Defamation – Absolute Immunity

Introduction

With the tremendous expansion of governmental functions in the last twenty years and with the great "sport" of legislative investigations at their peak, it becomes very important to take a long and careful look at the area of immunity from action for defamatory statements. The area of absolute immunity is supposedly very narrow and limited only to actions of the utmost public importance.[1] However, there has been a marked expansion of this "privilege".[2]

> Absolute immunity may be defined in this manner:
> ... an absolutely privileged communication is one in respect of which, by reason of the *occasion* on which, or the matter in reference to which, it is made, no remedy can be had in a civil action, however hard it may bear upon a person who claims to be injured thereby, and even though it may have been made *maliciously*.[3] (Emphasis added.)

Thus, the only major difference between an absolute and a qualified immunity is that in a qualified immunity case the statement must have been made in good faith; while in an absolute immunity case, the motives of the speaker are irrelevant.[4] The severity of the immunity makes evident the reason for the narrow scope of application. Absolute immunity is for this reason held to be limited to judicial, high legislative and top-level executive proceedings.[5] For purposes of analysis, however, and in actuality, the scope of absolute immunity is broader than that and should be classified under the following categories:[6]

(a) consent of the person defamed
(b) judicial proceedings
(c) legislative proceedings
(d) executives and other public officials
(e) administrative proceedings
(f) communication between husband and wife

If this classification were used it would help to solve the muddle

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[1] Cooley, Torts 525 (4th ed. 1932); 33 Am. Jur. Libel and Slander §125; 25 O. Jur. Libel and Slander §56.

[2] See notes 198, 199, *infra*.

[3] 33 Am. Jur. Libel and Slander §125.

[4] 25 O. Jur. Libel and Slander §§58, 69.

[5] Bigelow v. Brumley, 138 Ohio St. 574, 580, 37 N.E.2d 584, 588 (1941); Meyer v. Parr, 33 Ohio L. Abs. 467, 469, 19 Ohio Op. 543, 545 (1941); Cooley, Torts 532 (4th ed. 1932).

[6] For similar categorization, see: Prosser, Torts 821-831 (1941); Restatement, Torts §§583-592.

which usually arises in the administrative area.[7]

Basically the granting or refusal of immunity is a balancing problem. The problem in this area is the same as that which is the underlying theory of our governmental structure, *i.e.*, the never ending struggle to strike a perfect balance between the rights of the individual on the one hand, and the needs of the society on the other.[8] Thus, in determining whether an immunity will be extended, it will be necessary to look at the injury to the individual's reputation, and then determine if the injury is outweighed by an overriding public interest. That careful consideration must be given to the injury to personal reputation is noted by the Ohio Constitution in the following words:

> ... every person, for an injury done him in his land, goods, person, or *reputation* shall have remedy by due course of law...[9] (Emphasis added)

This provision does not forbid all "privileges," but it should always be the starting point, and it is for the courts to determine if public interest is great enough to overcome this barrier. The courts have lost sight of the balancing approach because of a definite "hardening of the arteries" in the established areas of judicial[10] and legislative[11] immunities, and, when the courts are faced with a new sector for applying or denying immunity, they decide the issue by analogy to the established areas.[12] There will always be new cases arising on the fringe[13] and possibly whole new areas, like the administrative branch,[14] presenting unique problems. Of course, this does not mean the decisions in the established areas should be completely disregarded, but it does mean that absolute immunity should not depend on how closely the new proceeding "mirrors" some type of proceeding where immunity has already been granted. This may be illustrated by two rather extreme hypotheticals. First

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[7] Mauk v. Brundage, 68 Ohio St., 89, 67 N.E. 152, 1 Ohio L. Abs. 119, 62 L.R.A. 477 (1903); Meyer v. Parr, 69 Ohio App. 344, 37 N.E.2d 637, 34 Ohio L. Abs. 448, 24 Ohio Op. 110 (1941); Beatty v. Baston, 13 Ohio L. Abs. 481 (1932). These cases all try to solve the problem of administrative immunity by looking at analogies of executive or judicial immunity, instead of going directly to the problem and deciding whether an immunity should be extended.

[8] FEDERALISM AS A DEMOCRATIC PROCESS 28 (1942).

[9] OHIO CONST., ART. I § 16.

[10] Liles v. Gaster, 42 Ohio St. 631 (1885), definitely determined that an absolute privilege exists in judicial proceedings.

[11] OHIO CONST. ART. II §12.

[12] See note 5, *supra*.

[13] Robinson v. Home Fire & Marine Ins. Co., 242 Iowa 1120, 49 N.W.2d 521 (1951). Pre-trial conversation of an attorney with a witness, held not absolutely privileged.

[14] Comment, 97 U. OF PA. L. REV. 887 (1948-49); Note 18 OKLA. L. REV. 1138 (1947).

assume a defamatory statement made before a municipal agency for granting dog licenses which followed all of the procedures which are practiced in our courts. Secondly, the same statement made before a Federal administrative agency whose determinations vitally affected the life of every citizen in this country, and although the agency had adopted procedural safeguards, they were not like those used by the courts. It is clear that the second situation presents a case where absolute immunity should be extended, while the first is clearly not such a situation. But if the analogy approach was strictly adhered to, the result would be just the opposite. The proper approach, then, in these new areas is to determine what is the policy reason for granting the immunity and how does this compare with the injury done to the defamed person's reputation, always keeping in mind the strong policy statement of the Due Process Clause of the Ohio Constitution.[15]

The use of the word "privilege" to describe the bar to recovery in defamation cases has been "fair game" for legal theorists.[16] The suggestion is that "immunity" is a much more accurate and proper term. "Privilege" seems to indicate something undemocratic that belongs to a favored class as pointed out by this definition:

> A particular and peculiar benefit or advantage enjoyed by a person, company, or class, beyond the common advantages of other citizens....[17]

Inherent in this definition is another real criticism of the use of "privilege." The idea is conveyed that the right to defame extends to a particular person no matter what the circumstances were under which the statement was made, instead of the concept that the right would extend to any person who made a defamatory statement under the proper circumstances,[18] as is actually the case.

An additional reason for using the term "immunity" becomes evident from reading several Ohio cases.[19] These cases seemingly confuse the exclusionary privilege in the law of evidence with the immunity extended to the defamer in tort law. In the *Tapplin-Rice-Clerkin Co.* case[20] the defendant uttered defamatory statements about plaintiff while testifying before a grand jury. Plaintiff brought an action for malicious prosecution. The court held that statements before a grand jury are absolutely privileged; and

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[15] See note 9, *supra.*

[16] PROSSER, TORTS 822 n. 30 (1941); Veeder, *Absolute Immunity in Defamation Cases: Judicial Proceedings,* 9 COL. L. REV. 463, 467-468 (1909).

[17] BLACK, LAW DICTIONARY 1359 (1951).

[18] Veeder, *Absolute Immunity In Defamation Cases: Judicial Proceedings,* 9 COL. L. REV. 463 (1909).

[19] Taplin-Rice-Clerkin Co. v. Hower, 124 Ohio St. 123, 177 N.E. 203 (1931); Lamprecht v. Crane, 5 Ohio Dec. 753 (1880).

[20] *Ibid.*

therefore, any evidence concerning statements made was inadmissable. Plaintiff in this case was unable to recover because he could not prove one element of his cause of action, *i.e.*, the defamatory statements. This is the ordinary effect of an evidentiary privilege. But the basic principle of absolute immunity for defamation cases is that the plaintiff has established a case of actionable defamation, but because of the unusual circumstances surrounding the defendant at the time he made the defamatory remarks, plaintiff will not be able to recover.[21] The question of immunity should not even be raised unless plaintiff can establish his cause of action.[22] Evidence of the statements should be admitted, and then defendant should attempt to establish a situation for the application of immunity. The term "immunity" carries a more proper connotation, and should be exclusively used in defamation cases.

A difficult problem in the immunity cases is determining the question of whether the matter is pertinent or relevant to the purpose for which the privilege is extended. For the present, it will be sufficient to say that the requirement of relevancy has been greatly liberalized.[23] This liberalization raises the question of balancing the interests presented before, but the problem of application, as will be discussed under the appropriate headings, of strict rules of relevance have caused the courts to be very liberal in what they hold to be relevant.[24]

The question of what is the function of the court and jury with respect to absolute immunity is rather simple in theory. Theoretically, the court will give the law on every fact situation, thus the question of immunity is always decided by the court.[25] This rule is almost unanimously applied where the facts are conceded — the court will in such cases decide the question of immunity.[26] The real problems arise when the facts involved in determining the immunity are disputed. An understanding of the problem can be obtained from this syllabus:

> Where the defense to an action for libel is that the publication was privileged, and issue is joined upon the allegations of fact on which the alleged privilege depends, the

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[21] 25 O. JUR. LIBEL AND SLANDER § 56.

[22] Note 78 A.L.R. 1182 (1932).

[23] Restatement, Torts §585, Comment *e* and the subsequent sections and their statements on relations of statement to proceedings. It is not to be inferred that these statements in the Restatement represents the law as it stands at present, but rather that the "any relation" test indicates the direction in which the courts are moving.

[24] 33 AM. JUR. LIBEL AND SLANDER §184.

[25] Note 26 A.L.R. 830 (1923).

[26] Mauk v. Brundage, 68 Ohio St. 89, 67 N.E. 152, 62 L.R.A. 477 (1903); Anderson v. Griffis, 8 Ohio L. Abs. 246 (1929); Southard v. Morris, 14 Ohio N.P., N.S., 465, 31 Ohio Dec. 634 (1913).

