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# Reconsidering the Litigator's Absolute Privilege to Defame

PAUL T. HAYDEN\*

"[N]either party, witness, counsel, jury, or Judge, can be put to answer, civilly or criminally, for words spoken in office."

— Lord Mansfield (1772)<sup>1</sup>

## I. INTRODUCTION

A lawyer representing a client in litigation decides, for any reason, to make false and damaging statements about someone else with some connection to the case. He may think such action will help protect his client, or get his client a better settlement. Or he may be motivated, less loftily, by spite, or ill will, or hatred towards the targeted person. The statements may be made in court or out of court, or in connection with some alternative dispute resolution process, such as an arbitral proceeding. They might be made before the litigation commences, when still in the planning stage, or right after a trial.

If such statements were made by someone outside the litigation context, the target would be able to pursue a tort action for defamation and upon proper proof could recover substantial sums from the speaker. But in the hypothetical presented above, the plaintiff confronts the lawyer's absolute privilege to say anything in connection with litigation without fear of having to pay for it. This longstanding common-law privilege, which is applied in English cases as far back as 500 years ago,<sup>2</sup> provides that an attorney representing a party in litigation may call someone—a witness, or the opposing party, or the opposing party's lawyer, for example—a liar, a cheat, a thief, or worse, without fear of being sued by the target of the statements, as long as the statements bear some (even tenuous) relationship to the lawsuit. The lawyer's motivation behind the speech, and even his actual knowledge of its falsity, is irrelevant.

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<sup>1</sup> *Rex v. Skinner*, 98 Eng. Rep. 529, 530, Lofft 55, 55 (1772).

<sup>2</sup> *Beauchamps v. Croft*, 73 Eng. Rep. 639 (Q.B. 1497).

Anyone concerned with the conduct and public image of litigators would hope that such conduct is rare, but the number of reported cases indicates otherwise.<sup>3</sup> Empirical evidence suggests that despite the absolute privilege, litigators are being sued more often now by their clients' adversaries, for defamation as well as for other torts, although such actions rarely succeed.<sup>4</sup> One need only open a legal newspaper to see references to allegedly damaging litigator speech and the protective privilege. Cases have arisen recently in connection with a major law firm's pro bono representation of a death row inmate, and in connection with a well-known economics consultant's work in securities litigations.<sup>5</sup> Moreover, while litigators have always had ample opportunities to defame others, modern developments appear to increase the potential harm to the targets of defamation. First, there are almost three times the number of lawyers in this country today as there were in 1970.<sup>6</sup> Furthermore, the high settlement rate of cases means that the tactical use of defamation as leverage does not depend upon its admissibility by the rules of evidence; even if a lawyer knows a defamatory utterance will not be introduced into evidence, it may be sufficiently embarrassing to the target of the speech to

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<sup>3</sup> Modern cases are collected in, among other places, 2 RONALD E. MALLEN & JEFFREY M. SMITH, *LEGAL MALPRACTICE* § 17.8 (3d ed. 1989), and in several A.L.R. annotations, cited throughout this Article. It seems safe to assume that the number of reported lawsuits represents only a small fraction of the actual instances of such conduct by litigators, given that the absolute privilege is well-recognized and presumably deters many would-be plaintiffs (and their lawyers) from pressing such suits to the level where a court would publish a decision.

<sup>4</sup> Ronald E. Mallen & James A. Roberts, *The Liability of a Litigation Attorney to a Party Opponent*, 14 WILLAMETTE L. REV. 387, 387 (1978) (citing data from cases and insurance company claims).

<sup>5</sup> Cris Carmody, *Zealous Pro Bono Work Leads to Libel Lawsuit*, NAT'L. L.J., Mar. 8, 1993, at 7 (reporting \$5 million suit against lawyers at Arnold & Porter by man accused in court documents of having committed the crime for which the firm's client was convicted); Mark Hansen, *Expert Sues Three Law Firms*, 79 A.B.A. J. 34 (Mar. 1993) (reporting \$50 million suit by University of Chicago professor and economics consultant against three law firms for, among other things, defamation and commercial disparagement based on allegedly unfounded allegations and threats made during litigations involving the plaintiff); see also Gail Diane Cox, *Latham Sued by Alleged Whistleblower*, NAT'L. L.J., Oct. 5, 1992, at 2 (reporting suit by former assistant controller of Latham & Watkins for wrongful termination, and quoting a firm spokesman as saying, if the plaintiff "were making the allegations he's making anywhere but in a lawsuit 'it would be defamation'").

<sup>6</sup> See Robert L. Nelson & David M. Trubek, *Introduction*, in *LAWYERS' IDEALS, LAWYERS' PRACTICES* 7 (Robert L. Nelson, et al., eds., 1992) (citing BARBARA A. CURRAN ET AL., *LAWYER STATISTICAL REPORT: A STATISTICAL PROFILE OF THE U.S. LEGAL PROFESSION IN THE 1980S* 5 (1985)).

impact on settlement.<sup>7</sup> Additionally, the courtroom—with its attendant rules of procedure and decorum—may not be the forum in which the litigator speaks. A litigator representing a party in mediation or arbitration proceedings may have more leeway to make defamatory statements in connection with the case; in short, the expansion of litigation from the more traditional courtroom setting into alternative fora means that the umbrella of protection for such false statements is ever widening. Finally, television coverage of trials, and of pretrial and posttrial maneuverings, means that defamatory utterances may reach more listeners and thus become more powerful and more potentially damaging.<sup>8</sup>

This Article reconsiders the absolute privilege for litigators, exploring several of the main rationales that have been put forth in its defense and assessing their merits in light of history, ethics, and developments in related legal doctrines governing attorney conduct. Part II describes the present contours of the litigator's absolute privilege to defame. Part III then critically explores the rationales thought to support the privilege's continued existence: its longstanding history; its overriding value to "the administration of justice"; its protection for honest lawyers from a searching inquiry into their good faith in making factual assertions; and the availability of alternative remedies against defamation by litigators. Because I conclude that none of these rationales adequately supports maintaining an absolute privilege for litigators, Part IV then suggests that states abandon the doctrine, substituting for it a qualified privilege that would retain adequate protection for lawyers and the legal process while providing better protection for the reputational interests of defamed persons.

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<sup>7</sup> One influential scholar has noted in passing that "[m]ore frequently than practicing lawyers, legal scholars seem surprised that cases settle for reasons other than the legal merits, or the law and economics version of the legal merits." Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR,"* 19 FLA. ST. U. L. REV. 1, 10 n.37 (1991).

<sup>8</sup> See, e.g., M. ETHAN KATSH, *THE ELECTRONIC MEDIA AND THE TRANSFORMATION OF LAW* (1989) (providing a provocative and wide-ranging exploration of the impact of the "new media," and technological advances in communications, on law and lawyers); Nadja S. Sodos, *The Ethical Considerations of Televising Federal Courtroom Proceedings*, 5 GEO. J. LEGAL ETHICS 915 (1992) (discussing history of televising trials, and calling for a uniform, nationwide system of cameras in the courtroom).

## II. THE ABSOLUTE PRIVILEGE TO DEFAME DESCRIBED

A. *The Legal Context: A Brief Overview of Defamation*

Defamation—a tort which includes libel (printed, written, or broadcast material) and slander (spoken material)—has a rich and varied history and an extremely complicated present.<sup>9</sup> Prosser and Keeton's treatise on torts notes at the outset of its defamation chapter that "[i]t must be confessed at the beginning that there is a great deal of the law of defamation which makes no sense. It contains anomalies and absurdities for which no legal writer ever has had a kind word."<sup>10</sup> Defamation has been simply defined as communication of an untruth to a third person which exposes a person to hatred, ridicule, or contempt; lowers one in the esteem of one's fellows; causes one to be shunned; or injures one in one's business or calling.<sup>11</sup> The *Restatement (Second) of Torts* defines a defamatory communication even more simply, as one which "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."<sup>12</sup>

Under the common law, the rules of defamation "protected the reputational interest by holding one who intentionally published defamatory material to a standard of strict liability or liability without consideration of fault."<sup>13</sup> A plaintiff typically put on evidence that a defamatory statement was made and that the defendant made it; a rebuttable presumption of falsity, and an irrebuttable presumption of harm to reputation arose.<sup>14</sup> To balance harm to free speech interests that might result from such an easy standard of proof, the defendant could avoid losing the case by proving either the truth of the allegedly defamatory statement, or that the statement was privileged.<sup>15</sup> This sounds simple enough. But as one astute observer has said of the common law, "[n]othing short of a major treatise could catalogue the various attitudes,

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<sup>9</sup> To attempt anything approaching a detailed summary of the entire sweep of the present law of defamation is beyond the scope of this Article. For recent books analyzing this area, see, for example, ROBERT D. SACK, *LIBEL, SLANDER & RELATED PROBLEMS* (1980); BRUCE W. SANFORD, *LIBEL AND PRIVACY* (2d ed. 1991); RODNEY A. SMOLLA, *LAW OF DEFAMATION* (1992).

<sup>10</sup> W. PAGE KEETON, ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 111, at 771 (5th ed. 1984).

<sup>11</sup> HAROLD L. NELSON ET AL., *LAW OF MASS COMMUNICATIONS* 99 (6th ed. 1989).

<sup>12</sup> *RESTATEMENT (SECOND) OF TORTS* § 559 (1977).

<sup>13</sup> KEETON ET AL., *supra* note 10, § 113, at 804.

<sup>14</sup> See Joel D. Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1353 (1975).

<sup>15</sup> KEETON ET AL., *supra* note 10, § 113, at 804.

doctrines, and practices which courts in the fifty states have applied in defamation actions."<sup>16</sup>

Moreover, since the "constitutionalization" of defamation law by the United States Supreme Court in a line of cases beginning in 1964,<sup>17</sup> merely stating the required elements of a defamation action is difficult. The *Restatement*, in a deceptively straightforward formulation, provides that defamation requires (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault, amounting to at least negligence; and (4) special harm, or actionability despite the lack of special harm.<sup>18</sup> But as Robert Sack points out, "[s]imple statements about the law of libel and slander should be made with caution. With the overlay of constitutional interpretation upon the common law, things are rarely simple."<sup>19</sup> "The law of defamation has been volatile ever since *New York Times v. Sullivan*," Rodney Smolla remarks in his defamation treatise, "and will remain so for the foreseeable future."<sup>20</sup> And as Bruce Sanford puts it in his treatise, the law of defamation, "new and restless as it is, will continue to evolve throughout the remainder of this century."<sup>21</sup>

In fact, precisely what a plaintiff must prove to succeed in a defamation action depends upon the identity of the plaintiff, the identity of the defendant, the nature of the defamatory utterance, and the specific jurisdiction.<sup>22</sup> Smolla offers one of the best brief formulations of today's apparently necessary showings in light of United States Supreme Court cases: first, "[p]ublic official and public figure plaintiffs must, as a matter of federal constitutional law, establish the existence of 'actual malice' in order to recover."<sup>23</sup> A statement is made with "actual malice," under *New York Times v. Sullivan*, if made "with knowledge that it was false or with reckless disregard of whether it was false or not."<sup>24</sup> Second, under *Gertz v. Robert Welch, Inc.*,<sup>25</sup> "private figure plaintiffs must establish 'fault' on the part of the defendant as a

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<sup>16</sup> Eaton, *supra* note 14, at 1351.

<sup>17</sup> SACK, *supra* note 9, at 39. This line of cases has grown quite long; between 1964 and 1991, the Supreme Court decided 27 libel cases. See David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487, 488 n.2 (1991) (listing the cases chronologically).

<sup>18</sup> RESTATEMENT (SECOND) OF TORTS, *supra* note 12, § 558 (1977).

<sup>19</sup> SACK, *supra* note 9, at 42.

<sup>20</sup> SMOLLA, *supra* note 9, at vii.

<sup>21</sup> SANFORD, *supra* note 9, § 1.7, at 21.

<sup>22</sup> SACK, *supra* note 9, at 39.

<sup>23</sup> SMOLLA, *supra* note 9, § 3.01[1], at 3-4.

<sup>24</sup> *New York Times v. Sullivan*, 376 U.S. 254, 280 (1963).

<sup>25</sup> 418 U.S. 323 (1974).

prerequisite for recovery, and . . . the term 'fault' has been interpreted as requiring, as a constitutional minimum, the existence of negligence."<sup>26</sup> Finally, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*<sup>27</sup> may mean

that none of the first amendment fault level restrictions in *Gertz* are operable when the plaintiff is a private figure and the defamatory speech does not concern matters of public interest. If this interpretation of *Dun & Bradstreet* is followed, then the states may be free to return a substantial portion of their defamation actions—those involving no public issues and private figure plaintiffs—to pre-*Gertz* strict liability standards.<sup>28</sup>

While it is fair to say that the constitutionalization of defamation law is the single most important matter to take into account in proposing change in any aspect of this tort,<sup>29</sup> nothing the United States Supreme Court has said has come close to sweeping away the common-law privileges.<sup>30</sup> Indeed, in the midst of these dramatic upheavals, the litigator's absolute privilege to defame seems comparatively a bulwark of consistency and certainty.<sup>31</sup> As one recent treatise puts it, "the rule of absolute privilege from liability for defamation is alive, well, and flourishing."<sup>32</sup>

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<sup>26</sup> SMOLLA, *supra* note 9, § 3.01[1], at 3-4.

<sup>27</sup> 472 U.S. 749 (1985).

<sup>28</sup> SMOLLA, *supra* note 9, § 3.01[4]. For a further discussion of Smolla's interpretation of *Dun & Bradstreet*, see *id.*, § 3.02[1]-3.05.

<sup>29</sup> See generally Anderson, *supra* note 17.

<sup>30</sup> Prosser & Keeton's treatise notes generally that the "complex structure" of common-law privileges "has not been eliminated, although the need therefor has been somewhat diminished" by the Supreme Court's constitutional decisions. KEETON ET AL., *supra* note 10, § 113, at 804. These authors further maintain that even the qualified privileges "have not been automatically abrogated" by these decisions, because "common law rules related to how and when a qualified privilege can be abused . . . are not the same as those related to the constitutional privilege," and because the common-law privileges apply most often to "statements about private individuals to further and vindicate private interests," an area in which the constitutional rules are inapplicable. *Id.*, § 115, at 825.

<sup>31</sup> For example, a new project to develop a uniform law of defamation for the states retains, in its current draft, the litigator's absolute privilege to defame. NAT'L. CONF. OF COMM'RS OF UNIFORM STATE LAWS, UNIFORM DEFAMATION ACT § 16(1) (Dec. 6, 1991 Draft) (on file with the author) ("An action may not be maintained under this [Act] based on: (1) a statement made: (i) in and pertaining to a judicial proceeding by a judge, attorney, witness, juror, or other participant; . . . (iii) in and pertaining to any quasi-judicial . . . proceeding by an executive or administrative official, attorney, witness, or other participant[.]").

<sup>32</sup> STUART M. SPEISER ET AL., THE AMERICAN LAW OF TORTS § 29:87, at 597 (1991).

## B. *Modern Scope of the Litigator's Common-Law Privilege*

It would be a distinct understatement to say that the litigator's privilege to defame is well-established in Anglo-American common-law jurisprudence. And despite intermittent criticism from early judges<sup>33</sup> and contemporary commentators,<sup>34</sup> it has been broadened in modern times. The *Restatement (Second) of Torts*, in section 586, now provides:

An attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding.<sup>35</sup>

The *Restatement* view is accepted in the vast majority of states.<sup>36</sup> Indeed, in all but two states the litigator's privilege to defame is absolute,<sup>37</sup> which means that

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<sup>33</sup> See, e.g., *White v. Nicholls*, 44 U.S. 266, 287 (1845) ("It is difficult to conceive how, in society where rights and duties are relative and mutual, there can be tolerated those who are privileged to do injury *legibus soluti*; and still more difficult to imagine, how such a privilege could be instituted or tolerated upon the principles of social good."); *Torrey v. Field*, 10 Vt. 353, 412 (1838) ("No person ought, in the course of judicial proceedings, even to publish that which he has no reason to believe, and does not in fact believe, and has no occasion to publish, except for some secondary purposes. But it must be confessed, the authorities upon this subject do not fully warrant this conclusion.").

<sup>34</sup> See, e.g., 1 GEOFFREY C. HAZARD & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 1.1:205, at 18.5 (2d ed. 1992) (calling the absolute privilege "highly dubious"); CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* § 5.6, at 231 (1986) (discussing the "disturbing" generosity of modern courts in applying the privilege, noting that "in the hands of some courts, the privilege has been reshaped into something very much like a privilege for a lawyer to be bumptious and unrestrained in all matters vaguely related to litigation").

<sup>35</sup> *RESTATEMENT (SECOND) OF TORTS*, *supra* note 12, § 586 (1977).

<sup>36</sup> See 2 MALLEEN & SMITH, *supra* note 3, § 17.8, at 24 n.9 (citing cases from 33 states that have adopted or approved the *Restatement* formulation).

<sup>37</sup> In Georgia, lawyers are granted an absolute privilege only for statements made in pleadings. GA. CODE ANN. § 51-5-8 (Harrison 1982). Other attorney statements made in the performance of a legal duty, in Georgia, are protected only if "made in good faith." *Id.* § 51-5-7(2). Louisiana grants attorneys and litigants only a qualified defamation privilege, under both its case law and by statute. LA. REV. STAT. ANN. § 14:49 (West 1986). Judges, legislators, and witnesses, however, are provided an absolute privilege. *Id.* § 14:50.

There seems to be very little variation among the other 48 states. In most, the absolute privilege remains a common-law rule untouched by legislative enactment. A few states have codified the litigator's absolute privilege. See CAL. CIV. CODE § 47(b) (West 1993); MONT.



bad faith or malicious motive will not destroy the privilege as long as the speech has some relation to the judicial proceeding.<sup>38</sup> In other words, the privilege today protects even the litigator who speaks with knowledge of the falsity of his statements or with reckless disregard of their truth (constitutional "actual malice"), and even with the intent to harm the person defamed (common-law "malice").<sup>39</sup> The absolute privilege is thus more of an immunity for litigators, by contrast to a qualified privilege, which protects only statements made without malice, or in good faith.<sup>40</sup>

The "statements" protected by the absolute privilege include not only matters said in court, or contained in documents filed in court,<sup>41</sup> but also letters written to others with some interest in the matters stated<sup>42</sup> and conduct such as

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CODE ANN. § 27-1-804(2) (1991); N.D. CENT. CODE § 14-02-05(2) (1991); OKLA. STAT. ANN. tit. 12, § 1443.1 (West 1993) & tit. 21, § 772 (West 1983); S.D. CODIFIED LAWS ANN. § 20-11-5(2) (1987); UTAH CODE ANN. § 45-2-3(2) (1988).

<sup>38</sup> 2 MALLEEN & SMITH, *supra* note 3, § 17.8, at 23.

<sup>39</sup> SACK, *supra* note 9, at 268; *see also* 2 MALLEEN & SMITH, *supra* note 3, § 17.8, at 26 n.11 (citing numerous cases). This feature explains why the absolute privilege has remained unaffected by the constitutionalization of defamation law: the absolute privilege protects speech to an even greater degree than the constitution has been held to require.

<sup>40</sup> *See* RESTATEMENT (SECOND) OF TORTS, ch. 25, tit. B, introductory note preceding § 585 (1977). As one early and important scholar explained:

Defamatory matter published on occasions absolutely protected, though spoken falsely and with actual or express malice, is said to impose no liability for damages recoverable in an action for defamation; while such a publication on an occasion only conditionally privileged entails such liability if spoken with actual malice. Qualified or conditional privilege therefore occupies an intermediate position between the total absence of privilege and absolute immunity.

Van Vechten Veeder, *Absolute Immunity in Defamation: Judicial Proceedings (Part I)*, 9 COLUM. L. REV. 463, 464-65 (1909).

<sup>41</sup> *See* RESTATEMENT (SECOND) OF TORTS, § 586 cmt. a (1977) (noting that privileged statements include, but are not limited to, "all pleadings and affidavits," "the examination and cross-examination of witnesses, comments upon the evidence and arguments both oral and written"); H.D. Warren, Annotation, *Libel and Slander: Statements in Counsel's Argument to Jury as Privileged*, 61 A.L.R.2D 1300 (1958); H.D. Warren, Annotation, *Libel and Slander: Statements in Briefs as Privileged*, 32 A.L.R.2D 423 (1953).

<sup>42</sup> *See, e.g.,* Weiler v. Stern, 384 N.E.2d 762, 764-65 (Ill. App. Ct. 1978) (holding absolutely privileged letter to clients concerning another client); De Vivo v. Ascher, 550 A.2d 163, 165-66, 168 (N.J. Super. Ct. App. Div. 1988) (holding privileged a letter sent by a lawyer in an active civil case to a third party saying plaintiff was engaged in illegal activity because the letter was sent to a party who had a sufficiently significant interest in the

the filing of a notice of *lis pendens*.<sup>43</sup> Further, the temporal limits of the judicial proceeding expand beyond the trial: Statements made in connection with contemplated litigation are protected, as long as the litigation is contemplated in good faith.<sup>44</sup> Even statements after trial have been protected when they were "incident to" the litigation.<sup>45</sup>

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litigation), *cert. denied*, 555 A.2d 607 (N.J. 1989); *Harris v. NCNB Nat'l Bank*, 355 S.E.2d 838, 842 (N.C. Ct. App. 1987) (extending privilege expressly to out-of-court communications between lawyers prior to anticipated litigation when bank's attorney sent copy of proposed complaint to plaintiff's employer); *Simmons v. Climaco*, 507 N.E.2d 465, 468 (Ohio Ct. App. 1986) (holding absolutely privileged letters sent by defendant lawyers to government officials complaining of improper conduct by plaintiffs who were government employees); *Rady v. Lutz*, 444 N.W.2d 58, 59-60 (Wis. Ct. App.) (holding privileged a letter sent by a lawyer to a court administrator accusing plaintiff, who had been party in previous suits defended by the lawyer, of having filed frivolous suits and having harassed public officials because the letter referred to past and present suits involving the lawyer's clients), *rev. denied*, 443 N.W.2d 313 (Wis. 1989).

<sup>43</sup> See, e.g., *Brown v. Bethlehem Terrace Assoc.*, 525 N.Y.S.2d 978 (N.Y. App. Div. 1988).

<sup>44</sup> Noteworthy recent cases applying the privilege to statements made before the commencement of litigation include, e.g., *Pinkston v. Lovell*, 759 S.W.2d 20, 22-23 (Ark. 1988) (involving a lawyer's statements to plaintiff's former clients that plaintiff was incompetent as attorney); *Club Valencia Homeowners Ass'n v. Valencia Assoc.*, 712 P.2d 1024, 1027-28 (Colo. Ct. App. 1985) (involving a letter to individual members of client association imputing fraud and embezzlement to plaintiff); *Arundel Corp. v. Green*, 540 A.2d 815, 818-19 (Md. Ct. Spec. App. 1988) (involving a letter to clients of business stating that product was unsafe); *Kanengiser v. Kanengiser*, 590 A.2d 1223, 1231-32 (N.J. Super. Ct. Law Div. 1991) (involving letter from one attorney to another which claimed fees were excessive); *Russell v. Clark*, 620 S.W.2d 865, 866-70 (Tex. Civ. App. 1981) (resulting from a letter to plaintiff's investors seeking information for use in lawsuit against plaintiff, asserting that investors were "victimized by some highly dubious promotional techniques").

