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Constitutional Limitations on the Defenses of Fair Comment and Conditional Privilege

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CONSTITUTIONAL LIMITATIONS ON THE DEFENSES OF FAIR COMMENT AND CONDITIONAL PRIVILEGE

New York Times Co. v. Sullivan[1]

I. INTRODUCTION

The main purpose of this comment is to explore the effect of the United States Supreme Court's decision on the law of defamation in general, and the law of fair comment and conditional privilege in particular.[2] This comment considers the Constitutional aspects of the *Sullivan* case only insofar as is necessary to explain the reasons for the court's decision. Although the case deals with public officials, and not candidates for office, because the two appear to be so analogous, and because the constitutional guarantees of freedom of speech and press seem to be equally applicable, both have been considered in this article.[3]

On March 29, 1960, a full page advertisement was carried in the New York Times entitled "Heed Their Rising Voices." The advertisement began by noting the peaceful non-violent demonstrations in which southern negro students were participating, and then described in some detail the "unprecedented wave of terror" with which these demonstrations had been met. One paragraph of the advertisement alleged that truckloads of police armed with shotguns and tear gas had ringed the Alabama State College campus after students sang "My Country 'Tis of Thee" on the State Capitol steps. The same paragraph further stated that when the entire student body protested to state authorities by refusing to reregister, their dining hall was padlocked in an attempt to starve them into submission. Another paragraph recounted that southern violaters had bombed the home of Dr. Martin Luther King, had assaulted his person, had arrested him seven times, and now have charged him with perjury. It was admitted by defendants that some of these statements were not true.

Plaintiff was Commissioner of Public Affairs for the city of Montgomery, Alabama. In such capacity, his duties included the supervision of the Police Department, Fire Department, Department of Cemetary and Department of Scales. Plaintiff instituted this action for libel, claiming that the above statements would be read as referring to him because of his supervision of the Montgomery Police Department. The New York Times Company and four Negro clergymen, whose names appeared at the end of the advertisement in a list of endorsers, were joined as co-defendants.

The Alabama jury awarded plaintiff damages of $500,000 against all defendants. The Alabama Supreme Court affirmed the judgment and rejected petitioners constitutional contentions by stating that the First Amendment of the United States Constitution does not protect libelous publications, and that the Fourteenth Amendment is directed against state and not private action.

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1. 376 U.S. 254 (1964).
2. For student notes dealing with the constitutional problems of the case see 44 B. U. L. REV. 563 (1964), 16 SYRACUSE L. REV. 132 (1964), 42 TEXAS L. REV. 1080 (1964), 113 U. PA. L. REV. 284 (1964).
3. Annot., 95 A.L.R.2d 1450 (1964).

The question before the United States Supreme Court was whether or not the rule of civil liability for defamation of a public official, as applied by the Alabama Courts, was constitutionally objectionable as a result of its failure to provide defendants with the defense of conditional privilege. The Court decided that constitutional guarantees prohibit a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with actual malice. Actual malice was defined as (1) knowledge of falsity, or (2) reckless disregard as to the truth or falsity of the statement. Thus a conditional privilege was required and the allowance of the defense of truth by the Alabama courts was adjudged to be insufficient constitutional protection as required by the First and Fourteenth Amendments.

Despite previous statements to the effect that the Constitution does not protect libelous publications, the Court insisted that it is not bound by prior decisions. This is true, said Justice Brennan, for the majority because none of the earlier cases have considered suits brought by public officials for expression critical of their official conduct.

In explaining the reasons for the decision, Justice Brennan notes that the history of the American Republic in general, and previous Supreme Court decisions in particuar, reflect a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open."[4] In this same vein was the Court's assertion that the interest of the public outweighs the interest of a public official or any other individual. A second reason for the decision was the similarity between the rule of law applied by the Alabama courts, and the Sedition Act of 1798 which, though never declared unconstitutional because of its repeal, has been the subject of substantial criticism as a result of the prohibitive effect it had upon discussion of governmental policies and officials. Another contributive factor to the decision was the previous adoption of this same rule by a minority of states. And finally, the court reasoned that a conditional "privilege for criticism of official conduct is appropriately analogous to the protection accorded a public official when he is sued for libel by a private citizen."[5]

