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Bringing Coherence to Defamation Law through Uniform Legislation: The Search for an Elegant Solution

Robert M. Ackerman

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BRINGING COHERENCE TO DEFAMATION LAW THROUGH UNIFORM LEGISLATION: THE SEARCH FOR AN ELEGANT SOLUTION

ROBERT M. ACKERMAN*

One of the most uncertain areas of modern American jurisprudence, the law of defamation remains largely a mystery to commentators and practitioners alike. In response to this confusion, the Conference of Commissioners on Uniform State Laws recently convened a committee to draft a Uniform Defamation Act. Although the committee withdrew this Act from consideration, the Commissioners passed in its place the Uniform Correction or Clarification of Defamation Act, a document drawn largely from one article of its predecessor. The Correction Act seeks to alter the shape of defamation litigation without substantially modifying the underlying law. More specifically, it encourages early settlement of disputes by providing for the elimination of general and punitive damages in situations when a publisher timely and sufficiently corrects or clarifies the disputedly defamatory statement.

In this Article, Professor Ackerman examines both the proposed Defamation Act and the Correction Act in detail, discussing, in particular, implementation of the Correction Act and its likely impact in states choosing to adopt the new law. In addition, Professor Ackerman offers a new proposal to better streamline defamation law in fulfillment of three primary goals: protection of speech; protection of reputation; and efficiency in implementation. Professor Ackerman suggests that the most effective means of achieving a more coherent body of defamation law loyal to these goals would employ a tripartite verdict procedure providing for explicit jury findings as to defamation, falsity, and fault, and would limit damages to objectively ascertainable amounts. This procedure, Professor Ackerman believes, would provide the most appropriate balance between plaintiffs' interests in clearing their names and defendants' federal constitutional concerns.

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I. INTRODUCTION

The law of defamation is in disarray. It is confusing. It is unclear. Most critically, it fails to serve its most important objectives: providing an adequate remedy for reputational harm while allowing sufficient protection for speech. The chaotic nature of defamation law is primarily due to the fact that, at present, defamation involves a juxtaposition of two bodies of law: (1) the archaic state common law of libel and slander, a system arising from medieval roots, and (2) First Amendment jurisprudence, as developed by the courts following the United States Supreme Court's landmark *New York Times Co. v. Sullivan*¹ decision in 1964. The latter body of law, of necessity, imposes only federal constitutional limitations on what remains essentially a state cause of action. As a result, the law of defamation resembles a creature fashioned by committee, or worse yet, one fashioned by several independent committees working in separate rooms in different eras with different blueprints—some building up and others chiseling down.²

Because of the confusion and frustration that attends the law of defamation, several individuals and groups have suggested various reform measures.³ Significant among these was a proposed Uniform Defamation

1. 376 U.S. 254 (1964). In *Sullivan*, the Court held that the Constitution "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-80.

2. Robert Sack has likened the few successful plaintiffs in the law of defamation to "the remnants of an army platoon caught in an enemy crossfire. Their awards stand witness to their good luck, not to their virtue, their skill, or the justice of their cause." ROBERT SACK, *LIBEL, SLANDER, AND RELATED PROBLEMS* xxvi (1980).

3. One early example is Professor Robert A. Leflar's suggestion of a retraction or right of reply remedy patterned after Arkansas's old "lie bill." Robert A. Leflar, *Legal Remedies for Defamation*, 6 ARK. L. REV. 423, 423-26 (1952). For more recent examples, see H.R. 2846, 99th Cong., 1st Sess. (1985) (introducing a bill by Representative Charles Schumer that would have established a new cause of action for libel with a declaratory judgment remedy); Marc A. Franklin, *A Declaratory Judgment Alternative to Current Libel Law*, 74 CAL. L. REV. 809, 812-13 (1986) (advocating a declaratory judgment proposal); Annenberg Washington Program, *Proposal for the Reform of Libel Law* (1988) (proposing a comprehensive model Libel Reform Act with emphasis on nonmonetary damage remedies). See generally Rodney A. Smolla & Michael J. Gaertner, *The Annenberg Libel Reform Proposal: The Case for Enactment*, 31 WM. & MARY L. REV. 25 (1989) (discussing the proposal).

Act ("proposed Act"), drafted under the auspices of the National Conference of Commissioners on Uniform State Laws ("the Commissioners").⁴ The proposed Act was the product of several years' work by the Drafting Committee. The Committee concluded not only that "the state of the law is in chaos," but that "some issues may not be fit for judicial resolution."⁵ The proposed Act attempted to address these problems primarily by providing yet another judicial remedy—in this case a "vindication remedy"—to supplement the traditional damages remedy for defamation.

Unfortunately, instead of simplifying matters, the inclusion of the vindication remedy added another layer of complexity and controversy to an already confusing area of law without guaranteeing redress of the current system's major flaws. Indeed, the vindication remedy drew so much criticism that the Drafting Committee ultimately withdrew the proposed Act from consideration.⁶ In its place, the Commissioners adopted the Uniform Correction or Clarification of Defamation Act ("Correction Act"), a series of provisions extracted from the final committee draft of the proposed Act.⁷ The Correction Act provides incentives for the early resolution of litigation on terms acceptable to both plaintiffs and defendants. While it fails to address certain deficiencies of defamation law, the Correction Act, if widely enacted, could dramatically alter the manner in which defamation cases are litigated.

This Article will briefly review the infirmities that plague contemporary defamation law in the United States. It will examine the reforms included in the proposed Act and consider whether any of the provisions that were not included in the Correction Act are nevertheless worth salvaging. It will then examine the Correction Act, which the Commissioners ultimately adopted. Next, the Article will offer criteria for reforming the law of defamation and consider the extent to which the Correction Act addresses these criteria. It will also suggest an alternative reform proposal tailored to meet these criteria. Lastly, the Article will consider the appropriate vehicles for these and other reform proposals, examining whether

4. The Drafting Committee, chaired by Dean Harvey S. Perlman of the University of Nebraska College of Law, was appointed in 1989. That committee produced at least six discussion drafts of a Uniform Defamation Act. Unless otherwise indicated, comments herein are based on the March 23, 1993 Discussion Draft, which was the final version of the proposed Act before it was withdrawn in June of 1993. It will hereinafter be referred to in citations as "PROPOSED UNIF. DEFAMATION ACT."

5. PROPOSED UNIF. DEFAMATION ACT, *supra* note 4, Prefatory Note.

6. See *News Notes*, 21 MEDIA L. REP. (BNA), June 8, 1993.

7. The Uniform Correction or Clarification of Defamation Act is substantially identical to Article IV (§§ 4-101 through 4-106) of the March 23, 1993 Committee Draft of the proposed Act. Comments and quotations herein are based on the October 13, 1993 Unofficial Final Draft of the Correction Act. Hereinafter, it will be referred to in citations as the "UNIF. CORR. OR CLARIF. ACT."

they are best advanced by the courts or the legislatures, whether at the state or national level, and whether on a uniform or state-by-state basis.

This Article posits that the law of defamation suffers from the same ailments that plague tort law generally, albeit in exaggerated form. For example, in personal injury cases, plaintiffs often are thwarted by limitations on liability that preclude jury access.⁸ Those plaintiffs who prevail, however, frequently enjoy grossly inflated damage awards.⁹ This pattern appears to be repeated, in exaggerated form, in defamation cases. Due largely to First Amendment constraints, many plaintiffs are denied access to any remedy for defamation; for the fortunate few who reach the jury, however, judgments have attained epic proportions.¹⁰ Although defamation cases exemplify the most pronounced problems of the tort system, they also offer the greatest opportunity for meaningful reform, as defamation claims offer the possibility of win/win solutions in which the plaintiff can be made whole, or at least nearly whole, at relatively little cost to the defendant.

8. E.g., COLO. REV. STAT. § 12-47-128.5 (1991) (severely limiting actions against vendors of alcohol); 42 PA. CONS. STAT. ANN. § 8528 (1982) (limiting actions that can be brought against government entities; similar to tort claims acts of several jurisdictions); WIS. STAT. § 125.035 (codifying the rule in *Olsen v. Copeland*, 280 N.W.2d 178, 183 (Wis. 1979), that extended limited immunity to persons who negligently furnish liquor to another; the statute effectively overruled *Sorensen v. Jarvis*, 350 N.W.2d 108 (Wis. 1984), which itself had overruled *Olsen*); see also *Feres v. United States*, 340 U.S. 135, 146 (1950) (denying claim by member of armed forces for injuries incurred while on duty); *Endresz v. Friedberg*, 248 N.E.2d 901, 905 (N.Y. 1969) (denying claim for wrongful death on behalf of children killed in utero); *Whetham v. Bismarck Hosp.*, 197 N.W.2d 678, 684 (N.D. 1972) (denying claim for emotional distress suffered by mother upon seeing newborn daughter dropped on tile floor of hospital). With respect to suits involving children and the loss of consortium, see *Russell v. Salem Transp. Co.*, 295 A.2d 862, 865 (N.J. 1972) (denying claim for loss of consortium by children resulting from injury to mother). See generally Michael A. Mogill, *And Justice for Some: Assessing the Need to Recognize the Child's Action for Loss of Parental Consortium*, 24 ARIZ. ST. L.J. 1321 (1992) (advocating need for broader recognition of parental consortium claims).

The available empirical evidence suggests that the volume of tort litigation has not increased substantially over the past few decades, at least in comparison to other types of litigation. See Roxanne Barton Conlin, *Litigation Explosion Disputed*, NAT'L L.J., July 29, 1991, at 26.

9. In the late twentieth century, considerable publicity and concern has attended the increasing frequency of large tort verdicts. While there were fewer than twenty verdicts of a million dollars or more in the nineteen sixties, more than three hundred and eighty verdicts awarded a million dollars or more between 1970 and the beginning of 1981.

The year 1979 alone saw eighty awards in the million dollar range.

MARSHALL S. SHAPO, TOWARDS A JURISPRUDENCE OF INJURY: THE CONTINUING CREATION OF A SYSTEM OF SUBSTANTIVE JUSTICE IN AMERICAN TORT LAW 5-163 (1984) (footnote omitted).

10. "Even adjusted for inflation (in 1986 dollars) the pre-*Sullivan* average award was 400% to 500% lower than the average libel award of the mid-1980's." LDRC *Recap and Update: Trial Results, Damage Awards and Appeals, 1980-1989 and 1990-1991: The "Chilling Effect" Writ Large . . . Then Writ Larger*, LDRC BULLETIN (Libel Defense Resource Center, New York, N.Y.), July 31, 1992, at 1 [hereinafter LDRC *Recap*]. "When jury trials were lost [by defendants] in the most recent two-year period, the average award increased dramatically to more than \$9 million (\$9,066,310), compared to less than \$1.5 million for the prior decade. The median award also skyrocketed—to 1.5 million, compared to the decade-long figure of \$200,000." *Id.* at 4.

Both the proposed Act and the Correction Act represent efforts at such reform. This Article examines the extent to which these proposals succeed and considers whether other remedies would better protect both speech and reputation.

II. THE PROBLEM

Problems with the law of defamation have been the subject of extensive discussion and commentary.¹¹ Without belaboring the point, these problems may be summarized as follows.

A. *The Law of Defamation Is Archaic*

Much of the law of defamation is feudal in origin. Indeed, the very term "defamation" represents an effort to embrace two torts—libel and slander—that evolved from the separate, and sometimes warring, jurisdictions of the royal and ecclesiastical courts.¹² In an age of broadcast and cable communications and on-line information services, the effort to maintain a distinction between these two torts serves no useful purpose. Similarly, the distinctions between slander and slander per se¹³ and libel and libel per quod¹⁴ have also outlived their usefulness. To be sure, the language¹⁵ is picturesque, but the niceties of pleading in this area are all too representative of the obscure incantations for which lawyers have been justifiably criticized.¹⁶

11. For collections of previous scholarly work on this subject, see Robert M. Ackerman, *Defamation and Alternative Dispute Resolution: Healing the Sting*, 1986 Mo. J. DISP. RESOL. 1, 3 n.10; David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487, 488 n.3 (1991). For a recent collection of articles of particular relevance to the proposed Act, see *REFORMING LIBEL LAW* (John Soloski & Randall P. Bezanson eds., 1992).

12. See W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 111, at 772 (5th ed. 1984). Recent cases involving televangelists Jimmy Swaggart and Jerry Falwell may suggest a renewed need for ecclesiastical jurisdiction. See *Gorman v. Swaggart*, 524 So. 2d 915 (La. Ct. App.), cert. denied, 530 So. 2d 571 (La. 1988); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

13. See KEETON ET AL., *supra* note 12, § 112, at 188 (defining types of slander considered actionable). Does slander per se treatment of statements regarding unchastity in a woman, but not in a man, offend equal rights? See *Sauerhoff v. Hearst Corp.*, 388 F. Supp. 117, 125 (D. Md. 1974) (answering in the negative), vacated on other grounds, 538 F.2d 588 (4th Cir. 1976). Has AIDS replaced leprosy as a "loathsome disease" (another category that has traditionally received slander per se treatment, see *RESTATEMENT (SECOND) ON TORTS* § 572 (1976)), or are we now too enlightened to attach a social stigma to any disease?

14. For a description of this distinction, see KEETON ET AL., *supra* note 12, § 112, at 796.

15. The language includes such rococo terms as "colloquium," "inducement," and "innuendo."

16. As early as 1726, Jonathan Swift stated that lawyers "hath a peculiar Cant and Jargon of their own, that no other Mortal can understand, and wherein all their Laws are written, which they take special Care to multiply; whereby they have gone near to confound the very Essence of Truth

B. *The Law of Defamation Is Complex*

Superimposed upon the common law system is a relatively new law of constitutional privileges created by the 1964 *Sullivan* decision and its progeny. Necessary as it might have been, the Court's grafting of federal constitutional limitations onto a cause of action previously considered a matter of state-made common law has rendered the law of defamation quite complex. Decisions delivered since 1964 have created a maze of categories and sub-categories envisioned by neither the framers of the Constitution nor the *Sullivan* majority.¹⁷ Various rules now apply, depending on the type of plaintiff involved (public official, public figure, or private individual),¹⁸ the context of the defamatory statement (i.e., whether or not the statement is one of public concern),¹⁹ and possibly, the identity of the defendant (media or non-media).²⁰ These classifications further complicate a system that already distinguishes between the written and spoken word—with varying jurisdictional treatment of broadcast communication²¹—and between language actionable and non-actionable per se. If this system sounds unduly complicated, it is.

and Falsehood, of Right and Wrong" JONATHAN SWIFT, *GULLIVER'S TRAVELS* 175 (Running Press Book Publishers 1992) (1726).

17. One commentator noted in 1981 that "the Court, inadvertently, has structured a bewildering labyrinth where even the mighty Theseus would yield to despair." Alexander D. Del Russo, *Freedom of the Press and Defamation: Attacking the Bastion of New York Times v. Sullivan*, 25 *St. Louis U. L.J.* 501, 501 (1981).

18. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 332-48 (1974); *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-83 (1964). *Gertz* held, *inter alia*, that while the *Sullivan* "actual malice" rule embraces public figures as well as public officials, plaintiffs who fall into neither category need not prove actual malice, but are constitutionally required to prove fault in order to recover damages. *Id.* at 345-48. *Gertz* further held that all plaintiffs, regardless of status, must meet the actual malice requirement to be awarded presumed or punitive damages. *Id.* at 348-50.

19. In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985), the Court held that the *Gertz* "actual malice" requirement for presumed and punitive damages does not apply to matters that are not of public concern.

20. In *Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc.*, 461 A.2d 414, 418, 421 (Vt. 1983), *aff'd on other grounds*, 472 U.S. 749 (1985), the Vermont Supreme Court upheld a judgment for presumed and punitive damages in the absence of actual malice on the grounds that the *Gertz* holding was limited to cases involving media defendants. While this rationale did not serve as the basis for the United States Supreme Court's ultimate decision, see *supra* note 19, (in fact, Justice Brennan, dissenting, took pains to count noses—indicating a rejection of this distinction, 472 U.S. at 775-76 (Brennan, J., dissenting)), subsequent cases indicate that the Court has reserved judgment on this issue. See, e.g., *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776-78 (1985) (limiting its requirement that private-figure plaintiffs prove defamatory speech is false to publications by media defendants regarding matters of public concern).

21. Compare, e.g., *Shor v. Billingsley*, 158 N.Y.S.2d 476, 480-81 (N.Y. Sup. Ct. 1956) (holding that communication by radio is libel), *aff'd*, 169 N.Y.S.2d 416 (N.Y. App. Div. 1957), *appeal denied*, 170 N.Y.S.2d 976 (N.Y. App. Div. 1958) with CAL. CIVIL CODE § 46 (West 1982) (establishing that radio communication is slander).

FIGURE 1: ELEMENTS OF CAUSE OF ACTION FOR DEFAMATION²²

Common law requirements	Defamatory statement. ²³ If not facially defamatory, must also show: Inducement (extrinsic facts necessary to convey defamatory meaning); ²⁴ Innuendo (explanation of defamatory meaning in light of extrinsic facts). ²⁵		
	Colloquium (statement is of and concerning plaintiff). ²⁶		
	Publication of statement to third party. ²⁷		
	If slander: special damages, or circumstances making statement slander per se. ²⁸		
Plaintiff/ Subject Matter:	Public official/figure	Private individual	Not matter of public concern
Constitutional requirements	Falsity (<i>Phil. News. v. Hepps</i>) (limited to media defendants?)		? ²⁹
	Actual malice (<i>Sullivan</i> , ³⁰ <i>Gertz</i>) ³¹	Fault (<i>Gertz</i>) ³² (ltd. to media defs?)	? (but see White cc in <i>Dun & Bradst.</i>) ³³
For presumed or punitive damages	Actual malice (<i>Sullivan, Gertz</i>) ³⁴	Actual malice (<i>Gertz</i>) ³⁵	No actual malice (<i>Dun & Bradst.</i>) ³⁶

Figure 1, set forth above, represents an attempt to summarize the elements presently required for a *prima facie* case of defamation.³⁷ The question marks that adorn the figure demonstrate that the legal doctrine

22. See KEETON ET AL., *supra* note 12, § 111, at 771-93.

23. "A communication is defamatory if it tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." RESTATEMENT (SECOND) OF TORTS § 559 (1976).

24. KEETON ET AL., *supra* note 12, § 111, at 782.

25. *Id.* at 782-83.

26. *Id.* at 783.

27. *Id.* at 771.

28. *Id.* at 788, 793.

29. See *supra* note 20 and accompanying text.

30. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

31. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342-45 (1974).

32. *Id.* at 345-48.

33. In his concurrence in *Dun and Bradstreet*, Justice White suggested that the *Gertz* requirement of fault had been completely eliminated in cases not involving matters of public concern. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 774 (1985) (White, J., concurring in the judgment).

34. *Sullivan*, 376 U.S. at 279-80; *Gertz*, 418 U.S. at 342-45.

35. *Gertz*, 418 U.S. at 348-50.

36. See *supra* note 19.

37. For a summary of the constitutional requirements pertaining to defamation actions, see *infra* text accompanying notes 203-07.

which has emerged to date remains far from clear and that further refinements may arise in the future.

C. *The Law of Defamation Is Uncertain and Confusing*

The intricacies of pleading and proving defamation have rendered this area of law obscure to all but specialists in the field. Although a boon to those of us who teach and write in the area, this uncertainty does little to inspire those who believe that law exists to serve the public, not the legal profession. Law ought to be accessible;³⁸ the law of defamation is not. In short, defamation is an area of case-dominated law, much in need of codification.