A very few courts—including those in New York—have refused to extend the privilege to all or most prelitigation statements. See, e.g., *LanChile Airlines v. Connecticut Gen. Life Ins. Co.*, 731 F. Supp. 477, 479-80 (S.D. Fla. 1990) (limiting protection to "necessary" preliminary statements); *Rosen v. Brandes*, 432 N.Y.S.2d 597, 601 (1980) (holding that privilege protects only statements made after litigation is commenced); *Post v. Mendel*, 507 A.2d 351, 352-57 (Pa. 1986) (granting protection to only those preliminary statements that "play an integral role in pursuing the ordinary course of justice"); see also 2 MALLEN & SMITH, *supra* note 3, § 17.8, at 34-36 (citing numerous cases); Vitauts M. Gulbis, Annotation, *Libel and Slander: Attorneys' Statements, to Parties Other Than Alleged Defamed Party or Its Agents, in Course of Extrajudicial Investigation or Preparation Relating to Pending or Anticipated Civil Litigation as Privileged*, 23 A.L.R.4TH 932 (1983); Thomas J. Goger, Annotation, *Libel and Slander: Out-of-Court Communications Between Attorneys Made Preparatory to, or in the Course or Aftermath of, Civil Judicial Proceedings*

The *Restatement* takes the position that "judicial proceedings include all proceedings before an officer or other tribunal exercising a judicial function," which may include arbitration proceedings.<sup>46</sup> Courts have followed the *Restatement* and have applied the privilege to protect statements made in connection with arbitrations.<sup>47</sup> Indeed, modern courts have applied the privilege to all kinds of "quasi-judicial" proceedings,<sup>48</sup> including various kinds of administrative settings ranging from a board of funeral directors and embalmers,<sup>49</sup> to a school board,<sup>50</sup> to a state labor commission.<sup>51</sup>

Some commentators have argued that the growth of alternative dispute resolution processes<sup>52</sup> provides "fertile ground for expansion" of the absolute privilege.<sup>53</sup> This is certainly true, but the implication that earlier courts construed "judicial proceedings" more narrowly than have modern courts is not; the current liberal construction of "judicial proceedings" is fully consistent with the early English and American cases. For example, in the oft-cited

*Application of Privilege Attending Statements Made in the Course of Judicial Proceedings to Pretrial Deposition and Discovery Procedures*, 23 A.L.R.3D 1172 (1969).

<sup>45</sup> See, e.g., *Cummings v. Kirby*, 343 N.W.2d 747, 748-49 (Neb. 1984) (arising because a lawyer called a witness a "crook" after verdict was rendered, holding the statement absolutely privileged).

<sup>46</sup> RESTATEMENT (SECOND) OF TORTS, § 586 cmt. d (1977).

<sup>47</sup> See, e.g., *General Motors Corp. v. Mendicki*, 367 F.2d 66 (10th Cir. 1966); *Sturdivant v. Seaboard Serv. Sys., Ltd.*, 459 A.2d 1058 (D.C. 1983). For a fuller discussion of the expansion of the privilege to arbitration proceedings, see William J. Andrie, Jr., Note, *Extension of Absolute Privilege to Defamation in Arbitration Proceedings—Sturdivant v. Seaboard Service System, Ltd.*, 33 CATH. U. L. REV. 1073 (1984). See also Gary D. Spivey, Annotation, *Libel and Slander: Privileged Nature of Communications Made in Course of Grievance or Arbitration Procedure Provided For by Collective Bargaining Agreement*, 60 A.L.R.3D 1041 (1974).

<sup>48</sup> 2 MALLEN & SMITH, *supra* note 3, § 17.8, at 29; see also Note, *Defamation—Absolute Privilege in Administrative Proceedings*, 97 U. PA. L. REV. 877 (1949); Wendy Evans Lehmann, Annotation, *Testimony Before or Communications to Private Professional Society's Judicial Commission, Ethics Committee, or the Like, as Privileged*, 9 A.L.R.4TH 807 (1981); W.E. Shipley, Annotation, *Libel and Slander: Privilege Applicable to Judicial Proceedings as Extending to Administrative Proceedings*, 45 A.L.R.2D 1296 (1956).

<sup>49</sup> *Lambdin Funeral Serv., Inc. v. Griffith*, 559 S.W.2d 791 (Tenn. 1978).

<sup>50</sup> *Frisk v. Merrihew*, 116 Cal. Rptr. 781, 783 (Cal. Ct. App. 1974).

<sup>51</sup> See Nedwyn R. Nelkin, Note, *Defamation—Absolute Privilege as Extended to Quasi-Judicial Proceedings*, 13 MO. L. REV. 320 (1948) (discussing *White v. United Mills Co.*, 208 S.W.2d 803 (Mo. Ct. App. 1948)).

<sup>52</sup> See generally STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION* 6-14 (2d ed. 1992) (discussing the ADR movement and current applications of ADR, and providing a bibliography of some leading scholarly works on the subject).

<sup>53</sup> Andrie, *supra* note 47, at 1077.

seventeenth century case of *Lake v. King*, the court analogized parliamentary grievance proceedings to judicial proceedings for purposes of applying the privilege, apparently regarding as determinative its agreement with the defendant's contention that the parliamentary committee to whom the defamatory statement was addressed "then and there had full power and authority to hear and examine grievances of this kind."<sup>54</sup> Similarly, one of the earliest American cases, *McMillan v. Birch*, extended the privilege to utterances made by a minister, about another minister, at a meeting of the Ohio Presbytery.<sup>55</sup> The Pennsylvania Supreme Court opined, in an opinion by Chief Justice Tilghman:

This freedom of speech in what is called a *course of justice*, is not confined to courts of *common law*. Cases have been cited to shew that it is extended to proceedings in ecclesiastical courts, and proceedings before justices of the peace; and I have no doubt but it should likewise be extended to proceedings before referees.

The objection in the case before us is, that Presbyteries and General Assemblies are not courts of justice. Certainly they are not . . . . But although they are not courts of justice, they are bodies enjoying certain rights, established by long custom, and not forbidden by any law. . . . [P]ersons thus consenting and pleading their causes either in a course of *complaint* or *defence*, fall within the principle applied to those who are speaking in courts of justice.<sup>56</sup>

Another of the earliest American cases, *Thorn v. Blanchard*,<sup>57</sup> from New York, involved a petition to "a counsel of appointment, containing false allegations, and praying for the removal of a public officer."<sup>58</sup> By a two-to-one vote, the judges decided that the counsel of appointment was analogous to a judicial proceeding, and on that basis applied the privilege.<sup>59</sup> One of the judges in the majority explained that prior cases had extended the privilege "wherein no prosecution for a libel will lie" to a Quakers' meeting and to a petition to the deputy governor of a hospital "addressed to the competent authority to administer redress."<sup>60</sup> He wrote:

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<sup>54</sup> *Lake v. King*, 85 Eng. Rep. 137, 138, 1 Saunders 1316 (K.B. 1679).

<sup>55</sup> *McMillan v. Birch*, 1 Binn. 178 (Pa. 1806).

<sup>56</sup> *Id.* at 186-87.

<sup>57</sup> 5 Johns. 508 (N.Y. 1809).

<sup>58</sup> *Id.* at 522.

<sup>59</sup> *Id.* at 526, 527-28, 530-32.

<sup>60</sup> *Id.* at 530.

The freedom of inquiry, the right of exposing malversation in public men and public institutions, to the proper authority, the importance of punishing offences, and the danger of silencing inquiry and of affording impunity to guilt, have all combined to shut the door against prosecutions for libels, in cases of that, or of an analogous nature.<sup>61</sup>

The historically broad construction of the kinds of proceedings to which the privilege attaches may be explained in part by the fact that when the so-called "judicial proceedings privilege" was developing, it was seemingly regarded by some of its judicial creators as nothing more than an offshoot of a more general rule which protected any speaker who had a legitimate (and sufficiently important) need to make the defamatory speech, whether in a judicial proceeding or not.<sup>62</sup> Evidence of this can be seen in the 1640 English case of *Molton v. Clapham*, in which the court, in finding that no action lay where the defendant said in open court that affidavits offered by the opposition were not true, analogized that situation to ones in which "I say, that J.S. hath no title to the land, if I claim or make title to the land: or if I say, that J.S. is a bastard, and entitle myself to be right heir," because in all such circumstances "the words are not actionable, because that I pretending title, do it in defence thereof."<sup>63</sup> A similar case from 1590, *Gerard v. Dickenson*,<sup>64</sup> while finding the words actionable for other reasons, opined that:

If the defendant had affirmed and published that the plaintiff had no right to the castle and manor of H., but that she herself had right to them, in that case, because the defendant herself pretends right to them, although in truth she had none, yet no action lies. For if an action should lie when the defendant herself claims an interest, how can any make claim or title to any land, or begin any suit, or seek advice and counsel, but he should be subject to an action? [W]hich would be inconvenient [sic].<sup>65</sup>

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<sup>61</sup> *Id.*

<sup>62</sup> See, e.g., Veeder, *supra* note 40, at 464 ("[F]ar back in the history of the common law . . . it was at once apparent that the general rule which holds the defamer to answer for the actual truth of his utterances would be unwarrantably severe if applied to those who, in the performance of public or private duty, or in the legitimate protection of private interests, find it necessary to make defamatory imputations."); see also 8 WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 377 & n.3 (ed. 1926) (discussing a 1597 case, *Vanspike v. Cleyson*, Cro. Eliz. 541, where it was ruled, he states, "that defamatory words spoken by the defendant of the plaintiff, in order to advise a third person upon a matter in which he had an interest, were not actionable").

<sup>63</sup> *Molton v. Clapham*, 82 Eng. Rep. 393 (1640).

<sup>64</sup> 76 Eng. Rep. 903 (1590).

<sup>65</sup> *Id.* at 904.

Subsequent cases clarify that the sort of communication to which these courts made analogies gives rise to only a qualified privilege, that is, one which does not shield the speaker from allegations of malice.<sup>66</sup> For example, in *Hargrave v. Le Breton*, the defendant was an attorney for a creditor; he bolted into the middle of an auction of the debtor's property (that had been mortgaged to the plaintiff) and announced that the debtor had been bankrupt before making the mortgage to the plaintiff.<sup>67</sup> As a result of this "bad news," which was partly false, the property did not sell, and the plaintiff sued for slander of title.<sup>68</sup> In his discussion of the case, Lord Mansfield opined that the defendant's client had a right to "preserve his own interest and that of the creditors" to provide such notice, analogizing the case to one in which one gives "the true character of a servant, upon application made to his former master, to inquire into his character, with a view of hiring him."<sup>69</sup> The effect of this privilege, however, was limited to removing the legal inference of malice; that is, a plaintiff could still recover upon proving that the speaker in fact defamed him maliciously.<sup>70</sup> Privilege law has generally developed along the lines Mansfield suggested;<sup>71</sup> today, the main body of cases within this more general rule has evolved into recognition of only a *qualified* privilege.<sup>72</sup> The judicial proceedings privilege, as we have seen, developed in a way far more protective of defamatory speech.

While the scope of proceedings to which the privilege obtains may have always been broadly conceived, however, in other ways the modern privilege has been extended beyond its ancient parameters. One example of this expansion is that the modern absolute privilege to defame protects the litigator

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<sup>66</sup> Holdsworth points out that prior to the seventeenth century, "the law as to privilege was meagre, and the modern distinction between absolute and qualified privilege had not arisen." 8 HOLDSWORTH, *supra* note 62, at 376.

<sup>67</sup> *Hargrave v. LeBreton*, 98 Eng. Rep. 269, 269-70 (1769).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 271.

<sup>70</sup> *Id.*

<sup>71</sup> English historian Cecil Fifoot is quite critical of Mansfield's opinion in the *Hargrave* case, while identifying it as the first "to suggest that a defendant might deserve a special, if conditional, protection in the conduct of private life." CECIL H.S. FIFOOT, *HISTORY AND SOURCES OF THE COMMON LAW: TORT AND CONTRACT* 134-35 (1949).

<sup>72</sup> See, e.g., RESTATEMENT (SECOND) OF TORTS, § 594 (1977) (stating that speech which protects the publisher's interest is conditionally privileged); *id.* § 595 (stating that speech which protects the interest of the recipient or a third party is conditionally privileged); *id.* § 596 (stating that speech to those with a common interest in the subject matter is conditionally privileged). For an analysis of these privileged occasions, see KEETON ET AL., *supra* note 10, § 115, at 824-39. See generally Orrin B. Evans, *Legal Immunity for Defamation*, 24 MINN. L. REV. 607 (1940) (comparing different privileges).

from more than defamation actions. As new tort theories have emerged, courts have not hesitated to expand the privilege "to cover theories, actions, and circumstances never contemplated by those who formulated the rule in medieval England."<sup>73</sup> The purpose of such an expansion is to prevent plaintiffs from subverting the purposes of the defamation privilege by bringing actions on other legal theories. As a California court put it, "[t]he salutary purpose of the privilege should not be frustrated by putting a new label on the complaint."<sup>74</sup> Thus, courts have applied the privilege to bar causes of action for, among others, intentional infliction of emotional distress; interference with contractual relationship; fraud; invasion of privacy; abuse of process; and negligent misrepresentation.<sup>75</sup> As Mallen and Smith explain, "The privilege protects the *publication*. Thus, the nature of the theory is irrelevant. The inquiry is whether the publication is an essential element of the cause of action. If so, the privilege provides a complete defense."<sup>76</sup>

The most important factor in the broadening of the absolute privilege, however, has been neither the expansive reading of the term "judicial proceeding," nor the application of the privilege to other torts, but rather an exceedingly liberal construction of the necessary connection between the statement and the proceeding. The *Restatement* provides that the defamatory utterance must have "some reference to the subject matter of the proposed or pending litigation, although it need not be strictly relevant to any issue involved in it," meaning that only those statements that have "no connection whatever with the litigation" are unprivileged.<sup>77</sup> One commentator urges that "[i]n nearly all states the requirement of pertinence is easily met and any doubts about whether the statement is pertinent are resolved in the speaker's favor."<sup>78</sup> While this is largely true, the pertinence requirement remains the single most fruitful area for arguments that the privilege does *not* apply in a particular case. Statements made to parties with no connection to the proceedings, such as the

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<sup>73</sup> 2 MALLEN & SMITH, *supra* note 3, § 17.8, at 25-26.

<sup>74</sup> Thornton v. Rhoden, 53 Cal. Rptr. 706, 719 (Cal. Ct. App. 1966).

<sup>75</sup> See 2 MALLEN & SMITH, *supra* note 3, § 17.8, at 39-42 (citing dozens of cases from several states).

<sup>76</sup> *Id.* at 40-41.

<sup>77</sup> RESTATEMENT (SECOND) OF TORTS, § 586 cmt. c (1977).

<sup>78</sup> SACK, *supra* note 9, at 269; see also Greenberg v. Aetna Ins. Co., 235 A.2d 576, 577 (Pa. 1967) ("When alleged libelous or defamatory matters . . . are pertinent, relevant and material to any issue in a civil suit, there is no civil liability for making any of them. Moreover, . . . all reasonable doubts (if any) should be resolved in favor of relevancy and pertinency and materiality."), *cert. denied*, 392 U.S. 907 (1968); Jonathan M. Purver, Annotation, *Relevancy of Matter Contained in Pleading as Affecting Privilege Within Law of Libel*, 38 A.L.R.3d 272 (1971).

press for example, have been held unprivileged in some cases. A noteworthy example is *Green Acres Trust v. London*, a 1984 case from the Arizona Supreme Court.<sup>79</sup> The defendant lawyers in this case had held a press conference prior to filing a class action against the plaintiffs, saying among other things that Green Acres, a company that marketed prepaid funerals, had "bilked" thousands of people, violated various laws, and was being investigated by the state attorney general's office.<sup>80</sup> The supreme court found these statements unprivileged, on the ground that the newspaper reporter to whom the comments were made "lacked a sufficient connection to the proposed proceedings."<sup>81</sup>

American courts' current liberalized position on the required nexus between the statement and the proceedings represents a victory of sorts for what was known some decades ago as the "English rule" over the more restrictive "American rule."<sup>82</sup> Some older English cases did appear to require that the court in which the defamatory utterance was made have jurisdiction over the subject matter mentioned.<sup>83</sup> Early in the developmental period of the privilege, however, any notion that the court had to have jurisdiction over the subject matter of the utterance, or that the statement needed evidentiary

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<sup>79</sup> *Green Acres Trust v. London*, 688 P.2d 617 (Ariz. 1984).

<sup>80</sup> *Id.* at 620.

<sup>81</sup> *Id.* at 623; *see also* *Troutman v. Erlandson*, 593 P.2d 793, 794-95 (Or. 1979) (finding a letter to person with "no direct connection" to proceedings not privileged); *Converters Equip. Corp. v. Condes Corp.*, 258 N.W.2d 712, 717 (Wis. 1977) (concluding letters to persons unconnected to suit are unprivileged).

<sup>82</sup> *See* Van Vechten Veeder, *Absolute Immunity in Defamation: Judicial Proceedings (Part II)*, 9 COLUM. L. REV. 600, 603-07 (1909) (contrasting more liberal "English doctrine" with then-stricter "American doctrine").

<sup>83</sup> In the 1591 case of *Buckley v. Wood*, 76 Eng. Rep. 888 (K.B. 1591), a defendant in an action before the Star Chamber accused the plaintiff of libel for statements made in the petition filed with the court. The judges distinguished between statements that were at issue in the case and those that were not, saying that "for any matter contained in the bill that was examinable in the said Court no action lies, although the matter is merely false, because it was in a course of justice." *Id.* at 889. Matters outside the court's cognizance, however, were not protected by the privilege; as the court put it, "for the said words not examinable in the said Court, an action on the case lies, for that cannot be in a course of justice." *Id.* at 889-90. Another early case, *Weston v. Dobniet*, 79 Eng. Rep. 369 (1618), drew a similar distinction between allegations concerning matters before the court and statements about matters the court had no power to adjudicate, protecting the former but not the latter.

In his nineteenth century treatise on libel, Francis Ludlow Holt said that statements protected by the privilege were those "necessary to the course of legal proceedings, and relevant to a matter before a court." FRANCIS LUDLOW, *A TREATISE ON THE LAW OF LIBEL* 183 (1st Am. ed. New York, Stephen Gould 1818).



relevance to be protected, gradually fell away. The seeds of such a development had been long present, it seems. *Brook v. Montague*,<sup>84</sup> an early seventeenth century case involving a lawyer defendant, said the privilege would protect any statement "pertinent to the issue, or the matter in question." Similarly, in the seventeenth century case of *Lake v. King*, the court took the position that the absolute privilege attached even if the court did not have jurisdiction to decide the underlying matters which were alleged to be defamatory.<sup>85</sup>

The modern English formulation of the requisite connection between the statement and the proceedings is found most strikingly in the 1883 case of *Munster v. Lamb*.<sup>86</sup> There, Munster (who happened to be a barrister) owned a house that was burglarized by one William Hill, allegedly with the help of his wife Ellen, who gave the residents of the house drugged beer to make them drowsy.<sup>87</sup> At Ellen Hill's trial on this charge, she was represented by Lamb, who said in court that "I can believe that there may have been drugs in the house of Mr. Munster, and I have my own opinion for what purpose they were there, and for what they may have been used."<sup>88</sup> After Ellen Hill's acquittal, Munster sued Lamb for defamation, asserting that what Lamb meant to suggest by his remark was that Munster kept drugs in his house for criminal and immoral purposes.<sup>89</sup> The court of appeal found Lamb's remarks absolutely privileged, reaching that decision even assuming *arguendo* that Lamb spoke maliciously, "without any justification or even excuse, and from the indirect motive of personal ill-will or anger towards" Munster, and "that the words were irrelevant to every issue of fact which was contested in the court."<sup>90</sup> It was enough for the court that "the words were uttered with reference to, and in the course of, the judicial inquiry which was going on."<sup>91</sup> Relying heavily on Lord Mansfield's dictum in *Rex v. Skinner*,<sup>92</sup> the court said starkly, "With regard to counsel, the questions of malice, bona fides, and relevancy, cannot be raised; the only question is, whether what is complained of has been said in the course of the administration of the law. If that be so, the case against a counsel must be stopped at once."<sup>93</sup>

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<sup>84</sup> 79 Eng. Rep. 77 (1606).

<sup>85</sup> *Lake v. King*, 85 Eng. Rep. 137 (1679).

<sup>86</sup> 11 Q.B.D. 588 (1883).

<sup>87</sup> *Id.* at 590.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 590-91.

<sup>90</sup> *Id.* at 599.

<sup>91</sup> *Id.*

<sup>92</sup> 98 Eng. Rep. 529 (1772).

<sup>93</sup> *Munster*, 11 Q.B.D. at 605.

In the United States, early cases often required the defamatory statement to be relevant to the proceedings in order for the privilege to attach.<sup>94</sup> They did so on the ground that to hold otherwise was to grant lawyers a license to defame with impunity. As the Alabama Supreme Court said in an 1861 case, "we find numerous and conclusive authorities, which, in the clearest manner, put the qualification, that only those communications, occurring in the course of judicial proceedings, are absolutely privileged, which are relevant."<sup>95</sup> Protecting irrelevant statements, the court opined, "would license malignity to pervert judicial proceedings to the accomplishment of its wicked purposes."<sup>96</sup>

Courts rarely found lawyers' statements irrelevant, however, although a few did. One humorous example appears in the 1845 New York case of *Gilbert v. People*.<sup>97</sup> The lawyer for a plaintiff in an action for trespass, which alleged that the defendant had come onto the plaintiff's property and harmed his sheep, placed into court documents the assertions that "the defendant was subject and accustomed to biting and worrying sheep," that "said defendant is reported to be fond of sheep, bucks and ewes, and of wool, mutton and lambs," and calling for the defendant "to be hanged or shot."<sup>98</sup> For this bit of literary embellishment, the lawyer became a defendant in a libel action and invoked the absolute privilege. The New York Supreme Court found these statements outside the privilege, as not "pertinent and material to the controversy."<sup>99</sup> In the court's eyes, the declaration at issue contained

statements and insinuations which could not but have been intended to stir up the passions of the defendant in that suit, and to make him an object of dark suspicion as well as of ridicule and contempt. . . . These . . . suggestions . . . were in no respect relevant or material to the action, and obviously must have been thrown in to scandalize and annoy the defendant. What had the court to do with these alleged "reports" and "habits?" Certainly nothing.<sup>100</sup>

Over time, most American courts have come quite close to the English standard, requiring (as does the *Restatement*) only "some connection" between

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<sup>94</sup> See Veeder, *supra* note 82, at 605-07 (contrasting the "English doctrine" with the "American doctrine"); *Developments in the Law—Defamation*, 69 HARV. L. REV. 875, 922-23 & n.313 (1956) (citing cases and stating that the last American case to require evidentiary relevance for the privilege was decided in Montana in 1939).

<sup>95</sup> *Lawson v. Hicks*, 38 Ala. 279, 286 (1862).

<sup>96</sup> *Id.*

<sup>97</sup> 1 Denio 41 (N.Y. 1845).

<sup>98</sup> *Id.* at 42.

<sup>99</sup> *Id.* at 43.

<sup>100</sup> *Id.* at 44.

the defamatory statement and the proceedings.<sup>101</sup> Statements in pleadings, for example, have been protected if they have “any bearing upon the subject matter of the litigation.”<sup>102</sup> The lawyer in *Gilbert* might well find that today’s privilege protects him even if yesterday’s did not. A number of modern cases do continue to use the word “relevance,” but it seems clear on their surface that they mean “pertinent,” not relevant in an evidentiary sense.<sup>103</sup>

As this summary indicates, the litigator’s privilege to defame is remarkably broad. It protects lawyers effectively from many kinds of tort actions which otherwise might be brought against persons aggrieved by lawyers’ harmful and admittedly false statements. The privilege is “obviously inconsistent with the rule that a remedy should exist for every wrong.”<sup>104</sup> It just as obviously lessens societal protection of reputation, which Justice Stewart called “a concept at the root of any decent system of ordered liberty.”<sup>105</sup> The doctrine must rest on some strong policy rationales. Just how strong they are is explored below.

