

Winter 1978

The Unconstitutionality of the Qualified Truth Defense to Libel Actions, 11 J. Marshall J. Prac. & Proc. 259 (1978)

Michael J. Polelle

Follow this and additional works at: <https://repository.law.uic.edu/lawreview>



Part of the [Constitutional Law Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Michael J. Polelle, The Unconstitutionality of the Qualified Truth Defense to Libel Actions, 11 J. Marshall J. Prac. & Proc. 259 (1978)

<https://repository.law.uic.edu/lawreview/vol11/iss2/2>

This Article is brought to you for free and open access by UIC Law Open Access Repository. It has been accepted for inclusion in UIC Law Review by an authorized administrator of UIC Law Open Access Repository. For more information, please contact repository@jmls.edu.

THE UNCONSTITUTIONALITY OF THE QUALIFIED TRUTH DEFENSE TO LIBEL ACTIONS

MICHAEL J. POLELLE*

The supremacy of federal law assures the amenability of even state constitutions to a continuing judicial scrutiny designed to guarantee compliance with the Federal Constitution. The launching of modern constitutional reform at the state level must therefore increasingly take account of the growing barrier reef of federal constitutional law. It appears that article I, section 4 of the 1970 Illinois Constitution has foundered upon that reef.

In adopting this section, the Sixth Illinois Constitutional Convention decided to keep the 1870 constitutional provision that truth shall be a defense in all libel cases if uttered for good motives and justifiable ends, with full knowledge that a year earlier the Illinois Supreme Court had declared the 1870 provision a violation of the first amendment of the United States Constitution.¹ The failure to heed judicial warnings when drafting the 1970 Illinois Constitution has led only seven years later to further doubt about the validity of this qualified truth defense in any libel case. Although at one level this article is a discussion of the constitutionality of the qualified truth defense under current United States Supreme Court decisions, the broader question inevitably involved is whether the 1970 Illinois convention unnecessarily launched article I, section 4 on stormy constitutional seas with the imminent prospect of shipwreck. The ultimate aspect of this broader question is whether there were other alternatives available to the convention which would have offered better prospects for withstanding the first amendment challenge to the validity of article I, section 4.

DEVELOPMENT OF THE QUALIFIED TRUTH DEFENSE

Under English common law, the justification of truth when pleaded as a defense to a defamatory statement had completely contrary results in civil and criminal law. In civil law the defense of truth when proved was an absolute defense to the

* A.B. (Honors), Loyola University; J.D., Harvard Law School; LL.M., The John Marshall Law School. Mr. Polelle is a Professor of Law at The John Marshall Law School. The author wishes to acknowledge the student research assistance of Mr. Mark Moynihan.

1. *Farnsworth v. Tribune Co.*, 43 Ill. 2d 286, 253 N.E.2d 408 (1969).

defamation case,² while in criminal law truth was not recognized as a defense to defamation.³ This antithetical result was due to different policy premises. The theory of absolute defense in civil law was based on the premise that the action of defamation protects only against injury to the actual character of the plaintiff. Therefore, a defamatory statement which is true does no harm to actual character because the plaintiff has merely suffered the deflation of a false reputation to the public eye.⁴ On the other hand, the premise of the criminal law has traditionally been that a defamatory statement is apt to cause a breach of the peace and therefore should be punished regardless of its truth.⁵ Indeed, the stinging truth of a defamatory statement may even more readily goad the defamed victim into a breach of the peace.

The Illinois Constitutions of 1818 and 1848 did not seriously depart from this common law tradition. Instead they simply provided generally that "every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty" and that "truth" may be given in evidence in the course of prosecutions for the publication of papers investigating public officers or in prosecutions where the matter published was proper for public information.⁶ The common law was apparently altered only to the extent that truth became a defense in a rather limited range of criminal prosecutions relating to public officials or matters of public interest. Thus, even as early as 1818 and 1848, the peculiarly American notions of freedom of speech and press had begun to supplant the goal of the criminal law to eliminate potential causes of public disorder even at the price of forfeiting truth.

The Illinois Constitution of 1870 substantially modified the common law truth defense by providing in article II, section 4:

Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty; and in all trials for libel, both civil and criminal, the truth when published with good motives and for justifiable ends shall be a sufficient defense.⁷

2. *Ogren v. Rockford Star Printing Co.*, 288 Ill. 405, 417, 123 N.E. 587, 591-92 (1919).

3. *People v. Fuller*, 238 Ill. 116, 136, 87 N.E. 336, 342 (1901).

4. "The law will not permit a man to recover damages in respect of injury to a character which he does not, or ought not to possess." *McPherson v. Daniels*, 109 Eng. Rep. 448 (K.B. 1829). Reasons later suggested are that a plaintiff with a bad character lacks standing, that a defendant renders a public service in exposing a bad character, and that public policy demands that truth not be fettered by fear of lawsuits. *W. PROSSER, LAW OF TORTS* § 116, at 797 (4th ed. 1971).

5. *R. PERKINS, CRIMINAL LAW* 418 (2d ed. 1969).

6. ILL. CONST. art. XIII, § 24 (1848); ILL. CONST. art. VIII, § 23 (1818).

7. ILL. CONST. art. II, § 4 (1870). "It was adopted with little debate or discussion and with no explanation for the changes effected in the

The Illinois Constitution of 1870 created a new and qualified defense in all libel cases, requiring the defendant to prove not only that the allegedly defamatory statement was true, but that it was also uttered for good motives and justifiable ends. Where no truth defense of any kind had existed at common law in criminal cases, the Illinois Supreme Court held the qualified truth defense now applied.⁸ And while in civil libel cases truth had previously been an absolute defense, in 1911 the Illinois Appellate Court concluded in *LaMonte v. Kent*⁹ that, under the 1870 constitution, truth would be a defense in civil libel cases only where "the publication was made with good motives and for justifiable ends."

The application of the 1870 constitution to civil libel cases met with an alternative interpretation in the 1914 case of *Tilton v. Maley*.¹⁰ Although the court was reluctant to discuss the alleged libel in detail, the plaintiff claimed that the defendant had published the "vices of youth long abandoned and forgotten."¹¹ Despite the provision in the 1870 Illinois Constitution and the uncited case of *LaMonte v. Kent*,¹² the appellate court affirmed the judgment of the trial court, which had permitted truth as an absolute defense. The appellate court in *Tilton* recognized that the sole issue in the case was whether truth was a sufficient defense or whether the defendant must further show that the truth was published with good motives and justifiable ends. In justifying its decision the appellate court was confronted with the difficult task of explaining how the earlier absolute defense of truth in civil libel cases had survived the plain language of article II, section 4 of the 1870 constitution.

The court found the solution to its dilemma by construing article II, section 4 as creating a *minimal* standard of the truth defense which must be accorded a defendant. This minimal protection to defendants who uttered truth in good faith, however, did not prevent the legislature or the courts from broadening the defense to an absolute one which would protect all defendants regardless of motives or ends. Having thus complied with minimal constitutional requirements, the traditional absolute de-

1848 provisions." G. BRADEN & R. COHN, *THE ILLINOIS CONSTITUTION* 19 (1969). As of 1964 there were 26 jurisdictions besides Illinois which made truth a defense if published with good motives and for justifiable ends. *Garrison v. Louisiana*, 379 U.S. 64, 71 n.7 (1964).