The collective intake of breath immediately preceding any United States Supreme Court pronouncement affecting the law of defamation underscores both the law's uncertainty and the potential ramifications of the Court's decisions in this area. Zigzagging from *Gertz* to *Dun & Bradstreet*³⁹ to *Falwell*⁴⁰ to *Milkovich*,⁴¹ the Court has plotted an uncertain and unsteady path, owing more to the Court's shifting politics than to consistent legal analysis.⁴² By now, the trend is clear: there is no trend.

D. *The Law of Defamation Is Expensive.*

Uncertainty and complexity in the law typically lead to more appeals, fewer settlements, and the prolongation of litigation. Charting an unsteady

38. David Dudley Field, an early proponent of codification, said:

And last, but not least, of all the benefits of a code, is the diffusion among the people of a knowledge of the laws under which they live, and to which they must conform their conduct. Here, more than anywhere else in the world, is it needful that the people should know the law. They are supposed to make it. They, at least, are responsible for it. They, by their agents, administer it and execute it.

David D. Field, *Reasons for the Adoption of the Codes*, in I *SPEECHES, ARGUMENTS AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD* 361, 372 (A.P. Sprague ed., 1884) (address given before the Judiciary Committee of the two houses of the New York Legislature on February 19, 1873).

39. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974), the Court held, *inter alia*, that a plaintiff could not recover presumed or punitive damages without proving actual malice. Later, in *Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759-61 (1985), the Court limited *Gertz* to "matters of public concern," allowing recovery of punitive damages in other cases without actual malice.

40. In *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988), the Court denied a nationally known minister's claim for intentional infliction of emotional distress in the absence of a showing of actual malice.

41. In *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990), the Court refused to find a separate constitutional privilege for opinion beyond that already provided through existing privileges. It held that a libel claim arising from charges made in a signed sports column was actionable. *Id.* at 23.

42. Judging by Chief Justice Rehnquist's opinion in *Falwell* (which drew no dissent), the basic holding of *Sullivan* appears to be sacrosanct. See *Falwell*, 485 U.S. at 55-56.

course, the Supreme Court has provided wisps of hope to both sides of the defamation battle, thereby fueling additional litigation. These cases typically result in victories for plaintiffs at the trial level, but success for defendants on appeal.⁴³ Damages have, quite plainly, gotten out of hand. Multimillion dollar verdicts are the norm, yet the proportion of these verdicts ultimately collected, after expensive post-trial motions and appeals, is relatively low.⁴⁴

All this litigation costs money, especially for defendants, who pay by the hour for legal services. As a result, defendants effectively lose even when they ultimately prevail in litigation.⁴⁵ Plaintiffs, even those who obtain representation on a contingent fee basis, frequently lose in another, more personal way, as cases grind on interminably, with little hope of damages or vindication in sight.⁴⁶ A *Bleak House* mentality prevails.⁴⁷ The intensity of feeling on the part of plaintiffs who feel that they have been maligned as well as defendants indisposed to compromise their First Amendment rights further fan the flames of litigation. Fear and loathing abound.⁴⁸

43. The success of plaintiffs at trial and defendants on appeal is documented in the following: Marc A. Franklin, *Good Names and Bad Law: A Critique of Libel Law and a Proposal*, 18 U.S.F. L. REV. 1, 4 (1983); Marc A. Franklin, *Suing Media for Libel: A Litigation Study*, 1981 AM. B. FOUND. RES. J. 795, 804-07; LDRC Recap, *supra* note 10, at 3-4.

44. Media defendants have had high rates of success in overturning plaintiffs' verdicts; the majority of these unfavorable awards are either reversed, remanded or substantially reduced. LDRC Recap, *supra* note 10, at 11-14. The Libel Defense Resource Center reports that of the total damages initially awarded during the previous decade, only 7.2% were ultimately paid in the form of finally affirmed judgments. LDRC RELEASE, August 26, 1992, at 3-4.

45. A graphic illustration of this phenomenon is *Immuno A.G. v. Moor-Jankowski*, 567 N.E.2d 1270 (N.Y. 1991). In this case, the editor of a small scholarly journal incurred in excess of one million dollars in legal expenses while "successfully" defending a suit brought by a large corporation. Summary judgment was ultimately granted, but not until the case reached the New York Court of Appeals, seven years after the action was commenced. A more detailed description of this litigation can be found in ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* 211-14 (1991).

46. To rephrase a metaphor widely attributed General William P. Westmoreland, no stranger to defamation litigation himself, there is no light at the end of this tunnel.

47. Charles Dickens's classic novel, *Bleak House*, portrayed the interminable case of *Jarndyce and Jarndyce*, which ground on for generation after generation. CHARLES DICKENS, *BLEAK HOUSE* 456 (George Ford & Sylvere Monod eds., Norton 1977) (1853).

48. In this atmosphere, defamation has thus far proved to be infertile ground for alternative methods of dispute resolution. A potentially helpful and farsighted dispute resolution procedure has been established by the Iowa Libel Research Project (ILRP). In 1987, the ILRP implemented the Libel Dispute Resolution Program (LDRP), a voluntary program employing mediation and fact-finding in an effort to set the record straight and avoid the expense and rancor of conventional libel litigation. Thus far, the program appears to be underutilized. During a three year research phase, contacts with lawyers in 128 disputes produced only five agreements to use the program. One possible explanation of low utilization may be that most disputes were too far advanced for the parties to turn back and repair the damage; another is that attorneys (who, for the most part, appeared to control the litigation) were unaccustomed to resolving disputes through a procedure

E. The Law of Defamation Lends Itself to Perverse Results

Because of the foregoing problems, defamation litigation becomes not so much a battle over truth or falsity, but a high stakes crap game in which the costs of litigation transcend the harm caused by the initial defamatory publication. As the reporter to the Drafting Committee for the proposed Act suggested, defendants lose by winning, plaintiffs win by suing, and the most heavily litigated issues bear little relation to the interests of the parties.⁴⁹ This is so because the overlay of constitutional protections, the issue of *fault*—actual malice in cases involving public officials or figures, negligence in most cases involving others—dominates defamation litigation. Plaintiffs who fail to recover damages claim that they failed “due to a technicality,” i.e. the constitutional requirement of fault.⁵⁰ Having garnered publicity through the very act of suing, plaintiffs, regardless of the outcome, are able to call the defamatory statement into question, and thus *win by suing*.⁵¹ Defendants and their insurers, increasingly wary about litigation costs, have come to settle an increasing proportion of their cases, notwithstanding the heavy burden of proof imposed on defamation plaintiffs.⁵² Meanwhile, some plaintiffs who have been unfairly maligned are deprived of any remedy due to the difficulty of proving fault.⁵³ Issues of truth or falsity, fairness, and redress for injury are lost in the gamesmanship that dominates this tort like no other.⁵⁴

that made no provision for damages. Rosselle L. Wissler et al., *Resolving Libel Disputes out of Court: The Libel Dispute Resolution Program*, in REFORMING LIBEL LAW 286, 294, 300 (John Soloski and Randall P. Bezanson eds., 1992); see also *World Arbitration and Mediation Report*, Vol. 2 No. 12, at 324 (Dec. 1991) (describing limited success of program).

49. RANDALL P. BEZANSON ET AL., *LIBEL LAW AND THE PRESS* 3, 79-82, 112, 182 (1987); Randall P. Bezanson, *Libel Law and the Realities of Litigation: Setting the Record Straight*, 71 IOWA L. REV. 226, 226, 228, 232-33 (1985).

50. Of course, viewers of Hollywood police dramas will recognize that this is not the first time a constitutional requirement has been described as a mere “technicality.”

51. BEZANSON ET AL., *supra* note 49, at 92-94.

52. Many are driven to settle libel claims rather than undergo protracted and expensive litigation with the ultimate risk of having to pay large damages. See LEWIS, *supra* note 45, at 203 (1991).

53. Quite obviously, a plaintiff who has been defamed inaccurately, but who cannot recover in the absence of fault, bears the burden of an injury without a remedy. Such a plaintiff can be likened to the accident victim who fails to overcome the fault hurdle in a personal injury case. The difference is that in defamation, the means to eradicate much of the injury are frequently available to the defendant at little cost. See *infra* text accompanying notes 141-43, 218.

54. To Alexander Meiklejohn's 1964 observation that the *Sullivan* opinion was “an occasion for dancing in the streets,” commentator Anthony Lewis has added a more sobering contemporary view:

Both the press and public-spirited individual citizens found themselves battered by libel claims and litigation costs that punished their expression as the *Sullivan* case had seemed to promise it would not be punished. For plaintiffs, too—those who felt genuinely wounded by what they considered false criticism—the libel process was frustrating. The dancing had stopped.

If anything is clear about the law of defamation, it is that there is a need for clarification, streamlining, and simplification. The law also cries out for remedies more closely in tune with the legitimate interests of the parties: plaintiffs' interests in protecting their reputations and defendants' interests in protecting their First Amendment rights.⁵⁵ The divergence in the law of the several states, along with common constitutional requirements, suggests to some that uniform rules are desirable.⁵⁶ These needs appear to have informed the Drafting Committee as it went about its work. The extent to which its efforts have succeeded in addressing these concerns is the focus of the balance of this Article.

III. THE PROPOSED UNIFORM DEFAMATION ACT

The proposed Uniform Defamation Act was a relatively long document, at least compared to most tort legislation or even most proposed defamation legislation.⁵⁷ Both the proposed Act and its descendant, the Correction Act, are products of a scholarly drafting committee, learned in the law of defamation, which carefully considered every nuance and attempted to anticipate most every contingency.⁵⁸

The proposed Act included thirty-two sections, divided into five articles. Together, they formed a comprehensive codification of an updated law of defamation while avoiding certain types of invasion of privacy and trade libel. In light of the extensive effort and careful thought that went into

LEWIS, *supra* note 45, at 200, 218.

55. Anderson, *supra* note 11, at 489.

56. Professor Anderson recently suggested:

Libel is a field that cries out for some uniformity. Today intrastate speech is even rarer than intrastate commerce. Defamers are rarely subject to one state's law, and unless they are, they must tailor their speech to the least protective state law to which they may be subject.

Id. at 553.

57. Together with prefatory note and comments, the March, 1993 draft took up 43 typewritten pages. Compare this with Professor Marc Franklin's proposed "Plaintiff's Option Libel Reform Act," Franklin, *supra* note 3, at 812-813, and H.R. 2846, 99th Cong., 1st Sess. (1985), and a bill introduced in the United States Congress in 1985 by Representative Charles E. Schumer (D-N.Y.) (each consisting of five sections occupying two to three pages). Of course, we dare not compare proposed defamation legislation to such *magnum opi* as the Internal Revenue Code. Tort lawyers will readily concede that when it comes to prolixity, their brethren in the tax field are the champions. One of the infirmities of the tax law, however, is the need to retain well-paid legal counsel in order to take maximum advantage of its myriad provisions. The same infirmity should not afflict the law of defamation. The law should not be the exclusive province of those wealthy enough to retain permanent legal representation.

58. In addition to Deans Perlman and Bezanson (Chair and Reporter, respectively), the Drafting Committee members were Hon. Jack Davies (St. Paul, Minnesota), Lewis C. Green (St. Louis, Missouri), John F. Hayes (Hutchinson, Kansas), Kathryn L. Hove (Solon, Iowa), Elmer R. Oettinger (Chapel Hill, North Carolina), Matthew S. Rae, Jr. (Los Angeles, California), Hon. Frederick P. Stamp, Jr. (Wheeling, West Virginia), Dwight A. Hamilton (Denver, Colorado), William J. Pierce (Ann Arbor, Michigan), and Hon. David Peeples (San Antonio, Texas).

the proposed Act, it is only fair to examine its provisions and consider which are salvagable, which are not, and why the bulk of it was withdrawn from consideration.

A. Streamlining Features

The proposed Act included several streamlining features that would have simplified and clarified defamation law without compromising important values. I briefly discuss them here in the hope that they might be revived sometime in the future.

1. First, Some Housecleaning

Three sensible features appeared near the beginning of the proposed Act. First, section 2-101 of the Act, read together with the definitions provided in section 1-101, eliminated the archaic distinction between libel and slander, replacing them with a single action for defamation.⁵⁹ Second, no special provision was made for claims actionable *per se*, nor was any needed with the elimination of the libel/slander distinction. Instead, under the proposed Act, a person would have been subject to liability to another person for defamation if "the person caused the publication of a false and defamatory factual statement about the other person which harmed that person's reputation."⁶⁰ Actual harm to reputation would have been necessary; "special" harm would not have been.⁶¹

Finally, the proposed Act made no distinction between media and non-media defendants. The comments to section 2-101 indicated that any such distinction, real or imagined, was to be avoided. This, too, would have been welcome. Clearly, you and I should have the right to discuss on the street corner in the afternoon what *The New York Times* has published on its front page that morning.⁶² Thus, whether written or spoken, printed or

59. The comment to PROPOSED UNIF. DEFAMATION ACT, *supra* note 4, § 2-101 stated, in part, "[N]o 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."

60. *Id.* § 2-101.

61. Under the common law, slander is not actionable in the absence of "special" harm, that is, some kind of out-of-pocket loss on the part of the plaintiff. *KEETON ET AL.*, *supra* note 12, § 112, at 793. An exception arises if the case involves one of the four categories of "slander *per se*." In some jurisdictions, libel is not actionable without special harm unless the statement is libelous on its face. *See, e.g.,* *Rosenbloom v. Metromedia, Inc.*, 289 F. Supp. 737, 743 (E.D. Pa. 1968), *rev'd*, 415 F.2d 892 (3d Cir. 1969), *aff'd*, 403 U.S. 29 (1971); *Robinson v. Nationwide Ins. Co.*, 159 S.E.2d 896, 898-99 (N.C. 1968). Neither of these requirements appears to be constitutionally mandated; rather, they are artifacts of a medieval system that predated radio, television, the photocopier and the fax machine.

62. Throughout this Article, the term "freedom of speech" is used, rather than the more limiting term, "freedom of the press." I view the former inclusive of the latter for the reason suggested in the text accompanying this note.

broadcast, whispered between friends or shouted from the rooftops, all *methods* of speech would have been treated in the same manner.⁶³ These reforms are clearly long overdue.⁶⁴

2. Burdens of Persuasion: Greater Consistency

Early drafts of the proposed Act retained the odd assortment of burdens of persuasion created by the decisions in *Sullivan* and its progeny.⁶⁵ Under section 3 of the February 6, 1992 Draft, the plaintiff would have been required to prove publication, defamation, harm to reputation, and falsity by a preponderance of the evidence. Further, the plaintiff would have had to prove abuse of privilege, negligence, and knowledge of falsity or reckless disregard for truth by clear and convincing evidence. The March, 1993 Draft adopted a "clear and convincing" standard as to proof of "falsity, publication beyond the scope of privilege, negligence, knowing falsity or reckless disregard of the truth, intent to injure and ill will." It reverted to a preponderance standard "on all other questions of fact."⁶⁶

Clearly, no constitutional infirmity attaches to applying the more stringent "clear and convincing" standard to the issue of falsity. Indeed, it is difficult to conceive of a situation in which a jury could fail to find falsity by clear and convincing evidence, but could nevertheless find that a publisher was *at fault* with respect to falsity by clear and convincing evidence.⁶⁷ At the very least, an assortment of standards invites confusion on the part of the jury. While a reasonable argument could be made for a

63. The proposed Act also took the sensible step of treating information retrieval services as secondary publishers not ordinarily subject to liability, certainly a forward-looking and sensible step in an age dependent on quick conveyance and retrieval of information. PROPOSED UNIF. DEFAMATION ACT, *supra* note 4, § 2-110. These publishers are the computer age equivalent of the newsstand vendor or book store operator, and should be accorded the same protection.

64. The law of damages can account for the differences in harm produced by different methods of speech. A defamatory statement published by a national news magazine would likely result in far greater injury than a defamatory statement communicated orally between friends, and the jury's damage award should reflect this distinction without any need for special categories.

65. In *Sullivan*, the Court stated that "actual malice" must be shown with "convincing clarity." *Sullivan*, 376 U.S. at 285-86. In *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), the Court held that, consistent with *Sullivan*, issues of constitutional fact, such as actual malice, must be proved by clear and convincing evidence. *Id.* at 511. *Bose* also established a heightened standard of review of actual malice findings. *Id.* at 499. In *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1986), the Court established that, at least in cases involving media defendants and matters of public concern, the plaintiff had the burden of proving falsity by a preponderance of the evidence.

66. PROPOSED UNIF. DEFAMATION ACT, *supra* note 4, § 2-106. The proposed Act therefore established identical standards for proof of the constitutionally mandated actual malice and the "garden variety" malice additionally required (under § 2-103, Alternative B) for recovery of punitive damages.

67. Put another way, if it is not clear to the jury that the statement was false, how could the defendant be found at fault for believing it to be true?

preponderance standard as to truth,⁶⁸ the Drafting Committee made the better choice.⁶⁹

3. Privileges: All Together

The proposed Act took a rational approach with regard to privileges that exist under the common law. Sections 2-107 and 2-108 listed the absolute and conditional privileges applicable to defamation actions.⁷⁰ These comprehensive lists, incorporated only after debate as to whether privileges should be left to the common law,⁷¹ again represented a laudable streamlining effort.⁷² While case law will always play a role in fleshing out the details, there is no reason to keep the privileges tucked away in West's Regional Reporter system, lurking as traps for the unwary.

4. Punitive Damages: Going, Going, But Not Gone

Tort defendants generally, and defamation defendants particularly, lament the wide discretion reposed in juries with respect to the assessment of damages.⁷³ Punitive damages play a particularly invidious role in defama-

68. In *Hepps*, Justice O'Connor reasoned that when the issue of truth or falsity cannot be resolved conclusively, the Constitution requires that the scales be tipped in favor of protecting true speech, even at the risk of protecting false speech. *Hepps*, 475 U.S. at 776, 778. By focusing on the situation in which the evidence was in equipoise, Justice O'Connor could not help but furnish the minimal breathing room provided by the preponderance standard.

69. Professor Franklin's proposal likewise adopted a uniform "clear and convincing" standard. Franklin, *supra* note 3, at 812-13.

70. Section 2-109 dealt with the conditional privilege mandated by the Constitution for statements concerning public officials and public figures. This section is discussed *infra*, in text accompanying notes 80-82.

71. PROPOSED UNIF. DEFAMATION ACT, *supra* note 4, § 7-101 cmt. (Aug., 1991 Discussion Draft).

72. While any action under the proposed Act was foreclosed if an absolute privilege (such as a judicial or legislative privilege) was invoked, PROPOSED UNIF. DEFAMATION ACT, *supra* note 4, § 2-107, only actions for damages were precluded by conditional privileges. *Id.* § 2-108. This was consistent with the rationale supporting the Act's distinction between actions for damages and actions for vindication. See *infra* text accompanying notes 89-93.

Consider two examples of the proposed Act's common-sense approach to privileges: the spousal privilege and the fair report privilege. Under the act, communications between husband and wife were considered absolutely privileged. PROPOSED UNIF. DEFAMATION ACT, *supra* note 4, § 2-107(4). This sensible rule would have replaced the sexist common law fiction that such statements involved no publication. *Id.* § 2-107 cmt. The fair report privilege, which applies to accurate and fair reports of official actions or proceedings open to the public, was included among the absolute privileges, a sensible standardization. *Id.* § 2-107(2). Some courts have treated this as a qualified privilege. *Id.* § 2-108 cmt.