II. The Defenses of Conditional Privilege and Fair Comment

A meaningful assessment of the significance of the *Sullivan* case requires a brief outline of the law of defamation and conditional privilege. The *Restatement of Torts* lists the elements of a prima facie case of defamation. It provides:

> In an action for defamation, the plaintiff has the burden of proving, when the issue is properly raised,
> a) the defamatory character of the communication,
> b) its publication by the defendant,
> c) its application to the plaintiff,
> d) the recipient's understanding of its defamatory meaning,
> e) the recipient's understanding of it as intended to be applied to the plaintiff,

4. New York Times Co. v. Sullivan, *supra* note 1, at 270.
5. *Id.* at 282.

f) special harm resulting to the plaintiff from its publication,
g) abuse of a conditional privilege.[6]

The traditional definition of a defamatory communication is one which tends to hold the plaintiff up to hatred, contempt or ridicule, or to cause him to be shunned or avoided.[7] To be actionable, the communication must have been so understood by a substantial and respectable segment of the community. It is incumbent upon plaintiff to allege facts sufficient to find parts (b), (c), (d) and (e) of the *Restatement* in every suit for defamation and each of these raises intriguing legal questions, but a discussion of them would go beyond the purposes of this article. Part (f), however, merits some discussion. As a result of historical accident, the law of defamation has been divided into two segments—libel and slander. The original distinction was based on the difference between written and oral words. But today the line separating libel from slander is often not so easy to draw. Perhaps the best generalization is that libel is expressed either in printing or writing or by signs, pictures, gestures and acts, and the slander is expressed by any other means.[8] Apparently the only remaining reason for the distinction results from differing legal requirements as to the damage that must have been sustained because of the defamatory communication. If plaintiff's complaint is based on a libeous publication, he need not allege any damages, for damage will be presumed from proof of the libel.[9] However, when plaintiff's suit is for slander, he must allege and prove special damages unless the slanderous utterances can be made to fit within one of four narrowly defined categories.[10]

Once plaintiff has made out a prima facie case, it is then open to defendant to set up various defenses which include truth, absolute privilege, privilege of reporting public proceedings, fair comment and conditional privilege. It is essential for a proper understanding to keep in mind that each of the above is a separate defense requiring different allegations for its invocation. When the distinction between them is disregarded, this subject becomes inexcusably confused. The scope of the conditional privilege is of immediate concern because it is the basis of the majority's opinion in the *Sullivan* case. To invoke the defense of conditional privilege, defendant must allege facts sufficient to find that the defamatory communication

6. RESTATEMENT, TORTS § 613 (1938).

7. PROSSER, TORTS, 756 (3rd ed. 1964). However, Prosser considers this definition too narrow and would define defamation as "that which tends to injure reputation in the popular sense; to diminish the esteem, respect, goodwill or confidence in which the plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him."

8. 53 C.J.S., *Libel and Slander* § 1 (1948); PROSSER, *supra* note 7 at 770. See § 559.410, RSMo 1959, where criminal libel is defined. Many Missouri cases have held this definition controlling in civil actions for libel, *e.g.*, Coots v. Payton, 365 Mo. 180, 280 S.W.2d 47 (En Banc 1955).

9. But note the growing tendency to require proof of special damages when libel is per quod rather than per se as reflected in the case of Chambers v. Nat'l Battery Co., 34 F. Supp. 834 (W.D. Mo. 1940). For a student note and recent case on this topic see, Parrish, *Libel Per Quod: Special Damages in Missouri*, 28 Mo. L. REV. 660 (1963).

10. PROSSER, *supra* note 7, at 772-80. These four categories are crime, loathsome disease, business or professional unfitness and unchastity.

was made (1) in self defense in reply to statements made by the plaintiff, or (2) bona fide upon any subject matter in which the party communicating had an interest or in reference to which he had a duty, if made to a person having a corresponding interest or duty. Because of the narrow application of the first component, most of the litigation in the area of conditiona privilege involves a determination of what corresponding interests or duties are sufficient to invoke this defense.

If defendant relies on the defense of conditional privilege, part (g) of the *Restatement* may come into the picture for plaintiff is permitted to show that defendant has abused his privilege as a result of malice or excessive statement. If plaintiff's allegations on this issue are believed, defendant's defense of conditional privilege will no longer prevent plaintiff's recovery.