8. *People v. Fuller*, 238 Ill. 116, 87 N.E. 336 (1910); *accord*, *People v. Spielman*, 318 Ill. 482, 149 N.E. 466 (1925); *People v. Taylor*, 279 Ill. 481, 117 N.E. 62 (1917).

9. 163 Ill. App. 1 (1911).

10. 186 Ill. App. 307 (1914).

11. *Id.* at 313.

12. 163 Ill. App. 1 (1911).

fense of the common law was still operative in civil libel cases and incidentally provided more than the minimal protection by shielding all defendants who told the truth, even those who did so with bad motives and for unjustifiable ends.

Forced to explain why the Illinois Supreme Court had earlier held that the defendant must prove the qualified truth defense in criminal libel cases, the *Tilton* court noted that the Illinois criminal statutes specifically provided that truth was a defense to criminal libel only if qualified by good motives and justifiable ends. The appellate court concluded that the Illinois legislature could likewise limit the truth defense in civil libel cases, but that until the legislature so specified, the 1870 Illinois Constitution did not change the absolute truth defense in civil cases.

The tenuous reasoning of the *Tilton* case is apparent. If the purpose of the 1870 constitutional drafters had not been to change the common law absolute truth defense in civil cases, then the language relating to good motives and justifiable ends was surplusage. It would, after all, be a rather curious constitutional provision which implicitly preserved the absolute defense of truth in civil cases by expressly conditioning the defense of truth on the presence of good motives and justifiable ends. The *Tilton* court's attempt to distinguish the contrary interpretation of the Illinois Supreme Court in the criminal libel cases fares no better. In those cases, the Illinois Supreme Court was interpreting the requirement of the 1870 Illinois Constitution and was not interpreting criminal statutory law. According to the Illinois Supreme Court, the 1870 constitution itself required that truth be only a qualified defense in criminal libel cases. But it is unreasonable to interpret the constitution as giving more protection to civil libel defendants than to criminal libel defendants where the constitution itself made no such distinction. What impelled the *Tilton* court toward its decision is not logic but a policy decision: the presumed preference of freedom of speech over the protection of harm to reputation. As the appellate court in *Tilton* clearly stated:

But when we remember that this line of constitutional law [article II, section 4] began in an attempt to give greater liberty of speech, and its whole history down to the present time is to guarantee [sic], as expressed in the title to our provision 'Freedom of speech and publication,' it seems to us judicial legislation to give effect to the provision as abridging freedom of publication by repealing the existing common law, under which truth alone was a sufficient defense.¹³

Five years later the Illinois Supreme Court in *Ogren v. Rockford Star Printing Co.*¹⁴ considered for the first time the

13. 186 Ill. App. at 313-14 (1914).

14. 288 Ill. 405, 123 N.E. 587 (1919).

relevance of the 1870 Illinois Constitution in a civil libel case. For the Illinois Supreme Court in *Ogren*, the defense of truth in libel cases after the 1870 constitution was as qualified by good motives and justifiable ends in civil cases as it was in criminal cases.¹⁵ The common law absolute defense of truth in civil cases did not, after all, survive the 1870 constitution but rather was reduced to a qualified truth defense. The Illinois Supreme Court in *Ogren* based its conclusion on an identical provision of the Nebraska Constitution which had been held by Nebraska courts to require that a defendant in a civil libel case not only allege and prove the truth of the defamatory statement, but also allege and prove that the statement, if true, was uttered with good motives and justifiable ends. A puzzling aspect of the *Ogren* case is its assertion that the application of the 1870 constitution to a civil libel case was one of first impression in Illinois. The Illinois Supreme Court showed no awareness of the supportive *LaMonte* case, decided eight years previously, nor of the contrary *Tilton* case, decided five years earlier.

Despite the definitive nature of the Illinois Supreme Court opinion in *Ogren*, the spirit of the *Tilton* case was not fully put to rest. *Schlaf v. State Farm Mutual Auto Insurance Co.*¹⁶ is one of several Illinois appellate decisions which appear to have ignored the *Ogren* conclusion that the truth defense is qualified in civil libel cases by reason of the 1870 constitution. In the course of affirming a directed verdict for the defendant in an action for slander, the appellate court stated, "[i]t is of course true that in all cases where an action is brought in slander or libel, proof of the truth of the statement is an absolute bar and that such evidence as to truth can only be properly introduced where there has been a plea of justification."¹⁷ It is this inattention to the 1870 constitution that is the troublesome aspect of the *Schlaf* case. It must be conceded that the 1870 constitution does not expressly change the absolute nature of the common law truth defense in slander cases. The 1870 constitution, as does the 1970 constitution, discusses the qualified truth defense only in terms of "all libel cases."¹⁸ Yet the *Schlaf* court seems

15. *Id.* at 416, 123 N.E. at 591 (1919).

16. 15 Ill. App. 2d 194, 145 N.E.2d 791 (1957). See also *United States Fidelity & Guar. Co. v. Hollerich & Walgenbach Co.*, 22 Ill. App. 3d 156, 319 N.E.2d 280 (1974); *Delsis v. Sepsis*, 9 Ill. App. 3d 217, 292 N.E.2d 138 (1972); *Mitchell v. Peoria Journal-Star, Inc.*, 76 Ill. App. 2d 154, 221 N.E.2d 516 (1966). Cf. ILL. REV. STAT. ch. 128, § 3 (1975), which since 1874 has stated that in slander or libel actions "it shall be competent for the defendant to establish the truth of the matter charged by a preponderance of testimony."

17. 15 Ill. App. 2d at 206, 145 N.E.2d at 796.

18. ILL. CONST. art. I, § 4; ILL. CONST. art. II, § 4 (1870). But see *Kilbane v. Sabonjian*, 38 Ill. App. 3d 172, 347 N.E.2d 757 (1976), where

to imply that truth would be the same absolute justification in libel cases as it was and is in slander cases. To so imply, however, is to breathe life into the repudiated *Tilton* analysis.

Based on the higher precedential value of the *Ogren* case, the orthodox law in Illinois has been that, at least in libel cases, civil or criminal, the burden of proof is on the defendant to prove, first, that the libelous statement was true and, second, if the statement was true, that it was published by the defendant with good motives and justifiable ends.

THE WARNING OF NEW YORK TIMES

In 1964 the case of *New York Times v. Sullivan*¹⁹ complicated the development of libel law under the 1870 Illinois Constitution because henceforth state defamation law would have to comply not only with the mandate of a state constitution, but also with the higher mandate of the first amendment of the United States Constitution. The United States Supreme Court in the *New York Times* decision established that public officials who sued for libel relating to official conduct would have to prove that the defendant published the statement with "actual malice." The term "actual malice" meant that the plaintiff-official must prove either that the defendant knew the defamatory statement was false or at least that the defendant published the defamatory statement with reckless disregard for its truth or falsity. The high standard of actual malice was later extended to public figures and even to matters of public interest.²⁰ Furthermore, the Court in the *New York Times* case clearly indicated that the nature of a state truth defense to a libel charge was equally a matter of first amendment interest subject to Supreme Court review.²¹

The holding of the *New York Times* case logically implies the unconstitutionality of the Illinois qualified truth defense to libel cases under the 1870 Illinois Constitution as interpreted by the Illinois Supreme Court. If a defendant in Illinois were to utter a true but defamatory statement regarding a public official, public figure, or matter of public interest after the *New York*

the qualified truth defense of article I, section 4 of the 1970 Illinois Constitution was apparently used as one ground for affirming dismissal of a radio slander suit against the defendants, although the defendants urged only absolute truth as a defense.