73. Justice O'Connor recently wrote:

Punitive damages are a powerful weapon. Imposed wisely and with restraint, they have the potential to advance legitimate state interests. Imposed indiscriminately, however, they have a devastating potential for harm. . . . Juries are permitted to target unpopular defendants, penalize unorthodox or controversial views, and redistribute wealth. Multimillion dollar losses are inflicted on a whim.

tion actions: they penalize defendants in the absence of a countervailing need for compensation on the part of plaintiffs; they raise the stakes of the game (and therefore the resources used to obtain or defend those stakes) to dizzying heights; most seriously, they give juries the opportunity to punish—and even eliminate⁷⁴—a publication that dares to buck popular sentiment or publish items that have an unsettling effect on a majority of readers.

The Drafting Committee initially attempted to eliminate the problem by prohibiting punitive damages.⁷⁵ Later, acting on instructions from the Commissioners, the Committee drafted an alternative provision that would have allowed punitives “only upon a showing by clear and convincing evidence that the publication was made with knowledge of its falsity, intent to injure the plaintiff, and ill will toward the plaintiff.”⁷⁶ Still, prior to withdrawal of the proposed Act, the Committee intended to advise strongly against the allowance of punitive damages.⁷⁷

Substitution of the Correction Act leaves punitive damages available in the absence of a correction or clarification.⁷⁸ While this works as an incentive for publishers to avail themselves of the Correction Act, it is an extortionate incentive.⁷⁹ The abolition of punitive damages should be a component of any comprehensive defamation reform measure.

B. Some Clutter Remained

Although the above measures would have helped streamline or modernize defamation law, some clutter remained under the proposed Act. Eliminating the possibility of damages predicated on strict liability,⁸⁰ it

Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032, 1056 (1991) (O'Connor, J., dissenting).

74. So venerable an institution as *The Saturday Evening Post* may have been crippled by a libel verdict. LEWIS, *supra* note 45, at 191 (commenting on *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967)).

75. PROPOSED UNIF. DEFAMATION ACT, *supra* note 4, § 5-102 (August, 1991 Discussion Draft). This provision was retained in PROPOSED UNIF. DEFAMATION ACT, *supra* note 4, § 2-103, Alternative A (March 23, 1993 Discussion Draft).

76. PROPOSED UNIF. DEFAMATION ACT, *supra* note 4, § 2-103, Alternative B.

77. *Id.* § 2-103 cmt.

78. Under § 5 of the Correction Act, a timely and sufficient correction or clarification limits the plaintiff's recovery to provable economic loss. See *infra* text accompanying note 141. In the absence of a correction or clarification, both general and punitive damages remain available.

79. As long as destructive punitive damages are possible, there will be too great a temptation for defendants to issue a “correction,” even where the defamatory statement is accurate. See *infra* text accompanying note 233.

80. PROPOSED UNIF. DEFAMATION ACT, *supra* note 4, § 2-101. Justice White's concurrence in *Dun & Bradstreet* suggested that the fault requirement had been dispensed with in cases involving statements which are not a matter of public concern, thereby reviving the prospect of strict liability for defamation. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 774 (1985) (White, J., concurring). This was, of course, the rule in widespread use prior to *Sullivan*.

nonetheless retained the distinction between public officials or figures and private individuals in connection with an action for damages. Under the proposed Act, a statement regarding a public official/figure enjoyed a "conditional privilege" that was lost if the statement was "unrelated to the person's status as a public official or public figure" or was "made with knowledge of its falsity or reckless disregard for its truth."⁸¹ Where a conditional privilege did not exist, i.e., in most defamation actions involving private individuals, a negligence standard applied.⁸²

The proposed Act's distinction between classes of plaintiffs may be constitutionally justified,⁸³ but it is not constitutionally mandated. Under *Gertz*, the states retained power to decide what level of protection was to be accorded speech about private individuals, so long as there was no liability for damages without fault.⁸⁴ If, as the comments to the proposed Act indicated, "all speech should be equally protected irrespective of context,"⁸⁵ then all plaintiffs and defendants should be subject to the same burdens.⁸⁶

The proposed Act would have eliminated that avenue of recovery, at least so far as a traditional action for damages is involved.

81. PROPOSED UNIF. DEFAMATION ACT, *supra* note 4, § 2-109; *see also id.* § 2-101(b)(1) (defining the action for defamation using the same standard for a conditional privilege).

82. *Id.* § 2-101(b)(2). The proposed Act eliminated the confusing distinction between the "actual malice" necessary to defeat the constitutional privilege of *Sullivan* and the garden variety, "heart of darkness" malice, sometimes used to defeat the common law privileges. *Id.* § 2-108(b), cmt.; *cf. Jacron Sales Co. v. Sindorf*, 350 A.2d 688, 698-700 (Md. 1976) (applying a reckless disregard standard to defeat a conditional privilege). As the comment to § 2-108 states, "[T]here is little policy justification for treating common law and constitutional privileges differently . . ."

83. Anthony Lewis has suggested that this distinction is grounded in the need to protect persons from liability for what may be viewed as seditious libel or a libel of government. *See Lewis, supra* note 45, at 140-99. This concern was evident in the special protection accorded statements regarding public officials in *Sullivan*.

84. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974). A few states have decided to apply an "actual malice" standard to all cases of public or general interest. *E.g., Walker v. Colorado Springs Sun, Inc.*, 538 P.2d 450, 457 (Colo. 1975), *overruled by Diversified Management, Inc. v. Denver Post, Inc.*, 653 P.2d 1103 (Colo. 1982) (requiring a showing of knowledge of serious doubt of truth under an actual malice standard); *AAFCO Heating & Air Conditioning Co. v. Northeast Publications Inc.*, 321 N.E.2d 580, 586 (Ind. App. 1974).

85. PROPOSED UNIF. DEFAMATION ACT, *supra* note 4, § 2-101 cmt.

86. This is especially the case if *all* plaintiffs are allowed to clear their names without any showing of fault, through either the proposed Act's vindication remedy or a tripartite special verdict. *See infra* text accompanying notes 88-90 and 105-15.

Justice Brennan has suggested that First Amendment principles are offended by a judicial determination of whether or not speech is a matter of public concern. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 777-78 (1985) (Brennan, J., dissenting). The same principles are similarly compromised when a public entity such as a court determines who is and who is not a public figure (and therefore worthy of more or less reputational protection).

Perhaps the best rationale for retaining a distinction between public officials/figures and other plaintiffs is the availability of self help to the former group. *See Gertz*, 418 U.S. at 338-39 (suggesting that public officials and figures usually enjoy significantly greater "access to channels of communication sufficient to rebut falsehoods" and therefore have a more realistic opportunity to counteract false statements). Actual malice is quite difficult to prove, and while both the pro-

Case law during the past twenty years has drifted away from the rationale that supported the distinction created in *Sullivan and Gertz*.⁸⁷ The distinction between classes of plaintiffs and the consequent patchwork quilt of legal rules have tormented the courts since 1964. Further streamlining of the law is in order.

C. *The Vindication Remedy*

By far the most controversial feature of the proposed Act was the "vindication remedy" provided for in Article III.⁸⁸ This remedy would have allowed plaintiffs to "obtain a written and published finding of fact on the question of falsity, but without the opportunity for any form of money damages."⁸⁹ Plaintiffs would have been allowed to obtain a declaratory judgment to clear their names simply by proving a false and defamatory factual statement *without* having to prove fault, as is constitutionally required in most defamation cases involving money damages.⁹⁰ On its face, the vindication remedy would have provided just what was needed by plaintiffs who had been defamed falsely but non-negligently: the opportunity to set the record straight and redeem their good names. At the same time, the vindication remedy likely would have protected from crushing damage awards those defendants who, in the absence of fault, had presumably proceeded in good faith.

posed Act and this Article have suggested a no-fault vindication remedy for all plaintiffs, the media are less likely to publicize a vindication award when a private plaintiff is involved. Given the relative ease, however, with which juries find negligence in defamation cases and the difficulty in distinguishing private figures from public ones in close cases, the undesirable consequences of this distinction far outweigh its value. See Franklin, *supra* note 3, at 823-24.

87. Why, for example, should the actual malice requirement apply to a supermarket tabloid's description of a show business personality's conduct in a restaurant, see *Burnett v. National Enquirer, Inc.*, 193 Cal. Rptr. 206, 215-16 (Cal. Ct. App. 1983), but not to a United States Senator's public ridicule of a government grant recipient? See *Hutchinson v. Proxmire*, 443 U.S. 111, 133-36 (1979).

88. The vindication remedy had its antecedents in proposals such as those of Professor Marc Franklin, the Annenberg Project, and Representative Charles Schumer (D-N.Y.). Professor Franklin proposed a declaratory judgment alternative to a defamation action that could be instigated at the plaintiff's option. Franklin, *supra* note 3 at 812-19. The Annenberg Project recommended a no-fault, no damages alternative that could be triggered at the option of either the plaintiff or the defendant in a libel action. Smolla & Gaertner, *supra* note 3 at 32-35. The Schumer bill, H.R. 2846, 99th Cong., 1st Sess. (1985), was similarly constructed. See Franklin, *supra* note 3 at 832-35.

Intense opposition to the proposed Act's vindication remedy surfaced almost immediately, and ultimately led to its withdrawal in favor of the less controversial Correction Act. Notwithstanding withdrawal of the proposed Act, the history of proposals for a no-fault, no damages vindication action suggests that such a remedy may remain grist for the analytical mill during the years ahead.

89. PROPOSED UNIF. DEFAMATION ACT, *supra* note 4, § 3-101 cmt.

90. Fault may not be required in cases involving statements that are not "matters of public concern." See *Dun & Bradstreet*, 472 U.S. at 773-74 (White, J., concurring).

Although there is little certainty in defamation law, a remedy providing for a declaratory judgment as to a false and defamatory statement without a showing of fault would likely have passed constitutional muster. The *Sullivan* and *Gertz* holdings require fault for the recovery of damages;⁹¹ the *Hepps* requirement that the plaintiff undertake the burden of proving falsity was retained by the vindication remedy. Professor David A. Anderson has recently suggested that "if the remedies are less burdensome on speech, the constitutional limitations can be less burdensome on plaintiffs."⁹² The *Gertz* and *Dun & Bradstreet* holdings appear to have embraced this view.⁹³

Still, some aspects of the proposed Act's vindication remedy may have been constitutionally suspect. For example, the vindication provisions provided that, if the plaintiff prevailed, the defendant was required (at the defendant's option) to either publish the court's findings as to falsity or pay the plaintiff an amount sufficient to secure their publication.⁹⁴ Such a provision, while perhaps fair and sensible, may have run afoul of the First Amendment, because it would have required either a mandatory publication or damages without proof of fault.⁹⁵ In addition, the proposed Act allowed recovery of attorney's fees by plaintiffs who had successfully pursued the vindication remedy, when "the defendant had no reasonable basis to refuse a timely correction or clarification."⁹⁶ Although this provision would appear to pass federal constitutional muster in cases involving private plain-

91. *New York Times Co. v. Sullivan*, 376 U.S. 254, 283-84 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974).

92. Anderson, *supra* note 11, at 537.

93. *Gertz* allows non-public figure plaintiffs to recover actual, but not presumed or punitive damages, in the absence of actual malice. *Gertz*, 418 U.S. at 348-49. *Dun & Bradstreet* allows the recovery of presumed and punitive damages without actual malice where the speech does not involve matters of public concern, and First Amendment considerations are therefore presumed to be of less importance. *Dun & Bradstreet*, 472 U.S. at 759-61.

94. PROPOSED UNIF. DEFAMATION ACT, *supra* note 4, § 3-103(a).

95. In *Miami Herald v. Tornillo*, 418 U.S. 241, 255-56, 258 (1974), a Florida right of reply statute was struck down by the Supreme Court on grounds that the First Amendment would be violated if the government were to tell the press what it must print. Although the proposed Act would have allowed a defendant to avoid an order to publish the court's findings by payment of an amount sufficient to secure publication elsewhere, such payment might have been considered damages in violation of the fault requirements of *Sullivan* and *Gertz*. Whether or not the relatively small amount necessary to secure publication of the court's findings would have passed muster under Professor Anderson's theory of relative burdens is open to conjecture. The proposed Act might therefore have been seen as giving defendants a choice between the Scylla of one unconstitutional burden and the Charybdis of another.

No constitutional infirmity would attach to a voluntary agreement between plaintiff and defendant to limit a fact-finding process to the issue of truth and for the defendant to thereafter publish the findings of fact. I suggested an out-of-court remedy of this type in an earlier article. Ackerman, *supra* note 11, at 20-23. The Iowa Libel Research Project has pioneered a voluntary program constructed along similar lines, with limited acceptance. See *supra* note 48.

96. PROPOSED UNIF. DEFAMATION ACT, *supra* note 4, § 3-104(1).

tiffs,⁹⁷ it would have invited precisely the type of evidence, and along with it the extensive discovery, that the vindication remedy was designed to avoid. With respect to public official/figure plaintiffs, an award of attorney's fees on a negligence basis might have violated the actual malice requirements of *Sullivan* and *Gertz*.⁹⁸ Generally speaking, fee-shifting is a rare occurrence in American tort law, and it is especially difficult to justify an award of attorney's fees against a party for tortious speech, particularly where it is unaccompanied by a showing of actual malice on the part of the alleged tortfeasor.⁹⁹ Fee-shifting on a no-fault basis is therefore suspect, if not constitutionally, then in the context of general principles of tort law.¹⁰⁰

Plaintiffs as well as defendants may have been shortchanged by the vindication remedy. The proposed Act might have relegated plaintiffs to a Hobson's choice of either (a) a vindication remedy offering little in the way of damages, or (b) an action for damages in which there would be no vindication absent proof of fault.¹⁰¹ Because this choice would have necessarily been made before the plaintiff had an opportunity to obtain discovery as to

97. This is because it required a negligence determination as a precondition to a fee award, and was thereby consistent with the fault requirement of *Gertz*.

98. See *supra* note 19. To suggest that attorney's fees and expenses are not truly "damages" under *Sullivan* and *Gertz*, when such fees can reach hundreds of thousands of dollars, elevates semantics over reality. Indeed, in most cases the amount awarded for attorney's fees would likely exceed any amount awarded to secure publication of the court's findings under § 3-103(a) of the proposed Act.

99. The fault requirements of *Sullivan* and *Gertz* may be viewed as having simply aligned the law of defamation with that of the law of torts generally. Ironically, just as the fault concept was being introduced to defamation law through constitutional mandate, state courts were becoming more willing to apply strict liability concepts to other areas of tort law, such as products liability and misrepresentation. See, e.g., *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897, 901 (Cal. 1963); RESTATEMENT (SECOND) OF TORTS §§ 402A and 402B (1965). Subsequent case law has demonstrated that "strict" products liability may not be quite as strict as had been imagined. See, e.g., *Prentis v. Yale Mfg. Co.*, 365 N.W.2d 176, 184 (Mich. 1985) (reverting to a negligence standard in design defect cases); Sheila L. Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 VAND. L. REV. 593, 618-36 (1980) (reviewing the use of risk-utility analysis in strict liability cases). The greater willingness of the courts to apply strict liability to misrepresentation, see RESTATEMENT (SECOND) OF TORTS § 552C (1965), may raise additional First Amendment concerns, as misrepresentation, like defamation, also involves speech. Perhaps the commercial nature of most such speech lowers the level of protection. But see *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 511-14 (1984) (applying *Sullivan* considerations to defamatory language in a commercial context).

100. Notwithstanding the urgings of some groups (most notably former Vice President Quayle's Competitiveness Council) to encourage the shifting of fees to unsuccessful tort litigants, I remain concerned about the chilling effect such a move would have on good faith litigants on both sides. More supportable is the shifting of fees upon a showing of bad faith, as measured by an objective standard, like "actual malice" on the part of a defendant. See *infra* notes 242-43 and accompanying text.

101. Of course, this choice would not be particularly painful for the plaintiff who cared only for vindication, and who would not have sought damages even if they were legally available. It is unclear whether many such plaintiffs exist, at least once the warpaint of litigation has been ap-

fault, and thereby make an informed assessment of the likelihood of prevailing in an action for damages, the problem would have been exacerbated.¹⁰²

The vindication remedy encountered harsh criticism from media representatives, largely because they viewed it as a new outlet for plaintiffs previously blocked by the fault requirements set forth in prior case law.¹⁰³ Of greater concern to this observer, however, was that the proposed Act provided no disincentive for plaintiffs who had been *truthfully* defamed, but nevertheless hoped to "win by suing," a pattern of conduct suggested by at least one major study.¹⁰⁴ These plaintiffs, unable to prove falsity (but perhaps hoping to strike it lucky with a large damage award), would have avoided the vindication remedy and continued to pursue the traditional action for money damages. As in pre-Act cases, they would have attributed lack of success in such an action to failing on a "technicality," that is, the inability to prove fault. Due to the absence of attorney's fees for successful defendants, no penalties would have attached to the plaintiff's inability to prove falsity; indeed, in the absence of a special verdict, there would have been no explicit finding on the falsity issue. Thus, under the proposed Act, "bad" plaintiffs (who were truthfully defamed) would have had no incentive to behave any differently than they do currently, while "good" plaintiffs (who were falsely defamed) may have had insufficient incentive to elect the vindication remedy.

plied. See *supra* note 48 (discussing the lukewarm response to a voluntary program offering only a vindication remedy).

102. Some plaintiffs might have chosen the vindication action, concerned that they would lose out entirely had they been unable to prove fault. Unfortunately, the proposed Act required plaintiffs to make this election at the time of the filing of the complaint, before any opportunity for discovery. See PROPOSED UNIF. DEFAMATION ACT, *supra* note 4, § 3-101.

While the plaintiff is most likely to have the best knowledge of the truth or falsity of a defamatory statement—after all, who knows better than the plaintiff whether she has indeed done what she has reportedly done?—the defendant is most likely to know whether fault exists. Only through discovery can the plaintiff ascertain the defendant's knowledge at the time of publication, and therefore establish fault. This was the basis for the Supreme Court's holding in *Herbert v. Lando*, 441 U.S. 153, 160-69 (1979), which allowed a public figure plaintiff to engage in extensive newsroom discovery despite a media defendant's claim of privilege.

Of course, the goal of judicial economy would have been served by the vindication action. Because fault was irrelevant in the vindication action, discovery as to negligence or, in the case of public officials/figures, actual malice would probably have been precluded. Time would have been saved and the intrusive newsroom discovery allowed under *Herbert* would have been eliminated. The problem is that if plaintiffs had been forced to make a premature choice, they would have been likely to elect the remedy providing the greater recovery. The vindication remedy would have simply been avoided by competently represented plaintiffs.

103. See, e.g., Boisfeuillet Jones, Jr., Comments of *The Washington Post* on the Proposed Uniform Defamation Act at 2-3 (Oct. 1, 1992); Testimony of Sam D. Kennedy on behalf of the National Newspaper Association and the Tennessee Press Association at 3 (Drafting Committee hearing, Washington, D.C., Oct. 9, 1992).

