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Proof of Actual Malice in Defamation Actions: An Unsolved Dilemma

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"How do you probe for the presence or absence of malice [in a defamation suit] if you can't ask what was the state of mind at the time this or that was done?"1 This question, which Chief Justice Burger asked at the recent argument of *Herbert v. Lando*,2 is a thorny one and raises a host of issues—practical, legal, and constitutional in nature. In practice, how will a limitation upon discovery affect the success of a defamation plaintiff's lawsuit and the operation of potential libel defendants' businesses? Under defamation law, if state of mind is in issue, must discovery of that state of mind be unlimited? Under the Constitution, does unlimited discovery potentially infringe upon freedom of speech or of the press?3

In *Herbert* Chief Judge Kaufman and I addressed ourselves to some of these practical and legal questions. The purpose of this Article is not to defend our decision to limit discovery or the reasoning by which either of us came to that result. Rather, the purpose

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2. 568 F.2d 974 (2d Cir. 1977), *reovd*, 99 S. Ct. 1635 (1979). This Article was written prior to the Supreme Court's decision, but the author wishes to leave it unchanged.
is to explore some ramifications of a plaintiff’s use of discovery procedures in a defamation suit to establish that the defendant acted with “actual malice” under the test of New York Times Co. v. Sullivan.  

The problem has long troubled some commentators but first came vividly to my attention in Buckley v. Littell. The context was not discovery but cross-examination of a libel defendant. In Buckley the prominent commentator, publisher, novelist, and erstwhile radio broadcasting magnate William F. Buckley, Jr., sued Dr. Franklin H. Littell, a minister, because of allegedly defamatory statements in Dr. Littell’s book. The book, ironically entitled Wild Tongues, had as its general topic the threat of totalitarianism to American religion and politics. My opinion for the Second Circuit Court of Appeals merely alluded in a footnote to the problem of proof of malice: “One of the most troubling aspects of the trial was that proof of ‘malice’ was almost solely by way of examination of Littell by Buckley’s counsel, an examination which covered over 500 pages of transcript.”

What was “troubling” to me was that plaintiff was examining an author’s thought processes at great length to discover what the author meant by the terms that he used in the book, even though some of the terms—“fellow traveler,” “fascism,” “fascist wing,” “fronts [of the John Birch Society]”—were in fairly common usage, at least in the not-so-dim past. Mr. Buckley’s lawyers dwelt on how the defendant meant the terms to apply to Mr. Buckley.

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6. Id. at 894 n.12.


8. The following testimony was elicited from Dr. Littell upon direct examination:

Q. Did you in reading this book [Danger on the Right] come upon the passage, page 247, talking about God and man at Yale, “The book was dili-
The idea of trying a person's views, opinions, thought pro-
gently promoted by the habitues of the right all the way from the near to the 
far including some on the antisemitic extremist fringe. This was not, of 
course Buckley's fault. He is no antisemite and will have no truck with anti-
Jewist bigotry."

Do you read that?
A. Right. It's there.
Q. Is there anything else on which you relied upon reaching the con-
clusion that Mr. Buckley was a fellow traveler of the radical right or fascist 
or whatever?
A. Not the radical right or the fascist, but of the radical right. A number 
of books of which this is one of the most important—
Q. What are the others?
A. Pardon?
Q. What are the others?
A. The others are books which I use in my seminar regularly in advis-
ing on term papers, theses and in teaching my seminar on totalitarianism.
Q. What are the names of those?
A. Well, I list a number of them here, I think.
THE COURT: You are talking about a listing in the book "Wild 
Tongues," right?
THE WITNESS: Yes, which isn't there. Yes, it is too.
There is an annotated bibliography, a basic bibliography of which—
Q. What page does it begin with?
A. Beginning on page 138.
Q. Which of these books discuss Mr. Buckley?
A. I would have to check each out to be sure which. I haven't taught 
the seminar for two years now. I have a bibliography and I have books and I 
could check out and indicate which ones I have data on Mr. Buckley if you 
want. One of the most important is the Forster and Epstein certainly.
THE COURT: That is the one "Danger on the Right"?
THE WITNESS: The one we have here, right. That was more or less my 
good fortune, as it happened.

Do you think, sir, it would be well for me to bring in books where 
Mr. Buckley is used?

Q. Aside from these books that you are going to bring Friday, is there 
anything else on which you relied in reaching the fellow traveler conclusion 
about Mr. Buckley?
A. Yes, I used the notes in my own journal and I used newspaper clippings and flyers of various kinds. The most important of which I sent in a packet a month ago to counsel as backstopping material.
Q. As to the notes in your own journal, I believe you testified that you have gone through your journal and reproduced those notes as Exhibit 19? You have compiled those notes? I believe you have testified, have you not, that you went through your journal and compiled those notes as Exhibit 19, is that not correct?
A. I am ready to believe it's Exhibit 19.
THE COURT: You are troubled about the number of the exhibit?
THE WITNESS: Yes, this is it.
Q. That is a compilation of the notes of your journal from which you 
relied?
cesses, and intentions stirred memories of old readings about the

A. Part of it. I never had time to go through the whole thing but those are the ones which I did have time to find.

Q. Is there anything else in that document, in that book [The Extremists], on which you relied in reaching your fellow traveler conclusions about Mr. Buckley?

A. Well, I think there may be other things which I haven’t checked back and located again; but I didn’t in the meantime recall this is one of the books I have been using all these years; and I can indicate some salient passages if it serves a useful purpose.

Q. If it is anything you relied on in reaching that conclusion about Mr. Buckley I’d like you to indicate the passage.

A. Well, you sound as though you think I wrote the book with a pile of books scattered around, as though I were exegeting [sic] a passage of the New Testament. I didn’t. I had read some of these things again and again over the years. Some of them I had looked through like that, some of the books I have never read at all in my library, although I hope to; and—so what I am saying is I don’t think it is fair to create the impression that I was reading it you know when I wrote what I did. It was something that over a period of time built up a general opinion and judgment.

Q. When you wrote “Wild Tongues,” did you go back and actually research anything about Mr. Buckley, or was this just material that was in your mind?

A. No, no, I had folders, as you know, and I looked through some of the items which I had there, and the rest was mostly memory.

Q. The folders, the folder on Mr. Buckley, I believe you have given us everything from that folder, and these are exhibits we have been going through.

You have given us everything from that folder, haven’t you, everything that you deem pertinent?

A. Everything which I intended to use a month ago.

Q. Outside of these folders, these books that you are talking about, did you look at these books at the time you were writing “Wild Tongues”? Did you consult them?

A. Well, yes.

Q. Like this book, for example?

A. Yes. Although I didn’t—I don’t think I looked at this book. I was working in what was then a beautifully setup seminar room in which there are several thousand books of which some hundreds deal with extremism, communism, nazism, church struggle in Germany, and so forth. And when I ran into a point where I’d forgotten something or I wanted to check, I’d just go get it either in folders or in the book.

Now I can’t say at that point, I don’t remember whether I—in the pages which we have been spending so many days on, I don’t recall whether I looked up any single thing but I did have of course in the process of writing use books and papers and so forth; but I just want to be clear with you that I wasn’t sitting there surrounded by a bunch of books; and maybe, you know, it’s part of the general feel which you build up over a period of time. You depend on your memory an awful lot in a thing like that.

inquisition of Galileo, the trials of witches at Salem, and the Oppenheimer security case, as well as of the actual trial of a postmaster whom I once defended against a disloyalty charge. Dr. Littell’s notes, letters, recollections, and most private thoughts—indeed his personal history—were on trial. But perhaps this was overly dramatic sentimentalism on my part; it was at most a side issue. And the law as firmly established by the Supreme Court in Sullivan permits recovery upon proof of “actual malice,” even in a suit brought by a public official or figure in reference to a public issue. How else could a plaintiff prove “actual malice,” defined as knowledge of falsity or reckless disregard of truth or falsity, if not by the closest inquiry into the mind of the alleged defamer?

If the depth of inquiry into state of mind was “troubling” in Buckley, the problem was even more serious in Herbert v. Lando. The plaintiff, United States Army Colonel Anthony Herbert, had created an important public issue by charging that fellow officers had covered up certain alleged war crimes and atrocities and by giving public interviews to the national press and television after his relief from command. One defendant was Barry Lando, an associate producer of the widely-viewed CBS television program 60 Minutes, who performed some (allegedly selective) investigative reporting and (allegedly one-sided) editing of material. With codefendant Mike Wallace, Lando produced a program televised on CBS concerning the truth or falsity of Herbert’s charges. Plaintiff’s pretrial discovery of defendants Lando, Wallace, and CBS concentrated on the subject of actual malice. At the time the defendants appealed from the order granting discovery, Lando had been deposed in twenty-six sessions over more than a year; his testimony produced a 2903-page transcript and 240 exhibits. As Chief Judge Kaufman, writing for the court, noted:

Lando answered innumerable questions about what he knew, or had seen; whom he interviewed; intimate details of his discussions with interviewees; and the form and frequency of his communications with sources. The exhibits produced included transcripts of his interviews; volumes of reporters [sic] notes;

12. 568 F.2d at 980.
13. Id. at 982.
videotapes of interviews; and a series of drafts of the "60 Minutes" telecast. [Plaintiff] also discovered the contents of pre-telecast conversations between Lando and Wallace as well as reactions to documents considered by both.\textsuperscript{14}

The court limited further discovery of the mental operations and intentions of Lando\textsuperscript{15} on the ground that such discovery would interfere with the "editorial process" or "function," a process which the Supreme Court had recently and explicitly protected in other contexts.\textsuperscript{16} My concurring opinion said: "Chief Justice Burger's opinion [in Miami Herald Publishing Co. v. Tornillo] explained that 'governmental regulation' of the 'crucial process' of 'editorial control and judgment' cannot be exercised consistently with evolving First Amendment guarantees of a free press."\textsuperscript{17} My opinion went on to add:

"Governmental regulation" surely includes judicial as well as legislative regulation; the First Amendment binds the courts just as it binds the other branches of government. Tornillo and Columbia Broadcasting [System, Inc. v. Democratic National Committee] thus suggest and support, if they do not compel, the proposition that the First Amendment will not tolerate intrusion into the decision-making function of editors, be it legislative or judicial action.\textsuperscript{18}

14. \textit{Id.} (footnote omitted).
15. The categories to which we extended protection included:
   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 written by Lando;
   2. Lando's conclusions about facts imparted by interviewees and his state of mind with respect to the veracity of persons interviewed;
   3. The basis for conclusions where Lando testified that he did reach a conclusion concerning the veracity of persons, information or events;
   4. Conversations between Lando and Wallace about matter to be included or excluded from the broadcast publication; and
   5. Lando's intentions as manifested by his decision to include or exclude certain material.

\textit{Id.} at 983.
16. For discussion of the relevance of these other contexts to defamation, see text accompanying notes 54-62 \textit{infra}.
18. \textit{Id.} at 987 (Oakes, J., concurring) (footnotes omitted) (discussing Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), and CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973)). Of course, the applicability of first amendment limitations to judicial action does not imply that the courts forfeit their traditional function of judicial review. The courts still decide the proper scope of such a constitutional limitation, even though the courts are not entirely disinterested parties to the dispute. As one writer has forcefully put it:
Needless to say, these opinions do not answer, nor for the most part attempt to answer, all of the many questions they raise. After all, the specific issue in *Herbert* that demanded resolution was whether the first amendment, by virtue of its protection of the "editorial function" of the press, imposes some limit upon discovery that probes the existence of "actual malice." At the time, I considered any such limitation primarily procedural, not substantive.\(^\text{19}\)

The opinions *do* tentatively suggest answers to some of the questions, including: (1) How does a plaintiff prove "actual malice" if courts limit discovery of the state of mind of the editor; (2) what is the "editorial process"; and (3) why is it entitled to special protection? In Part I of this Article the "answers" ventured in *Herbert v. Lando* are discussed and reconsidered, at the risk of having them mooted, at least for the present, should the Supreme Court decide the case before this Article is published. I say at least for the present because I believe that some of these questions are unlikely to go away whatever the Supreme Court's decision.

Part I of this Article also considers other questions that I think *Herbert* implicates. Among these are the following: (4) If the first amendment to some extent limits discovery to protect the "editorial function," should the first amendment similarly limit discovery

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Anthony Lewis... says apropos the Herbert case that the press objects to the fact that it is the judges in the law courts who must decide to what extent, if any, the law as an arm of government is entitled to intrude upon the workings of the press... The press objects, says Mr. Lewis, because, as the press sees it, the judges are often party to the very controversy to be decided.

Here is arrogance with a vengeance. The press wants to be judge in its own case, all the time, and does not want the judges to be judge in Herbert's case. I find it unbelievable that the press should pretend, upon an unjustified extrapolation from Bickel's phrase about a contest between press and government, that it is co-equal with and an adversary to the U.S. Government. I also find unbelievable that the press should claim that the law has no power to determine when and whether a litigant is entitled to evidence in the possession of the press if, as The Times appears to concede, that evidence is *not* absolutely privileged.


19. Although I did not at all times distinguish in my opinion between the substantive law of libel and the means of proving libel, 568 F.2d at 992 & n.28, the opinion did describe the discovery limitation as a "privilege" that would also apply to proof at trial; thus, I recognized that the privilege is a matter of substantive law. *Id.* at 995 n.38. Indeed *Sullivan's* constitutionalization of the law of libel as a "privilege," 376 U.S. 254, 283 (1964), is essentially an absorption and extension of the common law privilege of fair comment and is both substantive and procedural in content. See *Restatement (Second) of Torts* § 581A (1977).
to protect other functions of the press—what I shall call the repor-
torial and publishing functions? And should the same constitutional
protection that limits discovery also limit the taking of evidence at
trial? (5) Under the same assumption should the "institutional
press" receive different protection from the "lonely pamphle-
teer"? How about the private speaker or writer? If the protec-
tion extended to the "institutional press" is different, would there
not be a distressing differentiation between speech and press to the
potential detriment of both? Indeed, if the speech and press
clauses offer the same protection to the various forms of press and
to individuals, why the special concern about the "editorial pro-
cess" or "press functions"?

If Herbert's scope is expanded to the extent that its underlying
rationale suggests, we are left in something of a quandary. The
Herbert privilege becomes so broad that it seriously undermines
the efficacy of the tort of defamation; it would be logical, rather
than burdening courts with supervision of the privilege, either to
eliminate the tort in cases to which the privilege would apply or to
eliminate the Herbert privilege itself. The latter alternative is
unacceptable, however. The Herbert privilege protects vital first
amendment interests that Sullivan alone does not protect.

I am led, then, in Part II of this Article, to reexamine the
whole thesis of New York Times Co. v. Sullivan insofar as it per-
mits a public official to recover damages for statements that a de-
fendant makes with "actual malice" about a public issue. May a
person's innermost political and social beliefs be examined to de-
termine the existence of "actual malice"? Were not Justices
Black, Goldberg, and Douglas, and Professor Thomas

20. See note 19 supra.
U.S. 444, 450, 452 (1938). The noninstitutional press has had a significant role from
colonial times to the present. See generally FREEDOM OF THE PRESS FROM
ZENGER TO JEFFERSON (L. Levy ed. 1966) [hereinafter cited as FREEDOM OF THE PRESS].
23. This Article will not explore the arcane differences between libel and slan-
der or the somewhat esoteric difference between defamation actionable per se and
defamation actionable only upon proof of special harm. See RESTATEMENT (SECOND)
curring).
25. Id. at 297 (Goldberg, J., concurring).
26. Justice Douglas concurred in both the Black and Goldberg opinions in
Emerson\textsuperscript{27} correct when they suggested that Sullivan is internally inconsistent because the "actual malice" test contradicts the "central meaning" of the first amendment\textsuperscript{28} which the Court relied upon as the foundation for the test? To what extent can the trier of fact really differentiate between the "actual malice" test and the pre-Sullivan tests of common law malice or Sedition Act malice?\textsuperscript{29}

To be sure, Sullivan provides important limitations which protect first amendment interests. It shifts to the plaintiff the burden of proving "actual malice," requires proof of such by clear and convincing evidence, and authorizes reviewing courts to make an independent examination of the record to ensure that the plaintiff has satisfied the constitutional standard. But are these limitations really sufficient? On the other hand, if the courts abandon the "actual malice" test in suits by public officials concerning public issues, would there be the same "invitation to follow a dialectic progression"\textsuperscript{30} that the late Professor Harry Kalven predicted in connection with the applicability of the Sullivan test itself?\textsuperscript{31} That is to say, would the courts first abandon the test as to public figures, then as to matters of public interest or in the public domain, then as to the private conduct of public officials, and finally as to private matters? If not, what standards would or should the courts apply in these other cases?

