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Rethinking Absolute Immunity from Defamation Suits in Private Quasi-Judicial Proceedings

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Nat Stern

Rethinking Absolute Immunity from Defamation Suits in Private Quasi-Judicial Proceedings

21 U.N.H. L. Rev. 117 (2022)

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INTRODUCTION

The Supreme Court has recognized that actions for damages from defamatory falsehoods reflect “no more than our basic concept of the essential dignity and worth of every human being.”¹ Thus, subject to certain constraints imposed by the First Amendment, states have been afforded much latitude to fashion rules designed to vindicate individual reputation.² The availability of defamation suits in every state³ reflects the pervasive policy of advancing this interest. Nevertheless, states have not furnished causes of action for libel in every instance in which they are constitutionally permissible. For example, attorneys, parties, and witnesses generally enjoy absolute immunity from libel suits for allegedly defamatory statements they have made as part of a judicial proceeding.⁴ Moreover, many states have extended this privilege to proceedings such as administrative hearings and arbitration, where they include features deemed to qualify such proceedings as “quasi-judicial.”⁵

This Article does not challenge the idea that some nonjudicial undertakings have functions and safeguards that are sufficiently similar to judicial proceedings to justify insulation from libel actions. Nevertheless, absolute immunity in some contexts may undervalue reputational interests. In particular, the most common standard for determining whether a nonjudicial dispute resolution triggers absolute immunity assigns insufficient weight to the distinction between public and private proceedings. This Article proposes an approach that would require heightened justification for a private proceeding to qualify as quasi-judicial and thus to confer blanket immunity from libel suits on its participants. Part I describes the rationale, nature, and scope of this privilege and the constitutional setting in which it operates. Part II argues that the justifications for granting absolute immunity in proceedings that bear indicia of judicial hearings apply with weaker force to the private sphere than they do to the public sphere. Part III offers a framework that takes this disparity into account and describes the approach’s possible application to three areas: the securities industry, university discipline, and arbitration.

¹ *Gertz v. Robert Welch*, 418 U.S. 323, 341 (1974) (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring)).

² *See infra* Part I-B.

³ *See LexisNexis 50-State Surveys, Statutes & Regulations, Torts – Intentional Torts: Defamation* (Dec. 2020).

⁴ *See* RESTATEMENT (SECOND) OF TORTS §§ 586-88 (AM. L. INST. 1977). The nature and scope of the privilege are discussed at *infra* notes 6–12 and accompanying text.

⁵ *See infra* notes 13–15 and accompanying text.

I. ABSOLUTE PRIVILEGE AND ITS CONSTITUTIONAL FRAMEWORK

Absolute immunity for defamatory statements made in the course of judicial proceedings, which are designed to encourage participants to speak freely, has deep roots in Anglo-American jurisprudence. Today, most states have recognized this same privilege for statements arising out of quasi-judicial proceedings. Though this principle has been widely accepted, disputes often arise over whether a given proceeding should be designated as quasi-judicial or judicial. In addition, courts have considerable latitude to determine whether a communication is sufficiently related to such a proceeding and, based on the privilege's purpose, to warrant application of the privilege.

A. *Immunity for Statements in Judicial and Quasi-Judicial Proceedings*

The idea of immunity from suit for statements made at judicial proceedings extends far back in English law.⁶ In 1772, Lord Mansfield formally enshrined the rule: “[N]either party, witness, counsel, jury, or [j]udge, can be put to answer, civilly or criminally for words spoken in office.”⁷ The Restatement’s embrace of this principle⁸ reflects its longstanding acceptance in American law.⁹ Though the precise rationale for shielding each of these participants varies somewhat,¹⁰ their protection is united by the goal of removing a potential inhibition to fearless performance of duty. Thus, absolute immunity seeks to ensure that “persons who occupy certain positions, as judges, jurors, advocates, or litigants, should be perfectly free and independent, and that, to secure their independence, their utterances should not be brought before civil tribunals for inquiry on the mere allegation that they are

⁶ See Marion Neef & Stuart Nagel, *The Adversarial Nature of the American Legal System: A Historical Perspective*, in *LAWYER ETHICS* 73, 76–79 (Allan Gerson ed., 1980) (tracing origin of privilege the introduction of the adversary system after the Normans Conquest).

⁷ *Rex v. Skinner* (1772) 98 Eng. Rep. 529, 530 (KB).

⁸ See RESTATEMENT (SECOND) OF TORTS § 586 (attorneys), § 587 (parties), § 588 (witnesses) (AM. L. INST. 1977).

⁹ See, e.g., *Erie Cty. Farmers' Ins. Co. v. Crecelius*, 171 N.E. 97, 98 (Ohio 1930) (recognizing a rule of absolute immunity for witnesses, attorneys, and judges “grounded upon public policy”).

¹⁰ In his landmark treatment of the subject, Van Vechten Veeder separately articulated the justifications for each participant. See Van Vechten Veeder, *Absolute Immunity in Defamation: Judicial Proceedings*, 9 COLUM. L. REV. 463, 474 (1909) (judges); *id.* at 475 (jurors); *id.* at 476 (witnesses); *id.* at 477 (parties); *id.* at 482–83 (attorneys).

malicious.”¹¹ In pursuit of this larger interest, adoption of the rule embodies acceptance of the occasional injustice of malicious libel committed with impunity.¹²

Avoiding the specter of “certain retaliatory civil actions” has likewise underpinned the extension of absolute immunity to proceedings deemed quasi-judicial.¹³ To qualify as quasi-judicial, a proceeding must afford procedural protections similar to those provided by the judicial process.¹⁴ The great majority of

¹¹ *Id.* at 469.

¹² *See* *Niertert v. Overby*, 816 F.2d 1464, 1468 (10th Cir. 1987) (“Immunity cases inevitably involve a clash between policies favoring the important right of individuals to be compensated for their injuries, and those protecting the public interest and promoting the effective functioning of government.” (citations omitted)). *See also* *Doe v. McMillan*, 412 U.S. 306, 320 (1973) (resting decisions about absolute immunity on “whether the contributions of immunity to effective government in particular contexts outweighs that perhaps recurring harm to individual citizens.”).

¹³ *Ravalese v. Lertora* 200 A.3d 1153, 1158 (Conn. App. Ct. 2018). *See* *Butz v. Economou*, 438 U.S. 478, 516 (1978) (holding that federal administrators performing adjudicatory functions are entitled to absolute immunity from damages liability for their judicial acts and observing that “agency officials must make the decision to move forward with an administrative proceeding free from intimidation or harassment.”). A few states have recognized only a qualified privilege. *See, e.g.*, *Webster v. Byrd*, 494 So.2d 31, 34 (Ala. 1986) (noting adoption of conditional privilege by minority of states).

¹⁴ *See* *Gersh v. Ambrose*, 434 A.2d 547, 551–52 (Md. 1981) (“[W]hether absolute witness immunity will be extended to any administrative proceeding . . . will in large part turn on two factors: (1) the nature of the public function of the proceeding and (2) the adequacy of procedural safeguards which will minimize the occurrence of defamatory statements.”); *Lockheed Info. Mgmt. Sys. Co. v. Maximus, Inc.*, 524 S.E.2d 420, 424 (Va. 2000) (stating that absolute privilege attendant to quasi-judicial proceedings “has been extended to communications made in administrative hearings so long as the ‘safeguards that surround’ judicial proceedings are present.” (internal citation omitted)); *see also Webster*, 494 So. 2d at 34 (“Where an administrative proceeding is conducted with the same safeguards as those provided in judicial proceedings, e.g., notice and opportunity to be present, information as to charges made and opportunity to controvert such charges, the right to examine and cross-examine witnesses, the right to submit evidence on one’s behalf, the right to be heard in person, and the presence of an objective decision-maker, that proceeding is quasi-judicial in nature and statements made in the course of the proceeding should be absolutely privileged.” (citation omitted)); *see also* *Kraig J. Marton & Victoria H. Quach, Reporting Roulette: Complaining or Even Sitting on a Board Just Might Get You Sued (AKA The Immunity Laws in Arizona Are in a Terrible State of Disarray)*, 5 PHOENIX L. REV. 515, 525 (2012) (stating that courts appear to base analysis of whether an administrative proceeding is quasi-judicial on “just how “judicial” the . . . proceeding might be”); *William J. Andrie Jr., Extension of Absolute Privilege to Defamation in Arbitration Proceedings - Sturdivant v. Seaboard Service System, LTD.*, 33 CATH. U. L. REV. 1073, 1085 (1984) (“Many of the traditional safeguards of justice associated with quasi-

states have adopted an absolute privilege for statements made at such proceedings.¹⁵

Though specific formulations for determining whether a proceeding falls into this category vary, courts widely consider similar elements.¹⁶ A representative and influential example is the Connecticut Supreme Court's enumeration of relevant factors in *Kelley v. Bonney*:¹⁷

whether the body has the power to: (1) exercise judgment and discretion; (2) hear and determine or to ascertain facts and decide; (3) make binding orders and judgments; (4) affect the personal or property rights of private persons; (5) examine witnesses and hear the litigation of the issues on a hearing; and (6) enforce decisions or impose penalties.¹⁸

judicial proceedings, such as the right to an impartial decision maker, the right of both sides to be heard, and the right to refute documents and testimony, allow the potential damage of a defamatory statement to be mitigated.”).

¹⁵ *E.g.*, *Webster*, 494 So. 2d at 34; *Advanced Cardiac Specialists v. Tri-City Cardiology Consultants, P.C.*, 214 P.3d 1024, 1027 (Ariz. Ct. App. 2009); *Ascherman v. Natanson*, 100 Cal. Rptr. 656, 658–59 (Cal. Ct. App. 1972); *Renner v. Chilton*, 351 P.2d 277, 277 (Colo. 1960); *Kahala Royal Corp. v. Goodsill Anderson Quinn & Stifel*, 151 P.3d 732, 753 (Haw. 2007); *Bushell v. Caterpillar, Inc.*, 683 N.E.2d 1286, 1289 (Ill. App. Ct. 1997); *Clear Water Truck Co. v. M. Bruenger & Co.*, 519 P.2d 682, 685 (Kan. 1974); *McLeod v. State*, 206 P.3d 956, 961 (Mont. 2009); *Bouvier v. Porter*, 865 S.E.2d 732, 735 (N.C. Ct. App. 2021); *W. Mass. Blasting Corp. v. Metro. Prop. & Cas. Ins. Co.*, 783 A.2d 398, 403 (R.I. 2001); *Flugge v. Wagner*, 532 N.W. 2d 419 (S.D. 1995); *Pension Advisory Grp., Ltd. v. Country Life Ins. Co.*, 771 F. Supp. 2d 680, 699 (S.D. Tex. 2011); *Collins v. Red Roof Inns*, 566 S.E.2d 595, 598 (W. Va. 2002).

¹⁶ *See* Chris Kilgore et al., *Be Nice—Or I’ll Sue: Is This a New Perigree for FAA/Customer Relations?* *Cox & Novickis v. 5-State Helicopters, Inc. A Clash of Personal and Public Rights*, 70 J. AIR L. & COM. 239, 247 (2005) (“[W]hat constitutes a quasi-judicial proceeding . . . varies from jurisdiction to jurisdiction.”); *see* Piper M. Willhite, Comment, *Defamation Law: Privileges from Liability: Distinguishing Quasi-Judicial Proceedings from Proceedings Which Are Preliminary to Judicial Hearings*, 47 OKLA. L. REV. 541, 547–50 (1994) (describing different ways quasi-judicial proceedings are defined). The lack of uniformity in identifying quasi-judicial proceedings has long existed. *See, e.g.*, Jerry F. Lyons, Comment, *The Immunity of the Private Citizen Informer in Administrative Proceedings*, 30 TEX. L. REV. 875, 877 (1952) (noting “diversity of opinion” as to what makes a proceeding quasi-judicial).

¹⁷ *Kelley v. Bonney*, 606 A.2d 693 (Conn. 1992).

¹⁸ *Id.* at 704. *See* 50 AM. JUR. 2D *Libel and Slander* § 283 Westlaw (database updated November 2021) (adopting same standard); *Shanks v. AlliedSignal, Inc.*, 169 F.3d 988, 993–94 (5th Cir. 1999) (same). Substantially similar versions of *Kelley’s* approach have been articulated. An illustration of the systematic application of *Kelley’s* factors can be found in *Priore v. Haig*, 230 A.3d 714, 732 (Conn. App. Ct. 2020) (applying factors to conclude that planning and zoning commissioner’s hearing on whether to approve defamation plaintiff’s permit application constituted quasi-judicial proceeding).

A body need not possess all of these powers to be considered quasi-judicial.¹⁹ Instances of other courts employing this type of analysis to conclude that the body in question exercised quasi-judicial power are numerous. An oft-cited illustration is the New Jersey Supreme Court's 1955 decision in *Rainier's Dairies v. Raritan Valley Farms*.²⁰ In ruling that license revocation proceedings before the state's Director of Milk Industry were quasi-judicial, the court highlighted the Director's powers to investigate alleged violations of rules and regulations and to conduct formal hearings of an adversary nature "in much the same fashion as strictly judicial causes are conducted."²¹ Since *Rainier's Dairies*, courts across the nation have recognized a broad range of proceedings as quasi-judicial. Examples have included a hearing concerning the status of a public employee,²² an unemployment compensation proceeding,²³ a state Department of Corrections affirmative action investigation process,²⁴ arbitration,²⁵ disciplinary proceedings against police officers²⁶ and real

¹⁹ See *Bowers v. United Ass'n of Journeyman and Apprentices of Plumbing and Pipe Fitting Indus.*, No. H-08-1208, 2009 WL 10693901, at *6 (S.D. Tex. May 22, 2009) ("A proceeding need not exhibit all of the [enumerated] characteristics to be considered quasi-judicial . . ."); see also *Shanks*, 169 F.3d at 994 ("[A]lthough the factors are surely helpful guidelines, courts have not applied them formulaically, nor have they required that a threshold number of these criteria be satisfied."); see also *Boisvere v. Mass. Dept. of Env't Prot.*, No. 07-P-362, 2008 WL 976908, at *2 n.7 (Mass. App. Ct. April 11, 2008) (noting factors considered by Massachusetts Supreme Judicial Court and acknowledging that "these specific procedures are not always present").

²⁰ 117 A.2d 889 (N.J. 1955). See, e.g., *Ascherman v. Natanson*, 100 Cal. Rptr. 656, 659 (Cal. Ct. App. 1972); *Elder v. Holland*, 155 S.E.2d 369, 374 (Nev. 1967); *Knox v. Dick*, 665 P.2d 267, 270 (Nev. 1983).

²¹ *Id.* at 892.

²² See, e.g., *Forte v. City of Montgomery*, 420 F. Supp. 3d 1239, 1244 (M.D. Ala. 2019) (sergeant for fire department); *Anderson v. City of Dall.*, 116 F. App'x 19, 32 (5th Cir. 2004) (employee of city); *Hoffler v. Colo. Dep't of Corr.*, 27 P.3d 371, 372, 375 (Colo. 2001) (department of corrections employee).

²³ See, e.g., *Wal-Mart Stores, Inc. v. Lane*, 31 S.W.3d 282, 290 (Tex. App. 2000); *Dorn v. Peterson*, 512 N.W.2d 902, 906 (Minn. Ct. App. 1994).

²⁴ See *Morgan v. Bubar*, 975 A.2d 59, 69 (Conn. App. Ct. 2009).

²⁵ See, e.g., *Bushell v. Caterpillar, Inc.*, 683 N.E.2d 1286, 1288–89; *Kidwell v. GMC*, 975 So. 2d 503, 505 (Fla. 2d. DCA 2007). See also RESTATEMENT (SECOND) OF TORTS § 586 cmt. d (AM. L. INST. 1977) (stating that judicial proceedings for purposes of immunity "include all proceedings before an officer or other tribunal exercising a judicial function" and that "an arbitration proceeding may be included."). The treatment of arbitration proceedings as quasi-judicial is discussed at *infra* III-B(3).

²⁶ See, e.g., *Bohmer v. N.Y.*, 684 F.Supp. 2d 357, 364 (S.D.N.Y. 2010); *Rioux v. Barry*, No. CV054007375S, 2006 Conn. Super. LEXIS 47 at *15–16 (Conn. Super. Ct. Jan. 3, 2006).

estate brokers,²⁷ government administrative enforcement proceedings,²⁸ a proceeding before the Department of Health to consider an application to file a delayed birth certificate,²⁹ a school board's process for resolving a charge of misconduct by a teacher,³⁰ and a state bar association's disciplinary proceedings.³¹

The number of proceedings deemed quasi-judicial, however, does not mean that this status and its absolute privilege are lightly granted. On the contrary, "the availability of an absolute privilege must be reserved for those situations where the public interest is so vital and apparent that it mandates complete freedom of expression without inquiry into a defendant's motives."³²

Accordingly, courts have withheld recognition where they find inadequate assurance of procedural safeguards. For example, the D.C. Circuit Court of Appeals rejected an absolute privilege where a police investigatory committee did not engage in "traditional adjudicatory processes"—e.g., holding formal hearings—and lacked the power to issue a ruling that could be enforced or appealed.³³ Similarly, a court

²⁷ See, e.g., *Ward v. Simperts*, No. RDB-07-3266, 2008 WL 2271486, at *1, 4 (D. Md. May 29, 2008); *Williams v. Lazer*, 495 P.3d 93, 99–100 (Nev. 2021).