19. 376 U.S. 254 (1964).

20. *Curtis Publ. Co. v. Butts*, 388 U.S. 130 (1967) (public figure); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971) (public interest). *But see Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (implicitly overruling *Rosenbloom* and limiting *New York Times* to public officials or public figures).

21. 376 U.S. at 278, 286.

Times case, that defendant would be exposed to liability for civil or criminal libel under the 1870 constitution if the truth were uttered without good motives or justifiable ends. Yet such a possibility is in direct contradiction to the holding of *New York Times*, which requires that such a defendant's culpability be measured strictly by the mental yardstick of actual or reckless knowledge of falsity and holds that any additional requirements of good motives and justifiable ends are unconstitutional infringements upon the defendant's first amendment rights. The Court's balancing of reputation against first amendment freedom resulted in knowledge and recklessness becoming the only factors which would force first amendment considerations to yield to competing interests in reputation.

In another 1964 case, *Garrison v. Louisiana*,²² the district attorney of Orleans Parish in Louisiana held a press conference during which he issued critical statements against eight state judges, generally disparaging their judicial conduct. State criminal defamation charges were brought against the defendant district attorney and he was subsequently convicted of criminal defamation. The United States Supreme Court reversed the conviction and held that the *New York Times* requirement of actual malice limited not only the ability of a public official to bring a civil libel action but also the ability of a state to bring criminal defamation charges for defamatory criticism of public officials. The Court expressly held that the Louisiana limitation of the truth defense in criminal libel cases to utterances published with good motives and for justifiable ends was a violation of the first amendment since such a qualified truth defense, based as it is on the ill will of the defendant, exceeds the scope of actual malice as restrictively defined in *New York Times*.²³ The holding may extend to a broad category of civil libel cases since Justice Brennan, writing for the Court, generally noted: "Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned."²⁴ The Court, however, carefully left open the further question of whether a qualified truth defense would be similarly declared violative of the first amendment in a "purely private libel," one "totally unrelated to public affairs."²⁵

The predictable effect of the *New York Times* and *Garrison* cases upon the validity of article II, section 4 of the 1870 Illinois Constitution was not long in coming. The Illinois Appellate

22. 379 U.S. 64 (1964).

23. *Id.* at 69-74.

24. *Id.* at 74.

25. *Id.* at 72 n.8.

Court first recognized the applicability of the *New York Times* principle by using it, among other grounds, to affirm the dismissal of a civil libel complaint filed by a councilman and businessman against various defendants for publishing false accusations of the plaintiff's tax delinquencies.²⁶

Not until the Illinois Supreme Court decision of *Farnsworth v. Chicago Tribune Co.*²⁷ did the inherent constitutional incompatibilities of article II, section 4 and the first amendment become unavoidable. Farnsworth, an osteopathic physician, brought a civil libel action against the Chicago Tribune Company and against a feature writer of the Chicago Tribune for a series of newspaper articles which allegedly libelled the plaintiff by imputations of medical quackery, thereby destroying the plaintiff's medical practice. Based on his understanding of the *New York Times* principle, the trial judge refused to charge the jury with an instruction embodying the good motives and justifiable ends language of article II, section 4 of the 1870 Illinois Constitution. The defendants were instead allowed to argue that the truth of the statements was a sufficient defense both at common law and under the freedom of speech and press guarantees of both the federal and state constitutions. In the course of affirming the jury verdict for defendants, the Illinois Supreme Court concluded that if the plaintiff is a public person or the published articles contain matters of public interest, the first amendment, as interpreted by *New York Times*, prohibits the invocation of the qualified truth defense.²⁸ Finding that the topic of medical quackery was an issue of critical public concern, the court ultimately held that the *New York Times* test was applicable and thus an instruction based upon article II, section 4 was properly and constitutionally refused.²⁹

26. *Grabavoy v. Wilson*, 87 Ill. App. 2d 193, 230 N.E.2d 581 (1967). The special concurring opinion rejected the majority's reliance on the *New York Times* case: "That opinion was written in the light of the exigencies of the social ills of our times and much of the opinion as expressed must be considered dicta." *Id.* at 205, 230 N.E.2d at 587.

27. 43 Ill. 2d 286, 253 N.E.2d 408 (1969).

28. It is therefore clear that the article II, section 4 provisions of the Illinois constitution that truth is a defense in libel action only when published with good motives and for justifiable ends [*Ogren v. Rockford Star Printing Co.*, 288 Ill. 405, 123 N.E. 587] when applied to defamation of "public officials" or "public figures", is incompatible with the Supreme Court's interpretation of the scope of the first amendment guarantees of the Federal constitution. Accordingly, if the plaintiff is a "public figure" or if, as hereinafter discussed, the articles contain matters of public interest and concern so that the Federal constitutional safeguards apply, the trial court was correct in refusing to give the plaintiff's instruction based upon section 4 of article II.

Id. at 290, 253 N.E.2d at 410.

29. It is interesting to note that since the *Farnsworth* decision the United States Supreme Court has retreated from its position that matters

THE 1970 ILLINOIS CONSTITUTIONAL CONVENTION

By the time of the 1970 Illinois Constitutional Convention, both the United States Supreme Court and the Illinois Supreme Court had made it abundantly clear that the qualified truth defense of the 1870 Illinois Constitution could not survive the first amendment, at least as applied to libel cases involving matters of public interest or libel actions brought by public officials or public figures. Despite its awareness of these developments, the 1970 Illinois convention reenacted almost verbatim the former article II, section 4 as the new article I, section 4 of the 1970 Illinois Constitution. As finally passed, article I, section 4 of the 1970 constitution provides:

All persons may speak, write and publish freely, being responsible for the abuse of that liberty. In trials for libel, both civil and criminal, the truth when published with good motives and for justifiable ends, shall be a sufficient defense.³⁰

What requires explanation is how the 1970 convention was persuaded to permit the retention of the qualified truth defense in all libel cases when both the United States Supreme Court and the Illinois Supreme Court had prohibited such a defense

of public interest are subject to the *New York Times* standard. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (see text accompanying note 41 *infra*), the Court implicitly overruled its previous extension of the actual malice requirement in the plurality opinion of *Rosenbloom v. Metro-media, Inc.*, 403 U.S. 29 (1971).

The extension of the *New York Times* test proposed by the *Rosenbloom* plurality would abridge this legitimate state interest to a degree that we find unacceptable. And it would occasion the additional difficulty of forcing state and federal judges to decide on an *ad hoc* basis which publications address issues of "general or public interest" and which do not—to determine, in the words of Mr. Justice Marshall, "what information is relevant to self-government." *Rosenbloom v. Metro-media, Inc.*, 403 U.S., at 79. We doubt the wisdom of committing this task to the conscience of judges. Nor does the Constitution require us to draw so thin a line between the drastic alternatives of the *New York Times* privilege and the common law of strict liability for defamatory error. The "public or general interest" test for determining the applicability of the *New York Times* standard to private defamation actions inadequately serves both of the competing values at stake.