> issue is for the jury, and a refusal to instruct them that the publication was privileged, is not error.[27]

This statement is clearly correct if it stands for the proposition that the jury must decide the facts and then apply the law that was given to them. On the other hand, if the statement should mean the jury was to determine the confines of immunity, it is plainly erroneous. The judge should give hypotheticals on all possible results, and direct whether the statements would be immune under those circumstances.[28] Ohio apparently has adopted this proper and better approach.[29]

Excessive publication involves the problem of whether the statement is within the immunity. The term "excess of privilege" has two aspects.[30] The first is to decide whether the statement properly relates to the "privileged occasion."[31] This is just another term for the requirement of relevancy, and will be of definite interest in studying absolute immunity. Giving this task a name tag does not help much and the choice of terms here may well be confusing. The second aspect involves a case where the statement is within the privilege, but because of its abusive or improper nature the question is raised whether it should be immune. This type of "excess" generally goes to the jury as evidence of malice,[32] and is therefore irrelevant to any question raised in the area of absolute immunity. Most of the discussions of excess of privilege are involved in the area of qualified immunity and need not be extensively discussed here. The judge has the function of telling the jury whether the privilege had been exceeded. Whether it is the judge's function or that of the jury when analyzed is simply the usual problem of distinguishing questions of law from questions of fact and is not a special difficulty of the immuity cases.

Ordinarily, immunity is in the nature of an affirmative defense and must be averred by the defendant in his answer in order to raise the issue.[33] However, if the facts stated in the plaintiff's petition clearly present a privileged occasion, the court will rule on the immunity upon the filing of a demurrer by the defendant.[34] It is very likely that a demurrer will be sustained in the area of

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[27] The Post Publishing Co. v. Maloney, 50 Ohio St. 71, 33 N.E. 921 (1893) (Syllabus of the Court 3).

[28] AM. JUR. LIBEL AND SLANDER §§183-190; note 26 A.L.R. 830 (1923).

[29] 25 O. JUR. LIBEL AND SLANDER §57; see notes 25, 26, *supra.*

[30] Note 26 A.L.R. 843 (1923).

[31] For a definition of "privileged occasion" see, Bigelow v. Brumley, 138 Ohio St. 574, 587, 37 N.E.2d 584, 591 (1941).

[32] Kenney v. Gurley, 208 Ala. 623, 95 So. 34, 26 A.L.R. 813 (1923); 33 AM. JUR. LIBEL AND SLANDER §186.

[33] PROSSER, TORTS 822 (1941).

[34] Ginsberg v. Black, 192 F.2d 823 (7th Cir. 1951); Bueher v. Prudential Mutual Life Ins. Co., 123 Ohio St. 264, 175 N.E. 25 (1931).

absolute immunity if the petition has fully stated the facts, because of the definite scope of absolute immunity and the insignificance of good faith.[35] The court may find absolute immunity even though the irrelevancy of the statement is specifically alleged.[36]

CONSENT OF THE PERSON DEFAMED

In defamation, as in many other areas of tort,[37] consent by the person injured is, under normal circumstances, an absolute bar to recovery.[38] Several authorities have classified consent of the party defamed as an absolute immunity.[39] If immunity is used in its broadest sense to mean immunity from action for normally defamatory statements, then consent should be included. Also, since immunity is a balancing process between private rights and needs of society,[40] the weight on the public side may be very light since the defamed party has consented to the injury to his reputation. However, it would be more practical to treat consent as a separate defense. Immunity imparts the notion of an actionable wrong, but because of circumstances surrounding the *defamer* recovery is barred.[41] On the other hand, the consent theory is that there is no tort in the first place because of the action of the party *defamed.*[42] Common understanding will be better served if this distinction is maintained in the defamation cases, even if the difference is only slight and very technical.

If the defendant, at plaintiff's request, reports libelous statements he has heard, the statements will be immune.[43] If the plaintiff induces the defendant to make the statements so that an action in slander can be brought, the rule is:

> ... in a civil action a party cannot be allowed to recover damages for a libel which he procurred or instigated to be published against himself for the purpose of laying the foundation of a law suit for his own pecuniary gain. . . .[44]

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35 Preusser v. Faulhaber, 23 Ohio Cir. Ct. 312 (1909); Rudin v. Fauver, 9 Ohio N.P., N.S., 289 (1909), *aff'd* 23 Ohio Cir. Dec. 315, 15 Ohio Cir. Ct., N.S., 30 (1909), and cases cited note 34, *supra.*

36 Ginsberg v. Black, 192 F.2d 823 (7th Cir. 1951).

37 PROSSER, TORTS 117-125 (1941). The usual rules applying to consent are also applicable to defamation and will not be treated at length in this comment.

38 Shinglemeyer v. Wright, 124 Mich. 230, 82 N.W. 887, 50 L.R.A. 129 (1900), Noted 14 HARV. L. REV. 225 (1900-01); PROSSER, TORTS 830 (1941); RESTATEMENT, TORTS §583.

39 PROSSER, TORTS 830 (1941), RESTATEMENT, TORTS §583.

40 See note 8, *supra.*

41 25 O. JUR. LIBEL AND SLANDER §56.

42 PROSSER, TORTS 117 (1941): "It [consent] is not, strictly speaking, a *privilege,* or even a defense, but goes to negate the existence of any tort in the first instance." (Emphasis added.)

43 RESTATEMENT, TORTS §583; Note, 14 HARV. L. REV. 225 (1900-01).

44 Richardson v. Gunby, 88 Kan. 47, 54, 127 Pac. 533, 536 (1912), Noted 61 U. OF PA. L. REV. 422 (1912-13).

These two cases may well show the basis for distinguishing privilege from consent. In the first case, where plaintiff is seeking to discover the source of the defamation, he has a real interest in discovering the source, and the defendant should have a privilege. In the case involving an attempt to get a cause of action, there is no public policy served by the defendant's publication, therefore the bar to recovery must be based solely on the principle of *volenti non fit injuria.*

There is one exception to the rule that consent will bar recovery.[45] This exception is set out in *Richardson v. Gundy*[46] as follows:

> If however the plaintiff instigated or set on foot the inquiry for the purpose of ascertaining whether the defendant... was disseminating evil reports concerning [plaintiff], in order that such influences might be counteracted or for any other purpose and not for the purpose of predicating an action in his own behalf, he was not estopped from maintaining an action.[47]

Preventing republication,[48] or requiring justification or retraction[49] are the basic requirements of the exception. The best factual situation for the application of this exception is *Shinglemeyer v. Wright*[50] in which the defendant accused the plaintiff of stealing his bicycle, plaintiff called a policeman and had defendant repeat the charge to the officer. The Michigan court held that the communication was privileged. This may be explained because it was a statement to a policeman, but if not, an action for slander should have been allowed.

The publication must be kept within the scope of the consent,[51] and perhaps a request for a statement will give no consent to publish a defamatory matter to a third party.[52] The consent need not be expressed, but may, for example, arise from a person's membership in an organization.[53]

No matter what classification it is given, the attorney should

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[45] RESTATEMENT, TORTS §584.

[46] See note 44, *supra.*

[47] 88 Kan. 47, 54, 127 Pac. 533, 536.

[48] RESTATEMENT, TORTS §584.

[49] Note 14 HARV. L. REV. 225 (1900-01).

[50] 124 Mich. 230, 82 N.W. 887, 50 L.R.A. 129 (1900).

[51] RESTATEMENT, TORTS §583, Comment *d.*

[52] Nelson v. Whitten, 272 Fed. 135 (S.D.N.Y. 1920), Noted 6 Cornell L. Q. 430 (1920-21). In this case plaintiff requested a letter of recommendation. Defendant dictated a defamatory letter to his stenographer. The letter was sent to plaintiff. Held for plaintiff.

[53] Chapman v. Ellesmere [1923] 2 K.B. 431, opinion of Slesser, T. J., beginning at p. 457. Held, by joining the Jockey Club, the plaintiff consented to the publication of his suspension in the official racing newspaper. Slesser said this was a privileged communication on the basis of consent. p. 467.

be aware that the theory of consent applies to defamation cases, and may well be a way to bar recovery.

JUDICIAL PROCEEDINGS

Language used in the ordinary course of judicial proceedings, whether by the judge, a party, counsel, grand or petit jurors, or witnesses is "privileged" if it be relevant to the matter under consideration, and if the court has jurisdiction of the subject matter.[54] The immunity in judicial proceedings is an absolute bar to recovery in an action for libel or slander, notwithstanding any malicious intent on the part of the speaker.[55] This is the general rule which had its origin early in English judicial history[56] and has been only slightly modified since.[57] It must be kept in mind that the origins of judicial immunity and legislative immunity were separate and distinct and that probably the executive immunity came later through the process of analogy.[58]

The immunity of the judge[59] is based on the same policy which gives him immunity from all civil action for acts done within the scope of his judicial capacity.[60] The necessity that our judges be given complete independence to act without fear of vexacious litigation is the reason the immunity is absolute. It represents another attempt to keep our judges impartial. The judge's privilege is the broadest in the judicial proceeding, and it is doubtful that he would be questioned unless the statement was clearly irrelevant or beyond the purview of his judicial duties.[61] Immunity would,

[54] Liles v. Gaster, 42 Ohio St. 631 (1885).

[55] Kinter v. Kinter, 84 Ohio App. 399, 87 N.E.2d 379, 39 Ohio Op. 517 (1949).

[56] Veeder, *Absolute Immunity In Defamation Cases: Judicial Proceeding*, 9 COL. L. REV. 463, 474 (1909).

[57] The only noticeable modification in this country has been the addition of the requirement of relevancy. Mauk v. Brundage, 68 Ohio St. 89, 67 N.E. 152, 62 L.R.A. 477 (1903); PROSSER, TORTS 825 (1941).

[58] Compare: Veeder, *Absolute Immunity In Defamation Cases: Judicial Proceeding*, 9 COL. L. REV. 463, 474 (1909), (Judicial immunity history); with Yankwick, *The Immunity of Congressional Speech — Its Origin, Meaning and Scope*, 99 U. OF PA. L. REV. 960 (1950-51), Legislative immunity history). For history of executive immunity, See, Veeder, *Absolute Immunity In Defamation: Legislative and Executive Proceedings*, 10 COL. L. REV. 131, 141 (1910).

[59] Childs v. Voris, 6 Ohio Dec. 75, 4 Ohio N.P. 67 (1897). Judge of common pleas court held not liable for language used in deciding a case over which the court has jurisdiction. RESTATEMENT, TORTS §585.

