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I. INTRODUCTION

A. Background of the Defamation Act

One hundred years ago this Summer, the National Conference of Commissioners on Uniform State Laws (the "Uniform Law Commissioners," or "ULC") was first convened when representatives of seven states met in Saratoga Springs, New York just prior to the 1892 Annual Meeting of the American Bar Association. The self-conceived mission of this fledgling group was no less than to bring "harmony of law among the States of the Union" during an era when explosive development of interstate commerce, communication and transcontinental travel among the States had created new challenges to the federalist model upon which a very different Nation had been founded hardly more than one hundred years before.

In the hundred years since that first meeting, the Uniform Law Commissioners, as they came to be called, have done much to fulfill their ambitious mandate. The ULC's proposed "uniform laws" have on many occasions been widely and at times universally adopted by the States. Their subject matter has extended from the mundane but essential -- e.g., such matters as "weights and measures," "warehouse receipts," "probate of wills," "annulment of marriages," "stock transfers," "motor vehicle registration" -- to some of the landmarks of a "harmonized" American legal system -- perhaps most notably the "Uniform Commercial Code," a monumental work portions of which are still in progress or being updated and revised by the Commissioners. In connection with many if not most of such successful ULC projects, the commercial and societal need for uniformity of legislation among the States on the particular set of legal issues has been largely unquestioned. The greatest challenge for the Commissioners was to forge a workable and politically feasible synthesis out of whatever varying approaches to the shared goal of uniform law were propounded by the affected interests or industries.

In not all areas of law has there been such general agreement, however, as to the need for, or appropriateness of, uniform state legislation. Indeed, as the major areas of consensus have become increasingly occupied by the ULC's prior promulgations, there has at times been a tendency for the Commissioners to branch out into somewhat more controversial areas. The subject of this special report is one such area -- i.e., the ULC's recent and still-pending sally into the contentious field of defamation law.

Notably, it was not until 1986 -- already more than 20 years after the Supreme Court had undertaken its own judicial, constitutionally-driven libel law reform effort in New York Times v. Sullivan -- that the first serious consideration was given to the issue of defamation as a possible subject for uniform legislative reform under the auspices of the ULC. In that year a libel law "Study Committee" was empanelled. After a year of
consideration, culminating with the ULC's 1987 Annual Meeting, the Study Committee recommended that a project in this area would be "premature." According to ULC minutes, the Study Committee apparently reasoned that "[declaratory-judgment-type] reform proposals by Professor Marc Franklin of Stanford," and similar proposals and studies done by others, including [then-] Commissioner [Randall] Bezanson [Director of the Iowa Libel Project], had not yet been considered by the legal and publishing community." (Minutes of the ULC Scope and Program Committee, July 29-31, 1989.) On this basis, at its own recommendation, the libel law Study Committee's work was suspended sine die.

This suspension of activity was not long-lived, however. The matter of defamation law was put back onto the ULC's agenda only two years thereafter. Apparently, the impetus for this revived interest was a report issued in the fall of 1988 by the "Annenberg Libel Law Reform Project." That report had, inter alia, propounded a "Model" Libel Reform Act, including a mechanism for declaratory judgments of truth or falsity, whose purpose was to stimulate debate and to move the conflicting parties toward "a process in which both sides are encouraged . . . to solve their disputes without resorting to suits for money damages." (Annenberg Report, October 17, 1988 at 10). Within the ULC it was apparently conceived that, the Annenberg Project having thus suggested a "legislative" approach to the problem of libel reform, uniform state legislation under the auspices of the ULC would be the logical engine for the further consideration, and ultimately the implementation, of such a legislative solution.*

* Curiously, although the Annenberg proposal may have been the ultimate trigger for the ULC's Defamation Act project, the substantive balance of Annenberg can hardly be said to have been its guiding inspiration. Thus, the Drafting Committee's expert "Reporters' first background legal memorandum candidly expresses the view that the Annenberg Model Act "errs at almost every possible juncture in favor of the press." Perhaps not surprisingly, Annenberg project Director Smolla, now serving as the American Bar Association's "at-large" advisor to the Defamation Act Drafting Committee, has been frank in stating his opposition to key provisions of what quickly became the ULC's far less press-oriented proposals -- especially the Act's current intent to impose a declaratory judgment procedure on unwilling libel defendants. Smolla recently characterized the Act as adopting "either . . . middle of the road or somewhat conservative doctrine . . . . It's hard for me to read the Act as drafted and say that this is as good a deal for the media as New York Times v. Sullivan."
Action was briefly deferred on the question of formally reinstate
defamation to the ULC's active agenda of drafting
projects until the Scope and Program Committee was able to meet
with Randall Bezanson (along with Commissioners Haydock and
Oettinger) during the ULC's Annual Meeting in the Summer of 1989.
As a result of that meeting, and apparently without consulting any
of the affected interest groups, the Scope and Program Committee
unanimously recommended to the ULC Executive Committee that a
"drafting committee" be appointed. On August 1, 1989, the
Executive Committee of the ULC approved this recommendation.
Sometime thereafter a drafting committee of nine persons
-- none
of whom had direct or substantial experience with defamation law
-- was appointed, with Dean Harvey S. Perlman of the University of
Nebraska College of Law serving as Chair. Randall Bezanson, one
of the initial proponents of the project who was by then Dean of
the Washington & Lee School of Law and no longer a Commissioner,
was nominated to serve as the Perlman committee's
"Reporter/Draftsman."

The minutes that memorialize the decision to empanel the
ULC's Defamation Act Drafting Committee reflect the strikingly
broad and ambitious scope of the proposed project. In this
regard, the minutes are worthy of full quotation:

"It was the consensus of the Scope and
Program Committee that the state of the law [in
the defamation field] is in chaos and that there
is a need in this country to protect free speech,
a need to protect victims from press error, and a
need to free the press from punitive damages, and
a need to make the law uniform. It was clear to
the Committee that it will be impossible for the
judiciary in the United States to construct a
replacement system or to reform the law."

As noted in the ULC minutes, the Scope and Program Committee
concluded that only a "Uniform" Defamation Act drafted by the
Commissioners could resolve these fundamental problems in
defamation law. Its formal recommendation provided as follows:

The Scope and Program Committee unanimously
recommends to the Executive Committee that a
drafting committee be appointed to draft a Uniform
Defamation Act. The Scope and Program Committee
feels that the drafting committee should devise a
replacement system to reform the libel or
defamation laws in the United States.

B. Summary of LDRC's Defamation Act Project

It is hardly surprising, given the ULC's remarkably
ambitious intent to recast the entire body of U.S. defamation law,
that media groups would view such a project with great interest and perhaps a certain degree of trepidation and concern. As they have devolved, the media's efforts to monitor and attempt to influence the Drafting Committee's activities have been pursued on two primary tracks.

First, through key "advisors" nominated by the American Bar Association to the Drafting Committee, attorneys attuned to media interests have actually attended the ULC Committee's drafting sessions, providing live input and returning with first hand reports of the Committee's views and apparent intentions. Among the seven or eight advisors, at least five either directly represented ABA committees or groups with strong media oriented interests or else they were attorneys active and knowledgeable in representing media defendants. Indeed, of the remaining advisors, only one was clearly libel plaintiffs oriented.*

Second, because these advisors were ultimately bound to represent the particular interests of their ABA affiliations, as well as to exercise a certain restraint in terms of active opposition to the very project upon which they were to render "advice," it was apparent that any coordinated media-industry "lobbying" would have to be undertaken outside the core of advisors. By various means this mantle was ultimately bestowed on the Libel Defense Resource Center, in particular because of its expertise in the defamation field and because of its relatively comprehensive representation of most if not all sectors of the industry. In order to assure that there existed agreement regarding LDRC's response to the Defamation Act a poll was taken among all of LDRC's supporters. This confirmed by a 3 to 1 margin, that a "central" role for LDRC was favored. The same poll also confirmed a strong consensus that judicial reform and voluntary approaches were preferred (by a margin of more than 4 to 1) to legislative-type reform measures. By a similar margin LDRC's supporters expressed initial opposition to the very notion of a uniform act, regardless of its ultimate form or content.

In order to assure that this initial mandate was appropriately exercised over an extended period, in February 1990

* The advisors (and their ABA affiliates) are: Rodney Smolla, "at-large" advisor (nominated by the Section on Individual Rights); Ron Plessner (section on Individual Rights); Kevin Baine (Section on Litigation); Ron Guttman (Section on Torts and Insurance Practice); Dan Waggoner (Forum Committee on Communications Law); Bob Hawley (ANPA Joint Task Force); Tony Mauro (Media Conference of Lawyers and Representatives of the Media) [the ANPA and Media Conference Committees have recently been merged)]; and John Walsh (plaintiff representative without portfolio).
the Executive Committee of the LDRC approved the formation of two special committees to follow the activities of the Defamation Act Drafting Committee. LDRC wished to assure that its supporters, including many of the nation's leading media companies and associations, were well-informed on the progress of the ULC initiative in order to be better able to assess and possibly respond to proposals having such potential impact on their interests, constitutional as well as commercial.

The first of these special committees, denominated the LDRC Blue Ribbon Task Force on the ULC, is comprised of 11 of the 67 members of the Steering Committee of the LDRC, broadly representing various sectors of the media. Current members of the Blue Ribbon Task Force are: René Milam, Esq. (Newspaper Association of America -- major daily newspaper publishers); Richard M. Schmidt, Esq. (American Society of Newspaper Editors); R. Bruce Rich, Esq. (Association of American Publishers -- book publishers); Maria Pollante, Esq. (Authors League of America); Tina Ravitz, Esq. (Magazine Publishers of America, Inc.); Larry Worrall, Esq. (Media/Professional Insurance, Inc.); Steven A. Bookshester, Esq. (National Association of Broadcasters); Robert J. Brinkmann, Esq. (National Newspaper Association -- smaller and non-daily newspapers); J. Laurent Scharff, Esq. (Radio/Television News Directors Association); Jane E. Kirtley, Esq. (Reporters Committee for Freedom of the Press); Harry M. Johnston III, Esq. (Time Incorporated; LDRC Chairman). The Blue Ribbon Task Force has been of especial assistance in advising LDRC staff on its views regarding both the substance and the tactical aspects of LDRC's "lobbying" efforts on behalf of the industry.

The second of the special committees, denominated the LDRC Defense Counsel Section Advisory Committee on the ULC, is comprised of representatives from 11 of the almost 100 law firm members of the LDRC Defense Counsel Section. Advisory Committee members were chosen in light of their expertise and long experience with defamation law issues. They include the authors of three of the leading treatises in the defamation law field. Members of the Defense Counsel Section Advisory Committee are: Bruce W. Sanford, Esq. (Baker & Hostetler - Washington, D.C.); E. Susan Garsh, Esq. (Bingham, Dana & Gould - Boston); Richard E. Rassell, Esq. (Butzel Long Gust Klein & Van Zile - Detroit); P. Cameron DeVore, Esq. (Davis Wright & Tremaine - Seattle); Robert D. Sack, Esq. (Gibson, Dunn & Crutcher - New York); James J. Brosnahan, Esq. (Morrison & Foerster - San Francisco); Robert C. Bernius, Esq. (Nixon, Hargrave, Devans & Doyle - Washington, D.C.); Eugene L. Girden, Esq. (Kelley Drye & Warren - New York); Richard N. Winfield, Esq. (Rogers & Wells - New York); Lee Levine, Esq. (Ross, Dixon & Masnick - Washington, D.C.); Slade R. Metcalf, Esq. (Squadron, Ellenoff, Plesent & Lehrer - New York). The DCS Advisory Committee has worked closely with LDRC's staff in reviewing drafts of the Act and in preparing LDRC's major annual reports assessing their legal and policy implications.
C. Current Status of the Act

At its inception the ULC clearly recognized that any such ambitious mission to recast U.S. defamation law would not be easy -- indeed, that it would in the ULC's own words be an "heroic" task. Events over the almost three years since the drafting project was authored have certainly borne out this prediction.

In its first year of work the Defamation Act Drafting Committee produced two drafts of the Act -- its Reporters' "Preliminary Draft" (2/22/90) and a more formal, Drafting Committee redraft (7/13-20, 1990) which was "read" by the full Conference of Commissioners at its annual meeting in Milwaukee, Wisconsin. This first annual draft contained a number of highly controversial features that drew strong criticism from various quarters. LDRC's Report on that draft concluded that the Committee Draft remained deeply flawed and objectionably one-sided in key provisions that consistently favor libel plaintiffs' interests. Central features of the Act, most notably its rigid "bifurcation" of proceedings so that a trial on "truth" must generally be held before any constitutional defenses could be asserted, remained subject to serious constitutional challenge. Bifurcation, as well as other far-reaching proposals such as abolition of all distinctions between "public" and "private" defamation, "libel" and "slander," and "per se" and "per quod" concepts, revealed the Committee Draft as radical and untested, either not fit for, and/or unlikely to secure, uniform legislative enactment. LDRC was also critical of many other specific provisions of the Act. Overall, LDRC viewed the draft's substantive features as merely the latest in a series of proposals based on a "declaratory judgment" type of procedure. However, in comparison to other recent reform proposals the Act as then drafted was clearly the most one-sided in favoring plaintiffs' interests. Also, although by design intended to be more comprehensive in approach than most of these other reform proposals, the Committee Draft nonetheless frequently, and often inexplicably, failed to take advantage of the occasion to resolve open issues and address problems genuinely in need of reform.

Subsequent to the Act's first reading, it appeared that the burden had been shifted to the Drafting Committee to demonstrate that further revisions could bring the Act into a balance more acceptable to affected interest groups, most particularly the media. It also seemed clear that the drafting process would be extended by at least a year because so many questions had been raised, and doubts expressed, as to the viability of the Act as then drafted.

In its second year of drafting the ULC Committee did indeed go back to the drawing board, producing a total of 3 drafts (11/8/90; 12/20/90; and 8/2-9, 1991). Despite these multiple revisions, the draft ultimately submitted to the Conference for annual review was specifically not considered one ready for a
second and final reading. Among the major changes reflected in the 1991 annual draft were the substitution of a so-called "action for vindication" in place of the proposed "bifurcated" proceedings that had been so controversial. Although a declaratory judgment-type option had thus been retained, its impact was to some extent softened by the prospect (presented as a "bracketed" option, however, not favored by a majority of the Drafting Committee) of the need for a defendant's consent to the vindication action; as well as by the promise of the outright elimination of punitive damages in any fully-litigated (non-vindication) action. During proceedings at the 1991 annual meeting of the ULC in Naples, Florida, however, both media-oriented compromises were rejected. The alternative providing for defendant's consent was rejected and, in the only formal action by the Commissioners, after extended debate a decisive majority rejected the Committee's recommendation and voted to eliminate the total ban on punitive damages, instructing the Drafting Committee to reinsert a punitive damage remedy in the Act.

The immediate result of these actions at the 1991 annual meeting was to throw down the gauntlet to the Committee to attempt to find some entirely new formula for re-balancing the Act in order to attract support from media interests. Indeed, during the course of the Conference's debate on punitive damages Drafting Committee Chairman Perlman had warned that regression on that issue might render further work on the Act "an academic exercise," by which he was presumably acknowledging that the otherwise pro-plaintiff Act would become politically untenable without such a defense-oriented sweetener.

In the third year of drafting it might have been expected that particularly "heroic" efforts would have been made by the Drafting Committee in order to breath life into the Defamation Act. Curiously, while the Committee went through another 5 drafts (10/10/91; 11/11/91; 12/6/91; 1/6/92 and 2/6/92) relatively few substantive changes were made, with a number of the drafts reflecting only minor, technical or cosmetic changes. Punitive damages were reinstated, with some fine tuning that did not go nearly as far as had been expected to limit the regressive effects of the Conference's instructions. The Committee's major move on that issue was instead to add a "rebracketed" provision once again proposing outright elimination of punitive damages. However, the full Conference having decisively rejected this approach the Committee's motion, in effect, for reargument must be considered to remain an unlikely scenario.

Beyond such relatively modest revisions, the Drafting Committee's major third-year strategy appeared to turn from substantive revamping to public relations. Thus, the Committee ultimately recommended to the ULC that there be no reading of the Act at the Conference's 1992 annual meeting. Instead, the
Committee sought to defer final consideration pending an effort to open up the process to other interested parties -- presumably in the hope that some support might be forthcoming from one quarter or another. An "open session" of the Drafting Committee has been scheduled for October 9, 1992 in Washington, DC, with live testimony or written submissions being invited, addressed to the current draft (February 6, 1992) of the Act.

It remains to be seen whether the Committee's present plan to submit a final draft to the Conference for an up or down vote in the Summer of 1993 will founder for lack of any meaningful support. LDRC will be carefully assessing the views of its constituents, and attempting to assure that those views are made known to the Drafting Committee in October and, if necessary, to the full Conference of Commissioners next summer.

D. Editor's Note: The Organization of this Special Report

In this *Bulletin* we have combined sections of prior LDRC reports on the Defamation Act with updates and new insights prompted by recent re-drafts of the Act. Specifically, Part II on "Truth Trials" and "Damages" is largely excerpted from LDRC's "Follow-Up Report on the [Uniform] Defamation Act," dated August 1, 1991. The significance of the observations in that part of this Report has, if anything, been increased by changes made in the Act since last August. Part III is a substantially-updated version of similar section-by-section analyses dating back to LDRC's first major Report on the [Uniform] Defamation Act of June 25, 1990, but now keyed to the organization and content of the draft Act dated February 6, 1992. Finally Part IV, "The Act in Context," is largely a reprint of substantial portions of the June 25, 1990 Report, including some minor, but not systematic updating. The core of the Part IV analysis, reflecting as it does historical and policy concerns, would seem to be as pertinent today as it was two years ago. In two Appendices to this Special Report the reader is presented with the current version of the Defamation Act, marked-up to reflect changes since August, 1991, and with a chart prepared by LDRC tracking progress on key issues from draft to draft, through the draft currently pending.

While a number of *Bulletin* subscribers may have had an opportunity to read some if not all of LDRC's prior studies on the Defamation Act, the present "merger" of new and prior analyses provides both important updated information to those who have been closely following the Act and, we believe, a solid contextual background for readers as yet unfamiliar in any detail with the proposed Act and the issues it has raised. In sum, the current Special Report can be seen as a comprehensive, single source of LDRC analysis regarding the Defamation Act up to the ULC's draft dated February 6, 1992. Beyond this *Bulletin*, LDRC expects to issue an additional comprehensive analytical report on the pending
draft by or before the next scheduled meeting of the Defamation Act Drafting Committee on October 9, 1992. Assuming no significant revisions are made in the Act at that juncture, it is possible that this next report will represent LDRC's final analysis and would be the basis for any formal position for or against the Defamation Act should it ultimately come to a final vote in the Summer of 1993. Any such additional LDRC report(s) and positions, or summaries thereof, will be made available in future issues of the LDRC Bulletin.

II. THE TWO KEY ISSUES WHICH HAVE STOOD OUT THROUGHOUT THE DEVELOPMENT OF THE ACT

The drafters' sustained effort to trade the implementation of a declaratory judgment remedy in return for limited reform on the issue of damages has brought those topics to the forefront as the two key issues of the Act. The drafters, like other proponents of declaratory judgment proceedings for libel, apparently believe that libel plaintiffs are eager (or at least willing) to trade damages for a simple and forthright statement that the defendant’s publication was false, thus "vindicating" the plaintiff’s otherwise assertedly tarnished reputation. The drafters have thus put great effort into constructing a declaratory judgment mechanism within the Act; on the other hand, however, in their proposals regarding the traditional alternative of a fully litigated libel claim they have failed to resolve the most troubling feature of U.S. defamation practice from the point of view of libel defendants: i.e., the steady escalation in the frequency and excessive dollar amount of damage awards that have dramatically raised the ante across the board in U.S. defamation litigation. In thus hitching their reform wagon to declaratory relief for plaintiffs while failing to accord to defendants genuine damages relief, the drafters would seem to have satisfied no substantial constituency in the libel debate. Indeed, other declaratory judgment proposals have never made it past the study phase, and in the one instance where a truly voluntary alternative dispute resolution mechanism was available, few plaintiffs used it.* Perhaps the trial statistics compiled by LDRC suggest why plaintiffs -- or at least their attorneys -- have no interest in

* The latest report on the status of the Iowa Libel Research Project's Libel Dispute Resolution Program (the "program") indicates that contact with attorneys from 128 libel disputes over the three year period 1987-1990 resulted in only five instances of all parties agreeing to use the program. Of these five cases, one was mediated but ultimately left unresolved; one was resolved through settlement negotiations; in one case the parties agreed to arbitrate but the case has not yet been submitted to arbitration and two cases settled before actually entering the program.
giving up large damage awards. (LDRC's next Bulletin will provide the latest update and analysis of damage awards, through calendar year 1991, as well as a ten-year review.) The Act's focus on a declaratory judgment action, without an attempt at serious damage

reform reveals an approach to reform not guided by a desire to address demonstrated problems in the law, but by what would appear to be a single-minded mission to re-cast the law in favor of libel plaintiffs.

