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MORE SPEECH, LESS LITIGATION: EXTENDING THE NOERR-PENNINGTON DOCTRINE TO THE LAW OF DEFAMATION

In our increasingly litigious society, individuals and corporations frequently file defamation suits in response to statements concerning their persons. The effect of this tendency to sue operates to chill the first amendment right of citizens to petition the government for a redress of grievances. Because the cost and inconvenience of defending a defamation suit is overwhelming, many citizens are deterred from lodging good faith petitions at the town meeting, to their congressional representatives, and to the President of the United States. This conduct ultimately cripples the ability of a representative government to govern democratically.

Due to the apparent inadequacies of the current laws of defamation, some courts have turned to the Noerr-Pennington doctrine.


Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

3. Fees for defending a defamation suit were as high as $74,000 in 1980. Smith, The Rising Tide of Libel Litigation: Implications of the Gertz Negligence Rule, 44 MONT. L. REV. 71, 87 (1983) (fees required for defending libel litigation can be astronomical). Even the dissent in Webb recognized the chilling effect of defending a defamation lawsuit. Justice Neely stated that while the plaintiff could spend unlimited amounts on excellent legal advice, the defendants were hard pressed to hire counsel at all. "The potential for chilling legitimate first amendment rights where there is anything less than absolute immunity is awe inspiring." Webb v. Fury, 282 S.E.2d 28, 46 (W. Va. 1981) (Neely, J., dissenting).


to preserve the petitioning process. Although originally designed to safeguard a person’s freedom to exercise his right to petition from the fear of an antitrust sanction, the doctrine now applies in other areas of the law. Courts have used the doctrine to protect the petitioning process from a wide range of civil sanctions which might otherwise inhibit a person’s freedom to petition the government for a redress of grievances. The doctrine’s application to the law of defamation, however, remains uncertain.

The purpose of this comment is to question the ability of the law of defamation to safeguard a person’s access to the petitioning process. This comment advocates the extension of the Noerr-Pennington doctrine to the law of defamation. Like Noerr-Pennington in antitrust law, Noerr-Pennington in the law of defamation will act to safeguard the constitutional right to petition, and will consequently further protect our system of representative government.


12. See generally Sherrard, 53 Md. App. at 553, 456 A.2d at 59 (the right to petition is a necessary element of our representative democracy). The first amendment right to petition is not a right which our forefathers always ex-
Whether the restriction takes the form of an antitrust suit or a defamation suit, the restraint on the right to petition remains the same. 13

The first segment of this comment reviews the United States Supreme Court’s development of the Noerr-Pennington doctrine and its association to the first amendment right to petition. 14 The second segment analyzes the current law of defamation. It concentrates on the New York Times standard of malice and explains why this standard is insufficient to adequately safeguard a person’s freedom to exercise his right to petition. 15 Third, this comment discusses the common law absolute privilege afforded legislative and judicial proceedings, 16 and the problem of statements published outside the governmental arena. 17 This privilege parallels the evolution of the Noerr-Pennington doctrine; yet, each of the concepts have individual and distinct scopes which require discussion. The final segment sets forth a proposal designed to ensure that the right to petition remains uninhibited through the extension of the Noerr-Pennington doctrine to the law of defamation. 18 This extension will provide society with the benefits of a collective conscience by guaranteeing the free exchange of ideas, 19 thus leading to a healthy and knowledgeable democratic government.
ORIGINS OF THE Noerr-Pennington DOCTRINE

The United States Supreme Court, in a trilogy of decisions, 20 recognized the need to safeguard a person's right to petition from the effect of subsequent antitrust sanctions. The first of these, *Eastern Railroad President's Conference v. Noerr Motor Freight, Inc.*, 21 involved a coalition of trucking companies that brought an antitrust action against the railroad industry. The coalition claimed that a railroad campaign, designed to sway public sentiment against the trucking industry and to influence the passage and enforcement of laws, violated the Sherman Act. The campaign was so successful that it persuaded the Governor of Pennsylvania to veto a bill intended to assist the trucking industry. 22

The Supreme Court held that political efforts designed to muster public opinion and influence governmental decisionmaking did not constitute a violation of antitrust laws. 23 The Court stated that an interpretation of the Sherman Act forbidding an attempt to influence governmental action would substantially impair the legislature's power to govern. 24 In any representative democracy the branches of government act on behalf of the people. This democracy depends, to a very large extent, on the ability of the people to communicate with the government. 25 The Court emphasized that "[t]he right to petition is one of the freedoms protected by the Bill of Rights, and we cannot . . . lightly impute to Congress an intent to invade these freedoms." 26

In *Noerr*, the Court conceded that some of the railroads' peti-

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22. Id. at 130. The "Fair Truck Bill" would have permitted heavier trucking loads upon Pennsylvania roads. Id. The court noted that the genuineness of the petitioner's activity was evidenced by its successfulness. Id. at 144. Successful lobbying efforts indicate that a genuine effort to influence governmental action existed. Metro Cable Co. v. C.A.T.V. of Rockford, Inc., 516 F.2d 220 (7th Cir. 1975).
24. Id. at 137. To hold that the government may take actions to cease restraints of trade, but at the same time state that people may not inform the government about such activity, would impute to the Sherman Act a purpose to regulate political activity. This purpose has no basis in the legislative history of the Act. Id. There is legislative history which supports Noerr. During the debate over the Sherman Act, Senator Sherman stated that the Act "does not interfere in the slightest degree with voluntary associations made to affect the public opinion to advance the interests of a particular trade or association." 21 CONG. REC. 2562 (1890), quoted in Coastal State Mktg., Inc. v. Hunt, 694 F.2d 1358, 1364 n.21 (5th Cir. 1983).
25. Noerr, 365 U.S. at 137.
26. Id. at 138.
tioning activity involved unethical conduct.\textsuperscript{27} The unethical conduct, however, was secondary to an otherwise legitimate effort to influence governmental decisionmaking.\textsuperscript{28} The Court noted that as an incidental effect of all genuine petitioning activity, another's interests might be harmed. The imposition of a civil sanction, moreover, would necessarily render all genuine petitioning activity void.\textsuperscript{29} Thus, to hold otherwise would be an invasion of the political process.\textsuperscript{30}