The elements and application of the defense of fair comment differ from the defense of conditional privilege. Fair comment is the right to express an opinion upon matters of legitimate public interest. And it involves only the privilege to *comment upon* or *express an opinion about* a matter of public concern as opposed to the right to make false assertions of fact about that matter. Also, a part of fair comment is the requirement that the facts commented upon must be either true, privileged, or known or available to the recipient.[11] Fair comment is an essential attribute of a democratic society which enjoys the traditions of free speech as does ours. For the very premise upon which such a society is based is a well-informed citizenry capable of making intelligent decisions. Because of this function which fair comment is designed to promote, criticism of public officials and candidates for office has long been an important part of the privilege of fair comment.

Although it is sometimes difficult to distinguish the defenses of fair comment and conditional privilege, the differences are very real and should be maintained. Conditional privilege involves the right to make false assertions of fact which, though defamatory, are not actionable in the absence of actual malice. Fair comment is limited to an expression of an opinion upon true, privileged or known facts which are of genuine public interest. Because of its broader scope, the defense of conditional privilege can be asserted only if the defamatory communication was made in one of the circumstances listed. On the other hand, fair comment may be relied upon by any member of the public.[12]

There are two reasons why the defendants in *New York Times Co. v. Sullivan* could not rely upon the privilege of fair comment although the court mentions only one of them. In the first place, some of the asserted facts in the newspaper advertisement were admittedly erroneous, and were not in any other way privileged. This is the obvious deterrent to the use of the defense of fair comment which the court relies upon in its opinion. A second reason for non-allowance is because the advertisement is not couched in terms of opinion or comment. Instead it reads as an assertion of the existence of the stated facts, and the authorities are in gen-

11. RESTATEMENT, *supra* note 6, at § 606; 1 HARPER & JAMES, THE LAW OF TORTS § 5.28 (1956).
12. HARPER & JAMES, *supra* note 11.

eral agreement that the defendant must suffer the consequences for failing to demonstrate that he is merely expressing an opinion.[13]

As mentioned above, the defense of fair comment has always been available to defendants in a suit for defamation brought by a public official (or other public character) if the component elements of that defense can be proven. However, a majority of courts have refused to extend the defense of conditional privilege to such occasions.[14] These courts have failed to find any corresponding interest or duty between the defamer and the general public that would justify granting a conditional privilege. The reason most often advanced in support of the majority's position is that to allow false assertions of fact without adequate redress would deter desirable candidates from seeking public office.[15] The courts reason that a public official is more seriously harmed by statements of fact than by comment or opinion, and that the extension of a conditional privilege would make the attainment of a public office much more costly than it now is in terms of loss of reputation.[16]

III. Missouri Cases

Missouri has apparently followed the majority rule and refused to grant a conditional privilege to private citizens when sued for defamation by a public official.[17] While a careful examination of Missouri cases substantiates this general statement, it also reveals the difficulty the Missouri courts have had in arriving at this conclusion and the considerable confusion that continued to exist until the *New York Times Co. v. Sullivan* decision.

First, Missouri has always recognized the limited nature of the true conditional privilege as defined by the corresponding interest or duty test.[18] And, also, Missouri has never hesitated to declare the defense of fair comment applicable in a suit for

13. Eikhoff v. Gilbert, 124 Mich. 353, 83 N.W. 110 (1900).

14. Harper & James, *supra* note 11, at § 5.26; Prosser, Torts 622 (2d ed. 1955); Noel, *Defamation of Public Officers and Candidates*, 49 Colum. L. Rev. 875 (1949); Annot., 110 A.L.R. 412 (1937); Annot., 150 A.L.R. 358 (1944).

15. Prosser, *supra* note 14.

16. Noel, *supra* note 14, at 894. For other arguments against extension of the privilege see Veeder, *Freedom of Public Discussion*, 23 Harv. L. Rev. 413 (1910).

17. Noel, *supra* note 14, at 896. Hallen, *Fair Comment*, 8 Texas L. Rev. 41, 65 (1929-30): "Mis-statement of fact may not be privileged. But the cases are very liberal in declaring that statements are comments, and practically all the appellate decisions in recent years are in favor of the defendant." See also Annot., 110 A.L.R. 412, 420 (1937).