A. "Truth Trials": The Defamation Act Drafting Committee's Overriding Priority to Enhance the Protection of Reputation

In a major policy shift away from the current, constitutionalized law of defamation, the Act provides for the equivalent of a declaratory judgment action based solely on the truth or falsity of a challenged statement. Initially, the Act called for a mandatory bifurcation of the proceedings in a defamation trial. Unlike the usual pattern of bifurcation trying first liability and then damages -- the Act split the issues along the line of a determination of falsity and subjective reputational harm first, and considerations of mitigating factors such as privilege and actual damage second.

In particular cases, depending on the specific circumstances, bifurcation in some form might well serve the interests of justice and judicial efficiency. Where that is true, procedural rules and the inherent power of the court will already allow it. So far, however, there is no extended or persuasive history of judicial bifurcation in defamation actions. It is worth noting, in this connection, that the court in Ariel Sharon's case against Time Magazine (a case of such complexity that a cogent argument favoring bifurcation could probably be made) considered -- and ultimately rejected -- the possibility of bifurcation. See, Sharon v. Time Inc., 103 F.R.D. 86, 95 (S.D.N.Y. 1984); Sharon v. Time Inc., 599 F. Supp. 538 (S.D.N.Y. 1984).

Subsequent to the initial draft of the Act, the Committee members abandoned the more cumbersome and anomalous aspects of bifurcation and replaced the mandatory split proceedings with an optional "Action for Vindication," allowing plaintiffs to forego monetary damages in exchange for a "written and published finding of fact on the question of falsity."* Unfortunately, the optional

* One reason for this shift may well have been opposition from the organized litigation bar -- see letter of June 29, 1990 to drafting committee chair from Kevin T. Baine, ABA Litigation Section "advisor."
aspect of the provision is only available to the plaintiff. An earlier, bracketed provision requiring the defendant's consent to participate in a vindication action has recently been deleted. In addition, the defendant in a vindication action is prohibited from raising key claims of privilege "including constitutional privileges based on negligence or actual malice."* Thus, in its current guise, the vindication action, like the former mandatory bifurcation provisions remains a tool by which plaintiffs can force defendants into a "truth trial", stripped of essential defenses which have formed the core of defamation law for over 25 years.

The suggestion of a "declaratory judgment" of the truth or falsity of an allegedly defamatory publication is neither a new nor accepted reform proposal in the defamation field. Indeed, it has been under discussion for almost ten years and has generated much controversy but little organized support. Viewed on its own terms there does not appear to be much that is new about the current incarnation of the declaratory judgment mechanism that is likely to generate great enthusiasm among those previously withholding support for such a proposal.

Clearly, the absence of a provision requiring the defendant's mutual consent can be expected to be found unacceptable by many defamation defendants. Indeed, even leading supporters of a declaratory judgment alternative have objected to the imposition of such a procedure on an unwilling defendant. See Leval, "The No-Money, No Fault Libel Suit: Keeping Sullivan in its Proper Place," 101 Harv. L. Rev. 1287, 1301 (1988). Professor Smolla, the American Bar Association's at-large advisor on the Defamation Act, has strongly espoused this view in connection with the pending drafting process.** So long as the power to force

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* Only "absolute" privileges may be asserted to defeat a "vindication" action -- see current draft, Section 5 and comment thereto.

** In a letter dated January 2, 1991 to LDRC's General Counsel, Professor Smolla stated: "I no longer support any form of declaratory judgment procedure that may be imposed involuntarily on the parties." [Other academic commentators have opposed declaratory judgment reforms for different reasons. See, e.g., Anderson, "Is Libel Law Worth Reforming?," 140 U. Pa. L. Rev. 487, 546-550 (1992) (arguing that instituting a declaratory judgment action for libel will not necessarily reduce the costs of contesting a libel dispute, the number of disputes, or aggressive attitudes of litigants. Professor Anderson further points out that it is "easy to overestimate the benefit to media of reforms that substitute declaratory relief for monetary judgments." Id at 548. See also, Halpern, "Values and Value: An Essay on Libel Reform," 47 Washington and Lee L. Rev. 227, 238-247 (1990) (arguing essentially that there is no basis historically or philosophically for a declaratory judgment in libel disputes.)]
waiver of constitutional rights is given to the defamation plaintiff it is doubtful that an Act centrally based upon such a one-sided "reform" mechanism will find significant support from the organized defamation defense community.

Other features of the current vindication action also do not bode well for the prospect of consensus support. Not only would the defamation defendant be forced to endure an unconsented truth trial stripped of constitutional defenses, but because the committee has also incorporated an attorneys fee award into the procedure, the defendant would also be subjected to the potential of a substantial economic sanction -- over and above the cost of "defense" -- if held to have "unreasonably refused" to retract despite the provision of "sufficient grounds" to retract (neither standard further defined) thus requiring further proceedings in the truncated action. Even putting aside the serious constitutional issues raised by the imposition of such a penalty, it would not seem politically productive to build such a potentially onerous feature into an already controversial aspect of the Act.

Recent drafts of the Act do include some revisions to make the vindication action less one-sided. Initially, defendants were completely precluded from receiving attorneys fees. More recently, the Act would permit prevailing defendants in a vindication action to recover attorneys fees if they can prove the plaintiff "had no reasonable basis upon which to allege falsity." Notably, however, prevailing defendants in actions for damages may not seek attorneys fees, although plaintiffs may.

In addition, the so-called "termination" mechanism has been modified. Pursuant to this provision (Section 6 of the most current draft) a defendant may move to terminate the action by stipulating "on the record that it does not assert the truth of the publication or did not intend to assert its truth" and agrees to publish a "sufficient retraction." The comment to the Section explains that while defendants would rarely be willing to admit falsity, they might be comfortable "disclaiming" the truth. The drafters further attempt to take the sting out of termination for defendants by providing that under these circumstances the plaintiff is not considered to have "prevailed" and therefore is not eligible for attorneys fees. Of course the effect of the termination is still to impose strict liability for lack of truth. Moreover, to effectuate termination, defendants must agree to publish a "sufficient retraction." The intricate semantics imposed by the drafters hardly seem to alleviate the potential chill on free speech by substituting a forced admission of lack of truth for a judge or jury determination with the only real "benefit" being not having to pay plaintiffs' attorneys fees.

Finally, it should be recalled, the declaratory judgment mechanism is untested. There has essentially been no experience with this approach, which has already been rejected by the Legislatures of several States -- see infra at 42.
It is thus impossible to assess the institutional costs of the vindication action -- e.g., will there be many more, the same, or fewer defamation actions overall under this procedure? What percentage of plaintiffs will exercise their non-damages, vindication option? Will the vindication action reduce litigation costs greatly, marginally, or not at all? How often, and at what cost to editorial integrity, would the "termination" option be exercised by media defendants? How frequently, and based on what standards, will attorneys fee awards be granted?

Under the circumstances of these uncertainties, it is difficult to envision widespread support for a "uniform," "truth trial" mechanism of potentially nationwide reach.

B. Damage Reform: The Committee’s Proposed Trade-off for Media Support

Matching the drafters’ extensive efforts to create a new declaratory judgment process is their lack of success in effectuating significant damage reform in the context of fully litigated claims. The Act does not sufficiently recognize that the increasing award of mega-damages is a major problem in defamation practice. Although one interim draft did actually prohibit the award of punitive damages, the majority of the Conference apparently is unwilling to give up that penalty. The current draft contains two bracketed alternatives, one permitting and one prohibiting punitive damages. Clearly some members of the Committee realize that it will be very difficult for any members of the publishing community to support a "reform" Act which continues to allow for punitive damages. It is true that regulating punitive damages through the Act may raise a potential conflict with existing state laws. Some states impose caps on certain types of damages, as well as special procedures for asserting claims for punitive damages. Nonetheless, undertaking effectively to reduce or eliminate the frequent incidence of excessive damage awards would indicate that the Committee is at least somewhat responsive to the concerns of defamation defendants. Experience, even in the brief period since the drafting committee first proposed to embark upon such reform, has not diminished these concerns. Since the Spring of 1990, for example, five new defamation "mega-awards" -- each in excess of $10 million -- have been handed down by juries against established
media entities.* These awards, ranging from $13.5 million to $58 million, now represent six of the ten largest awards in the history of media defamation litigation. Although each of these verdicts included a punitive damage element, ranging from $9 million to $41 million and averaging over $20 million, each of the awards also included huge supposedly "compensatory" elements, ranging from $2.5 million to $17 million and averaging almost $9 million.

These recent huge awards demonstrate the intractability of the mega-damage award phenomenon. It is not clear that any type of legislative reform would effectively overcome the tendency of juries to make excessive awards.** In the cases just cited, for example, the elimination of punitive damages would apparently not have prevented the imposition of "compensatory" awards punitive in size if not intent.

A recent case demonstrates, similarly, that so long as more fundamental damage reform is not incorporated, not even the Act's elimination of "general or presumed" damages, nor the requirement of proof of reputational harm before any award may be made for resulting emotional distress, will necessarily prevent juries (or appellate courts under traditionally-loose standards of damages review) from awarding (or affirming the award of) large round numbers to "compensate" for inchoate and open-ended damage

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** In this discussion we put to one side the equally problematical question of whether truly adequate damage reform would ever be supported by plaintiffs' groups or uniformly be adopted without challenge by State Legislatures.
elements such as harm to reputation or emotional distress, regardless of the rubric under which such awards are made.

Thus, in Weller v. American Broadcasting Companies, Inc., No. A046379 (slip. op. at 25-30) the California Court of Appeal upheld a sizeable jury verdict -- denominated as entirely non-punitive -- based on what would seem to have been speculative, if not dubious, evidence of compensable injury. The verdict, totaling $2.3 million, was comprised of the following components:

$500,000 "for proven injury to [personal] reputation;"
$300,000 "for proven injury to [corporate] reputation;"
$500,000 "for additional presumed injury to [personal] reputation;"
and $1,000,000 "for mental suffering."

The plaintiffs, an antique silver dealer and his company, claimed they were defamed by broadcasts investigating whether a candelabra plaintiffs had sold to a museum was stolen and overpriced. The appellate court unconvincingly asserted that the plaintiffs had provided "competent evidence" of injury to reputation. Yet plaintiffs, according to the appellate court's own factual summary, presented no hard data of any kind for purposes of quantifying the value of the asserted reputational injury and offered no "direct testimony of customers or potential customers who refused to do business with them" because of harm to reputation resulting from the broadcast. In fact, a review of the underlying record reveals that not a single witness testified that he thought less of the plaintiffs after viewing the broadcasts. The only evidence at trial allegedly confirming the asserted injuries came from plaintiffs themselves.

Although determining the value of loss of reputation is a speculative endeavor, in a business context one would have expected plaintiffs to have at least provided some objective evidence to assist the jury in determining the value of asserted reputational injury. However, a review of the record reveals that plaintiffs not only failed to offer concrete evidence of declining profits, but that undisputed accounting evidence demonstrated plaintiffs' business continued to progress at a steady pace following the broadcasts. Nevertheless, the appellate court seemed quite comfortable affirming the multi-million dollar verdict based in large part upon the plaintiffs' speculative, subjective and self-serving testimony, contrary to such data, that a drop in "foot traffic" had been "observed," and that plaintiffs "believed" there had been a reduction in consignments to the antique shop. Beyond this, the only other "evidence" of damage caused by the broadcast consisted of the antique dealer's own hearsay testimony that (i) "[he] had been told by an appraiser that one of the [appraiser's] clients refused to deal with [plaintiffs];" and (ii) the "sister-in-law of one of [the
plaintiffs'] clients said she would be 'very leery' about doing business with [them]."

In Weller, the entire award was denominated as one for "general" damages.** Nonetheless, it would seem that the elimination of "general or presumed" damages suggested in the commentary to Section 5-101 of the current draft would not significantly have affected the outcome in Weller. This is so because at least $1.8 million of the damages awarded (apart from the "presumed" award of $500,000) fell within categories specifically compensable under the Act -- either injury to reputation or emotional distress. Although the current draft of the Act would arguably have eliminated the $500,000 award for "presumed" damage to reputation, it is not at all hard to imagine that this jury could readily have added, and the appellate court might well have approved, some additional amount -- perhaps the entire $500,000 -- either under the open-ended category of actual reputational harm or under the open-ended category of emotional distress.

Moreover, while the Act's commentary seems to equate "general" with "presumed" damages for these purposes, Weller confirms that traditional terminology in many jurisdictions does not do so. Accordingly, if the elimination of "general" damages was intended to do anything more than eliminate "presumed" damages, this intent would have to be made far more explicit, given the loose and varying uses of such terminology from jurisdiction to jurisdiction.

Furthermore, the hope expressed in the commentary to recent drafts -- that permitting only emotional distress damages parasitic to proof of injury to reputation will "limit the scope of emotional distress damages recoverable" -- would also not seem to be borne out by Weller. Plaintiffs in Weller recovered $1

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* In lieu of providing supportive empirical evidence, plaintiffs did offer "expert" testimony from two silver dealers and a museum director who testified to the self-evident proposition that a good reputation is important in the silver business and opined that "implied allegations" that a candelabra was stolen or overpriced could damage a dealer's reputation. Such testimony, while perhaps marginally pertinent, could hardly serve to assist the jury in quantifying the value of plaintiffs' alleged loss of reputation.

** According to the Court of Appeal the corporate plaintiff apparently sought, but failed, to prove "special damages." Apparently, the individual plaintiff alleged no special damages.
million on their "resulting" emotional distress claim based largely upon Weller's own testimony as to the "humiliation he felt in explaining these events to his family" and the "sorrow he experienced because his mother died before he was vindicated by the jury verdict." Weller also testified generally as to his "anger, worry, sleeplessness, loss of appetite and depression," although he did not claim to have incurred any "special" or "pecuniary" damages related to these claims of distress. Nonetheless, the jury readily embraced the conspicuous $1 million figure -- a figure whose only apparent relationship to "evidence" of actual injury appears to be the equivalence of that award to the combined round-number total of the two awards for reputational injury.

Thus, it would seem that the mere "linkage" of reputational and emotional distress recoveries still does not protect against excessive, unchecked awards so long as courts are able, as in Weller, to frustrate the goal of "limiting the scope of [resulting emotional distress] damages" by failing to formulate some objective standard by which recovery could be effectively confined (either in jury instructions or at the appellate stage).

Weller, of course, is hardly the only defamation case in which a multi-million dollar jury award has been comprised, even absent an express award of punitive damages, of round dollar amounts so obviously untethered to any specifically proven economic injury or specifically established quantification of the value of loss of reputation and/or attendant emotional distress. Weller is simply the most recent instance of a case of this kind -- and one that stands out because of the express appellate approval for such lax standards of proof.

Weller upheld its multi-million dollar award under a preponderance of the evidence standard. But even under a standard such as "reasonable certainty," as provided in the current draft, it is unlikely that these excesses would be corrected. At a minimum, given the largely indeterminate nature of "harm to reputation" and attendant "emotional distress," compensatory damages must be based on "clear and convincing" evidence of actual injury. Such a higher standard of proof, while no guarantee of the elimination of all excessive awards, at least would have the salutary effect of (i) requiring defamation plaintiffs to adduce and particularize some concrete evidence of their damages, rather than relying on generalized appeals to the sympathy -- if not to the passion and prejudice -- of the jury; (ii) enabling defamation defendants specifically to defend against and challenge on the objective merits attempts to prove such claims of huge damage, rather than simply attempting to deflect often histrionic appeals to jury sympathy, if not passion or prejudice; and (iii) perhaps most importantly, mandating that appellate courts -- unlike the minimal review performed by the Weller court -- meaningfully review huge defamation awards based on an independent evaluation of the evidence rather than based on an "absence of passion or prejudice" standard which is wholly inappropriate to cases with constitutional ramifications.
In the end, Sullivan and its progeny should be read to embrace the proposition that there can be no justification for excessive or windfall awards in any case where overriding values of free expression are at stake. Indeed, under Gertz, libel claims are only seen to be justified -- in their potential conflict with First Amendment claims -- in order to provide compensation for actual injury. If this is so, defamation defendants could well take the position that they have an absolute entitlement to at least the abolition of punitive and presumed damages -- as well as inflated compensatory awards -- even without the potentially significant trading away of other constitutional privileges that the committee draft would ask of them in return.

III. THE BROAD RANGE OF OTHER ISSUES COVERED BY THE ACT

Although the Act does not always tilt against the interests of libel defendants, the pro-plaintiff bias of the Act does pervade many of its current provisions. In addition, certain of the proposed reforms severely truncate or ignore years of development of constitutional or common law.

*SECTION 1 - DEFINITIONS.* The definitions section of the Act has been significantly pared down since early drafts. Initially, the Act attempted to define "defamation," "fact," "falsity," "person," "publication," "public official," "public figure" and "reputation". Only definitions for "defamation," "pecuniary damage," "person," and "publication" remain in the most recent draft.

The drafters wisely abandoned their attempt set limits on the constitutionally based concepts of public figures and public officials. This appears to be one of the few instances where the drafters have bowed to established legal precedent in lieu of attempting their own restatement of the law.

The added definition of pecuniary damage seems to be an attempt to buttress the drafters' elimination of the availability of general and presumed damages. Since the Act still allows for recovery of undefined "damages for harm to reputation," the new definition hardly constitutes an appreciable attempt at serious damage reform.

The definitions of "defamation," "person" and "publication," largely unchanged, still fail to bring any new clarity or reform to these issues.

*SECTION 2 - ELEMENTS OF CLAIM.* Seemingly standard language setting forth "elements of claim" masks a radical approach to reform, acknowledged and effectuated in the Comment, that would undertake to abolish all distinctions between "libel" and "slander," "public" and "private" claims and "media" and "non-media" publications or defendants.
The Draft thus resolves in a wholesale fashion constitutional issues expressly left open by the U.S. Supreme Court and abolishes fundamental concepts generally reflected in state or common law for centuries.

* SECTION 3 - BURDEN OF PROOF. Proposed proof requirements fail to provide meaningful reform on the issues of falsity and damages. The proposed Act requires the plaintiff to prove falsity only by a preponderance of the evidence. The drafters have failed to recognize and account for the increasing number of federal and state courts that now require libel plaintiffs to prove falsity by clear and convincing evidence as an adjustment to the similar burden for purposes of proof of actual malice -- a standard integrally related to falsity. Moreover, although claiming to favor damage reform, the drafters have rejected the clear and convincing proof requirement, proposing instead a less stringent requirement of "reasonable certainty" with which there has been no experience in defamation practice.

* SECTION 4 - PLEADINGS: EXPEDITED PROCEEDING. Although the Act attempts to require that allegations be pled with specificity, it does not require the plaintiff to plead any details of publication, such as the date and place or manner of publication. This is unfortunately consistent with the Act's treatment of publication for purposes of its statute of limitations (see infra).

This section also requires a plaintiff alleging libel by implication to explain the "circumstances giving rise to the defamatory meaning." While such a provision appears helpful, the recognition of "libel by implication" is controversial, and some states do not recognize it as a cause of action. Genuine reform would either preclude such a claim, or at least permit individual states the option to do so.

Finally, this section also provides for "expedited proceedings" if the plaintiff can show it is likely to suffer significant harm by republication. The Act, however, provides no explanation of applicable procedures, or even a suggestion as to what form such proceedings would take. This leaves open the potential for ex parte hearings and a result dangerously close to a prior restraint.