### III. RE-EXAMINING THE RATIONALES FOR THE PRIVILEGE

Over the years, courts and commentators have crafted various rationales in support of the litigator’s absolute privilege to defame. One sometimes finds the simple assertion that the policy rationales supporting the privilege are

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<sup>101</sup> See 2 MALLIN & SMITH, *supra* note 3, § 17.8, at 30–32; see also David W. Carroll, *Defamation—Absolute Immunity*, 15 OHIO ST. L.J. 330 (1954); James M. Johnson, *Libel and Slander—Immunity of Counsel for Defamatory Matter Published in a Judicial Proceeding*, 35 N.C. L. REV. 541 (1957). But see *Demopolis v. Peoples Nat’l Bank*, 796 P.2d 426, 430–31 (Wash. Ct. App. 1990) (holding statement made during recess impugning party’s credibility unprivileged because “not pertinent” to proceedings).

<sup>102</sup> *De Vivo v. Ascher*, 550 A.2d 163, 167 (N.J. Super. Ct. App. Div. 1988) (quoting RESTATEMENT (SECOND) OF TORTS § 587 cmt. c (1977)).

<sup>103</sup> See, e.g., *Ginsburg v. Black*, 192 F.2d 823, 825 (7th Cir. 1951) (noting the test was not one of legal relevance), *cert. denied*, 343 U.S. 934 (1952); *Hoover v. Van Stone*, 540 F. Supp. 1118, 1121 (D. Del. 1982) (finding that “relevance” means “some connection”); *Nix v. Sawyer*, 466 A.2d 407, 411 (Del. Super. Ct. 1983) (noting “relevance” not used as term of art); *Ponzoli & Wassenberg, P.A. v. Zuckerman*, 545 So. 2d 309, 310 (Fla. Dist. Ct. App. 1989) (finding defamatory statements privileged “so long as the statements uttered are connected with, or are relevant or material to the cause at hand or the subject of the inquiry” (quoting *Sussman v. Damian*, 355 So. 2d 809, 811 (Fla. Dist. Ct. App. 1977))).

<sup>104</sup> Veeder, *supra* note 40, at 465.

<sup>105</sup> *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring).

“obvious.”<sup>106</sup> Below, I explore four interrelated justifications that have been offered in support of the litigator’s absolute privilege to defame: first, that the privilege has such a long and consistent history that doctrinal stability compels its continuation; second, that it provides necessary protection for litigators for the sake of the “administration of justice”; third, that it protects litigators from pernicious inquiries into the good faith of factual assertions, and avoids embroiling lawyers in unnecessary subsidiary litigation concerning their advocacy; and fourth, that alternative remedies render defamation actions against litigators unnecessary.

Each rationale has something to commend it, of course, but each contains significant weaknesses. As to the first purported rationale, the privilege does in fact have a long history. Even setting aside centuries of English application, the privilege can be traced back in several states to the very beginnings of their jurisprudence. Doctrinal stability over time is a worthy value that tends to cut against revising a common-law rule, all other things being equal.<sup>107</sup>

Yet doctrinal stability alone does not justify maintenance of a common-law rule that fails to embody even more critically-important values. In his analysis of common-law adjudication (and thus, the process of change in the common law) Melvin Eisenberg has identified two such values: social congruence and systematic consistency. Eisenberg defines the “ideal of social congruence” as the notion that

the body of rules that make up the law should correspond to the body of legal rules that one would arrive at by giving appropriate weight to all applicable social propositions and making the best choices where such propositions collide. Attainment of this ideal helps assure that disputes will be resolved under, and law will be based upon, the society’s prevailing standards; harmonizes legal outcomes with the reasonable expectations of private actors; and furthers the legitimacy of the law by demonstrating its substantive rationality.<sup>108</sup>

This conception of the importance of social congruence is useful in assessing the second purported rationale for the privilege, which ultimately rests on the assertion that it promotes, rather than harms, the cause of justice. Thus when discussing this second rationale, specifically as reflected in the *Restatement’s*

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<sup>106</sup> See, e.g., THOMAS STARKIE, A TREATISE ON THE LAW OF SLANDER AND LIBEL 239 (Am. ed. Hartford, Conn., John L. Wendell 1858); WILLIAM BLAKE ODGERS, A DIGEST OF THE LAW OF LIBEL AND SLANDER 187 (1st Am. ed. Boston, Little, Brown and Co. 1881).

<sup>107</sup> MELVIN ARON EISENBERG, THE NATURE OF THE COMMON LAW 47 (1988).

<sup>108</sup> *Id.* at 44.

balancing test, broad considerations of competing social considerations, including moral and ethical concerns, are centrally relevant.

The common law's other critically important ideal, that of systematic consistency, means simply that "all the rules that make up the body of the law should be consistent with one another. Attainment of this ideal promotes predictability and evenhandedness and furthers the legitimacy of law by demonstrating its formal rationality."<sup>109</sup> This notion provides a useful analytical framework for the third and fourth purported rationales for the privilege: namely, that the privilege protects lawyers from searching inquiries into the motives behind their factual assertions, and that the privilege is superfluous because other remedies exist to deter the same conduct. As we will see, the existence of many coercive normative standards (including laws, procedural rules, and professional responsibility codes) that are *inconsistent* with the litigator's absolute privilege demonstrates that the privilege fails to serve the ideal of systematic consistency. And the "other remedies" rationale flies in the face of the ideal, admitting that there is inconsistency but touting it as a virtue in support of the privilege. Each of these four rationales is explored in more detail below.

#### A. *The Doctrinal Stability Rationale: The Privilege's Long History*

Early courts that criticized the absolute privilege for statements made in judicial proceedings sometimes applied it nonetheless on the ground that it was firmly established in the common law. One noteworthy example occurs in the 1838 case of *Torrey v. Field*,<sup>110</sup> from the Vermont Supreme Court, in which Justice Redfield wrote:

There is, in principle, no good reason why a suitor in a court should be permitted to publish slander with impunity, more than any other one, except so far as he may honestly believe . . . is necessary for the redress of his wrongs, and the obtaining of his just rights. . . . If the matter were *res integra*, we might be inclined to qualify this rule.<sup>111</sup>

But even in 1838, the matter was not *res integra*; instead, as an English court said a bit later about the coextensive absolute privilege for judges, it was viewed as "a matter *positivi juris*, as settled by decision and authority, rather

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<sup>109</sup> *Id.*

<sup>110</sup> 10 Vt. 353, 415 (1838).

<sup>111</sup> *Id.*

than as resting on sound or satisfactory principles."<sup>112</sup> Certainly, the privilege has a long history. But does longevity alone justify continued life? In this section, I look at the complicated and sometimes oblique early history of both defamation and the judicial proceedings privilege that protects lawyers from its sting. An exploration of this history provides insights into why, even before the United States Supreme Court further "complicated" defamation law with constitutional concerns, historians characterized the common law of defamation as being "as a whole, absurd in theory, and very often mischievous in its practical operation."<sup>113</sup>

### 1. *A Brief History of Defamation*

For centuries defamation has been regarded as wrongful conduct; the telling of harmful lies has long been condemned, on religious, moral, and legal grounds. The Bible, for example, is full of such condemnations. The Ninth Commandment forbids bearing "false witness" against a neighbor.<sup>114</sup> And as nineteenth century scholar Thomas Starkie said in his treatise on slander and libel,

there is . . . scarcely any offense which is more frequently alluded to in the psalms of David, or more strongly described in the energetic and figurative language of the east, than that of slander; whether it be for the purpose of characterizing the conduct as depraved and malicious men, of denouncing [sic] divine vengeance against them, or depicting the wretched and forlorn state of their unhappy victims[.]<sup>115</sup>

Ancient Roman law provided for stern punishment for defamers, ranging from monetary fines to imprisonment and death.<sup>116</sup> In England before the Norman Conquest, the Saxon King Alfred the Great (c. 871-899) commanded that a slanderer should be punished by having his tongue cut out, "unless he

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<sup>112</sup> Dawkins v. Paulet, 5 L.R.-Q.B. 93 (1869), *quoted in Veeder, supra* note 40, at 467 n.11.

<sup>113</sup> Van Vechten Veeder, *The History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546, 546 (1903).

<sup>114</sup> *Exodus* 20:16 (King James).

<sup>115</sup> STARKIE, *supra* note 106, at vii n.i (quoting eleven psalms and citing four others).

<sup>116</sup> HOLT, *supra* note 83, at 15-30.

redeemed it by the price of his head."<sup>117</sup> Statutes of Saxon Kings Edgar (c. 946-961) and Canute (c. 1027-1034) were to the same effect.<sup>118</sup>

In the years after the Norman Conquest of 1066, the Norman kings lessened these harsh punishments.<sup>119</sup> In this early period, defamation law was developed and applied in two distinct fora: local courts (including manorial courts) and ecclesiastical courts. Defamation cases were common in the local courts in the thirteenth and fourteenth centuries,<sup>120</sup> purporting to provide "substantial justice" for the "mass of humble folk."<sup>121</sup> Plaintiffs in these actions often claimed compensation not only for pecuniary damage caused by hard words,<sup>122</sup> but also for shame, or intangible harm to reputation.<sup>123</sup> The ecclesiastical courts, or "Courts Christian," provided the forum for defamation actions where money was not sought.<sup>124</sup> The two systems competed with one another for some time.<sup>125</sup> "The Church made wide claim of power to correct the sinner for his soul's health and within the scope of this broad assertion, along with the whole province of sexual morality, usury, and perjury, came defamation."<sup>126</sup> Neither the jurisdiction of the ecclesiastical courts nor the

<sup>117</sup> *Id.* at 32.

<sup>118</sup> THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 483 & n.1 (5th ed. 1956).

<sup>119</sup> MARTIN L. NEWELL, *THE LAW OF DEFAMATION, LIBEL AND SLANDER* 19 (Callaghan & Co. 1890).

<sup>120</sup> For a succinct, excellent discussion of the development of defamation law in local courts, based on a study of court records, see R.H. HELMHOLZ, *SELECT CASES ON DEFAMATION TO 1600* xlviiii-lxv (London 1985). See also Frank Carr, *The English Law of Defamation*, 18 L.Q. REV. 255, 263-67 (1902) (utilizing other primary sources).

<sup>121</sup> Veeder, *supra* note 113, at 549; see also FIFOOT, *supra* note 71, at 126 ("The surviving records of the thirteenth century show the local courts hard at work to secure redress for verbal and sometimes for written licence.").

<sup>122</sup> Fifoot cites cases from as far back as 1294 that made claims of "special damage" caused by defamatory utterances. FIFOOT, *supra* note 71, at 126 & n.4.

<sup>123</sup> 2 FREDERICK POLLOCK & FREDERICK WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 537 (2d ed. 1968).

<sup>124</sup> FIFOOT, *supra* note 71, at 126-27. For a more thorough modern description and analysis of the development of defamation law in the ecclesiastical courts before 1600, see HELMHOLZ, *supra* note 120, at xiv-xlvi.

<sup>125</sup> See FIFOOT, *supra* note 71, at 126-27 (calling the local and ecclesiastical courts "rivals" and discussing jurisdictional conflicts between the two); R.C. Donnelly, *History of Defamation*, 1949 WIS. L. REV. 99, 103-04 (stating that "jurisdictional difficulties and conflicts" arose between the spiritual and temporal courts).

<sup>126</sup> Donnelly, *supra* note 125, at 104. The ecclesiastical courts apparently coined the term "diffimation" for the class of injuries caused by "[r]eproachful language which lessened one's good name." *Id.* Plucknett further explains:

remedies it could offer were clear;<sup>127</sup> “[t]he scope of the ecclesiastical jurisdiction remained in dispute throughout the middle ages.”<sup>128</sup> The standard penalty in the ecclesiastical courts was for the defamer to acknowledge the “baselessness of the imputation.”<sup>129</sup> The offending person “announced that he had defamed the plaintiff and therefore begged pardon and forgiveness, first of God and then of the person defamed.”<sup>130</sup> If the defamation was public, so was the announcement; if the defamation had occurred in a more private place, the “penance was done in the house of the person defamed, of the minister, or of some neighbor.”<sup>131</sup> The guilty party made his apologies “[w]rapped in a white shroud and holding a lighted candle while kneeling.”<sup>132</sup> If the guilty party failed to make such amends, the church could excommunicate him, and the ecclesiastical court was also empowered to order a seizure of the goods of any defamer who refused to do penance.<sup>133</sup>

The royal courts, or “King’s courts,” also heard cases of defamation at least as early as the thirteenth century,<sup>134</sup> although ecclesiastical courts handled most defamation cases until early in the sixteenth century.<sup>135</sup> There were only three defamation actions reported in the King’s courts during the reign of Edward IV (1471-1483); one during the reign of Henry VII (1485-1509); and

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[T]he very word “defamation” is a technical term in church law, signifying that evil reputation which is sufficiently notorious to put a man on his trial. . . . The *diffmatus* is thus a person whose reputation is so bad that it serves as an accusation; but if as a result of the trial he is acquitted, then clearly his ill-fame was unfounded, and those who spread the calumny have themselves committed crime . . . .

PLUCKNETT, *supra* note 118, at 484.

<sup>127</sup> See HELMHOLZ, *supra* note 120, at xxxviii-xli (discussing remedies), xli-xlvii (discussing jurisdiction).

<sup>128</sup> FIFOOT, *supra* note 71, at 127.

<sup>129</sup> Donnelly, *supra* note 125, at 104.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> Colin Rhys Lovell, *The “Reception” of Defamation by the Common Law*, 15 VAND. L. REV. 1051, 1055 (1962).

<sup>133</sup> *Id.*

<sup>134</sup> See PLUCKNETT, *supra* note 118, at 485 (providing a discussion of applicable cases); *see, e.g.*, Donnelly, *supra* note 125, at 106-07.

<sup>135</sup> Donnelly, *supra* note 125, at 106 (noting that it was not “the practice’ to bring defamation [actions] before the royal courts” prior to the sixteenth century, although these courts would hear cases “where one of the parties was a royal official or belonged to a class of persons over which royal jurisdiction extended”).



five during the reign of Henry VIII (1509-1547).<sup>136</sup> During this formative period, another official forum was available to the royalty and upper classes who claimed to have been defamed.<sup>137</sup> In 1275, the first of a series of statutes known as *scandalum magnatum* (or the slander of magnates) was enacted, creating criminal penalties for publishing false news or scandal tending to produce discord between “the King and his People, or Great Men of this Realm.”<sup>138</sup> These statutes were administered in the Star Chamber, a court presided over by the King’s Council sitting without a jury.<sup>139</sup> The Star Chamber punished defamation severely, by “imprisonment, pillory, fine, whipping, loss of ears, and brands in the face.”<sup>140</sup> The *scandalum magnatum* statutes were re-enacted in 1554 and 1559, extending jurisdiction over violations to justices of the peace,<sup>141</sup> and around the middle of the sixteenth century, civil remedies began to develop for violation of the *scandalum magnatum* statutes.<sup>142</sup>

Following the waning of the local courts’ jurisdiction over defamation actions at the turn of the fifteenth century,<sup>143</sup> the royal common-law courts began to entertain more defamation cases, competing with the ecclesiastical courts for jurisdiction.<sup>144</sup> Canon law soon “lost most of its jurisdiction because

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<sup>136</sup> HOLT, *supra* note 83, at 34 n.f; Carr, *supra* note 120, at 388 (reporting that between 1327 and 1547, there are only ten defamation cases in the Year Books of the royal courts); Veeder, *supra* note 113, at 556.

<sup>137</sup> There was also the alternative dispute resolution technique of duelling, which was apparently commonly employed by noblemen during this period. As Holt puts it:

The people of England in that age were a military people. The offices of the law were in a great measure superseded by the imagined obligations of chivalry. It was a point of honour with every one to be sufficient for his own defence, and to assert and avenge his honour, and personal rights, by his sword.

HOLT, *supra* note 83, at 34; *see also* Lovell, *supra* note 132, at 1061 (discussing Star Chamber as an alternative remedy to duelling among upper-class litigants).

<sup>138</sup> 3 Edw. 1, c. 34, (1275) (Eng.), *quoted in* Donnelly, *supra* note 125, at 108.

<sup>139</sup> Donnelly, *supra* note 125, at 109.

<sup>140</sup> HOLT, *supra* note 83, at 40 (citing Coke, 3 Inst. 220).

<sup>141</sup> PLUCKNETT, *supra* note 118, at 486.

<sup>142</sup> *Id.*

<sup>143</sup> HELMHOLZ, *supra* note 120, at lviii (“By 1400 the local courts had lost their jurisdiction over civil actions for defamation.”).

<sup>144</sup> 8 HOLDSWORTH, *supra* note 62, at 335; *see also* PLUCKNETT, *supra* note 118, at 496–97 (discussing the impact of the abolition of the Star Chamber on the development of defamation law).

of the inadequacy and uncertainty of its remedies for middle-class people."<sup>145</sup> Gradually the common-law courts took over most cases of defamation<sup>146</sup> and by middle-to-late sixteenth century they commonly entertained such actions.<sup>147</sup> The seventeenth century saw the abolition of the Star Chamber (1641) and of the ecclesiastical courts' power to adjudicate defamation cases (1640), leaving further development of defamation law squarely in the hands of the royal common-law courts.<sup>148</sup>

Thus, "[u]nfortunately the English law of defamation is not the deliberate product of any period. It is a mass which has grown by aggregation, . . . and special and peculiar circumstances have from time to time shaped its varying course."<sup>149</sup> It is from this tortured English background, full of "meaningless and grotesque anomalies,"<sup>150</sup> that defamation law came into the United States. While early colonial law reflected sources other than the English common law,<sup>151</sup> in general the "English element [in American law] became, perhaps, stronger and more standardized" in the eighteenth century.<sup>152</sup> Indeed, as Lawrence Friedman reports, "One rhetorical pillar of the men of 1776 was that the [English] common law embodied fundamental norms of natural law."<sup>153</sup> The first Continental Congress adopted a Declaration of Rights in 1776 stating that the Colonies were "entitled to the common law of England."<sup>154</sup> Lawyers in the early years of American history used English law books, especially

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<sup>145</sup> Lovell, *supra* note 132, at 1066.

<sup>146</sup> For a clear analysis of many aspects of the development of defamation law in the royal courts between 1500 and 1600, based on court records, see HELMHOLZ, *supra* note 120, at lxxxvi-cxi.

<sup>147</sup> 8 HOLDSWORTH, *supra* note 62, at 335 (discussing the "flood of litigation" of defamation cases in the king's courts during this period); Lovell, *supra* note 132, at 1064 (noting the "inundation" of the common-law courts with slander actions "in the latter part of the 16th century"); Veeder, *supra* note 113, at 557 (noting that defamation cases became common in the king's courts during the reigns of Elizabeth I, James I, and Charles I, saying that "the reports teem with such cases"). Helmholz is more guarded in his language, noting a marked increase in defamation cases decided in the King's Bench in Hilary Terms from 1562 (nine cases) to 1598 (71 cases), which he calls "a story of growth that is impossible to dispute." HELMHOLZ, *supra* note 120, at lxxxvi-lxxxvii.

<sup>148</sup> Lovell, *supra* note 132, at 1067-68.

<sup>149</sup> Veeder, *supra* note 113, at 546.

<sup>150</sup> *Id.*

<sup>151</sup> LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW 33-35 (2d ed. 1985).

<sup>152</sup> *Id.* at 36.

<sup>153</sup> *Id.* at 109.

<sup>154</sup> *Id.*

English practice manuals,<sup>155</sup> increasing the influence of English law in the new nation.

The earliest American editions of defamation treatises invariably begin by stressing the overriding importance of reputation. In 1818, Holt characterized maintaining one's reputation as an absolute natural right that must be protected for the sake of other rights, calling it "not only one of our perfect rights, but that which alone gives a value to all our other rights; the integrity of our honour and character being one of the chief instruments of temporal prosperity and success."<sup>156</sup> Starkie echoed these sentiments in his widely-cited 1830 work: "The right, then, of every man to the character and reputation which his conduct deserves, stands on the same footing with his right to the enjoyment of life, liberty, health and property. . . . [S]ecurity to character and reputation are indispensably essential to the enjoyment of every other right and privilege."<sup>157</sup> And William Blake Odgers, on page one of the first American edition of his 1881 treatise, wrote that "[e]very man has a right to have his good name maintained unimpaired," calling this right "absolute and good against all the world."<sup>158</sup> While this emphasis on natural law may have abated in modern times, today's scholars have recognized that "[t]hrough centuries of vast legal experiment, the idea that wrongful injurious accusations deserve judicial attention has changed little, and its rationale not at all."<sup>159</sup>

## 2. *The Birth of the Litigator's Absolute Privilege*

Recognizing an "absolute" right to reputation, however, has never been an impediment to seeing the virtues of an absolute privilege. The same early treatise writers quoted above recognized that at times, an invasion of the natural right to reputation could not, and perhaps should not, be actionable because of the forum in which the words were spoken and the role of the speaker. One such instance occurs when utterances are made by a participant in a judicial proceeding. Thus, Holt noted without criticism that "[n]othing . . . is to be construed a libel which is necessary to the course of legal proceedings, and relevant to a matter before a court."<sup>160</sup> Starkie reported that "[t]he law, also, without regard to the question of intention, and on grounds of obvious policy,

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<sup>155</sup> *Id.* at 102.

<sup>156</sup> HOLT, *supra* note 83, at 15.

<sup>157</sup> STARKIE, *supra* note 106, at 240.

<sup>158</sup> ODGERS, *supra* note 106, at 1.

<sup>159</sup> SANFORD, *supra* note 9, at 23.

<sup>160</sup> HOLT, *supra* note 83, at 183.

repels the claim to damages in respect of any publication duly made in the ordinary course of a . . . judicial proceeding.”<sup>161</sup> And Odgers reported that “[n]o action will lie for defamatory statements made or sworn in the course of a judicial proceeding . . . . This immunity rests on obvious grounds of public policy and convenience.”<sup>162</sup>

The history of the litigator’s privilege to defame goes back almost as far as the English defamation action itself. Its origins can perhaps be traced to an even earlier English development, that of the writ of prohibition *de diffamatione*, which was a royal court writ to prevent the ecclesiastical courts from hearing a particular defamation case.<sup>163</sup> Donnelly explains that these writs were frequently used during the thirteenth and fourteenth centuries to bar

actions of defamation [that] were brought in the ecclesiastical courts for accusations made or evidence given in a royal court proceeding. The royal courts felt that statements made in the course of their proceedings were so exclusively of their jurisdiction that they could not be considered as grounds for an action in an ecclesiastical court.<sup>164</sup>

Two statutes, the Statute of *Circumspecte Agatis* of 1285 and the Statute *Articuli Cleri* of 1295, were passed to limit the issuance of the writs of prohibition, but another statute was passed in 1327 nullifying the effect of these two enactments on defamation actions.<sup>165</sup> While these writs were largely

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<sup>161</sup> STARKIE, *supra* note 106, at 239.

<sup>162</sup> ODGERS, *supra* note 106, at 186–87.

<sup>163</sup> For a full history of this writ, see Norma Adams, *The Writ of Prohibition to Court Christian*, 20 MINN. L. REV. 272 (1936).

<sup>164</sup> Donnelly, *supra* note 125, at 105; *see also* Adams, *supra* note 163, at 290–91 (citing such a use of the writ in 1254, and finding a 1279 case protecting from an ecclesiastical defamation action a juror who had made damaging statements in an inquest).

<sup>165</sup> FIFOOT, *supra* note 71, at 127; Donnelly, *supra* note 125, at 105. The relevant text of the 1327 statute provides:

The commons do grievously complain, that when divers persons, as well as Clerks and Lay People have been indicted before Sheriffs in their Turns, and after by Inquests procured, be delivered before the Justices! . . . (2) after their deliverance they do sue in the Spiritual Court against such Indictors, surmising against them that they have defamed them, . . . (3) the King will, That in such Case every Man that feeleth himself grieved thereby, shall have a Prohibition formed in the Chancery upon his Case.

