COMMENTS

TOKER v. POLLAK: THE APPLICABILITY OF ABSOLUTE PRIVILEGE IN DEFAMATION CASES

I
INTRODUCTION

The law of defamation protects individual reputation against the damage inflicted by libelous or slanderous statements. Sometimes, however, the interest in protecting an individual's reputation is outweighed by the societal need to investigate matters of public concern. Persons then must be encouraged to speak or write freely without being intimidated by the spectre of an ensuing defamation action. Thus, in certain situations, the courts recognize a privilege or immunity which may be absolute or qualified. A qualified privilege affords immunity only if the individual spoke without ill will or malice in fact. An absolute privilege, however, affords complete immunity from liability for spoken or written statements. The grant of absolute privilege represents a determination that the amount of beneficial information gained thereby more than outweighs the possible detriment occasioned by malicious abuse of the opportunity to injure an individual's reputation.[1]

In *Toker v. Pollak*,[2] the New York Court of Appeals considered the defendant's claim for absolute privilege. The *Toker* case pitted the plaintiff's right to safeguard and defend his reputation against both the defendant's plea for immunity and the public's need to insure the free flow of information to three separate government agencies. In assessing the claim for privilege, the court employed what may be called the "judicial/quasi-judicial" test. Under this test, absolute privilege is granted only to statements made during proceedings which are judicial or quasi-judicial in nature. This Comment first outlines the facts of *Toker*, and then examines the results reached by use of the judicial/quasi-judicial test. The last section suggests that the distinction between proceedings that are judicial or quasi-judicial in nature and those that are not may no longer be the proper focus for the decision whether to grant or deny a statement an

1. Note, *Defamation—Absolute Privilege in Administrative Proceedings*, 97 U. PA. L. REV. 877, 878 (1949). For a discussion of absolute privilege, see *Developments in the Law—Defamation*, 69 HARV. L. REV. 875, 917-24 (1956) [hereinafter cited as *Developments—Defamation*]; W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 114 (4th ed. 1971); 50 AM. JUR. 2d *Libel and Slander* §§ 192-288 (1970).

2. 56 A.D.2d 153, 391 N.Y.S.2d 593 (1977), *aff'd in part, rev'd in part*, 44 N.Y.2d 211, 376 N.E.2d 163, 405 N.Y.S.2d 1 (1978).

absolute privilege. The Comment then proposes an alternative method, better suited to resolving the competing considerations involved in a claim for absolute privilege.

II
THE CASE

A. The Facts

In 1961, defendant Stern's mother was injured in a fall on a New York City sidewalk. At the time of the injury, Stern was confidential secretary to a Justice of the Supreme Court, a position which prohibited him from representing his mother in her personal injury suit against the city. He therefore retained defendant Pollak to pursue his mother's claim. Pollak reached a settlement in 1963 with plaintiff Toker who, as Assistant Corporation Counsel, represented the city. Allegedly, Pollak later informed Stern that he (Pollak) had attained the settlement with the city by paying Toker a sum of money.

In 1972, Stern learned that Toker was a candidate for nomination to a Civil Court judgeship. Stern then contacted Victor Kovner, a member of the Mayor's Committee on the Judiciary.[3] Stern informed Kovner that while he (Stern) did not have any personal or direct knowledge of Toker, he felt that certain information concerning the candidate should be brought to the Mayor's Committee's attention. He then related the story of Pollak's alleged bribery of Toker. Kovner told Stern that the Mayor's Committee would be unable to take any action on Stern's report, because Toker was running for an elective office, and the Committee only screened candidates for appointive positions.

Toker was defeated in his bid for the judgeship. In January, 1974, however, Toker's name was submitted to the Mayor's Committee on the Judiciary for a review of his qualifications for appointment to the Criminal Court of the City of New York. Shortly thereafter, Kovner called Stern and reminded him of their 1972 conversation concerning Toker. Kovner asked Stern if he would speak with representatives of the New York City Department of Investigation, the agency to which the Committee had forwarded the investigation of Toker's

3. The Mayor's Committee on the Judiciary was created to insure the honesty and competency of the New York City judiciary. The Committee was formed by Mayor Robert F. Wagner in 1962 pursuant to Chapter 1, Section 3 of the New York City Charter, to assist the Mayor in selecting and screening candidates for judgeships filled by mayoral appointment. Since the inception of the Committee each mayor has pledged not to appoint any person to a judicial position without the recommendation of the Mayor's Committee and to make no reappointment unless so recommended by the Committee. *See* N.Y. Times, Dec. 27, 1978, § A, at 1, col. 3.

From 1966 to the present, a majority of the members of the Mayor's Committee have been designated by the presiding justices of the appellate division while the rest have been appointed by the Mayor. The Mayor's Committee conducts its activities on the basis of procedures recommended by the Committee on Modern Courts of the Association of the Bar of the City of New York. All proceedings and matters considered by the Committee are confidential. *See* Brief of the Mayor's Committee on the Judiciary, Amicus Curiae at 3-4, Toker v. Pollak, 44 N.Y.2d 211, 376 N.E.2d 163, 405 N.Y.S.2d 1 (1978); A. ASHMAN & J. ALFINI, THE KEY TO JUDICIAL MERIT SELECTION: THE NOMINATING PROCESS 130-50 (1974); Note, *Judicial Selection in New York: A Need for Change*, 3 FORDHAM URB. L.J. 605 (1975).

fitness and qualifications.[4] Stern met with the Commissioner of Investigation. He repeated that he had no personal knowledge of the alleged bribery, but in response to inquiries, Stern related what he had learned from Pollak.

In April, 1974, the Commissioner of Investigation referred the Toker investigation to the New York County District Attorney. Stern later appeared at the office of the District Attorney at the latter's request. He was informed by an Assistant District Attorney that an investigation of the alleged bribery had been commenced and that unless Stern responded to questions concerning the incident, he would be subpoenaed to appear before the grand jury. In response to the Assistant District Attorney's questions, Stern repeated the story concerning Toker's alleged acceptance of a bribe, again disclaiming any personal knowledge of the wrongdoing. The Assistant District Attorney then requested that, in lieu of grand jury testimony, Stern submit an affidavit summarizing the information he had given. After assurances that it would be kept confidential, Stern prepared and submitted the affidavit. The District Attorney's office ultimately determined that there was no legally admissible evidence of wrongdoing by Toker. Nevertheless, Toker was not appointed to the Criminal Court.

On December 12, 1974, Toker brought suit against Stern for damages in the amount of $2,000,000, claiming injury "in his character and reputation and in his profession and calling."[5] He alleged two causes of action, one for libel arising out of the affidavit which Stern had submitted to the Assistant District Attorney, and a second for slander arising out of Stern's oral communications with Kovner, the Commissioner of Investigation, and the Assistant District Attorney.[6]

B. The Decisions

Stern moved for summary judgment on each cause of action, but the motion was denied by the New York State Supreme Court.[7] On December 8, 1975, Stern moved to reargue his motion for summary judgment. He contended for the first time that his communications with the Assistant District Attorney

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4. The powers and functions of the Department of Investigation are set forth in the New York City Charter. NEW YORK, N.Y., CHARTER §§ 801-03 (1976). Under the Charter, the Commissioner of Investigation may conduct investigations directed by the Mayor or City Council. He may also initiate an inquiry which "in his opinion may be in the best interests of the city . . . ." *Id.* at § 803(b). The Department is authorized to scrutinize the backgrounds of prospective appointees to the bench.

In order to carry out the Department's broad powers, the Charter provides that the Commissioner of Investigation may issue subpoenas, administer oaths, and examine witnesses in public or private hearings. *See* Brief of the New York City Commissioner of Investigation as Amicus Curiae at 2, Toker v. Pollak, 44 N.Y.2d 211, 376 N.E.2d 163, 405 N.Y.S.2d 1 (1978).

5. Verified Complaint at 2, Toker v. Pollak, 44 N.Y.2d 211, 376 N.E.2d 163, 405 N.Y.S.2d 1 (1978).

6. Pollak was also named in the action, and he moved for summary judgment. The supreme court special term granted Pollak's motion on the libel cause of action because Stern had failed to establish any writing or publication by Pollak. As to the slander cause of action, special term denied Pollak's motion without prejudice to renewal upon the completion of Stern's examination before trial.