The Court did acknowledge, nevertheless, that certain petitioning activity would not be immune from the laws of antitrust. In \textit{Noerr}, a reference was made to what would later develop into the "sham" exception.\textsuperscript{31} The Court declared that there may be instances where petitioning activity is nothing more than a sham to cover an attempt to directly harm the business practice of a competitor.\textsuperscript{32} Although the Court failed to elaborate on what would constitute a sham, it did immunize in \textit{Noerr} such unethical conduct as fraudulent misrepresentation and malicious behavior.\textsuperscript{33} The conduct in \textit{Noerr} was absolutely immune from civil sanction because it was secondary to an otherwise "genuine" effort to sway public sentiment and influence governmental action.

Ultimately, the Court stressed that its decision restored the "true nature of the case—a no- 'holds barred fight' between two industries both of which are seeking control of a profitable source of

\textsuperscript{27} \textit{Id.} at 143. The unethical conduct consisted primarily of malicious conduct and fraudulent statements published in various publications. Generally, the statements alleged that the trucking industry constantly violated the laws and created many traffic hazards. The statements also urged the truckers to pay their share of road rebuilding costs and to obey the laws. \textit{Id.} See Webb v. Fury, 282 S.E.2d at 40 (W. Va. 1981) (court cited \textit{Noerr} as authority for the proposition that \textit{Noerr-Pennington} provides immunity against defamation litigation).


\textsuperscript{29} \textit{Noerr}, 365 U.S. at 143-44. See also Searle v. Johnson, 646 P.2d 682 (Utah 1982) (the first amendment protects genuine petitions even if the incidental effect of the petition is injury to another); Reid v. Delorme, 2 S.C.L. 76 (Brev. 1806) (every citizen has a right to petition government even though such petition might wound a reputation).

\textsuperscript{30} \textit{Noerr}, 365 U.S. at 137.

\textsuperscript{31} \textit{Id.} at 144.

\textsuperscript{32} \textit{Id.}

\textsuperscript{33} \textit{Id.} at 142.
These political struggles, common in the halls of legislative bodies, inherently involve the possibility, even the probability, that one party will be hurt by the statements of another. The Court reasoned that regardless of the reprehensible conduct in Noerr, an antitrust sanction was not the solution.

The second relevant Supreme Court decision, United Mine Workers of America v. Pennington, modified the Noerr rule by extending absolute immunity to petitioning activity addressed to executive officials. The Court reaffirmed that genuine petitioning activity, intended to influence the passage and enforcement of laws, was immune from antitrust sanction. The immunity applied regardless of any anti-competitive intent on the part of the petitioner.

It was not until the third relevant Supreme Court case that the Court had an opportunity to exclude petitioning activity from Noerr-Pennington immunity. In California Motor Transport Co. v. Trucking Unlimited, the Court explicitly based Noerr-Pennington immunity on the first amendment right to petition. In Noerr and Pennington, the doctrine was limited to an interpretation of the Sherman Act. In California Motor, however, the Court asserted that it would be destructive to the right to petition if petitioners could not, without violating antitrust laws, use the channels.

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34. Id. at 144. The Court noted that it appeared that both groups utilized all their political powers in order to influence the passage of laws which would either help them or injure the other. The contest was conducted along lines normally expected in the arena of politics except for the deliberate deception of the public and of public officials. Id. at 145.

35. Id. at 144.

36. Id. at 145.

37. 381 U.S. 657 (1964). In Pennington, it was alleged that petitioning activity directed at the Secretary of Labor, and designed to obtain adjustments in the coal purchasing policies of the Tennessee Valley Authority, violated antitrust laws. It was further alleged that the intent of the petitioning activity was to drive small coal companies out of business. Id.

38. Id. at 670. The Court stated that even though the petitioner may have intended to eliminate all competition, genuine efforts to influence public officials do not violate antitrust laws. This intent is not illegal, either standing alone or as part of a broader scheme. Id.

39. Id. One court which considered the plaintiff's anticompetitive purpose stated that even though the plaintiff hoped the cost of the suit would "break" the back of its competitor, the petition was immune from prosecution because it was otherwise genuine. Alexander v. National Farmers Org., 687 F.2d 1173, 1200 (8th Cir. 1982), cert. denied, 461 U.S. 937 (1983). See also Stern v. United States Gypsum, Inc., 547 F.2d 1329 (7th Cir. 1977) (motive is irrelevant even though the petitioner may be pleased at the prospect of injury), cert. denied, 434 U.S. 975 (1978); Sierra Club v. Butz, 349 F. Supp. 934 (N.D. Cal. 1972) (a malicious motive is of no relevance). Communications are absolutely protected, regardless of motive or intent, because greater mischief may result by permitting motive to be enclosed than from wholly rejecting it. Vogel v. Gruaz, 110 U.S. 311, 315 (1884).