1 Edw. 3, Statute 1, c. 11 (1275) (Eng.), *quoted in* Donnelly, *supra* note 125, at 105 n.25.

jurisdictional in purpose,<sup>166</sup> they seem to share one of the original goals of the absolute privilege for statements made in judicial proceedings—to insure the effective functioning of the court system, by specifically protecting those who bring allegations against others as part of the court process—and thus may be seen as a related historical antecedent to the absolute privilege.<sup>167</sup> Holdsworth reports a famous fifteenth century case (which he calls an “odd tale”) in which the royal court issued a writ of prohibition, barring a defamation action by the Abbot of St. Albans in the ecclesiastical court against a man who had accused the Abbot of falsely imprisoning his wife; the Abbot had allegedly “detained her in his chamber, and solicited her chastity without success.”<sup>168</sup>

That such a defamation theory would be used by those accused and acquitted of crimes should not be surprising, given that an allegation of criminality was the most common defamatory statement of the time.<sup>169</sup> Holdsworth reports that imputing a criminal offense punishable by imprisonment is “probably the oldest” category of words actionable per se—that is, for which damage and malice would be presumed merely by the fact of publication.<sup>170</sup> He traces the development of this categorization of cases to the very kind of jockeying for jurisdiction that also produced the writs of prohibition:

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<sup>166</sup> See, e.g., Donnelly, *supra* note 125, at 104–05 (discussing the writs in a paragraph on “jurisdictional disputes” between royal and ecclesiastical courts); Lovell, *supra* note 132, at 1059 (justifying the writs on the ground that the practice of bringing suit for defamation in the ecclesiastical courts against members of the grand jury which had indicted someone “could stultify royal criminal jurisdiction”).

The United States Supreme Court has noted that writs of prohibition “were particularly useful in exercising collateral control over the ecclesiastical courts, since the King’s Bench exercised no direct review over those tribunals.” *Pulliam v. Allen*, 466 U.S. 522, 533 (1984) (noting such in a judicial immunity case).

<sup>167</sup> See 3 HOLDSWORTH, *supra* note 62, at 411 (1923) (speaking of the writ of prohibition, remarking, “In self-defence, then, the courts of common law would prohibit certain actions for defamation.”).

<sup>168</sup> *Id.* at 410–11.

<sup>169</sup> HELMHOLZ, *supra* note 120, at lxxxviii (“A working assumption in the second half of the sixteenth century would have been that in order to be actionable, slanderous words must tend to subject a plaintiff to the corporal penalties of the criminal law.”); 8 HOLDSWORTH, *supra* note 62, at 347–48 (saying that imputing crime to another is the oldest form of defamatory utterance); Lovell, *supra* note 132, at 1055 (“Canon law knew that however unfortunate and wrong bad language might be, it was not defamatory unless and until it made allegations of a crime cognizable by it.”).

<sup>170</sup> 8 HOLDSWORTH, *supra* note 62, at 348.

[C]ourts were trying to distinguish the defamatory words which would be actionable in the common law courts, from those which were actionable only in the ecclesiastical courts. The test hit upon was contained in the question whether the offence charged was punishable in the common law courts or in the ecclesiastical courts. If one called another thief or traitor, the offence charged was punishable in the common law courts, and therefore an action for such defamation lay in those courts. If, on the other hand, one called another "heretic and one of the new learning," or adulterer, the offence charged was "merely spiritual," and no action lay at common law.<sup>171</sup>

Donnelly similarly reports that the "imputation of a crime was the first of the categories of words actionable per se to be developed, and was due to the attempt to cull out the defamatory words which would be actionable in the common law courts from those actionable in the ecclesiastical courts."<sup>172</sup> Thus, he concludes, the very categories of defamation that crystallized in this period of the English common law "were not developed on theoretical grounds or pursuant to any general principle but merely as practical expedients for extending jurisdiction."<sup>173</sup>

A modern lawyer faced with such a developing doctrinal conception, regardless of its rationale, would surely think to argue that a client brought to trial and acquitted of a crime had been defamed by those who made the accusation. The earliest case reports seem to indicate that such a theory occurred to many litigants at the turn of the sixteenth century, and that courts ultimately responded to such a theory by fashioning what we now know as the absolute privilege. Indeed, this appears to be the precise situation in one of the earliest English-language cases applying the absolute privilege, *Beauchamps v. Croft*,<sup>174</sup> which was decided in 1497, during the reign of Henry VII.<sup>175</sup> Lord

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<sup>171</sup> 8 *Id.* at 348.

<sup>172</sup> Donnelly, *supra* note 125, at 111.

<sup>173</sup> *Id.*

<sup>174</sup> 73 Eng. Rep. 639 (Q.B. 1497).

<sup>175</sup> There is apparent inconsistency in secondary sources over the date of the *Beauchamps* case, and because it is one of the earliest, if not the earliest, English case applying the privilege, determining its date holds some inherent interest. Holdsworth dates it 1569. 8 HOLDSWORTH, *supra* note 62, at 376. Plucknett, citing the case as the earliest example of the privilege's appearance in the common law, also dates it 1569. PLUCKNETT, *supra* note 118, at 497 & n.3. Donnelly, however, dates the case 1497. Donnelly, *supra* note 125, at 109 & n.48.

The text of the reported case itself seems to resolve any apparent conflict, however; the case was actually decided in 1497. The relevant portion reads:

Beauchamps sued Sir Richard Croft and others, alleging that he was defamed by statements in a writ Croft had filed with the court accusing him of forgery. The court found for the defendants, saying “the matter of justification is good, and out of the intention of the law . . . ; for no punishment was ever appointed for a suit in law, however it be false, and for vexation.”<sup>176</sup>

The principle stated in the *Beauchamps* case was reiterated in sixteenth century cases to bar persons who had been accused of crimes from suing their accusers for defamation. For example, in *Cutler v. Dixon*, a 1585 King’s Bench decision, the defendant had filed a petition alleging “divers great abuses and misdemeanors” by the plaintiff, yet no defamation action was permitted because the document was offered in the “ordinary course of justice.”<sup>177</sup> And in the 1591 King’s Bench case of *Buckley v. Wood*, Wood had previously sued Buckley in the Star Chamber charging him with various offenses, and also with being “a maintainer of pirates and murderers, and a procurer of murders and piracies,” among other things; Buckley then sued Wood for defamation.<sup>178</sup> Relying on *Beauchamps v. Croft* and *Cutler v. Dixon*, the judges decided that “for any matter contained in the bill that was examinable in said Court, no action lies, because it was in course of justice.”<sup>179</sup>

The rationale behind these earliest cases seems clear: the need to protect criminal complainants from retaliatory defamation suits, lest no one bring such

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Memorandum, That in *Michaelmas* Term, in the 13th year of Henry 7. in an action of *scandalum magnatum*, brought by Lord B. against Sir Richard C. and others in C.B. the case was, that the said Sir *Richard* had sued a writ of forger of false deeds against the said Lord B. pending which writ undetermined, nor tried, the said Lord B. for the slander of the said forgery by the said suit, brought his said action of *scandalum magnatum*, supporting the slander on the 12th day of *March*, in the twelfth year of *Hen. 7.* And the defendant justified the said slander by the user of the said writ, which was commenced before, s. on such a day in the eleventh year of the King &c. with a conclusion in his plea, “*which is the said slander*” &c.

*Beauchamps v. Croft*, 73 Eng. Rep. 639 (Q.B. 1497).

Henry VII ruled England from 1485 to 1509, so the thirteenth year of his reign—which is when the report says the case was decided—would be 1497, as Donnelly states. Holdsworth and Plucknett were apparently using the *publication date* of the case report in Dyer’s Reports, which is captioned at the top of the page “Trinity Term, 11 Queen Elizabeth,” meaning the eleventh year of Elizabeth I’s reign, or 1569. In dating the case myself, I have chosen to follow the modern American custom of dating cases according to their date of decision rather than the date of the volume in which they are reported.

<sup>176</sup> *Beauchamps*, 73 Eng. Rep. at 639.

<sup>177</sup> *Cutler v. Dixon*, 76 Eng. Rep. 886, 887 (K.B. 1585).

<sup>178</sup> *Buckley v. Wood*, 76 Eng. Rep. 888, 888 (K.B. 1591).

<sup>179</sup> *Id.* at 889.

allegations simply for fear of being sued. Indeed, the court in *Cutler v. Dixon* recognized this, saying that "if actions should be permitted in such cases, those who have just cause for complaint, would not dare to complain, for fear of infinite vexation."<sup>180</sup> This is not to say that a defamation privilege, absolute or otherwise, was "well-developed" in any clear sense by this time. As Helmholz explains, a number of cases prior to 1600

raised defenses which approximate the modern law of privilege. But this is probably an anachronistic term for the sixteenth century. It implies there was an acknowledged body of law defining situations in which speech was privileged. There was not. Instead what was available was a form of pleading which allowed the defendant to tell his side of the story and to attempt to show that he had not spoken the words maliciously.<sup>181</sup>

The seventeenth century saw the judicial proceedings privilege applied specifically and unambiguously<sup>182</sup> to counsel, and it is in these cases where we first see the privilege justified on the ground that the lawyer needs a privilege to protect the client's interests. In the leading case of *Brook v. Montague*, the court said that "a counsellor in law retained hath a privilege to enforce any thing which is informed him by his client, and to give it in evidence, it being pertinent to the matter in question, and not to examine whether it be true or false."<sup>183</sup> The lawyer defendant in *Brook* was alleged to have said in open court that the plaintiff had been convicted of a felony, in an apparent attempt to discredit the plaintiff's testimony in that trial. In plaintiff's suit against defendant for slander, defendant prevailed on the ground that "if a counsellor object matter against a witness which is slanderous, if there can be cause to discredit his testimony, and it be pertinent to the matter in question, it is

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<sup>180</sup> *Cutler*, 76 Eng. Rep. at 887-88.

<sup>181</sup> HELMHOLZ, *supra* note 120, at cx. To illustrate this point, Helmholz discusses the case of *Croke v. Grene*, decided in the King's Bench in 1559, in which the plaintiff sued the defendant for imputing a crime to him, the defendant having told the sheriff that he suspected the plaintiff of having stolen his horse. HELMHOLZ, *supra* note 120, at cx. The defendant, according to Helmholz, "was careful to spell out his reasons" for so speaking, but "that he had spoken as part of sworn legal proceedings was not irrelevant. Rather, with the other facts, it tended to show that he had not *maliciously* imputed a crime to the plaintiff and hence should not be found liable." *Id.* (emphasis added).

<sup>182</sup> I use the term "unambiguously" advisedly. It is not always easy to tell in the early English cases whether an action is against a lawyer or a litigant. As a New York judge said in 1839 of these very cases, "Many of these old cases are very imperfectly recorded, and are therefore apt to mislead us, unless they are examined with care." *Hastings v. Lusk*, 22 Wend. 410, 419 (N.Y. 1839).

<sup>183</sup> *Brook v. Montague*, 79 Eng. Rep. 77, 77 (K.B. 1606).



justifiable . . . although it be false.”<sup>184</sup> The same result was reached in *Hugh’s Case*,<sup>185</sup> from 1621. Sir Thomas Hughs, acting as a lawyer in litigation, had said in court that the plaintiff had murdered three children; when Hughs was sued by the plaintiff the court found for the lawyer on the ground that this utterance “was in his profession, and pertinent to the good and safety of his client, though it were not directly to the issue . . . .”<sup>186</sup> And in *Wood v. Gunston*, the court held that “if a counseller speak scandalous words against one in defending his clyent’s cause, an action doth not lie against him for so doing, for it is his duty to speak for his clyent, and it shall be intended to be spoken according to his clyent’s instructions.”<sup>187</sup>

Beyond protecting clients, however, the privilege may have been forged in part to serve less lofty goals. In delving into the history of the privilege, one cannot discount larger trends in defamation law at the time that might have been influential. Holdsworth reports that “at the beginning of the seventeenth century, the flood of . . . actions of defamation was so overwhelming that the judges thought it necessary to do all that they could to discourage them.”<sup>188</sup> Plucknett, too, asserts that “the common law courts were dismayed at the mass of slander cases which came before it,” and argues that they “deliberately debased the quality of the law in order to stem the demand.”<sup>189</sup> Whether or not judges actually had in mind the particular goal of restricting some plaintiffs’ access to the courts, we must recognize that the absolute privilege had—and has—that very effect. In any event, it seems likely that such an effect was seen not as a negative, but rather as a highly desirable aspect of the privilege early in its development.

The seed of the privilege, then, could be traced back almost 300 years by the time of Lord Mansfield’s 1772 announcement of what has been labeled the “comprehensive rule”:<sup>190</sup> “[N]either party, witness, counsel, jury, or Judge can be put to answer, civilly or criminally, for words spoken in office.”<sup>191</sup> Mansfield’s statement of the rule was apparently considered good law on both sides of the Atlantic, which should not be surprising because in the early years of American independence Mansfield was “[o]ne of the cultur[al] heroes of the American legal elite.”<sup>192</sup>

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<sup>184</sup> *Id.* at 78.

<sup>185</sup> 80 Eng. Rep. 470 (1621).

<sup>186</sup> *Id.*

<sup>187</sup> *Wood v. Gunston*, 82 Eng. Rep. 863 (1655).

<sup>188</sup> 8 HOLDSWORTH, *supra* note 62, at 353.

<sup>189</sup> PLUCKNETT, *supra* note 118, at 495.

<sup>190</sup> Veeder, *supra* note 40, at 474.

<sup>191</sup> *Rex v. Skinner*, 98 Eng. Rep. 529, Lofft 55, 55 (1772).

<sup>192</sup> FRIEDMAN, *supra* note 151, at 109.

American lawyers freely cited the early English privilege cases, and American judges relied upon the English common-law privilege rules in the earliest reported American cases. For example, in *McMillan v. Birch*,<sup>193</sup> an 1806 case from the Pennsylvania Supreme Court, the defendant's counsel cited<sup>194</sup> the sixteenth century cases of *Cutler v. Dixon*<sup>195</sup> and *Buckley v. Wood*,<sup>196</sup> the seventeenth century cases of *Brook v. Montague*<sup>197</sup> and *Weston v. Dobniet*,<sup>198</sup> and Lord Mansfield's opinion in *Astley v. Younge*.<sup>199</sup> In the 1807 case of *Badgley v. Hedges*,<sup>200</sup> from the New Jersey Supreme Court, the lawyers cited, in addition to *Astley v. Younge*,<sup>201</sup> the seventeenth century cases of *Wood v. Gunston*<sup>202</sup> and *Weston v. Dobniet*.<sup>203</sup> Counsel argued many of these same cases in the 1809 New York case of *Thorn v. Blanchard*,<sup>204</sup> and added Chief Justice Hales's opinion in the 1679 case of *Lake v. King*;<sup>205</sup> the New York Chancellor discussed the cases, and expressly relied on the 1591 case, *Buckley v. Wood*,<sup>206</sup> calling it "dictated by sound principles of law, and solid sense" and "very apposite to this case."<sup>207</sup> The defendant's lawyer in an 1839 case from Vermont, *Mower v. Watson*,<sup>208</sup> cited most of these early cases<sup>209</sup> as well as the fifteenth century case, *Beauchamps v. Croft*,<sup>210</sup> the judge, after saying that an earlier Vermont decision, *Torrey v. Field*,<sup>211</sup> controlled, nevertheless went on to discuss *Buckley v. Wood*<sup>212</sup> and the more recent English case of *Hodgson v. Scarlett*.<sup>213</sup> The list could go on and on; one finds the oldest English privilege cases cited with approval in American cases

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<sup>193</sup> 1 Binn. 178 (Pa. 1806).

<sup>194</sup> *Id.* at 181-82.

<sup>195</sup> 76 Eng. Rep. 886 (K.B. 1585).

<sup>196</sup> 76 Eng. Rep. 888 (K.B. 1591).

<sup>197</sup> 79 Eng. Rep. 77 (K.B. 1606).

<sup>198</sup> 79 Eng. Rep. 369 (K.B. 1618).

<sup>199</sup> 97 Eng. Rep. 572 (K. B. 1759).

<sup>200</sup> 2 N.J.L. 217, 219 (N.J. 1807).

<sup>201</sup> 97 Eng. Rep. 572.

<sup>202</sup> 82 Eng. Rep. 863 (K.B. 1655).

<sup>203</sup> 79 Eng. Rep. 369 (K.B. 1618).

<sup>204</sup> 5 Johns. 508 (N.Y. 1809).

<sup>205</sup> 85 Eng. Rep. 137 (K.B. 1679).

<sup>206</sup> 76 Eng. Rep. 888 (K.B. 1591).

<sup>207</sup> *Thorn*, 5 Johns. at 526.

<sup>208</sup> 11 Vt. 536 (1839).

<sup>209</sup> *Id.* at 538.

<sup>210</sup> 73 Eng. Rep. 639 (Q.B. 1497).

<sup>211</sup> 10 Vt. 353 (1838).

<sup>212</sup> 76 Eng. Rep. 888 (K.B. 1591).

<sup>213</sup> 171 Eng. Rep. 362 (C.P. 1817).

even after our Civil War.<sup>214</sup> Gradually, of course, American courts came to rely on American precedents, but the early English law still exerts a strong influence, and it is not possible to assess the modern American privilege without taking account of that influence.

Certainly, then, the litigator's privilege to defame has a long, if not unambiguous, history dating back to medieval times, and this is a significant point in favor of its continued application. Where a rule has a long history, people rely on it. They expect it to remain the rule. They expect that similarly situated people will be treated alike over time. This, of course, is one of the underpinnings of our *stare decisis* system.<sup>215</sup> The argument that courts should never change a long-established common-law rule, of course, reflects arch conservatism to the maximum possible degree. Judge George Sharswood, the author of one of the first American ethics treatises, wrote in the mid-nineteenth century that "when a decision has been long acquiesced in, when it has been applied in numerous cases, and become a landmark in the branch of the science to which it relates, . . . though it may appear to us 'flatly absurd and unjust,' to overrule such a decision is an act of positive injustice . . ." <sup>216</sup> Perhaps we could respond to Sharswood's argument by attacking the rationality of the privilege on purely historical grounds, pointing primarily to the fact that the privilege arose in England partially in response to conditions never present in this country—most notably, the competition between ecclesiastical and royal courts<sup>217</sup> and an overt desire to limit defamation actions which were clogging the courts.<sup>218</sup> Thus, we could argue, early American courts erred from the outset in relying on sixteenth and seventeenth century cases decided in such a different context, and later American courts have erred in failing to correct this original sin. The primary weakness in such an argument, it seems, is not that it is false but that it is too true. Undoubtedly, similar arguments could be mounted against almost every common-law rule now applied by American courts, but clearly it would be folly to overturn every such rule on that ground

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<sup>214</sup> See, e.g., *Marsh v. Elsworth*, 36 How. Pr. 532, 535 (N.Y. Sup. Ct. 1869) (citing *Brook v. Montague*, 79 Eng. Rep. 77 (K.B. 1606)); *Commonwealth v. Godshalk & Weaver*, 13 Phila. 575 (Pa. Ct. of Qtr. Sessions 1877) (citing, *inter alia*, *King v. Creevy*, 105 Eng. Rep. 102 (K.B. 1813); *King v. Lord Aberdeen*, 170 Eng. Rep. 337 (K.B. 1794); *Lake v. King*, 85 Eng. Rep. 128, 1 Saunders 120 (K.B. 1667-1669)).

<sup>215</sup> See EISENBERG, *supra* note 107, at 47-49. See generally EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 1-27 (1949) (discussing the concept of *stare decisis* in the common law).

<sup>216</sup> GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 42 (5th ed. 1907) (1854).

<sup>217</sup> See *supra* notes 143-48, 163-73 and accompanying text.

<sup>218</sup> See *supra* notes 188-89 and accompanying text.

alone. Such an historical argument has real force only where the rule as *presently* applied also fails to serve our present needs. As Judge Jerome Frank said, after discussing the rigid nineteenth century view of *stare decisis*, "The judicial practice of adhering to a rule embodying an unjust policy seems itself to be a policy—a policy of doing injustice."<sup>219</sup> Whether the litigator's absolute privilege to defame embodies unjust policy is our next inquiry.

### B. *Balancing "Justice" on the Scales: The Restatement's Rationale*

The *Restatement of Torts* explains that the various privileges to defame, generally speaking, "are based upon a policy that treats the ends to be gained by permitting defamatory statements as outweighing the harm that may be done to the reputation of others."<sup>220</sup> The *Restatement* then briefly specifies these ends to be gained: the litigator's absolute privilege "is based upon a public policy of securing to attorneys as officers of the court the utmost freedom in their efforts to secure justice for their clients."<sup>221</sup>

An absolute privilege can be justified only by *strong* policy rationales; that is, in a balancing test the scales should tip strongly, not merely slightly, in favor of the interests favoring the privilege. An early scholar said that absolute immunity applies to only those cases "in which the public benefits of free communication are so great that immunity must be granted however serious may be the individual injury, one overshadowing the other to such an extent that only the public interest can be regarded."<sup>222</sup> One modern commentator puts the matter more strongly, saying "a heavy burden of justification should be placed on any who would claim privilege or immunity, and any doubt should be resolved in favor of denial of the claim."<sup>223</sup> Prosser similarly maintains that the absolute privilege must protect interests of "paramount importance" to be legitimate.<sup>224</sup> Courts are generally in agreement on this point; as the Washington Supreme Court said in a recent case, "absolute privilege is afforded only if there exists some compelling policy justification."<sup>225</sup> Such conceptions seem to follow from the fact that, as Roscoe

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<sup>219</sup> JEROME FRANK, *COURTS ON TRIAL* 270 (1949).

<sup>220</sup> RESTATEMENT (SECOND) OF TORTS, ch. 25, tit. B, introductory note (1977).

<sup>221</sup> *Id.* § 586 cmt. a.

<sup>222</sup> Van Vechten Veeder, *Freedom of Public Discussion*, 23 HARV. L. REV. 413, 414 (1910).

<sup>223</sup> Richard K. Burke, *Privileges and Immunities in American Law*, 31 S.D. L. REV. 1, 39 (1985).

<sup>224</sup> KEETON ET AL., *supra* note 10, § 114, at 815–16.

<sup>225</sup> *Moore v. Smith*, 578 P.2d 26, 29 (Wash. 1978) (applying only a qualified privilege for citizen complaints to a voluntary bar association).

Pound posited, "Immunities, relieving particular persons or special classes or groups from the duties and liabilities appointed by law for their fellow men, have been regarded from times of old as odious."<sup>226</sup>

The *Restatement* formulation purports to strike a certain balance between competing interests. But as with any balancing test, the precise manner of articulation of these competing interests becomes outcome-determinative. Cast the conflict as the *Restatement* does, between recovery for one defamed person against the well-being of the entire legal profession and its clientele, for example, and the latter interest clearly proves most compelling. But if we add to the reputation side of the scales the integrity of the legal profession, and public confidence in the legal process, and remove from the other side of the scales part of the interest in "securing justice for clients"—because part of that interest would be served by allowing clients who had been defamed to obtain "justice"—then the balance may well tip *against* an absolute privilege.

Unfortunately, it appears that lawyers, courts, and many legal commentators tend to put their thumb on the scales when it comes to justifying the continuation of the litigator's privilege to defame, failing to weigh highly relevant, even compelling, interests that could tip the balance against it. Even accepting that the weightiest interest we have is that of insuring "justice for clients," it is not clear that the interest in "securing justice" is being placed on the correct side of the scales. This is so because defamation by litigators actually *damages* the cause of justice, by lessening public confidence in law and lawyers, by subverting ordered consideration of cases on the basis of their legal merits, and by harming the dignity not only of the person defamed but also the defamer and the defamer's profession.

That an incomplete or even self-deceptive balancing test has been long used by lawyers to excuse their own profession's harmful lies should not be surprising. As Sissela Bok points out, the liar's perspective always differs from that of those harmed by the lie. She says that many who may want to lie

would like to be able to weigh the advantages and disadvantages in a more nuanced way whenever they are themselves in the position of choosing whether or not to deceive . . . .

