441 U.S. at 177; Schlangenhaus, 379 U.S. at 114-15; \textit{Hickman}, 329 U.S. at 507.
\textsuperscript{103} \textit{Hickman}, 329 U.S. at 507.
\textsuperscript{104} Such constitutional values include the media's first amendment rights. These rights will not always prevail over other considerations which may consist of opposing constitutional considerations. For example, newspeople do not have a first amendment privilege to withhold relevant facts in a grand jury criminal investigation even if those facts include the identity of confidential sources. For such a situation, the first amendment interests are outweighed by the duty to appear before a grand jury and the duty to answer questions relevant to a criminal
is an especially important task which requires consistent application, especially when a media defendant is involved. Consistent application of discovery rules is essential because it gives notice to the media in general, and the publisher in particular, of what communications may be excluded from discovery. The result is that the media is able to exercise its constitutional rights more freely because the media has a better idea of what communications or information may be protected.\textsuperscript{106}

Consistency under the current guidelines, however, is elusive. This is because the \textit{Herbert} Court failed to provide guidelines regarding state of mind discovery other than a demand for firm application of the relevance requirement in the Federal Rules of Civil Procedure.\textsuperscript{107} The Court provided no further guidance despite its prior recognition of concern about potential discovery abuse.\textsuperscript{108} This is illogical. If the Court believed that the relevance standard did not prevent discovery abuses ten years ago,\textsuperscript{109} it is questionable as to why it would now condone the standard without effective changes. Although Federal Rule of Civil Procedure 26 (b)(1) was amended in 1983 to allow the court to limit discovery when the discovery is "unduly burdensome" after examining "the importance of the issues at stake in the litigation,"\textsuperscript{110} courts continued to consider \textit{Herbert} as controlling authority.\textsuperscript{111} Therefore, relevance is not an effective limit on the scope of discovery available in public figure-media libel cases.

The current broad scope of the discovery rules has resulted in several chilling effects on the editorial policy, and decision-making potentially suffers because editorial discussions are subject to admission in court. Several courts, however, including the \textit{Herbert} Court, investigation. Branzburg v. Hayes, 408 U.S. 665, 679-709 (1972).

105. For example, publishers and editors could pursue and discuss controversial stories with confidence that such information would not be used against them in court where confirmation of the facts may be difficult to obtain. Specifically, editors and reporters would be able to know the extent to which they could discuss information potentially embarrassing to a potential plaintiff without later having to disclose the difficulties in obtaining confirmation of the statement. \textit{See infra} text accompanying notes 137-43.

106. Guidelines are developing regarding the privilege a newsman may have to protect confidential sources in civil actions. For an excellent discussion of the question of news privileges, \textit{see Comment, California's "New" Newsman's Shield Law and the Criminal Defendant's Right to a Fair Trial}, 26 SANTA CLARA L. REV. 219 (1986). [hereinafter cited as \textit{Comment}].

107. \textit{Id.} at 177.


109. \textit{Id.}

110. \textit{FED. R. CIV. P.} 26(b)(i)-(iii).

have claimed that the actual malice standard creates the needed breathing space for the media to exercise its constitutional rights, and that the only chilling effect on the editorial process will be to deter false or reckless publication.\(^{112}\) This argument, while recognizing the difficulties often encountered in separating fact from reckless falsehoods,\(^ {118}\) ignores the effect of subjecting the editorial process to literally unrestricted discovery. Because the exposure of prepublication discussions can be very damaging, editors, reporters, and publishers may not confer as much or as thoroughly about a story. This could create a vicious circle: the chilling effect on the decision-making process could cause a decline in the quality of the editorial process. Presumably there would be less investigation and less accurate publishing which would therefore lead to more libel litigation. In addition, with less accurate publishing, the quality and quantity of public debate declines.\(^ {114}\)

Another chilling effect on the editorial process is the increased cost of litigation as a result of essentially unlimited discovery rules. Publishers must be concerned about the costs of defending libel suits.\(^ {118}\) In 1971, Metromedia spent almost $100,000 defending the libel action in the Rosenbloom case.\(^ {116}\) Undoubtedly defense costs are higher today.\(^ {117}\) In addition to the high financial costs, defending a libel suit wastes much of a defendant's time. In Herbert, it took over a year to take the defendant's deposition, and Lando and his associates "were diverted from newsgathering and reporting for a significant amount of time."\(^ {118}\)