[60] PROSSER, TORTS 151 (1941); RESTATEMENT, TORTS §585 Comment *g*.

[61] Child v. Voris, 6 Ohio Dec. 75, 4 Ohio N.P. 67 (1897). Judge made statements as to why he would not appoint plaintiff as defense counsel in a criminal case, held absolutely privileged. *See* Richeson v. Kessler, 73 Idaho 548, 255 P.2d 707 (1953). Conferences between judge and attorney about case which is never tried are absolutely privileged. NEWELL, SLANDER AND LIBEL 392-393 (4th ed. 1924), says relevancy rule does not apply to judges in the United States.

no doubt, extend to justices of the peace,[62] appellate judges,[63] and other public officers when they are performing a judicial function[64] as well as to trial court judges in Ohio. Do not assume from this that there are no sanctions for punishing judges who abuse their discretion. Judges may be impeached,[65] removed[66] or disbarred[67] for improper conduct, and there are of course strict ethical rules relating to the conduct of judges.[68] Besides this many judicial offices are elective. Impeachment and removal[69] of judges, however, are very rare. The available "reins" to check a judge are very weak, and properly so.

Grand[70] and petit[71] jurors are given an absolute immunity on the same policy grounds as the judges' immunity, *i.e.*, independence and impartiality in trying the facts. Besides this reason, there is also the practical difficulty of getting good juries, and if a juror were subject to a harassing civil action for any statements made, it would be almost impossible to impanel a jury. The same requirement exists here that the statement be pertinent and that it be spoken while the juror was performing a proper function.[72] A report of a grand jury will probably only be immune if a specific charge or indictment is returned.[73] This seems to be too strict a view and it would be better to grant an immunity to the grand jury for any

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[62] Liles v. Gaster, 42 Ohio St. 631 (1885); Darnell v. Davis, 190 Va. 701, 58 S.E.2d 68 (1950). These cases and those in the next two notes say the proceedings are judicial; therefore it may be presumed the presiding official would have the judge's immunity.

[63] Wilson v. Whitacre, 2 Ohio Cir. Dec. 392, 4 Ohio Cir. Ct. 15 (1889).

[64] Meyer v. Parr, 33 Ohio L. Abs. 467, 19 Ohio Op. 543, 6 Ohio Supp. 209 (1941), *reversed* 69 Ohio App. 344, 37 N.E.2d 637, 34 Ohio L. Abs. 448, 24 Ohio Op. 110 (1941) because the court felt it was an administrative not a judicial, proceeding; *See* Beatty v. Baston, 13 Ohio L. Abs. 481 (1932) Industrial Commission; Richeson v. Kessler, 73 Idaho 548, 255 P.2d 707 (1953). Basing the decision in administrative cases on whether they exercise a judicial function is subject to criticism, but the courts have followed this view.

[65] OHIO CONST. ART. II. §§23, 24.

[66] OHIO CONST. ART. II. §38; OHIO CONST. ART. IV. §17; OHIO REV. CODE §§3.03 3.08 (10-1, 10-2).

[67] In re Copland, 66 Ohio App. 304, 33 N.E.2d 857 (1940). Municipal judge disbarred for publishing a fictitious report of a case.

[68] Canons of Judicial Ethics of the American Bar Association.

[69] In re Bostwick, 29 Ohio N.P., N.S., 22 (1931) *aff'd* 43 Ohio App. 76, 181 N.E. 905 (1931); See 125 Ohio St. 182, 180 N.E. 713 (1931). This is the only clear case of removal found, and no impeachment cases were discovered.

[70] Irwin v. Murphy, 129 Cal. App. 713, 19 P.2d 292 (1933); Griffith v. Slinkard, 146 Ind. 117, 44 N.E. 1001 (1896); RESTATEMENT, TORTS §589.

[71] Dunham v. Powers, 42 Vt. 1 (1869); NEWELL, SLANDER AND LIBEL 406 (4th ed. 1924); RESTATEMENT, TORTS §589.

[72] RESTATEMENT, TORTS §589 Comments *b*, *c*, *e*.

[73] Bennett v. Stockwell, 197 Mich. 50, 163 N.W. 482 (1917).

report[74] unless they were given warning by the presiding official that such a report was not a part of their function and would not be protected.[75] Laymen who are performing such a vital function should not be held to such strict and technical standards. Proceedings before a grand jury are considered to be judicial in nature; therefore witnesses[76] and attorneys[77] appearing before such group will be extended an absolute immunity. There are apparently no specific sanctions for punishing a juror who uses abusive language, except that a juror may be cited for contempt of court.[78]

Counsel will be given absolute immunity for relevant statements made preliminary to,[79] or as a part of, a judicial proceeding in which he is acting.[80] There are two underlying policy reasons for granting this immunity. The first is quite similar to the basis for the judge and jury immunities, *i.e.*, that an attorney is an officer of the court and for that reason should be given great freedom of action.[81] This reason carries the least weight and is not mentioned very often. The second ground for the immunity of the attorney arises out of a person's right to have free access to the courts. This right has no real value unless the party is represented by an attorney who has broad discretion in presenting the party's case in the best possible light.[82] If an absolute immunity is to be extended to the parties to an action, it is obvious that their counsel should also be safe from action. This should be an extremely broad privilege and should not be destroyed because objections to the statements are sustained or motions to strike from the pleadings are granted. The immunity needs to be extended to activity outside the court where an attorney represents his clients. An attorney is also given

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[74] Irwin v. Murphy, 129 Cal. App. 713, 19 P.2d 292 (1933).

[75] RESTATEMENT, TORTS §589 Comment *e*.

[76] See Taplin-Rice-Clerkin Co. v. Hower, 124 Ohio St. 123, 177 N.E. 203, 81 A.L.R. 1117 (1931). Witness testifying before a grand jury, held absolutely privileged. From this it follows that a statement by a juror would be immune; RESTATEMENT, TORTS §589 Comment *f*.

[77] RESTATEMENT, TORTS §589 Comment *d*.

[78] OHIO REV. CODE §§ 2705.01 *et seq.* (12136), *especially* 2705.02 (B) (12137 (B)).

[79] Richeson v. Kessler, 73 Idaho 548, 255 P.2d 707 (1953) adopts the "Restatement view," as to preliminary statements. Preusser v. Faulhaber, 23 Ohio Cir. Ct. 312 (1909). Charged attorney with improper conduct prior to commencement of disbarment proceedings, held absolutely privileged.

[80] Southard v. Morris, 14 Ohio N.P., N.S., 465, 31 Ohio Dec. 684 (1913); Levy v. Littleford, 19 Ohio Dec. 604 (1909); RESTATEMENT, TORTS §586; 33 AM. JUR. LIBEL AND SLANDER §179. English rule: GATLEY, LIBEL AND SLANDER 178 (4th ed. 1953). Only distinction is the relevency problem.

[81] Veeder, *Absolute Immunity In Defamation Cases: Judicial Proceedings*, 9 COL. L. REV. 463, 483 (1909).

[82] Southard v. Morris, 14 Ohio N.P., N.S., 465, 467; 31 Ohio Dec. 684 (1913); see note 80, *supra;* RESTATEMENT, TORTS §586 Comment *a*.

immunity for statements made in pleadings, affidavits, and briefs which are relevant to the proceeding.[83] Even if it be found that the statements by counsel were defamatory, false, and irrelevant, there will not be a basis for a *libel* action merely because the court stenographer wrote the statement down.[84] Although an attorney would not be subject to a civil action for pertinent defamatory utterances, he would be limited to some extent by the sanctions of contempt,[85] suspension, removal, or reprimand,[86] for improper behavior before the court. Although it must be admitted that these sanctions do not do much to heal the injured person's reputation, they will act as a deterrent.

In order that all people may have a free and unlimited access to the courts, an absolute immunity applies to all relevant statements made by a party either prior to or during the trial.[87] This is true even though the party is suing as an agent or in some other representative capacity.[88] Preliminary statements if relevant and necessary will also be immune.[89] It should be remembered that a party may appear in an action as his own counsel and as a witness. Which immunity will protect him when performing one of these various functions is an unnecessary question since the scope of these various immunities is practically coextensive. A party is not subject to an action for relevant material contained in his pleading.[90] Statements at conferences between attorney and party are privileged but it is an evidentiary privilege and not an immunity from defamation. Parties who become too abusive would be subject to punishment for contempt.[91] A further possibility for an alternative sanction would be an action for malicious prosecution. This action is available in Ohio whether the action brought was criminal or civil.[92]

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[83] Rudin v. Fauver, 9 Ohio N.P., N.S., 289 (1909), *aff'd* 23 Ohio Cir. Dec. 315, 15 Ohio Cir. Ct., N.S., 30 (1909) *aff'd* 83 Ohio St. 468, 94 N.E. 1114 (1910); GATLEY, LIBEL AND SLANDER 179 (4th ed. 1953); RESTATEMENT, TORTS §586 Comment *a;* notes 16 A.L.R. 746 (1922); 32 A.L.R. 2d 423 (1953).

[84] Levy v. Littleford, 19 Ohio Dec. 604 (1909).

[85] OHIO REV. CODE §§2705.01-2705.10 (12136-12147).

[86] OHIO REV. CODE §§4705.02, 4705.03 (1707, 1708); Hogan v. State Bar, 36 Cal. 2d807, 228 P.2d 554 (1951).

[87] Buehrer v. Provident Mutual Life Ins. Co., 123 Ohio St. 264, 175 N.E. 25 (1931), Allegation in a pleading; Erie County Farmer's Ins. Co. v. Crecelius, 122 Ohio St. 210, 171 N.E. 97 (1930), Pleading; RESTATEMENT, TORTS §587; 33 AM. JUR. LIBEL AND SLANDER §180. English view: GATLEY, LIBEL AND SLANDER 179 (4th ed. 1953).

[88] 33 AM. JUR. LIBEL AND SLANDER §180; NEWELL, SLANDER AND LIBEL 399 (4th ed. 1924).

[89] Preusser v. Faulhaber, 23 Ohio Cir. Ct. 312 (1909); RESTATEMENT, TORTS §587.