and procedures of government to advocate their causes and points of view.\footnote{41} Although the California Motor Court held that efforts to influence governmental action were guaranteed by the first amendment, it restated the conviction that not all petitioning activity was protected by Noerr-Pennington.\footnote{42}

In California Motor, the defendant set up a trust fund to finance opposition to all applications submitted by the plaintiffs to a regulatory commission. The applications were subject to commission approval and required by the plaintiffs to participate in the trucking industry. Each application was challenged by the initiation of state and federal judicial proceedings.\footnote{43} The defendant also obtained rehearings, reviews, and appeals from commission and court decisions in order to further delay the efficient business operations of the plaintiffs.\footnote{44} The Court found the defendant guilty of antitrust violations.\footnote{45} The Court held that the activity of the defendant was not legitimately designed to influence governmental action, but was a sham petition intended to directly harm the plaintiffs.\footnote{46} This harm was accomplished by deliberately denying the plaintiffs the right to free and unlimited access to the regulatory process through concerted manipulation of the adjudicatory process.\footnote{47} The defendant was identified, therefore, as a regulator of

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\item \footnote{41}{Id. at 510-11.}
\item \footnote{42}{Id. at 513.}
\item \footnote{43}{Id. at 509.}
\item \footnote{44}{Id.}
\item \footnote{45}{Id. at 513.}
\item \footnote{46}{Id. In California Motor the petitioning activity was directed at the judicial branch. The plaintiffs argued that certain unethical conduct, like fraudulent misrepresentation, which might otherwise be condoned in the legislative arena, cannot seek refuge under the umbrella of politics when directed at the judicial branch. \textit{Id.} One court has stated that petitioning abuse should indeed receive more scrutiny when outside the legislative forum. Forro Precision, Inc. v. International Business Machines Corp., 673 F.2d 1045, 1059 n.10 (9th Cir. 1982). \textit{See also} Hecht v. Pro Football, Inc., 444 F.2d 931 (D.C. Cir. 1971) (scope of immunity depends on degree of political discretion exercised by the governmental body), \textit{cert. denied}, 404 U.S. 1047 (1972).

In his concurring opinion, however, Justice Stewart stated that Noerr had been trampled upon and that California Motor hindered the right to petition. 404 U.S. at 516 (1972) (Stewart, J., concurring). For a discussion of the California Motor opinion, see Crawford & Tschoepe, \textit{The Erosion of the Noerr Pennington Immunity}, 13 ST. MARY'S L.J. 291 (1981) (legislative and executive areas remain only defined by Noerr); Fischel, \textit{Antitrust Liability for Attempts to Influence Governmental Action: The Basis and Limits of the Noerr-Pennington Doctrine}, 45 U. CHI. L. REV. 80, 88 (1977) (it is doubtful that Noerr was limited by California Motor).

47. California Motor, 404 U.S. at 513. Petitioning activity which prevents a party from participating in the process is not petitioning activity protected by Noerr-Pennington, and therefore is open to a defamation action. Webb v. Fury, 282 S.E.2d 28, 39 (W. Va. 1981) (defendants did not thwart the plaintiffs access to the governmental process). The denial of access to the governmental process is not the only abuse which causes the immunity of Noerr-Pennington to be revoked. \textit{See} Wilmorite, Inc. v. Eagan Real Estate, Inc., 454 F. Supp. 1124}
the governmental process itself.\textsuperscript{48}

\textit{The Sham Exception}

The sham exception has been recognized by lower courts as petitioning activity that involves governmental contacts which are not genuine attempts to influence governmental action, but merely attempts to injure others through the deliberate abuse of the governmental process.\textsuperscript{49} It is a corruption of the petitioning process,\textsuperscript{50} a subversion of its integrity,\textsuperscript{51} and an alteration of the impartial functioning of government.\textsuperscript{52} Examples of sham activity include bribery,\textsuperscript{53} threats upon governmental officials,\textsuperscript{54} and bought votes.\textsuperscript{55} A sham includes a conspiracy with a licensing authority,\textsuperscript{56} and the deliberate filing of a false forecast solely to eliminate a competitor.\textsuperscript{57} It has also included a purposeful dissemination of information to a

\textsuperscript{(N.D.N.Y. 1977), aff'd, 578 F.2d 1312 (2d Cir.), cert. denied, 439 U.S. 983 (1978). Access barring is not intended to limit the "sham" exception to cases where access is barred, but is intended to be synonymous with abuse of process in a general sense. Otter Tail Power Co. v. United States, 410 U.S. 365, 380 (1973).


54. George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir.) (threats on an official hardly rise to the dignity of a legitimate petition to government), \textit{cert. denied}, 400 U.S. 850 (1970). One court has declared that there is little reason to extend \textit{Noerr-Pennington} immunity to a baseless communication which includes threats and other coercive measures. Sacramento Coca-Cola Bottling Co. v. Chauffeurs, Teamsters and Helpers Local No. 150, 440 F.2d 1096, 1099 (9th Cir.) (defendant unions influenced officials by means of threats and intimidation), \textit{cert. denied}, 404 U.S. 826 (1971).

55. \textit{See} Gorman Towers, Inc. v. Bogoslavsky, 626 F.2d 607 (8th Cir. 1980) (failure to allege abuse of process by activity such as buying of votes).

56. \textit{See California Motor}, 404 U.S. at 508. \textit{California Motor} consisted of petitioning activity which denied the plaintiffs' meaningful and unlimited access to the administrative process. The abuse was a result of "baseless and repetitive" claims brought against the plaintiff. \textit{Id. See also} Otter Tail Power Co. v. United States, 410 U.S. 366 (1972) (the hallmark of a sham is the baseless and repetitive lawsuit).