18. In *Garey v. Jackson* 197 Mo. App. 217, 229, 193 S.W. 920, 922 (St. L. Ct. App. 1917) the court declared, "It is the law in this state that before the defense of qualified privilege is available it must appear that the statements made by the defendant were made in the discharge of some duty, either public or private, either legal, moral, or social, to a person or persons having a corresponding interest or duty, and were spoken in connection with and were relevant and germane to some matter involving such an interest or duty, and that the words were spoken in the interest of or for the protection thereof." For Missouri cases adopting this statement of the law see Rauch v. Gas Service Co., 241 Mo. App. 976, 235 S.W.2d 420 (Spr. Ct. App. 1950); Perdue v. Montgomery Ward & Co., 341 Mo. 252, 107 S.W.2d 12 (1937); Fisher v. Myers, 339 Mo. 1196, 100 S.W.2d 551 (1936); Sitts v. Daniel, 360 Mo. 811, 284 S.W. 857 (St. L. Ct. App. 1926).

defamation brought by a public official if the comment is upon true or privileged facts and has not been made maliciously.[19]

Missouri courts have too often been guilty of failing to adequately distinguish the defenses of fair comment and conditional privilege and as a result it is often difficult to determine whether the court has granted defendant a conditional privilege or only the right of fair comment in a suit brought by a public official. In some instances the court has found the presence of actual malice and has thus declined to determine which defense is applicable as both may be defeated by a showing of bad faith on the part of the publisher. And to further complicate matters, some courts that obviously have the distinction well in mind have carelessly referred to fair comment as the qualified or conditional privilege of fair comment.[20] While this language is technically correct (as fair comment may be defeated by a showing that the facts commented on were false or the comment was maliciously made), it is confusing and should be avoided to clarify the decisions.

The Missouri decision that has most ably distinguished the two defenses is the case of *Cook v. Pulitzer Pub. Co.*[21] In this case the supreme court declares:

> We think there is good reason for recognizing the distinction thus made between the law applicable to the defense of privileged communications and that of privileged comment, making the privilege broader in the former than in the latter. In the former, the communication is usually made under a sense of duty and to one person or a limited number of persons. The privilege of comment, on the other hand, while of the highest importance to the public welfare, is not made under a sense of duty, but is purely voluntary, . . .[22]

Because the court finds that defendant is entitled to rely upon the defense of fair comment, it is not forced to determine whether defendant newspaper could properly invoke the defense of conditional privilege in this suit brought by the Secretary of State. However, by way of dictum, the court inferentially rejects conditional privilege, requiring that the statements must have been true to be privileged. This eliminates conditional privilege, for as we have seen, that defense is based upon the right to make false statements in the absence of actual malice.

An early case which purports to have been the first Missouri case to consider

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19. See, *e.g.*, Kleinschmidt v. Bell, 353 Mo. 516, 183 S.W.2d 87 (1944); McClung v. Pulitzer Pub. Co., 279 Mo. 370, 214 S.W. 193 (En Banc 1919); Cook v. Pulitzer Pub. Co., 241 Mo. 326, 145 S.W. 480 (1912); Branch v. Publisher: George Knapp & Co., 222 Mo. 580, 121 S.W. 93 (1909).

20. See, *e.g.*, Kleinschmidt v. Bell, *supra* note 19, at 528, 186 S.W.2d at 92 where the Supreme Court found that defendant could properly assert the defense of fair comment and justified its holding by stating:

> "By becoming a candidate he offered his character and fitness for office to the public view. Any discussion of his qualifications, especially his previous record in office, was qualifiedly privileged in the absence of false statement and malice."

21. Cook v. Pulitzer Pub. Co., *supra* note 19. This case involved a newspaper article charging that plaintiff, while Secretary of State, failed to have a private bank owned by a political friend examined, and permitted it to remain open after it was insolvent. The court held that the newspaper was privileged to comment upon true facts of public interest.