[90] See note 87, *supra.*

[91] See note 85, *supra.*

[92] Kintz v. Harriger, 99 Ohio St. 240, 124 N.E. 168, 12 A.L.R. 1240 (1919).

Seemingly for quite some time in Ohio, the cloak of absolute immunity did not extend to malicious prosecution.[93] However, in 1931, the Supreme Court of Ohio, without distinguishing malicious prosecution from libel or slander, overruled the *Kintz*[94] case and refused to admit evidence from the prior action.[95] Policy-wise there is no public interest in having the courts available to carry out a person's malice. Immunity assumes a proper action and thus, if statements are pertinent, they will not be actionable. Malicious prosecution, on the other hand, is aimed at the commencement of improper actions. Therefore, it would be both consistent and proper to refuse an action for libel or slander while allowing an action for malicious prosecution.

It is vital to any proper judicial system that it be able to obtain the truth. In order to get the truth, witnesses must not feel hesitant about testifying because of a fear that in so doing they will be subjecting themselves to liability for damages or at least to the trouble and expense of defending a civil action.[96] For this reason courts have generally extended an absolute immunity to witnesses for pertinent testimony in the course of a judicial proceeding.[97] Since witnesses are not usually familiar with the technical rules of evidence, the requirement of pertinency must be, and has been, liberally construed.[98] If the statement is made in answer to an unobjected question it should certainly be immune.[99] Perhaps the only non-immune statement should be one that is voluntarily offered by the witness after he has been given warning that the statement is not pertinent and will not be immune[100] or one that is obviously not pertinent. This approach has a very significant advantage in being easy to administer within the scope so clearly set out. Preliminary interviews between counsel and witnesses are said to be absolutely privileged.[101] This is clearly a defamation immunity and not an evidentiary privilege. A witness, though free from an action for

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93 Kintz v. Harriger, 99 Ohio St. 240, 124 N.E. 168, 12 A.L.R. 1240 (1919); Lamprecht v. Crane, 5 Ohio Dec. 753 (1880).

94 *Ibid.*

95 Taplin-Rice-Clerkin Co. v. Hower, 124 Ohio St. 123, 177 N.E. 203 (1931). Expressly overrules the *Kintz* case, but the court apparently misinterpreted it.

96 Bickerstaff v. Hingsley, 1 Ohio App. 91, 19 Ohio Cir. Ct., N.S., 384 (1913); Emerman v. Bruder, 5 Ohio N.P. 31, 7 Ohio Dec. 311 (1897).

97 Taplin-Rice-Clerkin Co. v. Hower, 124 Ohio St. 123, 177 N.E. 203, 81 A.L.R. 117 (1931); Liles v. Gaster, 42 Ohio St. 631 (1885); and cases cited note 96, *supra.*

98 In *Emerman v. Bruder,* 5 Ohio N.P. 31, 7 Ohio Dec. 311 (1897), the court holds that they will presume pertinency if nothing to the contrary is shown.

99 Veazy v. Blair, 86 Ga. App. 721, 72 S.E.2d 481 (1952).

100 RESTATEMENT, TORTS §588.

101 Beresford v. White, 30 T.L.R. 591 (1914).

slander, might be subject to punishment for contempt,[102] perjury,[103] and possibly even malicious prosecution.[104] These sanctions may well curb the tongue of the most malicious witness.

Persons who are not actual participants in the judicial proceeding are not extended an immunity. There is no policy argument for granting protection to one who procures testimony and who is not a necessary party to the proceeding.[105] One who bribes a witness will not be given the absolute immunity of the witness.[106] Apparent conflicts may be resolved when from the facts it appears that a party did the suborning. Under these circumstances the party is covered by his own immunity and need not claim a vicarious immunity.[107]

Relevant pleading,[108] briefs,[109] and affidavits,[110] are absolutely immune. It is merely a necessary part of the immunity extended to a party to the action. Taking a deposition before a notary is not considered a judicial proceeding;[111] therefore no absolute immunity is extended.[112] This seeming inconsistency may be reconciled by noticing that the cases giving no privilege involve reports of the deposition proceedings.[113] Official reports of judicial proceedings are generally considered to be absolutely privileged.[114] On the other hand, newspaper reports and unofficial reporters are considered to have only a conditional immunity.[115]

Courts are often presented with the problem of whether the

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[102] See note 78, *supra.*

[103] Bickerstaff v. Hingsley, 1 Ohio App. 91, 19 Ohio Cir. Ct., N.S., 384 (1913).

[104] The *Taplin* case, note 97, *supra,* makes this rather doubtful.

[105] Note, 144 A.L.R. 633 (1943).

[106] *See,* Bigelow v. Brumley, 138 Ohio St. 574, 37 N.E. 2d 584, 21 Ohio Op. 471 (1941). Person not a member of a committee not granted any immunity.

[107] Kinter v. Kinter, 84 Ohio App. 399, 87 N.E.2d 379, 39 Ohio Op. 517 (1949). Wife claiming husband took part in a conspiracy to defame her. Note, 144 A.L.R. 633 (1943).

[108] Buehrer v. Provident Mutual Life Ins. Co., 123 Ohio St. 264, 175 N.E. 25 (1931); The Erie County Farmer's Ins. Co. v. Crecelius, 122 Ohio St. 210, 171 N.E. 97 (1930); *cf.* Lanning v. Christy, 30 Ohio St. 115, 27 Am. Rep. 431 (1876). This case is just limited to its facts.

[109] Note 32 A.L.R. 2d 423 (1953).

[110] Harris v. Reams, 2 Ohio Dec. Repr. 281 (1860); Lamprecht v. Crane, 5 Ohio Dec. 753 (1880).

[111] Note, 90 A.L.R. 66 (1934).

[112] 33 AM. JUR. LIBEL AND SLANDER §156.

[113] Note, 90 A.L.R. 66 (1934).

[114] Bigelow v. Brumley, 138 Ohio St. 574, 37 N.E. 2d 584 (1941).

[115] The Cleveland Leader Printing Co. v. Nethersole, 84 Ohio St. 118, 95 N.E. 735, Ann. Cas., 1912 B, 978 (1911); Heimlich v. The Dispatch Printing Co., 26 Ohio Dec. 234, 18 Ohio N.P., N.S., 505 (1916); The Post Publishing Co. v. Maloney, 50 Ohio St. 71, 33 N.E. 921 (1893). If the court has not acted on the reported pleadings, no immunity at all. Byers v. Meridian Printing Co., 84 Ohio St. 408, 95 N.E. 917, 38 L.R.A., N.S., 1913 (1911).

statement was actually made in the course of a judicial proceeding, *i.e.*, what is a judicial proceeding? The court in which the statement is made must have jurisdiction of the subject matter.[116] This is a very impractical rule and a more practical solution would be one which would not put the parties to the risk of determining the jurisdiction.[117] One Ohio case[118] held that the immunity is not lost where the court in which the defamation was made had no jurisdiction because the statute of limitations had run. Nor is there any judicial proceeding until the court has taken action on the pleadings, or papers, filed with the court.[119] It does not matter whether the action is *ex parte* of *inter parte*. But if the defamation is spoken *ex parte* during the selection of jurors, it will not be privileged.[120]

Actions before a justice of the peace are considered to be judicial proceedings for the purpose of immunity.[121] The proceedings before grand juries are also included within the scope.[122] When a court is either admitting[123] or disbarring[124] an attorney it is exercising its judicial capacity and the proceedings are therefore immune. Although there is no direct authority in Ohio, lunacy proceedings are ordinarily considered to be under the "umbrella" of immunity.[125] Proceedings to obtain search warrants are generally considered to be judicial proceedings.[126] Military tribunals have also been granted an immunity, but this may be on the basis of an extension of the executive immunity.[127] As stated previously, taking a deposition is not considered a judicial proceeding.[128] There is a conflict of authority on the immunity extended to hearings for pardons[129] or extradition.[130] These proceedings are not in any sense judicial, and whether they should be covered by an absolute immunity must de-

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116 Liles v. Gaster, 42 Ohio St. 631 (1885).

117 Mundy v. McDonald, 216 Mich. 444, 185 N.W. 877, 20 A.L.R. 398 (1921).

118 Lamprecht v. Crane, 5 Ohio Dec. 753 (1880).

119 Byers v. Meridian Printing Co., 84 Ohio St. 408, 95 N.E. 917, 38 L.R.A., N.S., 1913 (1911).

120 Bates v. State, 17 Ohio N.P., N.S., 193 (1914). Holds that selection of jurors is not a judicial proceeding, but that the impaneling of jurors would be a part thereof.

121 Liles v. Gaster, 42 Ohio St. 631 (1885); Harris v. Reams, 2 Ohio Dec. Rep. 281 (1860).

122 Taplin-Rice-Clerkin Co. v. Hower, 124 Ohio St. 123, 177 N.E. 203 (1931).

123 Wilson v. Whitacre, 2 Ohio Cir. Dec. 392, 4 Ohio Cir. Ct. 15 (1889).

124 Preusser v. Faulhaber, 23 Ohio Cir. Ct. 312, 15 Ohio Cir. Ct., N.S., 312 (1909). *Aff'd* 82 Ohio St. 466, 92 N.E. 1111 (1910).

125 2 A.L.R. 1582 (1919).

126 Lamprecht v. Crane, 5 Ohio Dec. 753 (1880).

127 33 AM. JUR. LIBEL AND SLANDER §145.