But in this benevolent self-evaluation by the liar of the lies he might tell, certain kinds of disadvantage and harm are almost always overlooked. Liars usually weigh only the immediate harm to others from the lie against the benefits they want to achieve. The flaw in such an outlook is that it ignores or underestimates two additional kinds of harm—the harm that lying does to the

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<sup>226</sup> Roscoe Pound, *Legal Immunities of Labor Unions*, quoted in Burke, *supra* note 223, at 1.

liars themselves and the harm done to the general level of trust and social cooperation. Both are cumulative; both are hard to reverse.<sup>227</sup>

A hypothetical may aid discussion of these unaccounted-for harms in our specific context. A woman sues a man for damages, alleging that he committed a battery, falsely imprisoned her, and inflicted severe emotional distress on her, by attacking her sexually in his hotel room. The defense is consent. Prior to trial, the defendant's attorney, to gain tactical advantage for his client, tells the plaintiff's lawyer in a courtroom hallway that he has evidence that the plaintiff was widely known to have been promiscuous and is rumored to have had a venereal disease prior to the contact with the defendant. The defense lawyer knows that he does not, in fact, have any such evidence. The plaintiff, emotionally upset by these allegations and fearful that they may be more widely disseminated, tells her own lawyer to hurry and settle the case. The defamer's client gets out of the case earlier, and more cheaply, than he would have had his lawyer not made such false statements.

Now to our two kinds of interests not usually taken into account. First is harm to the liar, which Bok identifies as a loss of integrity and credibility, ultimately leading to a loss of power—even though, as Bok admits, “a lie often does bring at least a short term gain in power.”<sup>228</sup> Thus the lawyer in our hypothetical does gain a better settlement for his client in that case, reflecting the greater power that the lie gave the defense over the plaintiff. But the defense lawyer may have lost credibility with others, at least those who know that what he said was false. Such an effect is cumulative and hard to reverse. Indeed, the next time the lawyer engages in such tactics he may find a plaintiff willing to respond with public allegations that he is a serial liar. Or he may find that his standing among his peers, his friends, or even within his family has been subtly, but irreparably, damaged.

Some may object to this framing of the issue, and say that such observations have as much, or more, to do with sound *tactics* as sound *law*. In one sense, factoring in the harm to the defamer simply supplies the defamer with a selfish reason not to lie, even though the law permits him to do so. We might be unwilling to change long-standing law simply to benefit the defamer himself, and we might believe that it is simply “just desserts” that the defamer is punished for lying with a loss of integrity. Bok's second underrated factor, however, clearly implicates more than tactical considerations and the defamer's self-interest. She writes that liars

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<sup>227</sup> SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 23–24 (1978).

<sup>228</sup> *Id.* at 25–26.

often fail to consider the many ways in which deception can spread and give rise to practices very damaging to human communities. These practices clearly do not affect only isolated individuals. . . . [T]rust is damaged. Yet trust is a social good to be protected just as much as the air we breathe or the water we drink. When it is damaged, the community as a whole suffers; and when it is destroyed, societies falter and collapse.<sup>229</sup>

As we have seen, the defendant's attorney in our hypothetical has gained a tactical advantage in the case and has exploited it for the client's gain, but may have damaged his own integrity in the process. But viewed more completely, the attorney has also damaged the trust that citizens might otherwise place in lawyers to do the "right" thing and in the legal system to achieve just and fair results. As such conduct by attorneys continues, public trust in law and lawyers is further damaged, a phenomenon Bok has specifically noted: "Confidence in public officials and in professionals has been seriously eroded. This, in turn, is a most natural response to the uncovering of practices of deceit for high-sounding aims such as . . . the 'adversary system of justice.'"<sup>230</sup>

Some may question the relevance of Bok's moral philosophy to a doctrinal analysis of the litigator's privilege to defame. The short answer is that exploring the *ethics* of defamation by litigators is crucial to fairly analyzing the *law* of the litigator's privilege, for a number of reasons. On a general level, taking account of social mores (which include, in some manner, morals and ethics) is always relevant to assessing the doctrinal merits of a tort cause of action or privilege. As Prosser's hornbook explains, "[i]n a very vague general way, the law of torts reflects current ideas of morality, and when such ideas have changed, the law has tended to keep pace with them."<sup>231</sup> Further, ethical considerations appear highly relevant to a complete assessment of the strength of the interest in the administration of justice, which is purportedly determinative in the *Restatement's* balancing test. More pointedly, lawyers must engage in such an inquiry in part from the pragmatic and overtly self-interested realization that the legal profession itself—and thus the cause of justice for clients, to the extent that lawyers assist that cause—requires such explorations to preserve its vitality and legitimacy. As Michael Davis and Frederick Elliston say in their volume *Ethics and the Legal Profession*,

[S]ome restrictions are to be imposed on the means that lawyers can use in pursuit of justice. Accordingly, some conception of moral truth is required for lawyers to fulfill their societal role. To give up moral restrictions is to invite a

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<sup>229</sup> *Id.* at 26–27.

<sup>230</sup> *Id.* at 27.

<sup>231</sup> KEETON ET AL., *supra* note 10, § 4, at 21.

no-holds-barred war in which lawyers can do whatever works to get justice for their clients. Such unregulated and unmitigated legal warfare would threaten the very existence of law as a profession.<sup>232</sup>

In sum, to put this in Eisenberg's terms, the only way to fairly assess the social congruence of a rule is to take account of social propositions, which here includes ethical tenets concerning the telling of harmful lies.<sup>233</sup>

What, then, are the ethics of defamation by lawyers in litigation? Does immunizing it in fact harm the cause of justice more than it helps it? Let us take a real-world example of a "no-holds-barred" tactic, and one that will often be immunized by an absolute privilege: the all-too-common practice of filing false claims of sexual misconduct against a spouse seeking child custody in a divorce suit.<sup>234</sup> Arizona Judge Rudolph J. Gerber recently condemned such conduct, calling it "a leading offensive strategy, 'a nuclear weapon' in custody disputes."<sup>235</sup> Such charges certainly bear the requisite degree of "pertinence" to the divorce case for the absolute privilege to apply, and since the malice of the lawyer asserting such claims cannot be questioned, the lawyer need not fear a suit for defamation or any related tort action. Thus, as Judge Gerber admits—even while labeling such allegations "a form of extortion, actively aided by lawyers and seemingly tolerated by unwary courts"—even when a charge of sexual misconduct "is rankly false it offers tactical advantages: it raises prospects of criminal prosecution and embarrassment, each of which pressures an innocent spouse to abandon a viable custody claim."<sup>236</sup>

If we agree with Judge Gerber that such conduct is wrongful, why do we agree? Is it that we think lawyers should not lie, at least not under such circumstances? In his nineteenth century essay on legal ethics, George Sharswood wrote that, "The official oath . . . obliges the attorney 'to use no falsehood.' It seems scarcely necessary to enforce this topic. Truth in all its

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<sup>232</sup> Michael Davis & Frederick A. Elliston, *The Reemergence of Legal Ethics*, in *ETHICS AND THE LEGAL PROFESSION* 11, 18 (Michael Davis & Frederick A. Elliston eds., 1986).

<sup>233</sup> EISENBERG, *supra* note 107, at 44–45. He goes on to note that criticism of a legal rule as "socially wanting, because it fails to give appropriate weight to applicable moral norms, policies, and experience . . . reflects the ideal of social congruence." *Id.* at 46–47; *cf.* LON L. FULLER, *THE MORALITY OF LAW* 5–7 (rev. ed. 1969) (distinguishing between the morality of aspiration and the morality of duty, and asserting that the latter kind of morality has direct bearing on lawmaking decisions).

<sup>234</sup> R.J. Gerber, *Victory vs. Truth: The Adversary System and its Ethics*, 19 ARIZ. ST. L.J. 3, 9 (1987) (citing L. SPIEGEL, *A QUESTION OF INNOCENCE: A TRUE STORY OF FALSE ACCUSATION* (1986)).

<sup>235</sup> *Id.* at 9.

<sup>236</sup> *Id.*



simplicity—truth to the court, client, and adversary—should indeed be the polar star of the lawyer.”<sup>237</sup> Today these sentiments seem naive in their simplicity and self-assuredness. Some clearly agree with Sharswood,<sup>238</sup> and others clearly do not.<sup>239</sup> Perhaps Sharswood himself did not believe his own statement unqualifiedly.<sup>240</sup> Indeed, there is probably no ethical issue as widely debated as the proper resolution of the clash between the lawyer’s duty to his client and to others—the court and adversary, and third parties who might be harmed by the client or lawyer.<sup>241</sup>

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<sup>237</sup> SHARSWOOD, *supra* note 216, at 167.

<sup>238</sup> See, e.g., Richard K. Burke, “Truth in Lawyering”: *An Essay on Lying and Deceit in the Practice of Law*, 38 ARK. L. REV. 1, 3 (1984–1985) (“[L]awyer lying and deception cannot be squared with any principled statement of the purposes and goals of the profession. And we should say so.”); Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1055–59 (1975) (positing truth as the main objective of the adversary system and arguing for lawyers’ duty to pursue that objective); Gerber, *supra* note 234, at 20 (“If the adversary system is nothing more than a liars’ convention, then nothing is amiss. However, if the adversary system is intended to serve goals of truth and justice, lying constitutes a sufficient affront to those goals to deserve unqualified condemnation.”); Robert P. Lawry, *Lying, Confidentiality, and the Adversary System of Justice*, 1977 UTAH L. REV. 653, 657 (“The fact that the [adversary] system may result in a failure to gain the whole truth does not mean that the system can or does countenance lying. That point must be made again and again.”); Samuel D. Thurman, *Limits to the Adversary System: Interests that Outweigh Confidentiality*, 5 J. LEGAL PROF. 5, 19 (1980) (“The duty to tell the truth and to assist otherwise in its ascertainment should be a bedrock principle in the adversary system.”).

<sup>239</sup> See, e.g., MONROE H. FREEDMAN, *LAWYERS’ ETHICS IN THE ADVERSARY SYSTEM* 40–41 (1975) (arguing for defense counsel’s duty to discredit adverse witnesses known to be telling the truth); Charles P. Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3, 9 (1951) (arguing that “one of the functions of the lawyer is to lie for his client”).

<sup>240</sup> See, e.g., David R. Papke, *The Legal Profession and Its Ethical Responsibilities: A History*, in *ETHICS AND THE LEGAL PROFESSION*, *supra* note 232, at 37–38 (criticizing Sharswood’s fidelity to the notion that a lawyer’s duty to his client takes precedence over all other duties).

<sup>241</sup> For an excellent critical look at much of the prior debate, see Eugene R. Gaetke, *Lawyers as Officers of the Court*, 42 VAND. L. REV. 39 (1989). The organized bar has produced a number of pages on this topic, as well. See, e.g., ANNUAL CHIEF JUSTICE EARL WARREN CONF. ON ADVOCACY IN THE UNITED STATES, *ETHICS AND ADVOCACY FINAL REPORT* (The Roscoe Pound—American Trial Lawyers Found. 1978); COMMISSION ON PROFESSIONALISM, A.B.A., “. . . IN THE SPIRIT OF PUBLIC SERVICE:” A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM (1986); NAT’L CONF. ON THE CAUSES OF POPULAR DISSATISFACTION WITH THE ADMIN. OF JUSTICE, *THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE* (A. Leo Levin & Russell R. Wheeler eds., 1979).

On its most general level, this issue implicates the pros and cons of the adversary system itself, yet we need not replay that debate here.<sup>242</sup> In fact, the particular moral issue posed by the defamation privilege—whether it is acceptable to tell a lie that will likely harm a third person in order to gain a possible (or certain) advantage in litigation for one's client—seems rather easy to resolve. We find in the literature defenses of cross-examining the truthful witness and of concealing information that would harm third parties to protect client confidences,<sup>243</sup> but not of telling outright lies in connection with a case to gain some tactical advantage. Even the most conservative, pro-adversary system lawyer, it seems, condemns defamation by litigators. Small-town lawyers seem especially unlikely to approve of such conduct, on the ground that overzealous advocacy “destroys the fabric of professional relationship.”<sup>244</sup> Big-city lawyers seem no different in outlook. As a recent article notes, “one can only find two areas in which leaders of the bar seem to agree about what specific conduct constitutes ‘unprofessional’ behavior: advertising and litigation ‘abuse.’”<sup>245</sup>

It is true that lawyers' professional responsibility codes have long been criticized for setting up a separate “role morality” for lawyers, apart from the

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<sup>242</sup> It is, of course, both fascinating and essential, but beyond the scope of this discussion. For attacks on the system, see FRANK, *supra* note 219, at 80–107; MARVIN E. FRANKEL, *PARTISAN JUSTICE* (1980); Edmund Byrne, *The Adversary System: Who Needs It?*, in *ETHICS AND THE LEGAL PROFESSION*, *supra* note 232, at 204; David Luban, *The Adversary System Excuse*, in *THE GOOD LAWYER* 83 (David Luban ed., 1984); Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 *REP. OF THE A.B.A.* 395 (1906); Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 *STAN. L. REV.* 589 (1985); Thomas L. Shaffer, *The Unique, Novel and Unsound Adversary Ethic*, 41 *VAND. L. REV.* 697 (1988); William H. Simon, *The Ideology of Advocacy Procedural Justice and Professional Ethics*, 1978 *WIS. L. REV.* 29. For defenses, see Lon L. Fuller, *The Adversary System*, in *TALKS ON AMERICAN LAW* 34 (Harold Berman ed., 1971); Stephen A. Saltzburg, *Lawyers, Clients and the Adversary System*, 37 *MERCER L. REV.* 647 (1986).

<sup>243</sup> See, e.g., MONROE H. FREEDMAN, *UNDERSTANDING LAWYERS' ETHICS* 161–172 (discussing the use of cross-examination to discredit the truthful witness), 96–107 (concealing information to preserve confidentiality) (1990).

<sup>244</sup> Donald D. Landon, *Clients, Colleagues, and Community: The Shaping of Zealous Advocacy in Country Law Practice*, 1985 *AM. B. FOUND. RES. J.* 81, 106.

<sup>245</sup> Robert L. Nelson & David M. Trubek, *Arenas of Professionalism*, in *LAWYERS' IDEALS, LAWYERS' PRACTICES*, *supra* note 6, at 190. For a catalog of litigation abuses, see Richard H. Underwood, *Adversary Ethics: More Dirty Tricks*, 6 *AM. J. TRIAL ADVOC.* 265 (1982).

morality that applies generally to non-lawyers.<sup>246</sup> Yet others have praised this general idea.<sup>247</sup> A peculiar conception of role morality (or “professional morality,” a somewhat more specific formulation<sup>248</sup>) may suggest that while it is generally unethical to lie, lawyers in litigation may do so ethically because of their role as clients’ champions. Yet few would go so far, and the professional codes themselves clearly disapprove of litigators telling lies, in or out of court.<sup>249</sup> Clearly, to believe that defaming a third party in order to benefit the client is ethically permissible, one must believe that the harms of such conduct are outweighed by the benefits—and not many hold, or at least admit to,<sup>250</sup> such a belief.

So let us assess the *Restatement* “balance” a final time. It purports to weigh, of course, the salient interests: on one side, the would-be plaintiff’s interest in reputation, on the other, the interest in “securing to attorneys as officers of the court the utmost freedom in their efforts to secure justice for their clients.”<sup>251</sup> Yet this balancing test ignores other highly relevant considerations that cut strongly against the absolute privilege: denial of meaningful access to courts by persons whom lawyers have defamed (who are also, by the way, “clients”), harm to the image and fabric of the legal profession by insulating it from liability for conduct that no one seems to defend as rightful, and damage to court processes and thus to the cause of “justice” itself, flowing from the law’s failure to deter such overzealous advocacy. In short, we must be mindful that “[s]ociety has a substantial interest

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<sup>246</sup> See, e.g., Theodore Schneyer, *Professionalism as Politics*, in *LAWYERS’ IDEALS, LAWYERS’ PRACTICES*, *supra* note 6, at 137; see also Eric E. Jorstad, Note, *Litigation Ethics: A Niebuhrian View of the Adversarial Legal System*, 99 *YALE L.J.* 1089, 1095–1103 (1990) (presenting an insightful critique of legal ethicists’ view of lawyers as different from “regular people”).

<sup>247</sup> See, e.g., E. Wayne Thode, *The Ethical Standard for the Advocate*, 39 *TEX. L. REV.* 575, 578–79 (1961) (saying of the lawyer as counselor that “the ethical problems presented to him and the standard that should be met by him need not be, and probably should not be, the same as that applied to the lawyer in an adversary proceeding”).

<sup>248</sup> See Bernard Williams, *Professional Morality and Its Dispositions*, in *THE GOOD LAWYER*, *supra* note 242, at 259.

<sup>249</sup> See *infra* Part III.C.4.

<sup>250</sup> One reported experiment on lawyers’ ethics produced troubling results, suggesting that a large percentage of lawyers might be *willing* to lie to gain advantage for a client. A reporter contacted 13 personal injury lawyers in New York City and tried to get them to help her commit perjury in order to gain a favorable settlement for her, and a large contingency fee for themselves. Five of them said yes. See Jane Berentson, *Integrity Test: Five of Thirteen Lawyers Fail*, *AM. LAW.*, May 1980, at 15.

<sup>251</sup> *RESTATEMENT (SECOND) OF TORTS* § 586 cmt. a (1977).

in protecting the integrity of the legal system.”<sup>252</sup> This means that the system itself must be “protected against apparent subversion which would cause substantial loss of faith and disaffection among members of the society.”<sup>253</sup> Lying by lawyers represents such a subversion. And because it removes a significant deterrent to lying, the absolute privilege to defame subverts, rather than supports, a compelling societal interest in the integrity of the legal system. The *Restatement* balancing test, by failing utterly to recognize that harm, is both incomplete and deceptive.

### C. *Avoiding Inquiries into the Litigator's Good Faith in Making Factual Assertions*

#### 1. *Introduction*

Many have argued that the privilege to defame is not designed to protect lawyers who commit such admittedly bad acts, but rather lawyers who are *accused* of defamation despite their honesty and innocence. We must therefore carefully distinguish, some say, between justifying defamatory remarks in litigation and supporting the privilege to defame, because we may abhor defamation itself but believe that a privilege is needed to protect lawyers from unsubstantiated charges of defamation. We should recognize, in other words, that the absolute privilege, much like constitutional protections for speech, provides “breathing room” allowing for speech without fear. In his seminal 1909 article on absolute privilege, Veeder stressed this rationale:

The purpose of the law is, not to protect malice and malevolence, but to guard persons acting honestly in the discharge of a public function, or in the defense of their rights, from being harassed by actions imputing to them dishonesty and malice. . . . [T]he privilege is to be exempt from all inquiry as to malice . . . . The rule exists, not because the malicious conduct of such persons ought not to be actionable, but because, if their conduct were actionable, actions would be brought against them in cases in which they had not spoken falsely and maliciously . . . .<sup>254</sup>

From this perspective, the absolute privilege strikes a proper balance between protection for the reputation of a few people and protection of many more good, honest lawyers representing good, honest clients. So construed, the

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<sup>252</sup> Harold See, *An Essay on Legal Ethics and the Search for Truth*, 3 GEO. J. LEGAL ETHICS 323, 332 (1989).

<sup>253</sup> *Id.* at 333.

<sup>254</sup> Veeder, *supra* note 40, at 469–70 (footnotes omitted).

litigator's absolute privilege benefits the "administration of justice" not by immunizing socially bad conduct, but rather by freeing honest lawyers from the fear of searching inquiries into the thought processes and investigations behind their factual assertions, which makes all lawyers more effective for their clients. As Veeder put it, absent the privilege the honest lawyer would fear losing a case in which his advocacy was at issue, or at a minimum would be forced to consider "the expense and distress of a harassing litigation," and "[w]ith such possibilities hanging over his head," would be unable "to speak with that free and open mind which the administration of justice demands."<sup>255</sup> The fear, then, is of chilling useful, effective, proper advocacy.

On its surface, this argument seems quite compelling. Yet its implicit assumption is that absent an inquiry into the lawyer's malice in a defamation action, the foundation for the lawyer's factual assertions as an advocate will remain free from scrutiny. That is, for this rationale to have real force it must be assumed that other sanctions do not exist that would subject litigators to inquiries similar in kind to that involved in a defamation action. Only if this assumption is right does the privilege serve the prophylactic function that is so overwhelmingly important as to justify denying a remedy to many whose reputations have been harmed by litigators' excesses. This assumption is wrong, of course—more wrong today than in Veeder's time—and this error exposes the argument's fatal flaw.

In fact, the lawyer's conduct in making statements as an advocate is already put at issue in a number of ways and for a number of other purposes, pursuant to both other law and professional responsibility codes. Inquiries range from the lawyer's subjective good faith to the reasonableness of his factual investigations. The existence of these other inquiries shows that the grand protective purpose of the absolute privilege is largely mythical, and exposes the fact that the privilege lacks systematic consistency. Whatever the *goal* of the absolute privilege, its *effect* is not to protect lawyers against inquiries into their conduct on behalf of clients, because that already occurs pursuant to other normative standards. Its main effect is rather to bar a certain class of plaintiffs—those aggrieved by the lawyer's harmful lies—from getting compensation. Thus the rule of the absolute privilege to defame has become inconsistent with other rules governing the same conduct and lacks evenhandedness.<sup>256</sup>

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<sup>255</sup> *Id.* at 470; see also Eric Hellerman, Comment, *Defamation, Privilege, and the Public Interest: A Study in Priorities*, 45 BROOK. L. REV. 131, 139 (1978) (making the same argument).

<sup>256</sup> See EISENBERG, *supra* note 107, at 104–05 (discussing that such inconsistencies may lead ultimately to the overruling of common-law rules).

## 2. Federal Rules 11 and 26(g)

Two provisions of the Federal Rules of Civil Procedure, Rules 11 and 26(g), now often engage federal courts in an inquiry into whether a reasonable lawyer would know whether statements contained in documents filed in civil cases have a substantial basis in fact.<sup>257</sup> While this does not involve an inquiry into the lawyer's subjective good faith in the truth of his statements—the 1983 amendments of the rules substitute an objective “reasonableness” standard for the subjective test called for by the rule prior to that time<sup>258</sup>—the kind of inquiry contemplated by Rules 11 and 26(g) seems no less intrusive than any that would result if the absolute defamation privilege were to be abrogated.

Where a defamatory statement is contained in a “pleading, motion, or other paper” filed in federal court, such a statement may subject the signer of that paper—attorney or party—to sanction. This is so because Rule 11 requires that the signer certify that he believes, after a reasonable investigation, that factual representations contained in documents filed with the court are “well grounded.”<sup>259</sup> It provides, in relevant part:

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<sup>257</sup> Rule 11 has been controversial, and the 1983 amendments have spawned a voluminous debate, most aspects of which are beyond the scope of this Article. *See, e.g.*, Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925 (1989); Lawrence M. Grosberg, *Illusion and Reality in Regulating Lawyer Performance: Rethinking Rule 11*, 32 VILL. L. REV. 575 (1987); Victor H. Kramer, *Viewing Rule 11 as a Tool to Improve Professional Responsibility*, 75 MINN. L. REV. 793 (1991); Susan Lawshe, *Survey Project on Attorney Sanctions: Rule 11*, 3 GEO. J. LEGAL ETHICS 71 (1989); Melissa L. Nelken, *Has the Chancellor Shot Himself in the Foot? Looking for a Middle Ground on Rule 11 Sanctions*, 41 HASTINGS L.J. 383 (1990); Melissa L. Nelken, *Sanctions Under Amended Rule 11—Some “Chilling” Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313 (1986); Jeffrey Parnes, *More Stringent Sanctions Under Federal Civil Rule 11: A Reply to Professor Nelken*, 75 GEO. L.J. 1937 (1987); Ronald D. Rotunda, *Lawyers and Professionalism*, 18 LOY. U. CHI. L.J. 1149, 1159–71 (1987); William Schwartz, *Rule 11 Revisited*, 101 HARV. L. REV. 1013 (1988); Georgene M. Vairo, *Rule 11: Where We Are and Where We Are Going*, 60 FORDHAM L. REV. 475 (1991); James E. Ward, IV, Comment, *Rule 11 and Factually Frivolous Claims*, 44 VAND. L. REV. 1165 (1991); Debbie A. Wilson, Note, *The Intended Application of Federal Rule of Civil Procedure 11: An End to the “Empty Head, Pure Heart” Defense and a Reenforcement of Ethical Standards*, 41 VAND. L. REV. 343 (1988).