22. Cook v. Pulitzer Pub. Co., *supra* note 19, at 363, 145 S.W. at 492.

the specific problem seems to put Missouri squarely within the majority in the denial of a conditional privilege to an individual when sued by a public official for defamation. This is the case of *Smith v. Burrus*[23] which quotes at length from a Michigan case holding that though the qualifications of a candidate for public office are the proper subject for comment, the publication of falsehood against such candidate is wrong and ought to be punished.[24] The *Smith* case dealt with defamatory remarks made by one voter to a limited number of his fellow voters. So the court, if it had been so inclined, could have found a corresponding interest or duty sufficient to sustain the defense of conditional privilege without unduly stretching the corresponding duty or interest test.[25]

An excellent example of the confusion that can result from a failure to properly distinguish the defenses of conditional privilege and fair comment is the case of *Zorn v. Cox*.[26] A candidate for public office brought suit against a newspaper for an alleged defamatory publication. Here the court held the publication was a comment upon the public policy of a public official and thus privileged because circumstances obtained "with respect to a right or duty to communicate to others what, of right, they ought to know, even though it is not a legal, but only a moral or social duty of imperfect obligation."[27] While the latter portions of this opinion indicate that the court intended to grant only the privilege of fair comment and not a conditional privilege, the paragraph in the *Zorn* case from which the above passage was taken has been cited as authority for the granting of a conditional privilege.[28]

An interesting problem is whether or not a newspaper could ever properly invoke the defense of conditional privilege prior to the *New York Times Co. v. Sullivan* decision. The answer to the problem, of course, depends upon the existence of a corresponding duty or interest between the publisher and the general public. The case of *Merriam v. Star-Chronicle Pub. Co.*[29] purports to grant a conditional privilege to a newspaper, but a careful reading of the case reveals that only the defense of fair comment was granted. In *Morris v. Sailer*[30] the court spe-

23. 106 Mo. 94, 16 S.W. 881 (1891).
24. Wheaton v. Beecher, 66 Mich. 307, 33 N.W. 503 (1887).
25. *Accord*, Epps v. Duckett, 284 Mo. 132, 223 S.W. 572 (1920) ("personal character and official fitness were legitimate subjects of comment within the confines of the truth"); McClung v. Pulitzer Pub. Co., 279 Mo. 370, 214 S.W. 193 (En Banc 1919) ("The important fact is that the defendant made no substantial misstatement of fact as to what the public official did."); Walsh v. Pulitzer Pub. Co., 250 Mo. 142, 157 S.W. 326 (1913) ("a lie is never privileged"); Morris v. Sailer, 154 Mo. App. 305, 134 S.W. 98 (K.C. Ct. App. 1911) ("Must keep within the bounds of truth. There is no privilege in falsehood").
26. 318 Mo. 112, 298 S.W. 837 (1927).
27. Zorn v. Cox, *id.* at 118, 298 S.W. at 840.
28. Lee v. W. E. Fuetterer Battery & Supplies Co., 323 Mo. 1203, 1235, 23 S.W.2d 46, 61 (1929); Merriam v. Star-Chronicle Pub. Co., 335 Mo. 937, 942, 74 S.W.2d 592, 595 (1934). However, neither of these cases dealt with suits brought by a public official or a candidate for office. Note also that the *Merriam* case actually grants the defense of fair comment although the court refers only to the defense of conditional privilege.
29. Merriam v. Star-Chronicle Pub. Co., *supra* note 28.
30. Morris v. Sailer, *supra* note 25.

cifically answered the defendant newspaper's contention that the newspaper owed a duty to the public which justified granting the defense of conditional privilege by admitting that such a duty did exist but denying that it was of sufficient intensity to entitle the newspaper to the privilege of printing false statements. If the public's interest in the election of public officials is not considered of sufficient importance to justify a newspaper's falsehoods, it would seem that a newspaper could never establish a corresponding duty or interest between itself and the general public which would entitle it to use the defense of conditional privilege. But, the Supreme Court of the United States granted a conditional privilege to the *New York Times* without even considering this problem. Now the question becomes how far beyond the public official cases will a newspaper be allowed to establish the requisite corresponding duty or interest between itself and the public.

The case of *State ex rel. Douglas v. Reynolds*[31] illustrates another group of cases that must be distinguished from those previously noted. In this case, a letter to the St. Louis complaint board complaining of a city employee was held to be qualifiedly privileged in the absence of malice. Although the case granted a conditional privilege to a defendant in a suit for defamation brought by a public official, it is not in conflict with other Missouri decisions. This is because the allegedly defamatory communication was directed only to a governmental agency which had a very real interest in the inefficiency of city employees.[32]

For a Missouri case that very ably discusses the entire area of conditional privilege and fair comment, the reader is referred to *Warren v. Pulitzer Pub. Co.*[33] Though the case does not seem to turn upon it, the court has correctly and concisely distinguished the two defenses and has followed the majority rule declining to grant a conditional privilege to a defendant in a suit for defamation brought by a public official.