128 Note, 90 A.L.R. 66 (1934).

129 Andrew v. Gardner, 224 N.Y. 440, 121 N.E. 341, 2 A.L.R. 1371 (1918); note 2 A.L.R. 1376 (1919).

130 Brown v. Globe Printing Co., 213 Mo. 611, 112 S.W. 462 (1908).

pend on the nature and scope of the executive immunity. Administrative agencies, while exercising a quasi-judicial function, are said to be within the term judicial proceeding.[131] An excellent example of such an agency which often exercises a judicial function is the Industrial Commission.[132]

Most of the cases concerning absolute privilege discuss, to some extent, the problem of relevancy. In England, the requirement that a statement must be relevant to the issue in order to be privileged has been abandoned, and now the statement will not be actionable if it has any relation to the proceeding.[133] Some authorities hold that the relevancy doctrine has been totally destroyed and any statement before a judicial proceeding would be protected.[134] The courts in this country were rather hesitant to give such a broad privilege. They did not approve of the idea of using the courts as an instrument for maliciousness and as a consequence of this feeling the rule of relevancy was adopted.[135] The majority of cases concerning absolute privilege, except those dealing with state[136] and national[137] legislatures, have discussed and attempted to solve this problem. The pertinency standard has been constantly liberalized.[138]

In Ohio, the liberalization of the rule has been complicated by the first direct holding on the subject.[139]

> . . . in order to be privileged, the statement must be pertinent and material to the matter in hand. To be pertinent and material it *must tend to prove or disprove the point to be established,* and have substantial importance or influence in producing the proper result. In other words, the statement must be necessary to a full presentation and in that sense, essential to the accomplishment of the object sought.[140] (Emphasis added.)

This rule would seem to require relevancy in a strict, evidentiary sense. By reference to rules in other states, and by interpreting the *Mauk* case, the courts were able to greatly liberalize the re-

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131 GATLEY, LIBEL AND SLANDER 181 (4th ed. 1953).

132 Beatty v. Baston, 13 Ohio L. Abs. 481 (1932).

133 PROSSER, TORTS 825 (1941); Veeder, *Absolute Immunity In Defamation Cases: Judicial Proceedings* 9 COL. L. REV. 600, 604 (1909).

134 Note, 16 A.L.R. 746 (1922); GATLEY, LIBEL AND SLANDER 169 (4th ed. 1953).

135 Lanning v. Christy, 30 Ohio St. 115 (1870). Relevancy first mentioned.

136 Ohio Const. Art. II §12, ". . . shall not be questioned elsewhere . . ."

137 U.S. Const. Art. I § VI. Same provision as Ohio.

138 The trend is shown in notes 16 A.L.R. 746 (1922); 42 A.L.R. 878 (1926); 134 A.L.R. 483 (1941).

139 Mauk v. Brundage, 68 Ohio St. 89, 67 N.E. 152, 62 L.R.A. 477 (1903). Executive-administrative proceedings.

140 *Id.* at 97, 67 N.E. at 155.

quirements of pertinency.[141] None of the cases, however, have overruled the older, more strict rule. By a rather indirect means the Ohio Supreme Court apparently adopted a more liberal rule when they stated:

> . . . "occasion" has long been a word of art used by the court when dealing with the problems of absolute privilege. It connotes a wider range than the discussion merely of the merits of the central issue.[142]

By saying the occasion of the privilege is broader than the central issue, the court has finally said that if the utterance has any relation to the proceedings it will be privileged. There are these problems, however; the court discussed the *Mauk* case, and did not expressly overrule it; they talked about "relevancy" at one point and "occasion" at another. Besides this, a later Ohio case mimics the old relevancy rule.[143] Ohio law on this problem is evidently in a state of confusion. Although the cases do clearly indicate that, the court will be very favorable to the defendant's argument that the statement is relevant — perhaps to the point of adopting the English rule.

The relevancy requirement should be especially broad so far as concerns the witnesses and the parties, because of their lack of familiarity with the rules of evidence. And, as was pointed out before, a witness should be allowed to answer any question directed to him, unless instructed not to, and should be allowed to volunteer statements unless they are clearly uncalled for. The statement does not lose its privilege because it concerns a person not a party to the proceedings.[144] Nor is the statement necessarily irrelevant because it is struck from the pleadings,[145] or because it is not admissible in evidence.[146] The trend of the relevancy doctrine is towards the view of the Restatement — if the statement "has any relation" to the proceeding it will be absolutely privileged.[147] This view offers a great deal more ease in administration and relieves parties in a judicial proceeding of much of the risk. Relevancy has been pretty largely a dead issue for many years, so why not bury the bones?

LEGISLATIVE PROCEEDINGS

It is an undoubted necessity of parliamentary government that the members of the legislature have freedom of speech. Present-day

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[141] Ruden v. Fauver, 9 Ohio N.P., N.S., 289 (1909), *aff'd* 23 Ohio Cir. Dec. 315, 315, 15 Ohio Cir. Ct., N.S., 30, 31 (1909): [No need to question relevancy] ". . . further than to say that they have no such obvious irrelevancy or other want of relation to the action as to put them out of the pale of privilege"; The Erie County Farmer's Ins. Co. v. Crecelius, 122 Ohio St. 210, 171 N.E. 97 (1930).

[142] Bigelow v. Brumley, 138 Ohio St. 574, 587, 37 N.E.2d 584, 591 (1941).

[143] Kinter v. Kinter, 84 Ohio App. 399, 87 N.E.2d 389, 39 Ohio Op. 517 (1949).

[144] Veazy v. Blair, 86 Ga. App. 721, 72 S.E. 2d 481 (1952).

[145] Note, 134 A.L.R. 483 (1941).

[146] Veazy v. Blair, 86 Ga. App. 721, 72 S.E.2d 481 (1952).

[147] RESTATEMENT, TORTS §§585-589;

hearings and investigations, however, have caused doubt to arise in some persons' minds. For this reason, this section of the comment will attempt particularly to evaluate various sanctions.

Legislative immunity developed from the struggle between the Crown and the House of Commons. The privilege of the House of Lords was apparently never questioned. Perhaps this was because they functioned as a court, as well as a legislature, but the more practical reason is the great wealth and influence of the Lords. At first the immunity became a custom which was allowed because of the grace of the king. During this period there were disagreements as to the extent of the immunity and Elizabeth completely ignored it. After the Glorious Revolution, however, when the law of the Parliament became supreme, the immunity was given statutory and constitutional sanction. The Ninth Article of the Bill of Rights provided:

> That the freedom of speech and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament.[148]

Practically every country which uses a parliamentary form of government makes the legislator immune from action for words used while he was performing his legislative function.[149]

In this country legislative immunity became a part of the common law, and many legislatures adopted the immunity as a matter of course. When many of the state constitutions and the Federal Constitution were drafted, they contained an express provision for legislative immunity.[150] Thus, there is a twofold basis for the legislative immunity which creates some problems of analysis which will be discussed later.

This immunity, which was originally aimed only at protection from the executive branch, is now a general protection from action by anyone. The "majority rule" seems to be that the immunity only extends to state and national legislatures.[151] The argument for limiting the privilege to state and national legislators is that the county and municipal officer's functions are not so vital and, therefore, that a qualified immunity is enough. Statements may also be found that there is no requirement of relevancy of the statements.[152]

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148 I WILLIAM AND MARY, Sess. 2 c.2.

149 MAY, PARLIAMENTARY PRACTICE 46-52 (15th ed. 1950); Yankwich, *The Immunity of Congressional Speech — Its Origin, Meaning and Scope*, 99 U. OF PA. L. REV. 960 (1950-51); Veeder, *Defamation, Absolute Immunity In Legislative Proceedings*, 10 COL. L. REV. 131 (1910).

150 OHIO CONST. ART. I § 12; U.S. CONST. ART. I §6. Note the similarity to the English Bill of Rights provision.

151 Greenwood v. Cobbey, 26 Neb. 449, 42 N.W. 413 (1889); RESTATEMENT, TORTS §590; PROSSER, TORTS 827-829 (1941).

152 RESTATEMENT, TORTS §590.

This of course ignores the dual basis for the privilege. If the statement is protected by a constitutional provision, the immunity will probably be absolute and there will be no pertinency requirement. On the other hand if the immunity is based on the common law rules in this country, there will be the same relevancy requirements as were discussed in the Judicial Proceedings section. The immunity will extend to action in committees by the legislator,[153] and a witness before a legislative committee will be treated the same as a witness at a trial.[154] The immunity only extends to the statement, and if the legislator were to publish the defamatory matter at some other place it would not be absolutely privileged, even if the republication were only handing out copies of the Congressional Record.[155]

The authority in Ohio concerning this matter is rather meager. The constitutional provision should protect our state legislators from civil or criminal actions for libel and slander, and apparently it has been quite effective, because there is no reported case in Ohio dealing with such an action against a state legislator. The Constitution of Ohio, Article 11, Section 12, provides:

> And for any speech, or debate, in either House, they shall not be questioned elsewhere.

This provision makes it clear that there is no requirement of relevancy if a senator or representative seeks the immunity. The immunity in Ohio would probably be extended to county and local officers as well.[156] The immunity to these officers is, of course, based on the common law, not the constitution, as the latter applies only to state senators and representatives. This shows clearly why it was necessary in the *Tanner* case to discuss relevancy. The court of appeals in holding a preamble to an official entry by the county commissioner absolutely immune[157] unfortunately did not discuss the policy reasons for their decision but instead said they were stating the general rule in this country which they plainly were not. From a policy viewpoint it would seem better to require good faith on the part of local officials. The Supreme Court of Ohio in *Bigelow v. Brumley*[158] expressly recognized the twofold basis for legislative

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153 Tenney v. Brandhove, 341 U.S. 367 (1951); Van Ripen v. Tumulty, 26 N.J. Misc. 37, 56 A.2d 611 (1948).

154 Sheppard v. Bryant, 191 Mass. 591, 78 N.E. 394 (1906).

155 Long v. Ansell, 69 F.2d 386, 94 A.L.R. 1466 (D.C. Cir. 1934).

156 Tanner v. Gault, 20 Ohio App. 243, 153 N.E. 124, 24 Ohio L. R. 315 (1925) *motion to certify overruled,* 24 Ohio L.R. 50 (1925).

157 It is interesting to note that the court says that *Mauk v. Brundage,* 68 Ohio St. 89, 67 N.E. 152 (1903), is the Ohio rule on relevancy, but in the *Mauk* case it was held that a preamble to a resolution by a board of health was mere surplusage and not absolutely privileged. This indicates the liberalization of the relevancy requirement.