418 U.S. at 346. As a result, if the *Farnsworth* case were presented to the Illinois Supreme Court today, it is likely that because *Farnsworth* was a private individual, she would only be required to meet the negligence standard of *Gertz*.

Although the Court in *Gertz* chose to distinguish on its facts *Time, Inc. v. Hill*, 385 U.S. 374 (1967), that case also involved private plaintiffs—private figures who had been thrust into the public spotlight because they had been held captive in their home by escaped convicts. The Court held that because their ordeal was a matter of public interest, the plaintiffs had to prove that the falsity was published with actual malice in order to recover. In light of *Gertz* the precedential value of this case seems equally as imperiled as *Farnsworth*.

30. ILL. CONST. art. I, § 4.

Since the *Farnsworth* decision is based upon the Illinois Supreme Court's interpretation of the Federal Constitution, that decision must be considered unaffected by the reenactment of Section 4

in libel cases involving matters of public interest or in which public officials or public figures were the plaintiffs. By a vote of eleven to four, a majority of the Bill of Rights Committee, despite its awareness of the *New York Times* decision and the *Farnsworth* decision, preferred "to make no change in the circumstances in which truth would be a defense."³¹ The reasoning behind the successful majority proposal to retain the qualified truth defense was revealed during the floor debates when a minority of the Bill of Rights Committee, led by the chairman, Delegate Elmer Gertz, unsuccessfully offered alternate proposals in place of the majority's retention of the 1870 qualified truth provision. The main defenses of the retention proposal revolved around considerations of individual rights and the significance of the *New York Times* case. The argument was made that retention of the 1870 qualified truth defense would somehow better protect individual freedom and individual rights than any of the minority proposals. This reasoning was perhaps best summarized by Delegate Thomas C. Kelleghan:

Now let's not kid ourselves as to what's going on here.

This is a traditional and a sound and a fundamental right, and this effort to rip these defenses out of our basic liberties is disturbing, and every one of you should be disturbed at this point.³²

Such support of the qualified truth defense as a fundamental individual right carries a one-sided assumption that only plaintiffs would be affected by the proposal. However, in a libel case, individuals can be found on either side of the case. Certainly the qualified truth defense potentially presents a barrier more easily overcome by an individual plaintiff than the more potent absolute truth defense. Yet this slightly greater advantage offered an individual plaintiff would render correspondingly less protection to an individual defendant who had to rely on a qualified truth defense rather than on an absolute truth defense.

The majority further argued that the *New York Times* principle and its progeny could somehow become inapplicable. Delegate Arthur T. Lennon suggested various ways by which the *New York Times* principle could be neutralized:

So, I suggest to you (1) that those cases applied only to a given set of facts; (2) the Supreme Court of the United States,

in the 1970 Constitution. By refusing to alter the language of Section 4, the Convention left the second sentence of Section 4 to apply to libel cases not inconsistent with the *Farnsworth* holding and the *New York Times* case and its progeny.

ILL. ANN. CONST. art. I, § 4, *Commentary* at 296 (Smith-Hurd 1970).

31. RECORD OF PROCEEDINGS, SIXTH ILL. CONSTITUTIONAL CONVENTION, vol. 6 at 23, 25 (1969-70) [hereinafter cited as PROCEEDINGS]. *Garrison v. Louisiana*, 379 U.S. 64 (1964) was not cited in the report of the Bill of Rights Committee nor discussed by name in the convention debates.

32. 3 PROCEEDINGS, *supra* note 31, at 1410.

like others, can always change, reverse, and modify; and (3) what we in the majority of this committee are attempting to do is to retain some local protection on a subject of great importance.³³

This attempt to dismantle *New York Times* and *Farnsworth* by limiting these cases to their facts disregards the intentionally broad holdings of both cases. The difficulty of the traditional Illinois qualified truth defense was not only its application to a particular set of facts, but also its unconstitutional application to a whole category of cases involving, at the very least, public officials, public figures, and matters of public interest. The desire to limit cases to their facts would, if rigorously pressed to its ultimate conclusion, stymie the development of both the common law and constitutional law. Without precedential value beyond a specific factual context, legal principles would be relitigated to a judicial choking point. The further suggestion that in some way the United States Supreme Court might reverse its posture can only be interpreted as hopeful whimsy, because there were no dissenting opinions in *New York Times* and the concurring opinions thought the majority did not go far enough in protecting defendants against libel suits by public officials.³⁴ Nonetheless, the majority of the Bill of Rights Committee was able to convince their convention colleagues to retain the qualified truth defense in the 1970 constitution, even though it had been declared unconstitutional in the cases of its most common application, those involving public affairs.

Delegate Gertz presented alternatives which would have taken into account the substantial involvement of the United States Supreme Court in areas which had formerly been considered matters of only state concern. Two minority proposals were offered, either of which would have accommodated the holdings of *New York Times* and *Farnsworth*. The first proposal of the committee minority was a general one guaranteeing freedom of the press and of speech: "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty."³⁵ The purpose of this proposal was to avoid embedding the specifics of libel law in the new state constitution. Delegate Dawn C. Netsch, who unsuccessfully moved to substi-

33. *Id.* at 1408.

34. "We would, I think, more faithfully interpret the First Amendment by holding that at the very least it leaves the people and the press free to criticize officials and discuss public affairs with impunity." 376 U.S. 254, 296 (1964) (Black & Douglas, JJ., concurring). "In my view, the First and Fourteenth Amendments to the Constitution afford to the citizen and to the press an absolute, unconditional privilege to criticize official conduct despite the harm which may flow from excesses and abuses." *Id.* at 298 (Goldberg & Douglas, JJ., concurring).

35. 6 PROCEEDINGS, *supra* note 31, at 139 (Minority Proposal 1C(A)).

tute this minority proposal for the majority committee retention proposal, observed:

I would hate to see us caught in a position where, either affirmatively or by negative implication, we had written any of the current state of the law into our constitution, so that no matter what the United States Supreme Court did in the future we would not have any flexibility . . . we would not be able to change our own position.³⁶

The second proposal offered by Delegate Gertz on behalf of the committee minority would have provided that truth shall not be a defense in libel actions involving only private matters unless published with good motives and for justifiable ends.³⁷ This proposal would have answered certain concerns of the committee majority. Those in favor of retention had continually asserted what was felt to be a self-evident proposition: truth should not be a defense in situations where the past misdeeds of a private individual are dredged up after having been put to rest for many years.³⁸ Furthermore, this compromise proposal would have accommodated the rulings of the United States Supreme Court and the Illinois Supreme Court in regard to affairs and plaintiffs of public interest, while at the same time retaining the traditional qualified truth defense for purely private libels.

