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Defamation in Good Faith: An Argument for Restating the Defense of Qualified Privilege

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DEFAMATION IN GOOD FAITH: AN ARGUMENT FOR RESTATING THE DEFENSE OF QUALIFIED PRIVILEGE

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ABSTRACT:

Since the 1964 case of *New York Times v. Sullivan*, the standard for proving defamation has often proven insurmountable to public figure plaintiffs who claim their reputations have been hurt through libel or slander. But, the standard can prove equally insurmountable to "private figure" plaintiffs when a qualified, or "conditional," privilege applies. Such privileges, intended to further the social policy of candor on certain proscribed occasions, can be claimed regarding otherwise questionable conversations as long as the dialogue is made: 1) in good faith; 2) about a subject in which the speaker has an interest or duty; 3) within a scope limited to that interest; 4) in a proper manner; and 5) between the proper parties. This iteration is common to nearly every state in the union.

The trouble is that the concept of good faith is often either undefined by case law or left unclear. At times, it is described in terms of its inverse— lack of "bad faith." At other times, the term good faith is coupled with lack of "malice," a concept that is equally amorphous.

The significance of this shifting definition is consequential, for the casual use of the term suggests incoherence within the doctrine of qualified privilege. If a privilege arises only upon a showing of "good faith," then the establishment of that element does not square with one of the customary ways of overcoming that privilege — a showing of "actual malice." The other elements — pursuit of a delineated interest; a statement limited in scope; made to the proper parties; and in the proper manner —would prove superfluous and irrelevant. Actual malice would have been disproven by the one factor that matters — "good faith." And if good faith were defined to be "reasonable behavior" or the equivalent of "reasonableness" in some way, the standard becomes redundant, as all of the other elements would simply be inquiries into reasonable publication. To complicate matters, as the defense is an affirmative one, its standard articulation presents a peculiar state of affairs in which defendants are required to prove the existence of their own good faith, rather than requiring plaintiffs to prove its absence.

Courts and critics have noticed this incoherence and many have called for the doctrine's abrogation. In the attached comment, a historical investigation reveals the original meaning of the concept, and argues for a return to this first

1. The Columbus School of Law at The Catholic University of America. The author would like to thank his Professors Kathryn Kelly, Marin Scordato, and Clifford Fishman of The Columbus School of Law for assistance with this article.

understanding, which will make the doctrine coherent once again. In addition, philosophical, social, and prudential arguments are put forward to show the value of the doctrine and to clarify its proper articulation.

I. INTRODUCTION

Notoriously, no less authority than Professor Prosser himself has stated that much of defamation law simply makes no sense:

> It contains anomalies and absurdities for which no legal writer ever has had a kind word, and it is a curious compound of a strict liability imposed upon innocent defendants, as rigid and extreme as anything found in the law, with a blind and almost perverse refusal to compensate the plaintiff for real and very serious harm.[2]

Of course, Prosser made his statement before the changes to the area came by way of the First Amendment requirements of *New York Times Co. v. Sullivan* [3] and *Gertz v. Robert Welch, Inc.*,[4] but it is unlikely that the effect of these two cases and others would have changed the professor's opinion. The area remains among the most perplexing in law, and one of its most perplexing aspects is that of qualified privilege.[5] Dependent upon situational determinants, fraught with shifting burdens, and rife with contradictory terms, the doctrine has grown increasingly complex in the application. And when much of defamation law was constitutionalized following the Supreme Court's decisions in the above-referenced cases, the voices suggesting that the whole area might soon be abrogated did not exactly echo with regret or remorse.[6] Still, qualified privilege has survived, and it remains largely in the same form that has caused so much consternation throughout its existence.

Distinct from absolute privilege which emanates from a social policy meant to protect those in public office from retaliation for performing their given duties,[7] the legacy of qualified privilege stems from old concerns. Those concerns revolve around mostly private interests, and seek to acknowledge and reinforce cultural goods that civilization has long prized: self-defense, neighborliness, familial integrity, and merit. These goods are protected by recognizing qualified privileges in certain historically recognized contexts: 1) publications made in one's own interest; 2) publications made in the interest of another; 3) publications made in a common interest with another; and 4) publications made in furtherance of a familial relationship, which might more logically be seen as a subset of numbers

2. W. PAGE KEETON ET. AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 111, at 771-72 (5th ed. 1984).
3. 376 U.S. 254 (1964).
4. 418 U.S. 323 (1974).
5. Throughout the article, the term "qualified privilege" will be used in place of its alternative, "conditional privilege," which is preferred by the Restatement (Second) of Torts § 593 (1977). The concepts are synonymous.
6. KEETON ET AL., *supra* note 2, § 114, at 825.
7. KEETON ET AL., *supra* note 2, § 114, at 815.

two and three, but has nevertheless been afforded its own category by way of tradition.[8]

The defense is customarily stated in this way:

> A communication is qualifiedly privileged if it is made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a duty, if it is made to a person having a corresponding interest or duty. The essential elements of a qualifiedly privileged communication are good faith, an interest to be upheld, a statement limited in its scope to the upholding of such interest and publication in a proper manner only to proper parties.[9]

Cases in a vast majority of states rely on a definition much like this one, and sixteen more include implications of "good faith," or its inverse, a prohibition of "bad faith."[10]

The trouble is that this concept —good faith is so commonplace in spirit and generic in nature that it almost reaches the level of tautology. It is actually more amorphous than it first appears. Often, the term is never defined at all, and when it is, the definition is variously put. When it is described in terms of its inverse — a lack of "bad faith"[11] —it only begs the question of meaning on different grounds, from the negative perspective rather than the positive. At other times, the term good faith is coupled with lack of "malice," itself a term of historically incongruent classifications.[12]

The significance of this shifting definition is not without consequence, for the casual use of the term suggests incoherence within the doctrine of qualified privilege. If a privilege arises only upon a showing of "good faith," then how does that establishment square with one of the customary ways of overcoming that privilege — a showing of "actual malice"? If good faith were to mean "no actual malice"[13]— in the constitutional sense of that term — i.e., that the speaker has no knowledge of the statement's falsity and has not been reckless as to its truth or falsity — then proof of good faith alone would make for a complete defense. The other elements — pursuit of a delineated interest; a statement limited in scope; made to the proper parties; and in the proper manner — would prove superfluous and irrelevant. Actual malice would have been disproven by the one factor that matters — "good faith." No further inquiries would be required.

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8. Also included in the occasions granted a qualified privilege are publications made in the furtherance of some public interest. *See* LAURENCE H. ELDREDGE, THE LAW OF DEFAMATION, §§ 89-91 (1978).

9. Dobbyn v. Nelson, 579 P.2d 721, 723 (Kan. Ct. App. 1978), *aff'd*, 587 P.2d 315 (Kan. 1978) (quoting Senogles v. Sec. Benefit Life Ins. Co., 536 P.2d 1358 (1975)).

10. *E.g.* Barnett v. Mobile County Pers. Bd., 536 So. 2d 46 (Ala. 1988).

11. *Id.* at 54.

12. Stewart v. Nation-Wide Check Corp., 182 S.E.2d 410 (N.C. 1971).

13. *See Ex parte* Blue Cross and Blue Shield of Ala., 773 So. 2d 475, 478 (Ala. 2000), which cites a litany of cases that imply good faith equals "no actual malice." *E.g.* Clark v. Am. First Credit Union, 585 So. 2d 1367, 1370 (Ala. 1991); Gore v. Health-Tex, Inc., 567 So. 2d 1307, 1308 (Ala. 1990).

But that is not what good faith means.

The same coherence problem would arise if good faith were defined to be "reasonable behavior" or the equivalent of "reasonableness" in some way — the opposite of "negligent;[14] except in that event, the term is redundant with the other requirements. There is only superfluity in requiring reasonable behavior as an element separate from the types of behavior that would have to be reasonable — a statement limited in scope, audience, and manner of conveyance. All would be circular.

But good faith does not mean that either.

Perhaps the various uses of the term in such a loose way are only "a manner of speaking?" Perhaps it is necessary to talk of the propriety of the defendant's conduct, within an approved occasion, in this positive articulation, so as to prescribe behavior? Constructing a picture of the conduct entitled to the defense is just a convenient way of stating the argument. But speaking in this way has made for a confused understanding of what the defense requires and what a defendant must prove in order not to lose it. This iteration is not as harmless as it might appear, for there is universal agreement that it is for the defendant to establish his privilege, as the doctrine is an affirmative defense.[15] So how does he go about doing so? Is the burden on him to show his own good faith? And if so, once again the question is begged: What does it mean?[16]

14. "Within the context of qualified privilege, the requirement of 'good faith' means that the speaker must have had reasonable grounds for believing that the statement is true . . . ." 50 AM. JUR. 2D Libel and Slander § 260 (2010) (citing Wright v. Bennett, 924 So. 2d 178 (La. Ct. App. 1st Cir. 2005)); Probable cause to believe the statement was a requirement of the common law defense. *See* DAVID A. ELDER, DEFAMATION: A LAWYER'S GUIDE, § 2:33 (West 2010).