* SECTIONS 5 - 8 - ACTION FOR VINDICATION. These sections cover the parameters and procedures for actions for vindication, discussed in part II of this Bulletin.

* SECTIONS 9 - 12 - ACTION FOR DAMAGES. These sections cover the "traditional" action for damages. On a positive note, the Act does not permit "general" or "presumed" damages and also does not allow damages for "pure emotional distress."
Actions for vindication and damages both include an opportunity for the defendant to "terminate" the action by stipulating, on the record, that it "does not assert" and "did not intend to assert" the truth of the publication. In an action for damages, the defendant must then pay the plaintiff's legal fees and costs and publish "a sufficient retraction." While the drafters believe libel defendants will find a significant advantage to being able to "disclaim any assertion of truth," as opposed to "conceding" falsity, it is hard to believe that in practice defendants will actually have such a great appreciation for the semantics of abdication.

* SECTIONS 13 - 15 - RETRACTION. Seen in isolation from the rest of the Act, retraction is an issue that has historically been viewed as appropriate for legislative consideration. However, while it might represent an improvement over many current retraction statutes, the Committee Draft does not go far enough. In order to effectuate truly meaningful reform, such a provision would have to be amended to include, among other changes, an initial period when prompt retraction would entirely preclude any claim; extension to cover all media and types (and frequencies) of publications; elimination, or more equitable availability, of attorneys fees for litigation costs resulting from an unjustifiable demand for, as well as the refusal of, a retraction.

* SECTIONS 16 - 18 - PRIVILEGES. The Committee Draft is also inadequate and incomplete in its attempt substantively to modify existing privileges. The Section on "absolute" privileges is deficient in that it only applies to statements made in the context of "proceedings" or "meetings." It does not apply to federal or high level state officials in the performance of their duties. The fair report privilege is similarly unduly constricted in that it appears not to apply by its terms to judicial proceedings and only includes reports of open and public meetings, thus excluding coverage of official documents and certain closed but official proceedings that have generally been recognized as subject to the privilege. The Act fails to include a "conditional" privilege for "fair comment," a privilege long recognized judicially under common law. This omission is made more significant by the Act's determination to follow the Supreme Court's most recent decision declining to adopt a constitutional privilege for opinion "wholly in addition to" existing First Amendment protections. Early drafts recognized forms of "neutral reportage" and "wire service" privileges, but these have since been eliminated.
* SECTIONS 19 and 20 - LIABILITY OF REPUBLISHER. Treatment of republication in the Committee Draft is most notable for its failure consistently to modify current law, moving instead in directions that may be unfavorable to the libel defendant and, more fundamentally, for its failure to propose significant reform in an area that remains anachronistically linked to concepts of strict liability and the unwarranted fiction that a republisher is always to be viewed as adopting and asserting the truth of the initial publication. Similar deficiencies inhere in the Draft's strict treatment of the continuing liability of the initial publisher for later re-publications.

* SECTION 21 - INFORMATION RETRIEVAL SERVICES. This section is intended expressly to bring "information retrieval or transmission services", such as Lexis, Westlaw and computer bulletin boards into the ambit of libraries and archives typically exempt from liability for republication of a challenged statement. Although it is not clear whether this proposal represents a significant advance over current law, one of its purposes would appear to be to gain allies in the information services industry to counteract what the Drafting Committee fears may be general opposition to the Act from the publishing community.

* SECTION 22 - SINGLE AND MULTIPLE PUBLICATIONS. This section defines "single and multiple publications." A publication simultaneously received by more than one person is deemed a single publication, as is an "aggregate and reasonably contemporaneous publication."

* SECTION 23 - SURVIVABILITY OF CLAIMS; DEFAMATION OF DECEASED PERSON. By the drafters' admission, the current Draft is contrary to the common law, and many state statutes, provides that a claim survives the death of a libel plaintiff, "but only to the extent that the claim is for vindication. . . . or for recovery of pecuniary damages." The Act does prohibit defamation claims for statements made about an already deceased person.

* SECTION 24 - EXCLUSIVE REMEDY; OTHER ACTIONS. In providing that it is the "exclusive remedy for reputational or dignitary harm caused by the publication of a false statement," the Act appears to foreclose other related causes of action such as emotional distress and false light invasion of privacy. Once again, this appears to effect sweeping changes in the law, and is potentially disadvantageous to plaintiffs, particularly private figure plaintiffs.

* SECTION 25 - LIMITATION OF ACTIONS. The Draft's treatment of statutes of limitations also presents certain serious problems. While the proposed Act would render the service,
in another discrete area traditionally subject to legislative
treatment, of unifying practice around the majority rule of a
one-year limitation period, the statute is problematical in
incorporating a "rule of discovery" contrary to current
practice in the vast majority of states; in proposing an
unduly extended limitation period in connection with
replications; in formulating a one-sided "tolling"
provision favoring the libel plaintiff; and in adopting a
definition of the date of publication that also departs,
without justification and to the detriment of defendants,
from settled law.

* SECTIONS 26-30. These Sections -- treating "Uniformity of
Application and Construction," "Short Title," "Severability,"
"Effective Date," and "Application to Existing Relationships"
-- are largely ministerial and do not affect the substantive
law.

IV. THE ACT IN CONTEXT: AN HISTORICAL AND POLICY BASED ANALYSIS

A. Defamation Law 1990 -- A Stark Conflict of Perceptions
Sullivan

1. In the Delicate Constitutional Balance Between Freedom
and Reputation, Freedom Is Accorded Priority

Any analysis of a proposed fundamental "recasting" of the law
of defamation must begin with what, more than twenty-five years
have thought to be common ground. That the unrestricted
enforcement of libel claims threatens to impose an
unconstitutional "chilling effect" on the freedoms of speech and
press guaranteed by the First Amendment. That in order to assure
"robust and wide-open" speech on issues of public concern, we must
assure the "breathing space" that can only be provided by a
recognition that some unintentionally "false" expression is
inevitable in the "field of free debate." And thus, as the U.S.
Supreme Court has mandated since Sullivan, that before liability
-- or any other substantial penalty -- may constitutionally be
imposed, sufficient proof of falsity and of fault must be offered
by the libel plaintiff, under standards defined by the First
Amendment -- standards that supercede the power of inferior courts
or the legislative branch to modify or amend.

It is no doubt true that First Amendment interests are not the
only consideration in the delicate balance that represents today's
"constitutionalized" defamation law. As the Supreme Court
"The need to avoid self-censorship . . . is . . . not the only
societal value at issue. . . . The legitimate state interest
underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood." Id. at 341. See also Rosenblatt v. Baer, 388 U.S. 75, 86, 92-93 (1966); Milkovich v. Lorain Journal Co., No. 89-645, slip op. at 20-21 (U.S. June 21, 1990).

But even the Gertz Court reaffirmed the clear constitutional priority of First Amendment interests by noting that "[i]n [its] continuing effort to define the proper accommodation between these competing concerns, we have been especially anxious to assure to the freedoms of speech and press that 'breathing space' essential to their fruitful exercise." Id. at 342. And this priority to constitutional concerns has continued to be accorded, in the Court's defamation jurisprudence, in cases involving both "public" and "private" plaintiffs, to this day.

In Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984), the Court observed that freedom of expression "is not only an aspect of individual liberty -- and thus a good unto itself -- but also is essential to the common quest for truth and the vitality of society as a whole." For this reason, the Court in Bose reaffirmed application of the extraordinary rule of "independent appellate review" in public plaintiff libel actions in order "to confine the perimeters of any unprotected category [of speech] within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited," this being done "in order to preserve the precious liberties established and ordained by the Constitution."* Id. at 511.

More recently, in Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986), the Court held, in a notable extension of the fundamental implications of Sullivan, that the Constitution overrides ancient common law principles regarding the burden of proving truth or falsity even in cases brought by private libel plaintiffs. The Court observed that "where the scales are in . . . an uncertain balance, we believe that the Constitution requires us to tip them in favor of protecting . . . speech." Id. at 776.

Thereafter, in Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988), the Court not only did not question the priorities of Sullivan, but extended them to a public plaintiff's claim for intentional infliction of emotional distress in a case involving a most unsympathetic and unseemly publication. The Court recognized "the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern" and that these freedoms

* In contrast, the Supreme Court has held that the interest in reputation, although certainly valid and worthy of protection, does not arise to the level of a "liberty interest" under the Constitution. Paul v. Davis, 424 U.S. 693 (1976).
continue to require "breathing space" in order to avoid the "undoubted 'chilling' effect on speech" that would be caused by imposition of "liability . . . for false factual assertions" absent proof "both that the statement was false and that the statement was made with the requisite level of culpability." Id. at 50, 52 (emphasis in original).

And, in Harte-Hanks Communications, Inc. v. Connaughton, 109 S. Ct. 2678 (1989), the Court's most recent decision on the constitutional standards of liability in this area, although upholding a judgment against the libel defendant, strongly reaffirmed these fundamental principles.[*] The Supreme Court recognized that the continued vitality of the standards of New York Times v. Sullivan, as well as the special rule of independent appellate review, were "not simply premised on common law tradition, but on the unique character of the interest protected by the actual malice standard. Our profound national commitment to the free exchange of ideas, as enshrined in the First Amendment demands that the law of libel carve out an area of 'breathing space' so that protected speech is not discouraged." Id. at 2694-95 (citations omitted). Indeed the Court in Connaughton unanimously resisted any encroachment on, or dilution of, its stringent and careful definition of the actual malice standard, rejecting an inconsistent standard that had been applied by the Sixth Circuit Court of Appeals.

In sum, despite some provocative questions raised by one or another Justice from time to time, these are not, at their most fundamental core, issues upon which the Supreme Court has been deeply divided nor is there current evidence that the Court has any intention of reversing, or backing away from, the broad

[* Since this portion of LDRC's analysis was written one additional decision has been rendered by the Supreme Court on the actual malice rule, Masson v. New Yorker Magazine, Inc., 111 S. Ct. 2419 (1991). But in Masson the Supreme Court once again adhered to Sullivan's fundamental principles while rather sensitively applying them to the unusual issue of defamation assertedly caused by altered quotations. Seven Justices recognized the need to accommodate the practical necessities of journalism to the dictates of "First Amendment principles of general applicability."]
implications of Sullivan.* Certainly there exists no basis for concluding, from anything the Court has recently said or done, that it sees any fundamental imbalance, in its First Amendment defamation rules, that needs to be corrected; or that the Court would be particularly solicitous to a fundamental "replacement" of the standards, or a marked shift in the delicate balance, that it has sought to achieve over more than twenty-five years of constitutional rulemaking.

In stark contrast to these currently prevailing views, it is impossible to read the Committee's Draft, with any degree of care, yet not come away from that reading with an abiding conviction that the Defamation Act, as currently constructed, flows from a set of assumptions and perceptions substantially at odds with these clear constitutional standards and priorities. While not so bold as to purport to reverse Sullivan and its progeny outright, the Draft would seem to seek a not dissimilar result by according priority, not to the protection of First Amendment rights as has the Supreme Court since Sullivan, but to the determination of issues of falsity and reputation, and by establishing procedures

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* See Smolla, Foreword, in LDRC 50-State Survey 1988 ("[T]he structure and tone of Rehnquist's opinion [in Falwell] ... placed the Court solidly behind continuing allegiance to [Sullivan] ... praising the core rationales of the actual malice standard ... At least seven Justices went out of their way to announce their essential faith in ... the [Sullivan] and Gertz framework.") Id. at xxxiii. Nothing in Milkovich v. Lorain Journal, supra, the Court's most recent libel decision, changes this analysis. Justice Rehnquist's opinion was expressly intended to "hold ... the balance" between freedom and reputation. The Court reviewed and reaffirmed the continued vitality of the basic constitutional principles established in Sullivan and expanded through Connaughton. Even Hepps, whose ruling favoring free expression on the burden of proof issue had divided the Justices 5 to 4 when originally decided, served in Milkovich as the lynchpin of the analysis of Justice Rehnquist (a dissenter in Hepps). As the Court noted, "[t]he[se] numerous decisions ... establishing First Amendment protection for defendants in defamation actions surely demonstrate the Court's recognition of the Amendment's vital guarantee of free and uninhibited discussion of public issues." Id., slip op. at 20, 21. And Justice Brennan (joined by Justice Marshall), although he dissented to the Court's application of "the protections we have already found to be guaranteed by the First Amendment," agreed "almost entirely" with the majority's restatement of the governing constitutional principles. Id., dissenting opinion at 1, 2.
that could lead to the circumvention -- and thus largely the nullification -- of constitutionally-mandated privileges and defenses.

The "Prefatory Note" to the pending Committee Draft indicates -- indeed it candidly acknowledges -- that the Committee seeks to shift the delicate constitutional balance by now giving central priority in its reform proposals to the advancement of libel plaintiffs' asserted interests in reputation. While it is not inappropriate, in light of the mandate to achieve a correct balance between freedom and reputation, to consider whether libel plaintiffs' (lesser) interests are being sufficiently accommodated within the overriding structure of constitutionalized libel law, the Committee's one-sided choice only to seek "a way to provide additional protection for reputational harm," albeit assertedly "without interfering with legitimate First Amendment concerns," rests on an apparent predisposition, and on assumptions, that are subject to very serious question.

First, the assumption that the balance may constitutionally be tipped toward reputation implicitly assumes, without any proffered support, that defamation law is not already operating within a constitutional minimum of necessary privileges defined by the Supreme Court and lower courts under the First Amendment. Relatedly, the Committee appears to suggest -- and again without any proffered basis -- that perhaps "illegitimate" First Amendment protections are currently being recognized, in derogation of "legitimate" interests in reputation, and that First Amendment protections could therefore be cut back without violating constitutional commands.* While this line of reasoning can be vigorously attacked on theoretical grounds, it is also subject to most serious question for its lack of empirical foundation. The Committee's one-sided view ignores powerful evidence that, whatever problems may also afflict libel plaintiffs, the constitutional mandate to protect free expression from the chilling effects of libel claims has itself not yet been fulfilled. It is also premised on "empirical evidence" that, upon examination, is itself one-sided and subject to challenge.

2. Freedom From "Chilling Effects" Remains a Decidedly Unfulfilled Promise to Which the Defamation Act Fails to Pay Heed

One of the driving forces behind the "constitutionalization" of American libel law effected by New York Times v. Sullivan and

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* As the Committee states in its Prefatory Note: "The central question that animates this draft is whether there is a way to provide additional protection for reputational harm without interfering with legitimate First Amendment concerns." Prefatory Note at 1 (emphasis added).
its progeny has been an economic concern that the imposition of sanctions or other costs will have an undue "chilling" effect on the exercise of First Amendment freedoms. Trends over the past decade document that these potentially "chilling" economic effects remain perhaps the pre-eminent feature of libel litigation in the United States today. Data gathered by the LDRC reveal, for example, that during the past decade an unprecedented incidence of million-dollar jury awards and a vast inflation in the average size of initial awards was experienced. Even discounted for inflation, a comparison of pre-Sullivan damage awards with current damage awards clearly demonstrates a drastic increase in potential liability which outpaced even the dramatic and widely noted inflation of awards in other key areas of non-constitutional tort litigation. Moreover, even in cases where damages were not awarded, an assessment of the onerous and increasing cost simply of successfully defending libel actions, the vast majority of which are ultimately found to be legally meritless,* reflects the failure of even constitutionalized libel practice to make good on the promise of Sullivan to impede the adverse economic effects of civil libel litigation. Kaufman, "Trends in Damage Awards, Insurance Premiums and the Cost of Medial Libel Litigation," in E. Dennis and E. Noam, The Cost of Libel: Economic and Policy Implications (Columbia University Press 1989) at 1-15.

These data, and the concerns that they suggest, are not simply the obsession of media organizations. In 1983 a journalist and scholar, well known for his lack of sympathy for over-reaching claims by the media for First Amendment protection, wrote a widely-cited article which expressed great concern over a spate of million and multi-million dollar libel awards, reflecting "a time of growing libel litigation, of enormous judgments and enormous costs." "And it is not just judgments that worry publishers and reporters and others concerned with freedom of expression. It is the cost of defending libel actions. . . ." Lewis, "New York Times v. Sullivan Reconsidered: Time to Return to 'The Central Meaning of the First Amendment'," 83 Colum. L. Rev. 603, 609 (1983).

That same year another leading libel scholar, currently serving as the American Bar Association's at-large Advisor to the Defamation Act Drafting Committee, reported "a dramatic proliferation of highly-publicized libel actions brought by well-known figures who seek, and often receive, staggering sums of money." Smolla, "Let the Author Beware: The Rejuvenation of the American Law of Libel," 132 U. Pa. L. Rev. 1 (1983).

The following year, Judge Robert Bork -- hardly known as a doctrinaire advocate of judicial activism or of unduly expansive First Amendment rights -- observed:

[I]n the past few years a remarkable upsurge in libel actions, accompanied by a startling inflation of damage awards, has threatened to impose a self-censorship on the press which can as effectively inhibit debate and criticism as would overt governmental regulation that the first amendment most certainly would not permit. Ollman v. Evans, 750 F.2d 970, 996 (D.C. Cir. 1984) (en banc) (Bork, J., concurring), cert. denied, 471 U.S. 1127 (1985).

By 1986, LDRC was reporting -- far from the pre-1980 situation of essentially no million-dollar awards documented by Professor Franklin* -- the incidence of numerous million-dollar awards, to the point that the average award against media defendants had skyrocketed to "in excess of $2 million." Kaufman, "Libel 1980-85: Promises and Realities," 90 Dickinson L. Rev. 545, 555 (1986) (summarizing statistics compiled by the Libel Defense Resource Center).**

In 1988, very shortly before his retirement from the bench, Judge Bork again commented on the continued chilling effects of libel litigation:

This suit epitomizes one of the most troubling aspects of modern libel litigation . . . . Despite the patent insufficiency of a number of appellant's claims, it has managed to embroil a . . . defendant in over three years of costly . . . litigation. The message to this defendant and the press at large is clear: discussion of [the plaintiff] is


** Data released last year by LDRC, suggesting some recent reduction in the number of million-dollar libel judgments -- see Wise, "Study Shows Media Gains in Libel Cases," New York Law Journal, August 22, 1989 at 1, col. 3 -- although it marks a welcome improvement in a troubling area, does not detract from the longstanding concerns here expressed. This is certainly confirmed by two very recent record-setting libel awards against news organizations, one for $29 million, and the other for $34 million -- see discussion in Point V (4-103), infra. [For more up-to-date statistics see Part II, supra.]
expensive. However well-documented a publication . . . even . . . a successful motion for summary judgment . . . can be very expensive, if not crippling. Liberty Lobby Inc. v. Dow Jones, 838 F.2d 1287, 1303 (D.C. Cir.), cert. denied, 109 S. Ct. 75 (1988).

And finally, in 1989, Chief Judge Wachtler of the New York Court of Appeals, writing editorially, capsulized the dangerous state of libel litigation, as regards the pre-eminent need to protect First Amendment rights:

One of the most serious threats to our First Amendment right to free speech, in this bicentennial year of the Bill of Rights, comes from libel litigation and the consequent award of damages, which has the potential of putting a small publication out of business. As bad as the litigation itself is the fear of litigation, which has the 'chilling effect' of stifling free speech. Wachtler, "Media Intrusiveness Places the First Amendment at Risk," Newsday (April 7, 1989).

As Judge Wachtler wisely observed, the chilling threat of libel claims is not only of concern to the major media companies that have been subject to perhaps the most widely-publicized libel actions, but also to those smaller publishers less able to withstand the onerous costs and burdens of libel litigation. Also not to be forgotten, in weighing the balance of problems in this field, is the very real potential of libel claims for chilling the rights even of individual private citizens. Commentators have documented the increased incidence of suits, often based on questionable libel (or similar) claims, designed to harass, intimidate or shut up individuals and groups that publicly oppose proposals by plaintiffs such as real estate developers, corporations and elected officials. See P. Canan and G.W. Pring, "Strategic Lawsuits Against Public Participation," 35 Social Problems 506 (1988); see also Pring, "'SLAPPs': Strategic Lawsuits Against Public Participation," 7 Pace Environmental L. Rev. 3 (1989) (describing nationwide study of 250 lawsuits since 1970, against non-media defendants (individuals and citizens groups) sued for communicating with the government on issues of public concern, many of which involved defamation or related tort claims).