158 138 Ohio St. 574, 37 N.E.2d 584 (1941).

immunity and held that the constitutional provision recognizes, but does not restrict, the immunity. In this case the court said that a committee appointed by the governor to prepare the official argument in a proposed constitutional amendment by initiative procedure were absolutely immune if the matter contained in the argument was relevant. This shows the value of the common law-constitutional distinction even in states where local officials do not have an absolute immunity. Although the Ohio authority is meager, there is no good reason to assume that a later case would come out differently with the possible exception of a case involving a county commissioner, city councilman, or some other local legislator.

Whether a petition directed to the legislature is absolutely immune is a little litigated question. An early English case held that such petitions were absolutely immune.[159] This case has been explained, however, on the basis that the Parliament was acting in a judicial capacity.[160] This same commentator goes on to say that, unlike a judicial proceeding, the legislator has no chance to vindicate himself, while the petition remains on the public records. This argument lacks validity because the same inability to re-establish oneself is present in the case of a debate or speech by a legislator which contains defamatory matter concerning a third party who is not a legislator. It has been held, however, that a petition for recall was only qualifiedly privileged.[161] The most usual type of petition and the type most likely to be defamatory is the recall petition. A recall petition is a method of removal of public officers by vote of the electors in an election held for such purpose.[162] In Ohio we have constitutional recognition of initiative and referendum,[163] but nothing directly on recall. Article II §1 of the Ohio Constitution is not broad enough to allow recall.[164] There is a statutory provision for recall of municipal officers,[165] but the statute has been held unconstitutional by an Ohio Court of Appeals,[166] and there is strong indication that the Supreme Court of Ohio would do likewise.[167] The reason for this is that Article II §38 of the Constitution of Ohio is exclusive, except for other express

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159 Lake v. King, 1 Saund. 131, 85 Eng. Rep. 137 (1680).

160 Veeder, *Absolute Immunity In Defamation Cases: Legislative and Executive Proceedings*, 10 COL. L. REV. 131, 138 (1910).

161 State v. Wilson, 137 Wash. 125, 241 Pac. 970, 43 A.L.R. 1263 (1925).

162 28 AM. JUR. INITIATIVE, REFERENDUM, AND RECALL §48.

163 OHIO CONST. ART. II §1.

164 State *ex. rel.* v. Ducy, 36 Ohio L. Abs. 467, 44 N.E.2d 803 (1942).

165 OHIO REV. CODE §705.92 (3515-71).

166 State *ex rel.* v. Ducy, *supra*, n. 164.

167 State *ex rel.* v. Brown, 105 Ohio St. 479, 138 N.E. 230 (1922). But if a city under a home rule charter adopts a provision for recall, it will be Constitutional. State *ex rel.* v. Edmonds, 150 Ohio St. 203, 80 N.E.2d 769 (1948).

constitutional provisions, and it provides that officers shall be removed only "upon complaint and hearing." Thus, it is doubtful in Ohio that we will have much problem with libel actions based on petitions to the legislature.

This is the present condition of legislative immunity. A situation exists wherein we have placed all the emphasis on the societal side of the scales and have paid no attention to the protection of the individual. There has been a vigilant protection of the legislator, so that he will have no fear of speaking out; thus society will be better represented. But the individual may have his character and reputation ruined by the use of completely unreliable evidence with little, or no chance to vindicate himself. It would appear that in our necessary and vital battle against communism and fascism we are giving up many of the principles which we are fighting so hard to protect. The greatest virtue of our government has been the right to think and believe as you please, and the protection we have afforded to non-conformists even in times of great stress is the sign of a truly strong constitutional government.[168] Our legislative branch of government, however, is equally as vital and care must be taken that we do not destroy this important part of our governmental structure when we are trying to protect the individual.

At present there are at least four limiting forces or sanctions available to guard against the improper use of the legislative immunity. They are the internal rules of the legislature, the crime of perjury, recall petitions and public opinion. Note that none of these methods could be carried into force by the individual alone.

> Article II, Section 8, of the Ohio Constitution[169] provides:
> Each house, except as otherwise provided in the constitution, shall choose its own officers, may determine its own rules of proceeding, punish its members for disorderly conduct; and with the concurrence of two-thirds, expel a member. . . .

If this sanction was actually an operative one, there would be no need to discuss further the problems of finding an adequate sanction. The problem is that this sanction has been little used.[170] Seemingly the legislature would want to show that they were opposed to unlimited calumny, but apparently they think it is a blot on the whole legislature if they punish one of their members. It would seem better that the legislature put "their own homes in order," but it appears very unlikely that they will do this.

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168 Taylor v. Mississippi, 319 U.S. 583 (1943).

169 U.S. CONST. ART. I §5 is a similar provision.

170 Yankwick, *The Immunity of Congressional Speech—Its Origin, Meaning and Scope*, 99 U. OF PA. L. REV. 960, 970 (1950-51).

A witness may be limited to some extent in what he testifies to before a legislative committee because of the perjury sanction.[171] The difficulty with perjury is that it is hard to prove and would apply only to witnesses before committees and not to the legislators. "Perjury must be proved by the testimony of two witnesses, or of one witness and corroborating circumstances."[172] There is also the problem of political pressure on the official not to start prosecution against a friendly or influential witness. With these weaknesses, it becomes manifest that perjury is not an effective sanction.

A recall petition could be a very strong and direct sanction for the people. An aroused public opinion is required in order to recall an officer; so an individual could not bring the action without public support. In Ohio, as was pointed out before, removal of an officer may be had only on a hearing in court,[173] but our removal procedure would be available if the legislator had really gotten "out of bounds." The recent "Joe Must Go" campaign gives some indication of the problem of getting enough valid signatures to require an election.

If public opinion were strong enough, we would need no other sanction. But the people of this country have become quite docile about giving up their liberties, and are more and more willing to rely on a paternalistic government. So long as the leaders of the government are honest and faithful this is acceptable, but what if power-hungry and vicious men were given this great amount of power and control over our daily lives? The answer is obvious. Our educational system must take it upon itself to develop an awareness of the problem and an active interest in our governmental structure. At present, however, public opinion is a weak sanction. Along the same line is the need for better legislators and more responsible newspapers. But this cure is also very unlikely.

There have been various suggestions for the adoption of procedural safeguards to prevent the unchecked issuance of defamatory statements.[174] Examples of suggested safeguards are: that interested parties be given notice of the nature of the investigations; that a person should have the right to make a statement if his name was raised in an unpleasant manner; that interested parties should be given the right to call witnesses and cross examine others; and that a witness may be represented by an informed counsel who

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171 OHIO REV. CODE §101.44 (60), provides in part that ". . . . This section does not exempt a witness from the penalty of perjury."

172 OHIO REV. CODE §2945.62 (13444-22).

173 OHIO CONST. ART. II §38; OHIO REV. CODE §§3.07-3.10 (10-1 to 10-4).

174 Note, 16 U. OF CHI. L. REV. 544 (1948-49).

would take an active part. These safeguards would limit to some extent the "character assassination" which continues daily, but there are serious limitations to them. These safeguards have been adopted in some committees and the result was not too good.[175] There was no marked decrease of harmful statements. Also, in times of stress it is vital that the legislature be able to operate with dispatch, and this speed of investigation is the very value of committee action.[176] Therefore, it does not appear that the adoption of burdensome court procedure is the answer. However, it would be quite proper to adopt some of the procedural safeguards, at least those which do not hamper legislative investigations to any great extent.

Complete abolition of the legislative privilege by a constitutional amendment has been suggested.[177] This state of affairs of course would give the individual complete protection, but it would completely ignore any societal ends. A legislator would be afraid to open his mouth, and as a consequence the people would not be properly represented. There would even be a great likelihood that our entire representative form of legislature would collapse or lose all its vitality. The legislative immunity is an absolute necessity for our form of government and it should not be abolished because a few have abused it.

The most practical and feasible suggestion for curbing the abuser while still maintaining the immunity is that the person defamed be allowed to bring an action for damages against the government.[178] The first idea was to expand the Federal Torts Claims Act to include the historical action of libel and slander. This has great merit, and would be another step toward curing the mistake of transferring governmental immunity to this country from England. In this country the people, not the government, are supreme, and the government in this country "can do wrong." Professor Green would go one step further and create a new type of remedy more favorable to the party defamed. A new remedy must always be interrupted by the courts, while we have a good knowledge of the reactions of courts to an established action. The criticism of an action of libel and slander do not overcome this.

The solution, then, until public opinion is aroused and we get higher quality legislators, is to grant a party who is defamed a cause of action against the government. The legislator would still

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[175] *Id.* at 549.

[176] Green, *Public Destruction of Private Reputation—A Remedy?*, 38 MINN. L. REV. 577 (1954).

[177] Yankwick, *The Immunity of Congressional Speech—Its Origin, Meaning and Scope*, 99 U. OF PA. L. REV. 960, 973 (1950-51).

[178] Green, *supra*, n. 176; Yankwick, *supra*, n. 177.

be free to say anything he wanted to in the exercise of his duty, and the individual would be at least partly compensated for his injury. The effect of a trial on the merits, even though not directly against the legislator, might have a very favorable effect on what the legislator said. This approach will come very near to reaching the proper balance between the individual and the group.

Executive Proceedings

Even with the tremendous expansion of the executive branches of government in the past two decades, the amount of executive defamation and the comment it has aroused is very trivial. No very good reason is apparent unless it is the relative uncertainty of the extent of the immunity and the requirement that the statement be relevant. No matter what the reason, in comparison with the legislature, the executive branch has not abused their immunity. The problems here then, are mostly in the nature of defining the extent of the immunity.

It is very well settled that the highest officers of our nation and state are within the immunity.[179] This would clearly include the President and his cabinet,[180] and the equivalent of these officers at the state level.[181] This immunity is circumscribed, however, by the requirement that the statement made be pertinent and that it be made in the course of the executive's duty. The relevancy problem is quite similar to that discussed under the judicial section and it need only be pointed out that relevancy here is not used in a strict logical sense.[182]

One of the most difficult problems in this matter of executive immunity is to which, if any, minor officials the immunity is extended. The majority of states would hold, as to local officials, that the immunity is not absolute.[183] However, Michigan would extend the privilege to local executives.[184] Although the authority is very sparse in Ohio as to local officials, one court of appeals opinion[185] held that an absolute immunity extended to a county commissioner.