7. Toker v. Pollak, N.Y.L.J., May 9, 1976, at 16, col. 6.

were absolutely privileged. Stern's motion was denied on the grounds that it was untimely and, in the alternative, that Stern's communications to the Assistant District Attorney were not absolutely priviledged.[8]

On appeal to the appellate division, Stern argued that both his written and oral communications to the District Attorney, and his oral communications to the Mayor's Committee and the Commissioner of Investigation were absolutely privileged. The appellate division partially reversed the lower court's order, dismissing the cause of action for libel arising from the affidavit.[9] Judge Silverman, writing for the court, held that since Stern's affidavit was given at the request of the District Attorney in lieu of grand jury testimony, it was technically given in connection with a judicial proceeding and therefore was absolutely privileged.[10]

The court did not dismiss the cause of action for slander. The court noted that Stern's oral statements to the District Attorney should be absolutely privileged since they were made, as Stern's affidavit was, in connection with a judicial proceeding.[11] The court did not address its decision to Stern's statements to the Mayor's Committee (via Victor Kovner), finding no showing that defendant Stern repeated his statements within the one year period[12] of the statute of limitations.[13] Toker's cause of action for slander was upheld, however, because the court was unable to find Stern's statements to the Commissioner of Investigation absolutely privileged. The court felt that these statements should be so privileged on the grounds of public policy. As an inferior court, though, it was constrained to follow the 1922 decision in *Pecue v. West*.[14] There, the New York Court of Appeals had narrowed the circumstances under which absolute privilege could be found. Not finding communications to the Commissioner of Investigation to be one of those occasions or circumstances, the *Toker* court could not accord Stern immunity for his statements. "In light of the Court of Appeals' ruling in *Pecue v. West*, and in recognition of our function as an intermediate appellate court, we must continue to limit absolute privilege to judicial and quasi-judicial proceedings unless and until the Court of Appeals or the legislature tells us otherwise."[15]

Both Toker and Stern cross-appealed from the decision of the appellate division. Toker sought reversal of the dismissal of his libel claim, and Stern sought the dismissal of the slander cause of action. In its decision, the court of appeals affirmed its holding in *Pecue*, and limited the granting of absolute privilege to statements made in judicial or quasi-judicial proceedings.[16] Finding that none of Stern's communications fell within this rule, the court denied both his written and oral statements an absolute privilege.[17]

8. Toker v. Pollak, N.Y.L.J., June 3, 1976, at 8, col. 2.
9. 56 A.D.2d at 153, 391 N.Y.S.2d at 593.
10. *Id.* at 155-56, 391 N.Y.S.2d at 595.
11. *Id.* at 156, 391 N.Y.S.2d at 595.
12. N.Y. CIV. PRAC. LAW § 215 (McKinney 1972).
13. 56 A.D.2d at 156, 391 N.Y.S.2d at 595.
14. 233 N.Y. 316, 135 N.E. 515 (1922).
15. 56 A.D.2d at 157, 391 N.Y.S.2d at 596.
16. 44 N.Y.2d 211, 376 N.E.2d 163, 405 N.Y.S.2d 1 (1978).
17. *Id.* at 218, 376 N.E.2d at 166, 405 N.Y.S.2d at 4. While the court acknowledged that the

III
LEGAL CONSIDERATIONS

A. The Judicial/Quasi-Judicial Test

The purposes of absolute privilege are to encourage the best persons to undertake public office and to elicit the maximum amount of information on subjects of public interest from the widest array of witnesses.[18] The development of the law of absolute privilege has sometimes been effectuated by statute, but more often through court decisions.[19] Historically, statements made by all participants in judicial proceedings were the first to be accorded absolute privilege.[20] The concept of judicial proceedings has continued to play a central role in courts' determinations as to whether statements made by members of the public[21] are to be granted an absolute privilege.[22] Indeed, in *Toker*, the court noted that "critical to the determination of the present case is the scope of judicial proceedings to which absolute immunity attaches."[23]

Since the 1920's, courts have also accorded an absolute privilege to statements made during proceedings which take place outside the courtroom and which bear no direct connection to the judicial process. Essentially, three approaches have been taken to the problem of deciding when immunity should attach. Some courts have recognized an immunity from suit only when a state statute specifically provides that statements made during certain types of hearings or proceedings are absolutely privileged.[24] A very few courts have extended an absolute privilege to communications made during proceedings which

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statements were qualifiedly privileged, Stern had chosen not to elect this defense. 56 A.D.2d at 154-55, 391 N.Y.S.2d at 594-95, just as he had foregone the "public official" defense enunciated in New York Times Co. v. Sullivan, 376 U.S. 254 (1964). In *Sullivan*, the Court held that a public official cannot collect damages for falsehoods relating to his official conduct unless he proves "actual malice." *Id.* at 279-80. For liability to attach, the statement must be made with knowledge of its falsity, or with reckless disregard of whether it was true or false. *Id.*

Both these defenses required litigation of the case on the merits. With respect to *Toker*, the *Sullivan* defense would have required a determination as to whether plaintiff Toker was a public official and whether defendant Stern spoke with malice in fact. The defense of qualified privilege would have required, among other things, a determination of Stern's intent in making the communications to the Mayor's Committee, the Department of Investigation, and the District Attorney. For a discussion of qualified privilege, see text accompanying notes 71-86 *infra*. Stern, however, felt he was immune from any liability regardless of the facts of the case. He claimed that his statements were absolutely privileged because of the circumstances in which and the officials to whom they were made.

18. Note, *supra* note 1, at 878.

19. *Developments—Defamation*, *supra* note 1, at 921.

20. Statements made by judges, counsel, parties, and witnesses in the course of judicial proceedings are absolutely privileged in all states, provided that the statements are relevant to the subject of the hearings. *See* Veeder, *Absolute Immunity in Defamation: Judicial Proceedings*, 9 COLUM. L. REV. 463 (1909); *Developments—Defamation*, *supra* note 1, at 920; W. PROSSER, *supra* note 1, at 777-78.

21. The discussion here does not concern the privileges accorded public officials, a topic which will be considered later in the Comment. *See* text accompanying notes 123-130 *infra*.

22. *Developments—Defamation*, *supra* note 1, at 920.

23. 44 N.Y.2d at 219, 376 N.E.2d at 167, 405 N.Y.S.2d at 5.

24. *E.g.*, Goodley v. Sullivant, 32 Cal. App.3d 619, 108 Cal. Rptr. 451 (1973) (construing CAL. CIV. CODE § 47(2) (West 1954)).

concern matters in the public interest, regardless of the nature of the proceedings.[25] Finally, a large number of courts, including those in New York, are willing to attach an absolute privilege to communications made during proceedings or to agencies which are quasi-judicial in nature.[26]

Thus, to decide whether a statement is absolutely privileged most courts use a "judicial/quasi-judicial" test. If the statement in question was made during a proceeding connected with the judicial process, or was made during proceedings procedurally similar to those held in court, *i.e.*, those that are quasi-judicial, the statement will be absolutely privileged. The *Toker* court used the judicial/quasi-judicial test to determine whether Stern's statements to the Mayor's Committee, the Department of Investigation, and the District Attorney were absolutely privileged.

B. Judicial Proceedings: The District Attorney

The court of appeals first considered whether Stern's statements to the District Attorney fell within the scope of a judicial proceeding. In doing so, the court relied on its decision in *Pecue v. West*.[27] *Pecue* had limited the application of absolute privilege to statements made in judicial proceedings, which were defined as those taking place "in court or . . . before an officer having attributes similar to a court."[28] Using this definition, the *Pecue* court found that the giving of a complaint to a district attorney was not a judicial proceeding, because in receiving the complaint, a district attorney did not have attributes similar to those of a court. The court thus held that information given to a district attorney was not absolutely privileged.[29] On the basis of *Pecue*, the *Toker* court denied Stern immunity from suit for the statements and affidavit he had given to the Assistant District Attorney.[30]

The *Toker* court's reliance on *Pecue* is misplaced, however. While *Pecue* speaks in general and conclusory terms about the nature of judicial proceedings and the reasons why communications to a district attorney do not fall within their scope, the decision truly reflects a distaste for the particular facts of that case. The defendant in *Pecue*, a superintendent of the law and order department of the New York Civic League, received a false letter from an unidentified source, implying that the plaintiff ran a house of prostitution. Without stating that he was acting on unverified information, and speaking as if from personal knowledge, the defendant wrote a letter to the District Attorney, accusing the plaintiff of "keeping girls for immoral purposes."[31] This information proved to be completely false. In denying the defendant's letter an abso-

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25. *See, e.g.*, Wong v. Shorr, 51 Hawaii 608, 466 P.2d 441 (1970).

26. *E.g.*, Rainier's Dairies v. Raritan Valley Farms, Inc., 19 N.J. 552, 117 A.2d 889 (1955); Julien J. Studley, Inc. v. Lefrak, 50 A.D.2d 162, 376 N.Y.S.2d 200 (1975), *aff'd on other grounds*, 41 N.Y.2d 881, 362 N.E.2d 611, 393 N.Y.S.2d 980 (1977). *See* Note, *supra* note 1, at 877-84; W. PROSSER, *supra* note 1, at 779-80; Annot., 45 A.L.R.2d 1296, 1298 (1956).

27. 233 N.Y. 316, 135 N.E. 515 (1922).

28. *Id.* at 321, 135 N.E. at 516.

29. *Id.* at 321-22, 135 N.E. at 516-17.

30. 44 N.Y.2d at 220, 376 N.E.2d at 167, 405 N.Y.S.2d at 5.