Because this subject matter goes deep to first amendment roots, it has been exciting to explore but difficult to elucidate. My own belief that Sullivan is a great case and my high respect for the


29. The Sedition Act of 1798 made it a crime for any person to "write, print, utter or publish . . . any false, scandalous and malicious writing . . . against the government of the United States, or either House of the Congress . . . , or the President . . . , with intent to defame . . . ." Sedition Act of 1798, ch. 74, § 2, 1 Stat. 596.
31. "But the invitation to follow a dialectic progression from public official to government policy to public policy to matters in the public domain, like art, seems to me to be overwhelming." \textit{Id.} Kalven himself found the "invitation" a pleasing prospect, for he continued: "If the Court accepts the invitation, it will slowly work out for itself the theory of free speech that Alexander Meiklejohn has been offering us for some fifteen years now." \textit{Id.} (footnote omitted). He was, of course, referring to the "self-governance" theory of the first amendment advanced by Professor Meiklejohn. \textit{See} A. Meiklejohn, \textit{Free Speech and Its Relation to Self-Government}, in \textit{Political Freedom} 3 (1960). \textit{See also} Gertz v. Robert Welch, Inc., 418 U.S. 323, 357 n.6 (1974) (Douglas, J., dissenting).
author of the Sullivan opinion, Justice Brennan, makes no easier the job of untangling the interwoven threads and branches of those roots.

I. THE PRIVILEGE OF THE EDITORIAL PROCESS AGAINST DISCOVERY

A. Questions Posed by Herbert v. Lando

1. How Does a Plaintiff Prove “Actual Malice” if Courts Limit Discovery of the State of Mind of the Editor?—When Chief Justice Burger asked this question at the oral argument in Herbert v. Lando,32 he expressed a reasonable concern about the possible implications of the case. If the defamed plaintiff cannot ask the editor what his conclusions were about the veracity of persons, information, or events, what conversations he had with others in or out of the editorial room concerning what material to include or exclude from the publication, or why he decided to pursue or not pursue certain leads,33 the plaintiff will obviously be limited in his methods of proving “malice” even of the Sullivan variety—knowledge of falsity or reckless disregard of truth or falsity. The separate approaches of Chief Judge Kaufman and this author deserve comment.

Judge Kaufman’s opinion gives no explicit answer to the question of proof of “actual malice”; it does, however, imply that the material that the plaintiff had already obtained through discovery from Lando, Wallace, and CBS was sufficient.34 The opinion points out that “Lando answered innumerable questions about what he knew, or had seen; whom he interviewed; intimate details of his discussions with interviewees; and the form and frequency of his communications with sources.”35 Judge Kaufman notes that much of Lando’s testimony concerned the short and often cryptic remarks that he recorded during interviews.36 The judge also refers to exhibits produced, including transcripts of Lando’s interviews, volumes of reporters’ notes, video tapes of interviews, and a series of drafts of the actual telecast. In addition, the judge notes that the plaintiff discovered the contents of pretelecast conversations be-

33. See note 15 supra.
34. 568 F.2d at 984.
35. Id. at 982 (footnote omitted).
36. Id. at 982 n.18.
between the coproducers Lando and Wallace as well as their reactions to certain documents. Judge Kaufinan would thus limit discovery only to those questions relating to Lando's "beliefs, opinions, intent and conclusions in preparing the program."

How much of this material the plaintiff had already obtained before Lando first objected is not reported in the opinions.

My concurring opinion was somewhat different. I suggested that the plaintiff could prove "actual malice" in a number of ways. Logical inferences from the inconsistency between a television program's content and contrary facts that a plaintiff might independently establish would, I thought, provide an obvious starting point. I suggested that "a plaintiff might adduce circumstantial evidence from participants or interviewees on the television program." My opinion went on to say that although limiting discovery might deprive a plaintiff of the best proof of "malice" in the common law sense of ill will, the limitation would not necessarily prevent a plaintiff from proving "malice" in the Sullivan sense.

37. Id. at 982-83 (footnote omitted).
38. Id. at 992 (Oakes, J., concurring). One student commentator has suggested that such an inconsistency would tend to show only falsity, not "actual malice." Columbia Note, supra note 3, at 465 n.90. Proof of falsity, however, is necessary to proof of "actual malice." The probative value of circumstantial evidence depends on the extent to which the falsity shows knowledge of the falsity or the extent to which the obviousness of the falsity shows recklessness.
39. 568 F.2d at 993 (Oakes, J., concurring). Certain documents discoverable under the Freedom of Information Act indicated that "Lando's stated premise is that Herbert is a liar and he has stated that if he can't develop a sufficient number of incidents in which Herbert's account can not [sic] be debunked, then there will be no story," Brief for Appellee at 56, quoted in 568 F.2d at 993 n.30 (Oakes, J., concurring); that Lando "persist[ed] in [his] contention that he is interested in debunking Herbert. . . . [I]t will not go unless he can convincingly portray Herbert as the bad guy," id. at 57, quoted in 568 F.2d at 993 n.30 (Oakes, J., concurring); Lando "indicated that his piece [sic] is aimed at debunking Herbert in his long fight against the Army. Further Lando indicated that he would focus some attention on the failure of the media to check out Herbert's story prior to 'puffing him up'. [Sic] He plans to focus on four or five events which [sic] are contained in Herberts [sic] book and factually destroy Herbert's credibility." Id. at 58, quoted in 568 F.2d at 993 n.30 (Oakes, J., concurring).

One student commentator suggests that these documents tend to show ill will rather than knowledgeable or reckless falsifying. Columbia Note, supra note 3, at 466 n.91. But as will be explored later in this Article, I suggest that these documents show how difficult it is to distinguish between "malice" and "actual malice." See text accompanying note 204 infra.
40. 568 F.2d at 993 n.31 (Oakes, J., concurring). I continued: But Sullivan itself distinguishes common law malice from actual malice. Limiting proof of actual malice as defined in Sullivan resembles other rules of evidence which limit the "search for truth" in the interests of a higher so-
There is support for the proposition that a plaintiff may prove “actual malice” inferentially. The courts have said in other contexts that “[p]roof of a defendant’s knowledge or intent will often be inferential.” Thus in criminal cases where the defendant’s direct testimony is not available if he exercises his fifth amendment privilege, the Government may and usually does prove his state of mind, intent, or knowledge circumstantially. Prior and subsequent similar crimes, for example, may be admissible. Flight, a change of facial appearance, false exculpatory statements, as well as suppression, destruction, and fabrication of evidence are all generally admissible to prove consciousness of guilt. Other examples of proof by circumstantial evidence can be cited.

Other defamation cases have recognized that the plaintiff may prove Sullivan malice circumstantially. As the Supreme Court stated in St. Amant v. Thompson: “[R]ecklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.” And the court in Washington Post Co. v. Keogh noted that Sullivan recklessness is “ordinarily inferred from objective facts.”

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Id. In retrospect, however, I am less sure of the ability of factfinders to make the distinction between “malice” and “actual malice.” See text accompanying note 204 infra. Wrestling with these overlapping concepts may require a Hercules, see R. Dworkin, Taking Rights Seriously 105-30 (1977), or at least a stronger gladiator than the average juror, if not the average judge.

42. E.g., United States v. Curtis, 537 F.2d 1091, 1097 (10th Cir.), cert. denied, 429 U.S. 962 (1976).
48. E.g., Barnes v. United States, 412 U.S. 837, 846 (1973) (knowledge that goods were stolen is inferable from possession and comports with due process).
50. Id. at 732 (footnote omitted).
52. Id. at 968. In full context the statement is:
But if the scope of plaintiff's discovery is limited, and a fortiori if the scope of examination at trial is limited, plaintiff would not have direct proof from the defamation defendant's own lips as to his state of mind when interviewing witnesses, following leads, deciding what material to edit, and so forth. The plaintiff-appellee in *Buckley v. Littell* put the problem neatly:

Defendant also complains that he was examined respecting his beliefs. Of course, Littell was examined only concerning his "beliefs," or state of mind, with respect to the defamatory passage; he was not examined about his beliefs in general. As *New York Times* makes clear, the defendant's beliefs (in this limited sense) are the principal issue in this type of case; the proposition necessarily follows that the defendant is subject to examination respecting them. As the Supreme Court said in *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968):

"The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith."53

Thus, the answer to the question how a plaintiff can prove *Sullivan* malice after *Herbert v. Lando* is mixed. Certainly some inferential proof of "actual malice" will be available in virtually ev-

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That state of mind should generally be a jury issue does not mean it should always be so in all contexts, especially where the issue is recklessness, which is ordinarily inferred from objective facts. Summary judgment serves important functions which would be left undone if courts too restrictively viewed their power. . . .

In the First Amendment area, summary procedures are even more essential. For the stake here, if harassment succeeds, is free debate. . . . The threat of being put to the defense of a lawsuit brought by a popular public official may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself, especially to advocates of unpopular causes. All persons who desire to exercise their right to criticize public officials are not as well equipped financially as the Post to defend against a trial on the merits. Unless persons, including newspapers, desiring to exercise their First Amendment rights are assured freedom from the harassment of lawsuits, they will tend to become self-censors. And to this extent debate on public issues and the conduct of public officials will become less uninhibited, less robust, and less wide-open, for self-censorship affecting the whole public is "hardly less virulent for being privately administered."

*Id.* at 967-68 (footnote omitted) (quoting Smith v. California, 361 U.S. 147, 154 (1959)).

ery case. On the other hand, *Herbert* does impose costs on the defamation plaintiff. In many cases, although the plaintiff will be as able as before to prove "actual malice," he will incur additional temporal and financial costs that he could have avoided if permitted to discover the editorial process. In a few cases, the plaintiff might actually lose a case that he would have won but for the *Herbert* privilege. Whether these costs are excessive in light of competing first amendment values must await later discussion.

2. What Is the "Editorial Process"?—Both Chief Judge Kaufman's and my opinions essentially relied upon Chief Justice Burger's definition of the editorial process in his opinions for the Court in *Miami Herald Publishing Co. v. Tornillo*54 and *CBS v. Democratic National Committee*.55 As Chief Judge Kaufman put it, "the lifeblood of the editorial process is human judgment. The journalist must constantly probe and investigate; he must formulate his views and, at every step, question his conclusions, tentative or otherwise."56 The judge interpreted *Tornillo* as recognizing that "the existence of a right of reply statute would unconstitutionally burden an editor's exercise of judgment in choosing whether or not to print newsworthy material."57 He relied on the observation of the Chief Justice in *CBS* that "'[f]or better or worse, editing is what editors are for; and editing is selection and choice of material.'"58

My opinion spoke of the "editorial selection process"59 and utilized the same quotation from *CBS*. I suggested that "[t]he parameters of the editorial process concept [would] become more definite in the context of future cases,"60 but I pointed to the Chief Justice's own delineation in *Tornillo* as the obvious definitional starting point: "The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment."61

56. 568 F.2d at 983-84.
57. Id. at 978.
58. Id. at 979 (quoting *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 124 (1973)).
59. 568 F.2d at 986 (Oakes, J., concurring).
60. Id. at 995 (Oakes, J., concurring).
To be sure, on their facts *Tornillo* and *CBS* establish protection for the editorial process, not to protect defamation defendants, but to permit media defendants to exercise some control over who has access to their medium. One student commentator has thus objected to the holding in *Herbert* on the ground that "*Tornillo* and *CBS* do not speak to every aspect of the editorial process... but only to editorial control and judgment over the choice of material published." However, this criticism simply assumes that the Court’s "editorial judgment" cases must be narrowly read. Considered in context, those cases might suggest an even broader protection for the editorial process in a defamation suit. In *Tornillo* and *CBS*, the first amendment rights of the editors were competing with the asserted first amendment rights of the persons seeking access. But in a defamation case, the plaintiff does not assert first amendment interests. His interest in a clear reputation has weight, of course, but if that interest is balanced against first amendment rights of the editors, the scales might tip even more decisively in favor of the editors than in *Tornillo* and *CBS*.

The Supreme Court has given a fairly broad answer to the question what is the editorial process. We shall see, however, that the rationale of the cases protecting the editorial process supports even wider protection, extending to noneditorial press functions. Before examining the scope of this protection, we must explore with some care the governing rationale.

3. Why Is the Editorial Process Entitled to Special Protection?—Both Chief Judge Kaufman and I relied upon the chilling effect of discovery in holding that the editorial process deserves special protection. This section describes in somewhat more detail the nature of that chilling effect. It also explores a deeper issue: Upon which fundamental first amendment values does the editorial privilege most firmly rest? My opinion in *Herbert* relied largely upon Justice Stewart's view that the press as such deserves structural protection in our constitutional scheme. Upon further reflection, however, I conclude that the "checking function" of the first amendment, a function that Professor Vincent Blasi has articula-

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62. Columbia Note, supra note 3, at 455.
63. The checking function is premised on "the idea that free expression has value in part because of the function it performs in checking the abuse of official power." Blasi, *The Checking Value in First Amendment Theory*, 1977 Am. B. Foundation Research J. 521, 521 (italics omitted).
ted, provides a sounder rationale for the privilege.

Unlimited discovery of the editorial process in a defamation action would have a serious chilling effect upon potential defendants. Because the term "chilling effect" has become almost a slogan or a label in first amendment jurisprudence, it is important to describe in some detail what the abstraction means to a defamation defendant. Imagine being a reporter or editor who wishes, while investigating a story dealing with a powerful, rich political personality, to seek protection against a future defamation suit. One might feel impelled to take notes not only about what a witness says but also about his demeanor and about other factors bearing upon the source's credibility. One might keep a diary to record which witnesses were interviewed, and why some were interviewed and others were not. One might detail in writing why he decided to pursue certain leads and how he weighed them against other possibilities. If unlimited discovery is permitted, a defendant will inevitably be placed on the horns of a dilemma by able plaintiff's counsel. For example, if the defendant cannot remember whether he believed a given source, he will be made to appear foolish, if not careless. If he does not keep careful track of his conversations with coworkers, with his boss at the city desk or in the copy room, or with interviewees, the jury might infer that he has something to cover up. But the very keeping of notes in this fashion would operate to induce self-censorship on the part of the writer or editor: If one has to worry about such matters perhaps it is best not to write anything too controversial. And discovery of why the reporter or editor made each of the many decisions that go into the process of doing a story would involve a necessarily inhibitory examination of subjective, intellectual choices. The "chilling effect" on the actual publication process might be even greater: Why print or broadcast a story if there is even a chance that the subject will bring suit? There are risks in every business or pro-

64. Id. passim.

65. Inasmuch as Sullivan was decided 14 years ago, one may wonder why the Herbert issue has not arisen before now, except in one case, Buckley v. Vidal, 50 F.R.D. 271 (S.D.N.Y. 1970). The only answers that suggest themselves to me are that there has been no organized defamation-plaintiffs' bar to promote the type of probing discovery involved in Herbert (which I rather suspect) or that the defamation-defense bar had simply not conceived of the possibility of a privilege for the editorial process (which I rather doubt), or a combination of the two.

66. In Herbert v. Lando I reasoned:

[P]ermitting compelled discovery of the editorial process would indubitably increase the level of chilling effect in a way ostensibly not contemplated by
fession, to be sure. Doctors, and increasingly lawyers, are defendants in malpractice suits, for example. But is "defensive" journalism—as distinguished from "defensive medicine" or "defensive law"—something that the Republic can afford? I think not.

Present limitations on permissible discovery or cross-examination are few indeed. Rule 26(b)(1) of the Federal Rules of

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*Sullivan*. Thus, it is one thing to tell the press that its end product is subject to the actual malice standard and that a plaintiff is entitled to prove actual malice; it is quite another to say that the editorial process which produced the end product in question is itself discoverable. Such an inquiry chills not simply the material published but the relationship among editors. Ideas expressed in conversations, memoranda, handwritten notes and the like, if discoverable, would in the future "likely" lead to a more muted, less vigorous and creative give-and-take in the editorial room. This incremental chilling effect exceeds the level of chilling effect contemplated by the *Sullivan* balance.

568 F.2d at 993-94 (Oakes, J., concurring) (footnote omitted). Although the author of the Columbia Note, *supra* note 3, stated that "invocation of the 'chilling effect' concept" was "dubious," id. at 459, he went on to say:

The notion that a chill will result from inquiries into the editorial process, though conjectural, may be valid. Composing a story under deadline pressure, from sources whose credibility is often unknown to the reporter involves many subjective evaluations and decisions. Explaining and justifying the process to a jury is difficult. If a journalist has some conscious uncertainty as to the truth of a story, but believes it to be true, he may be deterred from printing it for fear of having to justify his subjective impression.

Responding to detailed inquiries on the editorial process may also cause a loss of newsroom morale, similar to that which prompted the attorney's privilege from disclosing "interviews, statements, memoranda, correspondence, briefs, mental impressions [and] personal beliefs"—the "work product." *Hickman v. Taylor*, 329 U.S. 495, 510-12 (1947); see Fed. R. Civ. P. 26(b)(3). The newsman's morale problem should be considerably less severe, however. An extremely small percentage of any reporter's stories are likely to be the subject of litigation; a litigating attorney, in contrast, would face the possibility of work-product discovery in almost every case he prepares.