15. KEETON ET AL., *supra* note 2, § 108, at 835.

16. A vast majority of state rules regarding qualified privilege include a requirement of "good faith," and are either exact replicas or close variants of the rule set out in Dobbyn v. Nelson, *supra* note 9. THE MEDIA LAW RESOURCE CENTER'S 50-STATE SURVEY, EMPLOYMENT LIBEL & PRIVACY LAW 2010: REPORTS FROM ALL FIFTY STATES, THE DISTRICT OF COLUMBIA & PUERTO RICO (Media Law Resource Center, Inc., 2010), sets out the representative rules in the following states, each including some form of good faith: Alabama: Cantrell v. North River Homes, Inc. 628 So. 2d 551, 553-54 (Ala. 1993) (quoting Hoover v. Tuttle, 611 So. 2d 290, 293 (Ala. 1992)); Arkansas: Addington v. Wal-Mart Stores, Inc., 105 S.W.3d 369, 378 (Ark App. 2003) (quoting Wal-Mart Stores, Inc. v. Lee, 74 S.W.3d 634 (Ark. 2002)); Connecticut: Miles v. Perry, 529 A.2d 199, 206 (Conn. App. Ct. 1987); Delaware: Battista v. Chrysler, Corp., 454 A.2d 286, 291 (Del. Super. 1982); District of Columbia: Millstein v. Henske, 772 A.2d 850, 856 (D.C. 1999) (citing Moss v. Stockard, 580 A.2d 1011, 1024 (D.C. 1990)); Florida: Nodar v. Galbreath, 462 So. 2d 803, 809 (Fla. 1984); Georgia: GA. CODE ANN. § 51-5-7 (2011); Indiana: Trail v. Boys and Girls Clubs of Nw. Ind., 845 N.E.2d 130, 136 (Ind. 2006) (citing Bals v. Verduzco, 600 N.E.2d 1353, 1356 (Ind. 1992)); Iowa: Winckel v. Von Maur, Inc., 652 N.W.2d 453, 458 (Iowa, 2002) (citing Theisen v. Covenant Med. Ctr., Inc., 636 N.W.2d 74, 83-84 (Iowa 2001)); Kansas: Dobbyn v. Nelson, 579 P.2d 721, 723 (Kan. Ct. App. 1978), *aff'd,* 587 P.2d 315 (Kan. 1978); Kentucky: Louisville Times Co. v. Lyttle, 77 S.W.2d 432 (Ky. Ct. App. 1934); Louisiana: Bell v. Rogers, 698 So. 2d 749, 754 (La. Ct. App. 2d Cir.1997) (citing Martin v. Lincoln Gen. Hosp., 588 So. 2d 1329, 1332-33 (La. Ct. App. 2d Cir. 1991)); Maryland: Bavington v. Robinson, 91 A. 777, 778 (Md. 1914); Massachusetts: Sklar v. Beth Israel Deaconess Med. Ctr., 797 N.E.2d 381 (Mass. App. Ct. 2003); Michigan: Bacon v. Michigan Cent. R.R. Co., 33 N.W. 181 (Mich. 1887); Minnesota: Hebner v. Great N. Ry. Co., 80 N.W. 1128 (Minn. 1899); Mississippi: Eckman v. Cooper Tire & Rubber Co., 893 So. 2d 1049 (Miss. 2005); Missouri: Lee v. W.E. Fuetterer Battery & Supplies Co., 23 S.W.2d 45, 60-63 (Mo. 1929); Nebraska: Dangberg v. Sears, Roebuck & Co., 252 N.W.2d 168, 171 (Neb. 1977) (citing Hall v. Rice, 223 N.W. 4 (Neb. 1929)); Nevada: Bank of America Nevada v. Bourdeau, 982 P.2d 474, 475 (Nev. 1999) (quoting Circus Circus Hotels v. Witherspoon, 657 P.2d 101, 104 (Nev. 1983)); New Hampshire: Pierson v. Hubbard, 802 A.2d 1162, 1166 (N.H. 2002) (quoting Pickering v. Frink, 123 N.H. 326, 329, 461 A.2d 117, 119 (N.H. 1983)); New Jersey: Coleman v. Newark Morning Ledger Co., 149 A.2d 193, 203 (N.J. 1959) (quoting Lawless v. Muller, 123

Much of the trouble with the term arises from the classic definition set out above, which in essence explains how a defendant must behave to avail himself of the qualified privilege defense. But this definition does not at all square with what the defendant must actually prove in order to make the argument. That is, though a failure to do all of the things listed in the quote from *Dobyn* above will result in an *abuse* of the occasion historically allowed defamatory latitude, all that the defendant actually needs to do under a proper understanding of the doctrine is to plead the defense in his answer — simply raise it as his excuse — thereby asserting that he was speaking on one of the occasions for which his jurisdiction grants the privilege, relieving him of defamatory liability. It is for the plaintiff to show, under the understanding of the restated rule championed here, either that the defendant abused the occasion by way of 1) some impermissible publication—misappropriation or indiscretion; or 2) some impermissible level of scienter. This iteration squares both with the logic and policy behind the doctrine, and with what the courts appear to be doing in their decisions. However, this understanding is at odds with the iteration of nearly every state in the union. And though it is largely consistent with the Restatement Second of Torts' articulation, this comment suggests refinements to that rule in order to clarify important distinctions. In short, the common law expression of the doctrine should be stripped of all elements and

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A. 104, 105 (N.J.1923)); New Mexico: Poorbaugh v. Mullen, 653 P.2d 511 (N.M. Ct. App. 1982); New York: Clark v. Somers, 557 N.Y.S.2d 209 (N.Y. App. Div. 4th Dept. 1990); North Carolina: Stewart v. Nation-Wide Check Corp., 182 S.E.2d 410 (N.C. 1971); Ohio: Jacobs v. Frank, 573 N.E.2d 609 (Ohio 1991); Oklahoma: Magnolia Petroleum Co. v. Davidson, 148 P.2d 468 (Okla. 1944); Rhode Island: Ponticelli v. Mine Safety Appliance Co., 247 A.2d 303 (R.I. 1968); South Carolina: Swinton Creek Nursery v. Edisto Farm Credit, ACA, 483 S.E.2d 789, 795 (S.C. Ct. App. 1997) (quoting Conwell v. Spur Oil Co., 125 S.E.2d 270, 275 (S.C. 1962)); Tennessee: Southern Ice Co. v. Black, 189 S.W. 861 (Tenn. 1916); Texas: Butler v. Central Bank & Trust Co., 458 S.W.2d 510, 514 (Tex. Civ. App. 5th Dist. 1970); Virginia: Williams Printing Co. v. Saunders, 73 S.E. 472 (Va. 1912); West Virginia: Swearingen v. Parkersburg Sentinel Co., 26 S.E.2d 209, 215 (W. Va. 1943). States with implicit good faith requirements include: Alaska: ALASKA STAT. § 09.65.160 (2011) (stating presumption of good faith created by qualified privilege); Arizona: Green Acres Trust v. London, 688 P.2d 617, 624 (Ariz. 1984) (stating qualified privilege lost through actual malice or excessive publication); California: Cal. Civil Code § 47 (Deering 2011) (stating inverse of good faith and that qualified privilege protects communications except statements made with malice); Colorado: Sunward Corp. v. Dun & Bradstreet, Inc., 568 F. Supp. 602, 607 (D. Colo. 1983) (adopting Restatement (Second) of Torts § 595 (1977) and protecting statements "fairly made"); Hawaii: Russell v. American Guild of Variety Artists, 497 P.2d 40, 45 at note 4 (Haw. 1972) (stating qualified privilege overcome by common law malice); Idaho: Barlow v. International Harvester Co., 522 P.2d 1102, 1112-13 (Idaho 1974) (stating qualified privilege defeated by constitutional or "express malice"); Illinois: Kuwik v. Starmark Star Mktg. & Admin., Inc., 619 N.E.2d 129, 134 (Ill. 1993) (adopting Restatement (Second) of Torts Second §§ 593-99 (1977)); Maine: Saunders v. VanPelt, 497 A.2d 1121, 1125 (Me. 1985) (adopting Restatement (Second) of Torts §§ 593-598A (1977)); Montana: MONT. CODE ANN. § 27-1-804(3) (2010) (stating qualified privilege applies to all statements made without malice); North Dakota: N.D. CENT. CODE § 14-02-05 (2011) (stating qualified privilege covers communications made without malice); Oregon: Wattenburg v. United Med. Laboratories, Inc., 525 P.2d 113 (Or. 1974) (requiring a proper motive); Pennsylvania: Maier v. Maretti, 671 A.2d 701, 706 (Pa. Super Ct.1995) (citing Beckman v. Dunn, 419 A.2d 583, 588 (Pa. Super Ct. 1980)) (requiring statement be made from a proper motive); South Dakota: S.D. CODIFIED LAWS § 20-11-5(3) (2010) (requiring statement be made without malice); Utah: Brehany v. Nordstrom, Inc., 812 P.2d 49, 57 Utah 1991) (stating qualified privilege covers communications made without malice); Vermont: Crump v. P & C Food Markets, Inc., 576 A.2d 441 (Vt. 1990) (stating qualified privilege overcome by either common law or constitutional malice); Washington: Bender v. Seattle, 664 P.2d 492, 502 (Wash. 1983) (stating qualified privilege overcome by actual malice); Wisconsin: Zinda v. Louisiana Pac. Corp.,440 N.W.2d 548, 552 (Wis. 1989) (stating qualified privilege overcome by actual malice); Wyoming: Sylvester v. Armstrong, 84 P.2d 729 (Wyo. 1938) (stating qualified privilege overcome by common law or actual malice).

requirements, and it should be reconceptualized as a zone of latitude towards communications spoken within the context of a legally-sanctioned occasion; indeed, as will be explained below, the expression "privileged communication" is itself imprecise and pernicious, and should be abandoned. The same goes for any discussion of "overcoming the privilege"; the right way of speaking is to say that the privilege does not exist, not that it is overcome. Again, the distinction is an important one, which will be explained below, and must be made so as to root out the mischief-causing idea that the privilege is something that can be "built," a positive reality comprised of an architecture of essential elements. The history of the doctrine, and right-thinking about it, show otherwise.

To lay the foundation for this argument, something can be gained from tracing the history of the term and from finding where it transects with the development of qualified privileges in defamation law. Part II will trace this history, and illustrate how the focus upon privileged occasions and abuses thereof morphed into talk of "privileged communications," resulting in the construction of "elements" for the same, including "good faith." From this understandable but unfortunate statement of the doctrine was born the confusing articulation that is so rife in the common law today.

The section will also explain that, although the doctrine was meant to allow for candor in the pursuit of certain socially-prescribed behavior, that candor was not conceived as limitless. Instead, the courts had in mind a more subtle concept, granting the defense only when the speaker exercised what will be referred to here as "discreet candor." The parameters of discretion were meant to act as insurance of good faith as much as they were to exemplify its lack.

Something can also be gained from looking to the debate about qualified privileges. To that end, Part III will examine the two criticisms typically aimed at the doctrine — that it is both unnecessary and unduly complex. This argument is often made in conjunction with a call for the defense's eradication, as such, or at least for a modification that would result in a more efficient and simple administration of the area. The section will point out evidence to the contrary — namely, that it is not possible to cover the particular interests adequately in the way the critics suggest, nor will efforts to do so simplify matters; in fact, the evidence used to claim an abuse of the privilege will only reassert itself in odd ways, calling for its recognition in strained analytical paradigms. In short, the section suggests new arguments supportive of why the qualified privilege is in fact a delicately constructed legal mechanism that actually provides quite well for particular interests sanctioned by society.