57. \textit{See} Woods Exploration & Producing Co. v. Aluminum Co. of Am., 438 F.2d 1286 (5th Cir. 1971) (filing of false forecast to administrative agency solely to reduce competition), \textit{cert. denied}, 404 U.S. 1047 (1972).
Noerr-Pennington and Defamation

A police officer solely to harass an individual and achieve other ends not related to law enforcement. A sham is also manifested by the filing of a knowingly frivolous lawsuit. In sum, a sham does not involve a bona fide grievance, but rather involves a baseless abuse of the petitioning process.

Defamation and the Sham Exception

In Sherrard v. Hull, an allegedly defamatory statement communicated to the government did not constitute a sham. The statement was made within an otherwise legitimate petition, the principal purpose of which was obtaining favorable governmental action. The court held that because the injury to the plaintiff was incidental to a genuine petitioning activity, no defamation action would lie for the exercise of the defendant’s right to petition. The petition itself was not based on intentional falsehoods. This court, like the Noerr Court, provided the defendant with an absolute immunity. It argued that the extension of the Noerr-Pennington doctrine from antitrust to defamation law was logical because the harm to the right to petition is as chilling in defamation cases as in antitrust cases.

The Law of Defamation and the First Amendment Right to Petition

The Supreme Court decided New York Times v. Sullivan with a firm belief in the national principle of robust, uninhibited

58. See Forro Precision, Inc. v. International Business Machines Corp., 673 F.2d 1045 (9th Cir. 1982) (defendant had a legitimate reason for going to the police).

59. See Bill Johnson’s Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983) (baseless litigation is not immunized by the first amendment right to petition). In Bill Johnson’s, the United States Supreme Court analogized baseless litigation to the “sham” exception and implicitly extended the Noerr-Pennington doctrine to the National Labor Relations Act. Id. at 734-44. The court, however, did not use the term Noerr-Pennington. Instead the court used only the first amendment itself. Id. at 741-44.


62. Id. at 573, 456 A.2d at 71.


64. Sherrard, 53 Md. App. at 572, 456 A.2d at 70.

debate over public issues. The Court recognized the need to protect the constitutional freedoms of speech and press from the restrictive nature of the common law rules of defamation. In *New York Times*, the Court held that a statement concerning either a public official or a public figure could only be libelous if the statement was made with actual malice. The Court defined malice as a knowledge of falsity or a reckless disregard for the truth. The Court reasoned that this heightened defamation standard better secured the "breathing space" necessary to safeguard the freedoms of expression. Although it allowed occasional published untruths to escape liability, the heightened standard allowed true statements to flow more easily.

The *New York Times* standard of malice has been applied in cases involving governmental petitioning activity. In *Arlington Heights National Bank v. Arlington Heights Federal Savings and Loan*, for instance, the Illinois Supreme Court held that because the freedom of speech is subject to a conditional standard of malice, the right to petition should similarly be subject to the same standard of malice. The court stated that it was not coincidental that the freedoms of speech and press were coupled in the first amendment with the right to petition the government for a redress of grievances. The interests safeguarded by the right to petition were deemed no more significant than those advanced by the freedoms of speech and press.

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66. Id. at 270.
67. Id. at 283.
68. Id. The term "actual malice" in *New York Times* is not to be mistaken with common malice which simply means ill will or improper motive. Malice, in this context, denotes an intent to lie. W. Prosser, *Handbook of the Law of Torts* § 113 (5th ed. 1984).
70. 37 Ill. 2d 349, 229 N.E.2d 514 (1967).
71. Id. at 351, 229 N.E.2d at 517. *Arlington Heights* dealt with a petition by a citizen to his local legislature. The court stated that, although it was mindful that the right to petition was zealously safeguarded by the courts, it would follow the precedent of *New York Times* and apply a malice standard to the right to petition. *Id. But see* Webb v. Fury, 282 S.E.2d 28 (W. Va. 1981) (declined to follow *Arlington Heights* because *Noerr* held intent not germane to petitioning activity).
72. *Arlington Heights*, 37 Ill. 2d at 350, 229 N.E.2d at 517.
73. Smith v. McDonald, 562 F. Supp. 829, 840 (M.D.N.C. 1983), aff'd, 737 F.2d 427 (4th Cir.), cert. granted, 105 S. Ct. 502 (1984). The *Smith* court declined to extend *Noerr-Pennington* to the law of defamation. It contended that the doctrine did not protect petitioning activity by way of the first amendment right to petition, but that it only protected the right from a construction of the Sherman Act. *Id. at* 841. The court also relied on a pre-*Noerr-Pennington* decision: White v. Nicholls, 44 U.S. (3 How.) 266 (1843). In *White*, the court did not decide on constitutional grounds, but on the common law, that a letter sent to the President and the Secretary of State, containing defamatory statements about
Other courts have held, however, that the right to petition the
government requires more protection than the New York Times
conditional standard of malice.74 The argument advanced is that
the right to petition has a spirit and scope independent of the free-
dom of speech.75 The right to petition is a narrower form of speech
which involves communications designed to influence governmen-
tal decisionmaking.76 The freedom of speech clause involves com-
munications made by one individual to another, whereas the right
to petition involves communications between individuals and gov-
ernment.77 The role of government formed the basis on which
these courts extended absolute immunity to the petitioning pro-
cess.78 These courts reasoned that the need of a representative gov-
ernment to receive information enabling it to govern more
democratically outweighed the potential harm of defamation.79

the fitness of a governmental official, was subject to a conditional privilege. Id.
at 290-91.