Id. at 459 n.60.

One may wonder whether it is not more important to the survival of the Republic to protect a reporter's "work product" than to protect a lawyer's. The small publisher may be "chilled" more than the large. See note 52 *supra*; text accompanying notes 135 & 136 *infra*.


68. In *Herbert* I noted that the court was invited "to set some limits in *Sullivan* cases on the untrammeled, roving discovery that has become so prevalent in other types of litigation in today's legal world." 568 F.2d at 985 (Oakes, J., concurring). I am aware of this prevalence in part because I am a member of the Second Circuit Commission on the Reduction of Burdens and Costs in Civil Litigation. The Chief Justice is, of course, well aware of the problem, *see* Agenda for 2000 A.D.—A Need
Civil Procedure broadly permits “discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.”\textsuperscript{69} A party may seek a protective order under rule 26(c) only to protect against “annoyance, embarrassment, oppression, or undue burden or expense.”\textsuperscript{70} With respect to cross-examination, if it is in proper form the judge will limit it only if it is repetitive or cumulative.\textsuperscript{71}

The Supreme Court has conceded, however, the potential for abuse of the liberal discovery procedures under the Federal Rules. For example, the Court relied in part upon such a danger in holding that a private cause of action under the securities laws should not be unduly expanded.\textsuperscript{72} The Court has also suggested that the first amendment may afford protection for otherwise discoverable material.\textsuperscript{73} Thus, the Ninth Circuit, relying in part on the danger of liberal discovery, has held that “in any case . . . where a plaintiff seeks damages or injunctive relief, or both, for conduct which is prima facie protected by the First Amendment, the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations [in order to state a claim for relief] than would otherwise be required.”\textsuperscript{74} If the potential for abuse is judicially cognizable in the securities field, it is surely exacerbated in the first amendment area, a realm of liberty vital to the health of the Republic.

The constitutional concern is that unlimited discovery may inhibit freedom of expression, or in the case of an individual such as Dr. Littell, freedom of thought or opinion.\textsuperscript{75} A partial response to

\textsuperscript{69} FED. R. CIV. P. 26(b)(1).

\textsuperscript{70} FED. R. CIV. P. 26(c).


\textsuperscript{72} Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 741 (1975). “The potential for possible abuse of the liberal discovery provisions of the Federal Rules of Civil Procedure may likewise exist in this type of case to a greater extent than they [sic] do in other litigation.” Id.


\textsuperscript{74} Franchise Realty Interstate Corp. v. Local Joint Executive Bd. of Culinary Workers, 542 F.2d 1076, 1082-83 (9th Cir. 1976), cert. denied, 430 U.S. 940 (1977).

\textsuperscript{75} I hope that the reader will forgive my frequent reference to the single most influential writer on the subject of freedom of thought and expression in colonial
this concern is that an individual’s freedom of thought or opinion is not inhibited except insofar as he expresses or disseminates it. But this answer is fallacious and has been recognized as such since the earliest thinking on the subject.76 Chief Judge Kaufman put it with his usual eloquence when he said:

[N]ewsgathering and dissemination can be subverted by indirect, as well as direct, restraints. It is equally manifest that the vitality of the editorial process can be sapped too if we are not vigilant. The unambiguous wisdom of Tornillo and CBS is that we must encourage, and protect against encroachment, full and candid discussion within the newsroom itself.77

My opinion in Herbert attempted not only to demonstrate the inhibitory effect of unlimited discovery on the editorial process but also to supply a specific rationale for the editorial privilege in terms of constitutional values. I relied largely, though by no means exclu-

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76. See CATO, Discourse upon Libels (letter no. 100), in 2 CATO'S LETTERS, supra note 75, at 292, 296-97.

To apply this to Libels: If Men be suffered to preach or reason publickly and freely upon certain Subjects, as for Instance, upon Philosophy, Religion, or Government, they may reason wrongly, irreligiously, or seditiously, and sometimes will do so; and by such Means may possibly now and then pervert and mislead an ignorant and unwary Person; and if they be suffered to write their Thoughts, the Mischief may be still more diffusive; but if they be not permitted, by any or all these Ways, to communicate their Opinions or Improvements to one another, the World must soon be over-run with Barbarism, Superstition, Injustice, Tyranny, and the most stupid Ignorance. They will know nothing of the Nature of Government beyond a servile Submission to Power; nor of Religion, more than a blind Adherence to unintelligible Speculations, and a furious and implacable Animosity to all whose Mouths are not formed to the same Sounds; nor will they have the Liberty or Means to search Nature, and investigate her Works; which Employment may break in upon received and gainful Opinions, and discover hidden and darling Secrets.

Id.

77. Herbert v. Lando, 568 F.2d at 979. Of course, if Tornillo and CBS apply only in access cases this appraisal is plainly erroneous. But why, then, did the Supreme Court speak of the “editorial process”? See text accompanying note 62 supra.
sively, upon Justice Stewart’s argument that the free press guarantee in the first amendment is a structural provision of the Constitution. The rest of this section describes first Justice Stewart’s thesis and then an alternative thesis of Professor Vincent Blasi concerning the “checking value” of the first amendment.

Justice Stewart’s rather innocent speech on November 2, 1974, at the Sesquicentennial Convocation of Yale Law School, excerpted as “Or of the Press” by a prominent law review, has engendered much controversy, including an extraordinary comment by way of dictum from Chief Justice Burger, an exchange between two prominent professors, other law review commentary, and considerable general discussion. Justice Stewart argued that the free press clause is not a redundancy and that it has significance independent of the free speech clause: It creates in effect a “Fourth Estate” or “institution outside the Government as an additional check on the three official branches” to engage in “organized, expert scrutiny of government.” He found support for his position partly in the intent of the Founders but also in recent Supreme Court decisions dealing with the organized press, including the libel cases, the confidential news sources case, the right of access cases, and the Pentagon Papers case. The essence of the argument is that the free press clause is based on concerns different from those of the speech (and presumably assembly) clauses.

78. My opinion also relied upon the prior restraint cases, the less drastic means test suggested in Nebraska Press Ass’n v. Stuart, 427 U.S. 539 (1976), and the new status of commercial speech. See 568 F.2d at 989-90, 989 nn. 18 & 20, 990 n.21 (Oakes, J., concurring).
79. See Stewart, supra note 21 at 633-34.
80. The phrase is from Blasi, supra note 63.
81. Stewart, supra note 21.
83. Lange, supra note 21; Nimmer, supra note 21.
85. Stewart, supra note 21, at 633-34.
90. Professor Melvin Nimmer has suggested that in certain instances there may
In the view of some critics, Justice Stewart's thesis unfortunately suggests that the institutional press is entitled to special privileges, greater than those of the noninstitutional press or the individual.91 This objection to the Justice's thesis is based upon two underlying concerns. First, as the Chief Justice has put it, because "media conglomerates" pose a "realistic threat to valid interests,"92 it would be unwise to confer "special and extraordinary privileges or status on the 'institutional press.' "93 Second, as Professor Lange has emphasized, differentiation between the clauses will undermine the protections that each affords, weakening the press by reducing its "constituency"94 and weakening individual interests in speech, i.e., "non-media speech."95

But the most serious failing of Justice Stewart's thesis is the absence of secure historical support for the differentiation of the clause. The intent of the Framers with respect to a distinction between the speech and press clauses is at best inconclusive. Nevertheless, the alternative "checking value" thesis, which history more strongly supports, in practical effect protects the institutional press in much the same way as the Justice would without reliance on the press clause.

History discloses "that the terms 'freedom of speech' and 'freedom of the press' were used quite interchangeably in the eighteenth century, particularly so among persons who were interested in the terms at a conceptual level."96 The foremost historian of the first amendment, Dean Leonard Levy, has recited somewhat conflicting evidence concerning Justice Stewart's thesis. On the one hand, Levy suggests that freedom of the press is the older of the two concepts.97 On the other hand, he states that, in the context of

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91. See Lange, supra note 21, at 88; Shiffrin, supra note 86, at 921-23; Yale Note, supra note 3, at 1723 n.6.
93. Id. at 797 (Burger, C.J., concurring).
94. Lange, supra note 21, at 107-13.
95. Id. at 113-18.
96. Id. at 88 (footnote omitted). Professor Nimmer, otherwise an ideological opponent of Professor Lange with respect to the Stewart thesis, agrees with this historical conclusion. Nimmer, supra note 21, at 640.

[F]reedom [of speech] had almost no history as a concept or a practice prior to the First Amendment or even later. It developed as an offshoot of freedom of the press, on the one hand, and on the other, freedom of
Seditious libel, writers and commentators did distinguish between the two clauses. Indeed, most pre-Bill of Rights American expository writing on freedom of the press stemmed from Cato’s essay on freedom of speech, an essay that spoke only once of “license of the press”; thus conceptual essays on freedom of the press might themselves be derivative, not the other way around. Because commentators appreciated without differentiation the transcendent values in free opinion, free speech, and free press, the issue of press clause “redundancy” was largely academic. History is therefore an inconclusive guide to the present controversy.

Justice Stewart’s emphasis on the functional aspects of the press, particularly its role as a “Fourth Estate,” is nonetheless valuable. The real contribution of the Justice’s thesis is to demonstrate the principal role that the “checking function” plays in First Amendment theory and the system of free expression generally. In a recent article, Professor Vincent Blasi brilliantly illustrates “the value that free speech, a free press, and free assembly can serve in checking the abuse of power by public officials.” Blasi does not argue that the checking value is the only important First Amendment value, but that it should be a significant component in any general First Amendment theory. As de Tocqueville, among others, recognized, the checking function ultimately stems from the

religion—the freedom to speak openly on religious matters. But as an independent concept referring to a citizen’s personal right to speak his mind, freedom of speech was a very late development, virtually a new concept without basis in everyday experience and nearly unknown to legal and constitutional history or to libertarian thought on either side of the Atlantic prior to the First Amendment. The very phrase, “freedom of speech,” until the last quarter of the eighteenth century referred primarily to a parliamentary, not a civil, right.

Id. (footnote omitted).

96. When the press was freed from prior restraints it simply became directly amenable to the law of libel as speech had always been. Thus, freedom of speech and freedom of the press, being subject to the same restraints of subsequent punishment, were rarely distinguished. Most writers, including Addison, Cato, and Alexander, who employed the term “freedom of speech” with great frequency, used it synonymously with freedom of the press.

Id. at 174. This interchangeability of terminology persists to this day. See note 86 supra.

96. See note 75 supra. Dean Levy has described the importance of this essay as follows: “If freedom of the press was the palladium of public liberty . . . Cato’s Letters was its intellectual source and provided virtually the entire content of its philosophy as well.” Levy, Introduction to FREEDOM OF THE PRESS, supra note 22, at xxviii.

100. Blasi, supra note 63, at 527.

101. Id. at 528.
correlative relationship between the sovereignty of the people and the freedom of the press.\textsuperscript{102}

There is little doubt that the checking function which the system of free expression performs was a principal concern of the Framers, including the antifederalists.\textsuperscript{103} The checking role of expression runs throughout the pre-Revolutionary literature,\textsuperscript{104} its theme is taken up not only in the Zenger trial\textsuperscript{105} but also in the colonial reaction to the prosecution of John Wilkes and others for seditious libel.\textsuperscript{106} The checking role finally developed in the libertarian viewpoint, which became established in response to the Sedition Act.\textsuperscript{107} And it is firmly emphasized by the Court in \textit{New York Times v. Sullivan} itself:

\begin{quote}
[I]n a debate in the House of Representatives, Madison had said: "If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people." Of the exercise of that power by the press, his Report [on the Virginia Resolutions which protested the Alien and Sedition Acts] said: "In every state, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men, of every description, which has not been confined to the strict limits of the common law. On this footing the freedom of the press has stood; on this foundation it yet stands . . . ." The right of free public discussion of the stewardship of public officials was thus, in Madison's view, a fundamental principle of the American form of government.\textsuperscript{108}
\end{quote}

As Professor Blasi has noted, Justice Stewart's thesis reflects a somewhat narrower view of the checking function than Blasi himself espouses:

The thrust of Justice Stewart's remarks . . . was not that the checking value should be a major component in a cognate theory

\begin{itemize}
\item \textsuperscript{102} A. \textsc{de Tocqueville}, \textit{Democracy in America} 182 (J. Mayer ed. 1969).
\item \textsuperscript{103} See J. \textsc{Main}, \textit{The Antifederalists} (1961); R. \textsc{Rutland}, \textit{The Birth of the Bill of Rights}, 1776-1791 (1955); G. \textsc{Wood}, \textit{The Creation of the American Republic}, 1776-1787, at 536-43 (1969).
\item \textsuperscript{104} See, e.g., \textsc{Cato's Letters}, supra note 75, \textit{passim}; L. \textsc{Levy}, \textit{supra} note 97, at 18-125.
\item \textsuperscript{105} \textit{Trial of John Peter Zenger} (N.Y. Sup. Ct. 1735), in \textit{16 American State Trials} 1 (J. Lawson ed. 1928) [hereinafter cited as \textit{State Trials}]; \textit{Freedom of the Press}, supra note 22, at 44-61.
\item \textsuperscript{106} See L. \textsc{Levy}, \textit{supra} note 97, at 145-75.
\item \textsuperscript{107} Id. at 249-309. See generally L. \textsc{Levy}, \textit{Liberty of the Press from Zenger to Jefferson}, in \textit{Judgments} 115 (1972).
\item \textsuperscript{108} 376 U.S. 254, 275 (1964) (citations omitted) (footnotes omitted).
\end{itemize}
of the First Amendment encompassing the speech, press, and
assembly clauses, but rather that the free-press clause embodies
different concerns than the other clauses because it is grounded
in a view about the institutional checking function of the organ-
ized press.109

Professor Blasi's broader view seems persuasive, although in practi-
cal effect it may not differ greatly from Justice Stewart's: Under ei-
ther view, analysis should focus upon the function that the press
performs.

Does the Blasi thesis (or the Justice's "functional" thesis) imply
special privileges for the "institutional press"? Concededly, the cor-
porate press usually performs the checking function, especially as
government becomes larger. Few individuals today have sufficient
independent resources to do the work of an Upton Sinclair110 or a
Jacob Riis.111 But Justice Stewart's thesis (insofar as it emphasizes
the checking function) implies not special privileges for the institu-
tional press generally but only privileges that will guarantee the ef-
cicacy of the checking function of the first amendment. Those who
challenge the Justice's thesis must, I think, be careful not to deni-
grate those "privileges" in seeking to avoid "preference" to the "in-
stitution." That is, if the checking function is to be well served, the
question is not whether the professional press is entitled to special
treatment under the Constitution; in Blasi's words, "considerations
relating to the viability and vitality of the institution itself should
be accorded special weight in the constitutional
112 not
for their own sake but so as to promote, protect, and effectuate the
checking function which they perform.

We are now in a position to answer more confidently the
question posed at the beginning of this section. The editorial pro-
cess deserves special protection against discovery by defama-
tion plaintiffs because forced disclosure might otherwise inhibit
free expression. We do not worry that just any speech might be
chilled; the checking value instructs us that the editorial privilege
in the defamation context would protect an unusually valuable
speech—speech directed at public issues. The special status of

110. See, e.g., U. SINCLAIR, THE JUNGLE (1906).
chose the turn-of-the-century "muckrakers" to illustrate the point; I could as easily
have chosen Bob Woodward and Carl Bernstein from the 1970's or Thomas Nast
from the 1870's.
112. Blasi, supra note 63, at 632 (footnote omitted).
"checking" speech, combined with the unique potential for a chilling effect when the very process of editorial judgment is open to discovery, is a compelling justification for an editorial privilege.

B. The Scope of Herbert in Light of the Checking Function

This part of the Article assumes that *Herbert v. Lando* holds correctly that the first amendment requires courts to limit discovery of an editor's state of mind at the time he performed his editing function. It also assumes that *Sullivan* correctly permits a defamation plaintiff to recover upon proof of "actual malice," even if he is a public official involved with public issues. If, however, the scope of the *Herbert* limitation is extended commensurate with the breadth of *Herbert*'s underlying rationale, the checking function, a severe strain is placed upon the *Sullivan* rule itself, a strain sufficient to demand reexamination of that rule.

1. Noneditorial Press Functions and Nondiscovery Limitations.—This section examines whether, in light of the value of the checking function, *Herbert* should be expanded to noneditorial press functions and to nondiscovery limitations on a defamation plaintiff's evidentiary inquiries into privileged press processes.

Discretionary press decisions entitled to first amendment protection include more than purely "editorial" decisions. But before examining whether *Herbert*'s limitation on discovery should extend to noneditorial functions, the nature of these functions must be described.