The section will also explain the philosophy behind the way presumptions work, which this article suggests is precisely what a privileged occasion gives rise to: a presumption of good faith. Because good faith is presumed upon a claim of the privilege, it should be deleted from the recitals of the doctrine's constitutional make-up. Indeed, the article calls for an imaginative overhaul of how the doctrine is conceived, which will be reflected in more precise language that clearly conveys that conception.

The rule suggested in Part IV takes up the findings of the previous section and suggests their application in a way that largely comports with that of the Restatement Second of Torts, with an important caveat. Part IV will also set out some alternative terminology and offer several conceptual schemes in hopes of providing clarity. Part V will summarize the arguments made here.

II. GOOD FAITH AND QUALIFIED PRIVILEGES: A BRIEF REVIEW

As a defense to a charge of defamation, a review of qualified privilege–and more particularly, to the concept of good faith as it relates to the privilege–must start with the history of defamation[17] law itself. The claim has its origins in the ecclesiastical courts, Professor Eldredge explains, since the error was primarily a moral one, requiring redress through confession.[18] As such, the concept of malice–intentional wrongdoing–was an essential part of slander. Jurisdiction over the area eventually arrived by way of the Star Chamber, which had reinforced the aspect of malice in libel actions due to that body's characteristic jurisdiction over criminal matters.[19]

"Malice," as it had come to be understood in the area, was set out most famously by the very case that struck it down as an element of the claim, *Bromage v. Prosser*: "Malice in common acceptance means ill will against a person, but in its legal sense it means a wrongful act done intentionally without just cause or excuse."[20] In *Bromage,* the Court of King's Bench noted that a lower tribunal had required malice as the "gist of the action." It corrected the error by distinguishing "malice in fact," which has the vernacular meaning of "malevolence," and "malice in law," which denotes lack of legal excuse, and by stating that malice in fact is never essential to an ordinary action for "a libel or for words."[21] Malice in law, however, was implied from the utterance.[22]

Despite the *Bromage* opinion's attempt to clarify the use of the term, the way it made the distinctions and refinements actually kept the idea alive. Courts continued to mention malice as part of the tort's nature,[23] presaging a tendency to retain and exacerbate error that has become characteristic of the area.

Aside from the dubious inclusion of malice as a requirement in a straight defamation claim, the concept's history with qualified privilege stands on more solid ground. For the charge of malice in its original sense —"ill will"— was

17. The term "defamation" as used here will be meant to include both "libel" and "slander."
18. ELDREDGE, *supra* note 8, at 26-27.
19. *Id.*
20. Bromage v. Prosser, (1825) 4 B. & C. 247, 255, 107 Eng. Rep. 1051(K.B.).
21. *Id.* To complicate matters further, malice in the vernacular sense came to be given yet more names by the courts, some redundant with terms that mean something else altogether. *See* THE DICTIONARY OF ENGLISH LAW (Earl Jowitt ed., Sweet & Maxwell, Ltd.) (1959) *s.v.* "malice": "[i]ll will or improper motive is often called actual or express malice, or malice in fact, to distinguish it from malice in law, which merely denotes absence of legal excuse." *Id.*
22. *See* ELDREDGE, *supra* note 8, at 28; *see also* ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS § 9-3 (PLI 3d ed. 1999).
23. Justice Burch's invective against the persistence of 'presumably learned judges' calling malice the "gist of the action" is in Coleman v. MacLennan, 98 P. 281, 291 (Kan. 1908).

always considered a way for the plaintiff to defeat the defense: "In the law of defamation the defence that the occasion was one of qualified privilege may be rebutted by establishing actual malice in the defendant, for he is not entitled to protection if he uses such an occasion for some indirect and wrong motive."[24] That is, although a claim could be defamatory without a showing that it was made from impure motives, a defense that a statement was made on a privileged occasion could indeed be defeated by such evidence. In fact, what was meant by malice in the area of qualified privilege could have been more clearly stated — and much trouble avoided thereby — in a rule that required the motive for speaking on the occasion to be for the purposes of pursuing some interest sanctioned by society, i.e., a policy allowed by that society's laws and respected by its courts. That seems to have been the meaning understood by the early cases in the area. The aforementioned tendency of the courts to muddy the concept accounts for the ensuing confusion.

The seminal case in the field of qualified privilege is the old English suit of *Toogood v. Spyring*.[25] There, the defendant reported, in the presence of others, that the workman he had hired to repair a barn broke into its cellar, got drunk on the stored cider, and ruined the work he was performing. The workman then brought the action for slander. Baron Parke stated the parameters of the defense of privilege:

> [T]he law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases, the occasion prevents the inference of malice, which the law draws from unauthorized communications, and affords a qualified defen[s]e depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not-restricted the right to make them within any narrow limits.[26]

Notably, there is no talk of good faith in the opinion, only a requirement that the statement be "fairly warranted by the occasion" and "honestly made," which denote sincerity of purpose within the proper context. Equally important is Baron Parke's focus upon the fact that it is the *occasion* itself that "*prevents the inference of malice*." While the *Toogood* court retains the idea of inferred malice, despite

24. THE DICTIONARY OF ENGLISH LAW, *supra* note 21, *s.v.* "malice"; *see also* Clark v. Molyneuax (1877) 3 Q.B. 237. Note that this meaning of "actual malice" is in the old sense of "ill will," not synonymous with constitutional malice in the sense of "knowledge of falsity or reckless disregard as to truth."

25. Toogood v. Spyring, (1834), 1 C.M & R. 181, 149 Eng. Rep. 1044 (Exch. Div.).

26. The defendant's statements about the plaintiff were made to several different parties on different occasions, and though the court held that the defendant committed what would now be called "excessive publication" with regard to one of the occurrences, it held that the others were protected via the privilege. *Id.* at 1049.

Bromage, the Justice seems to be making a larger point, i.e., that when a defendant speaks on such an occasion as the one involved in *Toogood*— later known as the "common interest" occasion[27]— there is a *presumption* that he speaks sincerely in pursuit of that interest. This presumption of sincerity amounts to the same thing as "good faith."[28] To put it another way, that the occasion "prevents the inference of malice" is only the negative way of saying that the occasion creates a "presumption of good faith" in pursuit of the interest. It is sincerity of purpose that the court is concerned with here–an authenticity of motive–for that is the sum and substance behind the philosophy of the doctrine in the first place[29]:to encourage free communication in the furtherance of certain societally-sanctioned interests. If that is not *actually* what the defendant is trying to do, as when he attempts to use the defense to mask some unsanctioned purpose, then the defense is not allowed. So at the time of *Toogood*, on the occurrence of such an occasion, giving rise to such a presumption, the plaintiff's answer had to come by way of showing "actual malice" meaning some improper motive.[30]

Most important of all, and worthy of considerable stress here, is Baron Parke's interest in the event itself — the "occasion"— for it is the context upon which the defense depends, upon which it rises and falls. It is an understanding characteristic of some of these early reported cases that is missing in others, and which slips away altogether in subsequent decisions.

The trail of this descent can be traced in the line of cases roughly contemporaneous with *Toogood*. In *Fairman v. Ives*,[31] some twelve years prior to Baron Parke's opinion, an officer sued a creditor for libel. Justice Holyrod, one of three presiding justices, set out the privilege in terms of the occasion:

> In the case of *Cleaver* v. *Sarraude*, which was tried at York, it was expressly held, that no action was maintainable for matter

27. See discussion associated with ELDREDGE, *supra* note 8.

28. The concept of presumptions from a philosophical perspective is set out in section III, *infra*. The state courts that use the iteration of the qualified privilege rule criticized here nevertheless understand and confirm that a presumption of good faith arises with the defense. *See also* Eaton v. Miller Brewing Co., 2009 WL 1277991 (Del. Super. Ct. April 30, 2009); Dadd v. Mount Hope Church, 780 N.W.2d 763 (Mich. 2010); McIntyre v. Jones, 194 P.3d 519 (Colo. App.2008); Barmada v. Pridjian, 2007-CA-00764-SCT (Miss. 2008); Radcliff v. Orders Distrib. Co., 662 S.E.2d 404 (N.C. Ct. App. 2008); Cassidy v. Hartford Fin. Serv. Grp., 2008 WL 250570 (Conn. Super. Ct. Jan.8, 2008); Thomas-Smith v. Mackin, 238 S.W.3d 503(Tex. App. 2007); Lowery v. Smithsburg Emerg. Med. Serv., 920 A.2d 546 (Md. Ct. Spec. App. 2007); Kevorkian v. Glass, 913 A.2d. 1043, (R.I., 2007); Mock v. Castro, 98 P.3d 245 (Haw. 2004); Bass v. Rivera, 826 So. 2d 534 (Fla. Dist. Ct. App. 2002); Godfredson v. Lutheran Bhd., 2000 WL 1675869 (Iowa Ct. App. Nov. 8, 2000); Swinton Creek Nursery v. Edisto Farm Credit, 483 S.E.2d 789 (S.C. Ct. App. 1997); Muthuswamy v. Burke, 618 N.E.2d 1021 (Ill. App. Ct. 1993); Moss v. Stockard, 580 A.2d 1011 (D.C. 1990); Sylvester v. Armstrong, 84 P.2d 729 (Wyo. 1938); Chesapeake Ferry Co. v. Hudgins, 156 S.E. 429 (Va. 1931); Ashcroft v. Hammond, 116 N.Y.S. 362 (N.Y. App. Div. 1909).

29. Paul Mitchell notes that [Justice] Baron Parke was "primarily concerned with the state of mind of the defendant," which is the Justice's same concern in a case decided the next year, Wright v. Woodgate, (1835), 2 C.M. & R. Eng. Rep. 573, 577, 150 Eng. Rep. 244 (Exch. Div.). Paul Mitchell, *Malice in Qualified Privilege*, 1999 PUB. L., 328, 330.

30. Of course, actual malice is now the term most associated with the constitutional standard, denoting actual knowledge of falsity or a reckless disregard as to it falsity. When the old meaning denoting "ill will" is used here, a meaning now associated with the term "common law malice," it will be clearly delineated; *See generally* NY Times v. Sullivan, 376 U.S. 254 (1964).

