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Proposed Model Statute on Group Defamation

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Freedom of expression is about as free as a free lunch. Both often bear unintended consequences and obligations. As I write this, at least ten persons have died in riots sparked by satirical cartoons of the Prophet Muhammad in *Jyllans-Posten*, a Danish periodical, which some three years ago had rejected cartoons satirizing the resurrection of Jesus Christ because they might provoke a public outcry.[1] In retaliation for what many Muslims consider sacrilegious cartoons, an Iranian periodical has solicited counter cartoons satirizing the Holocaust in order to give the West a taste of its own medicine.[2] Though of unusual proportions, the escalating reaction sparked by the Muhammad cartoons confirms that mass media communication has social consequences.

For this reason, most nations, including those in the Western tradition, such as Great Britain, countries of the European Union, and Canada, have various legal mechanisms, including criminal prosecution, for group defamation based on race or ethnicity. The United States remains peculiar in that a civil remedy for individual defamation exists, but neither civil, nor administrative, nor criminal remedies realistically exist for group defamation based on race or ethnicity. The paradox of defamation law in the United States is that the bigger the defamatory lie, the more likely no legal remedy exists. I have detailed the origin and nature of this American legal lacuna in an article entitled, *Racial and Ethnic Group Defamation: A Speech Friendly Proposal*.[3]

The Appendix to that article, reprinted below, sets out my proposed model "Racial and Ethnic Group Defamation Act." The Act has the goal of preserving traditional freedom of expression while at the same time

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1. *See Pakistan Parliament Slams Cartoons*, CNN, Feb. 3, 2006, http://www.cnn.com/2006/WORLD/meast/02/03/pakistan.cartoons.ap/index.html.

2. *See Iran Invites Cartoons on Holocaust*, CNN, Feb. 8, 2006, http://www.cnn.com/2006/WORLD/meast/02/07/iran.cartoon.ap/index.html.

3. 23 B.C. THIRD WORLD L.J. 213 (2003) (*reprinted in* FIRST AMENDMENT HANDBOOK (James Swanson, ed., West Pub. Co. 2004-05)).

providing a legal outlet for a community's determination through its judicial system that a racial or ethnic group has been defamed. By eliminating a damage remedy and refusing to adopt a regime of prior restraints, the Act preserves freedom of expression while providing for the first time other legal remedies based on a unique blend of declaratory judgment theory with options for retraction and a right of reply. Instead of chilling speech with crushing damages or injunctions, the Act multiplies speech by allowing plaintiffs a counter speech remedy in court that media megacorporations deny out of court. Because of the elimination of damages as a remedy the arcane complexities of "actual malice" and a plaintiff's public figure status spawned by *New York Times Co. v. Sullivan*[4] and *Gertz v.Robert Welch, Inc.*[5] become unnecessary. At the very least, I hope the proposed Act will stimulate a rethinking of mass media power and legal remedies for the defamatory abuse of that power.

RACIAL AND ETHNIC GROUP DEFAMATION ACT[6]

PREAMBLE

The purpose of this Act is to provide a remedy for a certain kind of defamation of unincorporated racial or ethnic groups and the derivative defamation of natural persons within such defamed groups. The Act is not intended to replace or modify the civil or criminal law relating to the direct defamation of specific and identifiable persons, whether natural or artificial, who claim to have been defamed in their individual capacity rather than by membership in a racial or ethnic group. The Act is to be construed in such a way as to avoid wherever possible any conflict with the freedom of speech and press guaranteed by either the First Amendment of the United States Constitution or the constitution of this state.

SECTION 1: SCOPE OF COVERAGE

This Act provides an action and remedy for group defamation only insofar as an identifiable racial or ethnic group is the subject of the defamation and for no other groups.

> Comment: *Because the Act is novel, the goal is to concentrate on race and ethnicity, which have a special importance because of social tensions created by an increasingly multicultural*

4. 376 U.S. 254 (1964).
5. 418 U.S. 323 (1974).
6. 23 B.C. THIRD WORLD L.J. 213-20 (2003).

society. Once the Act takes hold it could be extended to other groups in need of protection from other forms of defamation, such as defamation based on gender.