The science—art?, profession?—of newsgathering and publishing is complex. Like a field of wheat, it requires cutters, gatherers, harvesters, winnowers, and storers before the stalk is cut from the field, the grain separated from the chaff. In addition to the "editorial" function, there is a "reporting" and a "publishing" function. "Reporting" itself is multifunctional, consisting of newsgathering followed by story- or article-writing. "Reporting" includes not only investigation but also a prior determination of what to investigate. Investigation may require independent research of places, documents, or the like; and it often requires contact with "leads" or "leaks." These "sources" of news may be especially useful in regard to matters of public interest. After the information is collected, a responsible publication will digest it, analyze it, cross-

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check its accuracy, and use it to construct an initial story. The story is written not simply to convey the information gathered but to have an impact upon the audience. Of course, any speculation or inference should be, although it all too often is not, stated as such.

The "editorial function" is really a managerial one, in which the editor works with the reporter to determine what area or person to investigate. Editors sift the facts or information gathered, suggest new avenues of investigation or old places for verification, and finally revise, reorganize, and rewrite the "story."

But there is also a publishing function in, among other decisions, determining which story to run, what headline to give it, when and where to run it, and how to distribute it. As the organization becomes smaller, the reporting, editing, and publishing functions tend to blend or to be performed by fewer individuals whose functions overlap; as the organization becomes larger, the functions tend to be broken down and performed by separate persons (or even machines) with highly specialized tasks.

One student commentator has recently referred to the "selection and packaging function of the institutional press" in arguing that the Supreme Court's "public figure" standard "threatens the very editorial process it seeks to protect." Despite the different context, this author's analysis is instructive. "Selection and packaging decisions," he notes, "are implicit in the daily assignment of reporters, the structure of an individual story, the design of a specific page, and the distribution of information among pages."

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114. See text accompanying notes 54-62 supra.
116. By "organization" I mean to include any individual or institution that broadcasts a radio or television program or that publishes a newspaper, magazine, or book. In this section I use the term "press" generally to refer to all of these organizations.
118. Yale Note, supra note 3, at 1735.
119. Id. at 1725.
120. Id. at 1735 n.81.
ever the medium, are “based on the subtle interplay of the probable interest of the audience, the timeliness of the issue or event, and the potential consequences of the issue’s resolution to the relevant community.”121

Whether one views the functions of the press as tripartite—reportorial, editorial, and publishing—or as bipartite—“selection and packaging”—the functions overlap, and the interaction among them varies from one news item to another, even within the confines of a single organization, as well as from organization to organization and from medium to medium. For simplicity, however, I shall refer to the tripartite structure described above.

In *Herbert v. Lando* itself, the defendants exercised more than a purely “editorial” function. Lando served in several capacities: Reporter, editor, and coproducer. Wallace apparently served both as editor and producer. Although the opinions in *Herbert* refer to the editorial process, the facts are not so limited. The checking function rationale underlying the holding in *Herbert* would thus support application of the decision beyond the editorial function as narrowly construed.

The privilege that *Herbert* establishes should be applied to noneditorial press functions. If those who exercise the checking function deserve protection because of the special duty that they perform in curbing abuse of official power, then they deserve protection irrespective of the particular medium through which they act or the particular press function that they perform. In other words, whenever a member of the press makes a discretionary reporting, editing, or publishing decision and the “story” concerns a public issue, the checking value’s concern about “journalistic autonomy”122 is implicated; unlimited discovery of the motivation behind any such decision offends first amendment values as surely as did the roving discovery in *Herbert*.

The legalist may object to this “extension” of *Herbert* on the following ground. Newsgathering, part of the reportorial function, depends upon sources which might dry up if the reporter did not keep their identity confidential. Yet *Branzburg v. Hayes*123 recognizes at best a qualified privilege to keep confidential sources private: It holds that a reporter summoned before a grand jury must divulge the names of confidential sources if his story relates to the

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121. *Id.* at 1736-37 (footnotes omitted).
123. 408 U.S. 665 (1972).

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commission of a crime under investigation. An important factor in Justice White's opinion for the four-Justice plurality in Branzburg was the difficulty of defining the categories of reporters who might qualify for a conditional privilege. The opinion suggests that confining the privilege to the institutional press would be "a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer." The opinion also argues that because "[t]he informative function asserted by representatives of the organized press . . . is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists," the privilege would logically apply to such authors. Given the outcome in Branzburg, one wonders whether the checking function played its rightful role in the thinking of the Court.

Branzburg should not, however, be read as recognizing no protection for the newsgathering aspect of the reportorial function. Reflecting concern about the ability of the press to gather news effectively, the opinion does make the pragmatic argument that prosecutors may be loath to risk subpoenaing reporters. The opinion also warns that there is no justification for a grand jury investigation instituted in bad faith or for "harassment of the press undertaken . . . to disrupt a reporter's relationship with his news sources." And Justice Powell's concurring opinion emphasizes "the limited nature of the Court's holding" and reiterates the plurality's warning "that no harassment of newsmen will be tolerated." Although the composition of the Court has changed since Branzburg, with Justice Stevens replacing Justice Douglas, it is doubtful that the Court would go much further than Branzburg in lessening reportorial protection.

As Branzburg and other cases illustrate, the Supreme Court has not interpreted the first amendment as according uniformly high protection to all aspects of the reporting, editing, and publishing functions of the press. We are nevertheless on sound

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124. Id. at 704.
125. Id.
126. Id. at 705.
127. See Blasi, supra note 63, at 593, 601.
128. 408 U.S. at 706.
129. Id. at 707-08.
130. Id. at 709-10 (Powell, J., concurring).
131. See, e.g., Zemel v. Rusk, 381 U.S. 1 (1965). "The right to speak and publish does not carry with it the unrestrained right to gather information." Id. at 17.
ground in concluding that the Herbert privilege should extend to noneditorial press functions, for at least two reasons. First, the Court has in the past given insufficient attention to the checking value in first amendment theory. Second, Branzburg and similar cases suggest only that in some contexts the newsgathering part of the reporting function has less protection than the other functions. In the distinct context of the Herbert privilege, the question is whether the person invoking the privilege seeks to protect discretionary decisions made in the process of shaping the news through reporting, editing, or publishing. Such decisions must be shielded from government scrutiny if the press is to wield the "checking value" sword. Branzburg did not hold that a grand jury could ask a reporter questions such as why he did not pursue other leads. In short, the checking function does not give the press a general privilege against all government interference, but simply requires considerable freedom from government restraint when it is performing that function.

The preceding analysis should make it clear that Herbert's rationale proscribes not simply discovery but any evidentiary inquiry into the "editorial process" (broadly construed). Extensive trial cross-examination would be as inimical to the first amendment checking function as extensive discovery would be. It implicates the same values, the same interests.

2. Defining the Press.—The Court as a whole refuses to accord special protection to the institutional press and not to the "lonely pamphleteer." Justice White explicitly so stated in his opinion for the plurality in Branzburg. The Chief Justice reached the same conclusion in his concurring opinion in First National Bank v. Bellotti. And Justice Stewart's dissent in Branzburg, in which Justices Brennan and Marshall concurred, also assimilates the rights of the press to the rights of the individual. This conclusion appears well founded. The small newspaper or radio station, and a fortiori the "lonely pamphleteer," in some respects de-

132. My own opinion in Herbert hints at this point. 568 F.2d at 995 n.38 (Oakes, J., concurring).
133. 408 U.S. at 703-06.
135. 408 U.S. at 742 (Stewart, J., dissenting). "[T]he associational rights of private individuals, which have been the prime focus of our First Amendment decisions in the investigative sphere, are hardly more important than the First Amendment rights of mass circulation newspapers and electronic media to disseminate ideas and information, and of the general public to receive them." Id. (Stewart, J., dissenting).
serve even more protection than the institutional press. The threat of defamation suits is most likely to chill or induce self-censoring on the part of the small publisher, who lacks the resources of a conglomerate or chain necessary to defend itself successfully and is, nonetheless, a potential target for defamation suits.

The broadcaster or telecaster is in a situation similar to the press generally. Although there are differences in treatment under the law because of the Communications Act and accompanying regulations, broadcast and similar media are entitled to "press" protection. To be sure, Red Lion Broadcasting Co. v. FCC does weaken protection of the editorial function where access to the medium is restricted. In the defamation context, however, the editorial function of even the nonprint media deserves full protection, for the "restricted access" argument is inapposite. No one would seriously urge that the broadcaster's quasi-fiduciary responsibility to his audience either lowers the standard of proof that Sullivan imposes upon defamation plaintiffs or weakens the force of the Herbert privilege. And Herbert v. Lando itself was a suit against a telecaster.

Admittedly "[t]here are . . . differences inherent in the technology, economics and regulation of each medium that affect the manner in which the selection and packaging function is exercised," if not the contents of the ultimate "package" delivered. But in principle the degree of protection should vary only according to the degree to which the organization exercises the checking function.

The first amendment should similarly protect private authors, lecturers, political pollsters, novelists, academic researchers, and dramatists, the persons to whom Justice White referred in Branzburg, when they exercise the checking function. Under present law it cannot make any difference who performs the function: The law should protect even the private speaker when he

139. Yale Note, supra note 3, at 1735 n.81.
141. 408 U.S. at 705.
discusses a public issue.\textsuperscript{143}

Why, then, should there be special protection for the press or the editorial process? If there should be no difference among the various forms of media or between the speech and press clauses, why does \textit{Herbert v. Lando} specifically discuss "the press" and the editorial process? The simple reason is that the context in which the question of protection arose in \textit{Herbert}, and in which it will arise in almost all defamation cases, is the press context. An individual giving a soliloquy is not generally a defendant in a defamation action; for the most part the defendant is one who has given fairly widespread publication\textsuperscript{144} to his views. There are exceptions,\textsuperscript{145} of course. But the cost of litigation today is so great—for plaintiffs as well as defendants—as to preclude all but those cases that involve at least some chance of a significant money judgment. To be sure there will be the occasional case involving supposed slights to private "honor" or just plain personal vindictiveness.\textsuperscript{146} But almost inevitably, it is the press that will be on the receiving end of most defamation suits, particularly those involving large sums. By virtue of the basic common law rule that one who publishes defamation is just as liable as one who initiates it,\textsuperscript{147} a news publisher, publishing house, telecaster, or broadcaster is most likely to be the libel defendant.

\textsuperscript{120, 122} (1975). Professor Nimmer suggests that the distinction between the press and the public \textit{does} matter in limited contexts, for example, prison security, citing \textit{Pell v. Procunier}, 417 U.S. 817 (1974), and \textit{Saxbe v. Washington Post Co.}, 417 U.S. 843 (1974). Rather than make Professor Nimmer's distinction, I prefer to distinguish between persons exercising a "checking function" and those not doing so. At a given moment a member of the press might not be exercising a checking function—he might be reporting on a private citizen's comings and goings, for example—while on occasion a member of the general public, such as an antiwar protestor carrying a placard in Lafayette Park, might be doing so. Although it might sometimes be difficult for courts to make this distinction, the task is no more difficult than many other line-drawing problems.

\textsuperscript{143. \textit{Contra}, 4 W. BLACKSTONE, COMMENTARIES *151-52. Blackstone characterized press freedom as freedom only from prior restraint.}

\textsuperscript{144. By definition a publication of the libel is required. \textsc{Restatement (Second) of Torts} §§ 558(b), 577 (1977).}

\textsuperscript{145. \textit{E.g.}, id. § 577, Comment h: "Dictation to stenographer. The dictation of a defamatory letter to a stenographer who takes shorthand notes is itself a publication of a libel by the person dictating the letter even though the notes are never transcribed nor read by the stenographer or any other person." The dictation, however, might be privileged. See id. § 604.}

\textsuperscript{146. The stricter English libel laws contain some wonderful examples. See J. DEAN, supra note 4, at 118-24, 141-48.}

\textsuperscript{147. \textsc{Restatement (Second) of Torts} §§ 577, 578 (1977). Of course, \textit{Sullivan} and its progeny limit the liability of the publisher to cases of "actual malice."}
Similarly, I speak of the editorial function, though it overlaps the publishing and reportorial functions and though I would protect these as well when they serve the checking value, because the "editorial" decisions are the ones most likely to involve the matters of judgment which plaintiffs may question when attempting to prove "actual malice." The "heart" of the editorial room, to which I referred in *Herbert v. Lando*\(^{148}\) is the epicenter of most newspapers. Of course, the reporter's or publisher's state of mind may also be involved. In *Herbert*, Barry Lando was reporting and publishing as well as editing. And it would not be an unwarranted extension of *Herbert* to hold Dr. Littell's\(^{149}\) intricate mental operations immune from discovery.

But how far can this limitation extend? How much protection from discovery of evidence before or during trial should be available? Can a special procedural or evidentiary doctrine, however benign, be manufactured that effectively promotes a substantive purpose? Should it be? Is this not the failing of *Sullivan*—that under the guise of procedural rules (burden of proof and appellate review of the "constitutional facts") it attempts to mitigate the harshness of a substantive tort, yet leaves the tort itself viable? Is the court of appeals' decision in *Herbert v. Lando* intellectually sound? When do you have opinions, conclusions, and intentions "at the heart of the process," whatever that may be? Is there any way in which the law can provide the protection that the majority opinions in *Herbert v. Lando* sought to provide? This is the truly difficult question. We sought to answer it in *Herbert v. Lando*; perhaps it would be easiest to say that it is answerable only on an ad hoc, case-by-case basis.

On the other hand, if *Herbert* is read as broadly as the checking function suggests, might not the protection swallow up the rule? If the law is to protect the reportorial, editorial, and publishing functions—as well as all forms of expression by the institutional press, the noninstitutional press, and the private speaker, whenever the speech is in furtherance of the checking function—would not the rule so limit discovery as to make defamation suits worthless altogether? Indeed, in *Herbert* itself, was not a good deal of discovery that was not excepted to directed at the "editorial process"? An affirmance of *Herbert*, it can be argued, will inevitably be viewed as creating either a broad new privilege

\(^{148}\) 568 F.2d at 995 (Oakes, J., concurring).

\(^{149}\) See text accompanying notes 5-8 supra.
or a different rule of substantive law. To do the former may multiply problems of judicial supervision. The courts would have to monitor closely the discovery process in the defamation area, for surely the defendant will assert that many questions that the plaintiff propounds go to the "heart of the editorial process" as here defined. The courts would have similar problems of supervision at trial. Yet unlimited discovery and cross-examination will chill freedom of the press. Is this an insoluble dilemma? Or is there hope in the alternative interpretation of the result in Herbert—that it suggests a different rule of substantive law?

II. A Reexamination of the Sullivan "Actual Malice" Test

I am led inevitably though reluctantly to a reconsideration of New York Times Co. v. Sullivan. From everything said it is obvious that I think it was an extraordinarily valuable decision. I agree with Harry Kalven's contemporaneous assessment\(^{150}\) that it was daring: In constitutionalizing the law of defamation it overturned a longstanding rule of common law—permitting a public official to recover for defamation in respect to his official conduct whenever the defendant failed to prove truth—recognized in a large majority of states. And I have already suggested\(^{151}\) that by using the early Republic's response to the Sedition Act as a keystone of analysis, the Sullivan Court was emphasizing in part the checking-function value underlying the first amendment.

But some other "landmark" decisions making "radical" or "daring" innovations have proved erroneous in part—Monroe v. Pape's faulty treatment of municipal liability is one example.\(^{152}\) This is true because, as Anthony Amsterdam has pointed out, an appellate court, and perhaps especially the Supreme Court, is a "committee" in a real sense.\(^{153}\) To obtain a majority that will espouse a given position it may be necessary to couch the decision in pillows of qualifications to soften its impact. I have no way of knowing whether this occurred in Sullivan. But I do think that in preserving liability where a plaintiff establishes by "clear and convincing evidence" that a defendant made false defamatory statements with "actual malice" (disbelief in truth or reckless disregard

\(^{150}\) Kalven, supra note 28.
\(^{151}\) See text accompanying notes 103-109 supra.
\(^{153}\) Amsterdam, Perspectives on the Fourth Amendment, 58 MINN. L. REV. 349, 350 (1974).
of truth or falsity), the Sullivan majority established a rule which is logically at odds with the Court’s own recognition that a defense of truth provides insufficient protection for defamation defendants:

A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable “self-censorship.” Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. Even courts accepting this defense as an adequate safeguard have recognized the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars. . . . Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which “steer far wider of the unlawful zone.” The rule thus dampens the vigor and limits the variety of public debate.\textsuperscript{154}

This part of the Article will first examine the historical antecedents of the “actual malice” test. The test is not entirely new; some of the historical policy arguments about the wisdom of the rules of criminal and civil defamation are applicable to a surprising extent to the Sullivan test. The Article next undertakes a critical analysis of the test. After considering some individual views, the Article examines more particularly the strength of the policy arguments for and against the rule.

\textbf{A. Historical Antecedents of the “Actual Malice” Test: “Malice”\textsuperscript{155} in the Law of Criminal and Civil Defamation}

\textit{1. Criminal Law.}—In the early criminal defamation cases, there were at least two views about how malice should be treated.