31. 233 N.Y. at 319, 135 N.E. at 515.

lute privilege, the court noted that its decision was confined to the "precise facts" of the case before it. "We are not dealing with a case where a citizen transmits to a district attorney for his investigation information, suspicions, rumors, gossip, for what they are worth."[32]

The *Pecue* dicta, quoted above, imply that that court might well have reached a different result had the facts of *Toker* been before it. In *Toker*, defendant Stern, disclaiming any personal knowledge of plaintiff's allegedly criminal act, conveyed information given him by a friend to the District Attorney on the latter's request. The factual settings of *Pecue* and *Toker* are entirely different, with the result in the former being closely tied to its facts; consequently, the *Toker* court should not have relied on *Pecue* in denying Stern's communications to the District Attorney an absolute privilege.

Not only is *Pecue* a confined decision, but it is, as the appellate division noted in *Toker*, one whose doctrinal worth appears to have been "eroded"[33] by subsequent decisions. *Wiener v. Weintraub*,[34] for example, represents a tacit but marked shift in New York's policy toward absolute privilege since the decision in *Pecue*. Although *Wiener* did not overrule *Pecue*, it indicated that the court of appeals may no longer be as concerned, as it was in *Pecue*, with limiting the extensions of absolute privilege.[35] *Wiener* also signalled the court's readiness to define judicial proceedings more broadly. In *Pecue*, the court held that because a complaint to a district attorney was not a judicial proceeding, it was not absolutely privileged. In contrast, *Wiener* held that a complaint made to the Grievance Committee of the New York Bar Association marked the institution of a judicial proceeding and, therefore, was absolutely privileged.[36] Although not a judicial proceeding itself, the making of the complaint was directly related to the investigation and determination conducted by the Grievance Committee, which the court held to be a judicial proceeding because the committee is an "arm of the Appellate Division."[37] Similarly, the giving of information to the District Attorney may result in an investigation and indictment which sets in motion the wheels of the judicial process.[38] If a complaint made

32. *Id.* at 323, 135 N.E. at 517.
33. 56 A.D.2d at 155, 391 N.Y.S.2d at 595.
34. 22 N.Y.2d 330, 239 N.E.2d 540, 292 N.Y.S.2d 667 (1968).
35. 233 N.Y. at 321, 135 N.E. at 516.
36. 22 N.Y.2d at 332, 239 N.E.2d at 541, 292 N.Y.S.2d at 669-70.
37. *Id.*, 239 N.E.2d at 541, 292 N.Y.S.2d at 669-70.
38. Communications to a district attorney should be absolutely privileged whether or not the information provided leads to a criminal prosecution. *Cf.* Ramstead v. Morgan, 291 Or. 383, 347 P.2d 594 (1959) (letter, written by former client concerning his attorney and sent to the chairman of the county grievance committee of the state bar, was absolutely privileged, even though complaint did not eventuate in a formal hearing before the committee). If the according of privilege were to depend on whether the information given leads to the filing of an indictment, privilege could only be granted retroactively. It is the occasion on which a statement is made that confers the absolute privilege, and not that communication's substantive content. "The rule of privilege as applied to absolutely privileged communications is not founded on the theory that the communications furnish any defense, but on the fact that the law allows absolute privilege or immunity on account of the occasion upon which the communication is made." Reagan v. Guardian Life Ins. Co., 140 Tex. 105, 112-13, 166 S.W.2d 909, 913 (1942).

to a bar grievance committee constitutes an initial step in a judicial proceeding, statements and an affidavit given to a district attorney would appear to do so as well, rendering these communications worthy of an absolute privilege.

The court in *Toker*, however, summarily rejected this argument. "[T]he communication of a complaint, without more, to a District Attorney does not constitute or institute a judicial proceeding. . . . [N]o one would dispute that at this point a District Attorney receiving such information does not act as a judicial or quasi-judicial officer."[39] This pronouncement raises the question of when a district attorney's acts or functions are sufficiently integrated with the judicial process to render communications to him or her absolutely privileged. Commentators have urged that the better rule is to view all communications to a district attorney as absolutely privileged at the time they are spoken or written.[40] The facts of *Toker*, moreover, provide a particularly persuasive argument for according an absolute privilege. The case did not involve merely "the communication of a complaint, without more, to a District Attorney."[41] When the District Attorney met with Stern and asked him to answer questions and prepare an affidavit, the District Attorney already had initiated an investigation. In investigating, gathering, and reviewing evidence so as to determine whether or not to prosecute, the District Attorney was an officer playing an important role in the state's judicial machinery.[42] Stern's communications to the District Attorney were clearly linked to the initiation and prosecution of criminal proceedings and were therefore worthy of an absolute privilege.

Indeed, a number of courts have found statements to a prosecuting attorney to be absolutely privileged because of the close relationship between these communications and judicial proceedings.[43] The case most frequently cited for

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39. 44 N.Y.2d at 220, 376 N.E.2d at 167, 405 N.Y.S.2d at 5-6.

40. *See, e.g.*, W. PROSSER, *supra* note 1, at 780-81: "Although there is some authority to the contrary, the better view seems to be that an informal complaint to a prosecuting attorney or a magistrate is to be regarded as an initial step in a judicial proceeding, and so entitled to an absolute rather than a qualified immunity." *Id.*

41. 44 N.Y.2d at 220, 376 N.E.2d at 167, 405 N.Y.S.2d at 5.

42. In Imbler v. Pachtman, 424 U.S. 409 (1976), the Court noted that "[a]t some point, and with respect to some decisions, the prosecutor no doubt functions as an administrator rather than as an officer of the court." *Id.* at 431 n.33. The Court recognized, however,

> that the duties of the prosecutor in his role as advocate for the State involve actions *preliminary to the initiation of a prosecution* and actions apart from the courtroom. A prosecuting attorney is required constantly, in the course of his duty as such, to make decisions on a wide variety of sensitive issues. These include questions of whether to present a case to a grand jury, . . . *whether and when to prosecute*, whether to dismiss an indictment against particular defendants, which witnesses to call, and what other evidence to present. *Preparation, both for the initiation of the criminal process* and for a trial, *may require the obtaining, reviewing, and evaluating of evidence.*

Id. (emphasis added).

43. There is a split of authority on the subject. For cases holding communications to a district attorney absolutely privileged, *see, e.g.*, Vogel v. Gruaz, 110 U.S. 311 (1884); Borg v. Boas, 231 F.2d 788 (9th Cir. 1956); Gabriel v. McMullin, 127 Iowa 426, 103 N.W. 355 (1905); Hott v. Yarborough, 112 Tex. 179, 245 S.W. 676 (1922); Bergman v. Hupy, 64 Wis.2d 747, 221 N.W.2d 898 (1974); Schultz v. Strauss, 127 Wis. 325, 106 N.W. 1066 (1906). In *Vogel, Gabriel, Hott,*

this proposition is the 1884 decision in *Vogel v. Gruaz*,[44] where the Supreme Court held that volunteered communications to the Illinois State's attorney were absolutely privileged.[45] In a more recent Wisconsin case, *Bergman v. Hupy*,[46] defendant's statements to the District Attorney, accusing the plaintiff of perjury, were held to be privileged.[47] The court stated that: "As to statements made to a grand jury, . . . or to a district attorney or his assistant in seeking issuance of a criminal complaint, we deal with the initial proceedings that are an integral part of the regular course of justice."[48]

In failing to examine fully the relationship between statements made to a district attorney and the judicial process, the court's analysis in *Toker* appears to be erroneous. Moreover, even if the court had been unwilling to overrule *Pecue* and broaden its conception of a judicial proceeding, the court still could have found Stern to be immune from liability for defamation. By relying on the particular facts of *Toker*, the court could have granted Stern's statements an absolute privilege while still preserving whatever doctrinal validity *Pecue* still retains.[49] As the appellate division noted: "[T]aking the doctrine of the *Pecue* case at face value, we think there was still an absolute privilege here."[50]

Stern's statements and his affidavit were given in lieu of grand jury testimony and were equivalent to it;[51] thus, they were entitled to the same privilege. Unlike the defendant in *Pecue*, Stern gave his statements and affidavit to the District Attorney at the latter's request. He had been given the choice either of divulging his information voluntarily or of being subpoenaed before the grand jury. Stern chose the former. Had Stern been called before the grand jury, his testimony would have been absolutely privileged.[52] As the appellate

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and *Bergman*, the defendants volunteered their information to the district attorney. In *Toker*, however, Stern gave information to the District Attorney only at the latter's request.

For cases holding that communications to a district attorney should be awarded only a qualified privilege, *see, e.g.*, Cashen v. Spann, 125 N.J. Super. 386, 311 A.2d 192 (1973), *modified*, 66 N.J. 541, 334 A.2d 8, *cert. denied*, 423 U.S. 829 (1975); Pecue v. West, 233 N.Y. 316, 135 N.E. 515 (1922); Getchell v. Auto Bar Systems Northwest, Inc., 73 Wash. 2d 831, 440 P.2d 843 (1968).

44. 110 U.S. 311 (1884).

45. Although persuasive, the Court's decision is not controlling on the issue of whether statements to prosecutors are absolutely privileged, because the Court was interpreting Illinois law.

46. 64 Wis.2d 747, 221 N.W.2d 898 (1974).