31. Fairman v. Ives, (1822) 5 B. & Ald. 642, 106 Eng. Rep.1325 (K.B.).

> contained in a written communication made bonâ fide to a friend, and not for the purpose of slandering. The two cases are not exactly similar. The case cited rather resembles that of a bad character, given by a master of his servant. There, unless it be maliciously done, the communication is considered privileged *by the occasion on which it is made*. So, in the case of a confidential communication made between friends, to prevent an injury, and not for the purpose of slandering, *the occasion justifies the act*. If the communication be made maliciously, the case would be otherwise; and the falsehood of the facts stated might, in some case, be evidence of malice….[32]

Note that Justice Holyrod writes in terms of the "occasion" justifying the communication. However, in the same opinion, Justice Best expresses his agreement with Holyrod by stating things this way: "But the circumstances under which this letter was sent rendered it a *privileged communication*. It was an application for the redress of a grievance, made to one of the King's ministers, who, as the defendant honestly thought, had authority to afford him redress."[33]

While it is doubtful that Justice Best meant anything different from Justice Holyrod when he wrote privileged "communication" rather than "occasion," or even that Holyrod understood him to mean anything different, this distinction nevertheless became consequential in later iterations of the doctrine. In fact, Baron Parke took pains to correct the use of the term "privileged communication" in a case decided one year after his *Toogood* opinion.

In *Wright v. Woodgate*,[34] the plaintiff sued his former solicitors concerning a letter written to his guardian. Justice Parke stated:

> The term "privileged communication," as it was applied in this case, is not, perhaps, quite a correct expression. *The proper meaning of a privileged communication is only this*; *that the occasion on which the communication was made* rebuts the inference primâ facie arising from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove that there was malice in fact —that the defendant was actuated by motives of personal spite or ill-will, independent of the occasion on which the communication was made.[35]

As he had in *Toogood*, Baron Parke once more expressed the doctrine in such a way that makes the case clear: It is simply the occasion itself that acts as the catalytic factor. The "context" of speaking in furtherance of a sanctioned interest– in this case, a common interest shared by the guardian and the solicitors–

32. *Id.* at 645 (emphasis added).
33. *Id.* at 647 (emphasis added).
34. (1835) 150 Eng. Rep. 244, 2 Crompton, Meeson and Roscoe 573.
35. *Id.* at 577 (emphasis added).

establishes the defense; nothing more is necessary. The occasion rebuts any inference of malice, or to put things the other way around, creates a presumption of good faith in pursuit of that shared interest. This presumption can be overcome only by showing that the defendant's purposes were not in pursuit of the interest, but were motivated by ill-will or spite, i.e., malice in fact.

For whatever reasons, Baron Parke found this expression of the doctrine in terms of a "privileged communication," as though the utterance itself had an aura of protection about it, worthy of comment and correction. He had himself used the term before,[36] and would do so once again in a case three years later[37] (though apparently not after that), but this explanation in *Woodgate* illustrates how he meant its use to be understood: A communication made upon a privileged occasion, the occasion being the operative circumstance from a legal perspective.[38] It may be that the term "privileged communication," at the time used in the context of attorney-client privileges, was merely a convenient formulation and was borrowed for use in the defamation context. Perhaps Justice Parke thought a distinction between that which was an absolute privilege in the area of counsel should be clearly delineated from that which was only a qualified privilege in the area of libel.[39]

But despite Baron Parke's salutary explanation in *Wright*, the other expression of the doctrine continued on; in time, it took the fore. For example, the Court in *Coxhead* v. *Richard*[40] quotes the very language in *Woodgate*,[41] but nevertheless goes on to speak of "privileged communications" when it mentions an older case:

> In *Todd* v. *Hawkins* (2 M. & Rob. 20, 8 C. & P. 88), it was held that a letter from a son-in-law to his mother-in-law, volunteering advice respecting her proposed marriage, and containing imputations upon the person whom she was about to marry, was a *privileged communication*, and not actionable, in the absence of malice.[42]

Likewise, in the same year, *Blackham v. Pugh*[43] used the term:

36. Cockayne v. Hodgkisson, (1833) 172 Eng. Rep. 1091 Assizes (Stafford).

37. Kine v. Sewell, (1838-01-01) 150 Eng. Rep. 1157 Court of Exchequer. *Kine* seems to be the last appearance of the term coming from Parke in the defamation context. In the case of Gathercole, Clerk v Miall, (1846-04-23) 153 Eng. Rep. 872 Court of Exchequer, he once more stresses the "occasion": "Then I expressed an opinion that there was no occasion for the publication which could render it excusable; and the question really is, whether there was any occasion which would justify the remarks that had been made, or any remarks upon the conduct of the plaintiff."

38. *See Wright*, (1835) 150 Eng. Rep. 244, 2 Crompton, Meeson and Roscoe 573.

39. *See* Weeks v. Argent, (1847-05-06) 153 Eng. Rep. 1422 Court of Exchequer, in which Justice Parke uses the term in the area of attorney-client privilege. For the same usage, *see also* R. v. Richard Farley and Ann Jones, (1846-07-22) 175 Eng. Rep. 130 Assizes; Perry v. Smith, (1842-01-01) 174 Eng. Rep. 631 Assizes.

40. (1846) 2 Common Bench Reports 569; 135 Eng. Rep. 1069.

41. *Wright*, (1835) 150 Eng. Rep. 244, 2 Crompton, Meeson and Roscoe 573.

42. *Id.* (emphasis added). (1846) 2 Common Bench Reports 611, 615; 135 Eng. Rep. 1086.

> It was then insisted on the defendant's behalf, that the notice to Southey & Son was a *privileged communication*, inasmuch as it was a statement made, bonâ fide, and in the full belief of its truth, by a person having an interest in the subject-matter, and to a person interested in receiving the information; and, consequently, that the action was not maintainable without proof of express malice.[44]

These two cases, *Coxhead* and *Blackham*, along with a third, *Bennett v. Deacon*,[45] decided the same year, are relied upon by the oft-cited 1852 case, *Somerville v. Hawkins*,[46] which quoted the oft-cited *Wright v. Woodgate*. But in so doing, the *Somerville* court rephrased Justice Parke's wording altogether:

> In Wright v. Woodgate (2 C. M. & R. 573), it was held, that the meaning, in law, of a *"privileged communication," is, a communication made on such an occasion as rebuts the primâ facie inference of malice* arising from the publication of matter prejudicial to the character of the plaintiff, and throws upon him the onus of proving malice in fact; but not of proving it by extrinsic evidence only: he has still a right to require that the alleged libel itself shall be submitted to the jury, that they may judge whether there is any evidence of malice on the face of it.[47]

Justice Parke's refinement of the term "privileged communication," so as to focus upon the occasion as the operative feature of the doctrine –*"The proper meaning of a privileged communication is only this*; *that the occasion on which the communication was made rebuts the inference*"[48]–is completely muddled in *Somerville*, distorted so that it seems the communication itself rebuts the inference of malice. The focus is changed from the context to the utterance.

Blackham v. Pugh is not only an example of cases beginning to concentrate upon the communication rather than the occasion, but is also an example of the verbosity and redundancy that the courts were prone to in the area. The context that once spoke for itself and created a presumption of good faith overcome by malice in fact was set out as a communication *composed* of good faith, which was included as one of a number of elements that are for all intents and purposes the same thing:

> It was argued for the defendant that the publication of this letter to the auctioneers was privileged, because it was written by the defendant in good faith, and without malice, in the conduct of his

44. *Id*. (emphasis added).
45. (1846) 2 Common Bench Reports 628; 135 Eng. Rep. 1093.
46. (1851) 138 Eng. Rep. 231, 233.
47. *Id.* (emphasis added).
48. *Supra* note 34.

> own affairs, in a matter where his interest was concerned, so as to be within the description of privileged communications given by Parke, B., in *Toogood* v. *Spyring*.[49]

As has been explained above, good faith means a sincere pursuit of the sanctioned interest;[50] as such, there is no need to add "without malice," which is its opposite (a pursuit of an unsanctioned interest), nor any of the other redundant clauses that repeat the theme of sincere pursuit: "conduct of his own affairs"; or "matter where his interest is concerned."[51]

This iteration in *Somerville*, however, using the Latin, became the standard one in subsequent cases:

> A communication made *bonâ fide* upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contain criminatory matter which, without this privilege, would be slanderous and actionable. And this, though the duty be not a legal one, but only a moral or social duty of imperfect obligation.[52]

And the articulation was just as rife on the western side of the Atlantic as it was on the eastern, as evidenced by the fact that the leading cases in America and the leading American treatises cited to these same English cases for the rule:

> Privileged Communication——Rule 3——Where a communication is made bona fide upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, either public or private, either legal, moral, or social, such communication, if made to a person having a corresponding interest or duty, rebuts the inference of malice, and is privileged. When such is the case the onus of proving malice is thrown upon the plaintiff.[53]

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49. (1846) 135 Eng. Rep. 1086, 1090-91.

50. *Supra* note 28.

51. A publication made in self interest is one of the historically recognized occasions for which the defense is allowed. ELDREDGE, *supra* note 8.

52. Harrison v. Bush, (1855) 119 Eng. Rep. 509 (1855). (emphasis added).

53. ARTHUR UNDERHILL, PRINCIPLES OF THE LAW OF TORTS, OR, WRONGS INDEPENDENT OF CONTRACT 146 (1891) (citing Addison on Torts 170; Harrison v. Bush, 5 E. & B. 344; Wright v. Woodgate, 2 C. M. & Ros. 573; Somerville v. Hawkins, 10 C.B. 583; Lawless v. Anglo-Egyptian Cotton, L.R. 4 Q.B. 262). *See also* MARTIN L. NEWELL, THE LAW OF LIBEL AND SLANDER IN CIVIL AND CRIMINAL CASES AS ADMINISTERED IN THE COURTS OF THE UNITED STATES OF AMERICA 391 (2d ed. 1898): § 7 Requisites of the Occasion. A communication, to be privileged, must be made upon a proper occasion, from a proper motive, and must be based upon reasonable or proper cause. When so made in *good faith* the law does not imply malice from the communication itself, as in ordinary cases. Actual malice must be proved before there can be a recovery. (not part of quotation) (citing, *inter alia,* Briggs v. Garrett, 111 Penn. St. 414; Addison on Torts, sec. 1091).