\textsuperscript{154} 376 U.S. at 279 (citations omitted) (footnote omitted) (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958)). By contrasting its proposed standard to the traditional standard—placing “the burden of proving [the defense of truth] on the defendant,” \textit{id.},—the Court somewhat inflates the strength of its position that the traditional standard induces self-censorship. The Court does not merely impose on the plaintiff the burden of proving the unavailability of the defense of truth, an intermediate position that might also result in less self-censorship, but also requires the plaintiff to prove actual knowledge or reckless disregard of falsity by “clear and convincing” evidence. The Court thus implies that merely shifting the burden of proof on the issue of truth or falsity would afford insufficient protection. But we shall see that even after these three changes as to proof in a defamation action, the threat of libel judgments will still create some “dampen[ing]” effect.

\textsuperscript{155} \textit{Black’s Law Dictionary} cites as definitions “intent,” “ill will,” “without
The prevalent English (and hence colonial) view was Lord Mansfield's. The crime was one of strict liability, and any excuse or justification went to the punishment, not the crime. Thus the jury could not give a general verdict of not guilty: It determined only the questions of fact, namely, whether the accused published the paper in issue and whether the innuendoes were true. Moreover, the intent of the publisher was immaterial; as Lord Mansfield said: "[A] criminal intent from doing a thing criminal in itself without a lawful excuse, is an inference of law, and a conclusive inference of law, not to be contradicted but by an excuse..." Libel was malum in se.

But Mr. Bootle in England and Andrew Hamilton in New York argued the minority view that a malicious or seditious intent is an essential ingredient of the crime, an argument perhaps suggested by the common form of indictments and informations which alleged all sorts of wicked intentions. The English advocates of this view were not very successful in the courts. In Parliament, however, they were more so, securing enactment of Fox's Libel

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Id. at 1109 (citations omitted). The Restatement (Second) of Torts avoids using the word. See RESTATEMENT (SECOND) OF TORTS § 580A & Comment d (1977).

156. See Rex v. Dean of St. Asaph, 21 How. St. Tr. 847, 1033 (K.B. 1783). The case is described in 10 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 676-80 (1938).

157. 10 W. HOLDSWORTH, supra note 156, at 677. Indeed, because matters of excuse did not go to intent, a defendant could not offer his lack of malice in support of an excuse. Id. at 687.

158. Id. at 678-79.

159. Rex v. Dean of St. Asaph, 21 How. St. Tr. 847, 1035 (K.B. 1783), quoted in 10 W. HOLDSWORTH, supra note 156, at 677-78. Lord Mansfield goes on to say: "Where an innocent act is made criminal, when done with a particular intent, there the intent is a material fact to constitute the crime." Id. (emphasis in original), quoted in 10 W. HOLDSWORTH, supra note 156, at 678.


161. See 10 W. HOLDSWORTH, supra note 156, at 678-80.
Act 162 in 1792. Under the Act, the criminal intent of the defendant who uttered a false statement became a question for general jury verdict; 163 the court could no longer direct a verdict simply because the jury had established the fact and falsity of the publication. This victory was no less important because some members of Parliament who voted for the Act may have favored stringent prosecution of libel, but realized that under the old rules of strict liability juries simply would not convict. 164 To be sure, the Act may have had a more symbolic than substantive impact because juries, like judges, were subject to prevailing prejudices; and with few exceptions prosecutions in England remained successful. 165 Nevertheless, the Act is important in establishing the principle that the jury may, in rendering its general verdict, consider the malice of the defendant in the sense of criminal intent. 166

Developments in America were different. The colonial thinkers, well aware of the British prosecutions, were generally more concerned than the English about protecting persons with innocent intentions against defamation judgments. But the current of thought was not uniform, and its vagaries are worth recounting.

In the early eighteenth century, Cato’s Letters were very influential. Cato argued that the benefits of what the law denomi-
nated “libels” outweighed their mischiefs by keeping “Great Men in Awe” and serving as “some Check upon their Behaviour.” Libels were the inevitable result of a free press, “an Evil arising out of a much greater Good.” But although Cato proposed truth as a defense, he did not so promote lack of malice.

Andrew Hamilton, however, intimated in the famous Zenger trial that a malicious or seditious intent is essential to the crime of libel. Hamilton seems to have convinced the court against its will that the jury had the right to determine whether his client had such an intent. The argument did, of course, convince the jury, which returned a verdict of not guilty. Specifically, Hamilton addressed the jury as follows:

> What certain standard rule have the books laid down, by which we can certainly know, whether the words or the signs are malicious? Whether they are defamatory? Whether they tend to the breach of the peace; and are a sufficient ground to provoke a man, his family, or friends, to acts of revenge, especially those of the ironical sort of words? And what rule have you to know when I write ironically? I think it would be hard, when I say, such a man is a very worthy, honest gentleman, and of fine understanding, that therefore I meant he was a knave or a fool.

Although Hamilton did concede that his client’s statement would be a libel if false, he would leave to the jury the question whether the words were libelous; and he suggested that only a jury could decide whether the intent was ironic.

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167. CATO, supra note 76, at 293.
168. CATO, Reflections Upon Libelling (letter no. 32), in 1 CATO’S LETTERS, supra note 75, at 246, 252.
169. Id. at 247.
170. Trial of John Peter Zenger, supra note 105.
171. Id. at 38-39. Thus, although the court did not instruct in so many words that the jury must acquit if the intent was innocent, the court avoided the usual instruction that the jury must convict, regardless of intent, if the defendant published the libel and if the libel were not true.
172. Id. at 39.
173. Id. at 15. The Attorney General had argued that a “full definition of a libel” was “a malicious defamation, expressed either in writing or printing, and tending either to blacken the memory of one who is dead, or the reputation of one who is alive, and to expose him to public hatred, contempt, or ridicule.” Id. at 14.
174. Id. at 11.
It was only following the Wilkes case\textsuperscript{175} that the libel controversy began to focus upon malicious intent. In England, “Father of Candor’s” reply to “Candor” called for truth as “an absolute defense” in the case of state libels—disputes between the ministers and the people.\textsuperscript{176} Although “Father of Candor” granted that a “wilfully false” publication was damnable and seditious, he would leave to the jury the question of willfulness or malicious intent.\textsuperscript{177} In effect, then, he equated “malice” with criminal intent.\textsuperscript{178}

Levy’s own historical analysis\textsuperscript{179} consistently makes the same equation. He appears to have in mind the concept of knowing falsity when he points out that even our liberal forebears, who would permit truth as a defense and thus reconstruct Blackstonian concepts of defamation, would also permit punishment of “malicious falsehood” when not “error of opinion.”\textsuperscript{180} Yet Levy sometimes speaks in a looser sense, as when he asks in respect to the Framers, “Did they intend that malicious calumnies against the government should be free?”\textsuperscript{181}

The concept of malice was discussed on a new level during the

\textsuperscript{175} For discussion of the Wilkes case, involving an alleged libel by John Wilkes against George III in 1763, see R. Postgate, That Devil Wilkes (1929). See also L. Levy, supra note 97, at 145-48.

\textsuperscript{176} See L. Levy, supra note 97, at 148-52.

\textsuperscript{177} Id. at 152.

\textsuperscript{178} Father of Candor’s theory was, however, somewhat inchoate. As Levy notes, the theory’s reliance on truth as a complete defense overshadowed its discussion of intent:

Were truth an “absolute defence” as Father of Candor demanded, malice and bad tendency would be irrelevant considerations. They would be highly relevant, however, if the defendant could not prove the truth of his statements, which would be the case if they were in fact false, or if they were opinions neither true nor false, or if they were factually correct but unprovable so. In either of these three instances, none of which was considered by Father of Candor, truth as a defense, his main prop, was useless; it was also irrelevant since the defendant’s fate would then depend on whether or not the jury found his intent to be malicious, a judgment which they would form from their subjective evaluation of the harmless or harmful tendency of his words, an evaluation which later practice showed to be dependent upon their approval of his character and opinions. The history of sedition trials in the United States, under the federal sedition acts of 1798, 1918, and 1940, demonstrates that a requirement that criminal intent be proved to a jury’s satisfaction is a pro forma one, an empty protection of the accused.

\textsuperscript{179} Id. at 153.

\textsuperscript{180} Id. at 115, 152-54, 170-71, 186, 190, 196, 200, 234, 263, 270, 278, 293.

\textsuperscript{181} Id. at 199.

\textsuperscript{181} Id. at 234. Levy’s own answer was that it was possible that “the Framers neither said what they meant nor meant what they said.” Id.
congressional debates on the Sedition Act. As Levy explains, the Act made criminal "any false, scandalous and malicious' writings, utterances, or publications against the government, Congress, or the president, with intent to defame them, bring them into contempt or disrepute, or excite against them the hatred of the people." Although truth was a defense and the jury was empowered to determine both law and facts, Jeffersonians viewed the Act as a political instrument of the Federalist Administration to forbid public criticism. Representative John Nicholas of Virginia argued in opposition to the Act that offensive criticism would always be viewed as false. Representative Albert Gallatin of Pennsylvania agreed that opinions could not be proven true and predicted that juries sympathetic with the administration would judge critical opinions as ungrounded, "or, in other words, false and scandalous' and therefore malicious." His insight was that "truth" is a variable, not an absolute, which, so long as human beings evaluate it, will take on the color of their views or values. Thus, if false, a statement is "scandalous" almost by definition, and the meaning of "malicious" is equally derivative. If the term means "intended," then it is established by proof of intentional publication. If the term means "ill-intended," i.e., reflecting badly upon the subject, then again it will often be proven derivatively by proof of falsity. Malice in either sense tends to follow in the juror's mind, if not the philosopher's, from falsity.

Reflective and systematic thinkers soon took up the congressional debate. George Hay in his truly libertarian Essay on the Liberty of the Press recognized that in the realm of political expression there must be freedom for licentiousness, falsehood, and error, even if maliciously motivated, that is, intended with ill

182. Id. at 258 (quoting Sedition Act of 1798, ch. 74, § 2, 1 Stat. 596).
183. Id. at 259.
184. Id. at 260 (citing 10 ANNALS OF CONG. 2140-41 (1798) (remarks of Rep. Nicholas)).
185. Id. at 262 (quoting 10 ANNALS OF CONG. 2162 (1798) (remarks of Rep. Gallatin)).
186. The essay was published as HORTENSUS, AN ESSAY ON THE LIBERTY OF THE PRESS (Philadelphia 1799), cited in L. LEVY, supra note 97, at 268 & n.51. The essay was reprinted four years later in Richmond under the same title. Another influential essay by Hay was published at that time. G. HAY, AN ESSAY ON THE LIBERTY OF THE PRESS, SHEWING, THAT THE REQUISITION OF SECURITY FOR GOOD BEHAVIOUR FROM LIBELLERS, IS PERFECTLY COMPATIBLE WITH THE CONSTITUTION AND LAWS OF VIRGINIA (Richmond 1803), cited in L. LEVY, supra note 97, at 269 n.56.
The Framers knew "that this field would be often occupied by folly, malignity, treachery, and ambition; but they knew too that intelligence and patriotism would always be on the spot in the hour of danger, and to make their entrance at all times easy and secure, it was left open to all." 188

James Madison, draftsman of the first amendment, was aware that neither the defense of truth nor lack of malicious or criminal intent was of much value. 189 Juries, he thought, would infer intent from the publication; and the defense would therefore give insufficient protection to those who would utter or write unfavorable sentiments about their government. 190 The Sedition Act trials bear out Madison's thesis. I have independently reviewed those in Dean Lawson's American State Trials series. 191 In each case, the jury could have easily inferred from the mere publication the required statutory element of malice, i.e., criminal intent.

A Treatise Concerning Political Enquiry, and the Liberty of the Press 192 of 1800 was, according to Levy, the preeminent libertarian tract of the period. 193 Tunis Wortman, a New York lawyer, believing that freedom of speech and opinion derived from the premise of the Declaration of Independence that government is for the good of the whole people, took the view that "intellectual intercourse should remain 'entirely unshackled.' " 194 From these foundations Wortman argued that willful and false libels against the government should not be prosecuted. Government should vind-

187. See L. Levy, supra note 97, at 270.
191. These include the following: Trial of Thomas Cooper (C.C.D. Pa. 1800), in 10 State Trials, supra note 105, at 774 (J. Lawson ed. 1918); Trial of James Thompson Callender (C.C.D. Va. 1800), in id. at 813; Trial of Matthew Lyon (C.C.D. Vt. 1798), in 6 id. at 687 (J. Lawson ed. 1916); Trial of Anthony Haswell (C.C.D. Vt. 1798), in id. at 695 (Lyon's publisher-friend). The Lawson American State Trials series also includes two other criminal libel trials of note. Trial of Theodore Lyman (Mass. 1828), in 12 id. at 327 (J. Lawson ed. 1919); Trial of Harry Crosswell (N.Y. Sup. Ct. 1803), in 16 id. at 40 (J. Lawson ed. 1928).
193. L. Levy, supra note 97, at 283.
194. Id. at 284-85 (quoting T. Wortman, supra note 192).
cate its reputation only by representation of the truth, full publication of governmental transactions, a good record, and reliance on public opinion:

A libel might be willfully false and injurious. "Admitted. But how shall such opinion be destroyed, or its farther propagation prevented? By fair and argumentative refutation, or by the terrible dissuasive of a statute of sedition? By the convincing and circumstantial narrative of the Truth, or by the terrors of Imprisonment and the singular logic of the Pillory?" 195

Again, a representative government is functionally dependent upon freedom of political discussion.

Such libertarian views were not unanimously held, obviously, or Congress would never have passed the Sedition Act. Then, as now, some would draw the line of permissible speech to forbid only libel directed toward the government itself, rather than toward an individual. An earlier Sullivan, James, an eminent Massachusetts politician, advanced this thesis:

"But if the false publications proceed from malice to the government, or its officers, or from a seditious temper against the powers of the state, and the fact published be in itself false, there can be no reason why the author and publisher should not receive adequate and condign punishment." Criminal prosecution was not warranted in the case of a libel against an officer of the government, even for an act done in his official capacity, on the theory that the libel was against the person privately; the remedy in that case must be the same as in the case of an ordinary citizen: a civil suit for damages in the courts of the state in which the libel was published, even if the injured party be an officer of the United States government. But a false and malicious libel against such an officer made "with an intent to subvert the government of the United States, to bring it into hatred or contempt . . . must in itself be a crime against the government, and ought to be punished." 196

But this conceptual distinction, which continues to plague the law in other contexts, 197 is a distinction without a difference that ex-

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195. Id. at 286-87 (quoting T. Wortman, supra note 192, at 160).
196. Id. at 291-92 (emphasis in original) (quoting J. Sullivan, A Dissertation upon the Constitutional Freedom of the Press in the United States of America 31, 33 (Boston 1801)).
197. The law of mandamus is an example, see Century Arms, Inc. v. Kennedy, 323 F. Supp. 1002 (D. Vt.), aff'd per curiam, 449 F.2d 1306 (2d Cir. 1971), cert.
poses the compromising temperament to the hard realities of logic. The common law of seditious libel and of freedom of expression were simply not mutually compatible. As Sullivan himself said, a "wrong" but "honest" heart is indistinguishable from a seditious mind. So, too, a malicious utterance against the government cannot be distinguished from one against an officer of the government when directed toward his acts in an official capacity; the difference between intending to harm the state itself and intending to harm one of its agents performing an official act is too gossamer to support the weight of a libel verdict. Does it add anything to the equation to define "malice" in Sullivan terms, i.e., whether the alleged defamatory statement is made with knowledge or reckless disregard of its falsity? I doubt it.

Notwithstanding the libertarian philosophy of the Jeffersonians, their namesake's actions belied their words: when Jefferson took power he condoned, if he did not initiate, libel prosecutions of his Federalist opponents. Ironically the defense in one of those prosecutions provided an exposition of the law that is a good approximation of the law today. Harry Crosswell, editor of The Wasp, a Federalist publication, was convicted of seditious libel. On appeal, Alexander Hamilton defended him brilliantly, convincing half the members of New York's highest court that truth should be a defense. Hamilton discussed the question of malice in terms of intent:

I would call it a slanderous or ridiculous writing, picture or sign, with a malicious or mischievous design or intent towards government, magistrates or individuals. If this definition does not embrace all that may be so called does it not cover enough for every beneficial purpose of justice? If it have a good intent it ought not to be a libel, for it then is an innocent transaction, and it ought to have this intent against which the jury have in their discretion to pronounce.

Hamilton's argument apparently also impressed the New York legislature, among others; in 1805 the State enacted a bill permitting the jury to decide the criminality of an alleged defamation and denied, 405 U.S. 1065 (1972), as is the law of sovereign immunity, see Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949).
permitting truth as a defense if the defamation were published "with good motives and for justifiable ends"\textsuperscript{202} (whatever that means). Before \textit{Sullivan}, this standard had become the general rule.\textsuperscript{203}

To conclude, in the history of the criminal law of defamation, libertarian thought focused more on establishing the defense of truth and permitting the jury to give a general verdict than on defining the kind of "malicious" intent that was essential to the crime. This last issue, however, did generate some important discussion. The most sophisticated thinkers recognized that even if a "criminal" intent were necessary, defining "malice" as "ill will" gives too little protection to free expression, because the jury can so easily infer ill will from falsity and because sometimes "ill will" toward the government is just the kind of political expression that the first amendment should protect.