As a result of the litigation costs, a wealthy plaintiff or a plaintiff with strong support from legal or financial circles may be able to dictate future media coverage of him by threatening litigation.\(^ {118}\) Such a plaintiff may have the financial resources to tie up the media defendant in lengthy litigation. Libel plaintiffs often do not sue to recover damages but to vindicate their names. Many times, such

\(^{112}\) See supra text accompanying notes 94-96.

\(^{113}\) Herbert, 441 U.S. at 171-73.

\(^{114}\) See supra text accompanying notes 34-42.

\(^{115}\) Del Russo, supra note 45, at 520. See also Anderson, supra note 45, at 436 n.45 (citing The Associated Press, The Dangers of Libel 1 (1964) as an example of press self-censorship to avoid high litigation costs).

\(^{116}\) Anderson, supra note 45, at 436.

\(^{117}\) More recently, ABC supposedly spent $7 million to defend a libel suit and CBS spent at least $3 million in the pretrial phase of another suit. E. Pell, The Big Chill 162 (1984) [hereinafter cited as Pell].

\(^{118}\) 441 U.S. at 176 n.25.

\(^{119}\) See Herbert, 441 U.S. at 204 (Marshall, J., dissenting).
plaintiffs feel they have been wronged in the eyes of the community and that a lawsuit is a proper means of vindicating their reputation.\footnote{120} The threat of huge damage awards could chill future public debate on controversial issues. This reaction could be especially recurrent in emotionally charged issues such as the Vietnam War. For instance, in the Westmoreland case, the supporters and opponents of the war chose sides in the Westmoreland litigation.\footnote{121} Although public discussion on the subject may be active during litigation, the media will be more careful with regards to what they publish about the plaintiff in the future, and public debate will be chilled. The financial costs of litigation may also drive many small newspapers, radio, or television stations out of business as such costs would be prohibitive.\footnote{122}

\begin{flushright}
120. Del Russo, \textit{supra} note 45, at 520 (footnote omitted). \textit{See also} D. Kowet, \textit{A Matter of Honor} 68, 164-67, 224-26, 229-39 (1984) [hereinafter cited as \textit{Kowet}]. \textit{Westmoreland} was a good example of a plaintiff going to court to vindicate his reputation. \textit{See Kowet}, at 229-39.

In \textit{Westmoreland}, defendant CBS broadcast a television news documentary which stated that plaintiff Westmoreland, the former commander of the U.S. forces in Vietnam, engineered a conspiracy in the months before the Tet offensive in 1968 to suppress intelligence reports of a growing number of enemy troops in order to show progress in the war to the American public and to the White House. Westmoreland had support from both legal and financial circles. \textit{Id.} at 224-26. The $120 million in damages requested by General Westmoreland is an astronomical sum. \textit{Id.} at 228-29. Because of his support, even though Westmoreland settled his suit, publishers will consider their financial costs when they decide on what they publish about General Westmoreland and other controversial figures in the future.

As Ariel Sharon, another recent libel plaintiff, said after the jury found that Time Magazine had published a defamatory statement describing him as having encouraged the 1982 Palestinian refugee massacre, "I feel we have achieved what had brought us here to this country. . . . We came here to prove that Time Magazine lied . . . [a]nd we managed to prove that Time Magazine lied." \textit{Time Cleared of Libeling Sharon But Jurors Criticize Its Reporting}, N.Y. Times, Jan 25, 1985, at 1. Sharon was satisfied with this "vindication" of his reputation even though the jury did not find actual malice.

The Supreme Court noted the plaintiff's concern for his reputation and how this concern could be addressed. The Court concluded that there could be separate verdicts on the truth or falsity of the statement and actual malice. Dun & Bradstreet v. Greenmoss Builders, 105 S. Ct. 2939, 2950 (1985) (White, J., concurring).