<sup>258</sup> As the United States Supreme Court has explained, “Rule 11 was amended in 1983 precisely because the subjective bad-faith standard was difficult to establish.” *Chambers v. NASCO, Inc.*, 111 S. Ct. 2123, 2134 n.11 (1991).

<sup>259</sup> FED. R. CIV. P. 11.

The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact . . . and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."<sup>260</sup>

A litigating attorney who places a harmful lie in a document to be filed in a civil case in federal court, then, may well violate Rule 11 notwithstanding any common-law privilege, if he has failed to make at least a reasonable investigation of whether the statement is false, and certainly if he knows the statement to be a lie.<sup>261</sup> He may also violate Rule 11 if he has made the defamatory statement for the main purpose of harassing the target of the speech.<sup>262</sup> A recent empirical study showed that 6.8 percent of all Rule 11 sanctions during the 1989-90 period were for failure to adequately investigate

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<sup>260</sup> *Id.* A proposed amendment to Rule 11, passed by the Judicial Conference of the United States in September 1992, would revise these provisions to say, in relevant part:

By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper filed with or submitted to the court, an attorney or unrepresented party is certifying to the best of the person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances, —

(1) it is not being presented for any improper purpose, such as to harass . . . ;

. . . .

(3) the allegations and other factual contentions have evidentiary support, or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery . . . .

FED. R. CIV. P. 11 (Proposed Amendment 1992), *reprinted in* STEPHEN GILLERS & ROY D. SIMON, JR., *REGULATION OF LAWYERS: STATUTES AND STANDARDS* 607-08 (1993).

<sup>261</sup> If an entire action is filed maliciously, without probable cause, the lawyer who filed the action and lost may be liable to the defendant for malicious prosecution or wrongful civil proceedings. For a full discussion of these distinct causes of action and their particular problems, with citations, see 1 MALLEN & SMITH, *supra* note 3, §§ 6.5-6.20. Such actions against lawyers rarely succeed; courts apparently look for particularly egregious lawyer conduct. *Id.* § 6.19, at 334; *see also* KEETON ET AL., *supra* note 10, §§ 119-120.

<sup>262</sup> Courts appear to be split on whether the prohibition on "improper purpose" in Rule 11 should be judged on a subjective or an objective standard. *Compare* *Sheets v. Yamaha Motors Corp.*, 891 F.2d 533 (5th Cir. 1990) (arguing for an objective standard) *with* *Tabrizi v. Village of Glen Ellyn*, 883 F.2d 587 (7th Cir. 1989) (arguing for a subjective standard).

facts,<sup>263</sup> and 3.6 percent of sanctions were for intentionally alleging facts known to be untrue.<sup>264</sup> The authors of this study conclude that this former percentage is so low because "evaluating the adequacy of a party's factual investigation may require a degree of judicial factfinding into the attorney's actions that is prohibitively time consuming,"<sup>265</sup> highlighting the point that where Rule 11 is directed at unfounded factual statements, the nature of the lawyer's conduct must be closely scrutinized. Despite the relatively low rate of sanctions for failure to investigate facts, the attorney respondents in the study said that the most important single impact of Rule 11 on their practice has been that it makes them do "more factual investigation."<sup>266</sup>

The present text of the rule provides that if the lawyer violates the rule, the court "shall impose" upon the lawyer "an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the [document]."<sup>267</sup> Trial courts have wide discretion as to proper sanction under Rule 11, and have slapped lawyers with "reprimands, orders to attend continuing legal education classes, suspensions from practice, and monetary fines payable to the court."<sup>268</sup>

Similarly, if defamatory matter is contained in a written discovery request, discovery response, or discovery objection, the attorney may well be subject to sanction pursuant to Rule 26(g),<sup>269</sup> which provides in relevant part that "[e]very request for discovery or response or objection thereto" must be signed

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<sup>263</sup> Lawrence C. Marshall et al., *The Use and Impact of Rule 11*, 86 NW. U. L. REV. 943, 954-55 (1992).

<sup>264</sup> *Id.* at 969.

<sup>265</sup> *Id.* at 955.

<sup>266</sup> *Id.* at 960. Increased factual investigation prior to filing cases and pleadings was mentioned as the Rule's biggest impact by 22.9% of the respondents, a response "quite consistent with the intent of the framers of Rule 11." *Id.* at 964.

<sup>267</sup> The proposed amendment to Rule 11 would change the mandatory sanction language of the present rule to read, "the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties" responsible for violating the rule. FED. R. CIV. P. 11(c) (Proposed Amendment 1992), *reprinted in* GILLERS & SIMON, *supra* note 260, at 608. Further, the proposed rule would explicitly limit any sanction "to what is sufficient to deter repetition of such conduct or comparable conduct by persons similarly situated," which may consist of "directives of a non-monetary nature," fines paid to the court, or the payment of expenses to the opposing party. FED. R. CIV. P. 11(c)(2) (Proposed Amendment 1992), *reprinted in* GILLERS & SIMON, *supra* note 260.

<sup>268</sup> 1 HAZARD & HODES, *supra* note 34, § 3.1:204-1, at 556.

<sup>269</sup> Rule 11 is also sometimes used to sanction misconduct in connection with discovery. *See* Marshall, et al., *supra* note 263, at 954 n.41 (hypothesizing that the low use of Rule 26(g) may indicate that Rule 11 has become "the 'generic' or 'all-purpose' sanction" used "for all kinds of sanctionable activity").



by an attorney of record in the case, certifying that "to the best of the signer's knowledge, information, and belief formed after a reasonable inquiry it is: . . . (2) not interposed for any improper purpose, such as to harass . . ." <sup>270</sup> The current text of the rule states that if an attorney violates this rule, the court "shall impose . . . an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation . . ." <sup>271</sup>

### 3. Contempt and Related Sanctions

Apart from the Federal Rules outlined above, courts maintain the power to punish lawyers who engage in improper conduct during litigation, <sup>272</sup> including conduct that amounts to defamation. Courts may punish such conduct pursuant to their contempt power or their more general inherent power to punish improper litigation conduct, <sup>273</sup> as recently (and forcefully) reaffirmed in *Chambers v. NASCO*.<sup>274</sup> This inherent power to impose sanctions "extends to a full range of litigation abuses," even where more specific rules exist which purport to punish and deter the same conduct.<sup>275</sup> In *Chambers*, a party was sanctioned almost one million dollars for a pattern of bad faith conduct which included "attempts to deprive the Court of jurisdiction, fraud, misleading and lying to the Court."<sup>276</sup> A student commentator has complained that the *Chambers* case will "drive both lawyers and parties further into the dark with respect to exactly what conduct is sanctionable,"<sup>277</sup> a point which recognizes

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<sup>270</sup> FED. R. CIV. P. 26(g).

<sup>271</sup> *Id.*

<sup>272</sup> 1 HAZARD & HODES, *supra* note 34, § 3.1:101, at 543.

<sup>273</sup> See Michael Scott Cooper, Comment, *Financial Penalties Imposed Directly Against Attorneys in Litigation Without Resort to the Contempt Power*, 26 UCLA L. REV. 855, 856-57 (1979) (analyzing cases involving "the imposition of a monetary sanction directly against an attorney in a proceeding which is not called for the purpose of disciplining the attorney and in which the court does not announce that it is relying upon the contempt power").

<sup>274</sup> *Chambers v. NASCO, Inc.*, 111 S. Ct. 2123 (1991).

<sup>275</sup> *Id.* at 2134-35.

<sup>276</sup> *Id.* at 2130-31.

<sup>277</sup> S.D. Shuler, Note, *Chambers v. NASCO, Inc.: Moving Beyond Rule 11 into the Uncharted Territory of Courts' Inherent Power to Sanction*, 66 TUL. L. REV. 591, 602 (1991).

that the inherent power to sanction bad faith conduct is quite broad and has uncertain boundaries.<sup>278</sup>

The courts' contempt power is also quite broad, reaching any conduct that disrupts or obstructs the judicial process.<sup>279</sup> If defamatory comments at trial were also disruptive, or if they obstructed the trial in some manner, contempt sanctions could be imposed. Examples of such contempts in the reported cases generally, and not surprisingly, involve defamation of the judge rather than of some third party or other trial participant.<sup>280</sup> Even statements merely insulting to the judicial process (which usually means the judge personally) have been held contemptuous.<sup>281</sup> Dan B. Dobbs cites the example of a Maine judge who held a lawyer in contempt for saying after the judge had ruled against him, "I think it demonstrates your prejudice without doubt."<sup>282</sup> Among the harms found by the appeals court to justify affirming that sanction was "a lessening of public respect for the bench, the bar, and the judicial process,"<sup>283</sup> that is, a kind of defamation of the cause of justice itself.

#### 4. *Professional Responsibility Code Provisions*

Defamation by litigators is also subject to disciplinary action under the current professional responsibility codes. That is to say, there are numerous provisions in the Model Rules of Professional Conduct ("Model Rules") and in the Model Code of Professional Responsibility ("Code") that can fairly be construed to forbid defamation by litigators in connection with litigation, despite the existence of an absolute privilege in the common law.

Let us assume here that the lawyer making such defamatory statements either knows of their falsity or speaks with reckless disregard of their truth, or

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<sup>278</sup> A recent story in the *National Law Journal* reported that a federal district judge in Houston ordered an Ohio oil company and its three law firms to pay Baker & Botts \$18 million in legal fees for bad-faith conduct in litigation; the story reports that an appeal will be filed. Gary Taylor, *Baker & Botts' \$18 Million Bounty in Fees*, NAT'L L.J., Mar. 15, 1993, at 2.

<sup>279</sup> See Dan B. Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183, 185-86 (1971).

<sup>280</sup> See, e.g., *United States v. Schiffer*, 351 F.2d 91, 94 (6th Cir. 1965) (holding criminal defense counsel in contempt for accusing the judge of blatant bias and of running a "star chamber proceeding," and for commenting, "justice is finished in America"), *cert. denied*, 348 U.S. 1003 (1966).

<sup>281</sup> See Dobbs, *supra* note 279, at 186-87 & n.5.

<sup>282</sup> *Id.* at 192 (quoting *Alexander v. Sharpe*, 245 A.2d 279, 281 (Me. 1968), *cert. denied*, 397 U.S. 924 (1970)).

<sup>283</sup> *Alexander*, 245 A.2d at 283.

is motivated chiefly by ill will rather than by a legitimate desire to help the client. The litigator who engages in such conduct runs afoul of a number of prohibitions, both general and specific. The Preamble to the Model Rules indirectly condemns much defamation by litigators by the blanket statement that “[a] lawyer should use the law’s procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers, and public officials.” Model Rule 4.1(a) provides that “[i]n the course of representing a client a lawyer shall not knowingly (a) make a false statement of material fact . . . to a third person.” In the Code, Disciplinary Rule (“DR”) 7-102(A)(5) similarly forbids a lawyer from “knowingly mak[ing] a false statement of law or fact.” Model Rule 4.4 states that “[i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person.” The Code similarly provides in DR 7-102(A)(1) that a lawyer shall not take any action for a client when the lawyer “knows or when it is obvious that such action would serve merely to harass or maliciously injure another.” Model Rule 8.4, if given a broad construction, also arguably condemns defamation by litigators, labelling it “professional misconduct for a lawyer to (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; [or] (d) engage in conduct that is prejudicial to the administration of justice.” In the Code, DR 1-102(A)(4) and (5) echo these broad prohibitions.

For analytical purposes, the more specific Model Rule and Code provisions applicable to defamation by litigators may be divided into those aimed at in-court statements and those pertaining to out-of-court statements. A lawyer who utters knowingly false facts in court potentially violates a number of these specific rules. First, Model Rule 3.3(a)(1) provides that a litigator shall not knowingly “make a false statement of material fact . . . to a tribunal.” The Official Comment explains that while litigators generally need not have personal knowledge of matters asserted in pleadings, since they ordinarily contain assertions by persons other than the lawyer, “an assertion purporting to be on the lawyer’s own knowledge . . . may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry.” Model Rule 3.4(e) prohibits a litigator in trial from “allud[ing] to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence,” or from “stat[ing] a personal opinion as to the . . . credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused.” Model Rule 3.5(c) prohibits a litigator from “engag[ing] in conduct intended to disrupt a tribunal,” the Official Comment explaining that “[r]efraining from abusive or obstreperous conduct is a corollary of the advocate’s right to speak on behalf of

litigants.” And Model Rule 8.2(a) prohibits a lawyer from making a statement impugning a judge’s integrity “that the lawyer knows to be false or with reckless disregard as to its truth or falsity.”

The Code, in DR 7-106(C), similarly provides that a lawyer “appearing in his professional capacity before a tribunal” shall not:

(1) State or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.

(2) Ask any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person.

....

(4) Assert his personal opinion . . . as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused. . . .  
[or]

....

(6) Engage in undignified or discourteous conduct which is degrading to a tribunal.

The Code’s Ethical Considerations (“EC”), which are “aspirational in character and represent the objectives toward which every member of the profession should strive,”<sup>284</sup> elaborate on these prohibitions. EC 7-10, while recognizing the duty to “represent his client with zeal,” explains that such a duty “does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm.” ECs 7-36, 7-37, and 7-38 instruct the litigator to be courteous with judges and opposing counsel; EC 7-37 takes the position that “[h]aranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system.”

Statements made out of court are covered specifically by Model Rule 3.6 and by Code DR 7-107. Both rules are controversial, especially given their constraint on rights of free speech.<sup>285</sup> Both are also rather elaborate for the same reason. As Hazard and Hodes’ treatise explains, “when a lawyer’s

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<sup>284</sup> MODEL CODE OF PROFESSIONAL RESPONSIBILITY, preliminary statement (1986).

<sup>285</sup> See, e.g., William P. Hoye, *Silencing the Advocates or Policing the Profession? Ethical Limitations on the First Amendment Rights of Attorneys*, 38 DRAKE L. REV. 31 (1988-89); Joel H. Swift, *Model Rule 3.6: An Unconstitutional Regulation of Defense Attorney Trial Publicity*, 64 B.U. L. REV. 1003 (1984); Stephanie J. Baker, Note, *Restrictions on Attorneys’ Extrajudicial Comments on Pending Litigation—the Constitutionality of Disciplinary Rule 7-107: Hirschkop v. Snead*, 41 OHIO ST. L.J. 771 (1980); Joseph T. Rotondo, Note, *A Constitutional Assessment of Court Rules Restricting Lawyer Comment on Pending Litigation*, 65 CORNELL L. REV. 1106 (1980) (focusing on DR 7-107).

freedom of speech results in an improper influence on a pending trial, the unbiased application of law is threatened. A delicate balance between free speech and fair trial is required, for these two competing interests rank especially high among legal principles.”<sup>286</sup> In brief, Model Rule 3.6(a) prohibits only those extrajudicial statements that “a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.” DR 7-107 divides its prohibitions according to whether the extrajudicial statement is made in a criminal case, a civil case, or before an administrative proceeding. According to DR 7-107(B), a lawyer in a criminal case cannot, prior to trial, make a statement that “a reasonable person would expect to be disseminated by means of public communication” that relates to, among other things, the accused person’s “character, reputation, or prior criminal record,” the “credibility of a prospective witness,” or “any opinion as to guilt or innocence of the accused, the evidence, or the merits of the case.” Paragraph (D) restricts such public statements during trial, forbidding any remarks “that are reasonably likely to interfere with a fair trial.” Paragraph (E) restricts such public statements after trial but before sentencing, forbidding any remarks that are “reasonably likely to affect the imposition of sentence.” DR 7-107(G) provides that such public statements are forbidden if they relate to, among other things, “the character, credibility, or criminal record of a party, witness, or prospective witness,” the lawyer’s “opinion as to merits of the claims or defenses of a party,” or “[a]ny other matter reasonably likely to interfere with a fair trial.” Restrictions relating to an administrative proceeding, covered by paragraph (H), are substantially similar.

### 5. Conclusion

The existence of these laws and professional code provisions shows that in many instances and in many contexts courts presently require attorneys to possess either a subjective good faith belief that what they say is true or beneficial to the client’s cause, or that they have engaged in a reasonable inquiry as to their factual foundation. Indeed, one might well conclude that both Rule 11 and the professional codes basically provide a qualified privilege to litigators by prohibiting factual assertions made either with constitutional malice (knowing falsity or reckless disregard of truth) or with common-law malice (ill will and an intent to harm or harass). While some have argued

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<sup>286</sup> 1 HAZARD & HODES, *supra* note 34, § 3.6:101, at 664.

against these provisions,<sup>287</sup> their continued vitality<sup>288</sup> fatally undercuts the argument that the absolute privilege is justified because it effectively frees lawyers from the fear that the foundation for their statements in litigation will be examined later,<sup>289</sup> and that pernicious results would somehow obtain if defamed persons were allowed to get compensation by alleging in good faith and proving that a lawyer maliciously harmed them with words. Further, the existence of these other provisions that label defamation by litigators as wrongful conduct which may subject the lawyer to sanction demonstrates that the absolute privilege lacks systematic consistency; that is, the privilege's effect of immunizing lawyer conduct is at odds with many other legal provisions that condemn the very same conduct.<sup>290</sup> In short, the goal of freeing lawyers from the fear of subsidiary litigation that would inquire into their conduct and motives, however sound that goal may have been long ago, has been eviscerated by the subsequent enactment of other laws and professional code provisions. It is therefore unsound—and unfair to a particular class of plaintiffs—to maintain the absolute privilege on that rationale.

#### D. *The Superfluosity Rationale: The Existence of "Other Adequate Remedies"*

To some, "underlying this whole doctrine of absolute immunity is the conception of an alternative remedy."<sup>291</sup> The notion here is that the absolute privilege is not as bad as it seems because "the occasions to which immunity applies almost always afford other remedies, which minimize, if indeed they do not always afford adequate relief for, the damage which a person defamed may

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<sup>287</sup> See *supra* notes 257, 285 and accompanying text (discussing Rule 11 and professional responsibility rules, respectively).

<sup>288</sup> Perhaps the "vitality" of the professional code provisions restricting extrajudicial statements is not particularly strong. See *Gentile v. State Bar of Nev.*, 111 S. Ct. 2720 (1991) (rejecting, 5-4, a facial attack on MR 3.6, but by a different 5-4 vote finding it void for vagueness as applied); *Hirschkop v. Snead*, 594 F.2d 356 (4th Cir. 1979) (finding DR 7-107 overbroad); *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976) (holding similarly).

<sup>289</sup> Mallen and Smith, for example, suggest that the dominant policy consideration behind the absolute privilege to defame is "the need to preserve independent judgment so that attorneys are generally unfettered by fear of personal liability in order to freely utilize and pursue those procedures which are necessary to competently represent a client." 2 MALLEN & SMITH, *supra* note 3, § 17.8, at 23.

<sup>290</sup> See EISENBERG, *supra* note 107, at 47.

<sup>291</sup> Veeder, *supra* note 40, at 470.

have sustained.”<sup>292</sup> More modern commentators have noted that “courts, in establishing the privilege, have emphasized that even if they do not permit a civil remedy for damages, the wrongdoer may still be punished by either court-imposed sanctions or disciplinary proceedings.”<sup>293</sup> Today, there are a number of these “other remedies,” as recited above in section C: sanction under Rule 11 and Rule 26; contempt; sanction pursuant to *Chambers*;<sup>294</sup> and discipline pursuant to professional codes.

Most often, however, courts and commentators have invoked the professional responsibility codes as the “alternative” they have in mind. One recent court used this rationale in applying the absolute privilege to bar a young Indian-born attorney’s defamation action against an older lawyer who said in front of the plaintiff’s clients, “You don’t understand the law. Where did you go to law school; you should go back to law school before you practice law. You don’t understand. You better learn your English, go to elementary school.”<sup>295</sup> The court explained:

Attorneys do not possess a license to defame their adversaries in the course of a judicial proceeding. The immunity of the absolute privilege supports the public policy of allowing counsel to zealously represent a client’s interests without fear of reprisal through defamation actions. . . . A potential alternative mechanism available to deal with outrageous conduct by an attorney in lieu of an action for damages in slander may be the policing function of the Bar Disciplinary Committee.<sup>296</sup>

This “other available remedies” rationale is fraught with shortcomings. First, as argued above, it is logically inconsistent to argue that the absolute privilege is justified by the need to bar inquiries into a lawyer’s malice and then turn around and argue that other remedies involving a similar inquiry provide a viable alternative. Second, this inconsistency may betray the fact that courts are not particularly serious about the adequacy of these other remedies to combat defamation by litigators. That is, courts (and lawyers) may support the absolute privilege for litigators for other reasons, invoking “other remedies” merely as a

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<sup>292</sup> *Id.*

<sup>293</sup> *Mallen & Roberts, supra* note 4, at 393.

<sup>294</sup> *Chambers v. NASCO, Inc.*, 111 S. Ct. 2123 (1991).

<sup>295</sup> *Arneja v. Gildar*, 541 A.2d 621, 622 (D.C. 1988).

<sup>296</sup> *Id.* at 624–25; *see also* *Lyddon v. Shaw*, 372 N.E.2d 685, 690 (Ill. App. Ct. 1978) (explaining that “we reject the suggestion that the result which the court has reached today deprives Dr. Lyddon of his right [to a remedy],” saying that disciplinary action might be available against the attorney); *McNeal v. Allen*, 621 P.2d 1285, 1287 (Wash. 1980) (expressing a similar view).

kind of public relations maneuver.<sup>297</sup> A third complaint, relating to the second, is that these "other remedies" fail to fulfill the dual goals of tort law: deterrence of wrongdoing and compensation for the wronged plaintiff.<sup>298</sup>

In order for these other remedies to be adequate from *anyone's* perspective, they should at least effectively deter the antisocial conduct (that is, the defamation by litigators). Yet with respect to all such alternative remedies, there are significant real-world problems of impossibility, inadequacy, and inconsistency of enforcement. Regarding sanctions under the federal procedural rules, especially Rule 11, no one can deny that there has been a dramatic increase in sanctions under that rule since its amendment in 1983.<sup>299</sup> But many have recognized that courts' application of Rule 11 has lacked uniformity. Ethics and constitutional law scholar Ronald D. Rotunda wrote recently that Rule 11 "tends to be enforced unevenly and arbitrarily," citing specific examples of disagreements between judges as to what Rule 11 disallows and what it does not.<sup>300</sup> Regarding contempt and use of *Chambers*-type power to penalize lawyers, such sanctions are not commonly employed, and when they are they are aimed at only the most abusive attorney behavior.<sup>301</sup> As one commentator has noted about contempt,

even where all essential elements are present, courts are often hesitant to administer contempt sanctions. This reluctance apparently results from a pervasive judicial attitude that regards employment of the contempt power, like formal discipline, as a measure of last resort. Appellate courts have instructed courts below that the contempt power should be used with great prudence and caution. It is not available in doubtful cases.<sup>302</sup>

And with regard to professional responsibility codes, there is scant evidence of their use to discipline attorneys from engaging in the kinds of conduct discussed in this Article, and plenty of evidence—the existence of dozens of reported legal cases—that attorneys are not being deterred from such conduct by fear of disciplinary action. In part, this is due to the sad fact that state

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<sup>297</sup> See RICHARD L. ABEL, *AMERICAN LAWYERS* 143 (1989) ("[P]rofessional associations promulgate ethical rules more to legitimate themselves in the eyes of the public than to engage in effective regulation.").

<sup>298</sup> KEETON ET AL., *supra* note 10, § 4, at 25.

<sup>299</sup> See SAUL KASSIN, *AN EMPIRICAL STUDY OF RULE 11 SANCTIONS* (Fed. Jud. Ctr. 1985); Lawshe, *supra* note 257, at 71.

<sup>300</sup> Ronald D. Rotunda, *The Litigator's Responsibility*, *TRIAL*, Mar. 1989, at 98, 99–100.