In sum, there exists widely-recognized and incontrovertable evidence that the realities of recent libel litigation have the potential to chill if not destroy rights the current law of
defamation recognizes as pre-eminent under the Constitution. [*] Indeed, it is not unfair to suggest that it is these realities impacting adversely on libel defendants -- and not those identified by the Drafting Committee -- that have been the central hallmark of recent trends in this field. Even if one acknowledges the existence of other problems, some of them adversely impacting on the interests of libel plaintiffs, it is difficult to see how uniform reform of defamation law can be pressed upon the fifty states without taking into consideration -- and attempting to resolve -- those aspects of libel litigation that, unfortunately, do not appear to have influenced the Drafting Committee in its deliberations to date.

3. In Contrast, the Defamation Act's Apparent Premise, That it is Only Reputation Which Today Requires Special Assistance, is a One-Sided and Disputable Proposition That Does Not Provide a Fair Basis for Genuine Reform

In contraposition to these widely-recognized trends, supportive of a view that First Amendment interests continue to

[* Since this Report was initially written further support for these propositions has continued to come from even such arguably unlikely sources as conservative Ninth Circuit Judge Alex Kozinski who, writing a book review in the November/December 1991 issue of the Columbia Journalism Review, observed:

The Sullivan case was also the precursor of a phenomenon that has become a plague in more recent years: resort to the courts not to recover damages or to right a wrong, but as a means of beating a party into submission with the hobnailed club of litigation. What was once a process for resolving legitimate differences between civilized people often becomes the legal equivalent of biological warfare. Marginally profitable institutions - and the press usually has more than its share of those - are particularly vulnerable, finding it cheaper to settle than to pay the bills of their legal gladiators and suffer the risk of crushing verdicts. [Anthony] Lewis points out [in his new book, Make No Law] that, despite Sullivan, there have been a number of astronomical verdicts in press libel cases, often where the plaintiff clearly suffered no injury. Other suits, fended off successfully or reversed on appeal, were so costly to defend they chilled the vigor of the press because of the fear of litigation alone." Id. at 87-88.]
require solicitude and support in any genuine approach to the reform of defamation law, stands the "empirical evidence" cited by the Committee to support its one-sided impulse to advance the cause of the libel plaintiff.

Essentially, this evidence is based on a single study -- the Iowa Libel Project, a project co-directed by Dean Bezanson who now serves as the Drafting Committee's Reporter.*

While doubtless the Iowa Project made a significant contribution to the field, the specific findings upon which the Committee's Draft is now centrally based were disputed from the outset** and have not proven themselves in the real world of libel litigation. Even if they were not disputed and unproven, they would still not suffice as a basis for balanced reform, since they represent only one part of the picture, flowing as they do solely from conclusions regarding libel plaintiffs' attitudes toward defamation law and litigation. They fail to take adequately into account libel defendants' views and needs, not to mention the dictates of the constitutional limitations on libel law.

Essentially, the Iowa Project found that libel plaintiffs are frustrated by a process that, pursuant to Sullivan, focuses -- often initially and dispositively -- on the defendant's fault rather than the issue of truth or falsity. Furthermore -- and this is the long-disputed proposition that now stands as the lynchpin of the Committee's approach to reform -- the Iowa Project found that libel plaintiffs do not view as central to their concerns recovery of substantial damages -- the kinds of damages that too often become the excesses of which the defense side complains. Instead, according to the Iowa Project, most plaintiffs genuinely seek the kind of vindication that could be attained simply by a clear finding on the issue of falsity, regardless of the availability or pursuit of damages.*** Indeed, as this finding has subsequently been extrapolated, plaintiffs would generally be perfectly happy to trade vindication of a declaration of falsity in lieu of any recovery of damages.


*** See Libel Law and the Press, supra, at 4.
There are serious problems with these findings that suggest they cannot provide a complete and fair basis for genuine law reform. First, because they rely on post-hoc subjective characterizations of motives, they are to some extent inherently suspect as empirical findings, particularly to the extent they defy common sense and experience. Even one of the Iowa Project’s co-directors has acknowledged the problem of subjectivity and mixed motives.* Relying solely on the representation of libel plaintiffs’ motives, by the plaintiffs themselves, presents other problems. The plaintiffs interviewed for the Iowa Project had already been through their litigations and most, according to the findings, had lost. It was thus easy for the plaintiffs to be reflective, revisionist and more reasonable in their attitudes -- and perhaps their rationalizations -- after the fact.

In any event, it is not simply the motives of the plaintiff that controls the course of, and strategy pursued in, libel litigation. Libel plaintiffs’ attorneys, particularly the great majority that work on a contingency fee according to the Iowa Project, have much to say about whether an abstract declaration of falsity is sufficient when their fees are dependent on a percentage taken from any damage recovery.**

These persistent questions about the validity of the Iowa Project’s findings concerning plaintiffs’ motives, have been reinforced in light of events subsequent to their publication. The Iowa Project lead to the creation, also based on the same premise, of a formal Libel Dispute Resolution Program, offering a forum for the voluntary submission of the issue of truth or falsity, without the possibility of damage recovery. After more than two years of experience there is no indication that libel

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* See, "In Libel, Money Isn’t Everything," Wall St. J., July 13, 1989, at A14 (Iowa Project, founder Gilbert Cranberg, commenting on the complexity of establishing the libel plaintiff’s motivation observed, "Establishing motive in libel is especially complex given the frequently intangible character of the harm; the role played by anger and the desire to punish; the way objectives shift over time; the satisfaction people get merely by suing; and the influence of lawyers, whose interests may not be congruent with those of their clients.").

** It is notable that defendants often seek special verdicts in libel cases that go to trial. Yet it is most often plaintiffs’ counsel who object to such verdicts -- preferring general verdicts -- even though special interrogatories would advance the asserted goal of securing clear rulings on the issue of truth or falsity.
plaintiffs -- whose alleged purposes would be perfectly well served by such an alternative dispute resolution process -- have yet to come forward in substantial numbers to invoke this process. Indeed, at last published report, not a single case had gone fully through the process to a final determination of truth or falsity.* And so far as can be told, despite fairly wide publicity, few if any plaintiffs have attempted to enter this process from the outset, prior to their commencement of litigation. Most plaintiffs that have even considered diversion have apparently done so only after first initiating civil damage litigation, and only after being contacted and solicited by the Project. Doubtless, some defendants may also have resisted voluntary submission, and it may be that libel plaintiffs' attorneys are also a significant factor in objecting to the process for economic reasons. But in this real world test of the Iowa Project's findings, the "reforms" which they are said to support have thus far failed to be proven in practice. As long as attorneys are a part of the legal process envisioned by the Committee Draft, then this experience suggests that the premise on which the bifurcated process is based, will continue to be both questionable and unworkable.

The real world response has been similar with regard to other declaratory judgment proposals. To our knowledge no active support has been forthcoming from any organized or significant group speaking on behalf of libel plaintiffs, for such reform proposals in general, or for declaratory judgment legislation in particular -- see Point III.A., infra. It would appear the perception has been -- the Iowa Project's so-called "empirical" findings notwithstanding -- that the trade-off of damages for "vindication" is in reality too great from the point of view of plaintiffs or their attorneys. Yet it is this questionable and yet unproven premise that now still fuels the Committee's Draft.

It is thus perhaps not surprising, in light of this experience to date, that the Committee's Draft undertakes to go even further in loading up the incentives for plaintiffs to submit to the "truth trial" process. For plaintiffs can now,

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* See Stein, "Libel Resolution Program Off to a Slow Start," Editor and Publisher, Dec. 10, 1988, at 18 (Libel Dispute Resolution Program did not receive any cases during its first year of operation). As of the date of this LDRC Report it is apparently still the fact that no case has actually gone to final arbitration, with only one case having even reached the stage where there has been an agreement to arbitrate with the underlying damage suit voluntarily withdrawn.
under the pending proposal, have their cake and eat it too -- unless the defense completely folds with a buyout of the plaintiff (via retraction) and of the plaintiff’s attorney (via "voluntary" payment of the attorney’s fees) under Section 3-104. For despite the availability of a declaration of falsity in "stage one" of the bifurcated proceeding, the plaintiff can still either continue to pursue his full range of remedies in stage two, if no offer of termination is made, or plaintiff apparently retains absolute discretion to withhold consent to termination while continuing to seek damages of various kinds in stage two.

In sum, it is a one-sided bargain that is proposed in the Committee Draft -- a bargain that is in turn premised on a one-sided and self-serving view of the motives and goals of libel plaintiffs -- a view that is in any event highly suspect in light of common sense and experience. The Committee’s premise completely ignores the actions of libel plaintiffs in real world litigation. Moreover, by refusing to propose the ultimate trade-off of all damages and sanctions for the assertedly desired declaration of falsity it also ignores the ultimate logic of the premise on which it is initially based. And, of course, this reasoning also unjustifiably fails to consider the other side of the picture -- i.e., the harm that can be done to First Amendment rights by the continued availability of excessive damages and the chilling threat -- almost certainly exacerbated by the current proposals -- of continued costly libel litigation. Such a distorted view and approach to law reform is unsupportable; if pursued solely in this direction it would surely detract from the fine and balanced work done by the Conference in many other areas of law reform.

B. The General Case Against Comprehensive and Uniform Legislative Codification of Defamation Law

1. A Tradition of Common Law Development

The central vice of any "comprehensive," uniform codification of the law of defamation is precisely that it is purposefully designed to "freeze" the law of defamation throughout the nation. With minor exceptions, the history of the tort, both prior to and after New York Times v. Sullivan, is marked in contrast by a steady, albeit incremental, evolution of the cause of action, an evolution that is decidedly ongoing. The dangers inherent in stemming that evolution, in the context of a uniform statutory scheme, are perhaps best identified by reference to the discussion by Justice Stevens of an analogous evolution of the "actual malice" standard:

First, the common-law heritage of the rule itself assigns an especially broad role to the judge in applying it to specific factual situations.
Second, the content of the rule is not revealed simply by its literal text, but rather is given meaning through the evolutionary process of common-law adjudication; though the source of the rule is found in the Constitution, it is nevertheless largely a judge-made rule of law. Finally, the constitutional values protected by the rule make it imperative that judges -- and in some cases judges of this Court -- make sure that it is correctly applied.

*Bose v. Consumers Union, supra, 466 U.S. at 502.

The civil law of defamation, like the actual malice standard, has always manifested a flexibility that has permitted courts to adapt it to new challenges or changed circumstances exemplified by the facts of particular cases.* Thus, at common law, a series of conditional privileges evolved over time to respond to apparent inequities in the existing law. Similarly, following New York Times, courts have made similar adjustments in the constitutional

context, recognizing, inter alia, the doctrines of opinion,* neutral reportage, and incremental harm. See, e.g., Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984), cert. denied, 471 U.S. 1127 (1985); Edwards v. National Audubon Soc'y, 556 F.2d 113 (2d Cir.), cert. denied, 434 U.S. 1002 (1977); Masson v. New Yorker Magazine, Inc., 881 F.2d 1452 (9th Cir. 1989).[**]

2. The Absence of Comprehensive State Legislation in the Field

It is perhaps for the reasons just stated that the vast majority of U.S. jurisdictions have not chosen generally to

* While the Supreme Court has recently declined to follow lower courts in their widespread adoption of a free-standing, First-Amendment based privilege for opinion, Milkovich v. Lorain Journal, supra, it is not at all clear that these prior judicial developments will be entirely negated by Milkovich. As Justice Brennan noted in his dissent, the majority's analysis actually employed "the same indicia that lower courts have been relying on for the past decade or so to distinguish between statements of fact and statements of opinion . . ." Id., dissenting opinion at 2 (citing, inter alia, Ollman, supra).

[Post-Milkovich cases once again confirm the vitality and flexibility of the judicial process in crafting privileges sufficient to assure protection for opinionated speech. Some courts, while explicitly rejecting their pre-Milkovich context-based analysis, nonetheless have found in favor of media defendants in opinion cases. See, e.g., Unelko v. Rooney, 19 Med. L. Rep. 1161 (9th Cir. 1990); White v. Fraternal Order of Police, 909 F.2d 512 (D.C. Cir. 1990); Lester v. Powers, 596 A.2d 65 (Me. Supr. Ct. 1991). Other Courts appear to have followed Justice Brennan's analysis and continue to apply an Ollman or "Ollman-like" test. See e.g., Phantom Touring, Inc. v. Affiliated Publications, 19 Media L. Rep. 1876 (1st Cir. 1992); Moyer v. Amador Valley J. Union High Dist., 225 Cal. App. 3d 720 (1990). And, at least one court has looked to its State Constitution to find a greater protection of opinion than that now apparently available under the federal constitution. See, Immuno AG v. Moor-Jankowski, 18 Media L. Rep. 1625 (NY Ct. App. 1991). A more detailed analysis of post-Milkovich trends will be included in an upcoming LDRC Bulletin.]

[** Although the Supreme Court's recent decision in Masson, supra, appears rather definitively to have nipped a First-Amendment based "incremental harm" doctrine in the bud, that decision has quite provocatively invited state common law development of similar principles, nowhere expressly recognized in the pending Defamation Act.]
codify civil defamation law, but have relied on the long
tradition of judicial development of common law (and, more
recently, constitutional) rules in the defamation field.

Currently, the only state that has comprehensively codified
its civil defamation law is Oklahoma. Operating as a code state
has created significant problems to the extent constitutional
requirements have displaced Oklahoma’s increasingly outdated
code, portions of which were declared unconstitutional in 1976 by
the Oklahoma Supreme Court. Only in 1980 and 1981 was the
defamation code partially amended to modernize -- not
successfully in the view of attorneys practising in Oklahoma --
aspects of the state’s defamation code -- see LDRC 50-State
Survey: Current Developments in Media Libel and Invasion of
Privacy Law (Libel Defense Resource Center 1989) at 713.

California defamation law is governed by a less
comprehensive, but partial, codification in its Civil Code, id.
at 87, as is Georgia, id. at 249 and Texas, id. at 818 (libel
considered a statutory cause of action in Texas but additional
common law privileges and standards have been superimposed).
Only 3 other states (Montana, North Dakota and South Dakota) have
by statute enacted a general definition of civil libel and
slander -- see id. at 666, 804.

Pennsylvania allocates burden of proof in defamation actions
by statute, but the U.S. Supreme Court in Philadelphia Newspapers
v. Hepps, supra, held unconstitutional its requirement that the
defendant prove truth, id. at 732. To our knowledge only
Michigan has statutorily resolved the question of its standard of
fault applicable to private plaintiffs, id. at 488 -- and see
also Point III.B., infra, regarding the continued political
infeasibility of legislative codification in this field of law.
All other states that have adopted a constitutionally-required
fault standard, subsequent to Gertz v. Robert Welch, Inc., have
done so judicially.

The only exceptions to this rule of common law development
have involved particular issues such as retraction or statutes of
limitations, which inherently require distinctly legislative
choices -- see discussions in the Section-by-Section Analysis,
Point V, infra. Other discrete instances where legislative
action has been taken include certain special rules of pleading,
special jurisdictional requirements, recognition of truth as a
defense (also in state constitutional bills of rights
provisions), recognition of certain privileges not recognized (or
clearly and completely recognized) at common law, and abolition
of certain types of damages.

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3. A Body of Law Still in Flux

A "comprehensive" statutory scheme, such as the Draft, would by definition inhibit, if not prevent, courts from continuing the salutary process of common law and constitutional evolution. As Justice Stevens recognized in Bose, albeit in a slightly different context, the "constitutional values" undergirding the law of defamation make it "imperative" that courts have the power and flexibility to respond, on a case-by-case basis, to unanticipated threats to the free exercise of constitutionally guaranteed rights. Or, as Judge Bork has similarly concluded, "simple categories, semantically defined, with their flat and barren descriptive nature, their utter lack of subtlety and resonance" simply cannot be "nearly sufficient to encompass the rich variety of factors that should go into analysis when . . . values meant to be protected by the First Amendment are threatened." Ollman v. Evans, 750 F.2d at 994 (Bork, J., concurring).

Indeed, as the debate between Judge Bork and Justice Scalia in their Ollman opinions makes abundantly clear, there is not presently, nor has there ever been, any judicial consensus concerning the scope and nature of constitutionally imposed restrictions on the power of the states to afford a tort remedy for injury to reputation. The Bork/Scalia debate of the 1980's is, in many senses simply a continuation of the Black/Frankfurter debate of the previous generation. Since New York Times v. Sullivan, the Supreme Court has, with extraordinary frequency, felt compelled to speak to constitutional issues raised by defamation and related torts. Although many would argue that the Supreme Court's decisions have not always served to clarify the law, the notable frequency of the Court's efforts to do so speaks forcefully to the folly of pretending that the law is now settled, at least settled enough to be meaningfully captured in a national, uniform legislative scheme.

Finally, the evolutionary process that characterizes the law of defamation, both in its common law and constitutional dimensions, is, at bottom, a response to ongoing experience with the tort in the real world. Such a process allows courts, over time, to reassess the assumptions upon which existing rules are based, and discard those rules, or modify them, when it becomes clear that the assumptions are incorrect. See Ollman v. Evans, 750 F.2d at 994 (Bork, J., concurring). In contrast, the Draft is premised almost entirely upon a set of assumptions that even its proponents admit they cannot warrant to be accurate. For example, the Draft proceeds from the assumption that the so-called "truth trial" will result in a net decrease in the number of litigated disputes and in the costs of those cases that are litigated. It is equally likely, however, that the availability of a "truth trial," along with the promise of an award of attorney's fees to the successful plaintiff, will spawn
the development of a plaintiffs' "truth trial" bar which, like the class-action bar and others, regularly scans the morning paper for potential clients and causes of action. The point, we think, is that no one knows whether the assumptions upon which the Draft relies are accurate, and the "price" for guessing wrong is that fundamental First Amendment rights will be violated, not just in one case, but in all cases in all courts across the nation. This is simply too high a price to pay in pursuit of the goal of "uniformity."

It is therefore no accident that the framers expressly conceived of the First Amendment as a device, for better or worse, to keep the legislative branch out of matters relating to freedom of speech and freedom of the press. As Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), indicates rather concretely, even laws advertised as "enhancing" freedom of expression can, and often do, in reality infringe First Amendment rights. Even well-meaning legislatures, without political agendas of their own, cannot possibly be competent to divine, at one time and for all cases, the "correct" treatment of legal issues that trench so directly on expression itself. Both our constitutional heritage and the common law development of the defamation tort over many centuries suggest that it is the courts, and not the legislatures, that ought to be entrusted with accommodating the competing interests at stake.

4. The Pervasive Substantive Overlay of Constitutional Law

A still further constitutional consideration militates against the undertaking to draft a Uniform Act in the defamation field. This concern flows from the current pervasive overlay of constitutionally-mandated requirements that not only impinge upon, but in fundamental respects substantively define, the permissible scope and content of defamation law under the First Amendment. Not only are these constitutional requirements pervasive, but as we have just pointed out, they are also still developing so that they cannot with any degree of confidence or certainty be crystallized and codified by the Uniform Law Commissioners or any state legislature.

It is recognized that the ULC has, in other areas, demonstrated an ability to accommodate its proposals to the demands of the Constitution. One example that has been cited is the Uniform Extradition and Rendition Act of 1980. Reference to this Act, however, fails to address the more far-reaching constitutional concerns that are presented in the context of the proposed Defamation Act. Unlike defamation, extradition is a field traditionally left to legislative development. The 1980 Extradition Act was, in essence, a redraft of the ULC's earlier Uniform Criminal Extradition Act of 1926 which had, by that time, been adopted in a substantial majority of the states. The
appropriateness of uniform legislative treatment in the field was thus unquestioned. The 1980 Act represented an effort by the Commissioners simply to revise certain procedures in the prior Act that had lead to confusion among the states and that were considered no longer adequate to pass constitutional muster. By the time of the redrafting of the Extradition Act Supreme Court decisions had provided reasonably clear and definitive answers as to the types of procedures that would sufficiently accommodate the requirements of the Fourth Amendment. See *Gerstein v. Pugh*, 420 U.S. 103 (1975); *Michigan v. Doran*, 439 U.S. 282 (1978).