47. Privilege was accorded even though neither a criminal complaint was issued nor a criminal proceeding initiated. *Id.* at 748, 221 N.W.2d at 899.

48. *Id.* at 753-54, 221 N.W.2d at 902.

49. The *Toker* decision, like *Pecue*, thus would have been limited to its facts.

50. 56 A.D.2d at 155, 391 N.Y.S.2d at 595.

51. This equivalency can best be understood by recognizing that grand jury testimony and communications such as Stern's written and oral statements play an important role in investigating an individual and determining whether charges are to be brought against him or her. In making this determination, the district attorney and the grand jury also play equivalent roles. "The public prosecutor, in deciding whether a particular prosecution shall be instituted or followed up, performs much the same function as a grand jury." Smith v. Parman, 101 Kan. 115, 116, 165 P. 663 (1917).

52. It was widely recognized that an absolute privilege attaches to all statements made during grand jury proceedings. *See, e.g.*, Toker v. Pollak, 44 N.Y.2d at 221, 376 N.E.2d at 168, 405 N.Y.S.2d at 6; Bergman v. Hupy, 64 Wis.2d at 752, 221 N.W.2d at 901. *See also* W. PROSSER, *supra* note 1, at 777; Annot., 48 A.L.R.2d 716 (1956).

division held: "The affidavit[53] was so closely related to the functioning of the Grand Jury that it is protected by absolute privilege."[54]

In overruling the appellate division, the court of appeals stated that communications to a grand jury are absolutely privileged because, statutorily, grand jury proceedings are secret.[55] Since there was no statutory directive requiring secrecy with respect to statements made to a district attorney, the court declined to extend an absolute privilege to these statements.[56]

The court's reasoning seems insubstantial. Although no statute requires that communications to a district attorney be kept confidential, as a matter of practice they are treated as such.[57] Moreover, secrecy should not be the controlling factor. As Judge Wachtler noted in his dissent, grand jury proceedings are indeed privileged, but it is not because they are secret:

> On the contrary, the secrecy of the Grand Jury proceedings, and the witnesses' immunity from civil . . . liability are all based on the same

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53. In its opinion, the appellate division first discussed Stern's affidavit, finding it absolutely privileged. The court then noted that Stern's oral statements should be similarly privileged because like the affidavit, they were "a substitute for testimony before the Grand Jury, made at the request of the District Attorney and upon the District Attorney's statement that otherwise the defendant would be called to give his statement before the Grand Jury." 56 A.D.2d at 156, 391 N.Y.S.2d at 595-96 (1977).

54. *Id.* at 155-56, 391 N.Y.S.2d at 595. The court found Stern's affidavit similar to the prelitigation affidavit discussed in Beggs v. McCrea, 62 A.D. 39, 70 N.Y.S. 864 (1901), where Judge Ingraham, writing for the court, said:

> Nor do I think the fact that a person makes an affidavit without requiring the party requesting it to take proceedings to have his deposition taken deprives him of the protection of the privilege that is extended to a witness or person making an affidavit used in a judicial proceeding. If the defendant had refused to make an affidavit as to facts within his knowledge, he could have been compelled to make a deposition before a referee, . . . and that he made the affidavit without requiring that such an application be made would have no effect upon the question as to whether the affidavit when made was privileged.

Id. at 41, 70 N.Y.S. at 866. *Cf.* Ramstead v. Morgan, 219 Or. 383, 347 P.2d 594 (1959) (defendant's letter which complained of his attorney and which was sent to the state bar committee was held absolutely privileged even though the defendant never testified before the committee). The court reasoned:

> If the defendant's letter had set in motion the bar's trial procedure and he had been called before the committee to testify . . . the quasi-judicial character of the proceeding would warrant the application of the rule of absolute privilege (citations omitted). Considering the purpose of the rule, we think that relevant statements made in a complaint designed to initiate such quasi-judicial action should be protected.

Id. at 396, 347 P.2d at 600.

55. "Grand Jury proceedings are secret, and no grand juror or other person . . . may, except in the lawful discharge of his duties or upon written order of the court, disclose the nature or substance of any grand jury testimony, or any decision, result or other matter attending a grand jury proceeding." N.Y. CRIM. PROC. LAW § 190.25(4) (McKinney 1971).

56. 44 N.Y.2d at 220-21, 376 N.E.2d at 167-68, 405 N.Y.S.2d at 5.

57. *See* Lewis v. Roux Trucking Corp., 222 A.D. 204, 226 N.Y.S. 70 (1927), where the court held that communications to a district attorney were confidential. The court noted that the rule "which should be followed in this case . . . [is that] of denying access to the statements made by persons to the district attorney in connection with his duties in seeking evidence to prosecute public offenses." *Id.* at 212, 226 N.Y.S. at 79.

principle—that is, to assure truth and candor in a proceeding which performs a critical role in the administration of justice (citations omitted). In short, the absolute privileges applies, and should be applied when, as here, it is necessary to insure that an individual's concerns—especially, as the majority notes, 'fear of civil action . . .'—do not inhibit the witness or interfere with the public's need for unbridled truth in a matter involving significant and legitimate public interest.[58]

C. *Quasi-Judicial Proceedings: The Mayor's Committee on the Judiciary and the Department of Investigation*

Having held that Stern's statements to the District Attorney were not absolutely privileged, the court then considered those statements made to the Mayor's Committee and the Department of Investigation. These agencies are clearly not judicial in nature. Their proceedings are not held in court and are connected with the judicial process only indirectly. Thus, to decide whether Stern's statements to the Mayor's Committee and the Department of Investigation were absolutely privileged, the *Toker* court used the second prong of the judicial/quasi-judicial test, and sought to determine whether the agencies or their officers could be considered quasi-judicial.

While courts agree that statements made during quasi-judicial proceedings are absoutely privileged, there is disagreement as to just what constitutes a quasi-judicial proceeding.[59] Courts have held that only statements made before an agency whose hearing procedure is similar to that of a court will be absolutely privileged.[60] "[T]he more closely the procedure of any administrative agency approximates that of a court, the more readily will the courts be willing to extend an absolute privilege to statements made during the course of its action."[61] The requirement of procedural similarity reflects courts' concern for the protection of reputation. Courts hesitate to extend the immunity traditionally associated with the judicial process to agency proceedings unless these proceedings will provide some of the safeguards against and sanctions for defamatory remarks traditionally found in the courtroom. These sanctions and safeguards include the opportunity to be represented by counsel, the chance to confront and question adverse witnesses, the ability to subpoena necessary and favorable witnesses, and the power to punish perjury.[62] Agencies which have the power to hold hearings procedurally similar to those held in court tend to

58. 44 N.Y.2d at 224, 376 N.E.2d at 169-70, 405 N.Y.S.2d at 8.

59. *See* Rainier's Dairies v. Raritan Valley Farms, Inc., 19 N.J. at 562, 117 A.2d at 894; Note, *supra* note 1, at 879-80; Comment, *The Immunity of the Private Citizen Informer in Administrative Proceedings*, 30 TEX. L. REV. 875, 877 (1952).

60. *See* Toker v. Pollak, 44 N.Y.2d 211, 376 N.E.2d 163, 405 N.Y.S.2d 1 (1978); Fenning v. S.G. Holding Corp., 47 N.J. Super. 110, 117, 135 A.2d 346, 351 (1957).

61. Comment, *Libel and Slander—Absolute Privilege before Administrative Agencies*, 5 VILL. L. REV. 121, 123 (1959) [hereinafter cited as Comment, *Absolute Privilege*].

62. *See* Tatro v. Esham, 335 A.2d 623, 626 (Del. Super. Ct. 1975); White v. United Mills Inc., 240 Mo. App. 443, 449, 208 S.W.2d 803, 806 (1948); Engelmohr v. Bache, 66 Wash. 2d 103, 105, 401 P.2d 346, 348, *cert. denied*, 382 U.S. 950 (1965); Veeder, *supra* note 20, at 470-71; Comment, *supra* note 59, at 880.

have concomitant powers to protect an individual's reputation and to punish for false and defamatory remarks. Hence, statements to these agencies generally are held to be absolutely privileged.

In sum, whether statements to an agency will be absolutely privileged depends in great part on whether that agency has the power to hold quasi-judicial hearings.[63] Courts have held that a quasi-judicial hearing is one conducted by an administrative agency or board empowered to apply the law to the facts in a proceeding similar to a court hearing.[64] Quasi-judicial proceedings are presided over by a hearing examiner who is empowered to take evidence, to issue subpoenas, and to render a determination as to a party's status or entitlement. Agencies falling under this definition usually are those that license or regulate professions,[65] or grant economic benefits.[66] Boards or committees that discipline members of a profession also have been accorded quasi-judicial status.[67]

At the time Stern made his statements to Kovner, the Mayor's Committee on the Judiciary did not have many of the powers and safeguards associated with quasi-judicial agencies.[68] While the Department of Investigation does have many of these powers and safeguards,[69] it was not exercising them at the time Stern made his remarks. Since Stern did not speak during a hearing, but rather in private with the Commissioner, the court of appeals found Stern's statements to the Mayor's Committee and the Department of Investigation were made neither to quasi-judicial agencies nor in quasi-judicial proceedings. Consequently, Stern's statements to these agencies were not absolutely privileged.[70]

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63. *See* Fedderwitz v. Lamb, 195 Ga. 691, 25 S.E.2d 414 (1943) (communications to Revenue Commission held *not* privileged because the Commission did not hold a hearing prior to revocation of a liquor license).