<sup>301</sup> Cooper, *supra* note 273, at 862.

<sup>302</sup> *Id.*



disciplinary agencies, while the situation may be improving, are not known for their activism in disciplining lawyers.<sup>303</sup> As Charles Wolfram notes in his hornbook on ethics, "there are ample reasons to believe that discipline is selective, episodic, subject to constraints of fluctuating budgets and personnel ability, and subject to like influences that grossly distort the extent to which lawyer discipline reflects levels of deviance and compliance among lawyers."<sup>304</sup>

The second salutary goal of tort law is to compensate the injured plaintiff. Defamation law, specifically then, should provide compensation for harm to reputation in whatever form will make the plaintiff "whole."<sup>305</sup> Yet none of these other remedies even promises adequate compensation. According to the United States Supreme Court, Rule 11 is designed to deter frivolous filings, not to compensate an injured party.<sup>306</sup> The professional conduct codes are similarly not designed to compensate. Rather, disciplinary action pursuant to professional code is supposed to "incapacitate the offending lawyer, to deter that and all other lawyers from repeated violations of professional regulations, and to protect the image of the bar."<sup>307</sup> And while the contempt remedy may be compensatory, coercive or criminal in its purpose, contempt of court itself is defined as conduct "which tends to embarrass, impede or obstruct the

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<sup>303</sup> See, e.g., ABEL, *supra* note 297, at 143-51, 156-57; Richard L. Abel & Philip S.C. Lewis, *Putting Law Back Into Sociology of Lawyers*, in *LAWYERS IN SOCIETY* 495 (Richard L. Abel & Philip S.C. Lewis eds., 1989); Rotunda, *supra* note 257, at 1176-79; David B. Wilkins, *Who Should Regulate Lawyers?*, 105 *HARV. L. REV.* 801, 822-23 (1992) (giving reasons why ABA's claim that disciplinary process can control lawyer misconduct is "not plausible"); David O. Weber, "Still in Good Standing": *The Crisis in Attorney Discipline*, A.B.A. J., Nov. 1, 1987, at 58.

This is not to say that violations of the professional code provisions discussed in this Article are considered minor. On the contrary, in the American Bar Association Standards for Imposing Lawyer Sanctions, disbarment is recommended for a lawyer who, "with the intent to deceive the court, makes a false statement, submits a false document, . . . and causes serious or potentially serious injury to a party." ABA Standard 6.11, in *ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, STANDARDS FOR IMPOSING LAWYER SANCTIONS* 40 (1991).

<sup>304</sup> WOLFRAM, *supra* note 34, § 3.1, at 80.

<sup>305</sup> Some have maintained that what a defamed person wants as compensation is not money, but clearing his name; the most noteworthy example is Justice Byron White, who expressed that view in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 774 (1985) (White, J., concurring).

<sup>306</sup> *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990).

<sup>307</sup> WOLFRAM, *supra* note 34, § 3.1, at 80; Wilkins, *supra* note 303, at 805 & n.22.

administration of justice.”<sup>308</sup> Thus it seems that many defamatory comments cannot be punishable as contempt of court, leaving a significant percentage of defamed persons uncompensated.<sup>309</sup> Indeed, as one commentator has asserted, “the contempt power is limited in ways that make it unsatisfactory as an effective sanction against attorneys.”<sup>310</sup> Without a meaningful chance at compensation, the defamed person has little incentive to take any action at all against the defamer.<sup>311</sup> Thus the failure of the compensation function leads to a failure of the deterrence function as well. As Wolfram has explained, “Spurred on by the outrage of injury and the need for compensation, the person directly injured by an attorney violation can be expected to respond more readily with a damage action than the attorney disciplinary agency can with effective enforcement proceedings.”<sup>312</sup> The absolute privilege to defame stands as an effective barrier preventing any such response, and leaves one class of plaintiffs not with *other* adequate remedies, but rather with *no* real remedies. Some older American courts recognized this long ago. For example, in *Maulsby v. Reifsnider*,<sup>313</sup> an 1888 case from Maryland, the court justified its reassertion of the “American rule” of pertinence, and its rejection of the “English rule” put forth in *Munster v. Lamb*,<sup>314</sup> on the ground that a plaintiff had to have a meaningful chance at compensation in a defamation suit.<sup>315</sup> “We cannot agree,” the court said, “that for the abuse of his privilege [the attorney] is amenable only to the authority of the court. Mere punishment by the court is no recompense to one who has thus been maliciously and wantonly slandered.”<sup>316</sup>

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<sup>308</sup> Cooper, *supra* note 273, at 861 (citing *In re Shortridge*, 34 P. 227, 229–30 (Cal. 1893)); see also Louis S. Raveson, *Advocacy and Contempt: Constitutional Limitations on the Judicial Contempt Power*, 65 WASH. L. REV. 477, 558 (1990) (deeming use of contempt power justified only where actions “threaten imminent harm to the administration of justice” to a great degree).

<sup>309</sup> Some have argued for even stricter limits on courts’ contempt power. See, e.g., Raveson, *supra* note 308; W. Eugene Basanta, Note, *Taylor v. Hayes: A Case Study in the Use of the Summary Contempt Power Against the Trial Attorney*, 63 KY. L.J. 945 (1975).

<sup>310</sup> David W. Pollak, Comment, *Sanctions Imposed by Courts on Attorneys Who Abuse the Judicial Process*, 44 U. CHI. L. REV. 619, 620 (1977).

<sup>311</sup> See Wilkins, *supra* note 303, at 830 (“The chance to recover full compensatory (and perhaps even punitive) damages is obviously a substantial incentive to file suit.”).

<sup>312</sup> Charles W. Wolfram, *The Code of Professional Responsibility as a Measure of Attorney Liability in Civil Litigation*, 30 S.C. L. REV. 281, 291 (1979); see also Wilkins, *supra* note 303, at 848 (discussing how third party liability regimes “effectively mobilize private incentives” to uncover attorney misconduct).

<sup>313</sup> 14 A. 505 (Md. 1888).

<sup>314</sup> 11 Q.B.D. 588 (1883).

<sup>315</sup> *Maulsby*, 14 A. at 510 (Md. 1888).

<sup>316</sup> *Id.*

But now even the protection of a stricter pertinence rule is gone. In sum, from the perspective of both the defamed person and the larger society, it rings hollow to suggest that the availability of these other “remedies” obviates the need for any meaningful tort action.<sup>317</sup>

#### IV. LITIGATORS SHOULD BE GRANTED ONLY A QUALIFIED PRIVILEGE

##### A. *The Proposal*

Where the core rationales for a rule appear unsound, the rule itself must be questioned. Benjamin Cardozo said that few common law rules “are so well established that they may not be called upon any day to justify their existence as means adapted to an end. If they do not function, they are diseased. If they are diseased, they must not propagate their kind.”<sup>318</sup> A fair assessment of the conduct immunized by the absolute privilege suggests that it throws law and the legal profession into disrepute and threatens ultimately to produce a situation where no client obtains “justice”—at least not with the assistance of lawyers.<sup>319</sup> If the absolute privilege for litigators harms the cause of justice as much as it helps it, the privilege has failed to justify its existence as a means adapted to that particular end.

I have argued above that the absolute privilege fails to meet the ideals of social congruence and systematic consistency, even given its very long life in this country and in England. When the interests of social congruence and systematic consistency are not being served by a rule, doctrinal stability alone is an insufficient reason for retaining it. As Eisenberg explains,

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<sup>317</sup> One might draw an analogy here to the large body of case law interpreting equity’s requirement that a legal remedy must be “inadequate” before an equitable remedy will be granted. In that context, courts have said that a legal remedy is “inadequate” where it is “seriously deficient as a remedy for the harm suffered.” *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 386 (7th Cir. 1984) (citing *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197, 1205 (2d Cir. 1970)); see also Douglas Rendleman, *The Inadequate Remedy at Law Prerequisite for an Injunction*, 33 U. FLA. L. REV. 346 (1981); Val H. Stieglitz, Note, *The “Inadequacy of Legal Remedy” Requirement for Equitable Relief: The Development of the Rule and Its Application in South Carolina*, 35 S.C. L. REV. 677 (1984). While our context is of course different, it is hard to imagine any argument that from a plaintiff’s perspective, the available alternative remedies penalizing litigator defamation are not “seriously deficient.” Equity would thus label them “inadequate.”

<sup>318</sup> BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 98–99 (1921).

<sup>319</sup> See Gerber, *supra* note 234, at 20–21 (reflecting on the negative effects of unprofessional behavior by courtroom lawyers, commenting specifically on “the peculiar hostility directed by lay persons toward lawyer professionalism”).

We may sometimes accept, but we may never treasure, consistency with bad past decisions. Consistency with past institutional decisions does serve the fairness goal of arriving at like outcomes in like cases over time, but it can frustrate the fairness goal of arriving at like outcomes in like cases across the law, and the even more important fairness goal of arriving at the outcomes that would be generated by the best possible legal rules.<sup>320</sup>

Concluding that lawyers should not possess an *absolute* privilege to defame, however, is not at all inconsistent with believing that a *qualified* privilege should be granted. States do have a weighty interest in protecting lawyers from groundless suits in order to protect the system of justice. Litigators will often make others angry, and that anger may spawn purely retaliatory legal actions.<sup>321</sup> Yet while litigators are in need of some protection from harassing lawsuits simply because of the nature of their jobs, the absolute privilege protects them too much. The cause of justice for all clients compels us to see that plaintiffs in defamation actions are also clients in need of justice. As one commentator has said, "if all litigants should have the utmost freedom of access to the courts to secure their rights, it seems inequitable to burden one group of litigants in order to encourage other victims to present their claims."<sup>322</sup>

The ideals of systematic consistency and social congruence would be better served if litigators were granted only a qualified privilege to defame in connection with litigation. That is, the privilege should not protect litigators who make statements with either common-law malice (motivated chiefly by a desire to harm another) or constitutional malice (knowing the statements are false, or making them with reckless disregard of their truth or falsity). For the state supreme court judge or legislator who tends to agree, Louisiana law, which follows this basic scheme, provides a good model. Judges and witnesses are granted an absolute privilege to defame in connection with judicial proceedings, as in other states.<sup>323</sup> Parties and counsel, however, are granted a privilege that protects them only if their statements are "material and . . . made with probable cause and without malice."<sup>324</sup>

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<sup>320</sup> EISENBERG, *supra* note 107, at 144.

<sup>321</sup> See Mallen & Roberts, *supra* note 4, at 387 (stating that most actions filed against litigators by their clients' adversaries are "brought for vengeance").

<sup>322</sup> Sandra C. Segal, Comment, *It is Time to End the Lawyer's Immunity from Countersuit*, 35 UCLA L. REV. 99, 130 (1987).

<sup>323</sup> LA. REV. STAT. ANN. §§ 14:50(1), (2) (West 1986).

<sup>324</sup> Freeman v. Cooper, 414 So. 2d 355, 359 (La. 1982); Waldo v. Morrison, 58 So. 2d 210 (La. 1952).

This standard has been codified in section 14:49 of the Louisiana Revised Statutes, which provides: "A qualified privilege exists and actual malice must be proved, regardless of whether the publication is true or false, in the following situations: \* \* \* (4) Where the publication or expression is made by an attorney or party in a judicial proceeding."<sup>325</sup> This means, as the Louisiana Supreme Court has explained in a post-*Gertz* opinion, that "an attorney in Louisiana cannot make disparaging statements, either in pleadings, briefs, or argument, if the defamatory statements are not pertinent to the case or are made maliciously or without reasonable basis."<sup>326</sup> In general, Louisiana courts do not treat as privileged any statements made with either constitutional or common-law malice.<sup>327</sup> In other words, a statement that the lawyer "knows is false or that he has not just or probable cause to believe is true" is not privileged in Louisiana even if pertinent to the judicial proceedings.<sup>328</sup> Nor does the privilege protect a pertinent statement "actuated by malice and ill

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<sup>325</sup> LA. REV. STAT. ANN. § 14:49 (West 1986).

<sup>326</sup> *Freeman*, 414 So. 2d at 359.

<sup>327</sup> See *Wattigny v. Lambert*, 408 So. 2d 1126, 1140 (La. Ct. App. 1981) (holding findings of falsity and lack of probable cause to believe in truth of statement rendered question of common-law malice—defined as "ill will towards plaintiff"—irrelevant to holding that the lawyer abused his qualified privilege), *cert. denied*, 457 U.S. 1132 (1982).

For a more detailed discussion of common-law malice, and its relation to knowledge of falsity, see John E. Hallen, *Character of Belief Necessary for the Conditional Privilege in Defamation*, 25 U. ILL. L. REV. 865 (1931).

<sup>328</sup> *Freeman*, 414 So. 2d at 359 (quoting *Sabine Tram Co. v. Jurgens*, 79 So. 872, 873 (La. 1918)). Some early Louisiana cases suggested that the privilege for litigators should be absolute if the statement was pertinent to the proceedings. See, e.g., *Stackpole v. Hennen*, 6 Mart. (n.s.) 481 (La. 1828). The landmark Louisiana Supreme Court case of *Lescale v. Joseph Schwartz Co.*, however, found that other early Louisiana cases supported the rule it announced: that pertinent statements, if made with malice, were not privileged. *Lescale v. Joseph Schwartz Co.*, 40 So. 708, 710–11 (La. 1905). The supreme court believed that a contrary rule would perpetuate an inconsistency between the law of defamation and the law of malicious prosecution, asking:

Will the law hold a litigant answerable for the mere vexation or trouble he may cause his adversary by instituting a suit against him without probable cause, and yet privilege him to destroy utterly the reputation of the same adversary without probable cause if only he does it by means of relevant allegations in a suit?

We imagine not, and that, as much for his allegations as for the suit itself, the litigant ought to show probable cause, or else be answerable for the consequences. . . . Can he with any show of reason claim the right to make defamatory statements which he has no reason to believe are true?

*Id.* at 711.

will.”<sup>329</sup> Some courts have suggested that the constitutional malice standard has in essence superseded the common-law malice standard; as one recent case said, “good faith means a statement made with reasonable grounds for believing it to be true. Only when lack of such reasonable grounds is found can it be said that the person uttering the statement is actuated by malice or ill will.”<sup>330</sup>

A more detailed look at one fairly recent case illustrates how the malice question plays out in practice, and demonstrates how the constitutional and common-law malice standards tend to merge in a determination of whether the defamatory statements are made maliciously or without a reasonable basis. In *Jacobs v. O'Bannon*,<sup>331</sup> the lawyer for the defendant in a paternity suit (Jacobs) sued the plaintiff's lawyer (Perrone), over allegations made in a related federal civil rights action that was ultimately dismissed.<sup>332</sup> Perrone had alleged on behalf of her client (O'Bannon) that Jacobs and Jacobs' client had “conspired to deny O'Bannon her right of meaningful access to the courts in the paternity trial by improperly influencing and intimidating the judge and certain witnesses.”<sup>333</sup> Perrone won a jury verdict in the defamation action, and Jacobs appealed.<sup>334</sup> In determining whether the jury could have reasonably found Perrone's statements privileged, the appeals court reviewed Perrone's trial testimony concerning the basis for the allegedly defamatory allegations she had made on O'Bannon's behalf.<sup>335</sup> According to the court,

Perrone testified that she based each allegation on what she herself had observed during the discovery phase and trial of the paternity suit, or on what she was told by Robert Doud, a defense witness, or by Doud's two grown children, also potential witnesses. Perrone stated that she believed the judge in the paternity trial was being “pressured” because he acted very differently from his ordinary demeanor . . . Perrone also stated that Jacobs deliberately

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<sup>329</sup> See, e.g., *Waldo v. Morrison*, 58 So. 2d 210, 212 (La. 1952) (discussing defendant's lack of “wanton and wicked desire to disregard the rights and feelings of plaintiff, or to injure his reputation”); *Sunseri v. Shapiro*, 138 So. 2d 661, 663 (La. Ct. App. 1962); see also *Foster v. McClain*, 251 So. 2d 179, 181 (La. Ct. App.) (“Actual malice’ exists when a false statement has been motivated by personal spite or ill will or when it has been made with reckless disregard of the truth.”), *appeal denied*, 253 So. 2d 216 (La. 1971).

<sup>330</sup> *Elmer v. Coplin*, 485 So. 2d 171, 177 (La. Ct. App.), *cert. denied*, 489 So. 2d 246 (La. 1986).

<sup>331</sup> 531 So. 2d 562 (La. Ct. App. 1988).

<sup>332</sup> *Id.* at 562.

<sup>333</sup> *Id.* at 563.

<sup>334</sup> *Id.*

<sup>335</sup> *Id.* at 564.

blocked her attempt to get truthful answers to proper questions during the deposition of Sharon Doud, a key witness in the paternity trial, which led Perrone to believe that Jacobs was concealing evidence. According to Perrone's testimony, Jacobs lied to the judge when she stated during the paternity trial that she was surprised by the appearance of Mary and Timothy Doud as witnesses . . . . Finally, Perrone testified as to a sequence of events which led her to believe that the medical tests done by Dr. Hegre, an expert used by Jacobs in the paternity trial, were fabricated.<sup>336</sup>

The appeals court concluded, based on this testimony, that the lawyer had a "reasonable basis" for making the allegedly defamatory claims.<sup>337</sup> "While the evidence did not establish conclusively either the truth or falsity of the allegations," the court said, "it did establish that they were made with probable cause and without malice."<sup>338</sup>

The cases also indicate, commonsensically, that evidence tending to go to the pertinence of the defamatory statement to the proceedings may also be relevant in assessing the lawyer's lack of malice or ill will. That is, where a statement is not pertinent to the proceeding, that may indicate that it was motivated by ill will towards the target of the statement. For example, in *Freeman v. Cooper*,<sup>339</sup> the defendant (Cooper) was a lawyer who had represented himself in a divorce case brought by his wife, who was represented by the plaintiff (Freeman).<sup>340</sup> In the divorce action, Cooper filed a memorandum that accused Freeman of placing himself "above and beyond the law," of acting contemptuously towards the court, and of conspiring with his client to lie to the court.<sup>341</sup> Freeman sued Cooper for defamation and Cooper asserted the qualified privilege. The trial court found against Cooper, and awarded Freeman \$1,500; the appeals court affirmed.<sup>342</sup> The supreme court also affirmed, concluding that "defendant had no probable cause to believe that his statements about plaintiff's surreptitious actions or his considering himself to be above the law were true," and also that the statements "really had nothing to do with the merits of any issue in the litigation."<sup>343</sup> The court opined that "no one has a right to deem appropriate or pertinent . . . a libelous allegation that he knows is false or that he has not just or probable cause to believe is

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<sup>336</sup> *Id.*

<sup>337</sup> *Id.*

<sup>338</sup> *Id.*

<sup>339</sup> 390 So. 2d 1355 (La. Ct. App. 1980), *aff'd*, 414 So. 2d 355 (La. 1982).

<sup>340</sup> *Freeman*, 390 So. 2d. at 1357.

<sup>341</sup> *Id.*

<sup>342</sup> *Id.* at 1356, 1360.

<sup>343</sup> *Freeman v. Cooper*, 414 So. 2d 355, 359 (La. 1982).

true.<sup>344</sup> Thus, the Louisiana scheme seeks to protect the lawyer whose statements are pertinent to the proceedings, motivated by a good faith desire to help the client, and spoken with a reasonable basis for believing they are accurate. This appears to be a laudable goal, well served.

### B. Addressing Anticipated Criticisms of a Qualified Privilege

Critics of a proposal to change the absolute privilege to a qualified one as is applied in Louisiana will likely argue that given the nature of our adversary system and the hard feelings it engenders,<sup>345</sup> lawyers will find themselves subjected to a flood of litigation. However, those who predict dire harms to the cause of justice if such a qualified privilege were to be adopted must take account of the experience of Louisiana, which has applied a qualified privilege to litigator defamation for decades.<sup>346</sup> In fact, there has been no flood of litigation—there have been fewer than a dozen reported cases from 1970 to the present where a lawyer has invoked the privilege.<sup>347</sup> The plaintiff has prevailed in only two of those cases.<sup>348</sup> Indeed, Louisiana courts have praised their own system of qualified privilege for keeping the floodgates of litigation closed. As

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<sup>344</sup> *Id.* (quoting *Sabine Tram Co. v. Jurgens*, 79 So. 872, 873 (La. 1918)).

<sup>345</sup> Engendering hard feelings is simply one aspect of a broader transformation of disputes in our litigation system. *See, e.g.*, William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631, 639–49 (1980–81) (discussing subjects and agents of transformation).

<sup>346</sup> *See Lescale v. Joseph Schwartz Co.*, 40 So. 708, 709–14 (La. 1905) (stating clearly the rule of qualified privilege and reviewing the somewhat inconsistent prior history of Louisiana cases on the privilege).

<sup>347</sup> *See Miskell v. Ciervo*, 557 So. 2d 274 (La. Ct. App. 1990) (upholding dismissal of case against lawyers); *Leonard v. Smith*, 550 So. 2d 729 (La. Ct. App. 1989) (upholding dismissal of case against lawyer); *Jacobs v. O'Bannon*, 531 So. 2d 562 (La. Ct. App. 1988) (affirming jury verdict for lawyers, and affirming trial court's denial of directed verdict for plaintiff on defamation claim); *Elmer v. Coplin*, 485 So. 2d 171 (La. Ct. App.) (affirming motion to dismiss case against lawyer), *cert. denied*, 489 So. 2d 246 (La. 1986); *Jacobs v. O'Bannon*, 472 So. 2d 180 (La. Ct. App. 1985) (affirming summary judgment for lawyers); *Dupre v. Marquis*, 467 So. 2d 65 (La. Ct. App.) (reversing plaintiff's verdict), *cert. denied*, 472 So. 2d 38 (La. 1985); *Wattigny v. Lambert*, 408 So. 2d 1126 (La. Ct. App. 1981) (affirming plaintiff's verdict against lawyer), *cert. denied*, 457 U.S. 1132 (1982); *Freeman v. Cooper*, 390 So. 2d 1355 (La. Ct. App. 1980) (affirming plaintiff's verdict against lawyer), *aff'd*, 414 So. 2d 355 (La. 1982); *Foster v. McClain*, 251 So. 2d 179 (La. Ct. App.) (reversing jury verdict against lawyers and dismissing plaintiff's case), *appeal denied*, 253 So. 2d 216 (La. 1971); *Jones v. Davis*, 233 So. 2d 310 (La. Ct. App.) (denying summary judgment for lawyer defendants), *cert. denied*, 235 So. 2d 101 (La. 1970).

<sup>348</sup> *Wattigny*, 408 So. 2d at 1126; *Freeman*, 390 So. 2d at 1355.



Judge Robert J. Klees wrote in 1988, the qualified privilege prevents “an interminable flood of litigation” over statements made in pleadings.<sup>349</sup> In the absence of a qualified privilege, he wrote,

Whenever one took umbrage to such statements he or she might file suit. Even worse, after the initial defamation suit is concluded, more defamation suits would follow to obtain satisfaction for offensive statements made in the first defamation suit. The present case is a classic case of bitter litigation being conducted by aggressive, zealous counsel. Unless a qualified privilege protects them and their clients against prosecution for words uttered and statements made in the heat of litigious battle, lawsuits among them might never end.<sup>350</sup>

The same judge reaffirmed these points two years later, remarking that “to allow any defamation action based upon potentially offensive, albeit justifiable, statements would serve to invite a flood of litigation. Any such statement, whether proven or not, would become actionable.”<sup>351</sup> With the qualified privilege, of course, not every derogatory statement is actionable—only those which were defamatory and made with malice.