In other words, the ULC, in operating within this traditionally legislative arena, had merely to look to enunciated standards and to reflect them in discrete provisions within a revised Act. Moreover, to the extent that drafting choices were to be resolved in the Extradition Act, the choice was made to err on the side of expansive protection of affected constitutional rights, thereby obviating any potential question as to the constitutional sufficiency of the new procedures.

Defamation law, in contrast to criminal extradition law, has traditionally evolved through judicial interpretation and application of common law principles. More recently it has also been profoundly affected by the judicial recognition and expansion of First Amendment protections. Indeed, at this juncture, constitutional requirements are ingrained in almost every significant aspect of defamation law, including: (i) requisite standards of fault; (ii) defining types of plaintiffs, defendants and issues; (iii) applicable evidentiary burdens of proof and their allocation; (iv) the nature of recoverable damages and other available remedies; (v) procedures affecting the availability of summary judgment and the special scope of appellate review; (vi) the availability or necessity of certain privileges; as well as (vii) many of the basic elements of the tort, including truth, falsity, defamatory meaning and certain notions of injury and reputational harm. All of these issues have been recognized and addressed, at one time or another in the Supreme Court's constitutional jurisprudence, although some have not yet been fully resolved and all remain subject to evolving and unfinished constitutional interpretation.

Thus, while we do not dispute that issues like extradition reform necessarily engaged the Commissioners in a review of certain specific constitutional requirements, in order that they be properly reflected in particular provisions of a revised Extradition Act, such reform was made in an area otherwise largely free from further constitutional constraints. In contrast, drafting of the Defamation Act requires the Conference to attempt to discern the contours of still-developing constitutional standards pervasively affecting an entire body of the law. Moreover, at this juncture the Drafting Committee has candidly acknowledged that it has embarked not on an effort merely to codify and advance the principles of *New York Times v.*
Sullivan, but that is has undertaken substantially to redefine constitutional standards -- in the words of the Scope and Program Committee -- to "devise a replacement system" for U.S. defamation law -- by undertaking to favor the libel plaintiff and push defamation law toward what can at best be argued to be the minimum limits of First Amendment protection.* In sum, whether one supports or opposes this undertaking, it is difficult to dispute that it presents constitutional concerns of a far more difficult and fundamental nature than did a project like the Extradition Act redraft.

C. Political and Institutional Considerations Also Demonstrate That the Effort to Draft a Uniform Defamation Act is Inappropriate

Current Circumstances Do Not Support Comprehensive Legislative Action in the Defamation Field

It appears that in 1987 a "Study Committee" of the ULC recommended that a drafting project in the area of defamation law would be "premature." According to ULC minutes, that 1987 Study Committee apparently reasoned that reform proposals by Professor Marc Franklin of Stanford "and similar proposals and studies done by others, including Commissioner [Randall] Bezanson [i.e., the Iowa Project], had not yet been considered by the legal and publishing community." (Minutes of the ULC Scope and Program Committee, July 29-31, 1989.) On this basis, at its own recommendation, the Libel Law Study Committee was dissolved.

Although the Conference in its wisdom chose to reinstitute a formal Defamation Act project just two years later, it is difficult to discern how such a decision could be justified based on the intervening fate of the referenced reform proposals and studies, and what was in fact their largely hostile reception "by the legal and publishing community."

By the summer of 1987 Professor Franklin's declaratory judgment proposals had already been on the table for upwards of four years or more. See Franklin, "Good Names and Bad Law: A

* We note that while the Supreme Court has held that the Constitution does not prevent states from adopting policies or legislation that go further in enhancing rights of free expression than those required by the First Amendment, PruneYard Shopping Center v. Robbins, 447 U.S. 74 (1980), it is self-evident that the First Amendment does clearly constrain legislative repeal or abridgement of such rights.
Critique of Libel Law and a Proposal," 18 U.S.F. L. Rev. 1 (1983); Professor Franklin's most recent proposal appears in Franklin, "A Declaratory Judgment Alternative to Current Libel Law," 74 Cal. L. Rev. 809 (1986). While discussed with some favor among a small group of academics, the comprehensive aspects of his proposals, which were distinctly intended for legislative consideration, had generated little action and no success. And this situation did not markedly change between mid-1987 and mid-1989. The legal community did not adopt, and the publishing community generally opposed, any such proposal. The proposed [Uniform] Defamation Act would almost certainly encounter the same fate particularly in light of the fact that, even after the Committee's recent revisions, the Act is by far the most one-sided of these recent proposals in favoring the interests of the libel plaintiff.

As noted, none of the earlier reform proposals attracted broad support, certainly not enough to have been enacted in any state or legislature. Judge Leval, trial judge in Westmoreland v. CBS, in fact, opposes legislative imposition of the declaratory judgment option, favoring instead a process by which both parties would negotiate an agreement concluding that such a course of action is in their best interests. Leval, "The No-Money, No Fault Libel Suit: Keeping Sullivan in its Proper Place," 101 Harv. L. Rev. 1287 (1988).*

Neither a federal nor several state declaratory judgment bills have made any headway. The federal Schumer bill, H.R. 2846, 99th Cong. 1st Sess. (1986) was withdrawn by its author without formal consideration, other than in the form of a so-called "study bill." The Schumer bill is analyzed in Barrett, "Declaratory Judgments for Libel: A Better Alternative," 74 Cal. L. Rev. 847 (1986). Professor Franklin's proposals inspired the Lockyer bill in California, S. 1979 Cal. Leg., Reg. Sess. (1986), although that bill differed substantially from Franklin's in favor of plaintiffs. The Locyer Bill would not have affected actions for damages nor would it have given defendants incentive to settle via a published correction. The Lockyer bill was introduced but later withdrawn by its author due to media opposition. A proposal similar to the Lockyer bill, S.B. 1393 introduced by Senator Barry Keene on March 9, 1989, was defeated by the California Senate Judiciary Committee on May 23, 1989. Senator Bill Davis has recently filed yet another bill in California which substantially adopts the Lockyer bill.

* "I emphatically do not suggest that such a procedure be imposed by either legislation or court rule. A statute or rule would be too rigid and arbitrary to accommodate the needs of the parties in each particular dispute." Leval, supra, 101 Harv. L. Rev. at 1301.
A "restoration of reputation" bill in Illinois, H.B. 590, Ill. Leg. 85th Cong. (1987) (introduced by Timothy Johnson), also structured around a declaratory judgment type proposal, followed a similar path. After being introduced the bill was withdrawn as a result of substantial media opposition. In Hawaii, declaratory judgment legislation only for public figures (H.B. 2360; S.B. 2296) passed the House before opposition could be heard, but was killed in the Senate Judiciary Committee early this year.

As to Dean Bezanson's Iowa Project and its subsequent voluntary Libel Dispute Resolution effort, the same can be said -- little action of a positive nature has been discernable from the legal or publishing communities. For example, Dienes notes that neither media lawyers nor plaintiffs' lawyers have been "especially enthusiastic for these proposals." Dienes, "Libel Reform: An Appraisal," 23 U. Mich. J. L. Ref. 1, 16 (1989).

The only development between 1987 and 1991 that could arguably have justified a change of position was the decision of the so-called Annenberg project to include as a central element of its plan and "Model Act," a declaratory judgment mechanism. Report of the Libel Reform Project of the Annenberg Washington Program: Proposal for the Reform of Libel Law (1988). While this represented progress of a sort, it was only paper progress. For the Annenberg proposals, too, generated little affirmative action and still less support in the real world.

The Annenberg proposal, although commendable as an effort to bring plaintiff and defendant interests together, ultimately generated strong opposition from representatives of both plaintiff and defense interests in a series of conferences, sponsored by Annenberg. Moreover, no meaningful legislative action has been taken based on the Annenberg proposals.

A Connecticut bill, H.B. 5932, Conn. Leg. 1989, following the Annenberg model almost verbatim, was introduced but then quickly withdrawn. An Iowa bill, Senate File 40 (1989), reported to follow or be inspired by Annenberg, but going far afield, was not successful. At this juncture, the Annenberg "Libel Reform Project," which was never intended as a lobbying effort, has apparently been disbanded, with no further support for actual legislative activity likely.

Aside from its lack of support, one additional factor very significantly distinguishes the Annenberg proposals from the pending ULC effort. That is, Annenberg was denominated, and was intended to be viewed, as a "model," to be undertaken, if at all, on an "experimental" basis in one or only a small number of
jurisdictions.* This is far, far different than the notion of uniform state legislation inherent in the Drafting Committee’s recommendations.**

In sum, we see no basis whatsoever for concluding that the time is ripe for a uniform defamation act, either in terms of the prior interest and support of the "legal and publishing" communities for other analogous proposals, or in terms of the likelihood of widespread support for any uniform act generated by the National Conference of Commissioners on Uniform State Laws.

* Annenberg Project Director Smolla has pointed out that the Project group was divided on the issue of federal or state adoption. Although Smolla himself apparently favored a federal approach at the time, his Committee disagreed, at least to the extent that the federal approach was ultimately proposed only as an alternative to state action. Smolla himself acknowledged the benefits of "trying out the Annenberg proposal on an experimental basis at the state level. . . ." Smolla, "A Defense of the Annenberg Libel Reform Proposal," 7 Communications Lawyer, No. 1 (Winter 1989) at 9. It is noteworthy that Smolla has most recently expressed the view, in the context of the pending ULC effort, that declaratory judgment legislation is inappropriate absent general support for the concept by all sides, including media groups.

** We note that as a technical matter it does not appear that a final determination has been made to designate the Defamation Act as a "Uniform" Act -- see Rule 4 of the ULC Statement of Policy Establishing Criteria and Procedures for Designation and Consideration of Acts. Although that was the recommendation of the Scope and Program Committee (see minutes of July 29, 30 and 31, 1989, p. 16), that recommendation does not appear to have been reflected in the action of the ULC Executive Committee establishing a "Defamation Act" drafting committee -- see minutes of August 1, 1989, p. 2. To this day, the Drafting Committee nonetheless continues to refer to its drafts as for a "Uniform" Act, while the Staff of the Conference has quite properly continued to refrain from so designating the project -- see 1989-90 Reference Book, p. 107; 99th Annual Meeting agenda, p. 3; compare title of Prefatory Note with cover page of the Committee Draft.
2. The Defamation Act Initiative is Not Supportable Under the Conference's Own Statement of Policies and Criteria*

In light of the many issues that are presented by the Defamation Act as to constitutionality, legislative feasibility and practicability, it is not surprising that serious questions can be raised as to the general appropriateness of the entire enterprise. Indeed, the Conference's own policy statement, establishing criteria for consideration of an Act, would appear to indicate that the pending effort is not supported by the "positive criteria" there enumerated and is, in fact, contraindicated by the "negative criteria" that have been identified.**

Without reiterating many of the observations and arguments made elsewhere in the Bulletin the failure of the Defamation Act effort to accord with the Conference's established criteria may be briefly summarized.

(a) As to conformity with the listed "requirements":

(i) Positive Criteria***

(1) The kind of Act proposed by the Drafting Committee does not arise out of any known perception that any existing diversity in defamation law from state to state is a central problem in this field; or that uniformity -- other than that already assured by the uniform commands of the First Amendment -- represents a positive good in need of pursuit. In any event, we have pointed out the many respects in

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** While the Conference's policy also identifies "constitutional" criteria, these seem to be confined, by their terms, to matters, not here relevant, of Congressional vs. state legislative power and jurisdiction. It is submitted, in light of the structural constitutional concerns identified in Point II.D., supra, that such constitutionally related criteria ought also to take into account matters that are inappropriate for state legislation based on the "pre-emptive" effects, as it were, of Bill of Rights limitations such as the First Amendment, on both Congressional and state legislative action.

which the Draft does not represent a "practical step toward uniformity," both because of drafting deficiencies, problems of varying application and the limited likelihood of uniform passage of legislation that departs so fundamentally from existing law in the field.

(2) We have already discussed at length -- see Section B.2., supra -- how unlikely it is that such an Act, as divisive and controversial as the Committee's proposals are likely to be, will make any headway whatever in the state legislatures. For the same reasons, the Act is highly unlikely "to promote uniformity indirectly."

(3) For all of the reasons previously stated, a Uniform Defamation Act is highly unlikely to "produce significant benefits" of the kind enumerated in that, even if it were feasible and likely to be supported, the proposed Act would have little to do with such matters as "facilitating interstate . . . relations," or "responding to a need common to many states," or "avoid[ing] significant disadvantages arising from diversity of state law."

(4) While we cannot comment on the relative merits of the Defamation Act among other pending initiatives of the Conference, we doubt that there are any other projects underway that are more likely to be controversial and less likely to be ultimately productive of meaningful law reform than this one.

(b) As to accomplishing the listed "purposes [that] have met with the widest acceptance by state legislatures," again, most of the criteria have little or nothing to do with the field of defamation law or the proposed Defamation Act.

(1) Certainly, the Defamation Act would not "facilitate the flow of commercial transactions."

(2) It would not "avoid conflict of laws."

(3) It would not deal in any meaningful way with any problem of "reciprocity as to rights and remedies."

(4) It would not fill "emergent needs" or simply "codify common law" and, although it proposes to "modernize" certain "antiquated concepts" it proposes to do so, as we point out elsewhere throughout this Report, in an often radical and untested fashion and, in any event, links such modernization with other controversial proposals that are unlikely to find widespread support or acceptance.
(c) As to the "promotion of uniformity indirectly, this too, for reasons previously stated, is highly unlikely as to (1) legislative adoption; (2) case law development, particularly in light of overriding constitutional principles whose development is already in motion; or (3) "gradually increasing adoptions."

(ii) Negative Criteria*

It has been mandated that the Conference should generally avoid consideration of acts on subjects that are:

(1) Entirely novel, particularly where there is also an absence of legislative experience. Here, as just one central example, those aspects of the Committee's Draft that promote a "truth" trial, combined with the potential recovery by the libel plaintiff of attorney's fees, are wholly novel and untested either in terms of their ability to promote plaintiffs' interests, their impact on defendants' rights, or their effects on the administration of justice as regards the possibility of a substantial increase in numbers of claims, their relative efficiency or inefficiency in the disposition of claims, etc. Other major features of the Act are also wholly novel and untested -- e.g., elimination of all distinctions between "public" and "private libels," between "libel" and "slander," and "per se" and "per quod" libels.

(2) We have already pointed out elsewhere the likelihood of controversy in general. There are also, in fact, substantial "philosophical" and "policy" differences among the states on these issues, to the extent they remain free, under the governing constitutional structure of the law, to adopt varying legal standards. One example that the Act wholly ignores is the varying adoption, still in process among the states, of standards of fault applicable to actions brought by "private-figure" plaintiffs.

V. CONCLUSION

At bottom, unlike the vast majority of the Uniform Law Commission's projects which, we take it, arise from an obvious breakdown, actual or potential, in the interstate coordination of law enforcement or policy, often arising from new technological developments or emergent transactional needs in the business community or the public sector, where commerce among the states may be threatened or impeded, or where obviously disparate approaches would clearly benefit from a uniform approach that can be agreed upon by major affected interests, the issue of defamation law reform exists on a far different footing. In this field we deal with an ancient body of law, traditionally developed judicially, where many small but relatively inconsequential differences in practice among the states have subsisted for decades if not centuries.

Major law reform was in fact initiated in the defamation field more than twenty-five years ago, not by state legislatures but by the Supreme Court of the United States itself in the landmark case of New York Times v. Sullivan, and not in response to some technical or commercial need for coordination or uniformity among the states, but by dint of the overriding constitutional command to protect rights of free expression and a free press under the First Amendment. The continuation and expansion of that constitutional law reform over the past two-and-a-half decades has, in fact, brought substantial uniformity to this body of law, certainly to the point that -- whatever one's position on the question of further reform -- the need for uniformity, or problems arising from any lack thereof, can hardly be said to represent the pre-eminent issues in the field today.

Accordingly, the impetus for reform of the kind proposed in the current Committee Draft must be seen for what it really is -- not an attempt to bring uniformity to a field of law in need of greater consistency, but instead as a rather naked attempt substantially to shift the balance of rights in a sensitive and hotly contested field of law, based on a substantive agenda intended not to unify but to rewrite law in the field to the advantage of one side of the contest. If all interested parties were clamoring for legislative changes, and if overriding and inalienable constitutional rights did not hang in the balance, then perhaps the Uniform Law Commission, with its legislative expertise and venerable reputation, could serve a useful function even in the absence of other traditional criteria for action by the ULC. But no such consensus here exists and established or developing constitutional principles do in fact stand squarely in the line of fire.
The ideas and conclusions herein set forth, including drafts of proposed legislation, have not been passed upon by the National Conference of Commissioners on Uniform State Laws. They do not necessarily reflect the views of the Committee, Reporters or Commissioners. Proposed statutory language, if any, may not be used to ascertain legislative meaning of any promulgated final law.
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DEFAMATION ACT

PREFATORY NOTE

Since the United States Supreme Court recognized the First Amendment limitations on the common law tort of defamation, courts have struggled to find the proper balance between the constitutionally protected guarantees of free expression and the need to protect citizens from reputational harm. In addition, new technologies for information distribution have caused tension within the traditional rules of the defamation tort. The Scope and Program Committee recognized, as have other commentators, that the state of the law is in chaos and that some issues may not be fit for judicial resolution.

The central question that animates this draft is whether there is a way to provide additional protection for reputational harm without interfering with legitimate First Amendment concerns. There is empirical evidence to suggest that many targets of defamatory statements would be satisfied with vindication, that is with a determination that the statement was false. A fair reading of Supreme Court jurisprudence suggests that the constitutional privileges accorded speakers in defamation cases are designed to insure that the threat of monetary awards for potentially defamatory statements will not chill speech.

The draft attempts to balance these concerns by affording plaintiffs an option of seeking vindication alone, rather than money damages. In addition, incentives are created throughout the Act to encourage plaintiffs to accept vindication as a complete remedy. The draft also attempts to provide defamation defendants with incentives to respond with retractions or corrections when their published statements are in error.

Finally, and within the framework of still-evolving constitutional doctrine, the draft reflects an effort to bring an important measure of clarity and consistency to the adjudication of defamation actions, and to effect needed changes in such areas as compensatory and punitive damages, privileges, and retraction.
DEFAMATION ACT

SECTION 1. DEFINITIONS. In this [Act], [unless the context otherwise requires]:

(1) "Defamation" means a statement tending to harm reputation.

(2) "Pecuniary damage" means provable economic loss.

(3) "Person" means an individual, corporation, business trust, estate, trust, partnership, association, joint venture, or other legal or commercial entity, but does not include a government or governmental subdivision, agency or instrumentality.

(4) "Publication" means an intentional or negligent communication to a person other than the person alleging reputational harm from a communication.

COMMENT TO SECTION 1*

By the definition of "person," which does not include products or services, and by the requirement in Section 2 that a publication harm the reputation of a "person," the Act is made inapplicable to product disparagement or trade libel claims, as well as to the increasing variety of defamation-like false or misleading advertising claims. The definition also excludes from liability under the Act libels of government or governmental bodies, which are constitutionally immune from liability under the First Amendment (as distinguished from libels of public officials, which are not excluded and with respect to which actions may be brought under the Act).

* The drafters have moved the paragraphs of this Comment related to the fact/opinion determination to the comment to Section 2, infra.
The drafters' explanation of why "public official" and "public figure" are not defined has been moved to the Comment to Section 18, infra.

Under Section 1 (4) "publication" is defined as an intentional or negligent communication to a person other than the person alleging reputational harm from a communication. This definition is consistent with the Restatement (Second) of Torts, Section 577 (1). By the requirement that a communication be "intentional or negligent," the definition excludes communications to a third person that are the result of mistake or inadvertence, as long as the mistake or inadvertence is non-negligent. The Act, like the Restatement, includes this qualification as part of the definition of publication, rather than as [an added element of the tort] a defense to liability thereby making clear that the concepts of intentional or negligent communication go to the act of communicating, not as with the privileges contained in Sections 9 (negligence) and Sections 17 and 18 (malevolence), to the content of a communication.