104. See *supra* note 48 for information on the Iowa study.

D. *A Better Way: The Tripartite Verdict*

The idea of giving plaintiffs an opportunity to vindicate themselves without proving the fault required under the Constitution to obtain damages remains an appealing one.¹⁰⁵ However, courts can accord this opportunity simply by employing, in connection with the traditional action for damages, the tripartite special verdict pioneered by former United States District Judge Abraham Sofaer in *Sharon v. Time, Inc.*¹⁰⁶ This case involved *Time's* assertion that then-Israeli Defense Minister Ariel Sharon had encouraged a Phalangist massacre of Palestinian refugees.¹⁰⁷ At the conclusion of the trial, the jury was first asked whether *Time* had defamed Sharon. Having concluded "yes,"¹⁰⁸ the jury was then instructed to determine whether *Time's* statements about Sharon were false. After another affirmative finding,¹⁰⁹ the jury was asked to determine whether *Time* had made the statements with known falsity or reckless disregard for truth or falsity—"actual malice."¹¹⁰ On this question, the jury reached a negative conclusion.¹¹¹ Both plaintiff and defendant emerged from the courtroom proclaiming victory: Sharon because his reputation had been vindicated; *Time* because it had been neither found at fault nor required to pay money damages.¹¹²

The tripartite special verdict employed by Judge Sofaer strikes a reasonable, constitutionally sound balance between the plaintiff's interest in his reputation and the defendant's First Amendment rights.¹¹³ Furthermore,

105. The plaintiff's need to clear her name is not diminished by the fact that the defendant made the defamatory publication in good faith.

106. 609 F. Supp. 1291 (S.D.N.Y. 1984).

107. *Id.* at 1292.

108. Arnold H. Lubasch, *Jury Decides Time Defamed Sharon in Massacre Article*, N.Y. TIMES, Jan. 17, 1985, at B7.

109. Arnold H. Lubasch, *Jurors Back Sharon on 2d Key Point in Libel Trial*, N.Y. TIMES, Jan. 19, 1985, at A1.

110. It was undisputed that Sharon was a public official/figure subject to the *Sullivan* standard. *Sharon*, 609 F. Supp. at 1295.

111. Arnold H. Lubasch, *Time Cleared of Libeling Sharon But Jurors Criticize Its Reporting*, N.Y. TIMES, Jan. 25, 1985, at A1.

112. Honesty requires me to add a coda to this otherwise heartwarming account of judicial ingenuity. Some time after the trial, *Time's* counsel expressed dismay at the fact that each segment of the jury's tripartite verdict had been reported in the press (e.g., *supra* notes 108-11), an interesting view for a person defending the right to publish unflattering accounts of the activities of others. Sharon, for his part, pursued another action for libel against *Time* in Israel, where American constitutional requirements of actual malice do not apply. Sharon ultimately withdrew the action in return for a public apology and a substantial contribution toward his legal costs. Ian Murray, *Time Will Apologize to Sharon*, THE TIMES (London), Jan. 23, 1986, at 12. Still, the fact that another nation's laws provided additional opportunities for Mr. Sharon does not mean that justice was not served by American law as applied in Judge Sofaer's courtroom.

113. The tripartite verdict should pass constitutional muster for the same reasons as the proposed Act's vindication remedy: *Sullivan* and *Gertz* speak only of First Amendment limitations

it channels the jury into legally correct determinations guided by the facts and law, rather than passion or sympathy.¹¹⁴ The tripartite verdict might thereby restrain juries from making legally incorrect awards, particularly if they are aware that the plaintiff may receive vindication in the form of declaratory relief. In addition, an explicit jury determination as to each element discourages plaintiffs who have been *accurately* defamed from abusing the process.¹¹⁵

Although a trial judge could order a tripartite verdict in the absence of an express statutory mandate, the greatest advantage to this procedure would be obtained through its incorporation into statute or rule of court. A plaintiff who has been truthfully defamed, and who nevertheless hopes to "win by suing," is dissuaded from doing so only if she knows *in advance* that the tripartite verdict will be employed. A plaintiff who proceeds in good faith, on the other hand, should be able to proceed with an action for damages before she knows whether or not fault can be demonstrated. The

on actions for damages; the need to protect First Amendment rights declines as the penalties exacted are reduced. See *supra* text accompanying notes 91-93. Former Justice White has suggested use of the tripartite verdict; to date, the rest of the Court has been unresponsive. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 768 n.2 (1985) (White, J., concurring). Interestingly, Justice White's successor, prior to her elevation to the Supreme Court, also had occasion to praise Judge Sofaer's ingenuity. See *Tavoulareas v. Piro*, 817 F.2d 762, 809 (D.C. Cir. 1987) (Ginsburg, J., concurring).

However, at least one commentator has seen constitutional problems in allowing a plaintiff who has not proved actual malice to obtain a modicum of relief through the special verdict. See Syndi L. Norris, Comment, *Winning the War Against Self-Censorship: Eliminating Special Verdicts in Defamation Actions*, 90 DICK. L. REV. 683, 694-704 (1986).

114. The same can be said of special verdicts in tort actions generally. Greater use of the special verdict might obviate the need for more radical means of jury control, such as directed verdicts, remittitur and statutory damage caps.

115. It is possible that the defamation action brought by General William P. Westmoreland against CBS, tried in the same courthouse as the *Sharon* case, was settled in mid-trial and with no exchange of money because General Westmoreland feared that the tripartite special verdict would be employed in his trial, but with a different outcome, i.e., that the jury would find for the defendant on the issue of falsity. In other words, the prospect of the tripartite verdict may have caused Westmoreland to realize that he could *not* win by suing, and that any damage caused by CBS's libel (regarding allegedly inaccurate North Vietnamese troop counts provided by Westmoreland to President Johnson during the Vietnam War) might be compounded by a jury verdict. Subsequent writings by U.S. District Judge Pierre N. Leval, who presided over the Westmoreland trial, tend to buttress the suspicion that Judge Leval would have borrowed a page from Judge Sofaer's book. See Pierre N. Leval, *The No-Money, No-Fault Libel Suit: Keeping Sullivan in Its Proper Place*, 101 HARV. L. REV. 1287, 1291-98 (1988).

In fairness to General Westmoreland, Anthony Lewis has written:

The "truth" as to the number of North Vietnamese troops infiltrating into the South before the Tet offensive in 1968 was not a provable truth. The case turned on whether certain local guerilla forces should be included in the estimated numbers of soldiers that U.S. and South Vietnamese forces were facing. This depended on what kind of war it was, which was subject to much political debate and not capable of a settled answer in law.

LEWIS, *supra* note 45, at 216.

failure to *prove* fault should deprive her of damages and will often entitle the defendant to partial summary judgment; it should not deprive the plaintiff of vindication. Vindication should depend solely on the facts, not on the election of the cleverest legal strategem. Thus, the tripartite verdict fulfills the same goals as the proposed Act's vindication remedy but in a more straightforward, comprehensive way. Future proposals providing for vindication through the courts should therefore incorporate the tripartite verdict rather than a separate vindication remedy.

IV. TURNING LEMONS INTO LEMONADE: THE UNIFORM CORRECTION OR CLARIFICATION OF DEFAMATION ACT

Facing substantial opposition to the proposed Act, the Drafting Committee, in late spring of 1993, mercifully withdrew most of the proposed Defamation Act and substituted the Uniform Correction or Clarification of Defamation Act ("Correction Act"). The Correction Act is drawn largely from Article IV of the proposed Act. Recognizing that a massive revision of the substantive law of libel and slander was beyond reach, the Committee produced an act designed to change the manner in which parties would go about trying and, more significantly, settling defamation cases. The resulting Correction Act "seeks to remedy . . . flaws in current law by providing strong incentives for the parties in a defamation suit promptly to correct or clarify the alleged defamation as an alternative to costly litigation."¹¹⁶ The Act was adopted by the National Conference of Commissioners on Uniform State Laws at its annual meeting on August 5, 1993.¹¹⁷

A. Substantive Provisions

1. Definitions

The Correction Act is shorter and less ambitious than the proposed Act from which it sprung. For example, the definitions section, section 1, defines just three terms: "defamatory,"¹¹⁸ "person,"¹¹⁹ and "economic loss." Because timely and sufficient corrections under the Act limit the plaintiff's remedy to economic loss, the meaning of the last term is of great impor-

116. UNIF. CORR. OR CLARIF. ACT, *supra* note 7, Prefatory Note.

117. A motion at the annual meeting of the Commissioners to adopt the proposed Defamation Act was "soundly defeated." *News Notes*, 21 MEDIA L. REP. (BNA), Aug. 24, 1993 (quoting Henry Kaufman, General Counsel, Libel Defense Resource Center).

The American Bar Association will consider the Correction Act at its February, 1994 mid-winter meeting. State legislative consideration of the Act is likely to follow thereafter.

118. "'Defamatory' means tending to harm reputation." UNIF. CORR. OR CLARIF. ACT, *supra* note 7, § 1(1).

119. "'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." *Id.* § 1(3).

tance. Section 1(3) defines economic loss as "special, pecuniary loss caused by the publication."¹²⁰

2. Scope

Section 2 of the Correction Act, the scope section, indicates that the Act "applies to any [claim for relief], however characterized, for damages arising out of harm to personal reputation caused by the false content of a publication that is published on or after the effective date" of the Correction Act.¹²¹ Rather than merging libel and slander into a single action for defamation, as it had done under the Defamation Act, the Drafting Committee was content to promulgate a scope provision broad enough to encompass both of the traditional actions.¹²² Sections 11 through 14 of the Act are boilerplate provisions involving "Uniformity of Application and Construction,"¹²³ the "Short" Title,¹²⁴ "Severability,"¹²⁵ and the "Effective Date."¹²⁶

3. Request for Correction or Clarification

The heart of the Correction Act is found in sections 3 through 10.¹²⁷ Section 3 provides in part, "A person may maintain an action for defama-

120. *Id.* § 1(3). It is clear from the context of the Act that economic loss does not include attorney's fees and other expenses of litigation. Section 8 of the Correction Act (which deals with offers to correct or clarify when a timely correction or clarification is no longer possible) lists "reasonable expenses of litigation, including attorney's fees" as an item of recovery separate from economic loss, thereby distinguishing the two. *Id.* § 8.

121. *Id.* § 2(a). The Correction Act "applies to all publications, including writings, broadcasts, oral communications, electronic transmissions, or other forms of transmitting information." *Id.* § 2(b). This is an act for the information age.

122. Interestingly, § 3 of the Correction Act speaks in terms of an "action for defamation." *Id.* § 3(a). By moving the scope provision to the front of the Act (it had previously been buried in § 10) and placing it between the definition of "defamatory" in § 1 and the term "action for defamation" in § 3, the drafters appear to have indicated that such an action embraces all claims within the scope provision. An explicit definition of an "action for defamation" might have closed the circle, but the Drafting Committee was reluctant to tangle with the underlying law. Once burned, twice shy.

The Act is intended to embrace all actions for reputational injury, however styled. *See id.* § 2 cmt. It therefore covers actions for invasion of privacy and infliction of emotional distress insofar (but *only* insofar) as they involve reputational harm. *Id.* §§ 1-2 cmts. While "corporate" defamation claims are covered (because a corporation is a "person" under the Act, *see supra* note 119), claims such as product disparagement, unfair competition, false advertising and the like are not covered under the Act, as they "do not rest on harm to a person's reputation or other parasitic emotional harm." *See UNIF. CORR. OR CLARIF. ACT, supra* note 7, § 1 cmt. This may prove to be too fine a line to maintain.

123. UNIF. CORR. OR CLARIF. ACT, *supra* note 7, § 11.

124. *Id.* § 12.

125. *Id.* § 13.

126. *Id.* § 14.

127. These were §§ 2 through 9 before the Style Committee moved the scope section to the beginning of the Act.

tion only if: (1) the person has made a timely and adequate request for correction or clarification from the defendant; or (2) the defendant has otherwise made a correction or clarification."¹²⁸ Service of a summons and complaint for defamation containing the requisite information constitutes an adequate request for correction or clarification.¹²⁹ Thus, a request for retraction is not, in the technical sense, a condition precedent to an action, as in some existing retraction statutes.¹³⁰ The Act thereby "attempts to avoid technical requirements that can often serve as traps for unwary plaintiffs."¹³¹

"A request for correction or clarification is timely [under the Act] if it is made within the period of limitation for defamation actions."¹³² However, if the plaintiff fails to make a good faith attempt to request correction or clarification within ninety days after knowledge of the publication, damages are limited to provable economic loss.¹³³ Thus, as a practical matter, a plaintiff must request correction or clarification within the ninety day window or lose out on a substantial portion of her potential damages (i.e., general damages for pain, suffering, embarrassment, humiliation, and loss of reputation).¹³⁴

Under section 3(c) of the Act, a request for correction or clarification is adequate if it:

- (1) is made in writing and reasonably identifies the person making the request;
- (2) specifies with particularity the statement alleged to be false and defamatory and, to the extent known, the time and place of publication;
- (3) states the alleged defamatory meaning of the statement;

128. UNIF. CORR. OR CLARIF. ACT, *supra* note 7, § 3(a). Throughout the Act, the term "correction or clarification" is used, rather than the more familiar term "retraction." The new terms are probably more descriptive and perhaps carry less stigma for defendants than "retraction." One has visions of the city editor proclaiming, "We refuse to retract, but we're happy to correct or clarify." No harm in saving face, so long as the record is set straight. Call that a win/win solution.

129. *Id.* § 3(d).

130. See *Current Retraction Practice—An LDRC Survey*, LDRC BULLETIN (Libel Defense Resource Center, New York, N.Y.), 1992-93, Issue No. 3 at 2-3 [hereinafter *Current Retraction Practice*] (indicating that several states require that the plaintiff demand a retraction before suit is brought). This publication provides the results of a comprehensive fifty-state survey on current retraction statutes and practice.

131. UNIF. CORR. OR CLARIF. ACT, *supra* note 7, § 3 cmt.

132. *Id.* § 3(b).

133. *Id.*

134. The limitations period for commencement of a defamation action is tolled while the plaintiff waits for a response to a request for clarification. *Id.* § 3(e).

(4) specifies the circumstances giving rise to any defamatory meaning of the statement which arises from other than the express language of the publication; and

(5) states that the alleged defamatory meaning of the statement is false.¹³⁵

Thus, while some litigation over the adequacy of requests is inevitable, the Correction Act spells out its requirements sufficiently to avoid vague, shotgun requests that fail to pinpoint what is at issue.¹³⁶

Of course, a publisher may not always have enough information to immediately accede to a request for correction or clarification.¹³⁷ Section 4 of the Act therefore provides that a publisher may ask that a person requesting a correction or clarification disclose "reasonably available information material to the falsity of the allegedly defamatory statement."¹³⁸ Unreasonable failure to provide this information limits the plaintiff to recovery of provable economic loss.¹³⁹

4. Effect of Correction or Clarification

Of critical importance is section 5 of the Act. This provision states, "If a timely and sufficient correction or clarification is made, a person may recover only provable economic loss, as mitigated by the correction or clarification."¹⁴⁰ A publisher may therefore significantly limit its exposure to damages by making an adequate correction or clarification. Given the potential for huge awards of general and punitive damages, many publishers are likely to take advantage of this provision. With the publisher having done so, the defamed party is likely to abandon any claim for libel or slander because she will have obtained a measure of vindication through the correction or clarification, and in most instances, an action limited to provable economic loss will not be worth the cost.¹⁴¹

At a minimum, the incentives and disincentives built into this section will reduce the stakes involved in many defamation actions; at best, these

135. *Id.* § 3(c).

136. The comments to § 3 indicate that the "good faith attempt" necessary to preserve a claim for economic loss does not require the requesting party to satisfy all of the specific requirements of § 3(c) within the 90 day period. "It is sufficient that an attempt to obtain a correction or clarification was made and that the publisher was given sufficient notice of that fact." *Id.* § 3 cmt.

137. As the comments indicate, "the person challenging a publication's truth will often be in possession of the information upon which its falsity can be judged." *Id.* § 4 cmt. As suggested earlier, it is often the plaintiff who is in the best position to demonstrate whether the defamatory statement is true or false. *See supra* note 102.

138. UNIF. CORR. OR CLARIF. ACT, *supra* note 7, § 4(a).

139. *Id.* § 4(b).

140. *Id.* § 5.

141. In some instances, a modest financial settlement that helps defray the plaintiff's litigation expenses or provides compensation for economic loss may encourage her to abandon the claim.

measures should promote early resolution of such disputes. Much grief and embarrassment to the defamed party may be avoided at little expense or trouble to the publisher through the simple measure of a correction or clarification, which can prevent a molehill of misunderstanding from turning into a mountain of litigation.¹⁴² While the avenue of retraction was always open to publishers,¹⁴³ the significant reduction in damages now resulting therefrom should cause publishers to give that course of action more serious consideration.

5. Timeliness and Sufficiency

Our next inquiry involves what constitutes a "timely and sufficient correction or clarification" so as to limit damages in accordance with section 5. That issue is addressed in section 6 of the Correction Act, which provides that "[a] correction or clarification is timely if it is published before, or within 45 days after, receipt of a request for correction or clarification."¹⁴⁴ A correction or clarification is sufficient if it:

(1) is published with a prominence and in a manner and medium reasonably likely to reach substantially the same audience as the publication complained of;

(2) refers to the statement being corrected or clarified and:

(i) corrects the statement;

(ii) in the case of defamatory meaning arising from other than the express language of the publication, disclaims an intent to communicate that meaning or to assert its truth; or

(iii) in the case of a statement attributed to another person, identifies the person and disclaims an intent to assert the truth of the statement; and

142. The Correction Act's incentives for settlement bring to mind an October, 1981 report in *The Washington Post's* "Ear" column. That report discussed a "rumor" that former President Jimmy Carter had bugged President-Elect and Mrs. Reagan while they were residing in Blair House prior to the inauguration. *The Ear*, WASH. POST, October 5, 1981, at D1, col. 1. After some posturing, the *Post* published a retraction and apology that extolled the former President's record in matters pertaining to the right of privacy and stated, in part, "We now believe the story . . . to have been wrong." Paul Taylor, *Post Apologizes to Carter for Gossip Column Item*, WASH. POST, Oct. 23, 1981 at A1, col. 5. As a consequence, Carter decided not to sue the *Post* for libel. The dispute was resolved in eighteen days. Widespread enactment of the Correction Act may encourage early resolution of more disputes in this manner.

143. Most existing retraction statutes eliminate punitive damages in the event of a retraction, but retain general damages. See *Current Retraction Practice*, *supra* note 130, at 7. The threat of crippling awards therefore remains. See *infra* note 221 and accompanying text.

144. UNIF. CORR. OR CLARIF. ACT, *supra* note 7, § 6(a). Where a request for disclosure of evidence of falsity is made under § 4, a correction or clarification is timely if published within 25 days after receipt of a response or 45 days after receipt of the request for correction or clarification, whichever is later. *Id.* § 4(c).

(3) is communicated to the person who has made a request for correction or clarification.¹⁴⁵

Section 6 further explains that "[a] correction or clarification is published in a medium reasonably likely to reach substantially the same audience as the publication complained of if it is published in a later issue, edition, or broadcast of the original publication."¹⁴⁶ The section also specifies alternatives that may be employed when a subsequent issue, edition or broadcast will not be published within the necessary time limits.¹⁴⁷ Although litigation over these matters is inevitable, the Drafting Committee took pains to spell out what qualifies as a correction or clarification sufficient to invoke the Correction Act's damage limitations. The language is broad enough to encompass not only publications by mass media but also private, less formal publications in the form of letters, telephone conversations and the like.¹⁴⁸

Treatment of defamatory statements attributable to others under section 6(b)(2)(iii) is worthy of special comment. This provision in effect establishes a privilege of neutral reportage,¹⁴⁹ to be asserted in the form of a clarification. A simpler course of action would have been to establish a neutral reportage privilege to be asserted as a defense, without need for a "non-retraction retraction" in the form of a clarification.¹⁵⁰ Such a privilege would allow a publisher to repeat another person's defamatory statement without liability, so long as there was proper attribution.¹⁵¹ Many readers

145. *Id.* § 6(b).