The history continued, eventually resulting in the common iteration set forth in *Dobbyn v. Nelson.*[54]In that iteration, good faith has become an element of the communication, redundant with the interest that it was originally presumed to connote the sincere pursuit of, and set out alongside a positive recasting of those particular types of excessive publication that were historically seen as abuses of the sanctioned occasion—speaking more than need be said, in a way that need not have been employed, to parties who need not have heard: "The essential elements of a qualifiedly privileged communication are good faith, an interest to be upheld, a statement limited in its scope to the upholding of such interest and publication in a proper manner only to proper parties."[55] Today, practically every state in the Union and the District of Columbia labor under this five-part definition or a variant.[56] This is an incoherence of some consequence. Not only is "privileged communication" defined in this redundant fashion, it is also overcome in similarly redundant and confusing ways.

Several recent cases illustrate the point. In *Ex Parte Blue Cross & Blue Shield of Alabama*,[57] the Supreme Court of Alabama remarked upon the confusing repetitiveness of the standard qualified privilege defense in trying to decide which party should bear the burdens. The definition had resulted in the tortured way that prior law required the defendant to plead not only the privilege, but also a lack of actual malice, though the burden was on the plaintiff to prove the malice that the defendant denied:

> Our first clarification prompted by these cases is that the matters of faith and actual malice are *not* two separate essential elements. Rather, the term *good faith* was intended as the opposite of the term *actual malice.* The term *in good faith* means the same as the term *without actual malice.* Whenever these two terms are used conjunctively, one is redundant. Likewise the term *in bad faith* means the same as the term *with actual malice.* Whenever these two terms are used conjunctively, one is redundant.[58]

The court cites two cases[59] that define actual malice as opposed to implied malice, so in the old sense of "ill will, spite," etc., which goes by the alternative name "common law malice."

Similarly, in *Kuwik v. Starmark Star Marketing & Administration, Inc.*,[60] the Supreme Court of Illinois struggled with the standard five-part definition of qualified privilege:

54. 579 P.2d 721, 723 (Kan. Ct. App. 1978), *aff'd,* 587 P.2d 315 (Kan. 1978).
55. *Id.* (citations omitted).
56. *Supra* note 16.
57. 773 So. 2d. 475, 478 (Ala. 2000).
58. *Id.* (emphasis in original) (internal citations omitted).
59. *E.g.*, Clark v. Am.'s First Credit Union, 585 So. 2d 1367, 1371 (Ala. 1991).
60. 619 N.E.2d 129, 134 (Ill. 1993).

> If the court finds a conditional privilege exists, and thus that the communication was made in good faith by a defendant, the jury is then asked to determine whether the defendant abused the privilege by acting in "bad faith," *i.e.,* with actual malice. It is difficult to reconcile a finding by the court that a defendant made a statement in good faith with a finding by the jury that the defendant made the same statement with actual malice. . . . One case has explained this apparent anomaly by stating that the good-faith inquiry into whether a privilege exists looks to the objective reasonableness of a defendant's conduct in sending the letter (including the investigation as to its truth), while the inquiry into whether a privilege has been abused looks to the subjective knowledge of the defendant in making the statement. See *Larson v. Decatur Memorial Hospital*. However, the two inquiries necessarily overlap, as a defendant's conduct in making the statement, including the objective reasonableness of any investigation into the truth of the matter, greatly affects, if not determines, the question of the subjective knowledge of the defendant as to the truth of the defamatory matter. The two inquiries are too similar to justify two separate determinations, one by the judge as a question of law, and one by the jury as a question of fact. Such a process only serves to add confusion to an already confusing area of law.[61]

To rectify the situation, the court adopted the Restatement Second rule on qualified privileges, which should have done away with the five-part definition of the privilege altogether in favor of a focus on the occasions.[62] But as is often the case, despite the Court's attention to the matter in *Kuwik*, and the steps it takes to relieve the law of this five-part standard iteration, it was resurrected again in an appellate decision, *Zych v. Tucker*.[63] There, the Court not only cites the five-part rule again, but also cites the *Kuwik* decision in doing so.[64] It is the persistence of this iteration —objectifying the communication— that creates the problems that the Alabama and Illinois Supreme Courts were attempting to set straight.

As has been seen, the original understanding of a certain latitude granted for occasions in which a sanctioned interest is pursued, barring some abuse, was pulled apart and overstated somewhere along the way. The presumption of sincerity of purpose, i.e., "good faith," that arose upon such occasions, and which could be rebutted by evidence to the contrary, was transformed into one of the positive attributes of a "privileged communication," along with the a positive recasting of the indiscretion abuses. Instead of a context that was permitted leeway, defeasible upon abuse, the doctrine became alternatively stated as an objective reality—a communication *composed* of good faith and all of the discretion markers (limited

61. *Id.*
62. The Restatement rule is discussed *infra,* Part IV.
63. 844 N.E.2d 1004, 1008 (Ill. App. Ct. 2006).
64. *Id.*

scope, proper manner, and proper parties). In other words, a *zone* that allowed scope was reconceived — or at least restated—as a *statement* of a certain kind, one identified by the composite of features that had originally been seen as ways of abusing or transgressing the zone and thereby losing the defense.

This brief history illustrates that the original, and as it is argued here, correct way of conceiving and expressing the defense, in terms of a sanctioned "occasion," developed alongside the way that has led to such complexity and confusion, in terms of a "privileged communication."[65] It is likely that those who used the latter term were only doing so in a manner of speaking; as has been said, Justice Parke himself lapsed once or so.[66] But the transformation has had consequences, notably a devaluation of the concept of improper motive as a means to defeat the defense.

For in the conceptual change that resulted in a fairly simple idea —a sanctioned context given a certain latitude— being altered into a more complex communication composed of attributes, the law has often let its frustration with the tangled nest of elements, abuses, shifting burdens–not to mention the added difficulties of the constitutional standard–make it lose sight of the good that qualified privileges achieve, and the careful logic by which they protect those goods. Before attempting to provide a reconceptualization of the doctrine in the final section, the next section will set out an argument for its worth.

III. THE VALUE OF QUALIFIED PRIVILEGES: CRITICISM AND SUPPORT

The complexity and redundancy of the law in the area has left it open to the argument that the interests covered by the doctrine can be adequately addressed by either a simple negligence standard or an actual malice standard. In either event, the set of inquiries in such matters would be limited to questions of accuracy regarding the information. Improper motives, including the "common law malice" abuse —i.e., ill will, spite, etc.— are downplayed, if not altogether superseded by this position.[67] However, the importance of motives and discretion markers, and the indispensable nature of contextual evidence that privileged occasions present, counsel caution when considering an appropriate rule.

Inquiries into motives highlight the permissible *use* of the occasion (*why* is the statement being made?) that is a function distinct from the permissible *range* of a communication made upon a sanctioned occasion (*of what* is the statement composed, *to whom* is it being made, and *by what* manner?), which the discretion markers highlight. Such inquiries are also distinct from the permissible level of *accuracy* about communication (*to what degree* is the truth known?) used to effect the sanctioned purpose.

65. Professor Eldredge states his objection to the Restatement Second of Torts articulation of its rule in terms of "privileged communication" instead of "privileged occasions." ELDREDGE, *supra* note 8, at 450. He argues that only an occasion can be privileged. See section IV, infra.

66. *Supra* notes 36, 37.

67. See DAN B. DOBBS, THE LAW OF TORTS § 416, 1167-69 (2001) for a discussion of the possibilities.

A. Motives

The correct way to understand privileged occasions is to gather that they are merely conversational contexts, speech events that occur from time to time in a civilized society that, because of their beneficial purpose, are viewed with a more lenient eye when it comes to the accuracy of what is said within them. Historically, the use of that context to achieve a vendetta was not countenanced, though the argument began to fall out of favor at the turn of the century.

Bradford Corp. v Pickles[68] is cited for the principal that there should be no liability for the spiteful exercise of a right; therefore, the existence of ill will should have no consequence on the defense's validity. A more extensive argument is set out in the Iowa Supreme Court case, *Barrecca v. Nickolas*, where the Court ran through the reasons:

> Critics of the old common law test have pointed out that it no longer makes sense to base the defeasibility of qualified privileges on an inquiry into the motives of the publisher. In the post-*New York Times* era: "[t]he law of defamation will evolve much more coherently if ill-will malice is discarded altogether, and the knowing or reckless disregard of the truth standard is used for all conditional privileges….There are at least two grounds to support this unified standard. First, because the purpose of a common law privilege is to protect speech that furthers interests to which the law attaches special importance, it should not matter whether the speaker acts out of ill will if the speech furthers those interests, as long as the speaker does not know the statements are false, and does not recklessly disregard indications of their falsity…. The second reason for unifying constitutional and common law malice standards is simplicity. Constitutional and common law privileges often coexist in the same case, and the existence of more than one definition of malice can only bewilder juries (and possibly the judges and lawyers who try to explain the differences to them).[69]

The court goes on to call the "improper motive" test anachronistic, as in the past courts were compelled to punish sinful states of minds, among other things; that being the case, loss of a privilege due to personal animus was deemed logical. But since such arguments were no longer valid, according to the Court, "wrongful motive" should be abolished as a means to overcome the privilege.[70]

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68. (1895) A.C. 587 (H.L.).

69. 683 N.W.2d 111, 121-22 (Iowa 2004) (quoting Rodney A. Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel,* 132 U. Pa. L. Rev. 1, 78-81 (1983).