These conclusions have significant implications for the \textit{Sullivan} test itself. It is difficult enough for the logician to distinguish between ill will and lack of belief in truth. If one lacks belief in the truth of his statement (or does not care whether it is true), it follows that he has ill will against the person whom the statement defames or denigrates; conversely, if one has such ill will he must not care about the truth or falsity (although, concededly, he might believe that the statement is true). Thus, "malice" is evidence of "actual malice" under \textit{Sullivan},\textsuperscript{204} and "actual malice" could similarly be used as evidence of ill will. The distinction is confusing enough to judges, who use the term "actual malice" to describe a concept that they say is not "malice"; it must surely be confusing to jurors. In short, \textit{Sullivan}'s "constitutionalization" of the law of defamation may, in the criminal area, have simply reformulated the standard without significantly altering its practical operation. This result is less surprising, however, when we recall that the history of the \textit{Sedition Act} explicitly guided the Supreme Court in \textit{Sullivan}.

The history of criminal defamation suggests another lesson. Libertarian critics of the traditional seditious defamation rules

\begin{itemize}
\item \textsuperscript{202}  Act of Apr. 6, 1805, ch. 90, § 2, 1804-1806 N.Y. Laws 232.
\item \textsuperscript{204}  Indeed, the Second Circuit has flatly held that "evidence of negligence, of motive and of intent may be adduced for the purpose of establishing, by cumulation and by appropriate inferences, the fact of a defendant's recklessness or of his knowledge of falsity." Goldwater v. Ginzburg, 414 F.2d 324, 342 (2d Cir. 1969), \textit{cert. denied}, 396 U.S. 1049 (1970). Logically, can another conclusion be reached?
\end{itemize}
mainly objected that juries were unable to forestall convictions stemming from political prosecutions. Once juries obtained the power to render a general verdict, the critics shifted their attention to establishing the defense of truth. In practice, however, their first victory was probably more significant. No longer servant to an establishment judge, the jury could ignore his instructions and effectively liberalize the law of defamation in the privacy of the deliberation room. In other words, the critics' principal success was to liberate the jury from the control of the judge, thereby allowing community sentiment to inform the law. It is a different matter, however, to impose controls on the jury for the purpose of containing its biases against unpopular speakers and writers. Jury independence from judicial constraints is a two-edged sword: If the practical ungovernability of juries has a libertarian effect when the judge imposes a restrictive legal standard, it might have a constricting effect upon expression when the judge imposes a liberal standard, such as Sullivan's. This lesson is important in any final reckoning about the wisdom of the Sullivan rule.

2. Civil Law.—If the history of the criminal law of defamation has brought us full circle in our thinking on malice, perhaps the civil law will free us from the circuity. Jeremiah Smith pointed out that malitia was an element of defamation when the ecclesiastical courts had jurisdiction of the action: "In order to induce these courts to take jurisdiction to punish the sin of defamation, it was thought necessary to allege malitia on the part of the defendant."205 The allegation of malice came to signify "actual wrong intent or actual wrong motive,"206 and that utterers of defamation were morally culpable. When the king's courts took jurisdiction, they continued the formality of requiring this allegation, used in both the ecclesiastical courts and the criminal pleadings. However, in substance the plaintiff did not have to prove malice because the law allowed the jury conclusively to presume malice from the speaking or writing of defamatory words.207 Malice, in short, was purely a legal fiction. The Court in Sullivan uses the term "actual malice," I assume, to distinguish this implied malice of the English common law.

206. Id.
207. Id. at 370-71; 8 W. HOLDSWORTH, supra note 156, at 371-74.
Thus, at common law the plaintiff did not have to prove “malice” in the sense of “wrong motive”; he had only to show that the defendant used the words intentionally.\(^{208}\) Nonfictional malice, however, did have bearing in one important situation\(^{209}\)—when the defendant raised a conditional privilege, such as the privilege of fair comment,\(^{210}\) as a defense. In this situation malice was considered an abuse of the privilege, and upon a finding of malice the defendant would lose the privilege’s protection. Jurisdictions have differed on the kind of malice sufficient to constitute abuse of the privilege. In general, either lack of belief in the truth of the statement or lack of reasonable grounds for such a belief was sufficient; but a minority of jurisdictions essentially adopted a *Sullivan* standard and required lack of belief or reckless disregard of the rights of the plaintiff.\(^{211}\) The civil law, thus explained, does not involve a fiction at all where a conditional privilege is asserted, for it permits recovery only if the defendant did not believe or had no reasonable ground to believe that the alleged false and defamatory statements were true.

Again, *Sullivan* does not drastically alter this common law rule. The Court simply revises the rule a little: For the second prong (no reasonable grounds to believe), the Court substitutes the stricter “reckless disregard of truth or falsity” test.\(^{212}\) At common

\(^{208}\) Smith, *supra* note 205, at 367.

\(^{209}\) In some jurisdictions malice is also relevant to the measure of recoverable damages: Its presence may permit punitive damages, and its absence may mitigate damages other than the plaintiff’s actual losses. 1 HARPER & JAMES, *supra* note 203, § 5.20, at 418; *id.* § 5.27, at 451; *id.* § 7.9, at 569.

\(^{210}\) *See* *Restatement (Second) of Torts* §§ 593, 599 (1977). The privilege of fair comment protects expression of opinion on matters of public concern. The privilege applies only to opinions drawn from a contemporaneous expression of facts or assumed facts known to both parties; the privilege does not apply when the opinion is an inference based upon undisclosed facts. *See id.* § 566, Comments a & b, at 170-72.


\(^{212}\) *See* *Restatement (Second) of Torts* § 600 (1977). The *Restatement (Second)* modifies the common law test of the nature of the malice that abuses the privilege; the modification is intended to accommodate that test with the holding in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1972), that even a private plaintiff must establish negligence in a defamation suit. *Restatement (Second) of Torts* § 600, Comments a & b (1977).

Despite this modification, the *Restatement (Second)* tentatively retains the traditional “ill will” test of malice to determine whether the defendant is acting for the purpose of protecting a privileged interest. *See id.* § 592A, Special Note on Conditional Privileges and the Constitutional Requirement of Fault. Thus, § 603 provides:
law, as in *Sullivan*, the plaintiff has the burden of proving this form of malice. Of course, *Sullivan* requires proof by clear and convincing evidence and not simply by a preponderance. Moreover, the *Sullivan* test applies to *all* suits against public officials and figures; the common law standard for abuse, by contrast, applies only where the defendant interposes a conditional privilege. Nevertheless, this analysis does show that *Sullivan*'s malice standard does not represent an abrupt change from the past; in many cases, factfinders would reach the same result under either test.

B. A Critical Analysis of the "Actual Malice" Test

1. Some individual views.—With the history of "malice" in defamation law in mind, I turn to analysis of the *Sullivan* test itself. This section presents several individual criticisms of the test. The obvious starting point is the objection, raised in the concurring opinions in *Sullivan*, that the test offers too little protection to freedom of speech. Subsequently, this section examines the views of Professors Thomas Emerson and Vincent Blasi.

Justice Black spoke plainly in his concurring opinion, in *Sullivan*, which Justice Douglas joined. " 'Malice,,' he said, "even as defined by the Court, is an elusive, abstract concept, hard to prove and hard to disprove." State libel laws permitting the recovery of large judgments constituted, he thought, a "deadly

\[\text{"One who upon an occasion giving rise to a conditional privilege publishes defamatory matter concerning another abuses the privilege if he does not act for the purpose of protecting the interest for the protection of which the privilege is given." Id. § 603. Comment a provides in part:}

Thus a publication of defamatory matter upon an occasion giving rise to a privilege, if made solely from spite or ill will, is an abuse and not a use of the privilege. However, if the publication is made for the purpose of protecting the interest in question, the fact that the publication is inspired in part by resentment or indignation at the supposed misconduct of the person defamed does not constitute an abuse of the privilege. On the other hand, if the publisher does not act to protect the interest in question, the privilege is abused although he is not acting from spite or ill will. (Black, J., concurring).

\[\text{Id. at 293 (Black, J., concurring).}

\[\text{213. 1 HARPER & JAMES, supra note 203, § 5.27, at 455.}

\[\text{214. 376 U.S. at 296-97 (Black, J., concurring); id. at 304-05 (Goldberg, J., concurring).}

\[\text{215. Id. at 293 (Black, J., concurring).}

\[\text{216. The advertisement at issue in *Sullivan* produced two $500,000 verdicts, and at the time of the decision some 16 suits for over $7,300,000 were pending in Alabama against the New York Times or CBS. Id. at 294-95 (Black, J., concurring). The damages sought in Arrowsmith v. United Press Int'l, 320 F.2d 219 (2d Cir. 1963) (en banc), for defamation arising out of the Atlanta synagogue bombing were $56,280,000. Id. at 221.}
danger to the press." He considered the opinion of the Court a stopgap measure. The record, to Justice Black, did not "indicate that any different verdict would have been rendered here whatever the Court had charged the jury about 'malice,' 'truth,' 'good motives,' 'justifiable ends,' or any other legal formulas which in theory would protect the press."

This argument recalls Representative Albert Gallatin's criticism of the Sedition Act. "Malice," whether defined as bad motive or as knowing or reckless disregard of truth, will often be inferred from the falsity and defamatory character of the words. Whatever the standard, short of absolute exemption, the jury has to interpret legalisms, "legal formulas" in Justice Black's phrase, which leave it room to stifle discussion of public officials and public affairs, the very "kind of speech the First Amendment was primarily designed" to preserve. It was the potential magnitude and multiplicity of jury verdicts that concerned Justice Black, not the cost of discovery or of defense. The validity of his argument hinges on whether one believes that phraseology in the judge's charge has only a slight practical effect upon a jury, an argument as persuasive to me as it often was to Justice Jackson.

But Justice Black's argument fails to address one of the strengths of the Sullivan majority opinion's test, namely, the requirement that the reviewing court scrupulously conduct an independent review of the record to ensure that the plaintiff has satisfied the burden of proof. Another weakness in the concurring opinion in the eyes of some is that it derives from Justice Black's "absolute" view of the first amendment. But although the opinion does not state where the privilege stops, it need not extend beyond discussion of public affairs or criticism of public officials' performance of their public duty.

217. 376 U.S. at 295 (Black, J., concurring).
218. Id. (Black, J., concurring).
219. Id. (Black, J., concurring).
220. See text accompanying note 185 supra.
221. 376 U.S. at 295 (Black, J., concurring).
222. Id. at 296-97 (Black, J., concurring).
224. For discussion of the efficacy of this requirement, see text accompanying notes 264-276, 293-296 infra.
225. Columbia Note, supra note 3, at 460-61 & n.69; Yale Note, supra note 3, at 1725 n.9.
226. The opinion of Justices Black and Douglas refers only to public affairs or
Justice Goldberg’s concurring opinion, which Justice Douglas also joined, makes essentially the same point as Justice Black, but presents a thesis that is both narrower and broader. It is narrower in that Justice Goldberg would expressly preserve liability in the case of “[p]urely private defamation,” i.e., “defamatory statements directed against the private conduct of a public official or private citizen.” It is broader in that Justice Goldberg in several places equates “actual malice” with bad motive: Thus he speaks of a defendant’s “motivation,” words which “a jury finds false and maliciously motivated,” and of “critical, albeit erroneous or even malicious, comments on official conduct.” But he also forcefully reiterates Justice Black’s point that juries will readily make the psychological leap from falsity to liability. “The requirement of proving actual malice or reckless disregard,” he suggests, “may, in the mind of the jury, add little to the requirement of proving falsity, a requirement which the Court recognizes not to be an adequate safeguard.” And he refers to Justice Jackson’s perceptive analysis in United States v. Ballard: “The most convincing proof that one believes his statements is to show that they have been true in his experience. Likewise, that one knowingly falsified is best proved by showing that what he said happened never did happen.”

Justice Goldberg adds a new dimension to the argument in support of the privilege by suggesting that “a rule allowing the imposition of liability upon a jury’s evaluation of the speaker’s state of mind” will constrain public debate and advocacy and will have a chilling effect not only on the press but also on minority groups seeking support for their causes. Although his opinion, like Justice Black’s, does not refer to the reviewing court’s expanded role under the majority decision, it does address a point that Justice Black did not: What defenses does the public official have against performances of public duty as entitled to absolute protection. 376 U.S. at 295-97

(Black, J., concurring).
227. Id. at 301 (Goldberg, J., concurring).
228. Id. at 298 (Goldberg, J., concurring).
229. Id. at 300 (Goldberg, J., concurring).
230. Id. at 301 (Goldberg, J., concurring).
231. Id. at 298 n.2 (Goldberg, J., concurring).
232. 322 U.S. 78 (1944).
234. Id. at 300 (Goldberg, J., concurring).
235. Id. (Goldberg, J., concurring).
"unsubstantiated opinions or deliberate misstatements"?\textsuperscript{236} In answer, Justice Goldberg refers to the official’s own access to the media of communication and the Justice is willing to allow "some excesses and abuses [to] go unremedied"\textsuperscript{237} in order to promote "enlightened opinion."\textsuperscript{238}

Although the opinions of Justices Black and Goldberg are notable for their insight into the practical problem that Sullivan poses to juries, the criticism of Professors Emerson and Blasi is generally broader and more conceptual. Their arguments deserve careful review.

I would be troubled whenever any scholar so immersed in a field as Professor Emerson is in the first amendment is troubled.\textsuperscript{239} In *The System of Freedom of Expression*,\textsuperscript{240} he makes four basic criticisms of the Sullivan test, which I condense here with the request that the reader refer to his original work. The criticisms lead him to conclude that "the actual malice rule is inadequate, on the Court’s own rationale as well as for other reasons, to protect a system of freedom of expression."\textsuperscript{241}

Emerson’s first criticism is similar to the objections of Justices Black and Goldberg: "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."\textsuperscript{242} Specifically, any test that involves proof of a mental state adds little to the requirement that the plaintiff merely show falsity, a test that the Court rejects, because the plaintiff will generally prove malice inferentially.

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\textsuperscript{236} *Id.* at 304 (Goldberg, J., concurring).
\textsuperscript{237} *Id.* at 305 (Goldberg, J., concurring).
\textsuperscript{238} *Id.* (Goldberg, J., concurring). This once again echoes Cato. See *Cato*, supra note 76, at 294.

But I confess, the Libels may sometimes, though very rarely, foment popular and perhaps causeless Discontents, blast and obstruct the best Measures, and now and then promote Insurrections and Rebellions; but these latter Mischiefs are much seldomer produced than the former Benefits; for Power has so many Advantages, so many Gifts and Allurements to bribe those who bow to it, and so many Terrors to frighten those who oppose it; besides the constant Reverence and Superstition ever paid to Greatness, Splendor, Equipage, and the Shew of Wisdom, as well as the natural Desire which all or most Men have to live in Quiet, and the Dread which they have of publick Disturbances, that I think I may safely affirm, that much more is to be feared from flattering Great Men, than detracting from them.

*Id.*

\textsuperscript{239} See Herbert v. Lando, 568 F.2d at 991 n.26 (Oakes, J., concurring).
\textsuperscript{240} T. Emerson, *supra* note 27, at 518-43.
\textsuperscript{241} *Id.* at 535.
\textsuperscript{242} *Id.*
The formula is not saved by the rule that the burden of proof is on the plaintiff and that actual malice must be established with "convincing clarity." Ultimately the case goes to the jury and the subtleties of burden of proof are not likely to be reflected in the final verdict.243

Second, Emerson finds unconvincing the rationale that the Court later offered for drawing the line at actual malice—that calculated falsehoods "are no essential part of any exposition of ideas, and are of . . . slight social value as a step to truth."244

Exactly the same could be said of negligent false statements, which the Court does protect. Moreover, the explanation ignores the whole point of the New York Times case, that the practical impact upon truthful speech is the decisive factor. In addition . . . the refusal to give any value to false communication is contrary to the basic theory of the First Amendment; and it is not for the government to decide such questions in any event.245

Third, Emerson believes that the actual malice rule creates an "impossible" problem of judicial administration.

In every libel case considered by the Supreme Court, except Garrison, which invalidated the entire statute, the Supreme Court has found it necessary to review the evidence, instructions

243. Id. (footnote omitted). Emerson adds that the Sullivan Court tacitly concedes that the malice rule cannot actually control the outcome of a libel suit. In New York Times itself the Court was unwilling merely to announce the rule and send the case back for retrial in accordance with the new principle. It carefully reviewed the evidence and itself drew the conclusions which the jury would be bound to reach. The Court followed the same procedure in Butts and Walker [388 U.S. 130 (1967)]. In short, the actual malice rule leaves the speaker with roughly the same degree of risk as the earlier rules of negligence and engenders approximately the same amount of self-censorship. If the system of free expression cannot function under one it cannot under the other.