146. *Id.* § 6(c). The comments indicate that the principal thrust of the "sufficiency" requirement is that the correction or clarification reach "substantially the same audience" as the challenged publication. This may require, at least in some instances, greater prominence than the regularly published corrections column of a daily newspaper, depending upon the prominence of the original defamatory story. *Id.* § 6(c) cmt.

147. *Id.* § 6(d).

148. The comments to this section suggest a few examples of such publications. Among them is the defamatory employee reference or evaluation. In this situation, correction "may require no more than contacting those persons or firms to whom the defamatory statement was communicated." *Id.* § 6 cmt. However, if the statement has made its way to broader audiences, further steps should be taken, including efforts to have the offending material removed from files. *Id.*

Another example is the oral defamation to friends or colleagues (describe in the comments as "a classic slander"). Here, "a letter to those persons correcting or clarifying the defamation might suffice, on the assumption that word of the correction or clarification would spread as rapidly in the channels of gossip as did the original defamation." *Id.*

149. Courts have found that a privilege of neutral reportage allows for accurate reports of newsworthy statements of others. *See, e.g.,* *Edwards v. National Audubon Soc'y, Inc.*, 556 F.2d 113, 120 (2d Cir. 1977).

150. The term "non-retraction retraction" is reminiscent of the "non-denial denials" issued during the Watergate scandal and described by *Washington Post* reporters Carl Bernstein and Bob Woodward. *See* CARL BERNSTEIN & BOB WOODWARD, *ALL THE PRESIDENT'S MEN* 92, 104, 144 (1974).

151. The requirement of proper attribution prevents a publisher from hiding behind a phantom source. It also provides the defamed party with a form of discovery by smoking out the source,

will ignore the attribution, however, such that a defamed party should therefore have the benefit of a subsequent clarification. As Dean Bezanson has written, "Harm can accrue from even the most carefully worded neutral report, as reasonable readers do attach significance to an attributed remark simply by virtue of the fact that the publisher has deemed it worthy of publication."¹⁵²

6. Procedural Consequences

Section 7 of the Act describes the procedural consequences of a correction or clarification, providing, in pertinent part:

If a defendant . . . intends to rely on a timely and sufficient correction or clarification, the defendant's intention to do so, and the correction or clarification relied upon, must be set forth in a notice served on the plaintiff within 60 days after service of the [summons and complaint] or 10 days after the correction or clarification is made, whichever is later. A correction or clarification is deemed to be timely and sufficient unless the plaintiff challenges its timeliness or sufficiency within [20 days] after the motion is served.¹⁵³

Thus, the plaintiff bears the burden of challenging the adequacy of a correction or clarification; absent such challenge, the plaintiff is limited to provable economic loss. If a challenge is mounted, the timeliness and sufficiency of correction or clarification are determined by the court well before trial.¹⁵⁴ Plaintiffs' counsel should read the Act carefully; a cavalier approach to litigation may severely disadvantage many plaintiffs and their contingent fee-dependent counsel.

who remains a potential defamation defendant unable to invoke the protection of the Correction Act unless she, too, publishes a timely and sufficient retraction. See UNIF. CORR. OR CLARIF. ACT, *supra* note 7, § 9.

As the comment points out, nothing in the Act requires disclosure of confidential sources. Rather,

If there is a confidential source, the media defendant would have three alternative courses of action: (1) limit its liability by issuing a correction under this section and identifying its source, (2) issue a correction under subsection (b)(2)(i) or (ii) without identifying the source but fully vindicating the plaintiff's reputation, or (3) defend the defamation action.

Id. § 6 cmt.

152. Letter from Randall P. Bezanson, Dean and Professor of Law, Washington and Lee University School of Law to author (January 5, 1993) (on file with author).

153. UNIF. CORR. OR CLARIF. ACT, *supra* note 7, § 7(a). The bracketed material allows for minor variations consistent with local practice. See *id.* § 7 cmt.

A defendant's challenge to the adequacy or timeliness of a *request* for correction or clarification must be set forth no later than 60 days after service of the summons and complaint. *Id.* § 7 cmt.(b). Plaintiffs might question the asymmetry.

154. *Id.* § 7 cmt. This section prevents plaintiffs from proceeding to trial on the false hope that a challenge will succeed at the last minute and unlock the defendant's coffers.

7. Evidentiary Issues

Should the parties proceed to trial, the Act renders inadmissible (a) the fact or contents of a request for correction or clarification, or its acceptance or refusal, (b) the fact or contents of a correction or clarification, except in mitigation of damages, and (c) the fact or contents of an offer of correction or clarification, or its refusal.¹⁵⁵ These limitations on admissibility may, at first glance, appear puzzling. Why should an act that seeks to reduce the complexity and expense of defamation actions not allow a correction or clarification to serve as an admission as to the falsity of the original defamatory statement, thereby reducing the issues for trial? Why allow the parties to litigate the falsity of a statement that has already been corrected by its publisher?

I believe that the answers to these questions lie in the Committee's determination to structure the Act to promote the making of corrections and clarifications. With corrections and clarifications inadmissible except to mitigate damages, publishers contemplating a correction or clarification need not worry that such a course of action will redound to their disadvantage at trial. The provisions of section 10 thus play a role analogous to Rules 407¹⁵⁶ and 408¹⁵⁷ of the Federal Rules of Evidence. While the evidentiary provisions may, in a few cases, produce inconsistent results, they are more likely to encourage early termination of litigation.

8. Offer to Correct or Clarify

The remaining substantive provision of the Correction Act is section 8. This provision contemplates a situation under which a *timely* correction or clarification is no longer possible, but the publisher nevertheless wishes to make a correction or clarification. Such a scenario may arise when, after discovery, the publisher determines that a correction or clarification is warranted. To invoke the protections of section 8, the publisher must make a written offer to (i) publish a sufficient correction or clarification and (ii) pay the defamed person's reasonable expenses of litigation, including attorney's fees, incurred before publication of the correction or clarification.¹⁵⁸ Written acceptance of an offer of this type bars or, if an action has been com-

155. *Id.* § 10. The section also provides, "If the fact that a correction or clarification was made or the contents of the correction or clarification are received in evidence, the fact of the request may also be received." *Id.* § 10(b).

Offers of correction or clarification are discussed *infra* in text accompanying notes 158-62.

156. Under FED. R. EVID. 407, evidence of subsequent remedial measures is inadmissible to prove negligence or other culpable conduct.

157. Under FED. R. EVID. 408, evidence of compromise or offers of compromise is inadmissible to prove liability for the claim for which compromise is offered.

158. UNIF. CORR. OR CLARIF. ACT, *supra* note 7, § 8(a).

menced, terminates an action for defamation against the publisher.¹⁵⁹ A person refusing to accept a correction or clarification offered under section 8 may recover only provable economic loss and reasonable expenses of litigation, including attorney's fees incurred before the offer.¹⁶⁰

As in the provisions for timely correction or clarification, section 8 of the Act encourages damage control. Because the action has moved forward or, at minimum, the defamatory statement has had an opportunity to fester, a proper offer to correct or clarify must at this stage include an offer to pay litigation expenses. Likewise, the plaintiff who proceeds in the face of a proffered correction or clarification is entitled to an award of litigation expenses in addition to damages for economic loss.¹⁶¹ Should the expectations of the Drafting Committee be fulfilled, the plaintiff in this situation will likely settle for a correction or clarification and payment of litigation expenses, thereby preventing or terminating the litigation.¹⁶²

The Correction Act thus provides not just one, but two opportunities for the defendant to limit damages by means of a correction or clarification: through timely correction or clarification as provided by sections 5 and 6, or through a subsequent offer to correct or clarify as allowed by section 8. As a mediator who has often seen prospects for settlement ripen over time, I believe that section 8 of the Act represents a wise piece of drafting. It is consistent with the main goal of the Correction Act: to provide the parties ample incentive and opportunity to settle without protracted litigation.

B. Constitutional Considerations

The Correction Act should pose few problems under the United States Constitution. Unlike the provisions regarding attorney's fees under the proposed Defamation Act, the provision for court-ordered attorney's fees under section 8(c)(2) of the Correction Act is not constitutionally problematic.¹⁶³

159. *Id.* § 8(b). If an action has been commenced, dismissal is not proper until the defendant has complied with the terms of the offer. *Id.*

160. *Id.* § 8(c). Expenses of litigation are unavailable to a plaintiff who has failed to make a good faith effort to request a correction or clarification pursuant to § 3(b) or failed to disclose information pursuant to § 4 of the Act. *Id.*

161. Again there is provision for a judicial determination of the sufficiency of the retraction. *Id.* § 8(d). The same subsection provides for a judicial determination as to the amount of reasonable expenses of litigation, including attorney's fees. *Id.*

162. It may appear unfair to allow a defendant who has failed to make a timely correction or clarification to terminate litigation by offering a belated correction or clarification, together with litigation expenses. A defendant who had corrected or clarified on a *timely* basis could eliminate damages for all but economic loss, but could not terminate the litigation. The saving grace is that the belated correction or clarification requires acceptance by the plaintiff; absent such acceptance the action may continue, with the plaintiff recovering litigation expenses as well as economic loss. On balance, this seems fair to all parties.

163. *See supra* text accompanying notes 96-100.

The proposed Defamation Act required only the plaintiff's unilateral election of the vindication remedy to trigger an award of attorney's fees. The Correction Act requires action by the defendant, such as an untimely offer to correct or clarify, and a response by the plaintiff, such as rejection of the offer, before attorney's fees can be awarded.¹⁶⁴

Because the defendant can, under the Correction Act, unilaterally foreclose the plaintiff's recovery of certain categories of damages, constitutional challenges to the Act are most likely to be mounted by plaintiffs. "Open courts" provisions of state constitutions, which guarantee citizens access to the courts to pursue actions recognized at common law, are the most likely bases for constitutional challenge.¹⁶⁵ Retraction statutes enacted by individual states have generally passed constitutional muster when their effect has been merely to eliminate punitive damages in libel or slander actions.¹⁶⁶ The courts recognize that plaintiffs have no vested right to punitive damages and that the awarding of punitive damages is, therefore, a matter of legislative discretion.¹⁶⁷

In several cases, however, retraction statutes, or portions thereof, have been declared unconstitutional where the effect of a retraction or the failure to demand one was to limit recoverable damages to pecuniary loss.¹⁶⁸ Typical of these cases is *Madison v. Yunker*.¹⁶⁹ In *Madison*, the Montana Supreme Court construed a retraction statute in light of a state constitutional "open courts" provision which provided, in pertinent part, that "[c]ourts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character."¹⁷⁰ The court determined that the denial of general damages to a plaintiff who had failed to demand a retraction pursuant to Montana's retraction statute¹⁷¹ deprived the plaintiff of a

164. Recovery of attorney's fees, as well as damages for provable economic loss under §§ 5 and 8(c), are subject to the constitutional limitations set forth in cases such as *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1985), *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). This constitutional doctrine, together with the underlying common law, remain premises upon which the Act is based. Unlike the proposed Defamation Act, the Correction Act aims not to modify constitutional doctrine but to provide incentives for settlement. Circumstances remain very much under the parties' control, or perhaps more accurately, the defendant's control.

165. For an example of an "open courts" provision, see *infra* text accompanying note 170.

166. *E.g.*, *Comer v. Age-Herald Publishing Co.*, 44 So. 673, 674-75 (Ala. 1907); *Bank of Oregon v. Independent News, Inc.*, 693 P.2d 35, 39-40 (Or. 1985).

167. See, *e.g.*, *Ross v. Gore*, 48 So. 2d 412, 414 (Fla. 1950) (en banc); *Kelly v. Hall*, 12 S.E.2d 881, 883 (Ga. 1941); *Osborn v. Leach*, 47 S.E. 811, 813 (N.C. 1904).

168. These cases are of obvious relevance to our consideration of the Correction Act, which limits damages in a similar manner.

169. 589 P.2d 126 (Mont. 1978).

170. MONT. CONST. art. II, § 7.

171. MONT. CODE ANN. § 64-207.1 (1947).

remedy guaranteed under the state constitution. Significantly, the court found that the "right" of a libeled individual to obtain a retraction under the statute was not in itself a remedy.¹⁷²

In a similar case, *Boswell v. Phoenix Newspapers, Inc.*,¹⁷³ the defendant newspaper published a timely retraction of a story erroneously reporting that the plaintiffs, two security guards, had pled guilty to burglary charges.¹⁷⁴ In accordance with Arizona's retraction statute,¹⁷⁵ the trial judge's jury instructions precluded an award of general damages for loss of reputation and emotional distress.¹⁷⁶ The jury returned a verdict favoring the defense.¹⁷⁷ On appeal, the Arizona Supreme Court found that the retraction statute violated Article 18, Section 6 of the Arizona Constitution, which provides, "The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation."¹⁷⁸ The court read the constitutional provision broadly enough to extend to actions for strict liability as well as negligence, and to extend to actions for defamation as well as for bodily injury.¹⁷⁹ In addition, the court found that the statute did not merely regulate recovery for defamation, but abrogated it in violation of the state constitution.¹⁸⁰ The court stated:

[T]he retraction statutes go beyond regulating the mode, method, and procedure to be followed in pursuing the cause of action. In addition, the retraction statutes do not merely regulate the type and amount of damage that can be recovered. Instead, they completely deprive many who have sustained real injury of judicial remedy. For many who have been wronged, the effect of the statutes is to substitute retraction—a form of correction, withdrawal, and sometimes of apology—for a judicial remedy. A retraction is insufficient. . . . The legislature is without power to eliminate a judicial remedy. Of course, nothing prevents the legislature from requiring that retraction be considered in mitigation of damages, a principle already recognized at common law.¹⁸¹

172. *Madison*, 589 P.2d at 131.

173. 730 P.2d 186 (Ariz. 1986) (en banc), cert. denied, 481 U.S. 1029 (1987).

174. *Id.* at 187.

175. ARIZ. REV. STAT. ANN. §§ 12-653.02 to 12-653.03 (1992).

176. *Boswell*, 730 P.2d at 187.

177. *Id.* at 188.

178. *Id.* at 188, 196. For a detailed legislative history of this constitutional provision, see, e.g., Roger C. Henderson, *Tort Reform, Separation of Powers, and The Arizona Constitutional Convention of 1910*, 35 ARIZ. L. REV. 535 *passim* (1993).

179. *Boswell*, 730 P.2d at 194.

180. *Id.* at 196.

181. *Id.*

Thus, using strong language, Arizona's highest court ruled in a manner consistent with earlier decisions in North Carolina,¹⁸² Kansas,¹⁸³ and North Dakota.¹⁸⁴ While some of these cases may be regarded as antiquated, at least one such case has been cited with approval in a more recent case in which another statutory tort reform was declared unconstitutional.¹⁸⁵

Rétraction statutes are not without their constitutional defenders, however. In California, a state without an "open courts" provision, a retraction statute protecting only media defendants has been upheld against equal protection and due process challenges.¹⁸⁶ More importantly, retraction statutes limiting recovery to special damages have been upheld in the face of "open court" challenges in Oregon¹⁸⁷ and Minnesota.¹⁸⁸ The discussion of the Oregon Supreme Court in one such case is instructive. Writing for the court, Justice Holman stated,

The language of the constitution¹⁸⁹ does not specify that the remedy need be the same as was available at common law at the time of the adoption of the constitution; and the statute, while restricting the remedy, does not abolish the cause of action. . . .

In addition, the legislature has made available a retraction as a substitute for the remedy which the law would otherwise have provided. . . . As a practical matter, retraction can come nearer to

182. *Osborn v. Leach*, 47 S.E. 811, 812 (N.C. 1904). The North Carolina Supreme Court construed a retraction statute limiting recovery to "actual damages" as allowing recovery of both special and general damages, but not punitive damages, so as to survive constitutional challenge. *Id.* at 813; *accord*, *Pentuff v. Park*, 138 S.E. 616, 619 (N.C. 1927) (recognizing the *Osborn* decision as establishing the constitutionality of the retraction statute).

183. *Hanson v. Krehbiel*, 75 P. 1041, 1042-44 (Kan. 1904) (striking down statute limiting recovery to "actual" damages in the event of retraction).

184. *Meyerle v. Pioneer Publishing Co.*, 178 N.W. 792, 794 (N.D. 1920). In *Meyerle*, the North Dakota Supreme Court construed a statute similar to that struck down in *Hanson* so as to allow recovery of only those damages "sufficient to compensate . . . for the injury remaining unsatisfied after the publication of the retraction." *Id.* at 795-96. This eliminated exemplary damages, but allowed general and special damages to the extent unmitigated by the retraction. The statute's constitutionality was thereby preserved as in *Osborn*.

185. *Kansas Malpractice Victims Coalition v. Bell*, 757 P.2d 251, 260-61 (Kan. 1988) (citing *Hanson* as authority for striking down damage cap in medical malpractice actions).

186. *Werner v. Southern Cal. Associated Newspapers*, 216 P.2d 825, 828-35 (Cal. 1950) (en banc), *appeal dismissed*, 340 U.S. 910 (1951).

187. *Davidson v. Rogers*, 574 P.2d 624 (Or. 1978); *Holden v. Pioneer Broadcasting Co.*, 365 P.2d 845 (Or. 1961), *cert. denied and appeal dismissed*, 370 U.S. 157 (1962).

188. *Allen v. Pioneer Press Co.*, 41 N.W. 936, 938-39 (Minn. 1889). *Allen* was cited as recently as 1990 to uphold a Minnesota statute placing a cap on damages for loss of consortium. *Schweich v. Ziegler, Inc.*, 463 N.W.2d 722, 734 (Minn. 1990).

189. Article I, § 10 of the Oregon Constitution provides that "every man shall have remedy by due course of law for injury done him in his person, property, or reputation." OR. CONST. art. I, § 10.

restoring an injured reputation than can money, although neither can completely restore it.¹⁹⁰

Justice Linde, concurring, took a slightly different approach to retraction:

A step taken by a putative defendant which the law does not compel but leaves entirely to his own balance between his sense of innocence or stubbornness on the one hand and his sense of obligation or calculation of risk on the other is not a "remedy by due course of law." If an optional retraction plays a role at all in the validity of limiting the measure of damages for defamation, it would have to be that the retraction is deemed to reduce the "injury," not that it is a substitute legal remedy.¹⁹¹

While the distinction made by Justice Linde is minute, I believe that his view is the better one. A retraction or, under the language of the Correction Act, a correction or clarification, provided by a publisher does not provide a substitute remedy, at least in the legal sense of the word, so much as it reduces the injury giving rise to the cause of action and consequent need for damages. A statute limiting damages or, more precisely, eliminating those damages least susceptible to objective calculation, represents a reasonable effort to tailor the remedy to the wrong inflicted. Such a statute should be upheld in the face of "open courts" provisions, particularly in light of the equally strong constitutional protections regarding speech.¹⁹² The recent tendency of the courts to uphold various types of tort reform despite open courts provisions in state constitutions provides further support for this view.¹⁹³

190. *Davidson*, 574 P.2d at 625.

191. *Id.* at 626. Justice Linde also noted that the statute did not withdraw the common law action for defamation. *Id.* Perhaps more importantly, he felt it unnecessary to pursue the question of "how far the legislature must retain money damages as a constitutionally required remedy for noneconomic injuries," in light of the constitutional protection provided for speech. *Id.* To Justice Linde, that made defamation a "special case." *Id.*

192. *See infra* text accompanying notes 202-21.