The White case, however, was decided prior to New York Times v. Sulli-
van. Before New York Times was decided in 1964, no defamatory speech was
considered protected by the first amendment. The common law privilege was
also constrained mostly to the judicial forum. See Veeder, Absolute Immunity
in Defamation: Judicial Proceedings, 9 COLUM. L. REV. 463 (1909). The reliabil-
ity of the statement of the common law in White has itself been questioned.

74. See Stern v. United States Gypsum, Inc., 547 F.2d 1329 (7th Cir.) (be-
cause malice is so easily plead, it necessarily chills the first amendment right to
petition), cert. denied, 434 U.S. 975 (1977); Bass v. Rohr, 57 Md. App. 609, 471
A.2d 752 (1984) (despite the fact that the petitioner may have acted unfairly or
maliciously will not defeat the privilege); Sherrard v. Hull, 53 Md. App. 553, 456
A.2d 59 (the more recent cases favor a rejection of the New York Times stan-
dard of malice in petition cases), aff'd, 296 Md. 189, 460 A.2d 601 (1983).

75. City of Long Beach v. Bozek, 31 Cal. 3d 527, 531, 645 P.2d 137, 141, 183
Cal. Rptr. 86, 90 (1982), vacated, 459 U.S. 1095, on remand, 33 Cal. 3d 727, 661
P.2d 1072, 190 Cal. Rptr. 918 (1983) (prior opinion reiterated entirely). Cf. Mar-
bury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (no clause in the Constitution is
without independent effect).

76. See Sherrard v. Hull, 53 Md. App. 553, 456 A.2d 59, aff'd, 296 Md. 189,
460 A.2d 601 (1983) (the right to petition is to be distinguished from the freedom
of speech). The Sherrard court placed special emphasis on the right to petition
because it is one of two “rights” found in the first amendment. Because free
speech is not a right, but a freedom, arguably the designation of the right to
petition was intentional. Therefore, the founding fathers may have considered
the right to petition to be a more important form of speech. Id. at 567, 456 A.2d
at 71 (citing with approval, Note, Maryland's Summary Judgment Procedure in
(1981)).

77. Sherrard, 53 Md. at 573, 456 A.2d at 71.
78. Id.
79. Id. at 567, 456 A.2d at 67.
The Inadequacy of the New York Times-Gertz Standard to Safeguard the Constitutional Right to Petition

The principal reason given by courts for refusing to apply New York Times malice to the petitioning process stems from the modern rules of pleading. Courts which have applied Noerr-Pennington to antitrust law and other areas declare that malice is too easy to allege, and therefore even those who acted without malice may be subject to the cost and inconvenience of defending that issue in a lawsuit. One court reasoned that because of the modern rules of pleading, the malice standard invited intimidation from all who seek redress from the government. It is also unlikely that a motion to dismiss a complaint, which involves considerations of motive and intent, will occur at the pretrial level. This would likewise constitute an impermissible burden upon the right to petition.

Another element of the New York Times standard of malice which necessitates burdens the right to petition is the ascertainment of what constitutes a public figure. In Gertz v. Robert Welch, Inc., the Supreme Court defined a public figure as a person who, by reason of clear notoriety or fame, is within the public's attention. The Gertz definition, however, has proven to be imprecise. The question of public figure was left to state courts to decide. The result is an ad hoc determination which is final in most instances because the state court is deemed to be in a better position to judge a person's standing in the community. State courts, more often than not, apply their own law of defamation instead of the New York Times malice was extended to public figures in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). The instances of an involuntary public figure, however, must be rare. Id. at 345.

80. See Stern v. United States Gypsum, Inc., 547 F.2d 1329 (7th Cir. 1977) (malice is easy to allege), cert. denied, 434 U.S. 975 (1978).
81. Sierra Club v. Butz, 349 F. Supp. 934, 938 (N.D. Cal. 1972). Because malice is so easy to allege, a defendant will more than likely be obliged to face a full blown trial. The spectre of having to persuade a jury of knowledge of the facts so as to avoid reckless falsity will alone lead a citizen to reconsider lodging a good faith petition. Stern, 547 F.2d at 1345.
82. Sierra Club, 349 F. Supp. at 937.
83. Stern, 547 F.2d at 1345. See also Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 740-41 (1983) (regardless of how unmeritorious the suit, the defendant will most likely have to incur substantial legal expenses).
87. Id. at 351. The Gertz Court also stated that there may be instances where a person becomes an involuntary public figure who is thrust upon the public through no fault of his own. Id. The instances of an involuntary public figure, however, must be rare. Id. at 345.
88. Comment, The Public Figure Plaintiff v. The Nonmedia Defendant in Defamation Law: Balancing the Respective Interests, 68 IOWA L. REV. 517, 519 (1983) (litigation of libel and slander claims has grown complex and expensive).
89. See RESTATEMENT (SECOND) OF TORTS 580A comment (c) (1977) (appellate courts show deference to lower courts whose opportunity to judge one's exposure to the public is better).
York Times standard of malice. Therefore, the person exercising his right to petition the government will not benefit from the narrow standard of New York Times malice.

A majority of states have realized, however, that communications to the government require a higher standard of protection than that provided by state defamation laws or the New York Times standard of malice. These states afford a common law absolute privilege against defamation suits when a person makes a statement before a governmental body. The purpose of the common law privilege is to create an atmosphere whereby information may be freely presented to the government.