70. *Id.* at 122 (citing Dan B. Dobbs, *The Law of Torts* §§ 416, at 1167 (2001)). *But cf.* Great Coastal Express, Inc. v. Ellington, 334 S.E.2d 846, 851 n.3 (Va. 1985). In *Great Coastal Express,* the Virginia court holds that common law malice is *broader* than and *subsumes* constitutional malice, as the later is: "[K]nowledge that [the publication] was false or with reckless disregard of whether it was false or not." New York Times v. Sullivan, 376 U.S. 254, 280 (1964). *New York Times* refers to this as "actual malice." *Id.* at 279. That term is particularly

To an extent, the *Barrecca* court is right. "Ill will" towards the plaintiff alone is not a valid reason to deny the defense, not when there is a perfectly honest motive to pursue the sanctioned interest.[71] However, it is going too far to say that improper or wrongful motives as a whole are anachronistic. For as it has been argued here,[72] the whole point of the defense is to grant latitude to an occasion where a sanctioned interest is sincerely and earnestly pursued. The law raises a presumption of sincere motives, or "good faith," which is its shorthand. Again, if that is not the case — if the motive for speaking the defamatory statement is not in furtherance of the interest — then it is improper, regardless of whether it is motivated by animus toward the plaintiff or by some other impulse, even a generous one. It can be imagined that in a common interest context, an individual might utter a statement that proves to be false for some reason unrelated to the interest, but still unmotivated by animus, e.g., an opposition to hiring any new person at all, let alone the plaintiff, based on fiscal principles. As such, proof of a motive other than pursuit of the common interest should result in the denial of the defense. And while it is true that there is no liability for the spiteful exercise of a right, as the old English case says,[73] it is also true that there is no right to the defense of qualified privilege for defamation in the first place. "Spite" is of no consequence; but it must be jealously remembered that "motive" is of all the consequence in the world to qualified privileges, for that is what they existentially turn upon. To focus only upon accuracy, and not upon motive, is to lose sight of this fact.

One way of understanding the importance of motive is to analogize the abuse of the privileged occasion by reason of improper purpose to a conceptually similar area, abuse of process. To repeat, the purpose for granting the prescribed latitude is to further one of the sanctioned interests. But this latitude, which withdraws the plaintiff's protection from otherwise actionable falsehoods, is defeasible. If the circumstances are misused in some way, the defense is denied. Therefore, these approved circumstances act as a type of process for the conveyance of the protected speech. In this way, the focus upon motive is like that which is so central to the abuse of process claim:

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confusing, however, because many decisions, including our own, have used "actual malice" to describe common-law malice, a different and broader concept. *See, e.g.,* Preston v. Land, 255 S.E.2d 509, 511 (Va. 1979). Common-law malice is defined as "some sinister or corrupt motive such as hatred, revenge, personal spite, ill will, or desire to injure the plaintiff; or what, as a matter of law, is equivalent to malice, that the communication was made with such gross indifference and recklessness as to amount to a wanton or willful disregard of the rights of the plaintiff." *Preston*, 255 S.E.2d at 511. Thus, *New York Times* malice focuses only upon knowledge of falsity or reckless indifference to falsity. Common-law malice includes that element, but also includes matters related to the speaker's motive and mental state. Not wishing further to complicate a branch of the law already sufficiently vexed by two competing species of malice, we shall hereinafter refer to them by the foregoing names, avoiding "actual malice," which may describe either. It may very well be that indiscretion is circumstantial evidence of ill motive, and that actual malice is direct evidence of it. But that will not always be the case, and it is important to allow for cases when it is not. The integrity of the defense lies in recognizing fine distinctions.

71. The Restatement rule focuses on whether the motivation is primarily spiteful or not. *See* RESTATEMENT (SECOND) OF TORTS § 603 (1965).

72. *See* "Introduction," *supra* pp. 2-9.

73. *See* Bradford Corp. v Pickles (1895) A.C. 587 (H.L.).

> Abuse of process differs from malicious prosecution in that the gist of the tort is not commencing an action or causing process to issue without justification, but misusing, or misapplying process justified in itself for an end other than that which it was designed to accomplish. The purpose for which the process is used, once it is issued, is the only thing of importance….It is often said that proof of "malice" is required: but it seems well settled that, except on the issue of punitive damages, this does not mean spite or ill will, or anything other than the improper purpose itself for which the process is used, and that even a pure spite motive is not sufficient where process is used only to accomplish the result for which it was created.[74]

Interestingly enough, in his treatise on the common law, Justice Holmes speaks of the *inconsequentiality* of malice (in the sense of "ill will") in his section on privileges in slander, and its fundamental *consequentiality* in the next section on malicious prosecution.[75]

Just as in the case of abused process, ill will is not a key consideration in the qualified privilege context, but the use of the "process" for some motive other than a sanctioned one is the very heart of the matter. Another, and perhaps more precise way of putting things is to call such an abuse one of "intention," or "misappropriation of purpose." Regardless of the reason, liability will attach if the "process" is not used for the purpose that society has seen fit to recognize.

In a very real sense, an appreciation of use, purpose, and motive with regard to the defense is critical. The sincere pursuit of the interest (self interest, family interest, common interest, etc.) is fundamentally, existentially, the same thing as the occasion, for the occasion is one in which the interest is being sincerely pursued. The things said in pursuit of that interest, or said another way, in a sincere observance of the occasion, are granted a certain latitude, one with parameters that cannot be exceeded. This protects the plaintiff as much as possible. If the interest is not pursued sincerely, the occasion is misappropriated, and the law will not permit the doctrine to disguise a personal use, even if that use is not inspired by base motives. The law presumes that sincere pursuit — i.e., good faith —until the opposite is proven by the plaintiff.

Of course, misappropriation of purpose is not the only way to lose the defense. It can also be lost by indiscretion or by some level of impermissible scienter.

B. Discretion markers

At times lost in the discussion of qualified privileges is that they are essentially defenses to claimed falsehoods. Defamation has occurred, says the plaintiff, and quantifiable damage to his reputation has ensued. The occasions historically

74. PROSSER AND KEETON, *supra* note 2, at 897 (citations omitted).
75. OLIVER WENDALL HOLMES, JR., THE COMMON LAW, 95 (ABA, gen. ed. ABA Classics 2009).

recognized as deserving of the defense are of a dual nature in that they are both socially necessary and eminently exploitable. They are dangerous things, and dangerous for the very reason that they are valuable, i.e., because the context is one in which a reputation is put at risk of compromise in order to further a social interest.

A tension between the society's need to provide redress for the allegedly defamed, and its interest in allowing for discreet candor, is a delicate balance to achieve. That tension has been well expressed:

> The occasion is privileged in all these cases when the interest that the defendant's act tends to protect or advance is sufficiently important and the harm threatened thereto is sufficiently great to require or at least justify withdrawal of the legal protection ordinarily given to the plaintiff's interest according to a social policy based on communal standards of interest, value, and decent conduct.[76]

An occasion's discretion markers — of what was the statement composed; to whom was it said; and by what manner was it said — set the contextual parameters of the speech event (i.e., the sincere pursuit of the sanctioned interest occurring in time), providing outer limits to the "withdrawal" of the plaintiff's protections. But more than just limits beyond which a transgressive abuse of the occasion occurs, the markers serve an important function: containing the damage to the plaintiff's reputation at a contextual minimum. The markers act as a type of safeguard of propriety, as it were, and stand as a type of "fence" against the degree of damage that would ensue if they were removed. In other words, the markers act as a counter-balance to the harm that can occur from the excessive publication of a statement that is even sincerely believed to be true.

A distinction between the balancing of interests in the area of qualified privileges, which involves a withdrawal of the plaintiff's protections, as opposed to that of negligence, is set out in Harper, James and Gray's treatise.[77] The difference lies in the fact that in negligence, the balancing of the interests determines whether there was a transgression or not:

> [I]f the actor is acting to protect a very important interest of his own against a grave risk of harm, he may create toward another's interest a very considerable risk, whereas if the stakes on his own side are small, the same conduct will be regarded as altogether improper and therefore unreasonable. The balancing process is

76. FOWLER V. HARPER, ET. AL., 2 HARPER, JAMES AND GRAY ON TORTS, 250 (3rd ed., Little Brown & Co. (1996)).
77. *Id.*

> presupposed in the very definition of an "unreasonable risk" and this is implicit in the idea of negligence.[78]

Indeed, in the area of qualified privilege, there is a withdrawal of protection *from* the transgression; i.e., if the defense holds, the Plaintiff has no recourse for even an admitted offense.

The qualified privilege is in many ways akin to the defense of necessity, both public and private. In acts of private necessity, public policy allows for the trespass but requires payment for the harm caused. The good sought, e.g., protection in a storm, will not be discouraged by requiring the payment of damages for any actual harm. However, in acts of public necessity, when the trespass is made for the good of the public at large, restitution for actual harm caused is not the norm.[79]

Like the qualified privilege defense, in both private and public necessity occasions the sincerity of the trespasser is presumed and the purpose is approved by society. But unlike either of the necessity defenses, in the area of qualified privileges there is no way both to encourage the candor desired in the sanctioned occasions and also require payment for any actual harm caused. The discretion markers act as a means of containing the extent of the damage, mitigating it to a minimum. This mitigating effect stands guard against an aggravation of harm.

The idea of reasonable publication encourages a responsible dissemination of information without a concurrent chilling of speech. Two goods are achieved: People are encouraged to speak candidly, but the harm that might be done is limited. As such, privilege circumscribes behavior that is also encouraged, allowing that behavior as long as it stays within certain limits.

In general, privileges in intentional torts allow latitude in order to encourage a societal good; to stop a fleeing felon, for example, a police officer may use physical force that would otherwise be actionable. But the exercise of the privilege is not absolute; the policeman is not allowed to exceed what is proportionate under the situation at hand, and will be responsible if the boundaries of propriety are transgressed.[80] As has been said, however, the "horse is already out of the gate" when a defamatory utterance has been made, and the discretion markers help manage that loss.

Because of this fact, there must be a consequence for unreasonableness in the exercise of the privilege, so as not to become complicit with that abuse. In the area of the qualified privilege defense, even without evidence of knowledge, recklessness, or reasonable belief as to truth, there must be a negative impact for indiscretion, i.e., excessive publication, so as to keep the possibility of abuse on such grounds from becoming a probability. If the speaker is insulated from the effects of his indiscretion, there will be no checks on the occasions that are so volatile and liable to abuse, and latitude could devolve into license.

78. *Id.* at 251.
79. DOBBS, *supra* note 69, at 250-56.
80. *See* PROSSER AND KEETON, *supra* note 2, at 148-59.

C. Contextual Evidence

It has been argued that were negligence to be required as to truth or falsity in order to recover in cases of qualified privilege, "then it would seem that most qualified privileges could be abrogated. Most private interests would be adequately protected without the necessity for a recognition of a qualified privilege requiring knowledge of falsity or recklessness with respect to the truth or falsity of the defamatory matter published."[81]

But as has been suggested here, there is a delicate mechanism at work in the qualified privilege defense, one that operates on the functions of motivation inquiries, discretion markers, and finally, contextual evidence. The adequacy of a negligence standard would not respect this mechanism and the simplicity hoped for would be hard to achieve.