193. Cases upholding statutory damage caps in medical malpractice actions are illustrative. *See, e.g.*, *University of Miami v. Echarte*, 618 So. 2d 189, 190 (Fla.) (upholding statute offering plaintiff choice between arbitration or cap on noneconomic damages in medical malpractice claims), *cert. denied*, 114 S. Ct. 304 (1993); *Butler v. Flint Goodrich Hosp. of Dillard Univ.*, 607 So. 2d 517, 521 (La.) (upholding cap on general damages in medical malpractice victim's suit against multiple defendants), *cert. denied*, 113 S. Ct. 2338 (1993); *Murphy v. Edmonds*, 601 A.2d 102 (Md. 1992) (upholding cap on noneconomic damages in personal injury actions); *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898, 900 (Mo.) (en banc) (upholding cap on damages in medical malpractice action), *cert. denied*, 113 S. Ct. 511 (1992). *But see* *Smith v. Department of Ins.*, 507 So. 2d 1080, 1095 (Fla. 1987) (rejecting statutory cap on noneconomic damages in absence of substitute remedy); *Lucas v. United States*, 757 S.W.2d 687, 690-92 (Tex. 1988) (rejecting statutory damage limitations as violative of the Texas Constitution's "open courts" provision).

Open courts provisions should be construed as due process protections guaranteeing all persons access to the courts to pursue recognized causes of action; they should not forever freeze the common law in its place, with all rights and remedies intact as they existed at the time of the adoption of the state constitution. To suggest, as the Arizona court did,¹⁹⁴ that the legislature is incapable of altering causes of action and remedies that exist at common law is "judicial chauvinism"¹⁹⁵ of the worst kind. Automobile guest statutes,¹⁹⁶ workers compensation acts,¹⁹⁷ anti-heart balm statutes,¹⁹⁸ no-fault liability schemes¹⁹⁹ and a host of other statutory tort reforms would all come tumbling down in the face of this philosophy.

Notwithstanding my own views, open court provisions in state constitutions pose a potential barrier to judicial acceptance of the Correction Act.²⁰⁰ For this and other reasons,²⁰¹ the Correction Act, despite its charms, cannot be regarded as the ultimate remedy for all that ails defamation law. It behooves us to consider other measures. Before doing so, how-

194. See *Boswell v. Phoenix Newspapers, Inc.*, 730 P.2d 186, 190-96 (1986).

195. Credit California's Justice Clark for the term "judicial chauvinism." See *Li v. Yellow Cab Co. of California*, 532 P.2d 1226, 1247 (Cal. 1975) (Clark, J., dissenting).

I acknowledge that Arizona's constitutional language to the effect that "the amount recovered shall not be subject to any statutory limitation," ARIZ. CONST. art. 18, § 6, presents an almost insurmountable barrier to an interpretation friendly to the Correction Act.

196. Guest statutes (limiting causes of action on the part of non-paying passengers in automobiles) have been upheld against constitutional challenge in several instances. See, e.g., *Beasley v. Bozeman*, 315 So. 2d 570, 571 (Ala. 1975); *Richardson v. Hansen*, 527 P.2d 536 (Colo. 1974) (en banc); *Sidle v. Majors*, 341 N.E.2d 763, 775 (Ind. 1976). But see *Johnson v. Hassett*, 217 N.W.2d 771, 780 (N.D. 1974) (finding guest statute unconstitutional on several grounds).

197. Workers compensation statutes, eliminating tort actions against employers in favor of no-fault administrative remedies, have been widely upheld. See, e.g., *Curtiss v. GSX Corp. of Colo.*, 774 P.2d 873, 874 (Colo. 1989) (en banc); *Rajala v. Doresky*, 661 P.2d 1251, 1253 (Kan. 1983); *Heavner v. Town of Lincolnton*, 162 S.E. 909, 910 (N.C.), *appeal dismissed*, 287 U.S. 672 (1932). In some instances, constitutional amendments have been required in order to sustain workers' compensation acts. See, e.g., ARIZ. CONST. art. XVIII, § 8 (amended 1925); OHIO CONST. art. II, § 35 (amended 1912); PA. CONST. art. III, § 18 (amended 1915).

198. These statutes, eliminating causes of action for alienation of affections and criminal conversation, have been universally upheld. See, e.g., *Koestler v. Pollard*, 471 N.W.2d 7, 12 (Wis. 1991) (upholding statute eliminating action for criminal conversation); see also *O'Neil v. Schuckardt*, 733 P.2d 693, 698 (Idaho 1986) (judicially abolishing action for alienation of affection).

199. Automobile no-fault statutes have been widely, if not universally, upheld. See, e.g., *Manzanares v. Bell*, 522 P.2d 1291, 1314 (Kan. 1974); *Shavers v. Kelley*, 267 N.W.2d 72, 77 (Mich. 1978), *cert. denied*, 442 U.S. 934 (1979); *Montgomery v. Daniels*, 340 N.E.2d 444, 446 (N.Y. 1975). But see *Lasky v. State Farm Ins. Co.*, 296 So. 2d 9, 21 (Fla. 1974) (invalidating portions of no-fault statute on constitutional grounds).

200. A 1964 law review note reported "open court" or "certain remedy" provisions in the constitutions of 37 states. Note, *Constitutional Guarantees of a Certain Remedy*, 49 IOWA L. REV. 1202, 1202 (1964).

201. For other reasons why the Correction Act may not be a panacea, see *infra* notes 237-39 and accompanying text.

ever, we should develop criteria for the reform of defamation law and evaluate the Correction Act in accordance with those criteria.

V. REFORMING DEFAMATION LAW: SOME CRITERIA AND A PROPOSAL

A. *Criteria*

I suggest we focus on three criteria, two primary and one secondary, as guiding principles for defamation law reform.

1. Protection of Speech

The first of these criteria is that the law of defamation should provide sufficient protection of speech to foster the free, lively debate and comment necessary in a democracy. At the very least, this means that the law of defamation must comply with the requirements of the First Amendment to the United States Constitution.²⁰² The Supreme Court has imposed thus far the following constitutional requirements in defamation cases: (1) Neither a public official nor a public figure may recover damages for a statement regarding his or her official or public conduct without proving, with clear and convincing clarity, that the statement was made with known falsity or with reckless disregard for truth or falsity (actual malice).²⁰³ (2) No damages may be recovered by a plaintiff in a defamation action without proof of fault,²⁰⁴ and presumed or punitive damages may not be recovered in the absence of actual malice,²⁰⁵ unless the defamatory statement is not a matter of public concern.²⁰⁶ (3) In an action against a media defendant involving a statement that is a matter of public concern, the plaintiff has the burden of proving, by a preponderance of the evidence, that the statement was false.²⁰⁷

This list is surprisingly short in light of the complexity of the law of defamation. Most cases not included in the citations to this list have been of relatively little impact, consisting largely of early pronouncements subsequently overturned,²⁰⁸ procedural refinements,²⁰⁹ limitations on the applica-

202. "Congress shall make no law . . . abridging the freedom of speech, or of the press" U.S. CONST. amend. I.

203. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974); *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

204. *Gertz*, 418 U.S. at 347.

205. *Id.* at 349.

206. *Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. 749, 760 (1985).

207. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776-79 (1986).

208. *E.g.*, *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 43 (1971) (extending the *Sullivan* "knowing-or-reckless-falsity standard" to alleged defamatory falsehoods uttered about a private

tion of our short list of principles,²¹⁰ or refusals to expand these principles or adopt additional constitutional constraints.²¹¹ The brevity of the list does not imply that the Supreme Court should not find or impose²¹² additional constitutional limitations on defamation actions.²¹³ More to the point, in crafting legislation aimed in part at the protection of speech, we need not limit ourselves to the constraints imposed to date by the Supreme Court, based on the relatively small number of situations upon which it has ruled. By limiting protection of speech to those rules already fashioned by the Supreme Court, we forego the greatest advantage of legislation over court-made law: the ability to anticipate future controversies, rather than just react to existing ones, and to fashion a comprehensive body of law that takes a wide variety of situations into account.²¹⁴ This is even more important where, as here, the Supreme Court lacks the power to construct a complete body of law. Because libel and slander remain state law actions, the Supreme Court can only limit the reach of these actions in light of First Amendment concerns; it cannot piece together a comprehensive system from the ground up.

How, then, does the existing body of First Amendment case law fail to provide needed protection for arguably defamatory speech? Media and other interested bodies associated with the defense of defamation cases tell us that it is the financial impact of defamation actions that has the most harmful effect on speech, and that the chilling effect of potential defamation

"individual's involvement in an event of public or general interest"), *overruled by* 424 U.S. 448 (1976).

209. *E.g.*, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986) (holding that "a court ruling on a motion for summary judgment must be guided by the *New York Times* 'clear and convincing' evidentiary standard in determining whether a genuine issue of actual malice exists"); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 498-511 (1984) (holding that when reviewing a determination of actual malice, judges must independently examine the entire record and determine whether actual malice has been established with convincing clarity, rather than apply the clearly erroneous standard of Fed. R. Crv. P. 52(a)).

210. *E.g.*, *Hutchinson v. Proxmire*, 443 U.S. 111, 132, 135-36 (1979) (refusing to recognize a federal research grantee as a public figure and refusing to extend congressional immunity under the Speech or Debate Clause to encompass "defamatory statements scattered far and wide by mail, press, and the electronic media"); *Time, Inc. v. Firestone*, 424 U.S. 448, 454-55 (1976) (refusing to recognize a socialite as a "public figure" for purposes of applying the *Sullivan* standard and also refusing to extend the *Sullivan* privilege to all reports of judicial proceedings).

211. *E.g.*, *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990) (refusing to recognize a separate constitutional privilege for opinion).

212. The choice of words here depends on one's philosophy of jurisprudence; as one who leans toward legal realism, I'm inclined to use the word "impose."

213. For example, by applying the burden of proof, as set forth in *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 774 (1986), to cases involving non-media defendants, or by eliminating punitive damages altogether.

214. By anticipating future constitutional rulings (e.g., the extension of the *Hepps* rule to non-media defendants), statutory reform can eliminate the appreciable financial burden imposed by constitutional litigation.

liability will not disappear without meaningful reform with respect to damages.²¹⁵ According to the Libel Defense Resource Center (LDRC), there is "no apparent limit to the endemic excesses of mega-jury awards that have already had a grave impact on all aspects of media libel litigation."²¹⁶ A recent LDRC report indicates that the average jury award against media defendants has skyrocketed from less than \$1.5 million from 1980 to 1989 to more than \$9 million during 1990 and 1991.²¹⁷ Granted, these figures might be skewed by a single verdict for \$58 million during the latter period,²¹⁸ but even the median award jumped from \$200,000 for 1980-89 to \$1.5 million for 1990-91.²¹⁹ This phenomenon is a product of both punitive and compensatory damages. As the LDRC report claims,

It is clear from the LDRC data that juries know how to punish the media even when their damages are labeled as "compensatory." This aspect of the problem flows from the ill-defined nature of the non-economic damages that are most often awarded in libel cases for damage to "reputation" and for "emotional distress." Such elements are to the media in libel litigation what "pain and suffering" awards are to doctors and medical providers in malpractice actions. They are the excuse for juries to shift wealth based on sympathy for the alleged travails of assertedly injured plaintiffs. And in the field of libel such sympathy is not even for arguably measurable physical pain, but rather for alleged social or psychic harm—impact all the more difficult if not impossible objectively to measure.²²⁰

Hyperbole aside, one thing is clear from the data: The magnitude of damages awarded in present-day libel actions has a detrimental impact on speech sufficient to produce a chilling effect even on those publishers who have yet to bear the brunt of a substantial jury verdict.²²¹ Meaningful defa-

215. The intense media opposition to the proposed Act's vindication remedy tends to undermine this view. This remedy would have involved relatively little financial exposure for defamation defendants.

216. Henry R. Kaufman, Libel Defense Resource Center General Counsel, Statement accompanying *LDRC Recap*, *supra* note 10, in LDRC RELEASE, Aug. 26, 1992, at 4.

217. *LDRC Recap*, *supra* note 10, at 4.

218. Fifty-eight million dollars was awarded in *Fezell v. A.H. Belo Corp.*, No. 86-22271 (Tex. Dist. Ct. 1991). The case was settled after a motion for judgment notwithstanding the verdict was denied but prior to appeal. *LDRC Recap*, *supra* note 10, at B1.

219. *LDRC Recap*, *supra* note 10, at 4.

220. *Id.* at 15. I have written elsewhere about the unfair and disruptive effect of general damages in medical malpractice cases. See Robert M. Ackerman, *Medical Malpractice: A Time for More Talk and Less Rhetoric*, 37 MERCER L. REV. 725, 736-37 (1986). For a more general critique of general damages, see JEFFREY O'CONNELL, *ENDING INSULT TO INJURY* 48-55 (1975).

221. Despite data indicating a relatively high degree of success for defendants on appeal, see *supra* note 44, litigants remain burdened by the substantial attorney's fees necessitated by appeal. Testimony of Sam D. Kennedy, *supra* note 103, at 8-9; see also *supra* note 45 (describing the *Immuno* case, which reported an excess of one million dollars in legal expenses). The largest

mation law reform is therefore unlikely to occur in the absence of significant reform in the area of damage awards.

2. Protection of Reputation

My second criterion for defamation law reform is so plain as to be tautological: the law of defamation should provide a meaningful remedy for injury to reputation. Granted, one could argue for complete elimination of libel and slander as causes of action in light of First Amendment considerations and the availability of self-help, at least for public figures, through the marketplace of ideas.²²² Realistically, however, some kind of legal remedy for reputational harm seems imperative.²²³ Reflecting this view, the Supreme Court has stated:

The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood. We would not lightly require the State to abandon this purpose, for . . . the individual's right to the protection of his own good name "reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendment. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system."²²⁴

One might distinguish between the First Amendment's negative covenant against government interference with speech and what would appear to be an affirmative obligation undertaken by the state to protect its citizens' reputations against injury by other citizens.²²⁵ We may honestly debate whether we can realistically expect government to fulfill such affirmative obligations. Perhaps it is more realistic and invites less unwanted government intrusion simply to ask that government abide by its negative covenants.²²⁶ Nevertheless, some kind of remedy for reputational harm, like

verdict reported by the LDRC, totalling \$58 million, produced a post-verdict settlement, as the defendant compromised rather than risking all on appeal. *LDRC Recap*, *supra* note 10, at B1.

222. Today, that probably means an appearance on *Larry King Live* or *Oprah*.

223. This view is reinforced by the construction of "open courts" provisions of state constitutions so as to guarantee the right to bring an action for defamation. *See supra* text accompanying notes 168-85.

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

225. This obligation may be reinforced by "open courts" provisions in many state constitutions. *E.g.*, ALA. CONST. art. I, § 13; ARK. CONST. art. II, § 13; CONN. CONST. art. I, § 10; DEL. CONST. art. I, § 9 (1992 Supp.); PA. CONST. art. I, § 11.

226. We might distinguish between negative covenants that impose on government an obligation not to interfere with the rights of its citizens (as can be found throughout the Bill of Rights)

some kind of remedy for personal injuries of the physical sort, will exist for the foreseeable future.

Our acknowledgement of the need for a remedy for injury to reputation does not imply that the traditional remedies for defamation—money damages for pecuniary loss and general damage to reputation, as well as punitive damages—are the most appropriate ones. In the typical personal injury action, plaintiff's counsel laments to the jury that, in an ideal world, we would restore the plaintiff to the same physical condition she enjoyed prior to the defendant's tortious conduct, i.e., restore the plaintiff's life or good health. The laws of science, unfortunately, often prevent us from doing so. Hence, the only remedy available takes the form of money damages. The laws of science do not prevent us, however, from taking action to restore a defamed plaintiff's reputation. Here, a remedy superior to damages may in fact be available in the form of concrete steps to restore the plaintiff's good name. If, as Shakespeare had Iago state, he "[w]ho steals my purse steals trash,"²²⁷ then money damages are a poor substitute for a remedy more purposefully tailored to restore the plaintiff's reputation to good health, or, at least as close to good health as possible in a world of supermarket tabloids, late-night television, and political dirty tricks.

3. Efficiency

My third proposed criterion is that any reform measure must be efficient; that is, it must fulfill the first two criteria at as little cost—in terms of time, money, effort, and emotional strain on the parties—as possible. This criterion is subordinate but complementary to the first two, in that neither expense, nor delay, nor disturbance of peace of mind is conducive to the protection of speech or the protection of reputation. To effect a genuine remedy for reputational injury without imposing an undue burden on speech, a reform proposal must promote summary judgment in "bad" cases, principled settlement in "good" cases, and a minimum of appeals when cases are tried.²²⁸

One attribute of such a system would be a minimum of guesswork regarding the proper application of the law to a given dispute. Certainty

and affirmative covenants that impose upon government a duty to provide something for its citizens (be it food, education, or a cause of action for defamation).

227. WILLIAM SHAKESPEARE, *OTHELLO* act 3, sc. 3. It is ironic that Chief Justice Rehnquist should have chosen Iago's lament to underscore the importance of the interest in protecting one's good name. See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 12 (1990). It would appear to present the prototypical example of one who doth protest too much. Apparently even in Shakespeare's time, there were those who attempted to "win" by calling public attention to the blemishing of their reputations, notwithstanding the accuracy of the defamation.

228. By "bad" cases, I mean cases that never should have been brought; by "good" cases, I mean cases with substantial merit.

and stability regarding the law would reduce the number of pre-trial motions and post-trial appeals. With the law clearly established (within the limits of our constitutional and common law system), the parameters of litigation would be clarified and the opportunities for principled settlement negotiations enhanced.²²⁹ Fewer non-meritorious cases would be filed, particularly by lawyers dependent upon a contingent fee. Pretrial litigation would involve less gamesmanship and greater attention to the clarification of factual issues. To the extent facts are exposed, the need for trial would diminish, with the parties better able to fashion a mutual-help²³⁰ remedy in accord with the facts.

An efficient remedy would also involve a maximum amount of jury control, subject to the American practice of allowing juries to determine factual issues. If we are serious about clarity in the law and predictability of results, then the parties must have assurances that the ultimate outcome will be governed by law, not jury caprice. Rules calculated to promote special verdicts, objective standards for damages, and where appropriate, summary judgment are devices that can be employed to meet this end.

B. Evaluating the Correction Act

In large measure, the Correction Act addresses the three criteria. It allows defendants to limit their exposure to crushing damage awards, and thereby has a benign effect on speech. It also provides for a measure of reputational relief by encouraging correction or clarification of defamatory statements, while retaining damages for economic loss (and for general reputational injury in the absence of a correction or clarification). The Correction Act's provisions are tailored to produce relatively quick, inexpensive resolution of defamation cases, and are thereby consistent with our efficiency criterion.

The Correction Act, concededly, is not without its flaws. To publishers, the ability to eliminate general and punitive damages or even terminate litigation upon publication of a correction or clarification might pose too great a temptation. This may be particularly true in those organizations in which economic decisions made in the boardroom compromise editorial de-

229. This is particularly true if law reform shifts the focus of defamation actions away from issues of fault and back to the issue of the truth or falsity of the defamatory statement. See Anderson, *supra* note 11, at 521-22, and BEZANSON ET AL., *supra* note 49, at 184-90, for a discussion of the gamesmanship created by the shift away from the core issue of truthfulness toward the issue of fault.