The Common Law Legislative and Judicial Privileges

The common law has paralleled the development of the Noerr-Pennington doctrine. The privilege was originally restricted to statements made during a judicial proceeding. Eventually, the privilege was extended to quasi-judicial bodies, such as administrative agencies and executive commissions. The privilege now applies to legislative proceedings as well. Statements made to a governmental body are absolute privileges, but statements made by a private person to a quasi-judicial body or to a legislative body are not absolute privileges.

91. The states now use the common law privilege. The common law privilege in defamation is basically a conflict between two competing interests: the desire of an individual to be free from defamatory attacks and the public's interest in "full and free disclosure of facts in the conduct of the Legislative, Executive and Judicial departments of Government." Mills v. Denny, 245 Iowa 584, 43 N.W.2d 222, 225 (1954). The common law privilege is designed to ensure that those who desire to present information to government will not be inhibited by the fear of a defamation suit. Webster v. Sun Co., 731 F.2d 1, 5 (D.C. Cir. 1984).


94. In the judicial forum, adequate safeguards were thought to exist which would assure that a fair proceeding would result. Originally, it was believed that these safeguards were not present in other governmental forums. This contention has since been relaxed. See Gersh v. Ambrose, 291 Md. 188, 434 A.2d 547 (1981).

95. See, e.g., Reagan v. Guardian Life Ins. Co., 140 Tex. 150, 166 S.W.2d 909 (1942) (the privilege applies to proceedings before executive officials, boards, or commissions which exercise quasi-judicial powers).

governmental body, preliminary to or during an investigatory proceeding, may be absolutely privileged.\(^9\) This includes oral and written statements\(^9\) made voluntarily or under subpoena.\(^9\)

States that provide the absolute privilege recognize that the privilege cannot apply in all instances. The statement must be relevant to the particular proceeding or the communicator will not be immune from a defamation suit.\(^1\) While some courts have required that the statement be directly responsive and pertinent to the question asked,\(^1\) the modern approach to relevancy is much more liberal. Modern relevancy simply requires some connection between the statement and the subject matter of the proceeding.\(^1\)

The statement need not be material, and the question of truth or falsity need not be germane, as long as the statement has some relevance to the investigation.\(^1\) Defamatory statements which are clearly unconnected to the subject matter, therefore, are not afforded protection. Doubts as to relevancy have usually been resolved in favor of the communicator.\(^1\)

Although the relevancy rule may in some cases furnish immunity to those parties bent on defaming another, courts agree that the need for parties to freely speak their minds outweighs any possible harm to another's reputation.\(^1\) A governmental proceeding is frequently an encounter where feelings are wounded and reputations are soiled.\(^1\) One court recently stated that the remedy for a

\(^{9}\) See, e.g., Webster v. Sun Co., 731 F.2d 1 (D.C. Cir. 1984) (written memorandum submitted to a congressional committee preliminary to an investigation).

\(^{98}\) See, e.g., Webster, 731 F.2d at 1 (written memorandum); Bio/Basics Int'l, 545 F. Supp. at 1106 (S.D.N.Y. 1982) (oral testimony).

\(^{99}\) There was once a requirement that the person giving the information be under subpoena or the privilege would not apply. See Fiore v. Rogero, 144 So.2d 99 (Fla. App. 1962) (under subpoena). But see Jennings v. Cronin, 256 Pa. Super. 398, 402 n.2, 389 A.2d 1183, 1185 n.2 (1978) (the requirement of a subpoena is irrelevant).

\(^{100}\) RESTATEMENT (SECOND) OF TORTS § 588 (1973).

\(^{101}\) See Cooley v. Gaylon, 109 Tenn. 1, 70 S.W. 607 (1902) (statement which is pertinent to the proceeding, or in direct response to a question presented, will be afforded the privilege).

\(^{102}\) Hoover v. Van Stone, 540 F. Supp. 1118, 1121 (D. Del. 1982) (the requirement of relevancy is liberally construed). See also 50 AM. JUR. 2D Libel and Slander § 237.


\(^{106}\) Id. at 554, 514 P.2d at 507 (quoting Bussewitz v. Wisconsin Teachers Ass'n, 188 Wis. 121, 205 N.W. 808 (1925)).
person defamed by a statement made to a governmental body is not money, "but simply more speech - he has the right to tell his side of the story.”

Whether a common law absolute privilege applies is more difficult to resolve when a statement is made outside the protective environment of the governmental forum. These statements usually occur preliminary to the governmental proceeding. Although the privilege may apply to statements made preliminary to, or in the course of a governmental proceeding, excessive publication may render the privilege void. Excessive publication usually takes the form of statements communicated to the media or to disinterested third parties unconnected to the proceeding.

Statements Made Outside the Governmental Forum

The common law did not view the media as an interested party to the proceeding. Courts have generally held that a dissemination of information containing defamatory statements to the media is not privileged. The dissemination of the defamatory statement, however, must be the primary fault of the party making the statement. If the media receives the information through its own efforts, then no defamation action will lie against the party who made the statement.