64. *See, e.g.*, Rainier's Dairies v. Raritan Valley Farms, Inc., 19 N.J. 552, 117 A.2d 889 (1955); 44 N.Y.2d 211, 376 N.E.2d 163, 405 N.Y.S.2d 1 (1978); Lipton v. Friedman, 2 Misc. 2d 165, 152 N.Y.S.2d 261 (1956). *See also* Note, *supra* note 1, 879; Comment, *supra* note 59, at 877; Comment, *Absolute Privilege*, *supra* note 61, at 122; W. PROSSER, *supra* note 1, at 779-80; Annot., *supra* note 26, at 1299; 50 AM. JUR. 2d *Libel and Slander* § 237 (1970).

65. *See, e.g.*, Lininger v. Knight, 123 Colo. 213, 266 P.2d 809 (1954) (communications to Board of County Commissioners, empowered to revoke liquor licenses, held absolutely privileged); Rainier's Dairies v. Raritan Valley Farms, Inc., 19 N.J. 552, 117 A.2d 889 (1955) (communications to the Director of Milk Industry, empowered to set milk prices and determine validity of producer-distributor contracts, held absolutely privileged); Julien J. Studley, Inc. v. Lefrak, 50 A.D.2d 162, 376 N.Y.S.2d 200 (1975), *aff'd*, 41 N.Y.2d 881, 362 N.E.2d 611, 343 N.Y.S.2d 980 (1977) (communications to a state real estate licensing board held absolutely privileged).

66. *See, e.g.*, White v. United Mills, Inc., 240 Mo. App. 443, 208 S.W.2d 803 (1948) (communications to State Labor Commissioner, empowered to determine if discharged employees were entitled to workmen's compensation benefits, held absolutely privileged).

67. *See, e.g.*, Wiener v. Weintraub, 22 N.Y.2d 330, 239 N.E.2d 540, 292 N.Y.S.2d 667 (1968) (letter to Grievance Committee of the State Bar Association, empowered to investigate and discipline attorneys, held absolutely privileged); Alagna v. New York & Cuba Mail S.S. Co., 155 Misc. 796, 279 N.Y.S. 319 (1935) (steamship company's letter sent to F.C.C. for purpose of having radio operator disciplined held absolutely privileged).

68. *See* note 3 *supra*.

69. *See* note 4 *supra*.

70. 44 N.Y.2d at 222-23, 376 N.E.2d at 168-69, 405 N.Y.S.2d at 6-7.

D. *Qualified Privilege*

As a matter of law, the court of appeals found it impossible to accord Stern's statements to the Mayor's Committee, the Department, and the District Attorney an absolute privilege.[71] As a matter of policy, the court considered a qualified privilege more appropriate to the circumstances.[72] Echoing the rationale expressed by some other courts,[73] the *Toker* court stated that granting a qualified privilege to the defendant's statements would protect the right of citizens to express themselves freely in matters of public concern without sacrificing a defamed individual's right to redress.[74] A qualified privilege is often extended to statements made to protect the maker's private interests.[75] It has been held, for example, that a storekeeper, suspecting a customer of shoplifting, may question that customer within the hearing of others.[76] A qualified privilege also has been extended to communications made by members of a group with respect to their mutual concerns. Thus, the privilege is invoked for communications serving commercial,[77] religious,[78] social,[79] and labor groups.[80]

In general, a qualified privilege has been found where the interest which the defendant seeks to vindicate has an "intermediate degree of importance."[81] Absolute privilege, on the other hand, is reserved for statements made on occasions of great importance designed to serve the public interest.[82] As discussed in the next section,[83] the Mayor's Committee, the Department of Investigation, and the District Attorney play important roles in investigating criminality and assuring the quality of the New York judiciary. Hence, the occasions and circumstances prompting Stern's statements to these agencies were far different from those for which a qualified privilege has been granted.

A qualified privilege is both more restricted and less protective of the speaker than its absolute counterpart. For a statement to be qualifiedly privileged, it must be made in good faith, uphold a specific interest, be limited in scope to this purpose, and be published in a proper manner and to proper par-

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71. *Id.* at 221-22, 376 N.E.2d at 167-69, 405 N.Y.S.2d at 5-7.
72. *Id.* at 218, 223, 376 N.E.2d at 166, 169, 405 N.Y.S.2d at 4, 7.
73. *E.g.*, Melton v. Slonsky, 19 Ariz. App. 65, 504 P.2d 1288 (1973).
74. 44 N.Y.2d at 221, 376 N.E.2d at 168, 405 N.Y.S.2d at 6-7.
75. *Developments—Defamation*, *supra* note 1, at 924.
76. Kroger Grocery & Baking Co. v. Yount, 66 F.2d 700 (8th Cir. 1933).
77. *E.g.*, Putnal v. Inman, 76 Fla. 553, 80 So. 316 (1918) (communication by member of a merchant's protection association to other members concerning alleged debtor).
78. *E.g.*, Slocinski v. Radwan, 83 N.H. 501, 144 A. 787 (1929) (members of church discussing morals of minister).
79. *E.g.*, Reininger v. Prickett, 192 Okla. 486, 137 P.2d 595 (1943) (discussion of proposed new member in fraternal order).
80. *E.g.*, Soley v. Ampudia, 183 F.2d 277 (5th Cir. 1950) (charges against union member by officer at meeting).
81. W. PROSSER, *supra* note 1, § 115, at 785-86.
82. Statements made during legislative, judicial, and quasi-judicial proceedings are absolutely privileged. *Id.* § 114, at 776-82.
83. *See* text accompanying notes 96-115 *infra*.

ties only.[84] Courts look to see if these requirements have been met before granting a qualified privilege. Unlike a claim of absolute privilege, a claim of qualified privilege does not eliminate the necessity of litigating questions of fact,[85] such as improper motive or unreasonable conduct. The time and money involved in such litigation may deter free disclosure, as does the risk that a trier of fact may find against the defendant.[86] Even the possibility of a "nuisance action" may deter persons from bringing forward valuable testimony or participating in public proceedings.[87] Thus, as one commentator has noted, in situations of great importance to the public "it would be inadequate to extend a merely conditional privilege which would require one accused of defamation to show that the false statement was made in good faith. An absolute privilege is necessary, prohibiting any inquiry into the motives which prompted the statement."[88]

IV
ALTERNATIVE ANALYSIS

In denying that Stern's statements to the District Attorney were part of a judicial proceeding, *Toker* was incorrectly decided. On the other hand, in denying that Stern's statements to the Mayor's Committee or to the Commissioner of Investigation were made to quasi-judicial agencies or in quasi-judicial proceedings, the decision is well-founded. More important than the correctness of the results reached by use of the judicial/quasi-judicial test, however, is the validity of the test itself.

A. Weaknesses of the Judicial/Quasi-Judicial Test

The judicial/quasi-judicial test was devised to determine which statements should be accorded an absolute privilege. By insisting that an individual's statements be made in a judicial or quasi-judicial proceeding for an absolute privilege to attach, courts were able to guarantee some protection for individual reputation. *Toker* demonstrates, however, that the test has been applied in too mechanical a fashion. Courts have tended to use a simplistic formula, rather than to assess the competing interests presented by a claim for absolute privilege.[89] "As in most fields . . . where labels become convenient devices for describing legal results, some courts have been led to a use of the label to reach the result."[90]

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84. Garriga v. Townsend, 285 A.D.2d 199, 136 N.Y.S.2d 295; 50 AM. JUR. 2d *Libel & Slander* § 195 (1970).

85. *See* Kenny v. Cleary, 47 A.D.2d 531, 532, 363 N.Y.S.2d 606, 609 (1975).

86. *Developments—Defamation*, *supra* note 1, at 918.

87. Note, *supra* note 1, at 878.

88. *Id.*

89. *See, e.g.*, Jarmun v. Offutt, 239 N.C. 468, 80 S.E.2d 248 (1954). There, the court declared: "It would seem that a proceeding to commit an alleged mentally disordered person to a state hospital under the foregoing procedure is a judicial proceeding within the rule of absolute privilege and we so hold." *Id.* at 473, 80 S.E.2d at 252. Once the court determined that the proceeding was judicial, absolute privilege was extended to all statements made therein, with no consideration given to the policies for and against this extension.

90. Note, *supra* note 1, at 878. As the note indicates, the use of labels may produce anomalous

Mechanical use of the judicial/quasi-judicial test has led many courts to base their decisions on factors that should not be accorded probative value. The timing of an individual's statement, for example, has been unduly emphasized. A speaker must bear the burden of a possible defamation suit if the agency or officer is not conducting a judicial or quasi-judicial hearing at the time the information is given.