* The drafters' explanation of why "public official" and "public figure" are not defined has been moved to the Comment to Section 18, infra.
SECTION 2[§101]/ ELEMENTS OF CLAIM.

A person who [publishes] causes [to publish] the publication of a false and defamatory factual statement about another person [that harms] that person's reputation is subject to liability to that person in an action [under this Act]. Factual statement means a communication that is reasonably understood by recipients to be of a factual nature and is objectively provable or disprovable.

COMMENT TO SECTION 2[§101]*

A number of features of the Act should be noted in connection with Section 2[§101], which sets out the elements of the legal wrong. First, no distinction is made between slander and libel. The distinction is now largely anachronistic, and the rules of liability per se and related requirements for proof of harm and damage that turned on the distinction are not retained in the Act. All defamations are made subject to the same rules.

Second, no distinction is drawn on the basis of the medium employed in the publication, or the media or non-media identity of the offending publisher. Differences in the impact of a given medium can, of course, be relevant on a case-by-case basis under such headings as audience interpretation of meaning, reputational harm, and damage. The media/non-media distinction, generally employed as a means of distinguishing press or mass communication from private individual communication, is not used in the Act because, while occasionally of analytical utility, it is difficult to define and was considered unnecessary. Private speech is protected equally with public speech under the Act.

* The paragraphs in this Comment relating to the fact/opinion determination were, in prior drafts, part of the Comment to Section 1, supra.
The use of the term "factual statement" protects statements of opinion from liability, although not in so many words. By requiring as a condition of liability that a communication be a factual statement, based on reasonable interpretation of the recipient, and that it be disprovable and disproven by the injured party (see Section 3[170]2), statements of an evaluative, judgmental, or general and open-ended character, as well as statements not reasonably understood as factual, are not made actionable under the Act. See Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988).

The definition contained in Section 2 follows the approach taken by the Court in Milkovich v. Lorain Journal, 489 U.S. 270, 111 L.Ed.2d 1 (1990). This approach is consistent with, although a somewhat different formulation of, the position taken in the Restatement (Second) of Torts, Section 566 (1977), which provides that "A statement in the form of an opinion... is actionable... if it implies the allegation of undisclosed defamatory facts as the basis for the opinion." In a related fashion, Section 563 of the Restatement (Second) of Torts provides that "[t]he meaning of a communication is that which the recipient correctly, or mistakenly but reasonably, understands that it was intended to express." Both of these ideas have been incorporated in the definition of "fact".

By using "factual statement" to mean information that is reasonably understood by recipients to be of a factual nature and that is objectively provable or disprovable, the Act avoids the need to define "opinion," or to provide a separate privilege for opinion. The Act therefore departs from the approach taken by many courts prior to the Milkovich case, in which a four or five factor analysis was used to define opinion as a matter of law. Many of the same considerations (such as whether the context of the statement is one ordinarily associated with satire, hyperbole, or pure opinion) will still apply, but they will be more fact-based and dependent on the particular circumstances of each case, and not on presumptive categories of statement.

The Act rests liability on the reasonable understanding or interpretation given a statement. For example, the statement that "it is rumored that X is a thief" could not escape liability simply because the fact of rumors is true. If in its context the statement is interpreted reasonably as implying that X is a thief, that will be the relevant issue in an action under the Act, not simply the correctness of the assertion that rumors exist.
SECTION 3[2/102]. BURDEN OF PROOF.

In an action brought under this [Act]:

(1) The plaintiff bears the burden of proving by a preponderance of the evidence:

(i) publication;
(ii) defamation;
(iii) harm to reputation; and
(iv) falsity. [OR/THEL/CHALLENGE/FACT/AND]

(2) The plaintiff bears the burden of proving by clear and convincing evidence:

(i) abuse of privilege;
(ii) negligence; and
(iii) knowledge of falsity or reckless disregard [OR] for truth.

(3) The plaintiff bears the burden of proving the amount of damages with reasonable certainty.

(4) The defendant bears the burden of proving the facts necessary to establish a privilege.

COMMENT TO SECTION 3[2/102]

In Bose Corp. v. Consumers Union, 466 U.S. 485 (1984), the Supreme Court held that issues of constitutional fact, such as actual malice and, presumably, negligence, must be proved by clear and convincing evidence. Because abuse of privilege issues, such as common law malice or publication beyond the protected scope of a privilege, are of similar character and importance, the higher standard is applied to these issues, as well.

In outlining the burden of asserting and proving privilege, the Act is intended to reflect the common rule that one who seeks privilege has the burden of raising it and, if questions of fact are involved, of proving them by a preponderance of the evidence. The Act does not, however, purport to allocate factual issues involved in privilege matters between the Judge and Jury, but rather leaves these
issues to local practice. The plaintiff must prove the fact of
damage by a preponderance of the evidence under subsection 1.
The Act adopts the Restatement requirement that the amount of
damages be proved with reasonable certainty. This requirement
applies, of course, not only to pecuniary and economic damages,
but also to damages flowing from harm to reputation.

SECTION 4[2/101]. PLEADINGS; EXPEDITED PROCEEDING.

(a) In addition to other matters required by [the rules
of procedure for civil actions], the complaint
[petition] must:

(1) identify with particularity the specific
statements alleged to be false and defamatory
and the time and place of their publication
[and/specific/challenged/positions/thereof];

(2) state the alleged defamatory meaning and
identify the specific circumstances giving rise
to it if the meaning arises from an implication
of the publication rather than or in addition to
its ordinary meaning, or arises from innuendo,
sarcasm, or [a/statement/accompanied/by]
conduct [relevant/to/its/meaning];

(3) state that the alleged defamatory meaning is
false;

(4) include a copy of any retraction [∅] and
each request for retraction; and

(5) identify whether the action brought is one for
[defamation/under/Section/2/101]damages under
Section 9 or for vindication under Section
5[2/101].

(b) If upon motion by the plaintiff the court finds that
the plaintiff is likely to suffer significant
additional reputational harm from repetition of the
challenged publication, the court may [impose
appropriate/requirements/on/the/parties/in/order
to] expedite the proceeding.
COMMENT TO SECTION 4[§107]

Section 4[§107] provides that a plaintiff filing a complaint under the Act must describe the subject communication in sufficient detail adequately to inform the defendant of the subject of the suit. This section imposes special requirements in defamation actions that extend beyond the requirements generally imposed for all pleadings under state laws. Although some states require particularity of pleading in libel actions, see N.Y. CPLR Law § 3016(a) (McKinney 1974), current law is largely silent on how particularly a cause of action for defamation must be pled. Consequently, in some states a plaintiff may append a copy of a book or a lengthy article to the complaint, accompanied by very generalized allegations, thus forcing the defendant to deduce the part of the publication that is objectionable to the plaintiff. Particularity of pleading makes the defendant immediately aware of the subject of the suit and thus promotes efficiency and facilitates early steps to retract the communication or to settle the suit.

Subsection (a) requires that the exact offending words or conduct be set out in the complaint. A plaintiff may not give a general description of the communication limited by terms such as "to the effect" or "substantially." Furthermore, if only a portion of a communication is actionable, the plaintiff must specify in the complaint the actionable portion.

If the ordinary meaning of the subject communication does not give rise to a cause of action under the Act, but the circumstances surrounding the communication imply a meaning to the communication other than the ordinary meaning, the plaintiff must plead the specific circumstances. In a case involving innuendo, sarcasm, or a statement accompanied by conduct, the plaintiff must state the alleged implicit meaning.

Subsection (b) provides that a plaintiff who alleges continuing injury from a communication that is being repeatedly published may seek to have the proceeding expedited. At least one state currently provides for an expedited proceeding. Cal. Civ. Proc. Code § 460.5 (West 1973). Inclusion of this subsection reflects a policy decision that plaintiffs, who are not eligible for injunctions but who nonetheless are being injured by a continuous publication, should have an opportunity to obtain relief earlier than normal litigation procedures would provide. The court, however, is given full discretion in the matter.
SECTION 5[7].  [PROCEDURE/IN/] ACTION FOR VINDICATION:  
[ACTIONS/REQUIRED PROOF: EXCLUSIVE REMEDY] 

[7/101][/ACTION/FOR/VINDICATION/]

[SUBJECT/TO/THE/CONSENT/OF/THE/DEFENDANT/][7/4] A person bringing an action under this [Act] may elect, at the time of filing a complaint [petition], to limit the action to an action for vindication. If [§4] the election is made:

(1) the plaintiff must prove the elements contained in Section 2:

(2)[(7)] The publisher may not assert absence of fault [and] or claims of conditional privilege[§5/NOT/BE/ASSERTED/By/THE/PUBLISHER/][and]

(3)[(7)] damages may not be awarded[[]]; and

(4) except as provided in Section 7(b), the plaintiff may not bring an action for damages for reputational or dignitary injury caused by the publication of a false statement.

COMMENT TO SECTION 5[7/101]

Section 5[7/101] provides for an alternative cause of action to the traditional action for damages. The cause of action is one for vindication, by which a successful plaintiff can obtain a written and published finding of fact on the question of falsity, but without the opportunity for any form of money damages. Defenses to the action are likewise limited. Claims of absolute privilege can be raised and, if successful, will defeat an action for vindication, but claims of conditional privilege, including constitutional privileges based on negligence or actual malice, may not be raised.

[The/bracketed/language/At/the/beginning/of/7/101/would 
take/the/plaintiff's/election/of/an/action/for/a/vindication 
subject/to/the/consent/of/the/defendant/]/The/bracketed 
phrase/has/been/included/in/order/that/the/choice/of/a 
vindication/action/at/the/plaintiff's/election/of/an/available 
pri/given/under/consent/can/be/asserted/by/THE/COMMITTEE/OF 
THE/WHOLE/][There/is/a/division/within/THE/DEALING/COMMITTEE 
on/this/question/although/at/THE/PRESENT/TIME/a/majority/of 
the/committee/would/prefer/not/to/include/the/bracketed 
language/]
SECTION 6[§102]. ACTION FOR VINDICATION: TERMINATION BY DEFENDANT.

If at any time before 90 days after service of process in an action for vindication a defendant by motion stipulates on the record that it does not assert the truth of the statement or did not intend to assert its truth at the time of publication, or both, and agrees to publish, at the plaintiff’s request, a sufficient retraction, the court shall after the required publication dismiss the action against the defendant making the motion. Neither party may recover attorneys fees or expenses under Section 8.

COMMENT TO SECTION 6[§102]

Section 6[§102] provides, in substance, a counterpart to the offer of termination provision contained in Section 12[§105], which is applicable only to actions for damages. The purpose of Section 6[§102] is to permit -- indeed, to encourage -- the termination of a vindication action if the defendant is willing to disclaim any assertion of truth, and to publish that disclaimer. It is important to note that the defendant need not concede falsity. That is something that defendants are rarely willing to do, and are rarely in a position to do. A clear disclaimer of the assertion of truth, however, was judged to provide both significant and realistic relief for a plaintiff.

SECTION 7[§104]. ACTION FOR VINDICATION: FINDINGS OF FACT; DEFAULT BY DEFENDANT.*

(a) Except as provided in subsection (b), if the plaintiff prevails in an action brought pursuant to Section 5[§101], the court shall enter judgment which shall include written findings of fact on falsity and an order requiring the defendant at the defendant’s option:

1. to publish them in conformance to Section 15[§105](b)(1); or

* The drafters have reversed the order of Sections 7 and 8.
to pay the plaintiff an amount sufficient to secure their publication in conformance to Section 15[§707](b)(1).

(b) If the defendant makes a motion pursuant to Section 6[§707], but fails within a reasonable time to publish a sufficient retraction at the plaintiff's request, the plaintiff may:

(1) amend to assert a claim for damages against the defendant under Section 9[§709]; or

(2) introduce evidence of falsity and, if the Court finds proof of falsity adequate, it shall enter judgment which shall include written findings of fact on falsity and order the defendant to pay an amount sufficient to secure publication of the findings in conformance with Section 15[§707](b)(1).

SECTION 8[§707]. ATTORNEY'S FEES AND EXPENSES IN AN ACTION FOR VINDICATION.*

(a) In an action brought under Section 5[§705], reasonable expenses of litigation, including attorney's fees, shall be awarded:

(1) to a prevailing plaintiff upon proof that the defendant was provided sufficient grounds for retraction in the plaintiff's request for retraction, and that the retraction was unreasonably refused; or

(2) to a prevailing defendant upon proof that the plaintiff had no reasonable basis upon which to allege falsity.

* The drafters have reversed the order of Sections 7 and 8.
(b) An award of expenses and attorney’s fees to a prevailing party under this section may not be disproportionate to the reasonable value of those incurred by the other party for its own expenses and attorney’s fees.

COMMENT TO SECTION 8

Section 8(a)(2) is the only provision in the Act which permits defendants to receive reasonable expenses of litigation, including attorney’s fees. Awarding fees in vindication actions in which plaintiffs allege falsity without reasonable basis seemed appropriate in view of the fact defendants in such cases are precluded from claiming any but absolute privileges. The potential award of fees was also seen as an effective deterrent against plaintiffs bringing frivolous vindication actions.

The term "expenses of litigation, including attorney’s fees" is intended to be inclusive of all costs of litigation, and therefore to be broader than the recovery of attorney’s fees and costs. Recoverable expenses could include, for example, the costs of witnesses, experts, travel, and the like.

The amount of recoverable expenses is effectively limited by the requirement that the award be proportionate to the expenses of the party from whom recovery is made. In most cases this will result in setting the amount awarded at a level no higher than the actual expenses of the other party, although the possibility of pro bono representation, for example, led to the use of "reasonable value" in order that free services to one party not defeat a reasonable award to the other party.

SECTION 9[§]. ACTION FOR DAMAGES.*

* The drafters have changed former Section 9 regarding an action for damages to Section 12.
A plaintiff may recover damages in an action under this Act if the plaintiff proves the elements of a cause of action stated in Section 2 and also proves: [under/Section/177191/]

(1) in a case involving a conditional privilege [under/Section/177191/], that the defendant published the statement with knowledge of its falsity or reckless disregard for its truth, [pay/recovery] or

(2) in all other cases, that the defendant knew or reasonably should have known the statement was false.

A plaintiff entitled to recover damages under Subsection (a) may recover:

(1) damages for harm to reputation and resulting emotional distress; and

(2) pecuniary [I/SH damages] caused by the publication.

COMMENT TO SECTION 2[3/101]

Section 9[3/101] requires a showing of negligence or, for public official and public figure cases, as well as for other cases in which conditional privilege is successfully established, of actual malice, in all cases in which damages are sought. Under current law strict liability still applies to certain, although highly limited, settings of purely private libel. See Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985). The Act reflects the [policy] judgment that all speech should be equally protected irrespective of context, that in any event distinctions between fault-based and strict liability are unnecessarily confusing and conducive to litigation, and that the remaining instances of strict liability under the United States Supreme Court’s decisions are so narrow as to be of doubtful utility as a matter of policy.

It should also be noted that [damages/recoverable/under the/Act/are/limited/to/those/listed/in/Section/3/101]. [§]general or presumed damages, [as/well/as/pecuniary damages/are/explicitly] foreclosed under the Act. Moreover, by requiring that damages for emotional distress result from harm to reputation, the Act is intended to foreclose recovery for "pure" emotional distress, and to limit the scope of emotional distress damages recoverable.
The Act uses the phrase "pecuniary loss" defined in Section 1(2) to describe provable economic or out-of-pocket losses caused by a publication. The term is intended to include the types of damage described variously in state common law as "pecuniary damage," "special damage," "economic loss," or "out-of-pocket loss."

Of course, by virtue of Section 16, which forecloses any action to which absolute privileges apply, no damages may be recovered under Section 10 when absolute privilege is established.

[Alternative A]
[Committee Alternative]

[§10(1)] Section 10 PUNITIVE DAMAGES PROHIBITED.

Punitive damages may not be recovered under this [Act].

[Alternative B]

SECTION 10. PUNITIVE DAMAGES.

A plaintiff may recover punitive damages under this [Act] only upon a showing by clear and convincing evidence that the defendant published the challenged statement with knowledge of its falsity and with ill will toward the plaintiff. The provisions of [states should insert a reference to such provisions generally applicable to punitive damages as are appropriate] apply to the award of punitive damages under this section.

COMMENT TO SECTION 10

Pursuant to the Conference's action in 1991, a punitive damage provision has been drafted in order that a narrow alternative to complete prohibition of punitive damages will be available at the time of final reading. The provision limits punitive damages very strictly to cases in which the plaintiff can prove knowledge of falsity (not reckless disregard for truth) and ill will, or intent to harm.

Notwithstanding the limited nature of the punitive damages provision, the Committee remains convinced that punitive damages should not be available in any cases. The punitive damage provision is therefore presented as an alternative to the committee's [sic] recommendation. The action of the Committee of the Whole in 1991 did not amend the Act to require punitive damages, but rather required that an alternative provision allowing punitive damages be drafted for possible consideration at the time of final reading.
SECTION 11. ATTORNEY'S FEES AND EXPENSES IN AN ACTION FOR DAMAGES.

In an action brought under Section 9, reasonable expenses of litigation, including attorney's fees, may be awarded to a prevailing plaintiff who:

1. made an adequate request for retraction within 60 days of publication; and

2. proves that the challenged statement was published with knowledge of its falsity or reckless disregard for its truth.

SECTION 12[§]. [DEFENDANT'S] OFFER OF TERMINATION IN AN ACTION FOR DAMAGES*

[4/10/11 OFFER/SET/TERMINATION/]

(a) Any time before trial of an action for damages under this Act a defendant, by motion to the court, may make a termination offer. In the motion the defendant shall stipulate on the record that the defendant does not assert the truth of the statement or did not intend to assert its truth at the time of publication, or both, and the defendant shall agree:

1. to pay the plaintiff's reasonable expenses of litigation, including attorney's fees incurred prior to the filing of the motion; and

2. to publish, at the plaintiff's request, a sufficient retraction.

(b) If the plaintiff accepts the offer, the court shall dismiss the action against the defendant after the defendant fully complies with its terms. A plaintiff who does not accept the termination offer is limited to pecuniary damages and may not recover from the defendant making the offer the expenses of litigation, including attorney's fees.

* This section was formerly Section 9.
SECTION 13[§101]. REQUEST FOR RETRACTION.

(a) A request for retraction must:

(1) be made in writing and signed by the requester or by the requester's authorized agent;

([I]2) identify with particularity the specific statements alleged to be false and defamatory and the time and place of their publication;

([I]3) state the alleged defamatory meaning and identify the specific circumstances giving rise to it if the defamatory meaning arises from an implication rather than or in addition to ordinary meaning, or from innuendo, sarcasm, or conduct and

([I]4) state that the alleged defamatory meaning is false.

(b) If an adequate request has not previously been made, service of a summons and complaint in conformance with requirements of Section 4[§102] constitutes an adequate request for retraction. The time for filing a responsive pleading is suspended during the period provided in Section 15[§104] for responding to the request.

COMMENT TO SECTION 1[2][§101]

The retraction provisions of the Act (Sections 13–15[§101/§104]) should be read as a whole. These sections represent a careful balancing of the interests of plaintiffs and defendants, and are designed to encourage the prompt informal settlement of defamation claims.
Section 13 contains the general requirement that a retraction be sought as a precondition to suit. Section 13(b), however, provides that in all cases a complaint shall constitute such a request, thus avoiding the preclusive effect of an inadequate earlier request or a failure to seek a retraction for any other reason. A retraction serves to limit or eliminate the damages caused by a communication. Unlike many current retraction statutes, Section 13 does not require a party to seek a retraction within a certain time period following publication. Cf. N.C. Gen. Stat. § 99-1 (1985); Wis. Stat. Ann. § 895.05 (West 1983). A party may seek a retraction at any time prior to the expiration of the statute of limitations. Sections 11 and 14(1) are designed, respectively, to encourage an early request for retraction(/), and a favorable response.