²⁸ See, e.g., *Priore v. Haig*, 230 A.3d 714, 731; *Verdi v. Metro. Dade Cnty.*, 684 So. 2d 870, 873–74 (Fla. Dist. Ct. App. 1996); *Baldwin v. Adidas America, Inc.*, No. C2-02-265, 2002 WL 2012562, at *3 (S.D. Ohio July 29, 2002).

²⁹ See *Kirschstein v. Haynes*, 788 P.2d 941, 948–50 (Okla. 1990).

³⁰ See, e.g., *Rogers v. Bd. of Educ. of City of New Haven*, 749 A.2d 1173, 1178 (Conn. 2000); *Seiden v. Adams*, 150 So. 3d 1215, 1218–19 (Fla. Dist. Ct. App. 2014).

³¹ See, e.g., *Goldman v. Sahl*, 462 P.3d 1017, 1031, 1040 (Ariz. Ct. App. 2020); *The Fla. Bar v. Centurion*, 801 So. 2d 858, 861–62 (Fla. 2000); *Cohen v. King*, 206 A.3d 188, 191–92 (Conn. App. Ct. 2019).

³² *Supry v. Bolduc*, 293 A.2d 767, 769 (N.H. 1972).

³³ *White v. Fraternal Order of Police*, 909 F.2d 512, 524 (D.C. Cir. 1990). See *Barge v. Ransom*, 30 S.W.3d 889, 891–92 (Mo. Ct. App. 2000) (rejecting absolute privilege where city's police internal affairs unit investigators lacked power to subpoena witnesses or documents, witnesses were not sworn or subject to perjury sanctions, and there were no formal rules of evidence or opportunity for cross-examination); *Rom v. Fairfield Univ.*, No. CV020391512S, 2006 WL 390448, at *3–4 (Conn. Super. Ct. Jan. 30, 2006) (holding that statements made at disciplinary proceeding were entitled only to conditional privilege where student was barred from being represented by counsel, disciplinary board lacked power to compel testimony, oath was not required for testimony given, and recordings of proceedings would be destroyed upon completion of procedures); *Anderson v. Gordon*, No. 82-1687 1984 WL 180497, at *6 (Wis. Ct. App. April 25, 1984) ("The [agency] hearing is a 'meeting' which is more akin to a public discussion than a judicial hearing. The evidence at the meeting need not be under oath, allowance of cross examination is not mandatory, the extent to which the rules of evidence apply is unstated, and no provision is made for recording oral

found that the summary procedures employed by Nevada's board of medical examiners to suspend a medical license lacked the protections required to be considered a quasi-judicial proceeding.³⁴ Such procedural deficiencies, including lack of opportunity for cross-examination, likewise prompted a Missouri court to withhold absolute immunity for statements made at a union grievance proceeding conducted under an agreement between a company and its employees.³⁵ Proceedings held by bodies whose nature is facially nonadjudicatory — e.g., city councils — appear to evoke particular skepticism toward claims of quasi-judicial status.³⁶

B. Constitutional Framework of Defamation

Though the First Amendment has often dominated discourse on defamation doctrine, constitutional rulings only incidentally bear on states' latitude to confer immunity for false statements made at private hearings. A brief overview of the Supreme Court's constitutional framework for defamation demonstrates its limited relevance. Most importantly, the Court's treatment of defamation has grappled with issues of the minimum protection that governments owe libel defendants. By contrast, questions of quasi-judicial classification triggering absolute immunity

testimony."); *Zych v. Tucker*, 844 N.E.2d 1004, 1009 (Ill. App. Ct. 2006) (finding that defamatory letter sent to sheriff's office of internal affairs was entitled only to qualified privilege where office's power was confined to investigating complaints against members of sheriff's police and making recommendations to sheriff); *Richardson v. Dunbar*, 419 N.E.2d 1205, 1208 (Ill. App. Ct. 1981) (stating that absolute privilege does not attach when body performing quasi-judicial function "fails to follow judicial procedures").

³⁴ *Giarrusso v. Nev. State Bd. of Med. Exam'rs*, No. CV-S-05-0640-RLHPAL, 2006 WL 8441893, at *5–6 (D. Nev. Jan. 26, 2006). *See* *Spencer v. Klementi*, 466 P.3d 1241, 1248 (Nev. 2020) (denying absolute privilege for statements made during public-comment periods of planning-commission and improvement-district meetings because periods "lacked basic due-process protections").

³⁵ *Wright v. Over-The-Road & City Transfer Drivers, Helpers, Dockmen and Warehousemen, Local 41, International Brotherhood of Teamsters*, 945 S.W.2d 481, 492–93 (Mo. Ct. App. 1997).

³⁶ *See, e.g., Vultaggio v. Yasko*, 572 N.W.2d 450, 455 (Wis. 1998) (holding that witness's testimony at city council meeting was not protected by absolute immunity "in a situation with little guidance, structure or control" for witness's testimony); *Ims v. Town of Portsmouth*, 32 A.3d 914, 929 (R.I. 2011) (finding that communication to town council was not made in course of council's exercise of quasi-judicial function). *But see* *Perdue, Brackett, Flores, Utt & Burns v. Linebarger, Goggan, Blair, Sampson & Meeks, L.L.P.*, 291 S.W.3d 448, 453–54 (Tex. App. 2009) (ruling that a city council's deliberations on controversy over party's performance of contract with city constituted quasi-judicial proceeding where council had power to hear and ascertain facts, to subpoena and examine witnesses and to decide controversy).

assume the state's power to provide a cause of action for the alleged libel and ask whether the state should withhold exercise of this power in the case at hand.

As has often been observed, American defamation law has not been distinguished by its coherence or clarity.³⁷ Still, the Supreme Court's constitutional handiwork can be viewed as falling roughly into three groupings since the Court's landmark decision in *New York Times v. Sullivan*³⁸ brought defamatory speech within the compass of First Amendment protection.³⁹ In the first category lie rulings that erected barriers to recovery for libel plaintiffs. Most of these standards were promulgated during the period that began with *Sullivan* and closed with the end of the Warren Court. Under *Sullivan's* "actual malice" requirement, a public official could recover damages for a defamatory falsehood only by showing that the defendant either knew the statement was false or acted with reckless disregard of whether it was false.⁴⁰ The Court rendered this already heavy evidentiary burden even more formidable by requiring that the official establish actual malice with "convincing clarity" rather than by a preponderance of the evidence.⁴¹ Subsequent holdings elaborating on the nature of the actual malice requirement further fortified this obstacle to public officials.⁴² Moreover, the Court markedly increased the reach of the requirement by imposing it on plaintiffs designated as public figures.⁴³

³⁷ See, e.g., Joshua B. Orenstein, *Absolute Privilege from Defamation Claims and the Devaluing of Teachers' Professional Reputations*, 2005 WIS. L. REV. 261, 267 (2005) (characterizing American defamation law as "a hodgepodge of complex and contradictory standards"); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 111, at 771 (5th ed. 1984) (declaring that defamation law "contains anomalies and absurdities for which no legal writer ever has had a kind word"); David A. Anderson, *Rethinking Defamation*, 48 ARIZ. L. REV. 1047, 1056 (2006) (asserting that defamation law "gives us the worst of worlds").

³⁸ *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

³⁹ *Id.* at 269. The Court had previously deemed defamation unworthy of First Amendment recognition. See *Beauharnais v. Illinois*, 343 U.S. 250, 256–57, 266 (1952) (stating that libelous statements "are of such slight social value . . . that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality"); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (adopting the same statement).

⁴⁰ *Sullivan*, 376 U.S. at 279–80.

⁴¹ *Id.* at 285–86.

⁴² See, e.g., *Garrison v. Louisiana*, 379 U.S. 64, 72–73 (1964) (explaining that proof of plaintiff's animosity toward defendant by itself did not establish actual malice); *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) (holding that showing that a reasonably prudent person would not have published the defamatory statement without additional investigation falls short of demonstrating actual malice).

⁴³ *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring); see Harry Kalven,

Two additional developments expanded the range of protected expression regardless of the plaintiff's status. Reaffirming what had originally been an alternative ground for overturning the verdict in *Sullivan*,⁴⁴ the Court in *Rosenblatt v. Baer* required that an alleged defamatory falsehood be shown to be unequivocally "of and concerning" the plaintiff.⁴⁵ The Court in *Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin* also exempted from liability ostensibly factual charges that amount to rhetorical hyperbole rather than actual accusations of deplorable conduct.⁴⁶

In the mid-1980s, a trio of decisions further bolstered the position of libel defendants. In the 1986 case of *Philadelphia Newspapers, Inc. v. Hepps*, the Supreme Court ruled that private figures seeking damages against media defendants for speech of public concern bear the burden of proving falsity.⁴⁷ That same term, the Court held in *Anderson v. Liberty Lobby, Inc.* that a public figure's affidavit must support a reasonable inference of actual malice by clear and convincing evidence to avoid summary judgment for the defendant.⁴⁸ Two years earlier, the Court in *Bose Corp. v. Consumers Union* instructed appellate courts to apply independent review to determinations of actual malice at trial.⁴⁹

By the time of these later decisions, however, the Burger Court had facilitated libel plaintiffs' suits in a number of ways. In *Gertz v. Robert Welch, Inc.*, the Court relieved private figure plaintiffs of the burden of demonstrating actual malice in order to recover damages;⁵⁰ rather, a showing of negligence would suffice.⁵¹ Private figures would have to show actual malice only when seeking presumed or punitive damages,⁵² and, as the Court explained eleven years later, even this requirement applied only when the defamatory speech at issue involved a matter of public rather

Jr., *The Reasonable Man and the First Amendment*: Hill, Butts, and Walker, 1967 SUP. CT. REV. 267, 275–78 (1967) (explaining how separate opinions in combination produced this holding).

⁴⁴ See *Sullivan*, 376 U.S. at 288–92 (concluding that allegedly libelous statements at issue were not shown to have referred specifically to the plaintiff).

⁴⁵ *Rosenblatt v. Baer*, 383 U.S. 75, 82–83 (1966).

⁴⁶ See, e.g., *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 285–86 (1974) ("treason"). See also *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 13 (1970) ("blackmail").

⁴⁷ *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776–77 (1986).

⁴⁸ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255–56 (1986).

⁴⁹ *Bose Corp. v. Consumers Union*, 466 U.S. 485, 514 (1984).

⁵⁰ *Gertz v. Robert Welch*, 418 U.S. 323, 334, 340–41 (1974).

⁵¹ *Id.* at 347.

⁵² *Id.*

than private concern.⁵³ Even where the actual malice standard did apply to public officials and public figures, its potency was reduced in some instances by the Court's authorization of vigorous inquiry into the editorial processes of media defendants.⁵⁴

The third category comprises two decisions by the Rehnquist Court that enabled a plaintiff's suit to continue without more broadly eroding defendants' First Amendment protection. In *Milkovich v. Lorain Journal Co.*,⁵⁵ the Court refused to recognize a categorical constitutional privilege for statements of opinion,⁵⁶ but reaffirmed precedent insulating statements that did not "contain a provably false factual connotation" or could not "reasonably [be] interpreted as stating actual facts."⁵⁷ The Court struck a similar balance in *Masson v. New Yorker Magazine, Inc.*⁵⁸ when it permitted a suit to proceed over the defendant's alterations of quotations of the plaintiff's comments while holding that even deliberate alteration of a plaintiff's language does not constitute actionable falsity unless "the alteration results in a material change in the meaning conveyed by the statement."⁵⁹

II. FALLACIES OF EQUATING PUBLIC AND PRIVATE PROCEEDINGS

As long as defamation liability remains within the abovementioned constitutional parameters, states may continue to elect when to expose alleged libelers to suits. In principle, preclusion of actions for statements arising out of quasi-judicial proceedings represents a sound policy. Comments and testimony at zoning board hearings,⁶⁰ license revocation actions,⁶¹ and a host of other proceedings designed to ascertain facts to resolve disputes should not be inhibited by fear of libel litigation. At the same time, states should vigilantly ensure that such proceedings contain procedural guarantees necessary to prevent a descent towards libel safe harbors. In addition, the interest served by the proceeding should be sufficient to warrant the unjust harm to reputation that must occasionally result from absolute immunity. These goals will not be achieved if courts apply the

⁵³ See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985) (Powell, J., plurality opinion).

⁵⁴ See *Herbert v. Lando*, 441 U.S. 153, 175 (1979).

⁵⁵ *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990).

⁵⁶ *Id.* at 21.

⁵⁷ *Id.* at 20 (citation omitted).

⁵⁸ *Masson v. New Yorker Magazine*, 501 U.S. 496 (1991).

⁵⁹ *Id.* at 517.

⁶⁰ See *Priore v. Haig*, 230 A.3d 714, 736–37 (Conn. App. 2020).

⁶¹ *Indep. Life Ins. Co. v. Rodgers*, 55 S.W.2d 767, 768 (Tenn. 1932).

six commonly used factors for determining quasi-judicial status⁶² in an undifferentiated manner. The further proceedings stray from absolute immunity's original roots in judicial proceedings, the more warily should assertions of their quasi-judicial character be assessed. In particular, proceedings by private entities stand further removed from these roots than those conducted by public bodies. This obviously does not mean that courts should casually grant absolute immunity in governmental proceedings⁶³ or apply the equivalent of strict scrutiny⁶⁴ to private ones. They should, however, review claims of quasi-judicial character for private proceedings more cautiously.

The salient difference between private and public proceedings is that only the latter are subject to strictures of the Due Process Clause. Of course, the requirement that a proceeding incorporate a substantial portion of the six elements relevant to quasi-judicial status aims partly to assure the fundamentals of due process. This goal is made explicit by some courts' emphasis on the extent to which a proceeding resembles a judicial trial.⁶⁵ Ad hoc determinations of whether a proceeding crosses this threshold, however, does not fully substitute for the direct constitutional accountability imposed on governmental bodies. Moreover, the standard framework under which immunity is resolved focuses primarily on powers—e.g., to make binding orders and judgments—rather than such procedural safeguards as adequate notice and an impartial decisionmaker.⁶⁶ In some instances, state

⁶² See *supra* notes 17–18 and accompanying text.

⁶³ See, e.g., *Stephan v. Baylor Med. Ctr. at Garland*, 20 S.W.3d 880, 890 (Tex. App. 2000) (holding that report submitted to state medical board possessing quasi-judicial powers was not entitled to absolute immunity because board was not exercising quasi-judicial function in receiving report); *Haleem v. Tonks*, No. 1–09–0955, 2011 WL 9377819, at *1, 7 (Ill. App. Ct. June 30, 2011) (refusing to recognize absolute privilege for statements made to police department's internal affairs division).

⁶⁴ See *Citizens United v. FEC*, 558 U.S. 310, 312 (2010) (“[S]trict scrutiny . . . requires the Government to prove that the restriction ‘furthers a compelling interest and is narrowly tailored to achieve that interest.’” (quoting *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2007))). Strict scrutiny is notoriously difficult to satisfy. See Laurence H. Tribe, *American Constitutional Law* 1451 (2d ed. 1988) (“When expressed as a standard for judicial review, strict scrutiny is . . . ‘strict’ in theory and usually ‘fatal’ in fact.” (quoting Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972))); Clay Calvert, *Selecting Scrutiny in Compelled-Speech Cases Involving Non-Commercial Expression*, 31 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1, 10–11 (2020) (“[W]hen strict scrutiny is chosen, it typically dooms a statute in First Amendment jurisprudence.”).

⁶⁵ See *supra* notes 32–36 and accompanying text.

⁶⁶ Notably, this standard does not include a requirement that witnesses take an oath. See Willhite, *supra* note 16, at 555 (“An absolute privilege should not be granted to defamatory statements which are not made under oath.”).

regulation may supply judicially enforceable procedural features.⁶⁷ Nonetheless, courts should carefully examine the regulatory apparatus to ensure that it creates genuine fairness and that appeal from alleged lapses is realistically available.

The need for close judicial inspection is underscored by the extreme unlikelihood that the proceedings of a private tribunal will be deemed state action bound by constitutional guarantees. On the contrary, the Supreme Court's restrictive conception of state action almost categorically forecloses this possibility.⁶⁸ In particular, the Court has resisted claims of due process violations where the harm complained of has been directly inflicted by a private party in the absence of any public official on the scene.⁶⁹ It is also arguably incongruous to withhold recognition of state action from a private activity that is heavily regulated⁷⁰ while conferring immunity on statements arising out of that activity because it is regulated.

A related concern is the danger of unreflectively transplanting to private dispute resolution instruments the expansive scope of absolute privilege for judicial proceedings. Under the Restatement,

[a] party to a private litigation . . . is absolutely privileged to publish defamatory matter concerning another in communications *preliminary to* a proposed judicial proceeding, or *in the institution of or during the course* and as part of, a judicial proceeding in which he participates, if the matter has *some relation to the proceeding*.⁷¹

⁶⁷ See *Deatherage v. Bd. of Psych.*, 948 P.2d 828, 140–41 (Wash. 1997) (“Absolute immunity . . . should be confined to cases where there is supervision and control by other authorities, such as courts of justice, where proceedings are under the able and controlling influence of a learned judge, who may reprimand, fine and punish as well as expunge from records statements of those who exceed proper bounds, and who may themselves be disciplined when necessary.” (quoting *Mills v. Denny*, 63 N.W.2d 222, 225 (Iowa 1954))).