IV. Conclusion

The immediate significance of the *New York Times Co. v. Sullivan* decision is obvious. The Supreme Court has chosen this case as a vehicle to announce "a federal rule, binding on state courts, which prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with actual malice."[34] This decision necessitates a change in Missouri law with regard to defamatory actions brought by public officials, and demands that a conditional privilege be granted where previously only the defense of fair comment had been allowed. It is inevitable that the correctness of the Court's decision should be questioned in an area as controversial and confusing as this one where a proper solution depends upon striking the balance

31. 276 Mo. 688, 209 S.W. 100 (En Banc 1919).
32. See, Conrad v. Allis-Chalmers Mfg. Co., 228 Mo. App. 817, 73 S.W.2d 438 (K.C. Ct. App. 1934).
33. 336 Mo. 184, 78 S.W.2d 404 (1934). The basis of the decision is the qualified privilege of reporting public proceedings—a qualified privilege which is best kept separate and distinct from the true conditional privilege.
34. Annot., 95 A.L.R.2d 1450 (1964).

between an individual's right to be free from the threat of defamatory falsehoods and the right and need of society to have free and uninhibited discussion of all public matters.

It would appear that the Court's decision is well supported by reason and authority. Most legal scholars who have considered this specific problem have concluded that a conditional privilege should be granted on such occasions.[35] States such as Kansas, California and Arizona have granted a conditional privilege to defendants in suits for defamation brought by public officials without any noticeable decline in the quality of public officials.[36] This apparently rebutts the reason usually given for the majority position that the granting of a conditional privilege would discourage able men from seeking public office. The reasons long urged by scholars, a minority of states and now adopted by the Supreme Court for the granting of a conditional privilege in this situation seem more consistent with our democratic principles and our confidence that the ordinary American citizen is capable of making intelligent decisions if properly informed.

Though the case is of considerable importance because of its demand for an immediate change in the law of a majority of states, its greatest significance may not be so apparent. Prosser, in the latest edition of his work on torts, indicates that the *Sullivan* case may be precedent for extending the defense of conditional privilege to other matters of public interest where heretofore courts have been willing to allow only the defense of fair comment. It is Prosser's contention that other areas inviting public attention have previously been decided by analogy to the law which governed political figures. Now, asks Prosser, will the courts continue to find the analogy between public officials and anything else inviting public attention appropriate, thus necessitating a considerable change in the law of defamation.[37] And Prosser's speculation is not without foundation as the Supreme Court's opinion seems to indicate that such a result was intended. For in the course of its opinion, the court has quoted with approval the following passage from the famous Kansas case of *Coleman v. MacLennan*:

> In such a case the occasion gives rise to a privilege, qualified to this extent: anyone claiming to be defamed by the communication must show actual malice or go remediless. This privilege extends to a great variety of subjects, and includes *matters of public concern,* public men, and candidates for office (Emphasis added.).[38]

Thus, it would appear that the *New York Times Co. v. Sullivan* decision dictates the extension of a conditional privilege to all matters of public concern—a decision which is considerably broader than the facts of the case made necessary. If this interpretation is correct, false, defamatory statements may be made concerning anyone or anything submitted to the public for its approval without liability unless made maliciously. This would include teachers, coaches, books and their authors, musical

35. Harper & James, *supra* note 11, at § 526.
36. Noel, *supra* note 14, at 895; Noel, *supra* note 14, at 891.
37. Prosser, *supra* note 7, at 814.
38. 78 Kan. 711, 723, 98 Pac. 281, 285 (1908).

performers, actors, athletes, scientific discoveries, schemes or projects appealing for support, etc.[39]

And if the position of the three concurring judges were ever to become law, the privilege would be even broader. Justices Black, Douglas and Goldberg advocate the granting of an *absolute* privilege to the above occasions. Query: Would these men grant an absolute privilege to all matters of public concern? Their position seems questionable if limited to the public official and candidates for office cases, and intolerable if extended to cases involving other matters of public concern.[40]

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39. Prosser, *supra* note 7, at 813.
40. For a subsequent application of the *New York Times Co. v. Sullivan* decision see Garrison v. State of Louisiana, 379 U.S. 64 (1964).