Subsection (b) provides that the complaint shall constitute a request for retraction if no adequate retraction has been sought before the action is filed. This provision relieves the plaintiff of the obligation to request a retraction at some point before filing, although the Act is not intended to encourage that procedure. Indeed, 11(1) provides an incentive for an early request, as will, presumably, the plaintiff's own interest in reputational vindication. The principal reason for Section 13 (b) is to provide a cure in all cases for potential claims that the request for retraction was deficient in form or content, and for the attendant difficulties such claims might needlessly pose under the statute of limitations.

A publisher who has received a request for retraction prior to the filing of an action, and who considers that request to have been deficient, should therefore consider the complaint to constitute a new request for retraction requiring the publisher's response. Failure to give due notice of the publisher's intent to consider the complaint a request for retraction in such circumstances and, if necessary, to suspend the time for response, should constitute a waiver of any objections to the prior retraction request.

SECTION 14. [PUBLICATION] EFFECT OF RETRACTION.

If a timely and sufficient retraction is published, a person may not bring an action for vindication based on the challenged statement under Section 5, and a person who brings an action for damages under Section 2 may recover damages only for pecuniary loss caused before the date of the retraction.
Deemed unwise.

absolute ban even for exclusive uses or extreme cases was
made at the time of publication -- under current law, and an
Retraction -- pursuant to questions of equity, an
entirely because such information should remain if ever be
Retraction in Subsequent Proceedings. Such a provision was not
consideration was given to a section providing

Retraction properly.

actual malice, and has sought the
news of the request that the other party be subject
additionally, by refusing the request, a plaintiff is subject
damages in the event the publication of a retraction.
action for damages the requesting party may seek only pecuniary
section 44(7) the desirous to encourage parties to

[7/07/00] SECTION TO SECTION [7/07/00]
In limiting recovery of damages for pecuniary loss to those "caused before the date of the retraction," the Act attempts to cut off damage which arises after or is caused after the retraction, but not to prevent the recovery of damages caused prior to the retraction, but which may extend beyond the date of retraction. For example, if a physician is defamed and a retraction thereafter made, the physician should be able to recover damages for economic loss stemming from the loss of patients prior to the date of the retraction, even though that loss may continue for some period after the retraction. On the other hand, economic losses resulting from patients who changed doctors after the date of a retraction should not be recoverable, even though their decision was based upon the original defamation. At a trial of an action in which the defendant has published a retraction in accordance with Section 14, the plaintiff will bear the burden of proving damages caused by the publication before the retraction.

It should be noted that under Section 14[$102] a publisher may unilaterally retract and limit damages to pecuniary loss. This feature is designed to encourage publishers quickly to correct mistakes and thereby avoid much of the harm that may flow from the publication. [At a trial of an action in which the defendant has published a retraction in accordance with Section 14, the plaintiff will bear the burden of proving damages caused by the publication before the retraction.]

SECTION 15[$104]. TIMELY AND SUFFICIENT RETRACTION.

(a) A retraction is timely if it is published before or within [45] days after receipt of a request under Section 13[$101].

(b) A retraction is sufficient if it:

(1) is communicated in writing to the requester, is published in a manner and medium reasonably calculated to reach substantially the same audience as the [offending] publication complained of, and, if the retraction is published in another medium to conform to the [45]-day period [required by subsection Section 14(a)], is also published in the next practicable issue or edition, if any of the [offending] original publication; and

(2) refers to the challenged statement and:

(i) corrects the challenged statement;

(ii) in the case of a statement implied by a publication, or arising from innuendo.
sarcasm, or accompanying conduct, disclaims any intent to communicate or to have communicated the implied factual assertion or to assert its truth; or

(iii) in the case of a statement attributed to another person, disclaims any intent to assert or to have asserted the truth of the statement.

(c) Notwithstanding subsection (b), a retraction is sufficient if the plaintiff agrees in writing that it is sufficient.

COMMENT TO SECTION 15[§15]

Section 15[§15] sets out the requirements for a timely and sufficient retraction. A "timely" retraction must be published within 45 days of a request for retraction. A "sufficient" retraction must be published in substantially the same manner and medium as the original communication unless publication in some other manner and medium is reasonably calculated to reach the same audience as the original communication.

The important factors in determining whether a retraction is sufficient are reasonableness and whether the efforts are directed at reaching the same audience. Where publication is frequent, the retraction question is not likely to be problematic. Given the scope of the [Act], however, the obligation to retract will apply to all forms of communication, some of which will be narrowly focused, infrequent, and even one-time only. In many of these settings the [Act's] focus on reasonable efforts to reach the same audience will be important.

Newspapers and other frequent publications have been the principal subjects of retraction statutes throughout the country. Ordinarily retractions are required to be placed in similar locations to those in which the original story occurred, although even this rule is dependent upon a number of factors, including the nature and scope of the original story as well as the newspaper's practices concerning reserved space for corrections. Such alternatives, as well as others presented in different types of media, such as radio and broadcast, should be addressed in terms of the Act's requirement that the retraction, in its location and prominence, should be reasonably calculated to reach substantially the same audience as the original publication.
With other media and in other contexts, however, the rule will yield different results. For example, retraction of a defamatory employee reference or evaluation may require no more than contacting those persons or firms to whom the defamatory statement was communicated. If the statement has made its way into permanent files or broader audiences, however, reasonable efforts to have the material removed from such files or to communicate the retraction to identifiable members of the broader audience should be attempted.

For a book currently being sold, with no next edition in sight, reasonable efforts to retract might involve several measures: make necessary corrections in any future editions; notify persons who have purchased the book, if that information is available, or instead attempt through a notice at bookstores or a press release to reach this group; and provide through an insert or other warning notice to those persons who will, in the future, buy the current edition. The latter step assumes, of course, that the reputational harm can be avoided by such an insert rather than by recalling and correcting books that are on the shelf but unsold.

In the case of an oral defamation to friends or colleagues -- a classic slander -- a letter to those persons retracting the defamation (ungrudgingly, of course) might suffice, on the assumption that word of the apologetic retraction would spread as rapidly in the channels of gossip as did the original defamation.

Under subsection (b)(2) [A] a "sufficient" retraction must also correct the original communication. An equivocal retraction will not satisfy this requirement. But where the party requesting a retraction claims that the alleged defamation was the result of an implication contained in a communication or a statement attributed in the publication to another person, a sufficient retraction need only contain a statement that the party making the communication did not intend the implication and disclaims it, or that in publishing the attributed statement of another person the publisher disclaims any intent to attest to the truth of the facts contained therein. This will allow the publisher to disavow the alleged implication and yet stand behind the "facts" of the story.

It is important to note that in the case of statements attributed to another person, the retraction must identify that person even if the original publication did not do so.
SECTION 16[7F]. ABSOLUTE PRIVILEGES.

An action may not be maintained under this [Act] based on:

1. a statement made [by):
   (i) in and pertaining to a judicial proceeding by a judge, [an] attorney, [a] witness, [a] juror, or other participant;
   (ii) in and pertaining to a legislative proceeding by a legislator, [an] attorney, [an] aide, [a] witness, or other participant; or
   (iii) in and pertaining to any quasi-judicial or quasi-legislative executive or administrative proceeding by an executive or administrative official, [an] attorney, [a] witness, or other participant;

2. a statement that constitutes a fair and accurate report of an official action or proceeding [by] of a [meeting] of a governmental body, including an order or opinion of a court, or of a meeting of a governmental body which is open to the public;

3. a statement published with the consent of the person harmed;

4. a statement communicated between husband and wife; or

5. a statement required by law to be published.
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Claims of absolute privilege, whether listed in Section 16[7/101] or based on other law, may be raised in actions for vindication [AVAILABLE/IN/ACTIONS] under Section 5[7/101].

SECTION 17[7/102]. CONDITIONAL PRIVILEGES [IN/DAMAGES/ACTIONS].

(a) A person [IS/PUBLISHED/TO/PUBLISH] may not be held liable for damages based on a statement that is:

1. reasonably necessary for the protection of the publisher's legitimate interests;
2. reasonably necessary to protect the legitimate interests of others;
3. reasonably necessary to protect or foster a common interest between the publisher and the recipient of the communication; or
4. made to a person officially charged with the duty of acting in the public interest and in relation to that person's official responsibilities.

(b) The privileges under subsection (a) are not available if the plaintiff proves that the publisher:

1. [THE/PUBLISHER] unreasonably published [A DEFINATORY] the statement to persons other than those to whom publication was necessary to serve the interests giving rise to the privilege; or
2. [IS/STATEMENT/WEAK] published the statement with knowledge of its falsity or reckless disregard [OF] for its truth.[I]

COMMENT TO SECTION 17[7/102]

As with the statement of absolute privileges in Section 16[7/101], the Act provides a listing in Section 17[7/102] of the conditional privileges at common law. The statement of privileges is general so as to comprehend minor differences in interpretation in the various states, and the privileges are not listed as exclusive in order that additional privileges recognized in various states, or which might arise in the future, not be foreclosed. The privileges are drawn generally from the Restatement (Second) of Torts, §§ 594-598A (A.L.I. 1977).
The Act treats publications protected by conditional privilege (i.e., the scope of publication comports with the requirements of a privilege) in the same manner as statements falling within the public figure and public official constitutional privileges. Actual malice applies in both contexts. This reflects a judgment that there is little policy justification for treating common law and constitutional privileges differently, and that much confusion can be avoided by simplifying the standards for various privileges.

The fair comment privilege, formerly recognized in the Restatement and still recognized in most jurisdictions, has not been included nor is it currently included in the Restatement. See Restatement (Second) of Torts §§ 606-610 (A.L.I. 1977). The reason for not including the fair comment privilege is two-fold. First, given that statements of opinion are not, by virtue of the definition of factual statement in Section 12, actionable the privilege is not necessary. Second, the other privileges in the Act, including specifically the constitutional privileges outlined in Section 18, were deemed to make the fair comment privilege redundant, as those privileges would provide overlapping, and often greater, protection.

Finally, it should be noted that the fair report privilege, which applies to accurate and fair reports of official actions or proceedings open to the public, is included in the listing of absolute privileges in Section 16 (2). This privilege is sometimes considered to be a qualified privilege, but the better practice seems to be to consider it an absolute one, subject to its qualification of "accuracy" and "fairness."

Similarly, the protection of a person who provides a means of publication for a privileged publisher, often described as a "wire service" privilege, is not included in the Act, as the constitutional privileges have made it unnecessary.

SECTION 18. CONDITIONAL PRIVILEGE FOR STATEMENTS CONCERNING PUBLIC OFFICIALS AND PUBLIC FIGURES.

A person may not be held liable for damages based on a statement about a public official or a public figure unless the plaintiff proves that the statement was:

(1) unrelated to the person's status as a public official or public figure; or
(2) [statement] made with knowledge of its falsity or reckless disregard [of] its truth. [j]

COMMENT TO SECTION 18[7107]

Section 18[7107] [contains] reflects the constitutional privileges applicable to statements concerning public officials and public figures. The statements must be related to the person's status as a public official or public figure, and can be overcome only upon a showing of actual malice. Section 18[7107] is intended fairly to reflect current law. The section does not affect future developments, except insofar as they might be less protective than current law.

It should be noted that the negligence privilege established for "private" libel plaintiffs in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), and its progeny is not reflected in Section 18[7107], but is instead contained in Section 9 [3101] as a precondition to recovery of damages. Because negligence was deemed an appropriate precondition to recovery of damages in any type of defamation action, including purely private ones not covered by Gertz, and because negligence is not required to be proven in vindication actions under Section 5, the requirement was placed in the damage section rather than stated as a privilege.

The Act does not define "public official" and "public figure," but instead relies on the Supreme Court's still-evolving approach to the meaning of those terms. Under the Court's current approach, the category of public officials includes essentially all public employees, and public figures include those persons, whether public employees or not, "who are ... intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), quoted in Gertz v. Robert Welch, Inc., 418 U.S. at 336-337 and Milkovich v. Lorain Journal, [38/118/L14/ /841/851/111 L.Ed. 2d 1, 13 (1990). In both cases the constitutional privilege afforded a publisher only applies to "a defamatory falsehood relating to [a public official's] official

**SECTION 19. LIABILITY FOR REPUBLICATION.**

A person who republishes a statement is subject to liability under this Act as if the person were the original publisher.

**COMMENT TO SECTION 19.**

Section 19 states the long-standing rule that persons who republish information are subject to liability as if they were the original publisher. Consideration was given to placing conditions on liability for republication, such as the foreseeability of harm, the reasonableness of reliance on the original publisher, and the like, but it was concluded that the various privileges contained in the Act would, taken together, provide adequate protection for republishers in such circumstances. See generally Restatement (Second) of Torts, §§578, 581.

**SECTION 20. LIABILITY FOR REPUBLICATION BY ANOTHER.**

A publisher is subject to liability for injury caused by a reasonably foreseeable republication by another person unless:

1. the publisher made a sufficient retraction prior to the republication; or

* This paragraph, explaining why the Act does not define "public official" and "public figure" was formerly included as part of the Comment to Section 1, supra.
the [publisher] did not publish with knowledge of falsity or reckless disregard for truth, and requested the republisher, before the republication, not to publish—or

the republication is made or caused by the party harmed.

COMMENT TO SECTION 20

Unlike the relatively straight-forward way that liabilities of republishers have been dealt with in Section 19, the Act provides a more specific outline of potential liability of publishers for subsequent republication. Under Section 19 a republisher is in a greater measure of control over its liability, and has a full panoply of privileges available to it as it makes a publication judgment. In contrast, Section 20 imposes liability on a former publisher for subsequent publications over which that publisher may have no control and little, if any, information. Accordingly, Section 20 limits earlier publishers to liability only for reasonably foreseeable republications, and even with respect to such publications provides a safe harbor against liability for the former publisher if a sufficient retraction has been made or if the former publisher requests a republisher not to publish and if the former publisher did not publish with actual malice.

It is assumed with respect to Sections 19 and 20 that local law and existing third-party practice in various jurisdictions will deal with questions of joint and several liability, indemnification as between an original publisher and a republisher, and the ability to join such parties in an action.

SECTION 21. INFORMATION RETRIEVAL SERVICES.

A library, archive or similar information retrieval service providing directly or through electronic or other means access to information originally published by others is not subject to liability under Sections 19 and 20 if the library, archive, or similar information retrieval or transmission service:

(1) is not reasonably understood to assert in the normal course of its business the truthfulness or reliability of the information maintained; or transmitted or
Section 21(2) is designed to provide protection for the increasing number of library-type information retrieval or data-base sources of information, such as Lexis, Westlaw, Nexis, and the like. Data-bases are increasingly serving as principal sources for historical as well as contemporaneous information, much like the traditional library or archive. The provision of access to information through such library-type services is protected under Section 21(2) if the person using a service would not reasonably believe that the maintenance or provision of access to the information carries any connotation as to its truthfulness or reliability. In other words, as long as there is reasonable notice in the ordinary course of business that the truthfulness or reliability of the information is not asserted by virtue of its maintenance and accessibility, the information and storage retrieval entity will bear no liability for subsequent republication of the information.

Section 21(2) provides a "safe harbor" by which the maintainer of such information may notify those using it of the fact that the materials truthfulness or reliability is not asserted and should not be relied upon. The provision of such notification by, for example, a warning or disclaimer must be reasonable in order to qualify for protection from liability.

It is assumed by the drafters that such traditional facilities as public libraries, for example, would generally be exempt from liability by virtue of Section 21(1), as it is normally understood in the course of business that a public library does not attest to the truthfulness of all of the material and information contained within its collection.

The term "information...transmission service" used in the Act is intended to cover not only pure transmission services, but also computer bulletin boards. Such bulletin boards, however, must be of such nature that the users do not understand the transmitting service to attest to the truthfulness of the information transmitted, or the service should so inform the customers. In excluding such transmission services from liability, the Act does not preclude liability against the person or persons who originate a defamatory message which is carried on the transmission service. 
SECTION 22[9±102]. SINGLE AND MULTIPLE PUBLICATIONS [RULE].*

(a) Except as provided in subsections (b) and (c), each publication simultaneously received by more than one person is a single publication.

(b) A publication simultaneously received by more than one person is a single publication.

(c) An aggregate and reasonably contemporaneous publication is a single publication.

(d) As to any single publication damages for all resulting harm to a plaintiff must be recovered in a single action under this Act.

COMMENT TO SECTION 22[9±102]

The single publication rule under Section 22[9±102] (a)-(c) is drawn, although with significant drafting changes, from the Restatement (Second) of Torts § 577A (A.L.I. 1977). See also the Uniform Single Publication Act (1952) which, while different in form from the Act and the Restatement, is similar in substance. The Act treats "aggregate and reasonably contemporaneous" publication as single publications. This differs in approach from the Restatement, which uses the term "aggregate" but also specifies that any "edition of a book or newspaper, a radio or television broadcast, and an exhibition of a motion picture" is a single publication. Given technological change, these particularized categories are both incomplete and outdated. In their place, the twin ideas of aggregation and contemporaneous publication were used. The Act is not intended to change the rule with respect to motion pictures, books,

* The drafters have moved former Section 22, Statute of Limitations to Section 25, infra.
newspaper, radio, and TV, nor is it intended to change the basic underlying approach reflected in the Restatement as it will in the future be applied to new technologies, such as rental and home movies, pay TV, and the like.

Subsection (d) departs from the Restatement in that it concerns only the recovery of damages from all jurisdictions in the action, and puts that provision in mandatory, rather than permissive, terms. Section 577A (4) (c) of the Restatement (Second) of Torts also bars recovery of damages between the same parties in all jurisdictions. Such a provision was not included in the Act because of its doubtful enforceability in other jurisdictions and because doctrines of issue preclusion and res judicata would likely address many of the problems.

Subsection (d) departs from the Restatement in that it concerns only the recovery of damages from all jurisdictions in the action, and puts that provision in mandatory, rather than permissive, terms. [¶] Section 577A (4) (c) of the Restatement (Second) of Torts also bars recovery of damages between the same parties in all jurisdictions. Such a provision was not included in the Act because of its doubtful enforceability in other jurisdictions and because doctrines of issue preclusion and res judicata would likely address many of the problems.

SECTION 23[¶J. SURVIVABILITY OF CLAIMS; DEFAMATION OF DECEASED PERSON[§].

(a) A claim arising under this [Act] survives the death of the harmed individual, but only to the extent that the claim is for vindication under Section 5[¶] or for the recovery of pecuniary [¶] damages. This section does not affect the survivability of other claims arising from the publication.

(b) A person who publishes [¶] a statement concerning a deceased person is not liable [¶] under this [Act] to the estate of the deceased person or to the deceased person's [¶] relatives.

COMMENT TO SECTION 23[¶]

Section 23[¶] departs from the common law rule of non-survivability of defamation claims, as well as the common practice in state survival statutes to exclude defamation claims from their reach. See Prosser & Keeton, The Law of Torts § 126 (5th ed. 1984). Under the Act defamation claims that arise
before the death of a plaintiff survive that person's death. A rule of non-survivability was considered unfair, as it would require the termination of litigation, for example, upon the death of the plaintiff, and would foreclose the recovery of damages for pecuniary harm experienced by the deceased plaintiff, or the vindication of that person's reputation. It is noteworthy in this connection that defamation actions are not uniformly non-survivable, depending instead on the survival statute in particular states, and that in some states survivability is restricted to pecuniary damages (on the ground that recovery of emotional damage would represent a windfall to the estate) or exclude exemplary or punitive damages. Given the Act's severe limitation on recoverable damages, the survivability provision seemed to be a reasonable compromise of the competing interests.

Section 23 does not, however, change the general rule that a deceased person cannot be defamed. The provision dealing with defamation of deceased persons is drawn from the Restatement (Second) of Torts, Section 560 (1977).

SECTION 24. EXCLUSIVE REMEDY: OTHER ACTIONS.

(a) This Act provides the exclusive remedy for reputational or dignitary injury to a person caused by the publication of false statement.

(b) In an action under this section or any other claim based on harm to reputation, the injury is at least in part attributable to the falsity. Thus a claim arising in privacy, for example, which involves published falsity but which does not depend on that falsity for proof of the claim or of injury, would not be precluded. But when such a claim does depend upon falsity, the act precludes it even if the remedy provided in such a claim is for dignitary (e.g., privacy) harm rather than harm to reputation.
SECTION 25[§101]. LIMITATION OF ACTIONS.*

(a) A claim under this [Act] is barred unless [the] action is commenced in a court of competent jurisdiction within [one/year/after/the/plaintiff/knew/should/have/known/of/the/publication/within/one/year] five years after the publication or, in the case of a claim against a publisher based on a subsequent republication by another publisher, within 10 years after the publication from which the republication was derived.