The importance attached to timing is especially evident in *Toker*. The case outlines the indicia of a judicial or quasi-judicial proceeding, but ignores the fact that most agencies do not maintain ongoing investigations or hearings. Rather, it takes a relevant piece of information to galvanize an agency or officer into holding a hearing or conducting an investigation. Under the *Toker* rationale, the statements of an individual who offers information that might lead to the initiation of a judicial or quasi-judicial proceeding are not absolutely privileged, while defamatory statements made during such a proceeding are so privileged.

The Department of Investigation arguably has the requisite powers to be considered a quasi-judicial agency,[91] and statements made during hearings conducted by it are absolutely privileged. In *Toker*, however, the Commissioner of Investigation chose to elicit information from Stern before mobilizing his staff for an investigation and hearing. Consequently, Stern's statements were not privileged.

Similarly, under Mayor Koch's Executive Order of April 11, 1978, the Mayor's Committee now has powers, including the power to hold hearings, that arguably render it a quasi-judicial agency. Although the Executive Order, issued five days after *Toker*, is clearly a response to the court of appeals' adverse ruling against Stern, the fact that the Committee now may be deemed quasi-judicial will not aid those who find themselves in Stern's position in the future. An individual who gives the Committee information while it is evaluating candidates, but before a full, public, quasi-judicial hearing is held, will be exposed, as Stern was, to a defamation action.

The situation is also similar with respect to the District Attorney. The District Attorney requires information and justification to convene a grand jury or issue an indictment. Under *Toker*, however, an individual who supplies the District Attorney with information concerning alleged criminal activity will not be protected even though the District Attorney requested the information, while any statements made during courtroom or grand jury proceedings which are instigated because of these revelations will be privileged.

In using the judicial/quasi-judicial test to determine whether a statement is

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results. For example, in Meyer v. Parr, 69 Ohio App. 344, 37 N.E.2d 637 (1941), the court refused to grant an absolute privilege to a letter written to a licensing board seeking the revocation of an embalmer's license. The opinion noted that under the state constitution, judges must be elected. Because the presiding justices of the licensing board were appointees, the court concluded that the proceedings of the board were not judicial, and the letter could not be absolutely privileged.

91. *See* note 4 *supra*. The appellate division, however, did not deem the Department of Investigation to be a quasi-judicial agency though it thought statements to the Department should be absolutely privileged on grounds of public policy. The court of appeals did not address the issue of the Department's quasi-judicial status directly, focusing instead on the fact that the Department was not holding a quasi-judicial hearing at the time Stern made his remarks.

absolutely privileged, courts have put undue emphasis not only on the timing of a statement but also on the form of an agency's proceedings or operations. If an agency's proceedings are deemed sufficiently similar in form to those of a court, statements made before them will be absolutely privileged. Thus, courts' use of the test exalts form over substance and creates confusion, because there is no consensus as to the definition of a quasi-judicial proceeding. *Rainier's Dairies v. Raritan Valley Farms, Inc.*,[92] for example, is widely cited for defining quasi-judicial proceedings and holding that statements made during such proceedings are absolutely privileged. The court there noted, however, that because the line between quasi- and non-quasi-judicial proceedings is indistinct, "a more realistic approach, based more frankly on the admittedly conflicting social interests, ought perhaps be formulated."[93]

B. The Function/Safeguard Analysis

The weaknesses of the judicial/quasi-judicial test lend support to the *Rainier* court's suggestions that a new approach to the problem of absolute privilege ought to be developed. In developing this approach, courtroom proceedings again can provide a starting point, because they were the first to be absolutely privileged. Rather than focusing on the form of courtroom proceedings, however, a new formulation of the test for absolute privilege must concentrate on the underlying policies and rationales for granting privileges to statements made in court.

Courtroom proceedings are absolutely privileged for two reasons. The first is the extreme importance of these proceedings' function, which requires that individuals freely reveal information without being deterred by the threat of a defamation suit.[94] The second reason why courtroom proceedings are privileged is because they provide safeguards for protecting individual reputation against defamatory utterances.[95] Combining these two elements, an alternative to the judicial/quasi-judicial test can be devised. In determining whether statements to an agency or individual should be absolutely privileged, courts should look to (1) the importance of that agency or individual's function, and whether it requires a free flow of information from the public; and (2) whether the agency or individual in question provides adequate means of safeguarding an individual's reputation.[96] If an agency performs a function of crucial significance to societal well-being, and if the performance of that function requires the disclosure of information by members of the public, statements to the agency should be absolutely privileged, provided that sufficient safeguards are afforded for minimizing the impact and occurrence of defamatory utterances.

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92. 19 N.J. 552, 117 A.2d 889 (1955).

93. *Id.* at 562, 117 A.2d at 894.

94. *See* Tatro v. Esham, 335 A.2d 623, 625-26 (Del. Super. Ct. 1975); Toker v. Pollak, 44 N.Y.2d at 218-19, 376 N.E.2d at 166, 405 N.Y.S.2d at 4; Veeder, *supra* note 20, at 469, 474-90; PROSSER, *supra* note 1, at 776-78.

95. *See* Veeder, *supra* note 20, at 470-71.

96. Although somewhat elaborated upon here, this is essentially the test laid down in Note, *supra* note 1, at 879.

The "function/safeguard" analysis can be applied in a less rigid and mechanical fashion than the judicial/quasi-judicial test. While the latter test assesses an agency in terms of its conformity and similarity to the standard of judicial proceedings, the former evaluates each agency on its own merits, allowing for case-by-case determinations.[97] The function/safeguard analysis can easily be applied to the facts of *Toker* to determine whether Stern's written and oral statements should have been absolutely privileged. The first step of the analysis requires an assessment of the importance of the agencies and officials to whom Stern spoke. The second step requires an evaluation of the adequacy of the safeguards against defamation provided by these agencies and officials.

1. The Importance of the Public Function of the Proceeding

a. The Mayor's Committee on the Judiciary

The New York City judiciary has long been plagued by incompetence and corruption.[98] There is therefore a great need to assure the integrity and competency of the judiciary, for "[u]ltimately it is the judge who controls the rendering of justice by his administration of the law and court procedures."[99] The Mayor's Committee on the Judiciary was created to provide that assurance by screening and recommending candidates for mayoral appointments to judgeships.[100] In evaluating the integrity and ability of candidates for the judiciary, and in making recommendations as a basis for official action, the Mayor's Committee performs functions similar to those of bar association grievance or ethics committees.

Communications to such committees are recognized as being absolutely privileged because they perform a vital public function.[101] In *Wiener v. Weintraub*,[102] for example, the court of appeals granted an absolute privilege to statements made to the Grievance Committee of the New York State Bar Association. While the opinion noted that the proceedings held by the Committee were quasi-judicial in nature, the thrust of the opinion stressed the importance

97. Case-by-case adjudication does not have the attribute of predictability. Some issues, however, such as a claim of absolute privilege, can only be resolved in the context of the particular facts and circumstances surrounding them. The granting or denial of the privilege should ultimately rest upon the specifics of the situation under consideration. The judicial/quasi-judicial test has proved to be an imprecise and clumsy device. *Cf.*, San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting) (Court's rigid two-tier analysis not an appropriate device for resolving equal protection claims; a sliding scale of analysis, calibrated with respect to the particular facts of each case, should be used instead).

98. *See* C. ASHMAN, THE FINEST JUDGES MONEY CAN BUY (1973); Note, *supra* note 3, at 606; REPORT OF THE TEMPORARY COMMISSION OF THE NEW YORK STATE COURT SYSTEM (DOMINICK REPORT) pt. II, at 60-61 (1972); NEW YORK STATE COMMISSION OF INVESTIGATION, REPORT CONCERNING DISCIPLINE OF THE JUDICIARY IN THE FIRST AND SECOND JUDICIAL DEPARTMENTS (1974).

99. Note, *supra* note 3, at 608.

100. *See* note 3 *supra*.

101. *See, e.g.*, Wong v. Schorr, 51 Hawaii 608, 466 P.2d 441 (1970); Toft v. Ketchum, 18 N.J. 280, 113 A.2d 671 (1955); Wiener v. Weintraub, 22 N.Y.2d 330, 239 N.E.2d 540, 292 N.Y.S.2d 667 (1968); Ramstead v. Morgan, 219 Or. 383, 347 P.2d 594 (1959).