121. \textit{Kowet, supra} note 120, at 158-69, 224-26, 231-32. If General Westmoreland had won his case, or if another controversial figure wins a future case, the intimidation that the media may feel could signal a return to pre-\textit{New York Times} standards in which a public official could dictate public comment on his official conduct. This was a major problem that the Court was trying to solve in \textit{New York Times}. \textit{See supra} text accompanying notes 31-38.

Here, instead of state libel laws producing the chilling effect through strict liability, the high cost of litigation and the broad definition of relevance available to the court to compel state of mind discovery cause the chilling effect.

122. \textit{See Herbert}, 441 U.S. at 204 (Marshall, J., dissenting). \textit{See also} Pell, \textit{supra} note 117, at 164-67 (recognizing the effects of threatened libel litigation on small publishers and the inadequacy of liability insurance to cover punitive damages).
Consequently, the Court's holding in Herbert repudiates the spirit, policy, and effect of New York Times by inducing a chilling effect on the media's exercise of its first amendment rights, a chilling effect that the New York Times Court sought to avoid. The Court in Herbert used the actual malice standard to create a new balance in the tension between the first amendment values of free speech and press and the states' interest in protecting their citizens' reputations.

However, this new balance is weighted too heavily in favor of plaintiffs at the expense of constitutional values. It is necessary to tip the balance, and thus lessen the judicial leeway regarding pretrial discovery that produces a potentially chilling effect on the media. This current imbalance is not necessary because the competing interests can be balanced without sacrificing consistent and substantial constitutional protection.

IV. PROPOSALS

A. Re-emphasize Objective Proof of Actual Malice

When the Herbert court underestimated the importance of objective evidence to prove actual malice,\textsuperscript{123} it placed too much reliance on subjective evidence through state of mind discovery. Unrestricted state of mind discovery inhibits the editorial process because it potentially provides very damaging evidence against a media defendant at trial.\textsuperscript{124}

A subjective standard, however, cannot exist without objective proof. Objective proof is the mechanism by which a defendant's good faith claims are measured. It would be unfair to the plaintiff if the defendant could prevail merely by claiming a good faith belief that the published statement was true. Therefore, in order to maintain a reasonable balance between plaintiffs' and defendants' interests, trial judges should emphasize the use of objective evidence to prove actual malice in libel cases involving the actual malice standard.

Reliance upon objective proof to authenticate the defendant's actual malice is not a new idea. The Court in St. Amant called for objective proof to verify defendants' claims of good faith,\textsuperscript{125} and courts at both state and federal levels have authorized such use of objective evidence.\textsuperscript{126} Actual malice can be proven through several

methods, such as "absence of verification, inherent implausibility, obvious reasons to doubt the veracity or accuracy of information, and concessions or inconsistent statements by the defendant." 127

Judicial preference for objective or alternative sources of proof of actual malice is occurring in similar pretrial settings involving the protection of a reporter's, editor's, or publisher's confidential sources. 128 In the California case of *Mitchell v. Superior Court* 129 for example, one of the factors that the court took into account in fashioning such a newsman's privilege and deciding when the privilege should apply was whether the plaintiff had exhausted all alternative sources of obtaining the relevant information. 130 The court considered this factor, along with others, in order to determine when to apply the privilege. 131 The reason for considering these functions was to find an appropriate balance between the first amendment values protecting against compelled disclosure of the identity of a source (protection against interference with a reporter's newsgathering ability), 132 and those policies favoring disclosure (protecting the individual's interest in his reputation by making it easier for the plaintiff to prove actual malice). 133

Similarly, a trial court's emphasis on objective proof of actual malice will serve the competing interests mentioned above. By not overemphasizing the need to examine the defendant's state of mind, the proposal would ease the plaintiff's heavy burden of proof in media libel cases, thereby addressing the concern of the *Herbert*

---


130. *Id.* at 282, 690 P.2d at 634, 280 Cal. Rptr. at 161.

131. The other factors that the court considered were: first, the nature of the litigation and whether the reporter is a party to it; second, the relevance of the requested information to plaintiff's cause of action; third, whether a prima facie showing that the alleged defamatory statements are false has been made. *Id.* at 279-83, 690 P.2d at 632-34, 208 Cal. Rptr. at 159-61. For a more complete discussion of these factors, see Comment, *supra* note 106.