Critics will certainly argue, along the lines suggested above,<sup>352</sup> that anything short of an absolute privilege will chill vigorous advocacy by placing the fear of lawsuits in the mind of every litigator, however honest. True, the small number of Louisiana cases may reflect the fact that Louisiana litigators are more mindful of their vulnerability to suit, and therefore refrain from defaming in litigation. On its face, however, this seems to reflect effective deterrence of antisocial conduct rather than overdeterrence or “chilling.” No one has been heard to complain that litigators in Louisiana are impotent in comparison with litigators in other states. Louisiana courts have been mindful of potential chilling effects, but have found any such risk outweighed by the need to deter litigator defamation. The court in *Miskell* recognized that some would contend that “[i]f an attorney is afraid of the consequences which may flow from using possibly offensive statements, he can no longer represent his client with the ‘zeal’ called for in the Model Rules. However, this does not give the attorney free rein to make outlandish and unwarranted statements.”<sup>353</sup> Furthermore, as a general matter, an advocate’s zeal is difficult to chill.<sup>354</sup>

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<sup>349</sup> *Jacobs*, 531 So. 2d at 564.

<sup>350</sup> *Id.* at 564–65.

<sup>351</sup> *Miskell*, 557 So. 2d at 275.

<sup>352</sup> See *supra* notes 254–55 and accompanying text.

<sup>353</sup> *Miskell*, 557 So. 2d at 275.

<sup>354</sup> See, e.g., 1 HAZARD & HODES, *supra* note 34, § 1.3:101 at 70 (stating that “most lawyers accept that there is a positive obligation to give one’s all for each client”); Paul D.

Litigators are motivated by a number of factors to be zealous on behalf of clients: professional pride, loyalty, and even pecuniary gain—that is, many if not most litigators will be zealous, in part, in order to earn the client's fee and to enhance the chances of getting other paying clients. Thus at one level we may analogize the litigator's zealous advocacy to commercial speech,<sup>355</sup> which is also fairly chill-resistant.<sup>356</sup>

Supporters of the absolute privilege have touted as one of its strengths that it allows a judge, not a jury, to determine whether the privilege applies, because the question of pertinency is one of law, whereas by contrast the existence of malice is a question of fact.<sup>357</sup> Veeder made this argument in his 1909 article, saying that the key issue over whether pertinent statements made with malice should be actionable is “whether it is proper on grounds of public policy to remit such questions to the judgment of a jury.”<sup>358</sup> It is true that the question of actual malice will often be a difficult factual question, probing the lawyer's state of mind; the key question comes down to whether the lawyer was motivated by ill will or “in fact entertained serious doubts as to the truth of his publication.”<sup>359</sup> This is, in the abstract, a matter that may well preclude summary judgment,<sup>360</sup> let alone a verdict on the pleadings.<sup>361</sup> There seem to be, however, two strong responses to the argument that this is a fatally bad aspect of a qualified privilege. First, on its face, a fear of (and disdain for) juries is especially unseemly coming from lawyers. Certainly, critics of the civil jury are not, and have never been, in short supply.<sup>362</sup> But the argument

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Carrington, *The Right to Zealous Counsel*, 1979 DUKE L.J. 1291, 1292 (“Zeal does not appear to be in short supply for lawyers being paid directly by their own clients.”).

<sup>355</sup> Commercial speech “propose[s] a commercial transaction.” Board of Trustees v. Fox, 492 U.S. 469, 473 (1989) (quoting Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, 425 U.S. 748, 762 (1976)).

<sup>356</sup> See, e.g., Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, 425 U.S. 748, 771–72 n.24 (1976).

<sup>357</sup> 2 MALLEN & SMITH, *supra* note 3, § 17.8, at 38–39.

<sup>358</sup> Veeder, *supra* note 40, at 470.

<sup>359</sup> Anderson, *supra* note 17, at 511 (quoting Saint Amant v. Thompson, 390 U.S. 727, 731 (1968)).

<sup>360</sup> See, e.g., Jones v. Davis, 233 So. 2d 310, 315–16 (La. Ct. App. 1970) (reversing summary judgment for lawyer defendants, finding that fact questions concerning whether statements were made maliciously and without probable cause were not eliminated by the parties' filing of opposing affidavits).

<sup>361</sup> Anderson, *supra* note 17, at 511–13.

<sup>362</sup> See, e.g., Paul T. Hayden, *Cultural Norms as Law: Tort Law's “Reasonable Person” Standard of Care*, 15 J. AM. CULTURE 45, 52–53 (1992) (citing, *inter alia*, FRANK, *supra* note 219, at 109, 120–23, and Edward Devitt, *Federal Jury Trials Should be Abolished*, 60 A.B.A. J. 570, 570–72 (1974)).

that *lawyers* should not have to face juries when other litigants do smacks of blatant self-interest. Lawyers perhaps, more than others in society, know the truth of Judge Learned Hand's remark that "as a litigant, I should dread a law suit beyond almost anything else short of sickness and death."<sup>363</sup> Such special knowledge alone, however, does not justify special treatment. When a defamed plaintiff can plead a case against a lawyer sufficiently to get to a jury on the question of malice, that plaintiff is entitled to a day in court.

Second, the actual experience in Louisiana belies the fears that the malice question will seldom permit a lawyer to get out of a case short of jury verdict. Of the ten reported appellate cases since 1970 in which lawyers have asserted the qualified privilege, three affirmed dismissal of the allegations against the lawyer,<sup>364</sup> one affirmed the grant of summary judgment,<sup>365</sup> and another reversed a plaintiff's jury verdict and ordered dismissal of the case against the lawyers.<sup>366</sup> In one of these cases, *Leonard v. Smith*,<sup>367</sup> the appeals court affirmed dismissal of the case against the lawyer where the defamatory statement was contained in a letter from the lawyer to the district attorney, discussing a crime the lawyer's client was accused of and containing the allegation that the plaintiff had committed the crime.<sup>368</sup> In deciding that the statements were privileged as a matter of law, the court simply looked at the letter and found that "[t]he communication was an effort to clarify his client's position with law enforcement officials, and the contents of the letter attest to his good faith."<sup>369</sup> In a similar case, *Elmer v. Coplin*,<sup>370</sup> a lawyer was sued for defamation by an applicant for the District of Columbia bar, about whom the lawyer had written a disparaging letter.<sup>371</sup> The letter accused the plaintiff of fraud and deception, and urged that the plaintiff should be disbarred for misconduct.<sup>372</sup> The trial court dismissed the defamation case, and the appeals court affirmed, even while finding that the "remarks contained in the letter

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<sup>363</sup> FRANK, *supra* note 219 (quoting Learned Hand).

<sup>364</sup> *Miskell v. Ciervo*, 557 So. 2d 274 (La. Ct. App. 1990); *Leonard v. Smith*, 550 So. 2d 729 (La. Ct. App. 1989); *Elmer v. Coplin*, 485 So. 2d 171 (La. Ct. App.), *cert. denied*, 489 So. 2d 246 (La. 1986).

<sup>365</sup> *Jacobs v. O'Bannon*, 472 So. 2d 180 (La. Ct. App. 1985).

<sup>366</sup> *Foster v. McClain*, 251 So. 2d 179 (La. Ct. App.), *appeal denied*, 253 So. 2d 216 (La. 1971).

<sup>367</sup> 550 So. 2d 729 (La. Ct. App. 1989).

<sup>368</sup> *Id.* at 730-31.

<sup>369</sup> *Id.* at 733.

<sup>370</sup> 485 So. 2d 171 (La. Ct. App.), *cert. denied*, 489 So. 2d 246 (La. 1986).

<sup>371</sup> *Id.* at 173.

<sup>372</sup> *Id.* at 177.

were defamatory and false.”<sup>373</sup> It found the statements privileged because “the defendants acted in good faith with reasonable grounds for believing that the statements contained in the letter were true,” noting that the lawyer who drafted the letter “had made an extensive investigation into the facts,” as the letter itself showed.<sup>374</sup> An examination of these cases, therefore, tends to refute the view that whenever malice is at issue, a jury trial necessarily looms at the end of the case. Where the evidence does not adequately support the plaintiff’s case, the lawyer can in fact extricate himself by motion.

Critics may further contend that bringing the lawyer’s malice into issue in a litigation with a third party will create intolerable conflicts between the lawyer and the client, and may force the lawyer to divulge client confidences and attorney work product. As one article puts the problem, the dangers are two-fold if at the time of the defamation suit the lawyer is still engaged in the litigation in which the defamation allegedly occurred. First, the lawyer may want to “blame the client for any wrong and to disclose confidences necessary for self defense.”<sup>375</sup> Second, discovery in connection with the third party’s claim may “force disclosure of [the lawyer’s] motives, theories and strategies, the confidentiality of which may be essential to the continued representation of the client.”<sup>376</sup> This may lead to destruction of the client’s ability to press the case for which the attorney was hired in the first place.<sup>377</sup>

States adopting a qualified privilege might lessen this potential problem by simultaneously crafting a corollary rule providing that any action against a litigator for defamation could commence only upon the termination of the case in connection with which the statement was made, and tolling the statute of limitations until the termination of such primary litigation. Louisiana presently follows the rule that where the defamed person is a party in the underlying litigation, that litigation must be completed before any defamation action may begin.<sup>378</sup> Louisiana courts regard such a corollary rule as a necessary prophylactic to assure vigorous advocacy; as the court said in *Calvert*:

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<sup>373</sup> *Id.* at 173.

<sup>374</sup> *Id.* at 178–79.

<sup>375</sup> Mallen & Roberts, *supra* note 4, at 388–89.

<sup>376</sup> *Id.* at 389.

<sup>377</sup> *Id.*

<sup>378</sup> *See, e.g.,* Loew’s, Inc. v. Don George, Inc., 110 So. 2d 553 (La. 1959); Kent v. Stewart, 413 So. 2d 583, 585 (La. Ct. App. 1982); Young Oil Co. v. Durbin, 412 So. 2d 620, 627 (La. Ct. App. 1982); Lees v. Smith, 363 So. 2d 974, 979 (La. Ct. App. 1978); Marionneaux v. King, 331 So. 2d 180, 181 (La. Ct. App. 1976); Calvert v. Simon, 311 So. 2d 13, 15 (La. Ct. App. 1975).

Louisiana law permits recovery by a party damaged by libelous statements made without probable cause and with malice by another party in a judicial proceeding, but consistent with orderly procedure and the concept of unhampered expression in the course of litigation, requires the party claiming such damage to await the determination of the original proceeding.<sup>379</sup>

Such a delay has not been imposed, however, where the defamed person is not a party to the underlying suit in which the defamation allegedly occurred.<sup>380</sup> The rationale for not forcing a nonparty to wait to sue is that the nonparty has no ability to control the termination of the underlying suit.<sup>381</sup> This party/nonparty distinction has been criticized, however,<sup>382</sup> and a rule requiring anyone defamed to wait for the completion of the underlying case would not on its surface seem overly unjust as a *quid pro quo* for the very right to sue for a malicious and defamatory statement. That is, a state that abolishes the absolute privilege and adopts a qualified one and also requires defamation plaintiffs to wait to sue until the termination of the underlying case would still be granting defamed persons greater protection than they presently have. Such a rule would avoid serious disruption of the attorney-client relationship during the case in which the alleged defamation occurred.

Critics might also argue that adopting a qualified privilege for litigators would create an incongruity because other participants in the judicial proceedings (parties, witnesses, and judges) would be treated differently, and that there are insufficient reasons for different treatment. This argument has particular force with respect to parties. As in England,<sup>383</sup> the earliest American cases applied the privilege to both parties and counsel for statements made in connection with judicial proceedings, without distinguishing between the two.<sup>384</sup> The Vermont Supreme Court in the early case of *Mower v. Watson*<sup>385</sup>

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<sup>379</sup> *Calvert*, 311 So. 2d at 17.

<sup>380</sup> See, e.g., *McCall v. Bologna*, 465 So. 2d 115, 116-17 (La. Ct. App.), cert. denied, 468 So. 2d 1212 (La. 1985); *Lescale v. Joseph Schwartz Co.*, 40 So. 708 (La. 1906).

<sup>381</sup> *McCall*, 465 So. 2d at 116-17; *Lescale*, 40 So. at 708.

<sup>382</sup> See *Wright v. Bruyere*, 397 So. 2d 40, 41 (La. Ct. App. 1981) (“[W]e see no reason why the *Calvert* rationale should not apply to a defamatory statement made against one who is not a party to the action in which the statement was made.”).

<sup>383</sup> See *supra* notes 174-87 and accompanying text.

<sup>384</sup> See, e.g., *Stackpole v. Hennen*, 6 Mart. (n.s.) 481 (La. 1828) (lawyer); *Hoar v. Wood*, 44 Mass. (3 Met.) 193 (1841) (lawyer); *Bodwell v. Osgood*, 20 Mass. (3 Pick.) 379 (1825) (party); *Hill v. Miles*, 9 N.H. 2 (1837) (complainant in criminal case); *Badgley v. Hedges*, 2 N.J.L. 217 (1807) (party); *Garr v. Selden*, 4 N.Y. (4 Comstock) 91 (1850) (party); *Gilbert v. People*, 1 Denio 41 (N.Y. 1845) (lawyer); *Hastings v. Lusk*, 22 Wend. 410 (N.Y. 1839) (party acting as own lawyer); *Allen v. Crofoot*, 2 Wend. 515 (N.Y. 1829)

said that "principle and authority seem to concur in requiring that the privilege of the one should be coextensive with that of the other. The counsel is but the agent of the client, and in that capacity, only, could claim any protection."<sup>386</sup> While the notion that the lawyer may safely repeat anything the client tells him to say seems less true today than it was in 1839,<sup>387</sup> the states' treatment of the defamation privilege is consistent in keeping the lawyer's privilege coextensive with that of the client. It should be noted, however, that even though the legal standard is the same for clients and lawyers in all states, the application of that standard sometimes differs given differences in role and legal sophistication.<sup>388</sup> Ultimately, however, the argument that lawyers should have an absolute privilege because clients do simply begs the question of whether either needs an absolute privilege, or whether a qualified privilege would adequately protect both. Many of the arguments against an absolute privilege for litigators apply with equal force to parties; it is especially noteworthy that other laws covering similar conduct, such as Rule 11 and the courts' *Chambers*-type powers to sanction for bad faith, apply equally to parties and lawyers.<sup>389</sup>

With respect to witnesses and judges, however, this consistency argument has less merit. Witnesses are protected by an absolute privilege on the rationale that they should be able to testify without fear of being sued for defamation, and that if they lie under oath, they may be prosecuted for perjury.<sup>390</sup> There appear to be two key differences between lawyers and witnesses that justify greater protection for the latter: the greater possibility of chilling witnesses' testimony if they feared a defamation action and the existence of a real

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(party); *Burlingame v. Burlingame*, 8 Cow. 141 (N.Y. 1828) (complainant in criminal case); *Ring v. Wheeler*, 7 Cow. 725 (N.Y. 1827) (party acting as own lawyer); *Thorne v. Blanchard*, 5 Johns. 508 (N.Y. 1809) (parties); *Warner v. Paine*, 4 N.Y. Ch. (2 Sandf.) 195 (1848) (party); *Kean v. McLaughlin*, 2 Serg. & Rawle 469 (Pa. 1816) (party); *McMillan v. Birch*, 1 Binn. 178 (Pa. 1806) (party); *Vausse v. Lee*, 9 S.G.L. 79, 1 Hill 197 (1833) (lawyer); *Davis v. McNees*, 27 Tenn. 40 (1 Hum.) (1847) (lawyer); *Mower v. Watson*, 11 Vt. 536 (1839) (party); *Torrey v. Field*, 10 Vt. 132 (1838) (party).

<sup>385</sup> 11 Vt. 536 (1839).

<sup>386</sup> *Id.*; see also *Veeder*, *supra* note 40, at 482 & n.60.

<sup>387</sup> See, e.g., 1 HAZARD & HODES, *supra* note 34, § 3.1:202, at 548-49 (discussing duties imposed by Rule 11 regarding factual assertions, noting that "[d]epending on the surrounding circumstances, it may not always be safe for a lawyer to rely exclusively on client interviews as the basis for taking offensive or defensive action in litigation").

<sup>388</sup> See *Developments in the Law—Defamation*, *supra* note 94, at 923 & nn.317-18 (citing cases where courts have apparently applied a stricter standard to counsel as to the "pertinence" of the defamatory remark).

<sup>389</sup> Indeed, *Chambers* itself also involved conduct by the client, who was ordered to pay the million dollar sanction. *Chambers v. NASCO, Inc.*, 111 S. Ct. 2123, 2128 (1991).

<sup>390</sup> See RESTATEMENT (SECOND) OF TORTS § 588 cmt. a (1977).

alternative remedy in the form of a perjury prosecution. A greater possibility of chill exists with witnesses, it seems, because they are not under the same duty as lawyers are to make statements at all, and they do not generally share lawyers' motivations (professional duty, loyalty, and pecuniary gain). We do not want to create a situation where witnesses refuse to come forward, or where they testify simply that they "do not recall" because they fear a defamation suit in retaliation for damaging, but truthful, testimony. It has been argued that given the perjury sanction, "granting only a qualified privilege [to witnesses] might not result in undue further hindrance of the proceedings in question."<sup>391</sup> But this view fails to stress the fundamental difference between a threat of criminal sanction—which in theory at least will be brought by the prosecutor only in the clearest cases of abuse, and will succeed only on proof beyond a reasonable doubt—and a civil action for defamation, which may be brought by an individual and will succeed on proof by a preponderance of the evidence. A witness, even believing that her statements are true, may justifiably fear the latter and not the former, and thus be afraid to testify completely. Given these considerations, it is not surprising that Louisiana continues to protect witnesses with an absolute privilege.<sup>392</sup>

Judges, too, are clearly distinguishable from lawyers for purposes of assessing the proper scope of a protective privilege. Judges are paid public servants, more akin to legislators than to lawyers, perhaps; the justification for absolute immunity is said to be the preservation of their absolute independence.<sup>393</sup> The judicial defamation privilege, indeed, is simply "a special application of the rule that gives to judicial officers immunity from liability for their official acts."<sup>394</sup> "How could a judge so exercise his office," Veeder asks, "if he were in daily fear of having actions brought against him, and of having the mode in which he administered justice submitted to the determination of a jury?"<sup>395</sup> And as Lord Stair said in 1824, if judges were not absolutely immune from suit "no man but a beggar or a fool would be a judge."<sup>396</sup> The United States Supreme Court has upheld this absolute immunity from civil

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<sup>391</sup> *Developments in the Law—Defamation*, *supra* note 94, at 922.

<sup>392</sup> LA. REV. STAT. ANN. § 14:50 (West 1986).

<sup>393</sup> See RESTATEMENT (SECOND) OF TORTS § 585 cmt. c (1977); Veeder, *supra* note 40, at 474.

<sup>394</sup> RESTATEMENT (SECOND) OF TORTS, § 585 cmt. g (1977); Veeder, *supra* note 40, at 475.

<sup>395</sup> Veeder, *supra* note 40, at 474 n.34. This basic point was made by all the judges in the landmark English case of *Scott v. Stansfield*, 3 L.R.-Ex. 220 (1868).

<sup>396</sup> *Miller v. Hope*, 2 Shaw, Sc. App., Cas. 125 (1824), *quoted in* Veeder, *supra* note 40, at 474 n.34 and *KEETON ET AL.*, *supra* note 10, § 114, at 816 n.8.

actions for damages on a number of occasions.<sup>397</sup> Judges do appear to have greater exposure to civil actions than any other participant in litigation, simply by virtue of the fact they handle so many more cases. Yet it should be noted that this privilege, also, is not without its critics,<sup>398</sup> and some cracks may be appearing in its surface; in 1984, the Supreme Court upheld the award of attorneys' fees against a state judge in a section 1983 case, saying that the absolute immunity did not apply to cases involving injunctive relief.<sup>399</sup> The dissenters in the case said that the majority opinion "eviscerates the doctrine of judicial immunity."<sup>400</sup> Nonetheless, all states (including Louisiana) grant judges an absolute privilege to defame.

Finally, it is worth noting that a qualified privilege for litigators would seem to have systematic consistency on its side, looking at other privileges that relate to conduct other than defamation. Hazard and Hodes draw a parallel between the absolute privilege to defame and the qualified privilege for legal advice that harms a third person.<sup>401</sup> Section 772 of the *Restatement of Torts* provides that a lawyer is privileged "purposefully to cause another not to perform a contract, or enter into or continue a business relation, with a third person by giving honest advice."<sup>402</sup> This privilege is lost if the advice that causes the harm is given in bad faith, that is, with common-law malice.<sup>403</sup> As Hazard and Hodes report, the rationale for this privilege is similar to that for the absolute privilege to defame: to free lawyers from inhibitions about giving "candid advice on doubtful legal questions."<sup>404</sup> They conclude that the defamation privilege, "which cannot be lost even upon a showing of bad faith, seems highly dubious," adding that "[t]here does not appear to be any evidence

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<sup>397</sup> See, e.g., *Stump v. Sparkman*, 435 U.S. 349 (1978); *Pierson v. Ray*, 386 U.S. 547 (1967); *Bradley v. Fisher*, 80 U.S. 335 (1872); *Randall v. Brigham*, 74 U.S. 523 (1868).

<sup>398</sup> See, e.g., Jeffrey M. Shaman, *Judicial Immunity from Civil and Criminal Liability*, 27 SAN DIEGO L. REV. 1, 28 (1990) (calling the grant of civil immunity a "debatable practice").

<sup>399</sup> *Pulliam v. Allen*, 466 U.S. 522 (1984). One commentator has pointed to this case as an indication of "a growing trend to disfavor any immunity which tends to 'sacrifice . . . the individual to the system.'" Segal, *supra* note 323, at 142.

<sup>400</sup> *Pulliam*, 466 U.S. at 544 (Powell, J., dissenting) (joined by Burger, Rehnquist and O'Connor).

<sup>401</sup> 1 HAZARD & HODES, *supra* note 34, § 1.1:205, at 18.5.

<sup>402</sup> RESTATEMENT (SECOND) OF TORTS § 772 (1977).

<sup>403</sup> See 1 MALLEN & SMITH, *supra* note 3, § 6.23, at 349-51.

<sup>404</sup> 1 HAZARD & HODES, *supra* note 34, § 1.1:205, at 18.4.



that the same kind of qualified immunity as is applied with respect to the giving of legal advice would be insufficient to protect lawyers."<sup>405</sup>

Further, a qualified immunity for defamatory statements would simply leave lawyers with the same protection accorded to any other person who needs to use force to protect the safety of another person—including speaking to protect the interests of someone else<sup>406</sup>—and to any other person who defames another when the speaker and the recipient have a common interest and the communication is reasonably calculated to protect or further that interest.<sup>407</sup> Such privileges are lost if the publication is not made primarily to further the interest being protected, or if the defendant does not have reasonable grounds to believe that the statements are true.<sup>408</sup> A litigator's qualified privilege to defame could (and does, in Louisiana) basically parallel that scheme: to be privileged, the statement would have to be both pertinent to the proceeding (that is, made in furtherance of the interest being protected) and made without malice (that is, with the primary goal of helping the client, and with reasonable grounds to believe such statements are true). The fact that the absolute privilege does *not* presently parallel that scheme of analogous common-law privileges further demonstrates its systematic inconsistency.

## V. CONCLUSION

The litigator's absolute privilege to defame is solidly entrenched in American jurisprudence. It protects lawyers from any tort action founded on statements, as long as the statements bear some connection to a judicial proceeding. Even where the attorney knows that his statements are false, and even where he intends merely to inflict harm, the privilege protects him. This privilege has remained unexamined for too long. Courts and many commentators have simply taken it for granted, repeating without criticism the purported rationales behind the rule. But these rationales do not provide the strong degree of support necessary for maintaining a rule that so drastically restricts certain plaintiffs' ability to sue. In fact, in light of modern developments in law and lawyering, the absolute privilege lacks both social congruence and systematic consistency, making its continued application highly problematic. A qualified privilege, which would protect litigators from liability unless their statements in connection with judicial proceedings were made

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<sup>405</sup> *Id.* at 18.5.

<sup>406</sup> See KEETON ET AL., *supra* note 10, § 115, at 826–27.

<sup>407</sup> *Id.* at 828–29.

<sup>408</sup> *Id.* at 834.

maliciously, demonstrates greater social congruence and systematic consistency, and would far better serve the noble cause of justice.