The term "contextual evidence" refers to both the motives and the discretion markers taken as a whole and then offered as proof of the sanctioned behavior–"sincere discreet candor that the law will countenance. While there has been a trend towards employing a negligence standard in place of such old categories as invitees/licensees/guests in the area of trespass,[82] the situational scenarios that prompt the utterance in the qualified privilege context are organic; they are naturally occurring events that present themselves throughout lived experience. People seek to defend their interests, to protect their loved ones, to further their businesses and communities, etc., on a daily basis. As that is the case, it seems a fair assumption that the general populace would have it that under such circumstances candor should be encouraged, and that risk of abuse should be managed to remove fear of retaliation for mistakes. The law works best when it recognizes and helps further those means by which society's goods are achieved—in preservation of social goods.

Because of this state of affairs, any inquiry into negligence cannot be a limited one. The facts that are organically intertwined with the context— indeed, that are inseparable from it — will perforce require an inquiry into, and a presentation of, evidence related to motives and discretion. Evidence will be sought about: 1) the audience for the speech event: Who was told that needed to be told and who was told that wasn't?; 2) how far the speaker went: Did the speaker stay on topic, furthering the sanctioned interest, or did he stray into affairs that are unrelated and go beyond the scope of that interest's protection?; 3) whether the manner chosen to relay the information was one that achieved that purpose alone, or was an unwise and indiscreet vehicle for communicating a statement that could have a damaging effect; and above all, 4) the purpose for which the statement was made: Why did the speaker speak? Was he the appropriate party to make such a statement in the first place?

81. PROSSER AND KEETON, *supra* note 2, at 825.
82. *Id.* at 432-34; DOBBS, *supra* note 69, at 615-20.

In other words, all of the traditional inquiries as to motives and discretion, the importance of which has been argued above, will reassert themselves under a negligence standard because that evidence is natively related to the context.

It may be the case that for each inquiry a post-*Gertz*[83] court will set the standard at to what a reasonable person would do.[84] So with negligence as the measure, the court would require proof of reasonable belief as to truth. But nothing will really have been simplified by such a position. The evidence will crop up in the same way as before. In other words, evidence of motives and indiscretions of various stripes will find its way into the arguments, even if they are required — in a tortured way — to be considered as circumstantial evidence of what the defendant knew, disregarded, or should have believed. Indeed, as there is likely to be more evidence related to the context, i.e., motives and discretion, than there is to scienter, i.e., knowledge and belief, figuring out what to do with such evidence would be a major concern.

Furthermore, regardless of whether the reasonableness of the act is considered a question for the judge or for the jury, the same evidence would have to be taken into account by any trier of fact. To take motives and discretion markers and make them factors in determining reasonableness is a distinction without a difference. For these reasons, the simplicity hoped for in the adoption of a straight negligence standard is unlikely to be realized. Simplification of the area can only go so far.

The organicity of the mechanism described here, inseparably linked as it is with the social context, is supported by another argument, coming by way of the fields of philosophy and linguistics.

D. Philosophical Underpinnings

While the qualified privilege defense comes in for much criticism on the grounds of complexity, its structure and function reveal a validity that holds up under philosophical analysis.

It is argued here that the common law observed a rebuttable presumption of a good faith pursuit of the sanctioned interest, a proper motive in speaking the utterance that would establish the defense, barring some other abuse related to discretion or accuracy. That this is still understood to be the case is evidenced by the fact that at least seventeen states and the District of Columbia speak of a "presumption of good faith" arising upon the establishment of a privileged occasion.[85]

Philosophically, presumptions such as this arise from a need for practical means to make decisions. This is a clear-eyed choice, however, and does not deny that presumptions in general are subject to error. Professor Edna Ullman Margalit makes the case:

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83. 418 U.S. 323 (1974).

84. *See* Green Acres Trust v. London, 688 P.2d 617, 624 (Ariz.1984) (discussing "reasonable care" in publication).

85. *Supra* note 28.

> Presumption rules operate in situations where actions have to be decided upon in the light of insufficient information and often under external pressures and constraints. Errors…are bound to occur. There is no question of avoiding errors; at best there is the question of reducing their number. But a different sort of question is whether one type of error is to be preferred, on grounds of moral values or social goals, over the other(s). Evaluative considerations may exist which justify a systematic and generic bias in favor of erroneously proceeding on [one thing] rather than erroneously proceeding on [its opposite]….
>
> Thus, in his *Treatise on Judicial Evidence,* Jeremy Bentham (citation omitted) says that "in doubtful cases [the judge should] consider the error which acquits as more justifiable, or less injurious to the good of society, than the error which condemns." Hence, the presumption of innocence. It is, then, as a corrective device that this presumption, as well as others, may be thought of: as regulating in advance the direction of errors, where errors are believed to be inevitable.[86]

The reference to the presumption of innocence here is apt, as one that the law operates under by societal fiat without the need to create a fiction that each particular defendant *is* innocent.

Likewise, in the qualified privilege defense, the presumption of good faith arises because of a need for candor, not because the situations themselves are characteristic of truth-telling. The privileged occasion is not like an evidentiary exception to hearsay—a dying man's declaration, or a declaration against interest. The law is not naïve about what the conversational contexts may prove to be. But a choice is made here to allow a certain latitude–set off by discretion markers–and to presume good faith, all in order to "loosen the tongue." The presumption allows for a freedom necessary to conduct the kind of business that society values, and to do so efficaciously.

The practicality of the presumption in such occasions also finds support in the area of linguistics. Under philosopher Paul Grice's "Cooperative Principle," a presumption such as good faith in the pursuit of the conversational goal — i.e., that a person is being "sincere" when he speaks — is necessary for conversation to take place at all.

> [S]pending time and effort, in each and every instance in which one's interlocutor has uttered something, to find out to one's satisfaction whether or not it is indeed true or sincere or whether or not it indeed contributes appropriately to the purpose of the talk exchange in which one is engaged, before one proceeds to

86. Edna Ullman Margalit, *On Presumption*, 80:3 J. PHIL.145-63; 159 (1983).

> respond to that utterance is quite likely tantamount to undermining the particular piece of conversation under consideration, if not interpersonal communication in general. It is along such lines, then, of the general interest in the smoothness of talk exchanges, that the justifying considerations for there being conversational presumption rules . . . .[87]

In this way, the occasions historically recognized as deserving of the privilege create a presumption of good faith that is natural to the undertaking — indeed, is necessary for its undertaking altogether.

The conversational context that gives rise to this rebuttable presumption of good faith can always be rebutted on the grounds that it was not said for the sanctioned purpose— so on the grounds that there was no good faith— or was said in a way that transgressed the discretion markers. This is illustrated linguistically by a pragmatic analysis.

According to Philosopher J.L. Austin, every statement not only *says* something, but it also *does* something; what it "does" is called an "illocutionary act," and depending upon the context, that act will have a certain "illocutionary force."[88] For a statement to "represent" something as a fact,[89] as would be the case in a qualifiedly privileged occasion, certain conditions must be present. Austin set out what are known as "felicity conditions" that must be extant for any statement to have the requisite illocutionary force. If one is missing, the statement fails to have that force and is found "infelicitous."[90]

By way of example, a typical "common interest" scenario might take place when X says something that seems to be related to hiring the right person for a job opening, but his real motivation is to keep Y from getting the job because he hates him. The statement X makes could be challengeable on the following grounds:

> Preparatory condition (which relates to matters that precede the utterance): X is not the right person to say it (he is not on the hiring committee).
>
> Sincerity condition (which relates to the speaker's state of mind): X has the wrong motive or is lying (said because of hatred, not for the "good of the business," or said against a known fact).
>
> Essential condition (which makes the statement recognizable as its type–here, a representation of fact): X says more than need be said

87. *Id.* at 159-60.

88. *See* J.L. AUSTIN, HOW TO DO THINGS WITH WORDS 14 (Clarendon Press 1962) (1963).

89. According to the philosopher John Searle's scheme, all statements can be classified as: representatives (by which a speaker asserts the truth of a statement made); directives (by which the speaker intends to have something accomplished); commissives (by which a speaker commits himself to accomplish an act); expressives (by which the speaker communicates an internal state), or declaratives (by which a speaker changes the status of some entity). John R. Searle, *A Classification of Illocutionary Acts*, 5 LANGUAGE SOC'Y 1, 2 (1976).

90. *See* JOHN R. SEARLE, SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE 54–74 (1969).

> to further the interest (in addition to "he's always late," X brings up things about Y's personal life–more than just a business-related comment, so that the statement turns into something that "looks" like gossip).
>
> Propositional content condition (which relates to the proper context for the statement): X makes the statement outside the meeting, or to those that don't need to know or in an inappropriate way (e.g., over a loudspeaker).

Any of these failures would make the statement an "infelicitous" representative, on the grounds of motive, indiscretion, or knowledge.[91]

Finally, the qualified privilege mechanism also holds up under an Aristotelian causal analysis and can be explained in that way. Aristotle famously posited that all things are composed of four causes, the material (that of which it is made); the efficient (that by which it is made); the formal (that into which it is made); and the final (that for the sake of which it is made).[92] In the instance of the privileged occasion, things germane to the interest (material cause) must be communicated by way of a discreet mechanism (efficient cause) to make a limited statement affecting the interest (formal cause) for the purpose of furthering the objective of the interest (final cause). An intentional abuse (motive) will defeat the final cause; a discretion abuse will defeat the material and/or efficient and/or formal causes (i.e., by talking to a broader audience than necessary, by saying more than is necessary, by saying things in a manner than is unnecessary). Actual malice–knowledge or recklessness–may be evidence of an intentional abuse, defeating the formal cause, or it may be simply an impermissible mechanism (a lie or reckless attitude towards the truth cannot accomplish the means of the interest).