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179 Bigelow v. Brumley, 138 Ohio St. 574, 37 N.E.2d 584, 21 Ohio Op. 471 (1941); Matson v. Margiotti, 371 Pa. 188, 88 A.2d 892 (1952); Spalding v. Vilas, 161 U.S. 483 (1895); Restatement, Torts §591; Prosser, Torts 829 (1941).

180 Spalding v. Vilas, note 179, *supra;* Glass v. Ickes, 117 F.2d 273 (D.C. Cir. 1940); *Cert. denied* 311 U. S. 718 (1941). Mellon v. Brewer, 18 F. 2d 168 (D.C. Cir. 1927). No cases of a suit against the President.

181 Bigelow v. Brumley, *supra,* n. 179; Matson v. Margiotti, *supra,* n. 179.

182 See discussion p. 344, *supra.*

183 Mills v. Denny, —— Iowa ——, 63 N.W.2d 222 (1954); Greenwood v. Cobbey, 26 Neb. 449, 42 N.W. 413 (1889); 33 Am. Jur. Libel and Slander §144.

184 Trebelcock v. Anderson, 117 Mich. 39, 75 N.W. 129 (1898); Note 44 Mich. L. Rev. 871 (1945-46).

185 Tanner v. Gault, 20 Ohio App. 243, 153 N.E. 124 (1925) *motion to certify overruled,* 24 Ohio L. R. 50 (1925).

Even though this was a legislative case, it would be logical to extend the same immunity to minor executives. From a policy viewpoint, though, when it is remembered that the basis of the immunity is to prevent the harassment of public officers in order that they may perform their important functions, it would seem that a qualified immunity is sufficient.

Minor officials, under an executive who has an absolute immunity, or one who carries on important functions,[186] and army and navy officers[187] present the more difficult problem. The first group is protected by a vicarious immunity, *i.e.*, its members are the agents of the person who has the immunity performing his duties, so it is only proper they should get his immunities.[188] The agent, however, must not go beyond the scope of his duties and this is the reason why the immunity is often said only to be vertical.[189] This means that a minor official only has a duty to make statements to his superiors, and not to other departments or to the public. If, however, the minor executive had a duty to make reports to other branches there is no apparent reason why he would not be horizontally immune. This terminology seems useless and the better way to understand this is on the basis of an agency theory. There is a definite limit as to the extent of the vicarious immunity which needs to be pointed out. The function that the "agent-junior executive" is performing must be an important one. The classic example of this is that the immunity of the Postmaster General does not extend to a janitor in a local post office.

The last mentioned limitation, *i.e.*, importance of functions, may well do away with any need for a delegated immunity. If a lower executive performs a function which is so important that the public welfare demands that he be free to act, then the immunity should be original with the official. With our original concept of balancing applied it would seem quite logical that an individual who performed such a function would be absolutely immune no matter what his title may be. But the courts are likely to continue this trend of approaching these problems in traditional manner, and therefore the minor official would argue he gets his immunity from his departmental chief.

The immunity extended to servicemen is rather uncertain in this country because of the sparsity of cases. Nothing would seem more likely than that a high officer in the armed forces during time of war should be free of harassment in carrying out his

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186 Love v. Snyder, 184 F. 2d 840 (6th Cir. 1950).

187 33 AM. JUR. LIBEL AND SLANDER §145.

188 Bigelow v. Brumley, 138 Ohio St. 574, 37 N.E.2d 584 (1941).

189 Comment, 20 U. OF CHI. L. REV. 677 (1953).

functions. The need for decision is immediate and questionable people are likely to suffer, but the public need for protection overbalances a large amount of individual invasion.[190]

There is a definite conflict in determining whether communications by and to law enforcement officers are absolutely immune.[191] In Ohio a communication to a police officer is probably only qualifiedly immune.[192] The F.B.I. has a rather different position. It would seem better on policy grounds that all police communications be only qualified. But in the case of the F.B.I. where a statement is made to an officer by an informant, the proof of the case could be made impossible by the government's exercising its evidentiary privilege to exclude any statements made between an officer and a third party. This privilege is to be distinguished from the immunity in most libel cases, in which it is possible to prove facts sufficient to allow recovery, but because of the circumstances existing at the time, no recovery is allowed. In the evidentiary privilege as it applies here, the defamed party is unable to recover, because it is impossible to present any evidence that the defamatory statements were made.[193] This, in effect, shifts the matter of deciding whether a particular situation is privileged from the judiciary to the executive, but in the case of the F.B.I., where classified material is handled, this method prevents a complete exposure of the statements with a very good possibility that even if they were presented no recovery would be allowed.[194] The enforcement of the law will not be greatly impeded by the requirement that statements made by and to an officer be made in good faith.

Assuming for the moment we have an executive who is in a position to be immune, how can it be predicted whether his statements will be immune? The statement must be a necessary part of the communication; the communication must be reasonably related to the duties of the officer; and the communication must be made to a proper person.[195] These are mere words and of little help, but it will be remembered when vertical and horizontal immunity were discussed, that this carries the idea to whom the statement is made. Statements to the public through the press is the outside limit of "to whom the statement is made," but it may very

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190 For Brief discussion and the few unsatisfactory case see, 33 AM. JUR. LIBEL AND SLANDER §145.

191 Vogel v. Gruaz, 110 U.S. 331 (1883); Pecue v. West, 233 N.Y. 316, 135 N.E. 315 (1922); note, 140 A.L.R. 1466 (1942).

192 Popke v. Hoffman, 21 Ohio App. 454, 153 N.E. 248 (1926).

193 Comment, 51 COL. L. REV. 244 (1951).

194 Foltz v. Moore-McCormick Lines, 189 F. 2d 537 (2d Cir. 1951), *cert. denied* 342 U.S. 871 (1951).

195 Comment, 20 U. OF CHI. L. REV. 677 (1953); note 132 A.L.R. 1340 (1941).

well be the duty of the executive to communicate to the public.[196]

The *Matson* case indicates the extreme periphery of the executive privilege. In that case the Attorney General of Pennsylvania wrote to a city district attorney and said that one of the latter's assistants was a communist. The letter was released to the press before it was sent, and the Attorney General had no power over the removal of assistant district attorneys. The court held that the entire chain of publications was absolutely immune. It is a rather close question whether it is the duty of the Attorney General to advise the dismissal of an employee over whom he has no direct authority. It is also questionable whether there was a real necessity and duty to have the letter released to the press before the district attorney decided what action to take. Nonetheless this case does indicate a liberal flexible immunity which gives the executive the necessary freedom he requires to properly carry out his functions and in that sense the case is good. But did the court forget to consider the individual's rights?

There is one problem which pervades the whole area, *i.e.*, the immunity which is extended to a fair and accurate report of absolutely immune proceedings. The rule seems clearly to be that the privilege is only qualified.[197] It seems logical to say that if the person who made the statements is absolutely immune so should be the paper which quotes him. But the requirement that the publication be in good faith and not malicious does not greatly hamper the press, and it will protect an individual from malicious defamation.

The need for a sanction does not appear pressing in the area of the executive branch. Perhaps this is because of the many limitations on the immunity itself. If this is true, as it appears to be, might not the answer to the rather difficult legislative problem be to revoke the constitutional provisions and retain the common law absolute immunity with its more stringent requirements and thus solve that problem.

If a sanction is needed many of the provisions suggested in other Sections will apply with equal force here.

ADMINISTRATIVE PROCEEDING

To treat the administrative as a separate problem in a "privilege" article is a relatively new approach. The Restatement and most of the experts stick in a few sentences about "quasi" proced-

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[196] Glass v. Ickes, 117 F.2d 272 (D.C. Cir. 1940) *cert. denied* 311 U.S. 718 (1941); Matson v. Margiotti; 371 Pa. 188, 88 A.2d 892 (1952).

[197] Byers v. Meridian Printing Co., 84 Ohio St. 408, 95 N.E. 917, 38 L.R.A., N.S., 1913 (1911); Post Publishing Co. v. Maloney, 50 Ohio St. 74 33 N.E. 921 (1893); Heimlich v. Dispatch Printing Co., 26 Ohio Dec. 234, 18 Ohio N.P., N.S., 505 (1916).

ings and that is all that is done. Some law reviews recently have decided to approach this matter directly and by analysis fit together some logical pattern for the cases involving administrative agencies.[198] Their plight is clear. How can a person fit together cases in a logical way which have not been approached in an orderly manner?

The present basis for deciding whether an utterance made in an administrative proceeding has an immunity is to see how close an analogy there is between the agency and a court, executive or some other absolutely privileged group.[199] Deciding that an agency is quasi-judicial in nature does not answer the question of whether there should be an immunity. It may be said that there is a real value in the use of judicial procedure by an agency that has an absolute immunity, in that there will be a more mature and conservative approach in which the chance for "reputation slaughter" is much less likely. But to say that judicial function is required seems entirely immaterial. The approach of today may have more logic than the writer has allowed it, because the importance of the function of the agency has a high correlation to whether absolute immunity is extended.[200] But by and large the problem would be greatly simplified if the administrative area, which grew up after rules of immunity were settled, were separately approached. The same basis as was applied in the established areas for deciding the area of immunity should be applied now in deciding the extent of the immunity in the administrative cases.

In Ohio the rule is that, in the case of failure of analogy to a court or other "privileged" group, the immunity extended to an administrative agency is only a qualified one.[201] The common pleas

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198 See Notes 97 U. OF PA. L. REV. 877 (1948-49); 18 OKLA. L. REV. 1138 (1947); 13 Mo. L. REV. 320 (1948).