230. I use the term "mutual-help," because a reputable publication has as much interest as a defamed plaintiff in correcting a falsehood. The opportunity for such a negotiated remedy, possibly assisted by a fact-finder, is explored more fully in Ackerman, *supra* note 11, at 24-25.

cisions made at the city desk.²³¹ The continued availability of punitive damages in the absence of correction or clarification exacerbates the temptation to take the inexpensive, if unprincipled, way out.

For plaintiffs, the ability of the publisher to limit damages unilaterally poses at least a theoretical problem.²³² As a practical matter, however, full damages are available under current law only after protracted and painful litigation, and are often ephemeral.²³³ Yet these damages represent a real threat to defendants, who must always bear in mind the worst case scenario in the form of the huge damage award. The win/win possibilities under the Correction Act hold the promise of a better situation for all.

The beauty of the Correction Act lies in its potential for the avoidance of protracted litigation through preventive lawyering. It will require significant behavioral changes on the part of litigants and their counsel in order to take full advantage of this elegant mechanism. Publishers who stubbornly insist on "standing by their story" regardless of its dubious veracity will continue to face the high costs and enormous exposure characteristic of current defamation litigation. Attorneys who fail to read and comprehend the new rules and respond appropriately may find their clients wanting for remedies.²³⁴ Different types of fee agreements may become necessary, as defamed plaintiffs obtain much of their satisfaction not through damage awards, but through correction and clarification. Lawyers and clients who fail to seize the opportunities presented by the Correction Act may pay dearly.²³⁵

The Correction Act dramatically alters the way plaintiffs and defendants are likely to go about litigating defamation cases without dramatically changing the underlying law of libel and slander. The effect of the Act, at the very least, should be benign. While providing defendants an opportunity to limit damages without an explicit admission of wrongdoing, it provides a measure of vindication to plaintiffs, at least when defendants are

231. Preservation of the "historical wall . . . between business and news" can be cause for concern even at the nation's most venerable newspaper. See Ken Auletta, *Opening Up the Times*, THE NEW YORKER, June 28, 1993, at 55, 64-66.

232. I have already discussed how, to some state courts, this poses a constitutional problem. See *supra* text accompanying notes 168-85.

233. See *supra* note 44 and accompanying text.

234. The very elegance of the Correction Act may serve as a stumbling block for the uninitiated. Novice counsel might fail to understand the Act's subtleties and, like the Emperor Joseph in *Amadeus*, find that it contains "too many notes." See AMADEUS (Thorn EMI 1984). The Mozarts of the profession, willing to read the text and stir their creative juices, are more likely to find that it contains "just as many notes, majesty, as required, neither more, nor less." *Id.*

235. As an older lawyer once said to me, "The bulls make a little money, the bears make a little money, and the pigs starve." Statement by Lawrence Levin to author (circa 1977).

willing to admit error.²³⁶ What the Correction Act does not do, however, is provide better options to plaintiffs defamed by irresponsible defendants willing to heedlessly scatter defamatory innuendo and let the chips fall where they may.²³⁷ Nor does the Correction Act offer any additional protection to defendants who wish to stand, on principle, behind a story they believe to be accurate, notwithstanding the efforts of plaintiffs who hope to "win by suing" or risk all in pursuit of the home run.²³⁸ The Correction Act should therefore accomplish its purpose most effectively when there are reasonable people, acting in good faith, on both sides of the conflict. To the extent the perverse results of present-day defamation litigation are attributable to systemic problems, and not to personal idiosyncracies of the litigants, we can look forward to an improved state of affairs under the Correction Act.

There is, of course, no guarantee that parties to defamation actions will avail themselves of the Correction Act as often as is hoped. Retraction statutes already on the books in a number of states have had limited effect on the volume or consequences of defamation litigation.²³⁹ A few years experience with the Correction Act may demonstrate that more comprehensive defamation law reform remains necessary.

236. Note that complete vindication is not provided where the defendant attributes the statement to another person under § 6(b)(2)(iii); rather, it shifts the focus to another, perhaps less credible, defendant. UNIF. CORR. OR CLARIF. ACT, *supra* note 7, § 6(b)(2)(iii).

237. Plaintiffs who have been falsely defamed by unrepentant publishers will still have to run the gamut of rules pertaining to defamation actions, including, in most instances, the burden of proving fault.

238. Ironically it is these plaintiffs, who neither merit nor should receive damage-limiting corrections or clarifications, who stand the greatest chance of obtaining the highest damage awards. The growing willingness to risk all for the long shot is metaphorically demonstrated by Mickey Mantle's response to a reporter's query about Reggie Jackson's having surpassed him in career home runs. Replied the former Yankee switch-hitter: "He passed me on the alltime strike-out list a couple of years ago and nobody asked me about that." *Scorecard*, SPORTS ILLUSTRATED, June 2, 1986, at 18, 18.

239. A recent survey reported 33 states with retraction statutes. *Current Retraction Practice*, *supra* note 130, at 2. Respondents to the survey generally believed that the statutes tended to encourage publication of corrections or retractions and diminish the likelihood of litigation. *Id.* at 8-9. Still, the statutes have failed to arrest the problems affecting defamation litigation. See *supra* text accompanying notes 11-56. This failure may be attributable to a number of factors: (1) Some retraction statutes have been found unconstitutional, in whole or in part. See *supra* text accompanying notes 168-85. (2) Most retraction statutes eliminate only punitive damages and thereby provide less incentive for retraction than a statute eliminating general damages. See *Current Retraction Practice*, *supra* note 130, at 7. (3) Some retraction statutes provide a very small time period within which publishers are permitted to retract. *Id.* at 5-6. (4) Existing retraction statutes apply to only certain types of publishers, usually media groups; only one applies to all defendants. *Id.* at 8. (5) Inconsistencies in the retraction provisions of the various states render it most difficult for a nationwide publication to retract effectively. See *infra* text accompanying note 265.

Widespread adoption of a Uniform Correction Act would alter all but the first factor. It would not, however, eliminate the possibility that retractions are hard to come by due to human nature; that is, people simply might be too stubborn to use or accept them.

C. A Proposal.

The challenge to those seeking comprehensive defamation law reform is to fashion a remedy that accommodates the need to protect two seemingly irreconcilable values: speech and reputation. This challenge is met, albeit imperfectly, by a remedy that allows for recovery of objectively measured damages only upon a showing of actual malice, while employing the tripartite verdict to allow for vindication of plaintiffs who can prove that they have been falsely defamed. This remedy would protect defamation defendants against crippling damage awards, while providing deserving plaintiffs a measure of reputational relief. At the same time, it works as a disincentive for litigants—in particular, plaintiffs who have been truthfully defamed—who might otherwise abuse the process and harass their opponents.

1. Issues for Determination

Specifically, I propose that a court hearing a defamation case should present three issues to the jury: (1) whether the defendant published a defamatory statement concerning the plaintiff; (2) whether the statement was false; and (3) whether the statement was made with actual malice.²⁴⁰ The plaintiff would have the burden of proving each of these elements by clear and convincing evidence. The same standards would apply for public officials, public figures or private plaintiffs. Similarly, there would be no legal distinction between media and non-media defendants.

If the plaintiff cannot even establish the falsity of the allegedly defamatory statement, then judgment should be entered for the defendant and the court should award reasonable attorney's fees to the defendant.²⁴¹ I have argued that fee shifting should generally be avoided in the absence of bad faith on the part of one of the litigants, as established by objective criteria.²⁴² I submit that the bringing of an action for defamation regarding statements that are not demonstrably false—and who knows better whether they are false than the plaintiff?—is an objective criterion for bad faith suf-

240. These questions resemble those presented to the jury by Judge Sofaer in the *Sharon* trial. See *supra* text accompanying notes 106-11.

241. A good argument could be made for shifting the defendant's fees only after an additional factual finding, employing the proposed Act's standard (applicable only under the Act's vindication remedy), that "the plaintiff had no reasonable basis upon which to allege falsity." PROPOSED UNIF. DEFAMATION ACT, *supra* note 4, § 3-104(a)(2). I am disinclined to encumber the process with an additional factual finding that would also entail a shifted burden of proof. An adequate safeguard against a chilling effect on meritorious litigation can be provided by employing another Defamation Act provision to the effect that "an award of expenses and attorney's fees to a prevailing party . . . may not be disproportionate to the reasonable value of similar expenses and legal services of the other party." *Id.* § 3-104(b). This sensible provision protects a party from having to pay excess fees of another party who persists in overlitigating the case.

242. See *supra* note 100.

ficient to trigger an award of reasonable attorney's fees and other costs of litigation.

If the plaintiff succeeds in proving only the first two elements (a defamatory statement and falsity), the jury should so indicate, and the plaintiff should be free to publish this finding at her own expense through whatever means are available.²⁴³ In that situation, the plaintiff achieves a form of vindication, and the defendant is spared payment of money damages. No attorney's fees or other costs would be shifted. The proposal, like the proposed Defamation Act's vindication remedy, departs from the current procedure by allowing cases to go forward even where the defendant would be entitled to summary judgment on the fault issue.

2. Damages

Should the plaintiff succeed in proving all three elements, including actual malice, she should be provided a make-whole remedy in the form of money damages. The components of this damage award would be computed as follows:

a. Economic Damages

A successful plaintiff should recover all provable out-of-pocket losses occasioned by reason of the defamatory statement. These would include loss of business, diminished employment prospects, and the like. Allowed under present law upon competent proof, this recovery is also available under the Correction Act, even in the event the defendant has made a sufficient correction or clarification.

b. Attorney's Fees and Other Costs

Having proved actual malice on the part of the defendant, the plaintiff should receive reimbursement of all reasonable costs of litigation, including attorney's fees. Just as the bringing of an action regarding a statement that is not demonstrably false amounts to bad faith on the part of the plaintiff, the making of a defamatory statement knowing that it is false, or with reckless disregard for truth or falsity, amounts to bad faith on the part of a defendant.²⁴⁴ Here, actual malice acts as the objective criterion of bad faith sufficient to trigger a fee shift.

243. Alternatively, a private figure plaintiff could be awarded sufficient damages to purchase a published retraction, in light of the difficulty such plaintiffs might otherwise have in clearing their names. I am disinclined, however, to continue to complicate matters by retaining two classifications of plaintiffs. See *supra* notes 83-87 and accompanying text.

244. Arguably, persisting in litigation once a statement has been demonstrated to be false, through proof submitted in connection with a demand for retraction, is one form of bad faith that should encumber the defendant with the plaintiff's attorney's fees from the time at which the

c. Vindication Damages

The optimal remedy for defamation would involve not general damages for injury to reputation but concrete measures to restore the plaintiff's reputation.²⁴⁵ To some extent, the plaintiff may achieve a measure of vindication through a favorable judgment.²⁴⁶ The potential publicity of a plaintiff's judgment may fall far short of complete relief, however, especially in less prominent cases or when the plaintiff has limited financial means.²⁴⁷ Therefore, plaintiffs who have proved actual malice should enjoy a means of publicizing their victory in a manner sufficient to erase the defamatory blemish cast upon them by defendants. In most cases, achieving this goal will require something more than a retraction in the defendant's publication. Not only is the ordering of such a retraction constitutionally suspect,²⁴⁸ but there is no guarantee that a single retraction, published in the same manner as the original defamatory statement, will reach the audience originally or subsequently affected by that statement.²⁴⁹ Far broader communication is likely to be necessary, whether the original statement was an article in a newspaper or magazine, a statement broadcast on radio or television, or a slanderous statement uttered on a street corner or at a cocktail party.

The vindication remedy would best be shaped by the trial judge, who would consider the type and amount of publicity necessary to make the

falsity of the statement became obvious to the defendant. A determination of subjective bad faith—e.g., at what point did the defendant realize that the statement was untrue?—might be difficult in such instances. A determination of objective irresponsibility (i.e., at what point *should* the defendant have realized that the statement was untrue) reverts to a negligence standard, which may be an insufficient basis for fee shifting.

245. See *supra* text accompanying notes 222-27.

246. Vindication through publicity of a favorable judgment underlies both the vindication remedy set forth in the Defamation Act and the declaratory relief afforded by the tripartite special verdict suggested above.

247. In the most publicized cases a favorable verdict is most likely to vindicate the reputation of the plaintiff, with or without money damages. Carol Burnett emerged from her highly publicized battle with the *National Enquirer* with reputation intact, despite the reduction of her damage award. See *Burnett v. National Enquirer*, 7 Media L. Rptr. 1321, 1324 (Cal. Super. Ct. 1981), *aff'd*, 193 Cal. Rptr. 206 (Cal. Ct. App. 1983), *appeal dismissed*, 465 U.S. 1014 (1984). Wally Butts will forever be enshrined in the annals of Georgia football. See *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 136-37 (1967).

248. See *supra* note 95 and accompanying text. A voluntary retraction under the Correction Act would involve no objections under the U.S. Constitution. See *supra* note 165 and accompanying text.

249. The same objection could be made with respect to the requirements for a "timely and sufficient correction or clarification" under § 6 of the Correction Act. The Act requires that a correction or clarification be "published with a prominence and in a manner and medium reasonably likely to reach substantially the same audience as the publication complained of." UNIF. CORR. OR CLARIF. ACT, *supra* note 7, § 6(b)(1). Under the Act, "a later issue, edition, or broadcast of the original publication" suffices. *Id.* § 6(c). What if Monday's newspaper or television audience misses Tuesday's edition or broadcast? Perhaps republication by competing media or word of mouth will pick up the slack, but it is hardly a guarantee.

plaintiff's reputation "whole."²⁵⁰ Evidence could be presented as to the cost of various make-whole alternatives, probably in the second part of a bifurcated proceeding (the jury having found actual malice in the first part).²⁵¹ A constitutional guarantee of a jury role in awarding damages²⁵² might require a jury determination as to the amount of vindication damages, perhaps after the judge has determined the type and extent of publicity required. Judicial creativity would be encouraged, within constitutional constraints.²⁵³ The court would not be empowered to order the defendant to publish a corrective statement, but an offending publication's advertising rates could be relevant in determining the amount of money damages necessary to vindicate the plaintiff's reputation.

The judgment for vindication damages could be used by the plaintiff to publicize her vindication by the jury,²⁵⁴ but the plaintiff would not be required to apply the judgment to such a purpose. Should the plaintiff prefer to drown her sorrows with a new convertible or a trip to Puerto Vallarta, that should be her prerogative. What is important is the establishment of objectively determinable limits on damages to reputation and the shaping of a remedy that bears some relation to the injury incurred. This remedy could be applied to non-media defendants found liable for relatively private slanderous statements as well as to media defendants found liable for widely circulated libelous statements. The medium and extent of the corrective publication would vary with the need;²⁵⁵ the general principle of vindication would remain the same.

250. While I offer no assurances, perhaps the financial support for vindication provided under this remedy would satisfy courts looking for full relief to plaintiffs under "open courts" provisions of state constitutions. See *supra* text accompanying note 169-72. I would argue that this substitute remedy eliminates any constitutional objection, particularly in light of the greater threat to free speech posed by open-ended general damages under the current system.

251. Bifurcation would allow the parties to take advantage of a brief interval between the liability and damages phases to work out their own settlement regarding a corrective publication.

252. See *Boyd v. Bulala*, 647 F. Supp. 781, 789 (W.D. Va. 1986) (citing VA. CONST. art. I, § 11); *Smith v. Department of Ins.*, 507 So. 2d 1080, 1087-89 (Fla. 1987) (citing FLA. CONST. art. I, §§ 21-22); *Lucas v. United States*, 757 S.W.2d 687, 691-92 (Tex. 1988) (citing TEX. CONST. art. II, § 1).

253. Care must be taken to conform to the holdings of *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510-11 (1959) and *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 472 (1962) (requiring the submission of legal issues to the jury where a jury trial has been timely and properly demanded).

254. For example, the plaintiff might use the award to purchase advertising space.

255. Cases involving widely known public figures are likely to require the smallest amounts of vindication damages, as they are natural recipients of free publicity. A brief (one week) interval between the liability and damages phases of a bifurcated proceeding may provide opportunity for an assessment of the need for damages to publicize the plaintiff's vindication. By that time, some plaintiffs will have completed the full talk show circuit.

d. What Has Been Left Out?

Conspicuous by their absence from this damage formulation are general damages for injury to reputation and punitive damages.²⁵⁶ These forms of damages have spun out of control and often bear little or no relationship to the injury sustained; punitives by definition, general damages as a matter of practice. To the extent a plaintiff's reputation has been injured, an adequate remedy can be provided in the form of objectively measured vindication damages. Attorney's fees, which previously have been covered *sub rosa* by generous awards of general or punitive damages, would now be awarded explicitly, based on competent evidence.²⁵⁷

In sum, the proposal contemplates the following combination of elements and remedies:

FIGURE 2: THE PROPOSED SOLUTION: ELEMENTS AND REMEDIES

<i>Elements (i.e., what plaintiff must prove)</i>	<i>Remedies (i.e., what plaintiff gets)</i>
Defamatory statement	} Vindication (i.e., declaratory judgment but no damages)
Falsity	
Actual malice	{ Pecuniary damages Attorney's fees and other costs Vindication damages

Under this proposal, damages play a secondary role, providing the gap-fillers necessary to make the plaintiff whole through provision for economic loss and attorney's fees. Repair to the plaintiff's reputation, insofar as reputational harm is not represented by economic loss, would be accomplished primarily through the mechanism of the jury verdict itself: a statement by representatives of the community who have sifted through the evidence and determined that the record deserves correction. Damages would then play a role in assuring that this corrective information—the aim of the plaintiff's action—is communicated to the public.

256. In this sense, the proposal is consistent with the consequences of a correction or clarification under the Correction Act. I believe that punitive damages should be unavailable under *any* circumstance, however, and that their unavailability should not be predicated upon a retraction the defendant is in no position to provide.

257. With respect to attorney's fees, evidence of the plaintiff's attorney's billing rates, and their relationship to the usual and reasonable amounts billed for such services, would replace jury speculation. Instead of pulling a figure for general damages out of thin air, the jury would now be required to assess the real costs of vindication through advertising and other means.

3. Some Self-Criticism

Admittedly, this proposal offers imperfect and incomplete remedies. Particularly in the case of non-public figures, publication of a corrective statement may escape widespread public notice. Thus, the scars of libelous statements may never be fully eradicated. Still, payment of attorney's fees, restoration of economic loss, and assurance of a published retraction, or the funds necessary to purchase one, may provide some plaintiffs with a more complete and practical remedy than is available under current law or the Correction Act. Just as significantly, the proposed remedy should dampen the enthusiasm of plaintiffs who hope to obtain unwarranted, inflated awards consisting largely of general and punitive damages—awards unleavened by any objective standard of measurement.

The remedy suggested here meets our three criteria, albeit imperfectly. By means of the tripartite verdict, it provides a modicum of relief to even those plaintiffs who cannot demonstrate that a defamatory statement was made with actual malice. This relief is relatively costless for defendants, who are in turn protected against damages of numbing proportions, even when actual malice is shown. It thereby provides far greater protection for speech than does current defamation law. The remedy meets our efficiency criterion in that it clearly delineates the issues, thereby promoting settlement in summary judgment in whole or in part, and sets forth clear standards for the jury—particularly in the area of damages. It should therefore encourage swifter litigation and more settlements, particularly if it takes codified form.