(b) Within the period of limitations established by [In] subsection (a), a claim [against/a/publisher/based/on/a/subsequent/republication] is barred one year after the plaintiff knew or should have known of the publication or republication [unless/the/claim/against/a/publisher/is/based/on/a/subsequent/republication] within 10 years after the publication or republication.

(c) The limitation periods of this section are suspended during the period provided in Section 15[§101](a) for responding to a request for retraction.

(d) For purposes of this section, the date of publication [printed on or contained within a publication] is the date of publication, unless later publication is proved.

COMMENT TO SECTION 25[§101]

Section 25[§101] contains two provisions addressing limitations on actions. First, it balances the interests of both parties to a suit under the Act by adopting a rule based on plaintiff’s discovery of the publication but strictly limiting the period for filing suit once discovery is or should have been made and precluding all suits after five years of the publication. Second, it provides a ten-year limitation for suits based on republication covered by Section 20[§102].

Subsection (§1b) provides that a plaintiff must commence a suit under the Act within one year of the plaintiff’s actual or constructive knowledge of the publication. Although most states provide a one-year statute of limitations on libel actions, state

* This Section, formerly number 22 has been moved by the drafters.
statutes vary as to when the limitations period begins. Some states provide that a libel cause of action accrues when the publication is made, see N.Y. CPLR Law § 215 (McKinney 1974); Ill. Ann. Stat. ch. 110, para. 13-201 (Smith-Hurd 1934), while other states provide that a libel cause of action does not accrue until the plaintiff learns of the publication. Cal. Civ. Proc. Code § 340(3) (West 1982). Basing the statute of limitations upon the point of the publication has the advantage of providing a definite limitation on the publisher's liability. The Act departs from this approach in recognition of the fact that a person can be injured by a publication of which he is unaware.

A principal reason that a one-year discovery statute of limitations is used is that the Act covers private as well as media defamation. With a media defamation, such as one that occurs in a local newspaper, a discovery provision should have no significant effect in most cases, as it should be interpreted as justifying the conclusion that the plaintiff "should have known" of the story at the time of its publication in the newspaper. Purely private defamations, however, are more often unknown to the defamed individual until a later time, such as at the time of a subsequent job evaluation or at the point of an adverse job decision. It is in view of these problems arising in the private setting that a discovery provision was used.

Subsection (a) [§10] provides that a publisher's potential liability is terminated after five years of the publication. The five-year limit on liability represents a balance struck between fairness to plaintiffs and fairness to defendants. The Act protects the unaware plaintiff, but only for five years. Accordingly, a publisher will not have to defend a suit more than five years after the publication.

Subsection (a)[§10] also limits the original publisher's liability for foreseeable future republications to 10 years.

Subsection (c) provides that the statute of limitations is tolled while the plaintiff awaits a defendant's reply to a request for retraction. Although Sections 12[§10] and 15[§10] require a defendant to respond to a request for a retraction within 30 days, if the request comes within 30 days of the running of the statute of limitations, a defendant should not be able to delay his answer to permit the running of the statute.

[NOTE TO REVISERS]

[All or part of the statute (sic) of limitations provision can, if appropriate, be inserted in a statutory chapter of the State Code, which sets forth general statutes of limitations.
The State's general chapter on statutes of limitations may include a period of limitations for libel and slander, which will need to be repealed and replaced by Section 25 or portions of it. By placing the provisions of Section 25 in the general statute of limitations provision, the ordinary tolling provisions applicable to general statutes of limitations, such as absence of defendant, the minority of a plaintiff and the like, will be made applicable.

SECTION 26. UNIFORMITY OF APPLICATION AND CONSTRUCTION.

This Act shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this Act among states enacting it.

SECTION 27. SHORT TITLE

This Act may be cited as the Uniform Defamation Act.

SECTION 28. SEVERABILITY.

If any provision of this Act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

SECTION 29. EFFECTIVE DATE.

This Act takes effect . . . .

SECTION 30. APPLICATION TO EXISTING RELATIONSHIPS.

This Act applies to all publications made on or after its effective date.
The following is a "checklist" of issues and concerns identified by LDRC in connection with the proposed [Uniform] Defamation Act. It has been prepared in order to maintain an ongoing inventory of response to such expressions of concern -- or lack of response -- by the Uniform Law Commissioners.


The checklist continues to document a lack of responsiveness on many of the issues and concerns identified by LDRC. Although there continues to be some movement on specific points, overall there remain significant problems in the basic structure, balance and intent of the Defamation Act; also, issue has still not been joined on many of LDRC's most fundamental concerns -- concerns recognized by the ULC's own Review Committee on the Defamation Act in its comments on the 1990 first reading draft.
### General Policy Issues

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<tr>
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</tr>
</thead>
<tbody>
<tr>
<td>1. Intent to favor reputation and resolve problems faced by plaintiffs</td>
<td>Acknowledged</td>
<td>Noted as issue to be considered</td>
<td>Retained</td>
<td>Retained</td>
<td>Retained</td>
</tr>
<tr>
<td>2. Insufficient efforts to protect free speech and resolve problems faced by libel defendants</td>
<td>Implicit</td>
<td>Noted as issue to be considered</td>
<td>Only major proposal that clearly advances defendants' interests is elimination of punitive damages</td>
<td>No further major advancement</td>
<td>Punitive damages re-inserted as bracketed alternative</td>
</tr>
<tr>
<td>3. Resulting pervasive imbalance</td>
<td>No major change</td>
<td>Noted as issue to be considered</td>
<td>Subject to further study of many new proposals, significant imbalance appears to remain</td>
<td>Some further improvement, but imbalance still appears to remain</td>
<td>Some retreat - bracketed punitive damages alternative re-inserted; mutual consent alternative for vindication action deleted</td>
</tr>
<tr>
<td>4. Inappropriateness of novel, radical revision</td>
<td>Ignored</td>
<td>Noted as issue to be considered</td>
<td>Additional new and radical proposals substituted for bifurcation; no other major change</td>
<td>Untested action for vindication retained</td>
<td>Retained</td>
</tr>
<tr>
<td>5. Ignores impact of shifting constitutional overlay on any comprehensive state libel statute</td>
<td>Assumes no problem</td>
<td>Issue specifically noted</td>
<td>No substantive change; some commentary re application of constitutional standards</td>
<td>How expressly defers to constitutional standards at least as to definitions of &quot;public official&quot; and &quot;public figure&quot;</td>
<td>No pertinent change</td>
</tr>
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## General Policy Issues (continued)

<table>
<thead>
<tr>
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</thead>
<tbody>
<tr>
<td>5. Lack of need/support/consensus</td>
<td>Assumes need</td>
<td>Issue specifically noted</td>
<td>No meaningful change or apparent consideration</td>
</tr>
<tr>
<td>6. Lack of legislative tradition</td>
<td>Assumes no problem</td>
<td>Issue specifically noted</td>
<td>No meaningful change</td>
</tr>
<tr>
<td>7. Legislative infeasibility</td>
<td>Assumes no problem</td>
<td>Concern indirectly suggested</td>
<td>No meaningful change</td>
</tr>
<tr>
<td>8. Alternative of non-comprehensive reform in limited areas (e.g., retraction; statute of limitations)</td>
<td>No consideration</td>
<td>Issue specifically noted</td>
<td>No change in comprehensive approach</td>
</tr>
<tr>
<td>9. Inappropriateness of Defamation Act initiative under the ULC's own criteria</td>
<td>No consideration</td>
<td>Rejected</td>
<td>Proposals to discontinue project again rejected</td>
</tr>
</tbody>
</table>

## Major Structural Features of the Act

<table>
<thead>
<tr>
<th></th>
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</tr>
</thead>
<tbody>
<tr>
<td>1. Bifurcation/Truth Trial</td>
<td>Retained</td>
<td>Questioned</td>
<td>Truth trial retained as action for vindication, available solely at plaintiff's option (mutual consent alternative bracketed)</td>
</tr>
</tbody>
</table>
## II. Major Structural Features of the Act (Continued)

<table>
<thead>
<tr>
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</thead>
<tbody>
<tr>
<td></td>
<td>(as compared to)</td>
<td>7/19/90 Review</td>
<td>Draft Act</td>
<td>Draft Act</td>
</tr>
<tr>
<td></td>
<td>February 1990 Draft</td>
<td>Committee Report</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2. Deferral of constitutional privilege defenses to State Two</td>
<td>Retained</td>
<td>Questioned</td>
<td>Vindication alternative would still render constitutional defenses irrelevant</td>
<td>No Stage Two, but no constitutional defenses available in vindication action, although claims of absolute privilege available.</td>
</tr>
<tr>
<td>3. Attorneys fees to plaintiff after Stage One (without fault finding)</td>
<td>Deleted</td>
<td>--</td>
<td>Attorneys fees available to prevailing plaintiff in vindication action without proof of constitutional fault.</td>
<td>No change.</td>
</tr>
<tr>
<td>4. Attorneys fees only to plaintiff</td>
<td>Retained</td>
<td>Questioned</td>
<td>Retained in damages action</td>
<td>No change</td>
</tr>
<tr>
<td>5. Court ordered publication</td>
<td>Deleted</td>
<td>--</td>
<td>In vindication action losing defendant must now publish or pay for publication without any finding of fault</td>
<td>No change</td>
</tr>
<tr>
<td>6. Pressure to waive defenses and to settle (&quot;offer of termination&quot;)</td>
<td>Retained</td>
<td>Issue indirectly suggested</td>
<td>Retained in both action for vindication and for damages</td>
<td>No change</td>
</tr>
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<td>-------------------</td>
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<td>-------------------------------------------</td>
<td>--------------------------</td>
<td>-----------------------</td>
</tr>
<tr>
<td>7. Abolition of public libel/private libel dichotomy</td>
<td>Retained; no discussion</td>
<td>Issue specifically noted</td>
<td>No change; intent clarified</td>
<td>No change</td>
</tr>
<tr>
<td>8. Equal treatment of media/nonmedia defendants (LDRC supports)</td>
<td>Retained; no discussion</td>
<td>Issue specifically noted</td>
<td>No change</td>
<td>No change</td>
</tr>
<tr>
<td>9. Abolition of libel/slander dichotomy</td>
<td>Retained; no discussion</td>
<td>Issue specifically noted</td>
<td>No change</td>
<td>No change</td>
</tr>
<tr>
<td>10. Abolition of &quot;per se/&quot;per quod&quot; dichotomy</td>
<td>Retained; no discussion</td>
<td>Issue specifically noted</td>
<td>No change</td>
<td>No change</td>
</tr>
<tr>
<td>11. Abolition of ancillary causes of action, including false light privacy (LDRC supports)</td>
<td>Retained; no discussion</td>
<td>Issue specifically noted</td>
<td>No change</td>
<td>No change</td>
</tr>
</tbody>
</table>

II. Major Structural Features of the Act (continued)

<table>
<thead>
<tr>
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</thead>
<tbody>
<tr>
<td>11. Public figure/official Sec. 1 definition eliminated</td>
<td>No change</td>
<td>No change</td>
<td>No change</td>
<td>No change</td>
<td>No change</td>
<td>No change</td>
</tr>
</tbody>
</table>

III. Selected Section-by-Section Issues/Concerns*

<table>
<thead>
<tr>
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<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Inappropriate and/or incorrect attempt to restate constitutional definitions</td>
<td>Some movement, but incomplete</td>
<td>Issue indirectly suggested</td>
<td>Some additional movement in commentary, but incomplete</td>
<td>Public figure/official Sec. 1 definition eliminated</td>
<td>No change</td>
<td>No change</td>
</tr>
<tr>
<td>2. Other lost opportunities</td>
<td>No change</td>
<td>No comment</td>
<td>No change</td>
<td>No change</td>
<td>No change</td>
<td>No change</td>
</tr>
</tbody>
</table>

* Section numbers generally follow 12/90 Draft. Numbering scheme was re-vamped for February 1992 Draft. New Section numbers are noted in final column.
<table>
<thead>
<tr>
<th></th>
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</thead>
<tbody>
<tr>
<td>Section 2 (Elements and Proof)</td>
<td>7/19/90 Review Committee Report</td>
<td>7/19/90 Review Committee Report</td>
<td>7/19/90 Review Committee Report</td>
<td>7/19/90 Review Committee Report</td>
</tr>
<tr>
<td>3. Insufficient burden for proof of falsity</td>
<td>No change</td>
<td>No comment</td>
<td>No change</td>
<td>No change</td>
</tr>
<tr>
<td>Section 3 (Procedure in Defamation Actions)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>7. Alternative A: Action for Vindication</td>
<td>--</td>
<td>--</td>
<td>Added as alternative in lieu of bifurcated proceeding</td>
<td>No change</td>
</tr>
</tbody>
</table>

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### Issues or Concerns

<table>
<thead>
<tr>
<th>Section 3 (Procedure in Defamation Actions) (Continued)</th>
</tr>
</thead>
<tbody>
<tr>
<td>8. Alternative B: In judgment on claims of conditional privilege: mandatory truth/falsity findings</td>
</tr>
<tr>
<td>July 1990 Draft Act (as compared to 7/19/90 Review Committee Report)</td>
</tr>
<tr>
<td>-- --</td>
</tr>
<tr>
<td>December 1990 Draft Act</td>
</tr>
<tr>
<td>Added as alternative in lieu of bifurcated proceeding</td>
</tr>
<tr>
<td>August 1991 Draft Act</td>
</tr>
<tr>
<td>Alternative eliminated; mandatory truth/falsity findings now presumably confined to vindication action</td>
</tr>
<tr>
<td>February 1992 Draft Act</td>
</tr>
<tr>
<td>No change</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Section 2-102 (Bifurcated Trial) (Deleted 12/90)</th>
</tr>
</thead>
<tbody>
<tr>
<td>9. Inappropriate allocation of issues between Stage One and Stage Two</td>
</tr>
<tr>
<td>No change No comment</td>
</tr>
<tr>
<td>Bifurcation deleted; new mechanisms present some similar problems</td>
</tr>
<tr>
<td>No additional change No change</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Section 3-103 (Claims of Privilege) (Deleted 12/90)</th>
</tr>
</thead>
<tbody>
<tr>
<td>10. Adverse impact of deferral on summary judgment</td>
</tr>
<tr>
<td>No helpful change Concern indirectly suggested</td>
</tr>
<tr>
<td>Deferral deleted No change No change</td>
</tr>
<tr>
<td>11. Adverse impact of deferral on cost of litigation</td>
</tr>
<tr>
<td>No helpful change Concern indirectly suggested</td>
</tr>
<tr>
<td>Deferral deleted; but mandatory truth/falsity finding would add to costs Alternative B (12/90) eliminated No change</td>
</tr>
<tr>
<td>12. Inappropriate pressure on defense to stipulate or retract</td>
</tr>
<tr>
<td>No helpful change No comment</td>
</tr>
<tr>
<td>Similar pressures retained in vindication alternative Retained No change</td>
</tr>
</tbody>
</table>

---
July 1990 Draft Act
(as compared to
February 1990 Draft)

Issues or Concerns
Review Committee Report

Section 3-103 (Claims of Privilege) [Deleted 12/90] (Continued)

<table>
<thead>
<tr>
<th>13. Inadequate guidance to trial judge exercising discretion whether to accelerate</th>
<th>No change</th>
<th>No comment</th>
<th>Deleted</th>
<th>Deleted</th>
<th>No change</th>
</tr>
</thead>
</table>

Section 4-104 (Dismissal or Termination)

<table>
<thead>
<tr>
<th>14. Adverse impact of bifurcated discovery on cost of litigation</th>
<th>No helpful change</th>
<th>Issue indirectly suggested</th>
<th>Bifurcated discovery deleted; mandatory truth/false finding eliminated</th>
<th>Alternative B 12/90</th>
<th>No change</th>
</tr>
</thead>
</table>

Section 5-101 (Compensatory Damages)

<table>
<thead>
<tr>
<th>15. Inadequate definition and clarification of compensable elements</th>
<th>No helpful change</th>
<th>No comment</th>
<th>Some further clarification of prior confusing substantive change to be evaluated</th>
<th>Sec. 9</th>
<th>No change</th>
</tr>
</thead>
</table>

| 16. Inappropriate allowance of free-standing awards for "emotional distress" | No helpful change | No comment | No change | "Emotional distress" must now be a consequence of reputational harm | Sec. 9 | No change |
|---|---|---|---|---|---|

Section 5-103 (Punitive Damages)

<p>| 17. Failure to abolish or meaningfully limit punitive damages | No helpful change | Issue specifically noted | Punitive damages not allowed | Punitive damages still not allowed | Sec. 10 | Punitive damages re-inserted as bracketed alternative. |</p>
<table>
<thead>
<tr>
<th>Issues or Concerns</th>
<th>Section 5-104 (Proof of Damages)</th>
<th>Section 6 (Retraction)</th>
</tr>
</thead>
<tbody>
<tr>
<td>18. Insufficient proof requirement</td>
<td>Inadequate change</td>
<td>No comment</td>
</tr>
<tr>
<td>19. Lack of exemption from liability when immediate and sufficient retraction published</td>
<td>Made worse</td>
<td>No comment</td>
</tr>
<tr>
<td>20. Ineffective application to all media</td>
<td>No change</td>
<td>No comment</td>
</tr>
<tr>
<td>21. Lack of time limitation for retraction request</td>
<td>No change</td>
<td>No comment</td>
</tr>
<tr>
<td>22. Inadequate requirements for &quot;sufficient&quot; demand</td>
<td>No change</td>
<td>No comment</td>
</tr>
<tr>
<td>---------</td>
<td>-------------------</td>
<td>---------------------</td>
</tr>
<tr>
<td>Section 6 (Retraction) (Continued)</td>
<td>23. Inappropriate definition of &quot;sufficient&quot; retraction</td>
<td>No change</td>
</tr>
<tr>
<td></td>
<td>24. Inappropriate and imbalanced attorneys fee awards in connection with retraction</td>
<td>No change</td>
</tr>
<tr>
<td>Section 7-10 (Absolute Privileges)</td>
<td>25. Incomplete list of available absolute privileges</td>
<td>No change</td>
</tr>
<tr>
<td></td>
<td>26. Fair report privilege too narrowly stated</td>
<td>No change</td>
</tr>
<tr>
<td></td>
<td>27. Inadequate &quot;neutral reportage&quot; privilege</td>
<td>No helpful change</td>
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<tr>
<td>---------------------------------------------------------------------------------</td>
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</tr>
<tr>
<td>Section 7-102, 7-101 (Conditional Privileges)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>28. Inadequate protection for &quot;fair comment&quot;</td>
<td>Made worse</td>
<td>No comment</td>
</tr>
<tr>
<td>29. Inadequate codification of the Sullivan standard</td>
<td>No helpful change</td>
<td>No comment</td>
</tr>
<tr>
<td>30. Inadequate protection for commercial credit reporting services</td>
<td>No change</td>
<td>Issue specifically noted</td>
</tr>
<tr>
<td>Section 8 (Republication)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>31. Inadequate limitation of liability or modernization of the concept</td>
<td>No change</td>
<td>Issue specifically noted</td>
</tr>
<tr>
<td>32. Inadequate scope and procedures for protection of non-substantive republishers</td>
<td>No change</td>
<td>Issue specifically noted</td>
</tr>
<tr>
<td>---------------------------------------</td>
<td>----------------------------------------------------------</td>
<td>---------------------------------</td>
</tr>
<tr>
<td>Section 9 (Other Provisions)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>33. Inappropriate incorporation of a &quot;rule of discovery&quot;</td>
<td>No change</td>
<td>Issue specifically noted</td>
</tr>
<tr>
<td>34. Excessive tolling of the statutory period</td>
<td>No change</td>
<td>No comment</td>
</tr>
<tr>
<td>35. Survivability of actions</td>
<td>--</td>
<td>--</td>
</tr>
</tbody>
</table>

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