⁶⁸ See Sophia Z. Lee, *The Meaning of the Civil Rights Revolution: A Revolution at War with Itself? Preserving Employment Preferences from Weber to Ricci*, 123 YALE L.J. 2964, 2974 (2014) (referring to the Supreme Court's “formalist, narrow approach to state action”).

⁶⁹ See *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 358–59 (1974); *Flagg Bros. v. Brooks*, 436 U.S. 149, 156 (1978); *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 51 (1999).

⁷⁰ See *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 358 (1974) (finding “a heavily regulated, privately owned” utility not to be a state action; *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 175–76 (1972) (holding that state liquor board's extensive regulation of private club did not make club's racially discriminatory practices state action); *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1932 (2019) (“[B]eing regulated by the State does not make one a state actor.”).

⁷¹ RESTATEMENT (SECOND), TORTS § 587 (1977). See, e.g., *Wollam v. Brandt*, 961 P.2d 219, 223 (Or. Ct. App. 1998) (applying absolute privilege where there was “a distinct possibility” of litigation and statements to employer's investigator had “more than tangential relevance” to potential judicial proceedings (emphasis added)).

A similarly extensive conception of the privilege's reach has informed quasi-judicial proceedings.⁷² Thus, the range of expression protected by absolute immunity reaches far beyond statements made during the proceeding itself. Rather, the privilege can encompass a period that begins well before the proceeding is convened.⁷³ The potential breadth of defamatory falsehoods shielded as speech arguably "arising from"⁷⁴ quasi-judicial proceedings caution against an absolute privilege when that relationship is not manifest. In some instances, courts have recognized that any connection to a quasi-judicial proceeding was too attenuated to justify an absolute privilege.⁷⁵ Nevertheless, courts should be especially wary of claims of absolute immunity based on asserted links with private quasi-judicial proceedings. Lacking the accountability and procedural guarantees of their public counterparts, private proceedings should not be allowed to spawn a capacious cloak of immunity.⁷⁶

Further, as a general proposition, the state's interest in removing deterrents to forthright communication is weightier in the public than in the private sphere. In an early and still oft-cited analysis, Van Vechten Veeder ascribed absolute immunity's waiver of recourse to libel actions to "the necessity, in the public interest, of a free and full disclosure of facts in the conduct of the legislative, executive and judicial departments of the government."⁷⁷ Examples of this dynamic abound. For instance, statements at administrative segregation proceedings in a

⁷² See *Zych v. Tucker*, 844 N.E.2d 1004, 1009 (Ill. App. Ct. 2006) ("The absolute privilege which protects actions required or permitted in the course of a quasi-judicial proceeding also embraces actions 'necessarily preliminary' to such a proceeding." (quoting *Parrillo, Weiss & Moss v. Cashion*, 537 N.E.2d 851, 856 (Ill. App. Ct. 1989))); *Parrillo, Weiss & Moss*, 537 N.E.2d at 856 (finding statements in letter to administrative agency protected by absolute immunity because letter was "a preliminary step to a quasi-judicial proceeding").

⁷³ *Razavi v. Sch. of the Art Inst. of Chi.*, 122 N.E.3d 361, 373 (Ill. App. Ct. 2018) (holding that privilege applies to statements made as part of investigation into university student's alleged misconduct that led to disciplinary hearing); *Kutilek v. Gannon*, 766 F. Supp. 967, 972–73 (D. Kan. 1991) (ruling that that statement made by executive director of state board of healing arts during investigation conducted in connection with quasi-judicial proceeding were entitled to absolute immunity).

⁷⁴ *Lane v. Port Terminal R.R. Ass'n*, 821 S.W.2d 623, 625 (Tex. App. 1991).

⁷⁵ See, e.g., *Wallulis v. Dymowski*, 918 P.2d 755, 762 (Or. 1996) (finding defendant was entitled to qualified privilege); *Topping v. Meyers*, 842 S.E.2d 95, 105 (N.C. Ct. App. 2020) ("[A] press conference ventures too far afield from the core of protected speech to be entitled to absolute immunity from suit under legislative immunity in a quasi-judicial proceeding.").

⁷⁶ A proposed approach to placing limits on this reach appears at *infra* III-A and accompanying text.

⁷⁷ Veeder, *supra* note 10, at 463.

state prison were held absolutely privileged because of “the unquestioned risks to inmates, employees, and the public from a breakdown in order and discipline in correctional facilities and the potentially tragic consequences of such occurrences.”⁷⁸ While most questions of immunity in public institutional settings may pose less dramatic considerations, they still inherently implicate the implementation of public policy.⁷⁹ It is true that private proceedings too may sometimes touch on formal policy in a way that helps tip the balance to quasi-judicial classification, such as university disciplinary hearings carried out in accordance with a statutory scheme.⁸⁰ Even in such cases, however, that conclusion should result from a convincing rebuttal of a presumption against absolute immunity in the private realm.

Heightened scrutiny of the process afforded by private bodies is also supported by the practical unavailability of mechanisms other than libel suits by which victims of defamatory falsehoods can vindicate their reputation. For Veeder, the assumption of alternative recourse was central to his endorsement of absolute immunity.⁸¹ In *Rainier's Dairies*, the court noted that while an absolute privilege shielded the defendants from liability for libel, the plaintiff could still recover damages for malicious prosecution if it could prove the falsehood of the defendants' accusation and other elements of this action.⁸² Recovery for malicious prosecution, however, is generally quite difficult⁸³—especially when compared to less challenging obstacles faced by private figures in libel actions.⁸⁴ Nor does the threat of

⁷⁸ Vogel v. State, 721 N.Y.S.2d 901, 906 (N.Y. Ct. Cl. 2000) (quoting *Arteaga v. State*, 527 N.E.2d 1194, 1198 (N.Y. 1988)).

⁷⁹ See *Lyons*, *supra* note 16, at 875 (“The policy behind absolute immunity is obviously to benefit the public by giving its recipients complete freedom in the performance of their official duties.”).

⁸⁰ See *infra* notes III–B(2) and accompanying text.

⁸¹ See *Veeder*, *supra* note 10, at 470 (“[U]nderlying this whole doctrine of absolute immunity is the conception of an alternative remedy.”). See also *Stega v. N.Y. Downtown Hosp.*, 107 N.E.3d 543, 550 (N.Y. 2018) (“[F]or absolute immunity to apply in a quasi-judicial context, the process must make available a mechanism for the party alleging defamation to challenge the allegedly false and defamatory statements.”).

⁸² See *Rainier's Dairies*, 117 A.2d at 896. See also *Zagami, LLC v. Cottrell*, 957 A.2d 691, 698 (N.J. Super. Ct. App. Div. 2008) (recognizing privilege for statements made in liquor license renewal proceeding while generally assuming availability of actions for malicious use of process and malicious abuse of process).

⁸³ See Timothy M. Mulligan, *The “English” Rule – It Ain’t English, and Ought Not Be American*, 48 ST. MARY’S L. J. 443, 458 (2017) (attributing low number of malicious process suits to the “time, expense, difficulty, and uncertainty involved” in bringing such suits).

⁸⁴ See *supra* notes 50–53 and accompanying text.

prosecution for perjury over lies told under oath at private proceedings constitute an effective deterrent. Such prosecutions are rare⁸⁵ and bring a defamed individual less of the satisfaction and none of the compensation of a favorable libel verdict. A discouraging analogy is to the underutilization of sanctions for attorneys' defamation in the course of litigation.⁸⁶

Finally, formal hesitancy to grant to private proceedings quasi-judicial status with its attendant privilege would not represent a dramatic departure from the approach already taken in some jurisdictions. Indeed, a number of courts have rejected absolute immunity on the ground that the proceeding in question was not conducted by a public body.⁸⁷ In other instances, courts have characterized quasi-judicial proceedings in a way that strongly indicates they are inherently governmental.⁸⁸

⁸⁵ See Alan Henrich, *Clinton's Little White Lies: The Materiality Requirement for Perjury in Civil Discovery*, 32 LOY. L. A. L. REV. 1303, 1303 (1999) ("It would seem that perjury remains a common occurrence in criminal, civil, and administrative proceedings, and yet perjury prosecutions are rare."); John Watts, *To Tell the Truth: A Qui Tam Action for Perjury in a Civil Proceeding is Necessary to Protect the Integrity of the Civil Judicial System*, 79 TEMP. L. REV. 773, 784 (2006) ("Prosecutors' case loads have steadily increased and there is simply no political will to allocate scarce resources to prosecute civil perjury at the expense of violent crime."). See also Kristen M. Blankley, *Taming the Wild West of Arbitration Ethics*, 60 U. KAN. L. REV. 925, 927–28 (2012) (contrasting lack of action against prominent athlete who admitted having lied at arbitration hearing about taking performance-enhancing drugs with prosecution of different well-known athlete thought to have falsely denied taking steroids in testimony before grand jury).

⁸⁶ See Paul T. Hayden, *Reconsidering the Litigator's Absolute Privilege to Defame*, 54 OHIO ST. L.J. 985, 1039 (1993) (describing alternative remedies to libel suits such as holding attorneys in contempt as having "significant real-world problems of impossibility, inadequacy, and inconsistency of enforcement.").

⁸⁷ See, e.g., *Bose v. Bea*, 947 F.3d 983, 994 (6th Cir. 2020) (noting that Tennessee cases had applied absolute privilege for statements made in quasi-judicial proceedings "only to statements made before public bodies"); *Cuba v. Pylant*, 814 F.3d 701, 717 (5th Cir. 2016) (observing defendants' failure to cite Texas authority "for the proposition that a private institution's "adjudication" of a dispute invokes immunity"); *Overall v. Univ. of Pa.*, 412 F.3d 492, 497 (3rd Cir. 2005) ("We have not found a single Pennsylvania case according quasi-judicial status to entirely private hearings."); *Alexander v. Hackensack Meridian Health*, No. 19-18287, 2020 WL 5810526, at *7 (D. N.J. Sept. 30, 2020).

⁸⁸ See, e.g., *Simes v. Ark. Jud. Discipline and Disability Comm'n*, No. 4:10CV01047, 2012 WL 4469264, at *7 (E.D. Ark. Sept. 27, 2012) ("[A]bsolute [quasi-judicial] immunity flows not from rank or title or location within the government, but from the nature of the responsibilities of the individual officer") (internal citations omitted); *Richardson v. Dunbar*, 419 N.E.2d 1205, 1208 (Ill. App. Ct. 1981) ("The privilege adhering to testimony given in quasi-judicial proceedings encompasses testimony given before administrative agencies or other governmental bodies when

III. SPECIAL SCRUTINY FOR PRIVATE PROCEEDINGS

Differences between public and private proceedings suggest ways in which courts could implement the greater burden that defamation defendants should bear to show that the private proceeding where they made their disputed statement should qualify as quasi-judicial. These represent a combination of procedural and substantive considerations. Some elements may produce variations in status even within a particular category of proceeding. The realms of nongovernmental securities regulation, private university discipline, and contractual arbitration offer illustrations of how this approach might be applied.

A. *Salient Features*

Though skepticism toward a private proceeding's credential as quasi-judicial is a useful perspective, it should be supplemented by a focus on specific features. Consistent with established doctrine, their presence or absence should be treated as factors rather than discrete litmus tests. In a similar vein, the weight or extent of a

such agencies or bodies are performing a judicial function.”) (internal citations omitted); Wright v. Over-The-Road and City Transfer Drivers, Helpers, Dockmen and Warehousemen, 945 S.W.2d 481, 492 (Mo. Ct. App. 1997) (denying quasi-judicial status to proceeding conducted by committee created by collective bargaining agreement where committee “is neither a public body with official duties nor does it render judgments or make decisions of a judicial nature”); Angel v. Ward, 258 S.E.2d 788, 792 (N.C. Ct. App. 1979) (“[Q]uasi-judicial is defined as ‘(a) term applied to the action, discretion, etc., of public administrative officers, who are required to investigate facts, or ascertain the existence of facts, and draw conclusions from them, as a basis for their official action, and to exercise discretion of a judicial nature.’”) (internal citation and internal quotation marks omitted); Gray v. Bd. Of Cnty. Comm’rs of McIntosh Cnty., 312 P.2d 959, 960 (Okla. 1957) (“A quasi-judicial duty is one lying in the judgment or discretion of an *officer* other than a judicial officer.”) (emphasis added); Martinez v. Hardy, 864 S.W.2d 767, 772 (Tex. App. 1993) (“Absolute privilege, in the law of defamation, ‘protects the public interest by shielding responsible government officials against harassment and inevitable hazards of vindictive or ill-founded damage suits brought on account of actions taken in the exercise of their official responsibilities.’”) (internal citation omitted); Wal-Mart Stores, Inc. v. Lane, 31 S.W.3d 282, 290 (Tex. Ct. App. 2000) (“Judicial immunity extends to statements made in quasi-judicial proceedings before governmental executive officers, boards, and commissions which exercise quasi-judicial powers.”) (internal citations omitted). See also Ravalese v. Lertora, 200 A.3d 1153, 1158–59 (Conn. App. Ct. 2018) (confining illustrations of quasi-judicial proceedings to which absolute immunity attaches to those conducted by government) (internal citations and quotation omitted); Jim Fraiser, *A Review of the Substantive Provisions of the Mississippi Governmental Immunity Act: Employees’ Individual Liability, Exemptions to Waiver of Immunity, Non-Jury Trial, and Limitation of Liability*, 68 MISS. L.J. 703, 755–56 (1999) (noting 17 examples, all involving public functions, of absolute immunity under Mississippi law for “quasi-judicial officers acting in quasi-judicial capacities”) (internal citations omitted).

given factor may often be difficult to identify with precision. The benefits of even unquantifiable guidelines, however, exceed those of simply generalized wariness.

1. “Clear and Convincing” Standard.

Absolute immunity represents the state’s strategic sacrifice of its interest in protecting reputation to its need to promote candor at proceedings charged with ascertaining crucial facts and resolving disputes on the basis of such facts. This calculus, however, assumes that the body conducting the proceeding possesses the authority and procedural safeguards denoted by the term “quasi-judicial.” For the very reason of states’ “strong and legitimate state interest in compensating private individuals for injury to reputation,”⁸⁹ courts should scrupulously avoid unjustified quasi-judicial classification. As previously discussed, the danger of mislabeling is most acute when proceedings are not held under government auspices. Accordingly, defamation defendants seeking to invoke the absolute immunity conferred by quasi-judicial proceedings should have to meet a relatively demanding standard.

One candidate for such a standard is to require a clear and convincing showing that the private proceeding included sufficient features to justify its characterization as quasi-judicial. This standard has the advantage of being well-developed and familiar from the law of evidence⁹⁰ and statutory contexts.⁹¹ Admittedly, the obligation to make a clear and convincing demonstration typically involves support for a factual assertion rather than a legal assessment of the proceeding where the assertion was made.⁹² The line between questions of law and questions of fact, however, is not always plain. Defamation doctrine itself illustrates this phenomenon. To recover damages, a public figure must furnish “clear and convincing proof that the false ‘statement was made with “actual malice”—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”⁹³ Establishment of actual malice thus entails both a

⁸⁹ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348 (1974).

⁹⁰ *See, e.g.*, Emily Sherwin, *Clear and Convincing Evidence of Testamentary Intent: The Search for a Compromise Between Formality and Adjudicative Justice*, 34 CONN. L. REV. 453 (2002).

⁹¹ *See, e.g.*, 18 U.S.C. § 17 (insanity defense); 18 U.S.C. § 3143 (release or detention of a defendant pending sentence or appeal); 34 U.S.C.A. § 21302 (findings).

⁹² *See, e.g.*, *Active Video Networks, Inc. v. Verizon Commc’n, Inc.*, 694 F.3d 1312, 1327 (Fed. Cir. 2012) (“Clear and convincing evidence is such evidence that produces ‘an abiding conviction that the truth of [the] factual contentions are “highly probable.”” (quoting *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984))).

⁹³ *Harte-Hanks Commc’ns, Inc. v. Connaughton*, 491 U.S. 657, 659 (1989) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–280 (1964)).

factual determination and the operation of a legal standard. Moreover, epistemologically a defendant's mindset when making an allegedly libelous statement is not as objectively provable as, say, the medicine prescribed by a medical malpractice defendant. This blend of law and fact can also be said to mark the question of whether a proceeding should be considered quasi-judicial. For example, whether a private body has the power to "make binding orders and judgments" may hinge on an evaluation of the effective reach of the body's decisions.⁹⁴ However imprecise the clear and convincing standard may be, it serves to register the weight of the defendant's burden and particularly the need to show that the requisites for quasi-judicial classification have been practically and not just formally met.

2. Ability to Secure Witnesses.

One aspect of private proceedings on which courts should place this spotlight is a tribunal's capacity for summoning vital witnesses. In the case of public proceedings such as administrative hearings, the body will often have the power of subpoena or other means to obtain the testimony of witnesses.⁹⁵ Moreover, public entities' obligation to adhere to due process supplies a constitutional backstop to governmental lapses in this regard.⁹⁶ By contrast, private bodies generally lack the power to compel the participation of witnesses; in some instances, they may even exclude potentially valuable testimony.⁹⁷ The conventional indicia of quasi-judicial proceedings include the body's power to examine witnesses but do not address the

⁹⁴ See *Shanks*, 169 F.3d at 993–94 (internal citation omitted); see also *supra* note 18 and accompanying text.