While the common law absolute privilege will generally not apply to communications made through the media, the Noerr-Pennington doctrine may apply. The decision in Webb v. Fury demonstrates how an unprivileged statement, not afforded a com-

108. See generally 1 HARPER & JAMES, TORTS 456 (1956) (unnecessary and excessive publication will destroy the privilege).
109. See Asay v. Hallmark Cards, Inc., 594 F.2d 692 (8th Cir. 1979) (no privilege when communicated to the media).
111. Asay, 594 F.2d at 699.
112. Id. at 697. Accord Davis v. National Broadcasting Co., 320 F. Supp. 1070 (E.D. La. 1970) (when a statement is republished by the media, the defamed person has a separate cause of action against both the original defamer and the media company), aff’d, 447 F.2d 981 (5th Cir. 1971).
113. Asay, 594 F.2d at 699.
114. See Sullivan v. Birmingham, 11 Mass. App. 359, 416 N.E.2d 528 (1981). Mere making of relevant statements on a privileged occasion, with the hope that the media will make further publication, does not erase the immunity. The defendant must have uttered the defamatory statement with an intent that it be further communicated to the media. Id. at 363, 416 N.E.2d at 533. See also Johnson v. Cartwright, 355 F.2d 32 (8th Cir. 1966) (the media was a potential party to the litigation).
The common law privilege, may, nonetheless, be immune from a defamation action because it is protected by the first amendment right to petition. Webb involved an allegedly defamatory statement published in a newsletter circulated to individuals interested in the preservation of clean streams in an area of West Virginia. The newsletter was part of the defendants' widespread campaign which included petitioning the Environmental Protection Agency. Extending the Noerr-Pennington doctrine to the law of defamation, the court granted absolute immunity. The court reasoned that even though the defendants had caused the statement to be published in the newsletter, the activity was an attempt to muster public sentiment and was part of an otherwise legitimate petition designed to influence governmental decisionmaking. The Webb court asserted that to hold otherwise would permit a chilling effect on the freedom to exercise the right to petition.

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116. Id. Webb was a private citizen and a principal managing agent of a non-profit corporation designed to ensure that coal mining be conducted with full regard for the rights of future generations. He was also a directing manager of an organization which monitored the cleanliness of area waterways. Id. at 31. Webb noticed that pollution was entering local waterways near the operations of the allegedly defamed corporation's basis of operation. Webb brought a complaint to the Office of Surface Mining, United States Department of Interior, and a request for an evidentiary hearing before the Environmental Protection Agency. Id. Webb also caused a newsletter to be published which contained a two paragraph story. The story, which never mentioned the defamed company, nonetheless showed a map of the area and listed all permit numbers which indicated mining sites. All permits, moreover, were owned by the company in question. Id. at 33. Webb asserted that all petitions to the agencies and the dissemination of information in the newsletter were absolutely privileged petitioning activities under the first amendment, and therefore no action for damages of any nature could be maintained. Id.

117. The petition to the Office of Surface Mining and the Environmental Protection Agency were encouraged by the provisions of the Surface Mining Control and Reclamation Act and provisions of the Clear Water Act. Id. at 37-38.

118. Webb, 282 S.E.2d at 40. The court determined that the clear import of the Noerr-Pennington doctrine was to protect those who genuinely petition government for redress of grievances. Id. at 43.

119. Id. at 42.

120. Id. The court went on to note that the newsletter added nothing to the complaint, which was not otherwise disseminated to the governmental agencies, and that it did not come within the "sham" exception. Id. For other cases which mention dissemination to third persons and the media as a means to muster public sentiment, see Missouri v. National Org. for Women, Inc., 620 F.2d 1301 (8th Cir.) (use of a boycott privileged as an attempt to influence the ratification of E.R.A.), cert. denied, 449 U.S. 842 (1980); Feminist Women's Health Center, Inc. v. Mohammad, 586 F.2d 530 (5th Cir. 1978) (boycotting will not dismiss the immunity of petitioning activity); Mark Aero, Inc. v. Trans World Airlines, Inc., 580 F.2d 288 (8th Cir. 1978) (a publicity campaign involving the media was part of a genuine attempt to influence governmental action); Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board of Culinary Workers, 542 F.2d 1076 (9th Cir. 1976) (allegations including the dissemination of malicious and false statements through the media designed to sway sentiment, and illegal picketing, dismissed as insufficient to warrant interference
The common law absolute privilege and the *Noerr-Pennington* doctrine are similar, yet distinct, concepts. Both concepts find their basis in the belief that every person should have free access to the governmental process, unhindered by the fear of costly litigation. The public will benefit if petitioners and witnesses are not deterred by such apprehension. The *Noerr-Pennington* doctrine, however, is much broader in scope than the common law privilege, and even has constitutional origins. Extending the *Noerr-Pennington* doctrine to the law of defamation, therefore, as put forth in two recent decisions, rests on sound constitutional grounds.

**EXTENDING NOERR-PENNINGTON TO THE LAW OF DEFAMATION**

Although the courts in *Sherrard v. Hull* and *Webb v. Fury* reviewed the evolution of the *Noerr-Pennington* doctrine, the decisions were primarily based on the first amendment right to petition. It was the role of government which persuaded these courts to apply an absolute privilege, indefeasible of malice. In a representative government the people must be able to freely and candidly inform the government of actual or perceived wrongs. The *Sherrard* and *Webb* courts were alarmed by the apparent ease in which malice can be pleaded, and the effect it would have on the right to petition. The prospect of litigation, they argued, would discourage citizens from making good faith petitions.

The chilling effect of a defamation suit was emphasized in the *Webb* opinion. In *Webb*, the court asserted that the defendant’s petitioning activity was precisely the type of communication that the

with activity protected by the first amendment), *cert. denied*, 430 U.S. 940 (1977). *Cf.* Mid-Texas Communications v. American Tel. and Tel. Co., 615 F.2d 1372 (5th Cir. 1980) (private actions not directed at any governmental body and not designed to sway public sentiment was not privileged). The *Webb* court also noted that the information disseminated to the media and to the agencies was “far less noxious than any of those 'big lies' which the Court dealt with in *Noerr.*” 282 S.E.2d at 42-43.

121. See generally Bass v. Rohr, 57 Md. App. 609, 471 A.2d 752 (1984) (two privileges apply here: one is of a constitutional nature and the other has evolved from the law of libel and slander).