Id. at 536 (discussing Curtis Publishing Co. v. Butts and Associated Press v. Walker, which were consolidated on appeal and reported as Associated Press v. Walker, 388 U.S. 130 (1967)).


245. T. Emerson, supra note 27, at 536 (footnote omitted). I would add that "the government" includes the courts. See note 18 supra.

It is interesting to note that the Court's explanation of why calculated falsehoods are unprotected is simply a reference to a quotation from Chaplinsky, see note 244 supra and accompanying text, but the original quotation was an explanation of why all libels are unprotected. There is thus much force to Emerson's point that Garrison's explanation fails to justify drawing the line at calculated or reckless falsehoods.
and findings in complete detail. The very nature of the problem—to avoid unfair verdicts that dampen the exercise of free expression—makes this inevitable.246

Emerson’s fourth and final argument to some extent overlaps the second.

[S]erious doubts must arise about a rule of law that requires a government agency [here, the courts, with the aid, usually, of juries] to determine the truth or falsity of propositions advanced in debate over issues of public concern. This is certainly true if the matter is one of opinion, comment or judgment. But it is also true of statements of fact, which cannot really be isolated from the other aspects of the controversy. . . . One may well doubt . . . whether a libel suit ultimately produces the correct answer, or whether participants and observers believe it does. In any event it is the marketplace, not the government, which is supposed to resolve the matters under a system of freedom of expression.247

Emerson concludes that the actual malice rule is not only inadequate but “indeed inconsistent with the whole theory of the First Amendment”248 and therefore proposes “that full protection be extended to all discussions of public issues.”249 Professor Emerson, it might be noted, still adheres to the opinions advanced in his book. In a recent letter to this author, Professor Emerson stated:

Nothing that has happened since the publication of The System of Freedom of Expression in 1970 has altered my views on the “actual malice” rule as set forth in that book. On the contrary the development of libel law in recent years has confirmed my earlier opinion. There is mounting evidence that the “actual malice” rule does in fact result in self-censorship.250


247. T. EMERSON, supra note 27, at 537.

248. Id.

249. Id.

250. Letter from Thomas I. Emerson to the Author (Dec. 6, 1978) (copy on file
Professor Blasi, after the most careful analysis, comes to the same result: “On balance, I find persuasive the arguments in favor of an absolute privilege for communications about official behavior.”

Blasi expresses at least two basic criticisms of the Sullivan privilege as the Court has interpreted it. First, its level of protection does not vary according to the degree to which the checking function is implicated. Second, it affords an insufficient level of protection to the most important type of expression.

Blasi notes that the Court’s two-tiered standard for liability is inconsistent with the checking function. That is, the Court should not extend the Sullivan privilege to discussion of public figures because, in terms of the checking function, only speech about the official actions of public officials is entitled to the highest protection. Conversely, the Court should extend full protection to an article about the conduct of a public official even if it contains a passage defamatory of a private individual. In short, because the value of the communication should determine its level of protection, the scope of the Sullivan privilege should depend on the content of the communication, not the identity of the plaintiff.

With respect to the level of protection that the most protected speech deserves, Blasi favors an absolute privilege on two principal grounds. First, the danger of press self-censorship, even if no more acute in the context of communications about official behavior, is particularly serious in that context because of the threat to the checking function. Second, if the press is to perform that function effectively, it is important not to undermine journalistic autonomy; an absolute privilege is more likely to preserve that sense of autonomy than a qualified one.

In the remainder of the letter, Professor Emerson further recognizes that if the Sullivan rule is retained, it will cause serious interference with the editorial process:

Furthermore, as Herbert v. Lando demonstrates, when lawyers really get to work to prove the mental state of “actual malice” it inevitably leads to serious infringement upon the editorial process. The importance of avoiding interference with editorial judgments was not specifically stressed in The System of Freedom of Expression but has since been made clear by the decisions of the Supreme Court in Columbia Broadcasting and Tornillo.

Id.

251. Blasi, supra note 63, at 587.
252. Id. at 580-83.
253. See id. at 581.
254. Id. at 583.
255. Id.
256. Id. at 586-87.
257. Id. at 587.
One commentator has objected that an analytical approach that absolutely privileges the press is "one-sided" because it considers only the interests of the press and not those of libel plaintiffs.258 The objection is misguided. Professors Emerson and Blasi have endorsed absolute protection only for speech about "public affairs" or "public issues" or "official behavior."259 Where the line should be drawn in other cases, e.g., whether a sliding scale of liability should be created depending on the status of the individual allegedly defamed260 or the subject matter of the statement,261 is a matter for further development. This approach does not reject "balancing" between interests of private reputation and freedom of expression; it simply assigns a heavier weight to the expression side of the scale when a public issue or official behavior is concerned.262 If others assign a lighter weight to free expression and thereby obtain a different result, their disagreement is not over the propriety of balancing but over the constitutional magnitude of the interests being balanced.

2. Judicial Administration of the Sullivan test.—The Sullivan test, in its heavy reliance upon supervision by reviewing courts, necessarily produces costs and inefficiencies as well as benefits. This section begins with a discussion of the advantages of such supervision. It then examines some of the practical problems that the Sullivan test poses for the trier of fact,263 the trial judge, and the reviewing court.

The Supreme Court in Sullivan repeatedly admonishes reviewing courts to "make an independent examination of the whole record"264 to determine whether the verdict reflects proper application of the governing constitutional law and to assure that "the

258. Columbia Note, supra note 3, at 460 n.69.
259. T. Emerson, supra note 27, at 537-38; Blasi, supra note 63, at 582-87; Herbert v. Lando, 568 F.2d at 985 & n.2 (Oakes, J., concurring).
261. See Blasi, supra note 63, at 553.
262. See Anderson, supra note 113, at 271 n.3. The balance has similarly caused the weight to drop in favor of, e.g., criminal defendants in terms of their right to counsel first in felony cases, Gideon v. Wainwright, 372 U.S. 335 (1963), and then in all prosecutions resulting in imprisonment, Argersinger v. Hamlin, 407 U.S. 25 (1972).
263. By "trier of fact," I mean to refer not only to a jury but also to a judge performing that function. Later references to the "trial judge" generally describe only his judicial function.
judgment does not constitute a forbidden intrusion on the field of free expression." This reservation of appellate power, which the concurring opinions in Sullivan do not address, has been one of Sullivan's great strengths. Both on the highest level and in the lower courts, state as well as federal, courts that respect first amendment values have for the most part taken this power and duty very seriously.

The Supreme Court itself has on several occasions since Sullivan exercised its supervisory power to review the adequacy of the evidence and of the instructions, at the same time expanding and contracting the class of persons that the Sullivan privilege protects. There are scores of cases in which lower courts have exer-

265. Id. at 285. See also id. at 285 n.26.

266. The RESTATEMENT (SECOND) OF TORTS § 580A, Comment g (1977), puts it thus:

   g. Constitutional standard; appellate review. The issue of whether the defendant acted with knowledge of falsity or in reckless disregard of truth or falsity is usually called one of fact that is submitted to the jury for it to make a determination as to whether the plaintiff has proved his contention with convincing clarity. Actually, however, it involves both a determination of the facts and an application to them of a standard, similar to the determination of whether a defendant was negligent or not. The determination here is one on which constitutional rights stand or fall, and it is analogous in this regard to the classic instance in criminal law of the constitutional guaranty against self-incrimination and the application of a constitutional standard for determining whether a confession was given voluntarily or not. A finding on an issue of this nature is subject to close appellate scrutiny, and an appellate court may declare that the evidence is constitutionally inadequate to sustain the finding. The United States Supreme Court has on several occasions reviewed the evidence to decide whether the evidence justified a finding of knowledge or reckless disregard, and it has not hesitated to hold that the constitutional requirement of proof with convincing clarity has not been met, despite the jury verdict.

   The Supreme Court has also stated that the issue of whether the defamatory communication was made "of and concerning" the plaintiff is one involving constitutional rights. It has held on occasion that the evidence on this issue was constitutionally defective because it was incapable of supporting a jury's finding on this issue.

Id.


The experience of courts and triers of fact under Sullivan has
not, in any case, been completely rosy. The practical problems that the test has engendered would not, of course, disappear as to the kinds of defamation that would survive if the test were abandoned in cases involving public issues or official conduct. But in the latter cases, the problems would essentially\textsuperscript{277} be eliminated.

The first problem, to which Professor Emerson alludes\textsuperscript{278} and which is recognized as early as the Crosswell case,\textsuperscript{279} is the danger that the trier of fact will abuse the considerable discretion that the Sullivan test gives it. Professor Robertson has explained that whether the plaintiff seeks to prove state of mind only from objective facts—such as the inherent improbability of the statement, the reliability of the source, the reputation of the plaintiff, or factual contradictions within the published matter—or from "subjective" facts\textsuperscript{280}—such as admissions to others or testimony on direct examination—the Sullivan test places discretion in the hands of the trier of fact and thereby permits discrimination against unpopular publishers or ideas in favor of popular plaintiffs or ideas.\textsuperscript{281} As Justice Goldberg noted in Sullivan:

> If the constitutional standard is to be shaped by a concept of malice, the speaker takes the risk not only that the jury will in accurately determine his state of mind but also that the jury will fail properly to apply the constitutional standard set by the elusive concept of malice.\textsuperscript{282}

The problem is not diminished by the St. Amant-Gertz gloss\textsuperscript{283} that the plaintiff must produce evidence "that the defendant in fact entertained serious doubts as to the truth of his publication."\textsuperscript{284} And it is compounded by any rule that permits the jury to consider the defendant's bad faith or spiteful intention, \textit{i.e.}, bad motive, as

\textsuperscript{277} I say "essentially," not "altogether," because the preliminary question will remain as to whether the speech concerns a "public" or "private" issue. Similar questions will persist under any form of two-tier analysis, \textit{e.g.}, the Gertz test that public officials and public figures must prove actual malice, but private individuals need only prove negligence. \textit{See} L. Tribe, supra note 269, at 638-48.

\textsuperscript{278} \textit{See} text accompanying note 247 supra.

\textsuperscript{279} \textit{Trial of Harry Crosswell}, supra note 191, at 58-61.

\textsuperscript{280} \textit{See}, \textit{e.g.}, Stone v. Essex County Newspapers, Inc., 367 Mass. 849, 330 N.E.2d 161 (1975) (proof of actual malice from defendant's admissions).

\textsuperscript{281} Time, Inc. v. Hill, 385 U.S. 374, 402 (1967) (Douglas, J., concurring); Robertson, supra note 275, at 238.

\textsuperscript{282} 376 U.S. at 302 n.4 (Goldberg, J., concurring).


\textsuperscript{284} St. Amant v. Thompson, 390 U.S. at 731.
evidence of the defendant’s reckless disregard of truth or knowledge of falsity.\textsuperscript{285} But why should such evidence not be admissible? It surely is relevant. The problem is further exacerbated by any rule that permits a finding of falsity to create a presumption of intentional falsity.\textsuperscript{286}

The trial court also faces some practical problems in administering the \textit{Sullivan} test. The preliminary problem of supervising discovery is not simple, as \textit{Herbert v. Lando} shows. To be sure, \textit{Herbert} makes the task more difficult. But even apart from the \textit{Herbert} privilege, the trial judge must ensure that plaintiff’s discovery does not result in “oppression” of or an “undue burden” upon deponents\textsuperscript{287}—consequences that are unusually likely in \textit{Sullivan} cases because plaintiffs often must engage in more extensive discovery to prove the “elusive” mental state of “actual malice.” \textit{Herbert} itself is an obvious illustration.

The trial court, like the reviewing court, must leave inference and demeanor questions to the jury if it is the trier of fact,\textsuperscript{288} yet at the same time carefully review the evidence after trial (or the proffered proof before trial) to determine whether the plaintiff has met his burden of proof by “convincing clarity.”\textsuperscript{289} And, in addition to the evidentiary questions related to state of mind the court must, in the case of media defendants, govern the proof on questions involving the publishing process—whether the news is “hot,”\textsuperscript{290} what is reasonable investigation,\textsuperscript{291} and so on. Truth or falsity is still an issue, not always easy to prove, whoever has the burden.\textsuperscript{292}

Any appellate judge who has had to review an “actual malice” case, as I have from time to time, is aware of its difficulties. Of course that is no excuse for ducking the issue;\textsuperscript{293} indeed, as mentioned above, most courts take their supervisory responsibility very

\begin{footnotesize}
\begin{enumerate}
\item Herbert v. Lando, 568 F.2d at 986 (Oakes, J., concurring) (quoting FED. R. CIV. P. 26(c)).
\item See Robertson, \textit{supra} note 275, at 238-39 & n.255.
\item See notes 270-272 \textit{supra} and accompanying text.
\item See Curtis Publishing Co. v. Butts, 388 U.S. 130, 157 (1967); DORSEN \& BENDER, \textit{supra} note 4, at 695.
\item Compare Eaton, \textit{supra} note 4, at 1381-86, \textit{with} 50 N.C. L. REV. 390, 393-94 (1972). \textit{See also} Bezanson, \textit{supra} note 84, at 775-81.
\end{enumerate}
\end{footnotesize}
seriously. But notwithstanding the good faith of reviewing courts, by its nature the Sullivan test produces very different results depending upon who does the reviewing, the care with which he reviews, and the value judgments of the reviewer. The result may be a series of ad hoc judgments which vary from case to case, perhaps according to the seriousness of the defamatory matter and to the risk of falsity appreciated by the defendant.

Professor Emerson calls the problem of judicial administration “impossible.” The preceding discussion does not suggest such a pessimistic conclusion, but it does establish that the problem is very considerable. Whether this problem, together with the chilling effect of the Sullivan rule, is sufficient to outweigh the benefits of the rule, depends upon an analysis of these other two factors, to which I now turn.

3. Chilling Effect.—The inhibitory effect on speech of the Sullivan test takes various forms. I have already alluded to the problem that the reporter, editor, or publisher faces if his state of mind is at issue: He may feel compelled to preserve careful and selective notes for his future protection. Professor David Robertson has also suggested that the test’s emphasis on subjective doubt (the St. Amant-Gertz gloss) “creates an incentive for publishers to forego investigating the accuracy of defamatory statements.”

Perhaps the most serious problem for the publisher is the cost of the suit—a possibly adverse judgment as well as the expense of

294. See generally Anderson, supra note 113, at 275-76.
296. See note 246 supra and accompanying text.
297. See text following note 64 supra.
298. Robertson, supra note 275, at 240. As Professor Robertson points out: Some courts have held that while failure to investigate does not alone prove knowingly false, it is evidence for the jury to consider. See Alioto v. Cowles Communications, Inc., 519 F.2d 777, 780-81 (9th Cir. 1975), cert. denied, 96 S. Ct. 280 (1975); Popay v. Noveroske, 31 Ill. App. 182, 194-95, 334 N.E.2d 79, 90 (1975); Mahnke v. Northwest Publications, Inc., 280 Minn. 328, 341-43, 160 N.W.2d 1, 10-11 (1968). But if a publisher does investigate and receives a denial, ignoring the denial may also support a finding of knowing or reckless falsity, even though the publisher acted reasonably in ignoring it. . . . Thus, if a duty to investigate is imposed under the knowing or reckless falsity standard, the publisher is caught in a dilemma. Id. at 240 n.260 (emphasis in original). But see Edwards v. National Audubon Soc’y, 556 F.2d 113, 120-21 (2d Cir.), cert. denied, 434 U.S. 1002 (1977). See generally L. Tribe, supra note 269, at 638. “In the world of New York Times v. Sullivan, ignorance is bliss.” Id. (footnote omitted).
trial and trial preparation. The Court in *Sullivan* recognized that the amount of the verdict is critically important: "The fear of damage awards under [a state's civil libel law] may be markedly more inhibiting than the fear of prosecution under a criminal statute." Many media defendants have insurance against libel verdicts but insurance costs money. Moreover, the costs of defense, especially with the "untrammeled, roving discovery . . . in today's legal world" can be considerable. Professor Blasi has pointed out that a libel defendant might also "sacrifice journalistic values by settling a lawsuit (thus symbolically admitting fault and perhaps losing credibility)." And it is the lonely pamphleteer, the individual author, or the small newspaper or broadcasting company that can least afford to absorb these costs.