⁹⁵ *E.g.*, 52 U.S.C. § 30107(a)(3) (conferring subpoena power on the Federal Election Commission); 15 U.S.C.A. § 77s (West 2010) (conferring subpoena power on the Securities and Exchange Commission); CAL. LAB. CODE § 92 (West 2021) (conferring subpoena power on the Division of Labor Standards Enforcement); N.Y. TRANSP. LAW § 87 (McKinney 2020) (conferring subpoena power on the New York Department of Transportation).

⁹⁶ In the criminal context, of course, the Sixth Amendment supplements the requirements of due process with more specific guarantees. See U.S. CONST. amend. VI (providing that a criminal defendant has the right "to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor").

⁹⁷ See, *e.g.*, *The Conduct Process, Relevance*, DUKE U. STUDENT AFFS., <https://studentaffairs.duke.edu/conduct/student-conduct-system/conduct-process> [<https://perma.cc/X4EQ-WRQS>] (last visited Feb. 6, 2022) (prohibiting character witnesses from administrative hearings for the Office of Student Conduct and Community Standards); *University-Wide Disciplinary System*, U. CHI. U. POL'YS AND REGULS., <https://studentmanual.uchicago.edu/student-life-conduct/university-disciplinary-systems/university-wide-disciplinary-system/> [<https://perma.cc/BX97-TAVK>] (last visited Feb. 4, 2022) (excluding consideration of character witnesses).

authority to secure them.⁹⁸ Though not automatically defeating quasi-judicial status, the absence of such a mechanism should trigger particular judicial scrutiny of claims that crucial voices were absent from the proceeding.

3. Weight of Public Policy.

While absolute immunity exists to encourage uninhibited expression, the force of that rationale is not uniform across all proceedings. On the other hand, the state's interest in guarding individual reputation is essentially constant. Thus, the determination of whether a proceeding qualifies as quasi-judicial depends in part on the public gain to be derived from testimony that would be deterred without absolute privilege. Governmental entities, as creations of the state for implementation of public policy, inherently implicate a significant public interest. The identity of public officials with public interest is so strong that “[u]nder the doctrine of quasi-judicial immunity, state officials have absolute immunity from suit when the claims against them arise from duties and actions that are ‘functionally comparable’ to the duties and actions of judges.”⁹⁹ By contrast, private proceedings require more pointed demonstration that their value justifies barring defamed individuals from legal recourse.

The most obvious evidence that a private proceeding produces a substantial public benefit¹⁰⁰ is legislative impetus for the proceeding. A notable example is a private university's disciplinary hearing for a student accused of sexual assault. Federal¹⁰¹ and many state¹⁰² laws encourage such proceedings as part of the nation's campaign to curb the scourge of sexual violence on campus.¹⁰³ Though this

⁹⁸ See *Shanks*, 169 F.3d at 993–94; *Kelley*, 606 A.2d at 704.

⁹⁹ *Lipin v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 202 F.Supp.2d 126, 134 (S.D.N.Y. 2002) (internal citation omitted).

¹⁰⁰ See *Bose*, 947 F.3d at 995 (“A common theme emerges from the cases in which Tennessee has recognized an absolute privilege—a strong benefit to the public . . .”).

¹⁰¹ See 20 U.S.C. § 1681 (2021) (“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . .”); 34 C.F.R. § 106.45 (2020) (“For the purpose of addressing formal complaints of sexual harassment, a recipient's grievance process must comply with the requirements of this section.”).

¹⁰² See, e.g., MASS. GEN. LAWS ANN. § 168E (WEST 2021) (“[E]ach [university] institution shall adopt policies on sexual misconduct involving students or employees of the institution that comport with best practices and current professional standards and shall establish procedures for regularly reviewing and updating the policies . . .”).

¹⁰³ See Hannah Brenner & Kathleen Darcy, *Toward A Civilized System of Justice: Re-*

regulatory framework alone does not assure that a particular proceeding will include the features needed to qualify as quasi-judicial—crucial powers or safeguards may be lacking—such official endorsement can confer on challenged proceedings the benefit of the doubt.¹⁰⁴ In other instances, a statutorily prescribed process for privately settling disputes may provide the needed imprimatur. Perhaps the most important example of this boost to quasi-judicial status is arbitration conducted pursuant to a state’s arbitration law.¹⁰⁵ Again, while a given arbitral proceeding may contain deficiencies that preclude its designation as quasi-judicial, broad adherence to a legislative scheme can effectively create a presumption in its favor.

4. Channels of Appeal.

Absolute immunity is granted to ensure that participants in a proceeding are not dissuaded by the potential for libel litigation from helping a tribunal perform its task. The cumulative value of communication induced by removing this threat is thought to justify the damage to reputation from falsehoods occasionally committed under the cover of immunity.¹⁰⁶ Such tradeoffs¹⁰⁷ are not unusual in law. For example, the exclusionary rule bars introduction of evidence possibly indispensable to proving a defendant’s guilt in order to deter law enforcement from gathering information through means that violate the Fourth, Fifth, or Sixth Amendment.¹⁰⁸ When proceedings are tainted by falsehoods shielded from libel action, however, immunity need not leave the defamed party entirely without resort. Even assuming that alternative actions like malicious prosecution are not practically available,¹⁰⁹ a

Conceptualizing The Response To Sexual Violence In Higher Education, 102 CORNELL L. REV. ONLINE 127, 134–139 (2017); Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. KY. L. REV. 49, 52, 57 (2013).

¹⁰⁴ University proceedings to address charges of sexual misconduct are discussed further at *infra* III–B(2).

¹⁰⁵ See, e.g., FLA. STAT. §§ 682.01–682.25 (2013); N.Y. C.P.L.R §§ 7501–7515 (McKinney 2021); TEX. CIV. PRAC. & REM. CODE ANN. §§ 171.001–171.098 (West 2021).

¹⁰⁶ See *supra* notes 11–13 and accompanying text.

¹⁰⁷ See *Compton v. Romans*, 869 S.W.2d 24, 28 (Ky. 1993) (upholding absolute immunity for false statement made by commissioner presiding over quasi-judicial proceeding on ground that “the public interest in the unflinching enforcement of the law must prevail over the private interest of a wronged citizen.”) (internal citation omitted).

¹⁰⁸ See *Maine v. Moulton*, 474 U.S. 159, 180 (1985) (“To allow the admission of evidence obtained from the accused in violation of his Sixth Amendment rights whenever the police assert as an alternative, legitimate reason for their surveillance invites abuse by law enforcement personnel in the form of fabricated investigations risks the evisceration of the Sixth Amendment right . . .”).

¹⁰⁹ See *supra* notes 83–84 and accompanying text.

party who can present persuasive proof of falsehood should have means to remedy at least part of the injustice done.

In particular, a party who has suffered adverse action as a result of a proceeding's false testimony should have means of reversing the tribunal's decision. Given the interest in finality, the burden of proof should be high and statute of limitations relatively short. Additionally, where appropriate, principles of administrative exhaustion can apply instead of resulting in an immediate resort to courts. Still, credible assurance that the reviewing decisionmaker be fair and impartial should be expected. Moreover, the threshold of evidence needed to show the libel's impact should not be as steep as that required to first establish falsehood. Rather, a rebuttable presumption of materiality should accompany proof of defamation. Such an analysis would resemble the framework adopted by the Supreme Court for resolving whether a facially neutral law or policy was animated by a discriminatory intent in violation of the Equal Protection Clause. The burden of demonstrating that a disparate impact can be traced to a discriminatory purpose is formidable.¹¹⁰ In the unusual instance that a challenger satisfactorily shows that discrimination was a motivating factor, however, the government carries a substantial burden of proving that it would have reached the same decision in the absence of discrimination in order to prevail.¹¹¹

Although reviewability matters for both public and private proceedings, greater assurance of an effective mechanism should be demanded in the private sphere to

¹¹⁰ See *Personnel Adm'r. of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) ("Discriminatory purpose [I]mplies that the [government] decisionmaker . . . selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group.") (internal citation and internal quotation marks omitted); *Washington v. Davis*, 426 U.S. 229, 242 (1976) ("[W]e have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another."); Thomas B. Henson, *Proving Discriminatory Intent from a Facially Neutral Decision with a Disproportionate Impact*, 36 WASH. & LEE L. REV. 109, 114 (1979) (*Washington v. Davis* "increased the burden of proof for plaintiffs advancing claims under the fourteenth amendment, clearly establishing the proposition that plaintiffs must prove that a governmental decisionmaker acted with the intent or purpose to discriminate before a facially neutral statute violates the equal protection clause.").

¹¹¹ See *Hunter v. Underwood*, 471 U.S. 222, 228 (1985) ("Once racial discrimination is shown to have been a "substantial" or "motivating" factor behind enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor.") (internal citation omitted); Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1116 (1989) ("One suspects . . . that no conceivable purpose would cure an actual admission of discriminatory motivation. In such a case, the motivation itself creates great stigma which would likely prompt the Court to treat it as it now treats governmental actions that discriminate on their face.").

attain quasi-judicial status. In addition to due process safeguards,¹¹² quintessential public proceedings such as administrative hearings operate within a statutory framework that includes provisions for appeal.¹¹³ Private proceedings, however, do not possess this kind of intrinsic accountability. Accordingly, a lack of definite evidence of meaningful opportunity for review should militate against absolute immunity for statements made at such proceedings.

5. Relationship to Proceeding.

In some instances, the issue surrounding a claim of absolute immunity is not the character of the relevant proceeding but whether a setting outside its formal bounds forms an integral part of it. Whether a communication occurs during a step “preliminary and necessary” to,¹¹⁴ or is “made in a context connected sufficiently” to,¹¹⁵ a concededly quasi-judicial proceeding is hardly self-evident. Such malleable concepts risk stretching the reach of absolute immunity unduly beyond the core proceeding itself. Judicial vigilance against overextension¹¹⁶ should be especially pronounced in the case of defamatory statements said to be related to a private proceeding.

One potential source of excessive scope for absolute immunity is the danger of casually applying to quasi-judicial proceedings the same breadth of privilege that rightly applies to judicial proceedings. That breadth is grounded in the overriding importance of promoting “the proper and efficient administration of justice.”¹¹⁷ Thus, one state’s typical absolute immunity for judicial proceedings extends “not only to statements made in court, but also to statements contained in pleadings, affidavits and other documents filed in a judicial proceeding or directly related to the case.”¹¹⁸ Moreover, the privilege’s protection is not confined to these kinds of

¹¹² See *supra* note 65 and accompanying text.

¹¹³ See 2 AM. JUR. 2D *Administrative Law* § 385 (2022) (“The intent of Congress in enacting the Federal Administrative Procedure Act was to make agency action presumptively reviewable; there is a strong presumption in favor of judicial review of federal administrative actions . . .”).

¹¹⁴ *Lykowski v. Bergman*, 700 N.E.2d 1064, 1071 (Ill. App. Ct. 1998).

¹¹⁵ *Long v. Welch & Rushe, Inc.*, 28 F.Supp.3d 446, 460 D. Md. 2014).

¹¹⁶ See, e.g., *Albert v. Shaikh*, No. CVO30825352S, 2003 WL 22904562, at *6 (Conn. Super. Ct. Nov. 25, 2003) (“As to communications preliminary to a proposed judicial proceeding . . . [t]he bare possibility that the proceeding might be instituted is not to be used as a cloak to provide immunity for defamation when the possibility is not seriously considered.” (quoting RESTATEMENT (SECOND) OF TORTS § 588 cmt. E)).

¹¹⁷ *Ravalese v. Lertora*, 200 A.3d 1153, 1158 (Conn. App. Ct. 2018) (quoting *Hopkins v. O'Connor*, 925 A.2d 1030, 1042 (Conn.)).

¹¹⁸ *Odyniec v. Schneider*, 588 A.2d 786, 789 (Md. 1991) (internal citations omitted).

formal declarations. Statements made only in “contemplat[ion] [of] legal action” are also protected where they are “pertinent to potential litigation.”¹¹⁹ Thus, statements that are made to advance settlement negotiations¹²⁰ or appear in a settlement agreement¹²¹ receive absolute immunity. The sweeping scope of the lawyer’s litigation privilege¹²²—encompassing a range of communications that may precede initiation of litigation or even formation of an attorney-client relationship¹²³—highlights the far-reaching application of absolute immunity to expression related to the plausible prospect of litigation.¹²⁴ Nor must the alleged libel have been committed by someone directly involved in the litigation to qualify for the privilege. For example, statements made by a psychologist in a report during a post-dissolution custody and visitation proceeding were deemed protected even though the report was not admitted as an exhibit at the proceeding.¹²⁵ It sufficed merely that the psychologist had published her report “for the anticipated purpose of serving as an aid” to the court and the guardian ad litem in considering the best

¹¹⁹ *Wollam v. Brandt*, 961 P.2d 219, 223 (Or. Ct. App. 1998).

¹²⁰ *Id.* See, e.g., *Pape v. Reither*, 918 S.W.2d 376, 381 (Mo. Ct. App. 1996); *Romero v. Prince*, 513 P.2d 717, 720 (N.M. Ct. App. 1973). See also *Le v. Univ. of Med. And Dentistry*, No. 08–991 (SRC), 2009 WL 1209233, at *6 (D. N.J. May 04, 2009) (“[T]he doctrine of absolute immunity applies to ‘any communication . . . made by litigants or other participants authorized by law . . . to achieve the objects of the litigation . . . hav[ing] some connection or logical relation to the action.’”) (internal citation omitted).

¹²¹ See, e.g., *Sodergren v. Johns Hopkins Univ. Applied Physics Lab’y*, 773 A.2d 592, 602 (Md. Ct. Spec. App. 2001).

¹²² See *Atkinson v. Affronti*, 861 N.E.2d 251, 255 (Ill. App. Ct. 2006) (“An attorney must be at liberty to candidly and zealously represent his client in communications to potential opposing parties in litigation or other proceedings without the specter of civil liability for his statements clouding his efforts.”); *Smith v. Chestnut Ridge Storage, LLC*, 855 S.E.2d 332, 339 (W.Va. 2021) (“The objectives of the litigation privilege include: (1) promoting the candid, objective and undistorted disclosure of evidence; (2) placing the burden of testing the evidence upon the litigants during trial; (3) avoiding the chilling effect resulting from the threat of subsequent litigation; (4) reinforcing the finality of judgments; (5) limiting collateral attacks upon judgments; (6) promoting zealous advocacy; (7) discouraging abusive litigation practices; and (8) encouraging settlement.”) (internal citation omitted).

¹²³ See *Douglas R. Richmond, The Lawyer’s Litigation Privilege*, 31 AM. J. TRIAL ADVOC. 281, 308–09 (2007). But see *Rosen v. Brandes*, 432 N.Y.S.2d 597, 601 (N.Y. App. Div. 1980).

¹²⁴ *Gelinas v. Gabriel*, 106 N.M. 221, 741 P.2d 443, 443 (N.M. Ct. App. 1987) (allegedly slanderous statements made to claims representatives by personal injury claimants’ attorney to effect that attorney did not want physician examining her clients).

¹²⁵ *Ravalese v. Lertora*, 200 A.3d 1153, 1160–61 (Conn. App. Ct. 2018).

interests of the child.¹²⁶ Similarly, statements made by an investigator hired by a defendant insurance company received immunity because the litigation privilege “extends to all statements or communications in connection with the judicial proceeding.”¹²⁷

The privilege for defamatory statements made in connection with judicial proceedings is not boundless, of course, and courts have rejected claims of absolute immunity when alleged defamation bears too tenuous a link to litigation. For example, a report by a private detective commissioned by a husband on his wife was not granted where the evidence did not show that the report had more than an investigatory purpose.¹²⁸ Though the husband filed suit for divorce two months after receiving the report, he did not establish that he had contemplated doing so at the time he authorized the investigation.¹²⁹ Even communications made in anticipation of litigation do not warrant absolute immunity unless they “function as a necessary or useful step in the litigation process and must serve its purposes.”¹³⁰ Thus, comments made by a lawyer and his client with a view toward potential criminal prosecution did not trigger absolute immunity because they fell outside of this process.¹³¹ Moreover, statements that *do* bear directly on a judicial proceeding will still be denied immunity if made by someone not involved in the proceeding.¹³²

The extension of absolute immunity to quasi-judicial proceedings shares the litigation privilege’s rationale of affording participants “the utmost freedom of

¹²⁶ *Id.* at 1161.

¹²⁷ *Hawkins v. Harris*, 661 A.2d 284, 289 (N.J. 1995) (quoting *Ruberton v. Gabage*, 654 A.2d 1002, 1006–07 (App. Div. 1995)).

¹²⁸ *See Devlin v. Greiner*, 371 A.2d 380 (N.J. Super. Ct. Law Div. 1977).

¹²⁹ *Id.* at 386. *See Viers v. Baker*, 841 S.E.2d 857, 863 (Va. 2020) (denying privilege where defendant “made the statements solely for the purpose of assuaging the discontent growing among his constituents and members of his political party, without any plausible connection to a tenable pending or forthcoming criminal prosecution”).

¹³⁰ *Rothman v. Jackson*, 57 Cal. Rptr. 2d 284, 294 (Cal. Ct. App. 1996).