The key argument offered against the second alternative was the fear expressed by Delegate Leonard N. Foster that if the courts should decide to "go back toward what we [had] in 1870, we will not have embalmed and interred in our constitution what appears to be the current thinking in the state of the law, which as far as we can tell is in an extreme state of flux."³⁹ The majority of the Bill of Rights Committee seemed convinced that *New York Times* and *Farnsworth* were passing judicial aberrations. A rephrased version of this second alternative offered by Delegate Netsch went down to defeat along with the first alternative.⁴⁰

36. 3 PROCEEDINGS, *supra* note 31, at 1406. Compare the remarks of Delegate Helen C. Kinney:

I will support the minority position in this matter. I would have preferred the simple language of the Federal Constitution, because I feel that it does not preclude actions of libel or slander nor the provisions for affirmative defenses thereto. To single out libel without talking about slander, and to provide specific remedies for it seems to me inappropriate in a document which should be aimed only at basic guarantees.

Id. at 1408. Delegate Robert L. Butler in fact submitted an undebated individual proposal modelled after the first amendment: "No law shall be made abridging the freedom of speech, or the press." *Id.* at 3080.

37. 6 PROCEEDINGS, *supra* note 31, at 139 (Minority Proposal 1C(B)).

38. 3 PROCEEDINGS, *supra* note 31, at 1400.

39. *Id.* at 1413.

40. 1 PROCEEDINGS, *supra* note 31, at 308-09.

Although the proposal was never debated on the floor of the conven-

Unfortunately, an unyielding majority refused to accept the unconstitutionality of the 1870 qualified truth defense or the practical alternatives suggested by the committee minority. Recent Supreme Court developments have not made the obstinacy of the majority's action any less embarrassing. In fact, had the second Gertz minority proposal been accepted, it too would now be rendered unconstitutional in light of the evolving federal law since 1970. Perhaps the ultimate irony lies in the fact that it was Elmer Gertz himself who precipitated the Supreme Court case which has made his second minority proposal constitutionally questionable.

THE DEVELOPING FEDERAL LAW AND THE PRIVATE LIBEL PLAINTIFF

Four years after the 1970 Illinois Constitutional Convention and the adoption of article I, section 4, the United States Supreme Court issued its decision in *Gertz v. Robert Welch, Inc.*⁴¹ This decision has done nothing to alleviate the infirmities of article I, section 4 under the first amendment and has instead probably increased the extent of those constitutional infirmities.

In the *Gertz* case, Elmer Gertz, who had been chairman of the Bill of Rights Committee at the 1970 Convention, filed a civil libel action in federal district court for certain defamatory state-

tion, Delegate Henry T. Green offered a proposal to provide simply that the defense of truth would be a sufficient defense in all libel cases without a requirement that the defendant prove good motives and justifiable ends. 3 PROCEEDINGS, *supra* note 31, at 2959 (No. 269).

One of the more interesting aspects of the debates on article I, section 4 was the implicit resurrection of the *Tilton* interpretation of the Illinois qualified truth defense. Delegate Malcolm S. Kamin observed at the outset of debate:

As I understand it, Mr. Foster, this provision at least, as I read does not say that the truth shall never be a complete defense to a libel. It merely says that the truth, when published with good motives and for justifiable end [sic], shall always be a sufficient defense. Isn't that correct? Isn't this really a minimum statement of what the defense "shall always be" rather than a statement of what the defense "shall never be"?

MR. FOSTER: I suppose we could interpret it that way, but the courts I don't think—

MR. KAMIN: I don't think the case has ever come up to the courts in that way. I don't think any of the cases that you have cited have said that. As a result, it seems to me that this whole issue really is a tempest in a teapot, but I'll save that for the debate.

Id. at 1400.

However, Delegate Kamin did not participate in the subsequent debate on article I, section 4. Neither he nor the other delegates seemed aware of the *Tilton* decision which had anticipated his interpretation some 63 years earlier. The only answer to Delegate Kamin's interpretation was the *Ogren* case which had indirectly repudiated the reasoning of the *Tilton* case without ever mentioning *Tilton* by name.

41. 418 U.S. 323 (1974). See generally Note, *Gertz v. Robert Welch, Inc.: Constitutional Privilege and the Defamed Individual*, 8 J. MAR. J. 531 (1975).

ments appearing in *American Opinion*, a monthly periodical of the John Birch Society. After a jury verdict for the plaintiff, the district court decided that the *New York Times* standard applied because, even though plaintiff was neither a public official nor a public figure, the publication dealt with a matter of public interest. As a result, the trial court entered a judgment for the defendant notwithstanding the verdict on the ground that plaintiff's proof had not met the standard of *New York Times*.

When the case reached the Supreme Court, Justice Powell, delivering the opinion of the Court, held that while the states were constitutionally obligated under the first amendment to require that private individuals prove some fault in civil suits against the publishers or broadcasters of injurious defamatory falsehoods, private plaintiffs need not bear the greater burden of *New York Times*, regardless of the subject matter of the libel. Prior common law was thus in violation of the first amendment to the extent that it allowed libel to be proved without fault. The private individual suing for libel must at the very least show that the defendant uttered the defamation in a negligent manner, while a public official or public figure would still have to meet the higher test of actual malice under the *New York Times* case in order to prove liability. Finally, the Court held that a private plaintiff is constitutionally obligated to meet the *New York Times* definition of actual malice only in the event that punitive damages are sought.

A critical issue is whether the Illinois qualified truth defense has been completely put to rest by the reasoning in the *Gertz* case. Under *New York Times* and *Garrison*, the qualified truth defense is unconstitutional when public officials or public figures attempt to rely on it. But if a private plaintiff is now obligated to prove at least negligence in the utterance of the libel, then it would appear equally violative of the first amendment to hold liable a defendant who has communicated a true statement because the truth was not shown to have been published with good motives and justifiable ends. Since the essential element of culpability under *New York Times* is the defendant's knowing or reckless consciousness of falsehood, then the parallel logic of *Gertz* is that the culpability of a defendant accused of libel by a private plaintiff must be based on defendant's lack of reasonable grounds to believe the statement true. However, to find a defendant liable under *Gertz* where the statement was in fact true would be to find liability for carelessness in the air, which Justice Cardozo early established as insufficient to prove negligence at law.⁴²

42. "Negligence in the abstract apart from things related, is surely

Indications in the *New York Times* and *Gertz* cases are that truth, while sometimes damaging, is an important social value to be protected.⁴³ The protection of some falsehood under the fault standards of these cases is the price paid to avoid a chilling effect upon potential speakers of the truth. If it is correct that an essential element of liability under *New York Times* or *Gertz* is the presence of careless or malicious falsehood rather than truth, then article I, section 4 is constitutionally defective not only in that it places the burden of the qualified truth defense on defendants sued by public officials and public figures, but also in the wider range of cases brought by private plaintiffs against publishers or broadcasters. In both of these areas the qualified truth defense leaves impermissibly open the distinct possibility that a defendant can be held liable for a true statement because of bad faith in uttering the truthful statement.

Although it is somewhat unclear whether the *New York Times-Gertz* line of cases is limited to defendants who are newspaper companies and other media defendants, there is authority for the proposition that the implications of *New York Times* and *Gertz* necessarily apply to all defendants and that only the status of the plaintiff is critical under these Supreme Court holdings.⁴⁴ If both individuals and media defendants are protected, then the qualified truth defense is reduced to virtual uselessness. The only remnant of constitutionality would adhere to slander cases not covered by the explicit libel limitations of article I, section

not a tort, if indeed it is understandable at all. . . . Negligence is not a tort unless it results in the commission of a wrong, and the commission of a wrong imports the violation of a right. . . ." *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 345, 162 N.E. 99, 101 (1928) (Cardozo, C.J.) (citation omitted).

43. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) ("The First Amendment requires that we protect some falsehood in order to protect speech that matters."); *New York Times v. Sullivan*, 376 U.S. 254, 270, 279 (1964). See *Hemingway v. Fritz*, 96 Idaho 364, 366, 529 P.2d 264, 266 (1974) ("[F]ritz's [defendant's] motivation as to maliciousness in publishing the material is irrelevant if the material is true.")

44. *Jacron Sales Co. v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1976). *Jacron* involved an action for slander against a former employer for accusations of theft of company property. The court held in a case of first impression throughout the country that *Gertz* applied to both media and nonmedia defendants in both libel and slander actions. The case contains a thorough and thoughtful discussion of the impact of *Gertz* on state defamation laws. See also Anderson, *Libel and Press Self-Censorship*, 53 *TEX. L. REV.* 422 (1975); Brosnagan, *From Times v. Sullivan to Gertz v. Welch: Ten Years of Balancing Libel Law and the First Amendment*, 26 *HASTINGS L.J.* 777 (1975).

Interestingly, if we follow Karl Llewellyn's advice that the law is what officials do, then an examination of *New York Times* reveals that four private defendants as well as the *New York Times* Company reaped the benefit of the new actual malice standard. 376 U.S. at 256, 292. This implication was never considered when the Court decided *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), holding that private plaintiffs must show only that the libelous material was published with negligent regard for the truth.

4. Yet even here there are indications that the principles of the *New York Times*, *Garrison*, and *Gertz* cases must extend to slander cases as well, if first amendment freedom is not to be arbitrarily balkanized by the formal and often purely historical distinctions between common law slander and libel.⁴⁵ In any event, slander cases in Illinois are not governed by article I, section 4 so that presumably the common law absolute truth defense still prevails in slander cases.

A POTENTIAL LIMITATION ON AN ABSOLUTE RIGHT TO
SPEAK THE TRUTH—A RIGHT TO PRIVACY

The one countervailing argument that would protect the Illinois qualified truth defense from *Gertz* is based on the premise that the first amendment does not necessarily protect, in all circumstances, the utterance of all truthful statements. The strong social interest in allowing a private plaintiff to live down the indiscretions of past private conduct arguably counterbalances any first amendment interests in the truthful revelation of backyard gossip. The desire to protect a private individual's past was shared by both the majority and minority members of the 1970 Illinois Constitutional Convention.⁴⁶

In modern times this social interest in the protection of private, embarrassing, but true facts from the public eye has been increasingly expressed in the modern tort action for breach of privacy.⁴⁷ What the right of privacy action and the qualified truth defense in libel cases have in common is the underlying object of protecting privacy. If the modern right of privacy is valid under the first amendment to the extent of making truth irrelevant as a defense, then it seems that a qualified truth defense might also pass first amendment muster in libel cases involving private plaintiffs.

In *Cox Broadcasting Corp. v. Cohn*,⁴⁸ the name of a 17 year old rape victim was obtained from official indictments available to the public by a reporter who then televised the name over a station owned by Cox Broadcasting Corporation. The father of the deceased victim sued the reporter and the broadcasting corporation for the invasion of his common law right to privacy

45. *Jacron Sales Co. v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1976). See *Garrison v. Louisiana*, 379 U.S. 64 (1964) (criminal oral defamation).

46. 3 PROCEEDINGS, *supra* note 31, at 1400; 6 PROCEEDINGS, *supra* note 31, at 139 (Minority Proposal (1 C(B))).

47. W. PROSSER, *LAW OF TORTS* § 117, at 809-12 (4th ed. 1971). Illinois specifically recognizes this branch of the right to privacy; see, e.g., *Midwest Glass Co. v. Stanford Dev. Co.*, 34 Ill. App. 3d 130, 339 N.E.2d 274 (1975).

48. 420 U.S. 469 (1975).

that occurred upon publication of his deceased daughter's identity. The Georgia Supreme Court agreed that a privacy action lay under the common law. In reversing the Georgia Supreme Court, the United States Supreme Court noted the "face-off" that existed in the case between the first amendment and the right of privacy.⁴⁹ The Court avoided deciding the face-off by narrowly holding that the first amendment will not permit the press to be held liable for truthfully publishing information released to the public in official court records. Since the state's interest in protecting its citizens from an invasion of privacy was dissipated by the availability of information in public records, the Court intentionally avoided deciding whether the press may be held liable for publishing any information which is absolutely true, however damaging it may be to an individual's sensibilities or reputation.⁵⁰

Justice Powell, who delivered the Court's opinion in *Gertz*, stated in his concurring opinion in *Cox* that his only uncertainty about the absolute priority of the first amendment was whether "the Constitution may permit a different balance to be struck" where privacy or other nonreputational interests are at stake.⁵¹ In fact, Justice Powell concurred in *Cox* on the narrow ground that the interest of the state in protecting the privacy of its citizens through allowance of a common law action for invasion of privacy had been waived by the public availability of the court records.

On the other hand, Justice Powell viewed *Gertz* as requiring that truth be an absolute defense in libel cases, even in cases where the plaintiff is a private individual. "It is fair to say that if the statements are true, the standard contemplated by *Gertz* cannot be satisfied."⁵² It is safe to say, then, that if Justice

49. *Id.* at 489.

50. In delivering the opinion of the Court, Justice White explicitly postponed until another day the decision as to whether truth is absolutely protected by first amendment interests, regardless of any competing social interests in reputation or privacy:

The Court has nevertheless carefully left open the question whether the First and Fourteenth Amendments require that truth be recognized as a defense in a defamation action brought by a private person as distinguished from a public official or public figure. . . . In similar fashion, *Time, Inc. v. Hill*, supra, expressly saved the question whether truthful publication of very private matters unrelated to public affairs could be constitutionally proscribed (citation omitted).

Those precedents, as well as other considerations, counsel similar caution here. In this sphere of collision between the claims of privacy and those of the free press, the interests of both sides are plainly rooted in the traditions and significant concerns of our society.

Id. at 490-91.

51. *Id.* at 500 (Powell, J., concurring).

52. *Id.* at 499.

Powell's view is ascendant in the inevitable future libel case, article I, section 4 of the 1970 Illinois Constitution will become a nullity insofar as the qualified truth defense is concerned in libel cases.