Nevertheless, the proposal fails to fulfill each criterion perfectly. First Amendment absolutists²⁵⁸ are likely to decry almost any remedy for defamatory speech involving public officials; short of that, they may scoff at the "truth trial"²⁵⁹ allowed under the tripartite verdict.²⁶⁰ Further, those who

258. In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), Justices Goldberg and Black authored separate concurrences, both joined by Justice Douglas, advocating this view. *Id.* at 293 (Black, J., concurring) and 297 (Goldberg, J., concurring). These justices felt that the First Amendment gave the citizen and the press "an absolute, unconditional privilege to criticize official conduct despite the harm which may flow from excesses and abuses." *Id.* at 298 (Goldberg, J., concurring).

259. Critics of the proposed Act's vindication remedy labeled it a "truth trial." Libel Defense Resource Center Bulletin, *The Uniform Defamation Act: An LRDC Special Report*, Special Issue A, June 30, 1992, at 10. Because the tripartite verdict also allows vindication without fault, the same label may apply here. Of course, falsity of the defamatory statement is an element of almost every defamation case. See *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 778 (1986).

260. By all rights, the media should be the last to complain about a no-fault vindication remedy. With no provision for plaintiffs' attorney's fees and costs of a published retraction in the absence of fault, *contra* PROPOSED UNIF. DEF. ACT. §§ 3-103, 104, the only cost of an adverse judgment to a publisher is having its reputation for veracity besmirched—hardly cause for complaint by those who seek protection from liability for reputational harm. Under this proposal, the defendant at least receives full due process protection, including notice and opportunity to be

have suffered reputational injury may protest the incompleteness of the remedy—particularly those who cannot overcome the actual malice hurdle. Potential objections remain under the “open courts” provisions of state constitutions. Nevertheless, the remedy suggested here represents a reasonable accommodation of competing constitutional, remedial, and pragmatic interests, a solution that permits both plaintiffs and defendants to be “winners” to some extent, and a viable alternative to current law and practice.

4. The Proposal and the Correction Act Compared

The proposal offered here is more ambitious and far-reaching than the Correction Act. While the Correction Act eliminates general and punitive damages in the event of a sufficient correction or clarification, my proposal eliminates general and punitive damages under any circumstance, replacing them with litigation expenses and vindication damages in addition to economic loss. My proposal contemplates adoption of such streamlining provisions of the proposed Defamation Act as the merger of libel and slander into one cause of action, the elimination of any distinction between media and non-media defendants, and the codification of privileges;²⁶¹ it also eliminates the distinction between public and private plaintiffs.

Addressing none of these matters, the Correction Act represents a retreat from the Drafting Committee's original intent to effect comprehensive defamation law reform. In light of recent history, however, it is difficult to fault the Drafting Committee for its choice. Reform legislation should be advanced to obtain concrete, practical results, not to satisfy academic concepts of beauty. Given the common objectives of the Correction Act and the reform proposal suggested here, it would be prudent to first give the Correction Act a fighting chance. Should it survive legislative and judicial scrutiny and accomplish its ends, defamation litigation should be changed for the better. Should the Correction Act fall short of its goals, we might look to more comprehensive reform proposals.²⁶²

heard, before “publication” of the injurious information. That is more than many publishers provide for the targets of their defamatory stories.

261. See *supra* notes 59-64, 70-72 and accompanying text.

262. There is precedent for overlapping uniform legislation in the tort field. The Uniform Contribution Among Tortfeasors Act was approved by the Commissioners in 1955. It has since been enacted in over a dozen jurisdictions. The Uniform Comparative Fault Act, a more comprehensive statute that includes provisions for contribution among tortfeasors, was approved by the Commissioners in 1977. Since then, it has been enacted by two legislatures and one state supreme court. IOWA CODE §§ 668.1-668.15 (1984); WASH. REV. CODE §§ 4.22.005-4.22.925 (1981); *Gustafson v. Benda*, 661 S.W.2d 11, 15 (Mo. 1983) (en banc).

VI. THE VEHICLE FOR REFORM

Once we have settled upon the substance of defamation law reform, we must determine the proper vehicle for its implementation. In making this determination, we should focus on three inquiries: Is there a need for uniformity? Is there a need for legislation? What is politically feasible?

A. Is There a Need for Uniformity?

In a recent article on defamation law reform,²⁶³ Professor David A. Anderson presented an articulate argument for the need for reform on a nationwide basis:

Any reform that must be accomplished one state at a time offers little comfort to the national media or even to local media whose broadcasts or publications cross state lines. Their risk assessments must take into account the least protective state law to which they may be subject. The flexibility of modern jurisdictional, venue, and choice-of-law rules often allows a plaintiff to choose a state whose law is congenial.²⁶⁴ The benefits of statutory reform would be fully available to the media only if adopted federally or by all the states uniformly.²⁶⁵

The interstate implications of defamation, at least of the libelous variety, should be clear. Material differences in the law of defamation invite plaintiffs to file suit in the friendliest forum. In addition, the wide range of retraction statutes, varying in many details, is likely to render futile almost any retraction effort, at least in cases where a publication is distributed nationally. So long as publishers face different procedures and different consequences in different jurisdictions, efforts to correct or clarify may be to little avail. Uniform legislation would largely eliminate these problems.

Uniformity would also be of concern if only select states were to enact the dramatic changes contemplated under the proposed Defamation Act or advocated in this article. While many would view such reforms as enlightened experiments in the Brandeisian mold,²⁶⁶ the resulting forum shop would frustrate a true test of these experiments. Public figures unable to obtain damages in any event, due to the difficulty of proving actual malice,

263. Anderson, *supra* note 11.

264. Here, Professor Anderson cites *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779 (1984), which allowed a plaintiff with no connection to the forum state to take advantage of that state's unique statute of limitations so long as the defendant had the requisite minimum contacts.

265. Anderson, *supra* note 11, at 546.

266. "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens chose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); see also Franklin, *supra* note 3, at 819 (espousing this view in the context of defamation law reform).

would seek vindication in states that had adopted these reforms; private figures who desire the present panoply of damage remedies and other plaintiffs who hope to "win by suing" would file in states that had not adopted these reforms.

B. *Is There a Need for Legislation?*

Professor Anderson's solution to this dilemma is to cast the United States Supreme Court as the principal reformer of libel law.²⁶⁷ As discussed earlier, this is problematic because the Court is not in the business of shaping new remedies for state causes of action; it can only pare down existing ones as required by the Constitution.²⁶⁸ Acknowledging this problem, Anderson nonetheless argues, "Having created the system that is the source of so much dissatisfaction, the Court cannot now demur on the ground that law reform is not its business."²⁶⁹

Certainly, some reforms suggested on these pages may be imposed by the Court. Elimination of punitive damages and the imposition of a requirement that actual damages for reputational harm bear some relationship to the effort necessary to cleanse one's name are within the Court's power to place constitutional limitations on state law remedies that infringe upon speech.²⁷⁰ The Court also can give its blessing to procedural innovations in the federal courts, such as Judge Sofaer's tripartite verdict.²⁷¹ Other changes, including the erection of an elegant system of correction or clarification (as in the Correction Act), the creation of an ornate vindication remedy (as in the proposed Defamation Act), or the awarding of attorney's fees to successful litigants under limited circumstances (as advocated here), face more serious conceptual hurdles.

For the Supreme Court to create new remedies for what has so long been considered a state cause of action would be widely regarded as a judicial intrusion into the legislative realm and a federal intrusion across constitutionally demarcated boundaries.²⁷² Judicially mandated correction and clarification provisions such as those provided for under the Correction Act

267. Anderson, *supra* note 11, at 554.

268. See *supra* text accompanying note 2.

269. Anderson, *supra* note 11, at 554.

270. Decisions to this effect might trump state court efforts to strike down reform legislation on the basis of "open courts" provisions in state constitutions. However, the Court's allowance of presumed and punitive damages in the absence of actual malice, see *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 755-63 (1985), would indicate that it may not be ready to take these steps.

271. Justice White tentatively endorsed this device in his concurring opinion in *Dun & Bradstreet*. *Id.* at 768 n.2 (White, J., concurring).

272. The defense of federalism may be more dependent on one's position on the *subject matter* of legislation or judicial activity than on the *principle* of division of powers. The call by the recently departed Republican administration for a significant federal role in wide-scale tort reform

would raise similar objections. In *Sullivan*, the Warren Court made a daring move in recognizing that the state's provision of a remedy for defamatory speech had First Amendment ramifications. It would take an equally daring move for today's Court to appropriate the law of defamation so as to craft its own remedies or impose time frames for corrections and clarifications. The present Court has not indicated a taste for such adventure.²⁷³

That leaves us with the prospect of a legislative remedy. Legislation carries the advantage of providing for comprehensive reform rather than the piecemeal responses characteristic of litigation. With codification comes greater predictability of outcome, better risk avoidance, and more settlements. Codification of defamation law and, in particular, rules regarding correction and clarification, should remove much of the guesswork and gamesmanship, and, therefore, much of the expense, that accompanies present-day defamation actions.²⁷⁴

Granted, much mischief can occur when uniform or model legislation enters the legislative process.²⁷⁵ The future of the most political of all torts, however, cannot and will not be decided exclusively in the halls of

demonstrates that concerns regarding federalism may be largely a matter of whose ox is being gored.

273. The present Court appears to have abjured both the liberal activism of the Warren years and the reactionary designs of recent Republican administrations in favor of a cautious centrism typified by the jurisprudence of Justice O'Connor. See, e.g., *Planned Parenthood of Southeastern Pa. v. Casey*, 112 S.Ct. 2791, 2803 (1992) (upholding portions of Pennsylvania's restrictive abortion law while refusing to overturn *Roe v. Wade*, 410 U.S. 113 (1973)).

274. Perhaps the most articulate argument *against* legislative reform was offered by a publisher who appeared at the Drafting Committee's October 9, 1992 hearing:

Language is not a product, a steel bolt with specifications of strength, or a car, a lawn mower. It cannot be confined to a grammar book or a dictionary. It changes with time, with the social environment, the context of life itself. It changes and may be different on different levels and types of society and culture. Times change meanings. The impact of time changes the impact of language. And, no language changes so quickly as the American language. An American-speaking Russian I met . . . pointed out that American English was the most exciting language in the world because it constantly changes to adapt to the real life situations and discourse amongst our citizens. It is the now language. . . .

In that context, we find that the proposed Uniform Defamation Act would virtually freeze a body in law that evolved and continues to evolve through handling individual cases within the flexible structure of common law.

Testimony of William B. Northrop on behalf of the Newspaper Ass'n of America and American Society of Newspaper Editors at 3-4 (Drafting Committee hearing, Washington, D.C., Oct. 9, 1992).

275. As one press spokesman has remarked about the proposed Defamation Act, "If you toss this proposal into the laps of the elected representatives who are regularly covered by our newspapers in pursuit of their responsibilities and their regular re-election, you know not what you do." Testimony of Sam D. Kennedy, *supra* note 103, at 10. In a similar vein, the National Newspaper Association has expressed reservations regarding the Correction Act not because of the substance of the Act, but because of the potential for mischief in the form of amendments by state legislatures faced with the prospect of libel law reform. PUBLISHER'S AUXILIARY, Aug. 16, 1993, at 1.

academia or even the relative detachment of the courthouse. Just as Congress was forced to respond constructively to judicial activism in the field of civil rights,²⁷⁶ legislatures should ultimately have to face the hard choices necessary for tort reform.

C. *What Is Politically Feasible?*

The problem with legislation is an obvious one: To ensure enactment, it is necessary to forge a political consensus. In the case of uniform legislation, the consensus must be broad enough to secure fairly simultaneous enactment in most, if not all, states. Enactment of legislation in a few "media-intensive" states, such as New York and California,²⁷⁷ might influence adoption in other states, much as New York's 1962 enactment of the Uniform Commercial Code encouraged acceptance of that statute in almost every state.²⁷⁸ Prudence dictates that early efforts to enact the Correction Act be concentrated in those jurisdictions whose courts have displayed friendly attitudes toward tort reform measures.²⁷⁹

While one may argue for the enactment of comprehensive legislation of the type advanced in this Article, political reality suggests a more conservative approach.²⁸⁰ The most prudent course of action is to encourage widespread adoption of the Correction Act, and hope that its supporters' loftiest expectations are fulfilled. Should the Correction Act fail to meet these goals, further reform proposals might best be presented in the context of general tort reform. Conservatives who favor damage limitations in personal injury actions would be hard-pressed to oppose them in actions based on speech. Liberals might warm to a general tort reform proposal providing greater protection for the press than the Supreme Court seems prepared to

276. The landmark Civil Rights Acts of 1964, 1965, and 1968 may be seen as congressional responses to *Brown v. Board of Education*, 347 U.S. 483 (1954), and its progeny. Of course, it would be naive to suggest that it was Warren Court activism alone that produced this legislation.

277. California may not be the most politically hospitable jurisdiction for early enactment of the Correction Act. California's current retraction statute, CAL. CIVIL CODE § 48a (Deering 1990), is, not surprisingly, quite protective of the media. Like the Correction Act, the California statute limits the plaintiff's recovery to special damages after a correction has been made. *Id.* Furthermore, California requires the plaintiff to demand a correction within 20 days after knowledge of the publication, a shorter time period than that allowed under the Correction Act. *Id.*; see also UNIF. CORR. OR CLARIF. ACT, *supra* note 7, § 3(b) (providing for 90 day period). This media-friendly state is therefore unlikely to enact a less protective statute until it becomes recognized as the national standard.

278. Prior to 1962, only 14 states had enacted the Uniform Commercial Code. Within five years of the Code's enactment by the nation's leading commercial state, every state except Louisiana had enacted a version of the U.C.C. See 1 U.L.A. 1 (1989).

279. See *supra* notes 186-93 and accompanying text.

280. In light of the unenthusiastic response to the proposed Defamation Act, it is probably best to wait before rolling out another comprehensive reform proposal. Furthermore, the Correction Act may prove so effective that further reform is unnecessary.

grant.²⁸¹ Advocates of alternative dispute resolution might also support legislation calling for an array of remedies tailored to address the parties' underlying interests, just as they should cheer the Correction Act's efforts to promote efficient, win/win settlements.

A natural constituency for defamation law reform might exist within the state legislatures themselves. Legislators, about whom the media report every day, may view themselves as potential defamation plaintiffs.²⁸² If a reform proposal is perceived as anti-plaintiff, it is likely to encounter opposition within the legislature. Both the Correction Act and the proposal set forth in this Article, however, have features that some plaintiffs—particularly public officials—might appreciate. For example, imposition of an actual malice standard on all defendants (which I propose as a requirement for damages), would impose no greater burden on public officials who are subject to the actual malice standard under present law. Moreover, the availability of vindication through correction, clarification, or tripartite verdict might be attractive to a legislator willing to forego the burden of proving actual malice, obtain quick vindication, and move on with her career.

If the prospect of enacting a reform proposal in fifty state legislatures seems daunting, congressional action may appear more inviting. A federal statute would be one means of assuring uniformity, and a credible case for federal intervention may be based on Congress's Morganic powers under the First and Fourteenth Amendments and the Commerce Clause.²⁸³ We would be deluding ourselves, however, to think that defamation law reform appears high on Congress's list of national priorities.

281. There is an obvious irony here: Conservatives tend to be pro-defendant and liberals pro-plaintiff on general issues of tort reform. With respect to defamation law, however, their positions appear to have been reversed.

282. Those who assume that the courts would naturally take a more detached view of defamation litigation might take a look at Pennsylvania, where several members of the state supreme court have commenced defamation actions in the past decade. *See, e.g.,* *Larsen v. Philadelphia Newspapers, Inc.*, 602 A.2d 324, 325 (Pa. Super. Ct. 1991) (reporting Pennsylvania Supreme Court Justice Rolf Larsen's defamation action against newspapers that published stories about an investigation of the justice).

283. In *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966), the Court established that § 5 of the Fourteenth Amendment "is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." In *Rome v. United States*, 446 U.S. 156, 173-78 (1980), the Court legitimized congressional enactment of a prophylactic rule in the context of voting rights legislation supportive of Fifteenth Amendment principles. These cases would appear to support the view that Congress could, consistent with its power under § 5 of the Fourteenth Amendment (through which the First Amendment is applied to the states), enact comprehensive legislation concerning defamation. The First Amendment's traditional use as a shield, rather than a sword, with respect to a cause of action recognized under state law may defeat the analogy. This issue is deserving of a law review article unto itself.

While the immediate prospects for comprehensive defamation law reform are not particularly bright,²⁸⁴ the political landscape could change. A decision by the Supreme Court might send a signal to Congress or ignite a spark that spreads throughout the state legislatures. Should that happen, it would be helpful to have a carefully considered proposal to which a legislature could turn.²⁸⁵ At that point, the drafting of uniform or model legislation would become more than a mere academic exercise.

VII. CONCLUSION

The disarray in current defamation law strongly suggests the need for reform. The grafting of constitutional limitations on an archaic body of common law has created a system that neither vindicates the reputations of worthy plaintiffs nor preserves the First Amendment interests of potential defendants.

Responding to this problem, the Commissioners on Uniform State Laws convened a committee to draft a proposed Uniform Defamation Act. This comprehensive reform proposal was ultimately withdrawn in the face of intense media opposition to the proposed Act's "no-fault, no damages" vindication remedy. In its place, the Commissioners approved a Uniform Correction or Clarification of Defamation Act, drawn largely from one article of the withdrawn Act. Without modifying the underlying law, the Correction Act seeks to change the way parties go about trying and settling defamation cases. The Correction Act eliminates general and punitive damages where the publisher of a defamatory statement makes a timely and sufficient correction or clarification. In so doing, it encourages early termination of disputes to the parties' mutual satisfaction.

Implementation of the Correction Act may be hindered by constitutional challenges in state courts, several of which have declared similar retraction statutes unconstitutional. Widespread enactment of the Correction Act, however, should produce better results than existing retraction statutes, as publishers will be able to employ a uniform correction procedure offering protection nationwide. In the final analysis, the success of the Correction Act will depend largely on whether parties to defamation disputes are willing to alter their conduct so as to avail themselves of the opportunities the Act presents.

284. The prospects for enactment of the Correction Act, however, might be substantially better.

285. A uniform act also could serve as inspiration to a court. The Missouri Supreme Court went as far as to adopt, in its entirety, the Uniform Comparative Fault Act when it decided to eliminate contributory negligence as a complete bar to recovery. *See Gustafson v. Benda*, 661 S.W.2d 11, 15 (Mo. 1983) (en banc). The Kentucky Supreme Court also has seen fit to adopt portions of the Uniform Comparative Fault Act. *See Wemyss v. Coleman*, 729 S.W.2d 174, 177-78 (Ky. 1987); *Hilen v. Hayes*, 673 S.W.2d 713, 720 (Ky. 1984).

As the ultimate success of the Correction Act cannot be certain, it remains prudent to consider other reform proposals. The proposal set forth here would codify the tripartite verdict procedure, which provides for explicit jury findings as to defamation, falsity and actual malice. This procedure allows plaintiffs to obtain vindication through a finding of a false and defamatory statement, provides for damages where the defendant has acted in bad faith, and works as a disincentive to truthfully defamed persons who might otherwise abuse the system. By limiting damages to economic losses, reasonable attorney's fees, and amounts necessary to secure vindication, we can advance plaintiffs' interests in clearing their names while protecting the First Amendment rights of publishers.

Thirty years ago, the United States Supreme Court, with the best of intentions, set defamation law on a new course. Unfortunately, the path taken by the Court has protected neither speech nor reputation in the desired manner. With the Correction Act, the Commissioners have offered a slight course correction, anticipating that it will produce more favorable outcomes. It may not be time for dancing in the streets, but perhaps the band is warming up.