¹³¹ *See id.* at 291–92. *See also Toker v. Pollak*, 376 N.E.2d 163, 167 (N.Y. 1978) (“[T]he communication of a complaint, without more, to a District Attorney does not constitute or institute a judicial proceeding.”); Tracy Schachter Zwick, *Overprivileged? A Guide to Illinois Attorney’s Privilege to Defame*, 86 Ill. B.J. 378, 379 (1998) (“[T]he recent expansion of the attorneys’ privilege to cover out-of-court statements that only vaguely appertain to any judicial proceeding that appears suspect.”).

¹³² *Stein v. Krislov*, 999 N.E.2d 345, 357–60 (Ill. App. Ct. 2013) (rejecting absolute immunity for charges against attorney in case made in *ex parte* letter to presiding judge by attorney who did not participate in case).

access . . . without fear of being subsequently harassed by derivative tort actions.”¹³³ Like the privilege’s application to judicial proceedings, then, its scope in quasi-judicial proceedings is not confined to the proceeding itself. Rather, it “encompasses anything that may possibly be pertinent, resolving all doubt in favor of relevancy and pertinency.”¹³⁴ This principle operates powerfully—and most frequently—in the context of proceedings held by public administrative bodies. There, preliminary steps like investigations bear both a formal and functional relationship to the ultimate proceeding. Accordingly, a Texas court squarely rejected any rule that “private citizens’ communications to a quasi-judicial body about a matter that the entity was authorized to investigate and resolve would not be privileged unless and until the proceeding reached the administrative hearing stage.”¹³⁵ On the contrary, the privilege can include statements by private citizens that result in or assist investigations that contribute to a public agency’s

¹³³ *Miller v. Inst. for Def. Analyses*, No. 17-cv-02411-NYW, 2018 WL 10563049, at *6 (D. Colo. May 29, 2018). *See Couture v. Trainer*, 174 A.3d 1245, 1249–50 (Vt. 2017) (deeming absolutely privileged statements about prisoner in preparation for his parole board hearing on ground that “[u]nhindered communication with parole officers . . . is critical to ensure that members of the public can communicate sensitive and unflattering information to parole officers about parolees without fear of reprisal.”).

¹³⁴ *Cole v. Star Tribune*, 581 N.W.2d 364, 369 (Minn. Ct. App. 1998) (internal quotation marks and internal citation omitted). This principle, of course, has vigorous application to quasi-judicial proceedings themselves. *See, e.g., Dlugokecki v. Vieira*, 907 A.2d 1269, 1273 (Conn. App. Ct. 2006) (“Whether or not legally relevant, the [privileged] statements [made at a public hearing before a wetlands commission] . . . were related to the matter before the commission”); *Lane v. Port Terminal R.R. Ass’n*, 821 S.W.2d 623, 625 (Tex. Ct. App. 1991) (deeming absolutely privileged any defamatory material “*arising from*” agency’s quasi-judicial proceeding and stating that privilege “attaches to *all aspects*” of the proceeding) (emphasis added).

¹³⁵ *5-State Helicopters, Inc. v. Cox*, 146 S.W.3d 254, 259 (Tex. Ct. App. 2004). *See Meyers v. Amerada Hess Corp.*, 647 F. Supp. 62, 65 (S.D.N.Y. 1986) (recognizing absolute immunity for statements made at investigatory conference of New York State Division of Human Rights on ground that “absolute privilege attaches to ‘every step’ of a quasi-judicial proceeding.”) (citation omitted).

quasi-judicial hearing.¹³⁶ A common example is complaints about the conduct of law enforcement officers¹³⁷ and other public officials.¹³⁸

As with judicial privilege, courts enforce limits on the reach of absolute privilege for statements linked to public quasi-judicial proceedings, and naturally appear to observe more wariness of overly attenuated relationships in this sphere. Thus, while courts have granted absolute immunity to complaints designed to trigger an agency's quasi-judicial proceeding, they have withheld absolute immunity where the prospect of such a proceeding strikes them as speculative. One court rejected the defendant's complaints to several agencies about the plaintiffs as insufficient to afford them absolute immunity; in the absence of preexisting investigations by any of the agencies, these communications were dismissed as "mere complaints."¹³⁹

¹³⁶ See, e.g., *MTR Gaming Group, Inc., v. Arneault*, No. 1:11-cv-208-SPB, 2015 WL 136563, at *5, *14 (W.D. Pa. January 9, 2015) (applying absolute privilege to letter from defendant's attorney to state lottery commission accusing plaintiff of "mak[ing] blatantly false and scurrilous accusations" against defendant); *Tiedemann v. Superior Court*, 148 Cal. Rptr. 242, 247-48 (Cal. Ct. App. 1978) (holding that informer's communications to Internal Revenue Service about a possible tax fraud was absolutely privileged because it was intended to produce institution of a tax investigation proceeding and therefore bore "some logical relation or connection" to a quasi-judicial proceeding); *Time Was Garage, LLC v. Giant Steps, Inc.*, No. LICV106002895S, 2013 WL 7020532, at *11-12 (Conn. Super. Ct. Dec. 20, 2013) (recognizing absolute privilege for complaint in phone call to town's zoning enforcement office that led to investigation); *Parrillo, Weiss & Moss v. Cashion*, 537 N.E.2d 851, 856 (Ill. App. Ct. 1989) (extending absolute immunity to letter sent to state's department of insurance designed to prompt investigation of an insurance company and department's exercise of its quasi-judicial powers); *Sinnott v. Albert*, 195 N.W.2d 506, 508-09 (Neb. 1972) (accorded absolute immunity to complaint about attorney's alleged misconduct made to state bar association "whether or not the complaint resulted in later formal hearings"); *Story v. Shelter Bay Co.*, 760 P.2d 368, 372 (Wash. Ct. App. 1988) (extending absolute privilege to citizen's complaints and additional communication of information to two state agencies).

¹³⁷ See, e.g., *Perron v. Mashantucket Pequot Tribe*, MPTC-CV-97-138, 2002 WL 34244445, at *12 (Mashantucket Pequot Tribal Ct. July 11, 2002); *Belluomini v. Zaryczny*, 7 N.E.3d 1, 9-10 (Ill. App. Ct. 2014). See also *Belluomini*, 7 N.E.3d at 10 ("An investigation is a continuum and it defies rational thinking to isolate certain portions of the investigation in order to apply different levels of privilege.").

¹³⁸ See, e.g., *Connolly v. Stone*, 807 So.2d 979, 982 (La. Ct. App. 2002) (protecting statements in letter to board of elections bearing on board's investigation into the qualifications of a polling commissioner).

¹³⁹ *CNC/Access, Inc. v. Scruggs*, No. 04 CVS 1490, 2006 WL 3350854, at *13 (N.C. Super. Ct. November 15, 2006). See *Schanne v. Addis*, 121 A.3d 942, 949 (Pa. 2015) ("[Absolute] privilege operates by incentivizing individuals . . . to speak freely in seeking to initiate judicial or quasi-judicial proceedings. Where a declarant has no intention of initiating proceedings or otherwise obtaining a remedy, clothing his or her statement with immunity cannot serve this goal.").

Similarly, a defendant's complaints to three state agencies—most notably the state attorney general's office—did not qualify for absolute privilege because she had “simply reported [the plaintiff's] behavior to the Attorney General.”¹⁴⁰ Further, statements made during routine bank examinations conducted by state and federal regulatory agencies were not entitled to absolute immunity where they “may not . . . be considered preliminary steps to quasi-judicial proceedings.”¹⁴¹ Moreover, complaints to agencies about alleged misconduct can be tardy as well as premature. For instance, letters sent to government officials about the plaintiff's behavior were denied absolute immunity in one case because they pertained to matters already considered in a proceeding by a liquor license board before granting the plaintiff a license.¹⁴² Determined to draw a firm line, the court averred that acceptance of the defendant's reasoning “would be tantamount to stating that any citizen may write a defamatory letter to a municipal officer at any time under a cloak of immunity on the basis of a belated claim that the communication is an unspoken effort to initiate a governmental proceeding.”¹⁴³

Such lines should be even more steadfastly maintained where libel defendants seek absolute immunity for speech having a putative connection with private proceedings. The more limited scope of activities deemed related enough to a private quasi-judicial proceeding to activate this privilege should be commensurate with limitations on assigning that status to the proceeding in the first place. With fewer safeguards generally in place, statements made outside the proceeding itself should be manifestly intertwined with the purpose of the proceeding. While legal and social norms encourage private dispute resolution,¹⁴⁴ its benefits should not come at the expense of reputation in the absence of compelling countervailing considerations.

Of course, such circumstances do arise in some instances. Just as a private proceeding's alignment with legislative goals may support its characterization as quasi-judicial,¹⁴⁵ so may an informal statement advancing the policy embodied by that legislation warrant absolute privilege. Thus, the absolute immunity triggered

¹⁴⁰ *Willis v. Centennial & Mortg. & Funding, Inc.*, No. Civ.03-3641(RHK/AJB), 2004 WL 229076, at *9 (D. Minn. Feb. 2, 2004).

¹⁴¹ *Rockwood Bank v. Gaia*, 170 F.3d 833, 839 (8th Cir. 1999).

¹⁴² *Lega Siciliana Soc. Club, Inc. v. St. Germaine*, 825 A.2d 827, 831, 835 (Conn. App. Ct. 2003).

¹⁴³ *Id.*

¹⁴⁴ See Warren E. Berger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 276 (1982); Marc S. Galanter, *Reading the Landscape Of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 34-35 (1983).

¹⁴⁵ See *supra* notes 100-105 and accompanying text.

by a private university's disciplinary proceeding for alleged sexual violence¹⁴⁶ also extends to statements furthering the investigation that culminated in the proceeding.¹⁴⁷ Likewise, legislative endorsement of arbitration may not only confer quasi-judicial status on arbitral proceedings¹⁴⁸ but also justify immunity for statements that expedite such proceedings.¹⁴⁹

B. Applications: Form U5 Filings, University Discipline, and Arbitration

The operation of elements that bear on whether absolute immunity attaches to a private proceeding can be illustrated in three settings: submission of Form U5 in the securities industry, a private university's disciplinary procedures, and arbitration hearings. They are discussed in ascending order of cogency for granting absolute privilege, with Form U5 presenting a relatively weak case for protecting defamatory statements. Even with university discipline and arbitration, however, variations among individual proceedings counsel against a comprehensive rule on immunity.

1. Form U5: Not a License to Libel.

Form U5 serves as a means of reporting to the securities industry the departure of a broker from a firm belonging to the National Association of Securities Dealers, Inc. (NASD).¹⁵⁰ The form's questions are designed to alert potential future employers of circumstances that may warrant especially careful investigation of the broker's background.¹⁵¹ Under the rules of both NASD and the New York Stock

¹⁴⁶ See *infra* notes 188–96 and accompanying text.

¹⁴⁷ See *Razavi v. Sch. of the Art Inst. of Chi.*, 122 N.E.3d 361, 372–73 (Ill. App. Ct. 2018).

¹⁴⁸ See *supra* note 105 and accompanying text.

¹⁴⁹ See *Katz v. Odin, Feldman & Pittleman*, 332 F.Supp.2d 909, 921 (E.D. Va. 2004) (applying absolute privilege “not only to statements made during an arbitration proceeding, but also to written and oral statements made in furtherance of the arbitration.”).

¹⁵⁰ See *Form U5*, FINRA, <https://www.finra.org/registration-exams-ce/broker-dealers/registration-forms/form-u5> [<https://perma.cc/6X4D-7ZLW>] (last visited Feb. 13, 2022) (The form was created by the nongovernmental organization Financial Industry Regulatory Authority (FINRA)). See Anne H. Wright, *Form U-5 Defamation*, 52 WASH. & LEE L. REV. 1299, 1303 (1995).

¹⁵¹ For example, question 7A asks whether the former employee is or at termination was “the subject of an investigation or proceeding” by a government body or self-regulating organization with jurisdiction over investment-related businesses. See FINRA, *Form U5 Uniform Termination Notice for Securities Industry Registration*, 6 <https://www.finra.org/sites/default/files/form-u5.pdf> [<https://perma.cc/QZ4G-7QEM>] (May 2009). Question 7B asks whether the broker had been

Exchange (NYSE), member firms must file the U5 within thirty days of a broker's departure¹⁵² and update the form within thirty days of learning information that "renders the original filing inaccurate."¹⁵³

The content and context of Form U5 support a reluctance to recognize absolute immunity for speech at private proceedings. The debate over protection for declarations on the form shows the ambiguity and discretion that determinations of privilege can involve. Questions of what activities are sufficiently related to a quasi-judicial proceeding to justify absolute immunity and what balance best serves a regulatory scheme do not lend themselves to objective resolution. In addition, courts' treatment of privilege under Form U5 suggests that decisions on immunity can be driven as much or more by teleological judgments about the consequences of absolute immunity than by the degree of conformity to a formal model of quasi-judicial proceedings.

It comes as no surprise that submission and registration¹⁵⁴ of Form U5 have spawned libel suits. Because employers are required to report candidly on brokers' impetus for leaving and on their performance at the firm,¹⁵⁵ a Form U5 may contain information that is damaging to a broker's prospects for future employment in the industry. Thus, a terminated employee¹⁵⁶ who believes that negative information is

"under internal review" for fraud or other suspected violations of investment-related laws or industry rules or standards. *Id.* Question 7E(2) asks whether the broker was the "subject of an investment-related, consumer-initiated (written or oral) complaint" of certain kinds. *Id.* In addition, the employer must designate the reason for the broker's termination from one of five categories: "Discharged," "Other," "Permitted to Resign," "Deceased," "Voluntary." *Id.* at 2. A reason falling into one of the first three categories must be accompanied by an explanation. *Id.*

¹⁵² See *Regulatory Notice 10-39 Obligation to Provide Timely, Complete and Accurate Information on Form U5*, FINRA, <https://www.finra.org/sites/default/files/NoticeDocument/p122040.pdf> [<https://perma.cc/WC6R-67BR>] (Sept. 2010).

¹⁵³ *Id.*

¹⁵⁴ Registered forms can be viewed by members of NASD and NYSE. See Dayna B. Tann, *Licensing A Lie: The Privilege Attached to the Form U-5 Should Reflect the Realities of the Workplace*, 83 ST. JOHN'S L. REV. 1017, 1021 (2009). Under certain circumstances, they are also available to investors. See *id.* at 1022.

¹⁵⁵ See *supra* notes 151–53 and accompanying text.

¹⁵⁶ The term in this context refers to an employee who has left a firm and does not necessarily signify dismissal. See *What Kind of U5 Filings are There?*, FINRA, <https://www.finra.org/registration-exams-ce/broker-dealers/registration-forms/form-u5> [<https://perma.cc/3RJ5-FBQJ>] (last visited Feb. 15, 2022); Wright, *supra* note 150, at 1300 (A Form U5 must be filed when an individual leaves a firm for any reason); *id.* at n.2 ("The term 'termination'

inaccurate has strong incentive to sue for defamation. In addition to the ordinary goal of libel for plaintiffs to vindicate their good name, brokers' very livelihood may hinge on their ability to cleanse their reputation.

Brokerage firms may therefore feel that they face a dilemma. Failure to complete a Form U5 leaves them in violation of associational rules, while forthright disclosures may subject them to libel suits from former employees.¹⁵⁷ Only an absolute privilege for Form U5 statements, it can thus be argued, ensures the candid provision of pertinent information that the form seeks to report. Otherwise, employers may often report only what is accepted as minimal compliance with the requirement.¹⁵⁸ Absolute immunity, however, cannot plausibly be justified by treating submission of Form U5 as a quasi-judicial proceeding.¹⁵⁹ If courts are to confer such immunity, then, they must look to a significant connection between filing of the form and a definite quasi-judicial proceeding. This was the approach of the New York Court of Appeals in *Rosenberg v. MetLife, Inc.*¹⁶⁰ when concluding that filing Form U5 is entitled to an absolute privilege. In the court's eyes, submission of Form U5 could be viewed as "a preliminary or first step in NASD's

[in Form U5] . . . refers to any termination of a registered individual's employment for any reason.").

¹⁵⁷ See *Baravati v. Josephthal Lyon & Ross Inc.*, 28 F.3d 704, 708 (7th Cir. 1994) ("[S]ince the [NASD] members are *required* to state the reason for termination on the U-5, denial of the privilege puts them in a hard place, where if they state a reason discreditable to the employee they may be sued for libel while if they lie about the reason they will be violating the association's rules.") (internal citation omitted).

¹⁵⁸ See Tann, *supra* note 154, at 1040-41 ("With the rise in the prevalence of defamation suits and the judgments recovered from such suits, employers are overly cautious of providing employee references in fear of costly litigation. As a result, [r]ather than risk a lawsuit, many employers have adopted a 'no comment' or 'name, rank and serial number' policy.") (internal citation and internal quotation marks omitted).

¹⁵⁹ See *Baravati v. Josephthal Lyon & Ross Inc.*, 834 F. Supp. 1023, 1028 (N.D. Ill. 1993) ("The U-5 clearinghouse, although a recognized organizational subsidiary, possesses none of the six delineated powers attributed to quasi-judicial bodies."); *In re Acciardo v. Millennium Sec. Corp.*, 83 F. Supp. 2d 413, 419 (S.D.N.Y. 2000); Joseph W. Catuzzi, Note, *Please Be Delicate with My Permanent Record: The Pendulum Inches Towards Absolute Privilege in Merkam v. Wachovia*, 58 VILL. L. REV. 211, 233-34 (2013) ("[T]he Form U-5 reporting system lacks fundamental "judicial" characteristics. For example, employees lack a meaningful opportunity to dispute potentially defamatory or false statements, FINRA regulators are not necessarily weighing evidence and resolving disputes, and investigations do not accompany all Form U-5 filings.") (citations omitted).