102. 22 N.Y.2d 330, 239 N.E.2d 540, 292 N.Y.S.2d 667 (1968).

of the public function performed by the Committee.[103] "[T]he necessity of maintaining the high standards of our bar—indeed, the proper administration of justice—requires that there be a forum in which clients or other persons, unlearned in the law, may state their complaints, have them examined and, if necessary, judicially determined."[104]

As the appellate division noted in *Toker*,[105] the *Wiener* decision provides persuasive authority for granting an absolute privilege to statements made to the Mayor's Committee. As the court noted, " '[t]he necessity of maintaining the high standards of our bar' is surely no greater than the necessity of maintaining the high standards of our judiciary."[106] Similarly, in *Julien J. Studley, Inc. v. Lefrak*,[107] the appellate division held that a complaint made to a real estate licensing board was absolutely privileged. The court labelled the licensing proceeding quasi-judicial and could have found an absolute privilege on that basis alone. Nevertheless, the court also gave considerable attention to the importance of the board's licensing functions, which affect a "substantial segment of the public."[108]

The judiciary affects an equally great, if not greater, segment of the population. The Mayor's Committee performs a function of paramount public importance in recommending individuals for judgeships. To make effective recommendations, the Committee must receive an unimpeded flow of information from the public. Often the Committee has difficulty uncovering information which is critical to determining an individual's fitness to serve as a judge. Information given by members of the public concerning the competence, character, or temperament of a potential appointee or member of the bench may be of enormous value to the Committee in making its selections.[109] An individual

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103. In holding the filing of a complaint with the Grievance Committee to be an initial step in a judicial proceeding, *Wiener* represents a decided shift away from *Pecue's* narrow definition of judicial proceedings. The court made no attempt to harmonize the two cases; it may have held the complaint in *Wiener* to be part of a judicial proceeding simply to make its decision appear consistent with past grants of absolute privilege. In reading *Wiener*, it is apparent that the judicial label was but the nail upon which the protective cloak of absolute privilege was hung. The real basis for the grant of immunity was the importance of the Committee's function, which could be carried out only if members of the public came forward with information free from fear of facing a retaliatory defamation suit.

104. 22 N.Y.2d at 332, 239 N.E.2d at 541, 292 N.Y.S.2d at 679.

105. Although it felt constrained to deny Stern's oral statements an absolute privilege because of the court of appeals' holding in *Pecue*, the appellate division thought the statements should be so privileged on grounds of public policy.

106. 56 A.D.2d at 157, 391 N.Y.S.2d at 596.

107. 50 A.D.2d 162, 376 N.Y.S.2d 200 (1975), *aff'd*, 41 N.Y.2d 881, 362 N.E.2d 611, 393 N.Y.S.2d 980 (1977).

108. *Id.* at 165, 376 N.Y.S.2d at 204.

109. Maurice Rosenberg surveyed 144 judges on the attributes they thought most important for a lawyer to possess to become a trial judge. Highest on their list of necessary qualities for a successful trial judge were these six: (1) moral courage; (2) decisiveness; (3) reputation for fairness and uprightness; (4) patience; (5) good physical and mental health; and (6) consideration for others. Rosenberg then noted:

> A striking feature of these highest ranking attributes is that they tend to focus upon the personality or person of the candidate—what he *is* rather than what he has done, his innate or in-

who is easily angered, for example, or one who is prone to hold racial or ethnic biases, would not be well suited to a judgeship. The Committee must have knowledge of such traits before making recommendations for appointments.

b. The District Attorney

In investigating and prosecuting all criminal actions, the District Attorney performs a function of great societal importance.[110] Disclosures made by members of the public are essential in ensuring the success of an investigation and prosecution. This is especially true because probes conducted by the District Attorney often involve matters which are shrouded in secrecy. At the outset of an investigation, it is never clear what facts may later prove to be accurate or of controlling significance. Thus, citizens should be encouraged to supply any potentially valuable information. Courts have held that it is both the right and duty of citizens to report all facts tending to show the commission of a crime.[111] In *Vogel v. Gruaz*, the Supreme Court held that, in order to "promote the free and unembarrassed administration of justice," a communication to a state's attorney was absolutely privileged.[112]

c. The Department of Investigation

The Department of Investigation is an important adjunct to the Mayor's Committee, because it has been delegated the task of investigating the backgrounds of prospective judicial appointees. Information gathered by the Department is used by the Mayor's Committee in determining which candidates to recommend for judgeships. Not only does the Department assist the Committee in assuring the quality of the city's judiciary, but it also performs a function similar to that of the District Attorney. The Department is authorized to conduct inquiries ordered by the Mayor or the City Council, or those which, in the opinion of the Commissioner of Investigation, best serve the interests of the public.[113] In *Langert v. Tenney*,[114] the appellate division spoke of "[t]he highly confidential and investigative function performed by the Commissioner of In-

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trinsic qualities rather than his "external" attainments. They are more concerned with temperament, disposition, character, and attitude than with background, training or formal achievement. Except for good health, they tend to be subjective and difficult to recognize and measure. Furthermore, they are qualities that do not relate uniquely to the law, its study or its practice, and are not peculiar to lawyers or judges.

Rosenberg, *The Qualities of Justices: Are They Strainable?* in SELECTED READINGS ON JUDICIAL SELECTION AND TENURE 5 (G. Winters ed. 1967). As Rosenberg indicated, these are qualities that would be difficult for those unacquainted with an individual to discern. This fact reinforces the need to obtain information from members of the public when conducting the judicial selection process.

110. *See* Vogel v. Gruaz, 110 U.S. 311 (1884); Gabriel v. McMullin, 127 Iowa 426, 103 N.W. 355 (1905); Bergman v. Hupy, 64 Wis. 2d 747, 221 N.W.2d 898 (1974).

111. Roviaro v. United States, 353 U.S. 53, 59 (1957); In re Quarles & Butler, 158 U.S. 532, 535-36 (1895); Vogel v. Gruaz, 110 U.S. 311, 316 (1881); Schuster v. City of New York, 5 N.Y.2d 75, 81, 154 N.E.2d 534, 537, 180 N.Y.S.2d 265, 270 (1958).

112. 110 U.S. at 316.

113. *See* note 4 *supra*.

114. 5 A.D.2d 586, 173 N.Y.S.2d 665 (1958).

vestigation . . . ," noting that "[i]n this respect the Commissioner's function is closely allied to that of the District Attorney. . . ."[115]

Like the District Attorney and the Mayor's Committee, the Department is significantly aided by information rendered by members of the public. Full and free disclosure is essential to the Department, both in gathering information on the backgrounds of prospective judicial appointees, and in conducting other investigations.[116]

2. The Adequacy of the Safeguards Provided

Before finding that a particular statement is privileged, a court using the function/safeguard analysis must assess the adequacy of the safeguards against defamation employed by the agencies or officers under consideration. For the safeguards to be adequate, it is not necessary that all the traditional elements of a judicial proceeding be present. Indeed, if an individual's statements were deemed privileged only in the context of a full public hearing, this would, as noted earlier, place an undue burden on the individual seeking to volunteer or reveal important information. To make disclosure at a public hearing requisite to the grant of an absolute privilege would obstruct the goal of obtaining the maximum amount of information on subjects of public interest. "[I]t is fallacious reasoning to deny absolute privilege because of the diminution of traditional procedural safeguards . . . [A] delicate balancing of interests must be achieved, so that the full privilege is allowed if a decent minimum of orderly and rational procedure is present."[117]

In considering the adequacy of safeguards provided by an agency, the degree of secrecy afforded to communications received is relevant. The most important safeguard offered by the Mayor's Committee, the Department, and the District Attorney is that the three agencies keep all information received in the strictest confidence.[118] While secrecy cannot be guaranteed in every instance, it goes far toward protecting an individual's reputation. Courts have stated that

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115. *Id.* at 588, 173 N.Y.S.2d at 667.

116. Brief of the New York City Commissioner of Investigation as Amicus Curiae at 6-7.

117. Note, *supra* note 1, at 881.

118. With regard to the District Attorney, *see* note 57 *supra*. *See also* ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-107. If the District Attorney or any member of the District Attorney's staff communicates the subject of a complaint to anyone outside the scope of his or her duties, the District Attorney may be liable for damages in an action for defamation. *See* Goodyear Aluminum Products, Inc. v. State of New York, 21 Misc. 2d 725, 203 N.Y.S.2d 256 (1960); Jacobs v. Herlands, 51 Misc. 2d 907, 17 N.Y.S.2d 711 (1940), *aff'd*, 259 A.D.2d 823, 19 N.Y.S.2d 770 (1940); *see* Brief of the District Attorney, New York County, Amicus Curiae at 10-11, Toker v. Pollak, 44 N.Y.2d 211, 376 N.E.2d 163, 405 N.Y.S.2d 1 (1978). With respect to the Department of Investigation, *see* Langert v. Tenney, 5 A.D.2d 586, 173 N.Y.S.2d 665 (1958) (Commissioner of Investigation may not be compelled to disclose the name of informant and content of communications made by informant); Brief of the New York City Commissioner of Investigation as Amicus Curiae at 6. With regard to the Mayor's Committee, *see* Brief of the Mayor's Committee on the Judiciary. It also should be noted that the *Toker* case involved allegations and investigations concerning the conduct of an attorney. Under New York's Judiciary Law, "all papers, records and documents upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of an attorney . . . shall be sealed and be deemed private and confidential." N.Y. JUD. LAW § 90(10) (McKinney 1968).

secrecy is perhaps the most important means of safeguarding individual reputation. In *Wong v. Schorr*,[119] the Hawaii Supreme Court held that communications regarding the alleged unethical conduct of a member of the bar, made to a commission established pursuant to the rules of the court, were absolutely privileged. The court stated that the commission's proceedings were private and confidential, adding that secrecy achieved a proper balance between an attorney's interest in protecting himself from defamatory remarks and society's interest in protecting itself from unethical attorneys.[120] As support for its decision, the court cited *Wiener* where, in granting an absolute privilege to the complaint made to the Bar Grievance Committee, the New York Court of Appeals stressed the fact that the Committee's proceedings were conducted in secret.[121]

While secrecy usually prevents defamatory remarks from reaching the ears of the public, an individual's reputation may still be affected. Such remarks may be heard by individuals and agencies such as those involved in the *Toker* case—the Mayor's Committee, the Department of Investigation, and the District Attorney. One weakness in the Committee's ability to protect an individual's reputation is the fact that the Committee itself cannot investigate information received. Its members therefore may be improperly influenced by a libelous or slanderous remark which the defamed individual cannot rebut.