IV. RECONCEPTUALIZATING QUALIFIED PRIVILEGES

A summary of the argument made here falls along the following lines: In keeping with the original understanding of the defense as one that proceeds from a social context, i.e., an occasion–instead of from an utterance, i.e., a communication–any analysis of the facts before a court should begin with a simple determination as to whether the speech event occurred on one of the sanctioned occasions.[93] The existence of the occasion is typically considered a question of law, determined by the court.[94]

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91. For illustrative purposes, another way of conceiving the occasion's function can be explained in grammatical/syntactic terms: The Employer (subject) talks (verb) about X's work (direct object) to the hiring committee (indirect object) in a permitted way (adverb) for the purpose of a possible promotion (purpose/cause/motive). Each of these terms must stay limited to the objective of the utterance.

92. ARISTOTLE'S METAPHYSICS 74 (Hippocrates G. Apostle trans., Peripatetic Press 1979).

93. ELDREDGE, *supra* note 8.

94. All states consider this determination a question of law. *See* EMPLOYMENT LIBEL & PRIVACY LAW 2010 (Media Law Resource Center, Inc., 2010).

Once an occasion is determined to exist, it gives rise to a rebuttable presumption of a sincere motive to pursue the sanctioned interest. That presumption is one of "good faith." If the occasion is used in the right way (discreetly) and for the right thing (proper motive) the resulting candor is protected, even if mistakes are made. But if the discretion parameters are exceeded, or the sanctioned purpose misappropriated, the defense should be denied. Proof of abuse has historically been allotted to the plaintiff,[95] and under the formulation here, his evidence of abuse will either stem from indiscretion or misappropriation.

The return to this original concept— the speech event as a "zone/context" that can be transgressed— also supports the idea that the discretion markers mitigate the harm done to the plaintiff. Their transgression could also be considered circumstantial evidence of ill will, which is a means— though not a requisite means— to prove that the purpose has been exploited. Of course, lies are always a transgression— whether their purpose is in furtherance of the interest or not— which makes room for the actual malice standard of knowledge of falsity or reckless disregard of it.

Professor Eldredge notes in his treatise that the proper way to view the matter is one that sees the occasion as being privileged.[96] His objection to the Restatement Second of Torts' articulation of the rule in terms of "abusing a privilege" centers on a change from the first Restatement, which had put things the right way.[97] However, the organization of the Restatement rule, despite its use of terms, comports with the argument made here: Once the occasion exists, the question becomes one of abuse, which can be established by means of proving wrongful purpose, excessive publication, or actual malice, in the constitutional sense of the term, among others.[98]

It might seem that insisting on the term "abuse of occasion" as opposed to "abuse of privilege" is a small matter, but in fact the misconception has consequences. Many courts, such as the Kansas Court of Appeals in *Dobbyn v. Nelson*,[99]articulate the rule in terms of a positive reality that must be constructed — a communication that must be "made in good faith" and uttered "in the pursuit of an interest, limited in scope, to the right parties, in the right manner." As has been argued, this requirement that the defendant show good faith in the establishment of the defense causes confusion and is redundant with "in pursuit of the interest." Good faith *is* a sincere pursuit of the interest; it also conflicts with the means of rebutting the presumption— a showing of actual malice. The five-part standard articulation has led to the consternation of the courts described above. Putting things this way also skews the proofs. It conceives of the communication as

95. All states consider proof of an abuse as the plaintiff's burden. *See id.*
96. ELDREDGE, *supra* note 8, at 450.
97. *Id*.
98. RESTATEMENT (SECOND) OF TORTS §§ 593 et. seq. (1965).
99. 579 P.2d 721, *aff'd,* 587 P.2d 315 (Kan. 1978). *See also* Schauer v. Memorial Care Sys., 856 S.W.2d 437, 449 (Tex. App. Houston 1st Dist. 1993) (quoting *Marathon Oil v. Salazar,* 682 S.W.2d 624, 631 (Tex. App. Houston 1st Dist. 1984): ("Once the court finds a party has a qualified privilege, the plaintiff can overcome it only by a showing of actual malice. Actual malice in a libel action '"means publication of a statement with knowledge that it is false or with reckless disregard for whether it was false.'").

having arisen once sincerity and discretion are established by the defendant— a burden of establishment he should not have to bear— and overcome by a showing of actual malice. In other words, under this articulation, the "communication" has attributes of discretion and sincerity, but not of accuracy. This is the opposite of the Restatement articulation, which though it does not use the term "occasion," focuses on the event itself as giving rise to the defense.[100] The occasion is overcome by the plaintiff's establishment of abuse on the grounds of indiscretion, improper motive, or inaccuracy.[101]

The incoherence of the doctrine is the unfortunate fruit of a conceptualization of the defense in terms of a privileged communication, instead of a privileged occasion. It is also a persistent conceptualization, one that creeps back into court decisions such as *Zych v. Tucker*, despite the Illinois Supreme Court's pains to adopt the Restatement rule to quell the confusion.[102]As it is for the defendant, in claiming the affirmative defense,[103] to establish the existence of the "privileged communication," the articulation can result in unnecessary mischief. Under the wrong conceptualization, one that does not allow the defense to arise simply by proving that the occasion was sanctioned, the defendant can be forced to prove the elements of which the communication is said to be composed. This would lead to the strange state of affairs where a defendant is asked to present evidence of "good faith," which is likely to be composed of nothing more than self-serving statements. A defendant cannot be expected to present a "smoking gun" as to his real motives; that evidence would most likely be in the possession of the plaintiff, who should be required to prove an abuse on the grounds of misappropriation.

In short, the coherence of the doctrine would benefit greatly both from an articulation that loses good faith altogether, as it is unnecessary — and from a loss of the entire idea of a "privileged communication" possessed of elements and attributes. Because such an articulation is customary in the courts of nearly every state jurisdiction in the union,[104] is long-standing, and manages to resurface even when it is put down, the steps called for here will not be immediate. However, as has hopefully been established, the complications are unnecessary. They tend to frustrate the courts into calling for the abrogation of a defense that actually works quite well as a mechanism, carefully balancing competing interests that evolve in a natural context. Adoption of the rule set out in the Restatement Second of Torts— with the above mentioned caveat regarding the proper terminology— "abuse of occasion" instead of "abuse of privilege" would clarify the issue.

In that rule, the occasion arises upon a sanctioned interest, and is abused through either a showing of improper motive, excessive publication, or actual malice.[105] The Restatement chose the latter standard to address the constitutional requirements felt to be required by the *Gertz* decision, which required fault in cases

100. *See* RESTATEMENT (SECOND) OF TORTS, *supra* note 100.
101. *Id.*
102. *See supra* note 65.
103. PROSSER AND KEETON, *supra* note 2, at 108; 835.
104. *See supra* note 16.
105. *See* RESTATEMENT (SECOND) OF TORTS, *supra* note 100.

of defamation.[106] The response from the Restatement's authors was felt necessary in order to prevent the entire defense from being abrogated by a simple negligence standard. However, that choice has been criticized,[107] especially since the Supreme Court's decision in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*[108] has arguably allowed the common law standards to survive in situations involving a private party and a private concern. Professor Rodney Smolla contends that even a strict liability standard could survive in such circumstances.[109]

Regardless, it is the position here that the qualified privilege defense, when rightly understood, has value, and that the protections of the defendant provided thereby cannot be easily replaced in terms of adequacy and simplicity. In addition, it is unlikely that any alternative will include the mitigating features of the discretion markers, which control the damage to the plaintiff. As that is the case, the defense must be *given* value, by either providing protection to the defendant or by requiring more by way of proof from the plaintiff.

Put another way, if the defense is not lost by either one of the publication abuses, i.e., a) an indiscretion abuse; or b) a misappropriation abuse; then it must be lost by a scienter abuse (either actual malice or, if the court takes a strong reading of *Greenmoss* and allows a strict liability standard, then by either negligence or actual malice, as they become alternative ways to abuse the privilege).

The defense can be illustrated as follows, again making allowance for the constitutional requirements under two scenarios: one, a strong reading of *Greenmoss*, which allows protection from strict liability; the other, under a *Gertz* analysis, that requires negligence at a minimum

	Standard		Abuse of Occasion
Strong *Greenmoss*:	Strict Liability unless:		← Scienter (Neg. or Worse) OR Misappropriation (Motive) OR Indiscretion (Excessive Publication)
		QP	
Gertz:	Negligence unless:		← Scienter (Actual Malice) OR Misappropriation (Motive) OR Indiscretion (Excessive Publication)

Note that the terms "misappropriation" and "indiscretion" are used to signify the abuses related to motive and excessive publication. Both are types of "publication abuses," distinct from the "scienter abuse."

106. *Supra* note 4.
107. DAVID A. ELDER, DEFAMATION: A LAWYER'S GUIDE § 2.33 (Thompson West 1993).
108. 472 U.S. 749 (1985).
109. *See* RODNEY A. SMOLLA, § 8.42 LAW OF DEFAMATION (2nd ed. Thompson West 2005).

Of course, actual malice *can* be a "silver bullet" in the second scenario, but its proof is not absolutely necessary for the plaintiff to defeat the privilege. One of the publication abuses will suffice, which must be the case so as to control the use of the occasion for sanctioned purposes and to mitigate the negative effects of the latitude given. Both of these latter two requirements reinforce the policy of "sincere discreet candor" in the sanctioned context. The scienter abuses deny the defense because the plaintiff's protections will not be withdrawn to cover a known untruth, nor to protect a statement the veracity of which has been disregarded to an impermissible degree.

V. CONCLUSION

Arising from everyday contexts in which people have sought to protect and further their interests, those of others, or of the public, qualified privileges have had a checkered past. Like other areas of the law, they have been the object of much criticism and part of a movement bent on simplification. Those goals are worthy ones, but it is argued here that the complexity of the area is owing to the complexity of the very human contexts that give rise to the defense. And as has been suggested, the mechanism that has developed, if conceptualized in the right way, is not only simpler to understand and apply, but also uniquely capable of protecting the interests of all concerned. The public is benefitted by the sharing of important information, the defendant by the encouragement of candor, and even the plaintiff, through mitigating the damage done to his reputation by ensuring as much discretion as possible. Those objectives are achievable when the defense is conceptualized the right way— as a sanctioned occasion that creates a presumption of good faith in the pursuit of the interest pursued therein, that presumption defeasible upon abuse.

Like most areas of the law, a great deal is lost or won in seeing and stating things properly; more can be gained in this particular area by losing the requirement for a showing of good faith— one that the law, because of the circumstances, has always presumed.