¹⁶⁰ *Rosenberg v. MetLife, Inc.*, 866 N.E.2d 439, 444 (N.Y. 2007).

quasi-judicial process.”¹⁶¹ The court reasoned that NASD’s receipt of the form frequently triggered investigations¹⁶² into whether an employee who was terminated for cause had violated securities rules.¹⁶³

The court, however, apparently sought to avoid resting the privilege solely—or perhaps even primarily—on speculation that a particular Form U5 might spark a quasi-judicial proceeding. Rather, the court emphasized the public benefits of relieving employers of inhibitions about sharing information concerning former employees with NASD and its member firms that are considering hiring such individuals. Evidence of possible misconduct on a Form U5 helps both to inform prospective employers’ personnel decisions and to “enable the NASD to investigate, sanction and deter misconduct by its registered representatives.”¹⁶⁴ Thus, “accurate and forthright” responses on Form U5 facilitate NASD’s efforts to protect investors from unscrupulous brokers.¹⁶⁵

While not discounting the importance of Form U5, criticism of absolute privilege largely contends that blanket immunity undervalues reputational interests and is not necessary to serve the form’s purpose. The potentially devastating effect of absolute immunity on brokers’ reputations was vividly expressed by Judge Posner’s opinion for the Seventh Circuit in *Baravati v. Josephthal, Lyon & Ross, Inc.*¹⁶⁶ Acknowledging that NASD’s full-blown disciplinary proceedings would entail absolute immunity, the opinion distinguished Form U5 as the means by which the NASD administered an “employment clearinghouse” through which firms could obtain potentially valuable information concerning potential employees.¹⁶⁷ In the eyes of the Seventh Circuit, this function in and of itself did not justify completely

¹⁶¹ *Id.* at 444.

¹⁶² By contrast, the court’s grant of absolute immunity for an amended U5 in *Herzfeld & Stern, Inc. v. Beck* emphasized that the form had effectively initiated an NYSE investigation into the plaintiff’s conduct and therefore was tied to a specific quasi-judicial proceeding. *See Herzfeld & Stern, Inc. v. Beck*, 572 N.Y.S.2d 683, 691 (App. Div. 1991).

¹⁶³ *Id.* *See* *Merkam v. Wachovia Corp.*, No. 2397, 2008 WL 2214649, at *6 (Pa. Ct. Com. Pl. Apr. 8, 2008) (“[Defendants] should receive the full protection of absolute privilege to the statements made on Plaintiff’s Form U-5 and Registration Comments documents as the Form U-5 was required to be filed with the NASD”); *Fischkoff v. Iovance Biotherapeutics, Inc.*, 339 F.Supp.3d 383, 388 (S.D.N.Y. 2018) (distinguishing *Rosenberg* in denying absolute immunity for statement about former employee in forms 10-K and 10-Q on ground that neither form constituted “part of an SEC ‘quasi-judicial process.’”).

¹⁶⁴ *Rosenberg*, 866 N.E.2d at 444.

¹⁶⁵ *Id.*

¹⁶⁶ *Baravati*, 28 F.3d 704.

¹⁶⁷ *Id.* at 708.

insulating firms from liability for the contents of their Form U5. Rather, absolute immunity would be “tantamount to allowing a member of the NASD to blackball a former employee from employment throughout the large sector of the industry that the membership of the association constitutes.”¹⁶⁸

Moreover, the alternative to absolute immunity need not be no immunity at all; rather, a qualified privilege offers a means of serving both employees vulnerable to unfounded taint to their reputation and firms fearful of provoking libel suits. As the Seventh Circuit concluded a few years after *Baravati*, a qualified privilege is the “wiser policy . . . adequately protect[ing] the interests of all parties concerned.”¹⁶⁹ When reporting customer complaints, for example, firms are deterred from inflating or distorting customers’ grievances while enjoying assurance that good-faith efforts to restate complaints accurately on Form U5 will be shielded from successful defamation suits.¹⁷⁰ That assurance is bolstered by the formidable conception of qualified privilege widely adopted by states. The great majority of them define qualified (or “conditional”) privilege as requiring a demonstration of malice. In many states, this requirement is framed as a demonstration of actual malice as set forth in *New York Times v. Sullivan*¹⁷¹—i.e., knowledge or reckless disregard of a statement’s falsity.¹⁷² In cases involving suits by public officials and

¹⁶⁸ *Id.* See *supra* note 156, at 1039 (“With an absolute privilege in place, employers have no incentive to provide good-faith, accurate responses.”).

¹⁶⁹ *Dawson v. N.Y. Life Ins. Co.*, 135 F.3d 1158, 1164 (7th Cir. 1998). See *Cicconi v. McGinn, Smith & Co., Inc.*, 808 N.Y.S.2d 604, 609 (App. Div. 2005) (Ellerin, J., dissenting) (arguing for qualified privilege on grounds that it balances an employee’s reputational interests, the securities regulators’ “need for accurate and complete information about . . . problem representatives, and a broker-dealer[’s] desire for protection against civil liability for good-faith errors in Form U-5 reporting.” (quoting *Wright*, *supra* note 150, at 1330–31)); *Tann*, *supra* note 154, at 1039 (“The qualified privilege, a standard above negligence but short of absolute immunity, best meets the needs of all parties. In contrast, an absolute immunity provides employers with an incentive to use the Form U-5 to retaliate against departing employees.”).

¹⁷⁰ See *supra* note 168.

¹⁷¹ 376 U.S. 254 (1964). *Sullivan* is discussed at *supra* notes 38–41 and accompanying text.

¹⁷² *Id.* at 279–80. See, e.g., ALA. CODE § 6-5-182 (1975); *DeNardo v. Bax*, 147 P.3d 672, 679–80 (Alaska 2006); *McIntyre v. Jones*, 194 P.3d 519, 529 (Colo. App. 2008); *Barreca v. Nickolas*, 638 N.W.2d 111, 121 (Iowa 2004); *Bradford v. Mahan*, 548 P.2d 1223, 1228–29 (Kan. 1976); *Hakim v. O’Donnell*, 144 So.3d 1179, 1189 (La. Ct. App. 2014); *Kefgen v. Davidson*, 617 N.W.2d 351, 359 (Mich. Ct. App. 2000); *Wright v. Over-The-Road and City Transfer Drivers, Helpers, Dockmen and Warehousemen*, 945 S.W.2d 481, 493 (Mo. Ct. App. 1997). See also *Green Acres Trust v. London*, 688 P. 2d 617, 624 (Ariz. 1984) (requiring a showing of actual malice or excessive publication); *Lipson v. Anesthesia Servs., P.A.*, 790 A.2d 1261, 1283 (Del. Super. Ct. 2001) (requiring proof of excessive publication or that the

public figures, this barrier has proved famously difficult to overcome.¹⁷³ Instead of, or in addition to, *Sullivan's* formulation of actual malice, some states have characterized the malice that must be shown to defeat a qualified privilege as ill will by the defendant.¹⁷⁴

defendant knowledge that the statement was false); *Toler v. Sud-Chemie, Inc.*, 458 S.W.3d 276, 283 (Ky. 2014) (permitting plaintiff to overcome qualified privilege by showing knowledge or reckless disregard of falsity, publication of defamatory matter for improper purpose, excessive publication, or lack of reasonable belief that publication was necessary to accomplish the purpose for which the occasion is privileged (citing RESTATEMENT (SECOND) OF TORTS § 596 cmt. A (AM. L. INST. 1977))); *Seley-Radtke v. Hosmane*, 149 A.3d 573, 576 (Md. 2016) (plaintiff's rebuttal of conditional privilege requiring demonstration that defendant made statement with malice, defined as "a person's actual knowledge that his or her statement is false, coupled with his or her intent to deceive another by means of that statement") (internal citation and internal quotation marks omitted); *Uken v. Sloat*, 296 N.W.2d 540, 543 (S.D. 1980) (requiring plaintiff to establish that defendant acted with "reckless disregard for the truth"); *Demopolis v. Peoples Nat'l Bank of Wash.*, 796 P.2d 426, 431 (Wash. Ct. App. 1990) (plaintiff required to show that defendant "knew the statement was false, or had a high degree of awareness of its probable falsity").

¹⁷³ See David A. Elder, *Truth, Accuracy and Neutral Reportage: Beheading the Media Jabberwock's Attempts to Circumvent New York Times v. Sullivan*, 9 VAND. J. ENT. & TECH. L. 551, 615 (2007) ("The Court has acknowledged that the Sullivan standard is 'exceedingly difficult' to meet . . ." (quoting *Herbert v. Lando*, 441 U.S. 153, 192 (1979))); 20 A.L.R.3d 988 (1968) ("The 'actual malice' standard is a rigorous, if not impossible, burden to meet in most defamation cases . . .").

¹⁷⁴ See, e.g., *Hawran v. Hixson*, 209 Cal. App. 4th 256, 288 (Cal. Ct. App. 2012); *Rice v. Alley*, 791 A.2d 932, 937 (Me. 2002) (allowing plaintiff to overcome conditional privilege by showing defendant's having acted with Sullivan actual malice or "spite or ill will") (internal citation and internal quotation marks omitted); *Kuelbs v. Williams*, 609 N.W.2d 10, 16 (Minn. Ct. App. 2000) (defining malice as "actual ill-will or a design causelessly and wantonly to injure a plaintiff"); *Bank of Am. Nev. v. Bourdeau*, 982 P.2d 474, 476 (Nev. 1999) (holding that conditional privilege cannot be overcome unless privilege "is abused by bad faith, malice with spite, ill will, or some other wrongful motivation, and without belief in the statement's probable truth"); *Feldschuh v. State*, 658 N.Y.S.2d 772, 774 (N.Y. App. Div. 1997) (requiring plaintiff to show that defendant "was motivated by actual malice [under Sullivan] or ill will"); *Clark v. Brown*, 393 S.E.2d 134, 138 (N.C. Ct. App. 1990) (actual malice established by "evidence of ill-will or personal hostility" by defendant or by showing that defendant "published the defamatory statement with knowledge that it was false, with reckless disregard for the truth or with a high degree of awareness of its probable falsity") (internal citation and internal quotation marks omitted); *Kevorkian v. Glass*, 913 A.2d 1043, 1048 (R.I. 2007) ("The qualified privilege can be overcome when the plaintiff proves that the person making the defamatory statements acted with ill will or malice."). See also *Lauder v. Jones*, 101 N.W. 907, 907 (N.D. 1904) (indicating that "actual malice" constitutes lack of good faith); *Bland v. Lawyer-Cuff Co.*, 178 P. 885, 887 (Okla. 1918) (requiring plaintiff to show "express malice"); *Freeman v. Dayton Scale Co.*, 19 S.W.2d 255, 257 (Tenn. 1929) (stating that plaintiff has burden of "showing malice"); *Crump v. P & C Food Markets, Inc.*, 576 A.2d 441, 446 (Vt. 1990) (holding that plaintiff "must show malice or abuse of the [conditional] privilege sufficient to defeat it").

Under the heightened scrutiny of claims for absolute immunity proposed by this Article, Form U5 contents seem a weak, if not untenable, candidate for absolute privilege. Even champions of blanket immunity have not maintained that submission of the form itself constitutes a quasi-judicial proceeding. Among other deficiencies, submission and registration of Form U5 lacks what has here been identified as a crucial feature of private proceedings warranting absolute privilege: the ability to secure witnesses. On the contrary, brokers themselves have no opportunity to rebut derogatory claims about their behavior before a Form U5 can be viewed by members of the NASD.¹⁷⁵ Under these circumstances, any speculative link between a particular Form U5 and a later NASD or NYSE hearing falls short of the relationship with a quasi-judicial proceeding upon which absolute immunity would rest. Certainly, the case for absolute privilege on this ground does not represent the clear and convincing showing that should be required for such privilege.

Moreover, the channels of appeal within NASD from an allegedly false statement on a Form U5 are inadequate both on paper and in practice. Expungement proceedings to correct a defamatory statement on a Form U5 place an expensive burden on defamed employees¹⁷⁶—one that an unemployed worker may be unwilling or unable to undertake. Moreover, the timeline for initiating and conducting an expungement action may render even a successful resolution effectively moot because the harm to brokers' reputations has left them unable to retain or recruit clients.¹⁷⁷ Nor can brokers receive monetary relief for their injury if they prevail in such an action, so that simple vindication of their name may prove a "pyrrhic"¹⁷⁸ victory incapable of restoring a wrecked career.

Against these considerations, then, the case for absolute immunity relies on the premise that no lesser degree of protection for employers will effectuate public policies associated with trade in securities. The difficulty with this rationale lies with the plurality of such policies. A singular focus on maximizing the amount of pertinent information on terminated employees available to firms may militate in

¹⁷⁵ See Wright, *supra* note 150, at 1307.

¹⁷⁶ See Jeffrey L. Liddle & Ethan A. Brecher, *Form U-5 Defamation Claims: The End of the Line? Not So Fast*, in PRACTICING LAW INSTITUTE, CORPORATE LAW AND PRACTICE COURSE HANDBOOK SERIES, Securities Arbitration 2007: Arbitrators and Mediators—Winning Their Hearts and Minds 673, 687 (2007) (“[A]rbitrators should award . . . attorney’s fees to employees who prevail on their Form U-5 expungement actions . . . to alleviate the high financial burden for pursuing this limited remedy.”).

¹⁷⁷ See *id.* at 687 (“By the time an employee can prove he was ‘defamed,’ he might no longer be employable in the securities industry and/or might no longer have any clients, due to the passage of time and the taint from the original defamation.”).

¹⁷⁸ *Id.*

favor of an absolute privilege. By the same token, however, an exclusive pursuit of fuel efficiency in passenger vehicles might justify regulation that sacrifices important safety goals. The degree of immunity for Form U5, too, confronts important competing policies. However effective in promoting candor, absolute immunity for these statements also confers carte blanche on employers to tarnish dealers irrespective of the accuracy of their charges. It would be naïve to think that no firm would succumb to the temptation to distort an employee's history or the reason for the employee's departure. Thus, a one-sided emphasis on dissemination of information comes at the expense of the state's powerful interest in protecting reputation. In isolation, one might plausibly conclude, as the *Rosenberg*¹⁷⁹ court apparently did, that absolute immunity's contribution to ferreting out unscrupulous dealers warrants the resulting occasional harm to innocent dealers. In light of the countervailing considerations advanced by this Article, however, this justification fails to meet the heavy burden proposed here for wholesale exemption from defamation claims.

2. University Disciplinary Hearings: Allegations of Sexual Harassment and Assault.

Proceedings to resolve alleged violations of university codes have led to defamation suits over a variety of charges. These include accusations of student cheating,¹⁸⁰ faculty submission of inaccurate data for publication,¹⁸¹ and plagiarism.¹⁸² A particularly frequent source of such litigation has been accusations of sexual assault and sexual harassment. Under the model of immunity proposed here, the element of public policy favoring absolute privilege is straightforward and powerful. Still, the force of this policy does not relieve a court of responsibility for ensuring that protected charges are made in the course of a quasi-judicial proceeding that warrants extinguishment of any remedy for libel. The very gravity of such misconduct supports the need for the heightened justification advocated by this Article for absolute privilege in private institutional proceedings.

¹⁷⁹ See *Rosenberg v. MetLife, Inc.*, 866 N.E.2d 439 (N.Y. 2007). See *supra* notes 159–64 and accompanying text.

¹⁸⁰ *E.g.*, *Bose v. Bea*, 947 F.3d 983 (6th Cir. 2020); *Le v. Univ. of Med. and Dentistry*, No. 08–991 (SRC), 2009 WL 1209233, at *1 (D.N.J. May 4, 2009).

¹⁸¹ *E.g.*, *Mauvais-Jarvis v. Wong*, 987 N.E.2d 864 (Ill. App. Ct. 2013).

¹⁸² *E.g.*, *Childress v. Clement*, No. LC–2078–3, 1997 WL 33573766 (Va. Cir. Ct. Dec. 9, 1997).

The horrific nature of sexual assault is vastly magnified by the frequency of its commission in our nation.¹⁸³ University campuses in particular have been one of the most conspicuous¹⁸⁴ and commented-upon¹⁸⁵ settings for sexual assault. Even this

¹⁸³ See Sharon G. Smith et al., *The National Intimate Partner and Sexual Violence Survey: 2015 Data Brief – Updated Release*, CDC (Nov. 2018) <https://www.cdc.gov/violenceprevention/pdf/2015data-brief508.pdf> [https://perma.cc/BZ46-5G5L] (“In the U.S., 43.6% of women (nearly 52.2 million) experienced some form of contact sexual violence in their lifetime”); *Scope of the Problem: Statistics*, RAINN, <https://www.rainn.org/statistics/victims-sexual-violence> [https://perma.cc/B45U-ED6E] (last visited Feb. 17, 2022) (reporting that the average number of rapes and sexual assaults against females of childbearing age each year is approximately 250,000).