199 This accounts for the vain attempt by the common pleas court in *Meyers v. Parr* to say the Board of Embalmers was exercising a judicial function. *Meyers v. Parr*, 33 Ohio L. Abs. 467, 19 Ohio Op. 543, 6 Ohio Supp. 209 (1941), *reversed*, 69 Ohio App. 344, 37 N.E. 2d 637, 24 Ohio Op. 110, 34 Ohio L. Abs. 448 (1941). See also Wilson v. Whitacre, 2 Ohio Cir. Dec. 392, 4 Ohio Cir. Rep. 15 (1889); White v. United Mills Co., 208 S.W. 2d 803 (Mo. 1948).

200 Independent Life Ins. Co. v. Rodgers, 165 Tenn. 447, 55 S.W.2d 767 (1933); Independent Life Ins. Co. v. Hunter, 166 Tenn. 498, 63 S.W.2d 668 (1933). Statements to state insurance commissioner held absolutely privileged in one case only qualified in the other. Problem is that the *Hunter* case could be based on the fact the statement is outside the commissioner's duty. See also note 198, *supra*.

201 Meyers v. Parr, 69 Ohio App. 344, 37 N.E.2d 637, 34 Ohio L. Abs. 448, 24 Ohio Op. 110 (1941) common pleas report 33 Ohio L. Abs. 467, 19 Ohio Op. 543, 6 Ohio Supp. 209 (1941); Patterson v. Kincaid, 44 Ohio App. 154, 184 N.E. 705 (1932); But *cf.* Mauk v. Brundage, 68 Ohio St. 89, 67 N.E. 152 (1903). In

court in the *Meyers* case dealt at length on the board's subpoena powers, court-like hearing, and right to appeal. From these procedural methods they decided the agency was exercising a judicial function. The court of appeals reversed. They found that the board was not exercising a judicial function, because by the Constitution of Ohio judges must be elected and the administrators were not. Although their basis seems rather shaky, the court properly decided that the Board of Embalmers was an administrative agency and not some magical, quasi-court. From this point on the opinion of the court treats the problem of whether absolute immunity should be extended to administrative agencies. They decide not. The basis seems to be that a conditional immunity is sufficient to protect the public interest, and yet the private reputation will be given adequate protection. The difficulty with the case is that the court tries to decide whether *all* administrative agencies should have an absolute immunity and not whether an absolute immunity should extend to the Board of Embalmers.

The *Meyers* case may indicate the approach to be taken. It would be well and proper to look, as did the common pleas court, at the internal procedure of the agency, not to see if they were a quasi court, but instead to determine how capable and accountable they would be if they were afforded this great power. Unquestionably the proper approach to the problem is to face it directly. We also have the basic policy of balancing the societal needs against the private reputation; and besides this, the wisdom and the mistakes in other areas of absolute immunity are available for our edification, waving red flags that will help to keep us on the right paths.

As was pointed out before, the *Meyers* case attempted to decide the problem for the entire administrative area. Each agency should be treated separately, and even then it might be wise to look at the particular function.[202] However, since the vital element from the societal viewpoint is freedom from fear of harassment and damage by public officers, it would be much better to either grant an agency immunity for all its functions or refuse the absolute immunity entirely. In deciding whether an agency should have an immunity we should once more get out our scales and put on one side the importance of the function the agency is to perform and on the other the likely injury to the reputation of the individual members of our nation, and if the public importance weighs the heavier, then an absolute immunity should be granted. But on the other hand, if the private interest side were the heavier, keeping in mind the added

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which the supreme court strongly indicates that relevant proceedings before a board of health would be absolutely privileged.

[202] See note 200, *supra*.

weight afforded to this by the Due Process Clause, then the immunity would not be absolute, but only qualified.

The administrative immunity problem has been rather poorly handled, but as soon as the courts clear away the underbrush and approach the problem in its real light—as a separate area of government — the problem should be solved in an accurate and proper manner.

COMMUNICATIONS BETWEEN HUSBAND AND WIFE

The question of immunity is rarely presented in cases where there is a defamatory communication between a husband and wife. Traditionally the courts have taken the position that there is no publication in this situation and therefore no actionable defamation.[203] The reason being that a husband and wife are regarded as one person insofar as the publishing of defamatory statements are concerned.[204] The courts say that it is the same as talking to "oneself" when a husband is speaking to his wife.[205] This theory is an absurd legal fiction and has been wisely and properly refuted in other areas of the law[206] as it should be in the defamation sector. The inconsistency of the "singleness" approach is brought out by a factual situation in which a third party makes a defamatory statement to one spouse about the other spouse. In this type of case, the courts hold that there has been a sufficient publication on which to base an action of libel or slander.[207] If the parties to a marriage were really "one" person for defamation purposes there could be no recovery in the aforementioned hypothetical situation, because a defamatory statement made only to the person defamed does not amount to an actionable publication.[208] To apply this "singleness" theory of marriage to the situation where the statement is made by one spouse to the other and not to apply it where the statement is made to the spouse by a third party is completely illogical unless the courts are covertly balancing the interests and then rationalizing the proper result by a fictional approach. There can be little doubt, however, that in the communications between spouses there is an actionable publication if the occasion is not privileged.[209] Since no Ohio case has determined this issue, it is suggested that, if the courts of this state are ever presented with such a problem, they cast aside this "fictional veil" and decide the case on the actual issues presented.

The actual problem presented is whether the public interest

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203 PROSSER, TORTS 831 (1941); note 78 A.L.R. 1182 (1932).

204 GATLEY, LIBEL AND SLANDER 103 (4th ed. 1953).

205 Note 78 A.L.R. 1182 (1932).

206 OHIO REV. CODE §§3103.01-3103.08 (8002-1 to 8002-8).

207 Duval v. Davey, 32 Ohio St. 604 (1877).

208 Steele v. Edwards, 15 Ohio Cir. Ct. 52, 8 Ohio Cir. Dec. 161 (1893).

209 25 O. JUR. LIBEL AND SLANDER §41.

in preserving a confidential relationship between a husband and wife overbalances the injury that will be done to the reputations of the individuals defamed.[210] In other words, whether this type of case presents the circumstances necessary for the granting of an immunity. Although it is quite necessary not to confuse evidentiary privilege and defamatory immunity,[211] it will be helpful at this point to discuss the evidentiary privilege extending to communications between husband and wife for the purpose of ascertaining the policy views of the court. The basis of the evidentiary privilege is that a spouse should feel perfectly free to disclose his thoughts to his mate without fear of the words coming back to him in the form of a petition or in an indictment.[212] If an absolute immunity were to be extended to defamation cases, it would be on this same basis.[213] The evidentiary privilege belongs at least to the spouse making the communications,[214] thus if an action based on statements to one's spouse were brought against the spouse, he could defeat any recovery by having the evidence necessary for the plaintiff to establish his cause of action excluded, *i.e.*, the communication of the defamatory statement to his spouse.[215] This shows that the policy of the courts as determined from the law of evidence would indicate that an absolute immunity should be granted to spouses for defamatory communications between themselves about third parties. There is an additional cogent reason for saying that Ohio would grant an absolute immunity as opposed to a qualified immunity. This is that the evidentiary husband and wife privilege in Ohio is, perhaps, a rule of exclusion[216] instead of the usual rule which would at least limit the power to exclude the evidence to one or both of the marital partners.[217] Although this Ohio case[218] is subject to criticism, it does indicate a strong policy stand that the confidence of the marital partner should be protected. The American Law Institute has taken the position that communications between spouses should be absolutely privileged.[219] Although it is doubtful that this is a restatement

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[210] See note 8, *supra*.

[211] Taplin-Rice-Clerkin Co. v. Hower, 124 Ohio St. 123, 177 N.E. 203 (1931).

[212] WIGMORE, EVIDENCE §2332 (3rd ed. 1940).

[213] RESTATEMENT, TORTS §592 Comment *a*.

[214] WIGMORE, EVIDENCE §2340 (3rd ed. 1940).

[215] This view is analogous to that suggested in the cases involving communications to F.B.I. officers where the government has an exclusionary privilege. 51 COL. L. REV. 244 (1951).

[216] Dick v. Hyer, 94 Ohio St. 351, 114 N.E. 251 (1916) third party allowed to exclude communication between husband and wife. The decision is open to criticism from an evidentiary viewpoint, but it clearly states the strong Ohio policy in favor of protecting marital confidence.

[217] WIGMORE, EVIDENCE §2340 (3rd ed. 1940).

[218] Dick v. Hyer, *supra*, n. 216.

[219] RESTATEMENT, TORTS §592: "A husband or a wife is absolutely privileged to publish to the other spouse false and defamatory matter of a third person."

of the common law view, it does seem to be a proper analysis of the situation. It must be admitted that the traditional approach reaches the proper result, but it achieves that end by a very "mystical" approach.

It is the generally prevailing opinion that only a conditional immunity will be extended to relatives, other than husband and wife, for defamatory communications among themselves.[220]

CONCLUSION

Absolute immunity has, in general, reached a proper level of development in the judicial and executive areas of our government. The relevancy requirement is becoming of less effect, but not to the point where it is valueless. This requirement that a statement be pertinent has a deterrent effect which is not found in the legislative proceeding.

The legislative area presents the most immediate and challenging problem. Individual reputation, at the moment, represents a small price for political prominence, and conviction without evidence indicates "proper" procedure. Allowing an injured party an action against the government appears to be the temporary answer, until the great forum of public opinion becomes aroused and puts an end to this dilemma.

The courts in the administrative cases in the future should approach the problem directly and decide the issue by balancing societal ends against individual reputation. The approach should be to determine the privilege for each agency individually and not as a group.

These are the problems. Will we be able to save this immunity which has given our government officials that freedom and fearlessness which has made our government great, and allowed statesmen to entertain and advocate unpopular views? We can not lightly discard this element of our government. On the other hand, will there continue, so long as we have this immunity, a mass of reputation "murders" based on incompetent witnesses? This cannot be shrugged off as another element of our complex society. No, the answer rests simply in a return to respect for the rights which plainly belong to every individual by our officials and by "We the people."

David W. Carroll

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220 GATLEY, LIBEL AND SLANDER 229-232 (4th ed. 1953); note, 78 A.L.R. 1182 (1932).