GERTZ APPLIED IN ILLINOIS

In *Troman v. Wood*⁵³ the Illinois Supreme Court applied the requirements of *Gertz* to Illinois libel law. In *Troman* the plaintiff sued the Chicago Sun-Times and its reporter for an allegedly libelous article which implied by photograph and story line that the plaintiff's house was the headquarters for a gang of thieves and that she was associated with the gang. In reversing a dismissal at the trial level, the Illinois Supreme Court stated that although the plaintiff was a private person, any public interest in the subject matter of the story was irrelevant because the *Gertz* case required only that a private plaintiff prove some fault without necessarily meeting the actual malice test of *New York Times* in order to establish liability. However, the Court restricted this holding by further stating, "[o]ur holding in the present case is, of course, not intended to remove any of the absolute or qualified privileges which have heretofore been recognized in this State to the extent that the facts may warrant their application."⁵⁴

This carefully stated holding addresses the propriety of the qualified truth defense of the 1970 Illinois Constitution.⁵⁵ As was held in *Troman*, private plaintiffs must prove the published statement false and that the defendant lacked reasonable grounds to believe the statement true. The qualified truth defense presupposes that a defendant who publishes a truthful libel is still responsible to the plaintiff if defendant fails to prove good motives and justifiable ends. The burden on the plaintiff under *Troman* and *Gertz* to prove careless falsity and the burden on the defendant under article I, section 4 to prove more than simple truth are logically inconsistent burdens. If the private plaintiff fails to prove falsity, then under *Troman* the plaintiff has failed to prove a prima facie element of the case and it should be dismissed without requiring that the defendant prove either the affirmative defense of truth or good faith utterance of the truth. On the other hand, if falsity is proven, leaving the plaintiff only with the burden of showing negligent publication, the defense of truth is un-

53. 62 Ill. 2d 184, 340 N.E.2d 292 (1975).

54. *Id.* at 198, 340 N.E.2d at 299.

55. "Perhaps the key element in the court's opinion is its refusal to make a reappraisal of the first amendment question." 64 ILL. B.J. 476, 477 (1976).

available and the question of good faith utterance of truth can never be reached.⁵⁶

CONCLUSION: IS THE ARTICLE I, SECTION 4
QUALIFIED TRUTH DEFENSE CONSTITUTIONAL?

The constitutional debility of article I, section 4 of the 1970 Illinois Constitution has been created by increasing acceptance of the proposition that truth is an absolute value designed to be protected by the first amendment, regardless of circumstances. Since the rationale behind the *New York Times* case is that some falsity must be tolerated where actual malice cannot be proved in order to preclude a chilling effect on potentially truthful statements,⁵⁷ then one might ultimately be led to the conclusion that truth when found should be accorded absolute protection. Indeed, the classic justification for freedom of speech in the area of opinions has been based on the concept that ideas should compete for acceptance. John Stuart Mill premised freedom of expression on the observation that a particular opinion may be true and even if it was not true, a false opinion was still valuable because it would serve as a helpful impetus to the finding of

56. Indications are that the Illinois Appellate Court is still applying the qualified truth defense of article I, section 4, without noting any inconsistency with the *Gertz* principle as applied by the *Troman* case. In *Welch v. Chicago Tribune Co.*, 34 Ill. App. 3d 1046, 340 N.E.2d 539 (1975), a fired employee of the Chicago Tribune Company sued the newspaper company and its sports editor for defamatory statements posted on an office bulletin board. The defendants contended that since the Illinois Supreme Court in *Farnsworth* had held the qualified truth defense invalid under the 1870 Constitution, it was equally invalid under the 1970 Illinois Constitution; substantial truth of the charges against the employee should, therefore, be an absolute defense. The appellate court rejected the argument by noting that good faith and justifiable motives would have to be shown. The *Farnsworth* case was distinguished on the ground that it concerned only plaintiffs who were public figures or subjects of public interest, unlike the fired employee-plaintiff before the court. In sustaining the suggestion that good motives and justifiable ends had to be proven, the appellate court in *Welch* did not advert to the implications of the *Gertz* case which had been decided after *Farnsworth* and before the *Welch* decision was issued, nor did it have available the *Troman* decision which was decided a month after the *Welch* case. *Accord*, *Diedrich v. Northern Ill. Publishing Co.*, 39 Ill. App. 3d 851, 350 N.E.2d 857 (1976); *Kilbane v. Sabonjian*, 38 Ill. App. 3d 172, 347 N.E.2d 757 (1976).

Despite the *Welch* case, there are still other inconsistent Illinois appellate cases which broadly indicate that truth is a sufficient defense in libel cases without noting the qualified truth defense contained in Illinois constitutional law. See *United States Fidelity & Guar. Co. v. Hollerich*, 22 Ill. App. 3d 156, 319 N.E.2d 280 (1974); *Delsis v. Sepsis*, 9 Ill. App. 3d 217, 292 N.E.2d 138 (1972); *Mitchell v. Peoria Journal-Star, Inc.*, 76 Ill. App. 2d 154, 221 N.E.2d 516 (1966); *Schlaf v. State Farm Mut. Auto Ins. Co.*, 15 Ill. App. 2d 194, 145 N.E.2d 791 (1957).

57. 376 U.S. 254, 278-79 (1964).

As the Court stated in *New York Times v. Sullivan*, . . . "Allowance of the defense of truth with the burden of proving it on the defend-

truth.⁵⁸ At first blush it would seem inconsistent to protect some falsehood in order to protect potential truth and then to abandon that protection once truth is found merely because of the unsavory character of the truth-speaker.

Yet the test of this absolute commitment to truth is not in the area of opinion but rather in the more offensive area of factual assertion. The abstraction of an opinion does not defame nor deceive because the very nature of the statement forewarns that the discussion is still in the area of speculation.⁵⁹ It is here that the case for absolute freedom of expression becomes the strongest. But when the statement is reduced to the stark factual assertion that the plaintiff did commit a particular and disgraceful act, the question of whether the act happened or not is more than speculation. The traditional aphorism of Justice Holmes that one does not have the right to yell "fire" in a crowded theatre was expressly premised on the assumption that the information was false.⁶⁰ Yet what if there is in fact a fire in the theatre?

The United States Supreme Court has recently expressed the view that a state may not suppress truthful information about a lawful activity because of a fear that the release of such information may have an adverse effect on the recipients or disseminators of the information.⁶¹ Although truthful factual assertions may be generally protected as an absolute value when there are no other significant competing values, it does not follow that the truth of a factual assertion is always constitutionally protected regardless of circumstance. One may be protected by the Constitution for yelling "fire" in a theatre which is in fact aflame because no interest is served in suppressing the warning. But even if in fact John Doe did steal hubcaps some thirty years

ant does not mean that only false speech will be deterred." The First Amendment requires that we protect some falsehood in order to protect speech that matters.

Gertz v. Robert Welch, Inc., 418 U.S. 323, 340-41 (1974).

58. J.S. MILL, *ON LIBERTY* 76 (Penguin ed. 1974).

59. Opinions typically do not justify reliance in either defamation or misrepresentation actions. See W. PROSSER, *LAW OF TORTS* § 111, at 741-42, § 109, at 720-24 (4th ed. 1971).

60. "The most stringent protection of free speech would not protect a man in *falsely* shouting fire in a theatre and causing a panic." *Schenck v. United States*, 249 U.S. 47, 52 (1919) (Holmes, J.) (emphasis added).

61. See *Linmark Associates, Inc. v. Township of Willingsboro*, 97 S. Ct. 1614, 1620 (1977), where the Court struck down as violative of the first amendment a township ordinance banning "For Sale" and "Sold" signs from residential property, though the alleged township interest was to promote stable and racially integrated housing. *But cf. Chicago Real Estate Bd. v. City of Chicago*, 36 Ill. 2d 530, 224 N.E.2d 793 (1967) (Chicago ordinance prohibiting distribution of written material designed to induce "panic peddling" held constitutional against first amendment challenge).

ago, there are interests involved other than the social value of truth. Of greatest concern is a strong social recognition of a right to privacy which has been accorded protection under the Constitution as well as by common law.⁶² Society has an interest in encouraging rehabilitation by allowing the misdeeds of the past to be buried by time⁶³ and in preventing emotional injury to others unaware of the private and embarrassing truth. Both of these interests would be eroded if backyard gossip were to be protected in all circumstances simply because of its socially insignificant truth. Perhaps Justice Powell's conjecture in *Cox* that a different constitutional balance may be struck in the privacy area is a harbinger for future cases.