¹⁸⁴ See, e.g., Nick Anderson et al., *Survey: More Than 1 in 5 Female Undergrads at Top Schools Suffer Sexual Attacks*, WASH. POST (Sept. 25, 2015), https://www.washingtonpost.com/local/education/survey-more-than-1-in-5-female-undergrads-at-top-schools-suffer-sexual-attacks/2015/09/19/c6c80be2-5e29-11e5-b38e-06883aacba64_story.html [https://perma.cc/5KPW-9KTM]; Stephanie M. DeLong et al., *Starting the Conversation: Are Campus Sexual Assault Policies Related to the Prevalence of Campus Sexual Assault?*, 33 J. OF INTERPERSONAL VIOLENCE 3315, 3317 (2018); Tyler Kingkade, *There's No More Denying Campus Rape Is A Problem. This Study Proves It*, HUFF. POST (Feb. 2, 2017, 10:08 am), https://www.huffpost.com/entry/college-sexual-assault-study_n_569e928be4b0cd99679b9ada [https://perma.cc/2PFE-94AJ].

¹⁸⁵ Much of this commentary has criticized universities for their perceived lack of responsiveness to reports of sexual assault by alleged victims. See, e.g., Michael Dolce, Opinion, *College is Starting Again, and With it the Threat of Campus Sexual Assault. A Lawyer Offers Advice*, NBC NEWS (Sept. 2, 2019, 5:04 AM), <https://www.nbcnews.com/think/opinion/college-starting-again-it-threat-campus-sexual-assault-lawyer-offers-ncna1048511?icid=related> [https://perma.cc/2SCR-5PZM] (“[K]now that the administration is often looking out for their staff more than for you Too often universities are unprepared for sexual violence, both in terms of resources and training.”); Matthew Albright, *Feds Study UD's Handling of Sexual Violence Complaints*, DEL. ONLINE (June 6, 2014), <http://www.delawareonline.com/story/news/local/2014/06/06/feds-probe-uds-handling-sexual-violence-complaints/10079821/> [http://perma.cc/Y8V4-5G8S] (“Universities, speaking generally, have been a really problematic area for sexual assault.”); Alanna Vagianos, *Colleges Leave Sexual Assault Survivors In Limbo As Coronavirus Spreads*, HUFF. POST (Feb. 22, 2021, 6:00 AM), https://www.huffpost.com/entry/colleges-sexual-assault-survivors-coronavirus-title-ix_n_5e73b012c5b6eab7794439ff [https://perma.cc/XT2L-RUKD]; Tyler Kingkade, *For Years, Students Have Accused Virginia Universities of Botching Sexual Assault Cases*, HUFF. POST (July 1, 2014), http://www.huffingtonpost.com/2014/07/01/virginia-universities-sexualassault_n_5545486.html [http://perma.cc/RBQ6-2N5E] (“Students have been suspended for drinking offenses, and expelled for plagiarism, and [failure to expel students found responsible for sexual assaults] sends the message to the university community that sexual assault is not as serious as these other behaviors.”); Tyler Kingkade, *Education Department Investigating Claims UC Berkeley Botched Sexual Assault Reports*, HUFF. POST (Apr. 21, 2014),

degree of attention is based on only limited knowledge of its incidence on campus, for rape is an exceptionally underreported violent crime.¹⁸⁶ At colleges, evidence indicates that victims far more often than not do not make formal reports of the crime to police.¹⁸⁷ Thus, policies that encourage students to report sexual assault to university authorities can play a crucial role in helping students to cope with the traumas that frequently result.¹⁸⁸ One such policy is the adoption of measures that

http://www.huffingtonpost.com/2014/04/21/uc-berkeley-investigationsexual-assault_n_5185990.html [<http://perma.cc/D2XR-86KH>] (stating that University of California Berkeley is being investigated for Title IX complaints from thirty-one students alleging “there was little to no response on the part of the university when students reported rape, sexual assault and ongoing harassment on campus”).

¹⁸⁶ See Emily Thomas, *Rape Is Grossly Underreported In The U.S., Study Finds*, HUFF. POST (Nov. 21, 2013, 11:07 AM), https://www.huffpost.com/entry/rape-study-report-america-us_n_4310765 [<https://perma.cc/47PX-8U8S>]; W. David Allen, *The Reporting and Underreporting of Rape*, 73 S. ECON. J. 623, 623 (2007). Victims may refrain from reporting sexual assault for a number of reasons. Frequently, they want to keep others from learning of the assault out of embarrassment or shame. See Bonnie S. Fisher et al., *Reporting Sexual Victimization to the Police and Others: Results from a National-Level Study of College Women*, 30 CRIM. JUST. BEHAV. 6, 32 (2003). Some fear that police will display skepticism or even hostility to a report of rape. See *The White House Council on Women & Girls, Rape and Sexual Assault: A Renewed Call to Action* 17 (2014), <http://https://obamawhitehouse.archives.gov/blog/2014/01/22/renewed-call-action-end-rape-and-sexual-assault> [<https://perma.cc/3QTV-94JY>] (“Some victims report that law enforcement officers actively discouraged them from reporting, asked questions about their sexual history and dress, and overemphasized prosecution for false reports.”); Eliza Gray, *Why Victims of Rape in College Don't Report to the Police*, TIME (June 23, 2014), <http://time.com/2905637/campus-rape-assault-prosecution/> [<http://perma.cc/BUM3-WVDL>].

¹⁸⁷ See Sofi Sinozich & Lynn Langton, *Rape and Sexual Assault Victimization Among College-Age Females, 1995-2013*, U.S. DEP'T JUST., BUREAU JUST. STATS. (2014), <https://bjs.ojp.gov/content/pub/pdf/rsavcaf9513.pdf> [<https://perma.cc/T8YU-RT8E>] (“Among student victims, 20% of rape and sexual assault victimizations were reported to police, compared to 32% reported among nonstudent victims ages 18 to 24.”); Cameron Kimble & Inimai M. Chettiar, *Sexual Assault Remains Dramatically Underreported*, BRENNAN CTR. FOR JUST. (Oct. 4, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/sexual-assault-remains-dramatically-underreported> [<https://perma.cc/4868-JPAC>]; Lisa A. Paul et al., *College Women's Experiences with Rape Disclosure: A National Study*, 19 VIOLENCE AGAINST WOMEN 486, 487 (2013) (estimating frequency of formal reports as ranging from 5% to 33%). See also 735 Ill. Comp. Stat. 5/8-804 (2015) (“Because of the fear, stigma, and trauma that often result from incidents of sexual violence, many survivors hesitate to report or seek help . . . As a result, they . . . may lack the psychological support necessary to report the incident of sexual violence to the higher education institution or law enforcement.”).

¹⁸⁸ See generally, e.g., Ann Wolbert Burgess & Lynda Lytle Holmstrom, *Rape Trauma Syndrome*, 131 AM. J. PSYCHIATRY 981 (1974).

ease or remove victims' inhibitions born of fear of retaliation or other painful repercussions. This rationale largely underlies the absolute immunity that some courts have accorded to campus accusers of sexual assault. Summarizing this justification, one court explained: "If sexual assault victims are at risk of facing a civil lawsuit from their attacker throughout the reporting and disciplinary process, they will be less likely to come forward and report the crime. Absent a report, the sexual assault perpetrator goes free, potentially committing other similar misdeeds."¹⁸⁹ Defamation suits over complaints against professors through a university's anti-harassment procedures have similarly been blocked by absolute privilege.¹⁹⁰

The case for absolute immunity is further buttressed by federal policies. Section 304 of the 2013 Reauthorization of the Violence Against Women Act¹⁹¹ (commonly referred to as the Campus SaVE Act) requires universities to develop policies and programs to combat domestic violence, dating violence, sexual assault, and stalking on campuses.¹⁹² Such policies must include announced procedures for victims of these offenses to follow.¹⁹³ Though the law affords universities latitude in their disciplinary procedures, they must "provide a prompt, fair, and impartial investigation and resolution."¹⁹⁴ In addition, regulations promulgated under Title IX¹⁹⁵ prescribe policies and procedures concerning the reporting and investigation

¹⁸⁹ *Razavi v. Sch. of the Art Inst. of Chi.*, 122 N.E.3d 361, 373–74 (Ill. App. Ct. 2018).

¹⁹⁰ *See, e.g., Hartman v. Keri*, 883 N.E.2d 774, 777–78 (Ind. 2008). *See also Reichardt v. Flynn*, 823 A.2d 566, 575 (2003) (holding that parents' complaints of sexual harassment by high school teacher and coach to public school officials were protected by absolute immunity). *But see Schanne v. Addis*, 121 A.3d 942, 943–45, 949 (Pa. 2015) (rejecting absolute immunity for allegation to friend by former high school student of sexual misconduct by teacher where former student had not contemplated judicial or quasi-judicial proceedings).

¹⁹¹ Pub. L. No. 113-4, § 304, 127 Stat. 54, 89 (effective Mar. 7, 2013) (amending 20 U.S.C. § 1092(f)).

¹⁹² *See The Campus Sexual Violence Elimination (SaVE) Act*, CLERY CTR. FOR SEC. ON CAMPUS, <http://clerycenter.org/campus-sexual-violence-elimination-save-act> [<http://perma.cc/PS32-AT82>]; *THE VIOLENCE AGAINST WOMEN REAUTHORIZATION ACT OF 2013: SAFELY AND EFFECTIVELY MEETING THE NEEDS OF MORE VICTIMS*, NAT'L NETWORK TO END DOMESTIC VIOLENCE [<http://perma.cc/9S9W-ZFUR>], at 1; *The Campus Sexual Violence Elimination Act*, JEANNE CLERY ACT INFO., <http://www.cleryact.info/campus-save-act.html> [<http://perma.cc/9K6L-GRYT>].

¹⁹³ 20 U.S.C. § 1092(f)(8)(A) (2018).

¹⁹⁴ 20 U.S.C. § 1092(f)(8)(B)(iv)(I)(aa) (2018).

¹⁹⁵ 20 U.S.C. 1681(a) ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . .").

of alleged sexual misconduct.¹⁹⁶ The federal commitment to curbing sexual violence on campus, then, gives weight to regarding disciplinary hearings and the process leading to them—where appropriate safeguards exist—as quasi-judicial proceedings offering absolute immunity.¹⁹⁷

Even these compelling considerations, however, do not justify automatic absolute privilege for every accusation of sexual misconduct on campus. The process through which accusations are addressed should still contain adequate procedural safeguards and recognizable features of quasi-judicial proceedings. A blanket privilege without regard to context or detail could enable, if not invite, the small proportion of accusers whose charges are unfounded¹⁹⁸ to come forward. Because sexual violence is such a heinous and notorious act, precautions should be taken to prevent individuals wrongly accused of its perpetration from being branded with this taint. Perhaps in large part for this reason, some courts have stopped short of granting absolute immunity for statements made as part of university procedures.

A federal district court's holding in Maryland illustrates these courts' acceptance of a conditional privilege as sufficient to protect accusers' interests. Two university students disciplined for sexual misconduct after a university hearing brought a defamation suit against their student accuser and witnesses.¹⁹⁹ Inspecting Maryland law, the court inferred that the accuser's statements would be entitled to a qualified or conditional privilege.²⁰⁰ Thus, the plaintiffs would have had to show malice, defined under state law as "a person's actual knowledge that his [or her] statement is false, coupled with his [or her] intent to deceive another by means of

¹⁹⁶ See, e.g., 34 C.F.R. § 106.8 (2020).

¹⁹⁷ *Razavi v. Sch. of the Art Inst. of Chi.*, 122 N.E.3d 361, 373 (Ill. App. Ct. 2018) (holding that where university had adopted "federally mandated procedures . . . repeated allegations about a claimed sexual assault or misconduct made to campus security and school authorities, and which are published as part of an investigation into and disciplinary hearing for the alleged misbehavior, are cloaked with absolute privilege").

¹⁹⁸ See Dara Lind, *What We Know About False Rape Allegations*, VOX (June 1, 2015, 8:20 AM), <https://www.vox.com/2015/6/1/8687479/lie-rape-statistics> [<https://perma.cc/2X3W-WGFH>] ("[R]esearch has finally nailed down a consistent range for how many reports of rape are false: somewhere between 2 and 8 percent . . ."); Rachel M. Venema, *Police Officers' Rape Myth Acceptance: Examining the Role of Officer Characteristics, Estimates of False Reporting, and Social Desirability Bias*, 33 VIOLENCE AND VICTIMS, 176, 180 (2018).

¹⁹⁹ See *Doe v. Salisbury Univ.*, 123 F. Supp. 3d 748, 755–56 (D. Md. 2015).

²⁰⁰ See *id.* at 758. The court had already determined that the plaintiffs' complaint did not set forth sufficiently specific allegations to support a cause of action. *Id.*

that statement.”²⁰¹ In the eyes of the court (and presumably Maryland), conferral of qualified rather than absolute privilege did not signify doubt about the importance of protecting victims from the risk of civil liability. Instead, the court assumed that conditional immunity would suffice to encourage victims to “reach[] out for help in the aftermath of a traumatic sexual assault.”²⁰²

In other instances, courts’ withholding of absolute immunity may have been influenced by the defamation suits’ being brought against parties other than an alleged victim. In a Connecticut case, for example, only a qualified privilege was extended to a university’s resident advisor and director of judicial affairs who had accused the student plaintiff of violating the university’s “Community Standards.”²⁰³ Deeming the disciplinary board that had suspended the student a quasi-judicial body,²⁰⁴ the court nevertheless noted procedural deficiencies in the board’s hearing in rejecting the defendants’ argument for absolute immunity.²⁰⁵ Unlike in the Maryland case, qualified privilege was here framed as a device to protect the accused—who “was entitled to more stringent procedural safeguards than he received”²⁰⁶—than the accuser. Additional hesitancy to grant absolute privilege where the defamation plaintiff was not a victim can be seen in a Texas case, where the court sustained a suit against a student who had stated in a quasi-judicial proceeding²⁰⁷ that a professor had engaged in sexual misconduct.²⁰⁸

Admittedly, refusal to treat university disciplinary proceedings as a complete shield against defamation suits arising from them can be viewed as clashing with judicial traditions of universities’ autonomy.²⁰⁹ The question of privilege, however, presents a different calculus from those cases in which asserted constitutional rights are being weighed. In the context of private universities, constitutional

²⁰¹ *Id.* (internal citations and internal quotation marks omitted).

²⁰² *Id.* at 759.

²⁰³ *Rom v. Fairfield Univ.*, No. CV020391512S, 2006 WL 390448, at *1 (Conn. Super. Ct. Jan. 30, 2006). The accused student was alleged to have (among other things) entered a women’s restroom on campus. *Id.*

²⁰⁴ *Id.* at 5.

²⁰⁵ *See id.* at 3.

²⁰⁶ *Id.* at 6.

²⁰⁷ *See Hoskins v. Fuchs*, 517 S.W.3d 834, 845 (Tex. Ct. App. 2016) (Walker, J., dissenting).

²⁰⁸ *Id.* at 843–44 (holding that professor was private figure who could prevail by establishing student’s negligence).

²⁰⁹ *See Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 86 n.3 (1978) (recognizing “the significant and historically supported interest of the school in preserving its present framework for academic evaluations”).

constraints—at least federal ones—do not come into play at all. Rather, the state is simply striking its own balance between its policies shaping immunity and its interest in protecting individual reputation. Moreover, permitting defamation suits in some instances does not directly invade a university’s discretion in structuring its procedures. Allowing suits to go forward in the unusual instance where a plaintiff can make a showing of malice does not challenge the integrity of a proceeding or even the validity of its result. Of course, a successful defamation action by a student punished by the university on the basis of an accuser’s testimony calls into question the accuracy of the university’s conclusion. This friction, however, is not unlike the principle of separate sovereigns under which state and federal actions arising from the same circumstances produce different outcomes.²¹⁰

Once again, all these considerations are amplified in the setting of a private university. In *Cuba v. Pylant*,²¹¹ the Fifth Circuit Court of Appeals applying Texas law expressly rested its refusal to accord absolute immunity on the private status of the university at whose proceeding the allegedly defamatory statement had been made. The defendants were parents who had written the university in support of their daughter’s claim that the plaintiff had raped her while both were students there.²¹² They sought to dismiss the plaintiff’s suit on the ground that their communications to the university were made as part of the university’s quasi-judicial process initiated by their daughter’s accusation.²¹³ Surveying Texas precedent, the court concluded that no case had “establishe[d] immunity for a statement in a ‘quasi-judicial’ proceeding *in a private institution that does not have any law enforcement or law interpreting authority.*”²¹⁴ A federal court applying Ohio law similarly refused to bar a defamation suit by a student expelled from a private university over its finding that he had sexually assaulted a fellow student.²¹⁵ The court found it “unlikely that the Ohio Supreme Court would afford absolute immunity to statements made during a *private* university’s student disciplinary

²¹⁰ See *United States v. Lanza*, 260 U.S. 377, 382 (1922) (“[A]n act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each.”); *Gamble v. United States*, 139 S.Ct. 1960, 1964 (2019) (affirming that separate prosecution by federal and state governments does not violate Fifth Amendment’s Double Jeopardy Clause).

²¹¹ *Cuba*, 814 F.3d at 717.

²¹² *Id.* at 705.

²¹³ *Id.* at 716.

²¹⁴ *Id.* at 717.