The price paid, however, is of public concern only insofar as it adversely affects public interests—here first amendment values. It is the inhibitory effect upon those values—the checking function, the exchange of ideas—that ultimately matters. The chilling effect on these values can be considerable even under *Sullivan*; the problem is compounded by "untrammeled, roving discovery" and the dilemmas that the plaintiff's search for "state of mind" evidence imposes on cautious defendants, as well as by the vagueness of the standards of liability. One student commentator suggests that the first amendment tolerates other "chills" but I fail to see how

299. See note 216 supra.
300. 376 U.S. at 277.
301. 568 F.2d at 985 (Oakes, J., concurring).
303. Blasi, supra note 63, at 588. Blasi also notes that "[t]he fear of huge damage awards can force news organizations to become beholden to outsiders, such as libel insurers and lawyers, who have nonjournalistic priorities," perhaps causing the sense of journalistic autonomy to suffer. *Id.*
305. The commentator in Columbia Note, supra note 3, at 459 n.59, mentions obscenity, espionage, privacy, and antitrust laws as having inhibitory effects upon speech that are permissible. But "chill" analysis in this context is inapposite to such laws. The "press" is properly subject to the same rules of business conduct as any other business. Associated Press v. United States, 326 U.S. 1, 7, 19-20 (1945). See FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775 (1978) (regulations upheld barring common radio or television or newspaper ownership in same community). To be sure, the threat of concentration of the media is a serious one, and it has significant repercussions on the vitality of free speech; the Chief Justice should be
that is an argument for this one. If the question is whether Sullivan struck the correct balance in cases involving public issues or official conduct, then surely the “chill,” whatever its magnitude, must be taken into account.

Sullivan itself was partially grounded on chilling effect principles. A number of cases have recognized these principles in formulating procedural rules to further the Sullivan privilege. Even commentators unwilling to establish an absolute privilege in public issue cases acknowledge that libel discovery and the threat of judgments have a chilling effect; they therefore seek their own accommodations by way of bifurcated trials or a definition of public figures as those who have “access to self-help remedies.” Of course, the extent of the “chill” has not been measured empirically, and concededly it is exceedingly difficult for judges (or Justices) to estimate it. But whatever the precise extent, the Sullivan test undoubtedly has a serious inhibitory effect on one of the most valuable kinds of speech. It remains to be determined whether the benefits of the test outweigh this substantial cost.

4. Arguments for the Status Quo.—This Article has already mentioned and rejected several arguments for maintaining the Sullivan rule. This section describes five other specific arguments; critical analysis discloses the weaknesses in each.

First, in support of Sullivan, it is feared that the unavailability of recovery for dishonest defamation may deter people from seeking public life. Harry Truman’s “If you can’t stand the heat, get out of the kitchen” should not be the basis upon which people commended for again calling the problem to our attention in First Nat’l Bank v. Bellotti, 435 U.S. 765, 796-97 (1978) (Burger, C.J., concurring). But government can deal with this threat as it deals with the threat of concentration in any business market, namely, by vigorously enforcing applicable law and perhaps by improving that law. The presence of the threat, however, does not justify interference with the checking function.

306. 376 U.S. at 270 (“uninhibited, robust, and wide-open” debate); id. at 279 (“[dampen] the vigor . . . of public debate”). See also Garrison v. Louisiana, 379 U.S. 64, 73 (1964) (prohibition even of false statements motivated by hatred will chill debate on public issues).


308. Columbia Note, supra note 3, at 466-67 (first stage on issue of falsity; second on state of mind, with round of discovery in between).

309. Yale Note, supra note 3, at 1746. See also id. at 1746-51.
enter the public sphere; Truman’s reassurance to the strong should not become advice to the timid. As it is, too many people stay out of the kitchen.

Second, news media all too often are irresponsible, authenticate facts insufficiently, or are just plain superficial. Moreover, a substantial segment of the press lives, as it always has, on salacious gossip about newsworthy people: the old Police Gazette audience is now reading the National Enquirer. In either case, any rule more protective of defendants than Sullivan will further weaken the credibility of the publisher.

Third, Sullivan may limit the danger of the “big lie” technique. A Joe McCarthy unrestricted by Sullivan defamation liability might pose a serious threat to our liberties.

Fourth, we should consider the interests of the defamed person himself: A publisher or writer has actually damaged that person’s reputation by statements that are untrue, knowing that they are untrue or recklessly disregarding their possible falsity. One judge, reacting to our decision in Herbert, has said of a rule limiting defamation suits further than Sullivan: “Are men and women of honor who happen to be public figures to right vicious slanders hereafter by resort to fisticuffs or duelling?”

And fifth, if the Sullivan test is abandoned in some areas, Harry Kalven’s “dialectic progression” may occur: Absolute protection from liability in the context of public affairs and official conduct may lead to the complete abolition of the tort of defamation.

My criticisms of these purported justifications of the Sullivan rule begin with my doubt that the threat of defamation deters very many from public life; the threat would surely not be much greater absent Sullivan than it is now. There are constraints other than the law of defamation that keep public discussion within bounds, as Professor Emerson has pointed out. Most potential public offi-

311. Kalven, supra note 28, at 221.
312. T. Emerson, supra note 27, at 538. Cato’s Letters as usual anticipated the argument:
[A]ll the Methods hitherto taken to prevent real Libels have proved ineffec-
tual; and probably any Method which can be taken, will only prevent the World from being informed of what they ought to know, and will increase the others. The subjecting the Press to the Regulation and Inspection of any Man whatsoever, can only hinder the Publication of such Books, as Authors are willing to own, and are ready to defend; but can never restrain such as they apprehend to be criminal, which always come out by stealth. There is no hindering Printers from having Presses, unless all Printing be forbidden,
cials or politicians know that their conduct must be like Calpurnia's; official conduct is necessarily life in a fishbowl, and those who forget do so at their peril. Although I recognize that the press may come close to destroying a person in public life, absent stronger evidence that worthy individuals shun public life because of this risk, it seems to be a cost worth bearing.

As for the press itself, Professor Blasi reminds us that to gain a sense of "journalistic autonomy," "it is important that the journalism profession develop an internal ethos that emphasizes such qualities as independence, vigor, innovativeness, and public responsibility." Most journalists or journalistic groups with whom I have come into contact fit readily in this category, and this self-restraint probably colors my thinking. And even though some journalists do not so fit, some journalistic standards already exist. There are "institutional pressures" from within an organization itself, ongoing self-evaluation through Ford Foundation and

and scarce then: And dangerous and forbidden Libels are more effectually dispersed, enquired after, and do more Mischief, than Libels openly published; which generally raise Indignation against the Author and his Party. It is certain, that there were more published in King Charles II's and King James's Times, when they were severely punished, and the Press was restrained, than have ever been since. The Beginning of Augustus's Reign swarmed with Libels, and continued to do so, whilst Informers were encouraged; but when that Prince despised them, they lost their Force, and soon after died. And, I dare say, when the Governors of any Country give no Occasion to just Reflections upon their ill Conduct, they have nothing to fear from Calumny and Falshood [sic].

CATO, Second Discourse upon Libels (letter no. 101), in 2 CATO'S LETTERS, supra note 75, at 300, 305-06. See also CATO, supra note 76, at 298.

313. Private life should, of course, be another matter. I recognize that the sometimes blurry distinction between "private" and "public" life, see Blasi, supra note 63, at 583-85, might offer some support for the argument that abandonment of Sullivan in actions involving public conduct deters entry into public life. Some people might fear that the media would ignore this distinction and publicize purely private matters. Faced with the risk of exposure of their private as well as public conduct, some might be deterred from entering the public sphere. But there are more direct ways to minimize this possibility than retaining the Sullivan rule—e.g., increasing media observance of the distinction by careful judicial supervision which both clearly defines the line and enforces the rule of liability for overstepping it.

314. Blasi, supra note 63, at 587.

315. See Yale Note, supra note 3, at 1737 n.86. The well-known slogan, "All the News That's Fit to Print," epitomizes these standards.

316. See T. EMERSON, supra note 27, at 538.

other seminars, proposals for National News Councils, and the like. And there is, after all, a marketplace.\textsuperscript{318} Moreover, the so-called “Yellow Press” will always be with us, thriving on the seamier side of human nature, pandering to our lower instincts. Fortunately one doubts whether its avid readers believe much of what they read or if they do whether its stories have much adverse effect on the persons they defame. I do not consider this segment of the press a serious factor in the discussion of liability for defamation because its own deliberate approach renders its credibility minimal.

As might be expected, Professor Emerson answers the “big lie” argument as well as anyone:

The big lie generally relates to matters of opinion, historical judgments, or political conclusions, not to statements of fact about particular living persons. It is more likely to defame groups than individuals. It is normally utilized by government, which is immune from libel, or by powerful political factions. One cannot look to the rules of libel in civil proceedings to control forces of this nature and magnitude.\textsuperscript{319}

The individual who is defamed and who cannot recover under \textit{Sullivan} can still depend on other forces to prevent unlimited harm.\textsuperscript{320} We are dealing with public issues or official conduct; thus the defamed individual will often have readily available means of reply.\textsuperscript{321} Moreover, regional differences promote different views; “defamation” in Des Moines might be innocuous criticism or even praise in New York. As \textit{Herbert v. Lando} indicates, different media or professional organizations may take different approaches on a given subject and the defamed individual is likely to have at hand media and other supporters of his official conduct or position on a public issue. Finally, unless the truth of the “defamation” is established, the subject’s admirers will tend to retain or even increase their support, as some recent presidents have been aware.

The “dialectic progression” that Kalven predicted is not inevi-

\textsuperscript{318} To be sure, by emphasizing profit maximization the media too often create a low quality product. \textit{See Comm’n on Freedom of the Press, A Free and Responsible Press} 55-57 (1947). I have enough faith in the intelligence of the public, however, to believe that a reputation for falsehood tends to undermine credibility.\textsuperscript{319} T. Emerson, \textit{supra} note 27, at 538.

\textsuperscript{320} \textit{See id.}

\textsuperscript{321} \textit{See Gertz v. Robert Welch, Inc.,} 418 U.S. 323, 344 (1974). The Court was careful not to over emphasize the efficacy of rebuttal, \textit{id.} at 344 n.9, but I think that the Court properly mentioned and relied in part on whether rebuttal was available to the defamed individual.
table. Under *Sullivan*, the Court has already created two tiers of liability.\(^{322}\) An extension of *Sullivan* that absolutely privileges some speech might also be two-tiered or might employ a sliding scale.\(^{323}\) The complete eradication of the tort of defamation is logically possible, to be sure, but, as Justice Holmes said, speaking in a different context, "not . . . while this Court sits."\(^{324}\) Professors Emerson\(^{325}\) and Blasi\(^{326}\) do not go so far; neither do I.

**CONCLUSION**

Balancing these considerations, one is left with a sense of uncertainty. I believe that the scales ultimately tip in favor of a view that Cato first\(^{327}\) but perhaps John Marshall best expressed; James Madison in turn adopted Marshall's eloquent exposition as did the author of the *Sullivan* majority opinion:

323. As Blasi suggests: A theory based on the checking value might, for example, provide absolute protection for communications critical of public officials, a qualified privilege defeasible upon proof of reckless disregard for the truth applicable to speech about public figures, and a negligence standard for all other defamatory utterance. Alternatively, the checking value could justify the gradations of privilege advocated by Justice Harlan in *Butts*: the reckless-disregard standard for suits by public officials, a "gross negligence" standard for suits by public figures, and a negligence standard for suits brought by private individuals. A proponent of the checking value could even wind up with a doctrine much like that adopted in *Gertz* if he scaled the various categories of utterance as has been done above, and then decided to lump together for identical treatment the two most favored categories, public official and public figure, not on the ground that their speech value is identical but because a multi-tiered scale of privileges would be too unwieldy as a practical matter. Alternatively, the desire to avoid constitutional standards keyed to the state of mind of the defendant might lead one to eschew all inquiry into culpability and instead to vary the level of constitutional protection on the basis of differential requirements of proof of harm, for example, or of reference to the plaintiff, depending on the subject matter of the allegedly defamatory story. The important point about analysis framed partly around the checking value is that one need not assume that all communications have a constant value or that all gradations of protection can turn only on such factors as the plaintiff's rebuttal opportunities or assumption of risk.
325. Emerson does suggest, however, that in his system of free expression there might be only "small room remaining for the law of libel." T. Emerson, *supra* note 27, at 531.
326. *See* note 323 *supra*. *See also* Blasi, *supra* note 63, at 583-87.
327. *See* note 312 *supra*. 
Among those principles deemed sacred in America, among those
sacred rights considered as forming the bulwark of their liberty,
which the Government contemplates with awful reverence and
would approach only with the most cautious circumspection,
there is no one of which the importance is more deeply im-
pressed on the public mind than the liberty of the press. That
this liberty is often carried to excess; that it has sometimes de-
generated into licentiousness, is seen and lamented, but the rem-
edy has not yet been discovered. Perhaps it is an evil inseparable
from the good with which it is allied; perhaps it is a shoot which
cannot be stripped from the stalk without wounding vitally the
plant from which it is torn. However desirable those measures
might be which might correct without enslaving the press, they
have never yet been devised in America.\textsuperscript{328}

A margin of error, a degree of abuse—these we must tolerate
to preserve our system of freedom. This is the hardest lesson for us
all to learn; it affects each of us and each of our civil liberties.\textsuperscript{329}

"[F]alse statements," Professor Emerson says, "whether intentional
or not, perform a significant function . . . by forcing citizens to de-
defend, justify and rethink their positions."\textsuperscript{330} "[T]he process of
checking official misconduct," Blasi tells us, "sometimes requires
the press to behave as a vigorous, unabashed partisan, campaigning
with all available resources . . . ."\textsuperscript{331} So too "apathy and anomie,"
those twin dead hands on the wheel of the democratic ship of
state, must be counteracted and "passions as well as rational cogita-
tions" activated.\textsuperscript{332} In the oft-quoted words of Sullivan itself, there
is "a profound national commitment to the principle that debate on
public issues should be uninhibited, robust, and wide-open."\textsuperscript{333}
But perhaps the best elucidation of the principle is found in one of
Cato's letters of 1721:

\begin{itemize}
\item \textsuperscript{328} Rosenbloom \textit{v.} Metromedia Corp., 403 U.S. 29, 51 (1971) (Brennan, J., dis-
senting) (quoting 6 \textit{THE WRITINGS OF JAMES MADISON}, 1790-1802, at 336 (G. Hunt
ed. 1906) (emphasis in original)).
\item \textsuperscript{329} See \textit{Near v. Minnesota ex rel. Olson}, 283 U.S. 697, 720 (1931), where Chief
Justice Hughes said, writing for the majority: "The fact that the liberty of the press
may be abused by miscreant purveyors of scandal does not make any the less neces-
sary the immunity of the press from previous restraint in dealing with official mis-
conduct." \textit{Id.}
\item \textsuperscript{330} T. Emerson, \textit{supra} note 27, at 530.
\item \textsuperscript{331} Blasi, \textit{supra} note 63, at 624.
\item \textsuperscript{332} \textit{Id.} at 632.
\item \textsuperscript{333} 376 U.S. at 270. \textit{See} Kalven, "Uninhibited Robust and Wide-open"—\textit{A
Note on Free Speech and the Warren Court}, 67 MICH. L. REV. 289 (1968).
\end{itemize}
As long as there are such Things as Printing and Writing, there will be Libels: It is an Evil arising out of a much greater Good. And as to those who are locking up the Press, because it produces Monsters, they ought to consider that so do the Sun and the Nile; and that it is something better for the World to bear some particular Inconveniencies arising from general Blessings, than to be wholly deprived of Fire and Water.334

*Herbert v. Lando* is the first case before the Supreme Court to raise the question whether liberal discovery under the Federal Rules of Civil Procedure may interfere with principles of free expression underlying the first amendment, yet the case is also one of a long line of defamation cases that illuminate those principles. In exploring these underlying values, my concurring opinion in *Herbert* partly relied upon a differentiation between the free press and free speech clauses, a position that Justice Stewart first expressly advanced. That differentiation, however, is both unprovable from the perspective of the Framers' intent and conceptually debatable; its most serious failing is that it can be construed to afford greater protection to the "institutional" press than to the individual speaker or publisher and contains no justification for such a special privilege. Footfalls are always on "untrod paths."335

But the very discussion sheds a more penetrating light on the functions that the first amendment performs. In particular, discussion illuminates the special role of the "checking function" that Professor Vincent Blasi has articulated so well. When we explore the implications of *Herbert* in light of that function, we confront another dilemma: how can plaintiffs meet their burden of proving the defendant's state of mind under *New York Times Co. v. Sullivan* without hindering defendants from performing that function? This dilemma leads perforce to a reexamination of the *Sullivan* test and leads me to conclude that the Supreme Court should abandon the test in the sphere of public issues and official conduct. Needless to say, I am not free to urge this conclusion in my judicial capacity.336 Whether further reexamination of first amendment principles as applied in *Herbert v. Lando* or other areas will prompt the Supreme Court to review the *Sullivan* rule I do not venture. But I heartily recommend such a review.

334. CATO, supra note 168, at 252.
335. Herbert v. Lando, 568 F.2d at 985 (Oakes, J., concurring).
336. See id. at 991 n.26.