122. See generally Id. (there exists a need to present information without the fear of subsequent harassment from a defamation suit).

123. Id. at 65, 471 A.2d at 755.


right to petition intended to foster. The defendant was a concerned citizen who desired clean streams. Yet, when he informed the government of wrongs committed by an alleged polluter, the accused claimed defamation. The petitioner, moreover, was an individual of ordinary means, while the accused was a well-financed corporation. Even the dissent recognized that in cases like Webb the potential for chilling genuine petitions to the government, when there is anything less than absolute immunity, is enormous.

In Sherrard, the petitioner addressed a local legislative hearing. One of the matters presented to the legislature concerned a zoning designation near the petitioner's farm. The petitioner gave her views on the subject, but questioned a commissioner who had voted in favor of a change in zoning on how much money it had cost to get him to vote for the change. The person who brought the rezoning proposal sued for defamation. As in Webb, the Sherrard court noted that the petitioning activity was the type the first amendment covered. The court also noted that the petitioner was encouraged to speak out at the hearing. The court held that as long as the principal purpose of a petition is to obtain a favorable governmental response, no defamation action would lie. In weighing the individual's desire to be free from a defamation suit against the need of the government to receive information enabling it to better serve the needs of the public, the Sherrard court held that the latter must prevail.

Both courts underscored their opinions with the need to maintain a system of government that encourages a free exchange of competing social and economic interests. In Webb, the court observed that both parties had ample opportunity to participate in the petitioning process and that each party had an opportunity to speak on the issue. The Webb court was careful to caution, however, that if people cannot communicate their views to the government, our democratic system, designed to do the will of the people, would not.

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131. Webb, 282 S.E.2d at 37. The petitioning activity was on "all fours" with the conduct held to be protected by the Noerr-Pennington doctrine in Noerr and its progeny. Id.
133. Id. The dissent contendted that an absolute privilege should not be the first remedy put forth. Instead, the rules of pleading should be made rigid in petitioning cases. Id. at 47.
135. Id. at 555, 456 A.2d at 61. Although the court noted that falsehoods have never been protected for their own sake, to not apply an absolute privilege would chill the right to petition. Id. at 571, 456 A.2d at 69.
136. Id. at 572, 456 A.2d at 70.
137. Id.
138. Id. at 566, 456 A.2d at 67.
139. Id. at 567, 456 A.2d at 67.
140. Webb, 282 S.E.2d at 39.
fail. In *Sherrard*, the court outlined a method which would not only safeguard the right to petition, but would also better protect an individual’s desire to be free from defamation.

*Combining Common Law Relevance with the Sham Exception*

In *Sherrard*, the court reasserted the proposition that a petition must be recognized as a genuine effort to influence governmental decisionmaking, and not just a sham designed to harm an individual. Unlike the other *Noerr-Pennington* decisions, however, the *Sherrard* court imposed the requirement that the allegedly defamatory statement must be relevant to the overall proceeding. In order to satisfy the relevancy requirement the statement must have some objective reference to the subject matter of the petitioning activity. If the overall petition is a sham, or the particular statement irrelevant, then no immunity applies. The court reasoned that the relevancy requirement was necessary to further protect the interests of the allegedly defamed party.

Subsequent to the *Sherrard* decision, the court in *Bass v. Rohr* applied the sham and relevancy requirements to a petition made to a Home Improvement Commission. The court determined that the allegedly defamatory statements were relevant to the complaints filed to the commission, and thus absolute immunity applied. The *Bass* court further ordered the complainant to pay all costs.

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141. *Id.* at 43. The United States appeared as amicus in *Webb*. The United States urged the *Webb* court to apply an absolute immunity for citizens who are sued because of petitioning activity intended to influence governmental decisionmaking. A conditional privilege would be insufficient, resulting in a chill on the exercise of the first amendment right to petition. Reply Brief for the United States as Amicus Curiae at 13, *Webb v. Fury*, 282 S.E.2d 28 (W. Va. 1981).

142. For a discussion of this method, see *infra* notes 143-150 and accompanying text.

143. *Sherrard*, 53 Md. App. at 566, 456 A.2d at 67. For a discussion of the sham exception, see *supra* note 49-64 and accompanying text.

144. *Sherrard*, 53 Md. App. at 574, 456 A.2d at 71. The relevancy requirement is substantially similar to the modern relevancy requirement imposed by the common law privileges. See *supra* notes 101-104 and accompanying text.


146. *Id.*

147. *Id.* The relevancy requirement was not part of Maryland’s common law privilege. The *Sherrard* court, however, incorporated the requirement because of competing interests involved and the broadness of the *Noerr-Pennington* doctrine. *Id.*


149. *Id.* at 618, 471 A.2d at 757.

150. *Id.* at 620, 471 A.2d at 758.
CONCLUSION

While relevancy must be decided on a case-by-case basis, it will effectively serve to rid the petitioning process of those individuals who might otherwise hide behind the broad sham exception. For instance, a statement concerning a person's personal life has no place in a petition which relates to the pollution of the environment or the failure to properly construct a home. The incorporation of relevancy deserves attention from courts which in the future will decide whether to apply Noerr-Pennington to the law of defamation.

In light of the evolution of the Noerr-Pennington doctrine, its extension to the law of defamation is reasonable and logical. Whether the threat of litigation comes from an antitrust suit or an action for defamation, the harm upon the right to petition remains the same. Unintentional verbal and written accusations can easily be exploited by the allegedly defamed person as a means of revenge. The response should not be a defamation suit, but more speech.

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