133. *Id.*
C. What Limitation on State of Mind Discovery Would Protect the Media

This proposal would also protect constitutional values by limiting the importance that the Herbert Court placed on subjective evidence. Therefore, courts and plaintiffs would not have to rely as much on state of mind discovery. Also, re-emphasizing objective proof would lessen the chilling effect on the editorial process in two ways: first, editorial decision-making and prepublication discussions would be less inhibited since the individuals would know that the actual conversations would not be admissible as evidence; second, the time and financial costs of litigation would decrease for both parties. As a result, deep pocket plaintiffs would not be as great a threat to libel defendants because the lower litigation costs would reduce their economic leverage.

Thus, there is no need to rely as heavily on subjective evidence of the defendant's state of mind in libel cases. Other methods are available to prove actual malice and should be used in order to protect the media without sacrificing the states' interest in protecting their citizens' reputations.

B. Allow a Limited Discovery Privilege for the Editorial Process

In order to prevent the chilling effect caused by largely unrestricted state of mind discovery, a limited discovery privilege for the editorial process should be created. This privilege should encompass all prepublication conversations by those involved in publishing the statement. Justice Marshall called for this type of privilege in his dissenting opinion in Herbert and it should be established now.

Under such a privilege, plaintiffs would not be entitled to inquire into the content of the prepublication discussions of reporters, editors, publishers, or others involved in the editorial process. Otherwise, discovery proceedings in media liable cases would be gov-

134. 441 U.S. at 170, 174, 176.
135. Id. at 170.
136. See supra text accompanying note 119 for a definition of a deep pocket plaintiff in a defamation context.
137. Under Herbert, state of mind discovery is only subject to the trial judge's firm application of the relevance standards of the Federal Rules of Civil Procedure. 441 U.S. at 177.
138. Id. at 202-10 (Marshall, J., dissenting). Justice Marshall's privilege, similar to the one in this proposal, would protect prepublication editorial discussion from discovery by any defamation plaintiff. This comment's proposal would limit the privilege to cases in which the actual malice standard applies, since the defendant's state of mind is not as crucial in cases using negligence as the applicable standard of liability.
139. Plaintiffs could, however, ask whether such conversations took place in order to show objective evidence of actual malice. The defendant's failure to discuss the story before its publication is one example of using objective means to prove actual malice.
erned by the normal discovery procedures under the state and federal rules of civil procedure.140

This privilege would allow writers, editors, and publishers to discuss their opinions and doubts about certain publications or to experiment with the presentation of such information without fear of public disclosure of their remarks.141 As Justice Marshall stated in his dissenting opinion, "[t]hose who expect public dissemination of their remarks may well temper candor with a concern for appearances . . . to the detriment of the decision-making process."142 The freedom from such exposure would encourage those involved in the editorial process to exchange their ideas more freely. It would also encourage public debate on a wider range of issues; this is consistent with the ideals of an open society and was a goal that the New York Times Court recognized.148

The privilege should be limited to prepublication discussions for two reasons. First, an absolute discovery privilege for the editorial process would provide no check on irresponsible journalism. An absolute privilege could expose citizens to unjustified attacks on their reputations without providing those injured with adequate legal recourse because of the plaintiff’s increased burden of showing actual malice. This conflicts with the legitimate state interest in protecting its citizens’ reputations from unjustified attacks.144

Second, a limited editorial privilege is desirable because the actual malice standard is a subjective standard of proof. Although objective evidence should be used by plaintiffs whenever possible to prove actual malice, the plaintiff must focus on the defendant’s state of mind to some extent. Thus, during discovery a plaintiff should be entitled to inquire into the beliefs, opinion, or conclusions of the de-