It should be noted, however, that the Mayor's Committee does not function independently of the Department of Investigation, but rather in tandem with it. While the Mayor's Committee does not have investigatory capabilities, the Department of Investigation is authorized to check the backgrounds of potential candidates for the judiciary and to transmit its results to the Mayor's Committee.[122] This process serves to reduce the impact that a defamatory remark may have on the Committee's decisions. Similarly, the court in *Wiener* noted that "[a] lawyer against whom an unwarranted complaint has been lodged will surely not suffer injury to his reputation among the members of the Grievance Committee since it is their function to determine whether or not the charges are supportable."[123] Like the Department, the District Attorney also has investigatory powers. It is empowered to determine the credibility of any information received, thereby lessening the impact of defamatory communications.

C. The Function/Safeguard Analysis and Public Officials

The function/safeguard test is not a mode of analysis totally foreign to the courts. Without labelling it as such, courts have used the analysis in determining whether a public official is immune from defamation liability. To decide whether an official has such immunity, courts first assess the impor-

119. 51 Hawaii 608, 466 P.2d 441 (1970).
120. *Id.* at 659, 466 P.2d at 442.
121. *Id.* at 611 n.3, 466 P.2d at 443 n.3.
122. *See* note 4 *supra*.
123. 22 N.Y.2d at 332, 239 N.E.2d at 541, 292 N.Y.S.2d at 669.

tance of his or her function;[124] "[i]n determining which officials should be immunized, the key test is the nature and extent of the duties they perform . . . ."[125] If these duties are found to be significant, the individual in question should not be deterred from fulfilling them by the threat of a defamation suit.

Determinations of privilege are made on a case-by-case basis. In New York, for example, it has been held that the responsibilities of a borough president[126] and the state commissioner of education[127] are sufficiently important to warrant the finding that their statements are absolutely privileged. The duties of a high school principal[128] or an acting president of a state university,[129] on the other hand, do not rise to the same level of importance. Thus, statements by these officials are not absolutely privileged.

A finding that an official's functions are of great importance is not decisive as to the question of absolute privilege. Courts also consider the need to protect an individual's reputation. For a statement to be absolutely privileged, it must have been made within the course of the official's duties,[130] on a subject related to the nature of the official's job,[131] and in a manner appropriate to the circumstances.[132] These requirements limit the conditions under which an official may speak without incurring liability for defamation. If a court determines that any of the requirements have not been met, an official's statement will not be absolutely privileged.[133] The injured individual can seek recompense by filing a defamation suit against the official as if that official were a private individual.

D. The Function/Safeguard Analysis and the Balancing of Competing Interests

Unlike the judicial/quasi-judicial test, the function/safeguard analysis is not a litmus test with definite requirements that must be satisfied before a statement is granted an absolute privilege. Rather, the function/safeguard analysis is a means of balancing the competing claims presented by a claim of absolute

124. *See, e.g.*, Barr v. Matteo, 360 U.S. 564, 573-74 (1959).

125. Mink Hollow Dev. Corp. v. State of New York, 87 Misc. 2d 61, 64, 384 N.Y.S.2d 373, 377 (1976).

126. Sheridan v. Crisona, 14 N.Y.2d 108, 198 N.E.2d 359, 249 N.Y.S.2d 161 (1964).

127. Laurence Univ. v. State, 41 A.D.2d 463, 344 N.Y.S.2d 183 (1973).

128. McAulay v. Maloff, 82 Misc. 2d 447, 369 N.Y.S.2d 946 (1975).

129. Stukuls v. State, 42 N.Y.2d 272, 366 N.E.2d 829, 397 N.Y.S.2d 740 (1977).

130. *See, e.g.*, Barr v. Matteo, 360 U.S. at 573-75 (the issuance of a press release by petitioner, Acting Director of the Office of Rent Stabilization, concerning his intention to fire petitioners for plans they had formulated with regard to the use of agency funds, was done within the course of the Acting Director's official duties and thus was absolutely privileged).

131. *See, e.g.*, Walker v. D'Alessandro, 212 Md. 163, 129 A.2d 148 (1957) (adverse public comments by the mayor, concerning paintings exhibited in a city-owned building, were neither within nor related to the scope of his mayoral duties and thus were not absolutely privileged).

132. *See, e.g.*, Cheatum v. Wehle, 5 N.Y.2d 585, 159 N.E.2d 166, 186 N.Y.S.2d 806 (1955) (no absolute privilege attached where defendant, a state conservation commissioner, stated in a speech given at a sportsmen's testimonial dinner that plaintiff, a public official in the conservation department, was guilty of malfeasance in office).

133. *See, e.g.*, Jacobs v. Herlands, 51 Misc.2d 907, 17 N.Y.S.2d 711 (1940), *aff'd*, 259 A.D. 823, 19 N.Y.S.2d 770 (1940); Goodyear Aluminum Products, Inc. v. State, 21 Misc.2d 725, 203 N.Y.S.2d 256 (1960).

privilege: the public's interest in a free flow of information versus the individual's interest in protecting his or her reputation. Under the analysis, statements may be privileged if they are made to agencies or officials performing important functions which require disclosures by the public, and if measures are taken to prevent unfettered character assassination. As the importance of the entity under consideration increases, a corresponding diminution in the procedural safeguards offered may be tolerated.

Absolute privilege "is founded on theory that the good it accomplishes in protecting the rights of the general public outweighs any wrong or injury which may result to a particular individual."[134] Undeniably, an extension of absolute privilege works hardships in individual cases. Such privilege effectively grants a license to defame, leaving an injured individual without legal recourse. While the harm resulting to the individual cannot be underestimated, it may be outweighed by the benefit accruing to the public. The Supreme Court has stated that "as with any rule of law which attempts to reconcile fundamentally antagonistic social purposes, there may be occasional instances of actual injustice which will go unredressed, but we think that price a necessary one to pay for the greater good."[135]

In *Wiener*, the New York Court of Appeals noted that in granting an absolute privilege to an allegedly defamatory letter sent to the Bar Grievance Committee, the court may have permitted occasional false and malicious statements to be made to that committee with impunity. Nevertheless, the court held that to maintain the high standards of the bar, the potential injury to a particular attorney arising from the absolute privilege must be tolerated.[136] The rationale of *Wiener* is directly applicable to *Toker*. It is indeed true that the proceedings of the Mayor's Committee, the Department of Investigation, and the District Attorney do not offer the same array of safeguards and sanctions for defamatory utterances as do court proceedings. According Stern's statements an absolute privilege may force a defamed individual to forego redress or recompense. Ultimately, though, this privilege serves the public by securing a free flow of information to the Mayor's Committee, the Department of Investigation, and the District Attorney, thereby aiding their attempts to enforce the law and ensure the quality of the city's judges.

V
CONCLUSION

In deciding whether the statements of members of the public should be absolutely privileged, courts traditionally have used a judicial/quasi-judicial test, which has become a somewhat formalistic device. In contrast, the proposed function/safeguard analysis both allows courts to make case-by-case determinations of privilege and compels courts to consider the competing interests presented in a claim for absolute privilege.

134. Reagan v. Guardian Life Ins. Co., 140 Tex. 105, 113, 166 S.W.2d 909, 913 (1942).
135. Barr v. Matteo, 360 U.S. at 576.
136. 22 N.Y.2d at 332, 239 N.E.2d at 541, 292 N.Y.S.2d at 669.

Had the New York Court of Appeals used the function/safeguard test in *Toker*, Stern's written and oral communications might well have been found absolutely privileged. The functions of the Mayor's Committee, the Department of Investigation, and the District Attorney are crucial to law enforcement in New York City and to the development and maintenance of a highly qualified judiciary. While fulfilling these important duties, the three operate in a manner that minimizes the impact and occurrence of defamatory remarks. Their proceedings do not offer the same range of safeguards against defamation found in the courtroom; thus, some harm to individual reputation might have occurred had Stern's statements been granted an absolute privilege. The detriment of potential harm to an individual would have been far outweighed, however, by the benefit accruing to the public in assuring a free flow of information to the Mayor's Committee, the Department of Investigation, and the District Attorney.

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