Nevertheless, it does not follow that merely because a state could ignore the truth defense or reduce it to a qualified defense in right of privacy cases, the same result will occur in libel cases involving the qualified truth defense of article I, section 4 of the 1970 Illinois Constitution. Unlike the right to privacy, the Supreme Court has concluded that the reputational interests protected by traditional libel law do not of themselves deserve protection under the fourteenth amendment of the Federal Constitution or under federal civil rights statutes because they do not involve "liberty" or "property" interests in the constitutional sense.⁶⁴ This is in accord with the perception of Justice Powell in the *Gertz* case that even the reputational interests of a private plaintiff must give way to truth in a libel case.

More generally, it is difficult to perceive any legitimate damage to reputation in a libel case where the statement made of the plaintiff is in fact true and only the good faith of the defendant is questioned. Courts are not obligated to compensate for a false reputation of virtue which has been built by concealing private acts of vice. This principle appears to lie at the heart of the common law maxim that truth was an absolute defense in civil libel cases.⁶⁵ Though reputation may not be compensable, the violation of privacy itself may be egregious enough to warrant compensation. The interests being protected by libel actions and by that branch of privacy which protects against the disclo-

62. *Roe v. Wade*, 410 U.S. 113 (1973) (constitutional right of privacy); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (same). For recent common law protection of privacy, see generally W. PROSSER, *LAW OF TORTS* § 117 (4th ed. 1971).

63. See, e.g., *Melvin v. Reid*, 112 Cal. App. 285, 292, 297 P. 91, 93 (1931): "Where a person has by his own efforts rehabilitated himself, we, as right-thinking members of society, should permit him to continue in the path of rectitude rather than throw him back into a life of shame or crime."

64. *Paul v. Davis*, 424 U.S. 693 (1976).

65. See note 4 *supra*.

sure of private and embarrassing facts are not identical. The indication of recent Supreme Court trends is that the right of privacy may well be a sufficient exception to the general principle that the factual assertion of truth is absolutely protected under the first amendment.⁶⁶

There is another reason to suggest that article I, section 4 is subject to constitutional infirmity, even beyond the first amendment strictures of the *Gertz* and *New York Times* cases. The qualified truth defense in article I, section 4 of the 1970 Illinois Constitution is limited to criminal and civil trials for libel. By its terms it does not apply to slander cases. The basic distinction between libel and slander has been that the former is usually written and the latter usually oral in nature. This distinction has never been a completely consistent one and the modern technologies of radio and television are said by eminent authority not to fit "the rather senseless distinctions inherited from the sixteenth century."⁶⁷ Yet the Illinois Criminal Code of 1961 allows truth, when communicated with good motives and justifiable ends, to constitute an affirmative defense to the crime of "criminal defamation." The crime of "criminal defamation" does not distinguish between written and oral defamation and in fact refers to defamatory communications made by any means.⁶⁸ Therefore, the posture of Illinois law is such that article I, section 4 of the 1970 Illinois Constitution discriminates between libel and slander, limiting a defendant to a qualified truth defense in a libel case but presumably still permitting the common law defense of absolute truth in slander cases. However, the Illinois Criminal Code establishes that the qualified truth defense is available in any kind of criminal defamation, be it libel or slander. The net result is that only in a civil slander case does a defendant possess the original common law defense of absolute truth.

The troublesome distinctions between common law libel and slander are rendered even more incapable of rationalization in

66. See *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

67. W. PROSSER, *LAW OF TORTS* § 112, at 754 (4th ed. 1971). See also *Whitby v. Associates Discount Corp.*, 59 Ill. App. 2d 337, 340, 207 N.E.2d 482, 484 (1965) ("A defamation designed for visual perception is a libel; an oral defamation is a slander.")

68. "A person commits criminal defamation when, with intent to defame another, living or dead, he communicates by any means to any person matter which tends to provoke a breach of the peace." ILL. REV. STAT. ch. 38, § 27-1(a) (1975). "In all prosecutions for criminal defamation, the truth, when communicated with good motives, and for justifiable ends, shall be an affirmative defense." *Id.* § 27-2.

A similar California statute was found totally void in light of *Garrison v. Louisiana*, 379 U.S. 64 (1964). See *Eberle v. Municipal Court*, 55 Cal. App. 3d 423, 127 Cal. Rptr. 594 (1976).

light of the crazy quilt distinction between libel and slander in Illinois statutory and constitutional law. If a criminal defendant in a prosecution for criminal defamation by slander were to raise the defense of unequal protection under the fourteenth amendment of the United States Constitution, it is not at all clear that the Illinois constitutional and statutory scheme would survive, since the Supreme Court has clearly held that state restrictions on first amendment freedoms must be justified in terms of a compelling state interest rather than on the basis of mere rationality.⁶⁹ It is questionable what compelling state interest is served by requiring criminal defendants to make do with a qualified truth defense in criminal defamation by slander whereas a defendant in a civil slander case has an absolute truth defense.

In summary, the qualified truth defense set forth in article I, section 4 of the 1970 Illinois Constitution is clearly a violation of the first amendment in relation to public plaintiffs suing in libel. In addition, that provision also stands in grave jeopardy of being declared a violation of the first amendment even beyond cases involving public plaintiffs. Since the Illinois Supreme Court has expressly limited the truth defense to good faith and justifiable motives,⁷⁰ it would be impossible for the United States Supreme Court to conclude that article I, section 4 has been interpreted by Illinois courts to implicitly allow an absolute truth defense. These constitutional questions surrounding the qualified truth defense in Illinois could all have been avoided by adopting the first minority proposal submitted by Delegate Gertz at the convention: "Every person may speak, write and publish on all subjects, being responsible for the abuse of that liberty."⁷¹ This first minority proposal would have allowed the 1970 Illinois Constitution to remain a flexible instrument, adaptable to the rapid changes in traditional defamation law which have proceeded apace in recent years. Finally, the Illinois experience illustrates the proposition that a state bill of rights should be a general statement of basic social principles, rather than a detailed set of legal rules likely to be swept onto the barrier reef of changing federal constitutional law.

69. "The decisions of this Court have consistently held that only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms." *NAACP v. Button*, 371 U.S. 415, 438 (1963). *Accord*, *Williams v. Rhodes*, 393 U.S. 23, 31 (1968).

70. *See, e.g.*, *Ogren v. Rockford Star Printing Co.*, 288 Ill. 405, 123 N.E. 587 (1919); *People v. Taylor*, 279 Ill. 481, 117 N.E. 62 (1917).

71. *See* note 35 and accompanying text *supra*. Delegates Roy C. Pechous and Peter A. Tomei also offered undebated individual proposals identical to the first minority proposal offered by Delegate Gertz. 7 PROCEEDINGS, *supra* note 31, at 2961, 3043 (Nos. 275 & 433).