140. It is possible to see the analogy between the situation in Herbert and a situation involving a reporter faced with the compelled disclosure of a confidential source. The policy supporting some degree of privilege against such disclosure is similar to that supporting a limited privilege encompassing prepublication editorial discussions. Just as compelling a reporter to disclose the identity of a source may significantly interfere with his newsgathering ability, Mitchell, 37 Cal. 3d at 275, 690 P.2d at 628, 208 Cal. Rptr. at 155, requiring those involved in the editorial process to disclose their prepublication discussions will hamper their ability to freely sort through the facts they have and to decide how and what should be published. See supra notes 112-14 and accompanying text. In both situations there is a need for candor and a free flow of information. Palandjian v. Pahlavi, 11 MEDIA L. REP. (BNA 1028, 1030 (D.D.C. 1984)).
fendant in order to obtain evidence of actual malice. The Court’s holding in *Herbert* does not “chill” a reporter’s or editor’s thought processes. A reporter’s or editor’s brain does not cease to function because their thoughts may be subject to discovery. Reporters and editors continue to form opinions and conclusions about what they publish. What *is* chilled, however, is prepublication discussion among reporters, editors, and others involved in the editorial decision-making process. That is what the proposal for an editorial communication privilege seeks to remedy.

Application of the privilege to the facts in *Herbert* shows how the privilege would serve the competing interests. A look at the questions that the defendant objected to in *Herbert* reveals that only one of the five objectionable questions involved in that case (the conversations between Lando and Mike Wallace) would be protected by the privilege. The remaining four questions all focused on the defendant’s state of mind outside of any prepublication deliberative discussions. Therefore the plaintiff could justifiably directly inquire about such matters during discovery.

The proposal for an editorial privilege covering prepublication discussions is intended to provide guidelines to discovery in media libel cases using the actual malice standard. These guidelines will help preserve the media’s exercise of its first amendment rights. At the same time, the privilege is limited enough to preserve the states’ interest in protecting their citizens. As a result, the proposals properly balance the competing interests present in media libel cases.

146. See supra note 53.
147. See supra note 53 for the applicable questions. The fifth question, concerning Lando’s intentions, may also be protected since it may be irrelevant at to whether Lando acted with reckless disregard for the truth. The *New York Times* definition of actual malice does not involve ill will or motive, the traditional definitions of malice, but involves reckless disregard for truth. Therefore, information regarding the defendant’s intentions could be irrelevant and not subject to discovery. *Herbert*, 441 U.S. at 199-201 (Stewart, J., dissenting).

A further question to consider is whether a media defendant can waive this privilege. This question is pertinent since a defendant may choose to present evidence of good faith belief in the truth of the publication at the outset of discovery. *Herbert*, 441 U.S. at 173 n.21.

Therefore, for the purpose of this particular publication, a defendant who presents direct evidence of prepublication discussions before the plaintiff requests it can be said to have waived the privilege. Just as CBS, which sought to protect a self-evaluation memo (the Benjamin Report) during pretrial discovery in *Westmoreland*, could not hold out the Benjamin Report to the public in order to substantiate its statements and then refuse to reveal the report on the claim that it is a confidential internal memo meant for self-evaluation, a media libel defendant should not be able to use prepublication discussions to show good faith belief and then refuse to answer questions about those discussions. See *Westmoreland* v. CBS, 97 F.R.D. at 706.
V. Conclusion

In 1964 the Supreme Court established actual malice as the standard of proof in media libel cases. The New York Times\textsuperscript{148} Court attempted to safeguard the first amendment rights of free speech and free press. The Court sought to preserve these freedoms without sacrificing the valid state interest of protecting the reputations of its citizens. Later decisions disturbed this balance and created obstacles to establishing appropriate standards of proof in media libel cases. Further problems arose when the Court in \textit{Herbert v. Lando} allowed unlimited state of mind discovery into the editorial process.\textsuperscript{149} In doing so, the Court undermined the rationale behind \textit{New York Times}. \textit{Herbert} left too much room for judicial error in enforcing the relevance requirement of the Federal Rules of Civil Procedure.

As a result, there is a need to return to the principles set forth in \textit{New York Times} in order to balance the competing state and constitutional interests. This can be achieved without sacrificing first amendment guarantees. By re-emphasizing objective proof of actual malice and by granting a limited discovery privilege for the editorial process, the courts can strike the balance between the states' interest in protecting their citizens' reputations and the constitutional rights protecting media defendants.

\textit{John T. Schreiber}

---

\textsuperscript{148} 376 U.S. 254 (1964).
\textsuperscript{149} 441 U.S. at 175.