²¹⁵ *Doe v. Coll. of Wooster*, No. 5:16-cv-979, 2018 WL 838630, at *12 (N.D. Ohio Feb. 13, 2018).

proceedings.”²¹⁶ In cases involving offenses other than sexual misconduct as well, courts have refrained from affording absolute immunity to statements arising from disciplinary proceedings at private universities.²¹⁷

Even in a recent, much-publicized case where a district court recognized absolute immunity for an accusation of sexual assault made at a private university’s proceeding, the Second Circuit Court of Appeals questioned whether the lower court had correctly interpreted state law. In *Khan v. Yale University*, a Connecticut district court found Yale University’s disciplinary hearing to constitute a quasi-judicial proceeding barring a defamation suit by the alleged student perpetrator of the assault.²¹⁸ Acknowledging that the Connecticut Supreme Court had not considered whether a “purely private proceeding” could qualify as quasi-judicial, the district court pointed out that the same court had not explicitly confined absolute immunity to proceedings before governmental bodies.²¹⁹ Inferring that Connecticut’s determination of a proceeding’s character was rooted in principles that transcend the distinction between public and private entities, the court went on to find that Yale’s hearing contained sufficient hallmarks of quasi-judicial proceedings.²²⁰ On appeal, however, the Second Circuit Court of Appeals concluded that state law did not reflect a clear position on whether proceedings conducted by nongovernmental entities could be deemed quasi-judicial and certified the question to the Connecticut Supreme Court.²²¹

²¹⁶ *Id.* at *8 (emphasis added).

²¹⁷ *E.g.*, *Overall v. Univ. of Pa.*, 412 F.3d 492, 497–98 (3d Cir. 2005) (denying absolute privilege for statement made about professor at proceeding under university’s grievance procedure after not finding “a single Pennsylvania case according quasi-judicial status to entirely private hearings”); *Bose v. Bea*, 947 F.3d 983, 994 (6th Cir. 2020) (allowing defamation suit by expelled student over accusation of cheating made against her during proceeding at private college on ground that Tennessee applied absolute privilege for statements made in quasi-judicial proceedings “only to statements made before public bodies”); *Mauvais-Jarvis v. Wong*, 987 N.E.2d 864, 885–86 (Ill. App. Ct. 2013) (refusing to “broaden the scope of absolute privilege immunity to include statements made in the context of a private university’s research misconduct proceedings”); *McDaniel v. Loyola Univ. Med. Ctr.*, No. 13-cv-6500, 2019 WL 12312024, at *3 (N.D. Ill. Nov. 20, 2019) (permitting defamation suit based on statements made about plaintiff at private university’s hearings to consider plaintiff’s probation and termination from residency program).

²¹⁸ 511 F.Supp. 3d 213 (D. Conn. 2021).

²¹⁹ *Id.* at 220.

²²⁰ *See id.* at 220–22.

²²¹ *Khan v. Yale Univ.*, No. 21-95-cv, 2022 WL 628128, at *21 (2d Cir. Mar. 4, 2022).

3. Arbitration: Presumptively but Not Inevitably Quasi-Judicial.

Under both conventional analysis and the approach proposed by this Article, private arbitration presents an exceptionally strong case for designation as a quasi-judicial proceeding. The overriding public policy served by arbitration is obvious and weighty: to ease the caseload of the heavily burdened court system.²²² It is thus not surprising to find many states granting categorical immunity from libel suits for statements made at arbitration.²²³ Even here, however, the limitations inherent in nongovernmental proceedings caution against uncritically applying absolute privilege to all arbitral communications.

A number of themes emerge in courts' endorsement of absolute immunity for statements arising out of arbitration. Foremost among these themes is the argument that exposure to liability would inhibit individuals from pursuing this salutary mechanism for alternative dispute resolution.²²⁴ As support, courts often

²²² See Warren E. Burger, *Isn't There A Better Way?*, 68 A.B.A. J. 274, 276–77 (1982).

²²³ See, e.g., *Martinez v. Hellmich Law Grp., P.C.*, 681 F. App'x 323, 327 (5th Cir. 2017) (applying Texas law); *Bad Ass Coffee Co. of Haw. v. Naughty Donkey Enters., LLC*, 64 So. 3d 659, 663 (Ala. Ct. Civ. App. 2010) (applying Utah law); *Yeung v. Maric*, 232 P.3d 1281, 1286 (Ariz. 2010); *Ehrman v. Adam*, No. AO8-2120, 2009 WL 2746749, at *3 (Minn. Ct. App. Sept. 1, 2009); *Kidwell v. Gen. Motors Corp.*, 975 So. 2d 503, 505 (Fla. 2d DCA 2007); *Cross v. Safeway, Inc.*, No. Civ. 03-132-TC, 2004 WL 1969407, at *4 (D. Or. Sept. 2, 2004); *Bushell v. Caterpillar, Inc.*, 683 N.E.2d 1286, 1289 (Ill. App. Ct. 1997); *Moore v. Conliffe*, 871 P.2d 204, 209–10 (Cal. 1994). See also RESTATEMENT (SECOND) OF TORTS § 585 cmt. c (AM. L. INST. 1977) (including an arbitrator as a “judicial officer” for purposes of judicial immunity); RESTATEMENT (SECOND) OF TORTS § 586 cmt. d (AM. L. INST. 1977) (“[Judicial proceedings] include all proceedings before an officer or other tribunal exercising a judicial function” and that “an arbitration proceeding may be included.”).

²²⁴ See, e.g., *Sturdivant v. Seaboard Serv. Sys., Ltd.*, 459 A.2d 1058, 1060 (D.C. 1983) (“Clearly if parties in arbitration hearings were given less protection [from defamation suits] than those in purely judicial proceedings, a disincentive would be built into the system.”); *Corbin v. Wash. Fire & Marine Ins. Co.*, 278 F. Supp. 393, 398 (D.S.C. 1968) (“[If] the parties cannot argue their cause or offer testimony before the arbitrators without threat of harassment via libel actions, arbitration becomes a farce and the many expressions of judicial and legislative encouragement of arbitration a snare.”); *Odyniec v. Schneider*, 588 A.2d 786, 793 (Md. 1991) (“The social benefit derived from free and candid participation by potential witnesses in the arbitration process is essential to achieve the goal of a fair and just resolution of claims of malpractice against health care providers.”). See also Zachary Pyers & Daniel Bey, *Applying the Absolute Privilege to Defamation, Afforded in Judicial Proceedings, to Arbitration: A Logical Next Step for Ohio*, 45 CAP. U. L. REV. 635, 649 (2017) (“[T]he absence of the absolute privilege to defamation for arbitrators and litigators would directly undermine the usefulness of arbitration as an alternative dispute mechanism, thus encouraging litigants to flock to the already overburdened judiciary in order to avoid potential defamation liability and directly thwarting the public policy which encourages arbitration.”).

point to formal encouragement of this means of avoiding resort to litigation.²²⁵ Prominent also in some opinions is the contractual commitment embodied in arbitration agreements to this mode of resolving differences.²²⁶ At a more basic level, courts appear to find it easy to conceive of arbitration as a quasi-judicial proceeding triggering absolute immunity because, in serving as a substitute for a formal trial,²²⁷ it bears a distinct resemblance to one.²²⁸ Whatever a court's rationale in a given case, judicial embrace of arbitration's quasi-judicial character is reflected

²²⁵ See, e.g., *Corey v. New York Stock Exch.*, 691 F.2d 1205, 1211 (6th Cir. 1982) ("Federal policy, as manifested in the Arbitration Act and case law, favors final adjudication of differences by a means selected by the parties." (citing 9 U.S.C. §§ 2, 3, 4)); *Sturdivant*, 459 A.2d. at 1060 ("To deny an absolute privilege to witnesses, parties, arbiters and counsel who participate in these proceedings, would chill the effect of the new [civil arbitration] rules.").

²²⁶ See, e.g., *Yeung v. Maric*, 232 P.3d 1281, 1286 (Ariz. 2010) ("[P]ublic policy supports extending the absolute privilege to participants in private, contractual arbitration proceedings."); *Moore v. Conliffe*, 871 P.2d 204, 209 (Cal. 1994) ("[T]he need for an absolute privilege to foster the giving of complete and truthful testimony was a vital component in the private contractual arbitration setting as it is in a traditional courtroom proceeding."). See also Thomas E. Carbonneau, *The Exercise of Contract Freedom in the Making of Arbitration Agreements*, 36 VAND. J. TRANSNAT'L L. 1189, 1192–93 (2003) ("Freedom of contract . . . is at the very core of how the law regulates arbitration."); MyLinda K. Sims & Richard A. Bales, *Much Ado About Nothing: The Future of Manifest Disregard After Hall Street*, 62 S.C. L. REV. 407, 410 (2010) ("[Section 2 of the Federal Arbitration Act] establishes that arbitration is a creature of contract law and that arbitral provisions should be viewed in this light.").

²²⁷ See *Moore*, 871 P.2d at 209 (stating that private arbitration proceedings "serve a function analogous to . . . the court system").

²²⁸ See *Rolon v. Henneman*, 517 F.3d 140, 146 (2d Cir. 2008) (granting absolute immunity in arbitration hearing to witness who "performed substantially the same function as witnesses in judicial proceedings with nearly identical procedural safeguards: he took an oath, offered testimony, responded to questions on direct and cross-examination, and could have been prosecuted for perjury"); *Yeung v. Maric*, 232 P.3d 1281, 1286 (Ariz. Ct. App. 2010) ("Under the [Uniform Arbitration] Act, parties to arbitration must be provided notice of the proceeding, are entitled to present evidence, and may be represented by an attorney, and the arbitrator may issue subpoenas and has the power to administer oaths. . . . [T]hese safeguards make arbitration sufficiently analogous to judicial litigation to warrant application of the [absolute] privilege."); *New Albany Main St. Props., LLC v. Stratton*, No. 2021-CA-0562-MR, 2022 WL 1695881, at *6 (Ky. Ct. App. May 27, 2022) ("While there are differences between arbitration and traditional judicial proceedings, it is nevertheless 'an adversarial process with the fundamental components of due process including a hearing with an opportunity to present evidence and cross-examine witnesses, and to have representation by counsel if desired.'" (quoting *Ky. Shakespeare Festival, Inc. v. Dunaway*, 490 S.W.3d 691, 696 (Ky. 2016))).

by the willingness to extend an absolute privilege to a range of participants in and phases of an arbitral proceeding.²²⁹

Notwithstanding this favorable judicial attitude, however, a virtually per se rule of absolute privilege in arbitration proceedings goes too far. Though private arbitrations indeed bear significant attributes of judicial proceedings, they also lack important safeguards present at formal trials. Mark Sponseller has usefully identified some of the principal differences:

In contrast to a judge, an arbitrator need not follow precedent, rules of evidence, nor the rules of law. . . . Unlike judicial findings in civil litigation, in which ‘parties are entitled to know the findings and conclusions on all of the issues of fact, law or discretion’ an arbitration award is nothing more than a statement of the rights and obligations of the parties. In fact, arbitration associations discourage arbitrators from giving reasons for a decision . . . A record of the proceedings, fundamental to civil litigation, is not required in an arbitration. In most cases a transcript of the arbitration proceedings will not be prepared.²³⁰

In addition, arbitration does not necessarily include an opportunity for discovery.²³¹ Given the offsetting advantages of arbitration (such as cost, speed, and flexibility) none of these deviations from the litigation model should be viewed as condemnation of this valuable tool for resolving disputes. The discrepancy in safeguards, however, warrants careful scrutiny of categorical claims for absolute immunity in arbitral proceedings.

Moreover, while the public policy advanced by recourse to arbitration is important, another element of the approach proposed here detracts from the case for absolute immunity; namely, reviewability. Though arbitrators’ decisions can be appealed as a formal matter, the grounds for vacating an award are extremely

²²⁹ See, e.g., *Corbin v. Wash. Fire & Marine Ins. Co.*, 278 F. Supp. 393, 398 (D.S.C. 1968) (“[T]he absolute immunity attaching to [arbitration] proceedings must extend beyond the arbitrators themselves; it must extend to all ‘indispensable’ proceedings To urge that the immunity should be limited to the arbitrators would be similar to arguing that judicial immunity should go no farther than the judge.” (citations omitted)); John B. Lewis & Lois J. Cole, *Defamation Actions Arising from Arbitration and Related Dispute Resolution Procedures—Preemption, Collateral Estoppel, and Privilege: Why the Absolute Privilege Should Be Expanded*, 45 DEPAUL L. REV. 677, 728 (1996) (“If only statements made in the [arbitration] hearing itself are protected, the parties are exposed to liability for statements in pre-arbitral proceedings or documents, such as statements of claim, pre-hearing conferences, disciplinary notices, correspondence, depositions, or grievance committee sessions.”).

²³⁰ Mark A. Sponseller, *Redefining Arbitral Immunity: A Proposed Qualified Immunity Statute for Arbitrators*, 44 Hastings L.J. 421, 436–37 (1993) (citations omitted).

²³¹ See *Moore v. Conliffe*, 871 P.2d 204, 223 (Cal. 1994) (Baxter, J., dissenting).

limited.²³² Further, as with other nongovernmental proceedings, the harm to reputation caused by false defamatory statements at arbitration hearings will not be remedied by the mechanism for overturning an arbitrator's ruling or—in all likelihood—prosecution for perjury.²³³ Indeed, it is doubtful whether perjury laws apply to arbitration at all.²³⁴

Finally, the voluntarist premise of the contractual rationale for enforcing terms of arbitration agreements fails to account for the compulsory arbitration clause contained in contracts that many businesses impose upon their customers.²³⁵ The Supreme Court has upheld such provisions even where they compel individual arbitration in preclusion of class actions.²³⁶ To reach this result, the Court ruled in one case that state law forbidding the provision as a contract of adhesion was preempted by federal law.²³⁷ A company insistent on mandatory arbitration will

²³² See Norman S. Poser, *Judicial Review of Arbitration Awards: Manifest Disregard of the Law*, 64 BROOK. L. REV. 471, 471–72 (1998) (“[J]udicial review of arbitration awards is strictly limited. It is well established that a court may not modify or vacate an award simply because the arbitrator made an error misinterpretation, or misapplication of law. The award may be vacated only if the proceeding was tainted with corruption, misconduct or bias; if the arbitrator exceeded his or her authority; or if the arbitrator acted in ‘manifest disregard of the law.’” (citation omitted)); Nico Gurian, *Rethinking Judicial Review of Arbitration*, 50 COLUM. J.L. & SOC. PROBS. 507, 509 (2017) (“Under both the [Federal Arbitration Act] and many state statutes, judges must apply an extremely deferential standard of review to arbitration decisions.”); *Group III Mgmt., Inc. v. Suncrete of Carolina, Inc.*, 819 S.E.2d 781, 786 (S.C. Ct. App. 2018) (“A ... court cannot vacate an arbitral award merely because it is convinced that the arbitration panel made the wrong call on the law. On the contrary, the award ‘should be enforced, despite a court’s disagreement with it on the merits, if there is a barely colorable justification for the outcome reached.’” (quoting *Wallace v. Buttar*, 378 F.3d 182, 190 (2d Cir. 2004)); *Blankley*, supra note 85, at 977–82 (discussing narrow grounds for appealing arbitration award). See also Federal Arbitration Act, 9 U.S.C. § 10(a) (setting forth four specific grounds on which a court can vacate an arbitrator’s award).

²³³ See supra note 85 and accompanying text.

²³⁴ See *Blankley*, supra note 85, at 933 (concluding from fifty-state survey that language of perjury laws do not apply to arbitration).

²³⁵ See Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POL’Y INST. (Sept. 27, 2017), <https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration/> [<https://perma.cc/J8NT-H8F5>] (last visited Mar. 15, 2022).

²³⁶ See *Amer. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013) (rejecting suit brought by merchants who had agreements with American Express); *AT&T Mobility LLC v. Conception*, 563 U.S. 333 (2011) (dismissing suit by consumer having cell phone agreements with AT&T).

²³⁷ See *Conception*, 563 U.S. at 340–44.

obviously shape its terms to the company's advantage.²³⁸ Under these circumstances, it is open to question whether the proceeding will afford the protections that warrant application of an absolute privilege to defamatory statements. Such arbitration, then, well illustrates why private proceedings should entail absolute immunity only upon a clear and convincing demonstration of its need.

CONCLUSION

Absolute immunity for statements made in quasi-judicial proceedings represents the state's conscious sacrifice of its interest in protecting individual reputation. Given the weight of that interest and the potentially devastating consequences of defamatory falsehoods, such immunity should be based on careful calculation of the benefits and risks of shielding these statements. While determinations of absolute privilege must be individualized, it is a fair generalization that risks tend to be greater and benefits less in private proceedings. Accordingly, courts should scrutinize claims of entitlement to absolute immunity in this setting more closely than in public proceedings. That scrutiny need not amount to an overwhelming presumption against quasi-judicial status for private proceedings. As discussed in this Article, some types of private dispute resolution appear to be strong candidates for surviving a requirement of heightened justification for immunity. Still, it is in this context that courts should be especially mindful that "the availability of an absolute privilege must be reserved for those situations where the public interest is so vital and apparent that it mandates complete freedom of expression without inquiry into a defendant's motives."²³⁹

²³⁸ Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. Times (Oct. 31, 2015), <http://nyti.ms/1KMvBJg> [<https://perma.cc/6FJ2-6YL4>].

²³⁹ *Supry v. Bolduc*, 293 A.2d 767, 769 (N.H. 1972).