SECTION 2: ACTIONABLE DEFAMATION

(A) Only defamation, as defined under the law of this jurisdiction, which attributes or imputes criminality to any race or ethnic group by virtue of or by reason of the race or ethnicity of the group is actionable under this Act.

Comment: *False attribution of criminal conduct is such a serious form of defamation under traditional law that it has been considered defamation in itself without the need to allege or prove special damages. In addition, this subclass of defamation has a precise meaning because criminal conduct is defined by the criminal laws of the jurisdiction in which this Act takes effect and by centuries-old precedent refining the meaning of this subclass. It is arguably undesirable, both for possible constitutional and practical reasons, to extend a cause of action to language substantially more vague in content, such as "depravity" or "lack of virtue," as set out, for example, in Art. I § 20 of the Illinois Constitution (Individual Dignity Clause). Given that the void-for-vagueness doctrine generally has been used only in criminal cases or in First Amendment cases involving prohibition or limitation of speech, however, a jurisdiction might plausibly extend coverage to other defamatory statements besides criminal conduct.*

(B) Statements of fact that constitute defamation under Section 2(A) of this Act are automatically actionable.

(C) Statements of opinion, as defined by the law of this jurisdiction or federal constitutional law, may only constitute defamation under Section 2(A) if they are based either expressly or implicitly on false facts. If they are so based on false facts, defamation may exist under this Act even though consideration of the opinion in conjunction with such facts is necessary to construe a defamatory meaning. If they are expressly or implicitly based on true facts, defamation does not exist under the Act, whether or not the facts are reasonably sufficient to support the opinion.

(D) Rhetorical hyperbole or pure invective, whether classified as fact or opinion, is not actionable.

(E) Defamation of an individual based on race or ethnicity shall not be considered group defamation unless the number of individuals defamed is reasonably sufficient to infer an express or implied defamation of the entire race or ethnic group or unless the individual defamation, whether based on a real or fictionalized individual, is reasonably construed as a symbolic defamation of the entire race or ethnic group.

Comments: *Subsections 2(B), (C), and (D) are based on the constitutional demarcation between actionable defamatory opinions and non-actionable defamatory opinions set out by the Supreme Court in* Milkovich v. Lorain Journal Co., *497 U.S. 1 (1990). The distinction should remain because it existed at common law even apart from later First Amendment doctrine. See also* Hustler Magazine v. Falwell, *485 U.S. 46 (1988). Subsection 2(C) would protect researchers, such as Dr. William Shockley, if their controversial or even loathsome conclusions or opinions are based on true facts. As long as a third-party reader or listener can evaluate the reasonableness of the conclusion or opinion based on the disclosed true facts, the marketplace of ideas needs no state intervention. Subsection (E) is designed to protect against disingenuous attempts to disguise group defamation as individual defamation, such as the symbolic use of "The Wandering Jew" to represent all Jews. Yet, most individual defamation will not amount to group defamation, such as the accusation that a particular Italian-American is a "Mafia hitman."*

SECTION 3: PROPER PLAINTIFFS

(A) The Attorney General of this State is authorized to bring an action under this Act.

(B) The only other party, or parties, authorized to bring an action under this Act is a proper representative, or representatives, expressly selected from the aggrieved racial or ethnic group by the Attorney General in his or her sole discretion and only if the Attorney General expressly relinquishes his or her primary authority to bring an action.

(C) Any representative or representatives selected by the Attorney General pursuant to Section 3(B) shall have the same standing to bring an action under this Act as would the Attorney General.

Comment: *This is based in part on a Massachusetts criminal libel statute, which provides that statutory actions for libel*

based on "race, color or religion" are instituted "only by the attorney general or by the district attorney for the district in which the alleged libel was published." M.G.L.A. 272 § 98 C. Since the reforms of 1990, French law permits certain associations in existence for five years and organized to defend the Resistance and concentration camp inmates to initiate criminal proceedings involving war crimes, crimes against humanity, criminal collaboration, and legal proceedings brought against those who deny the Nazi Holocaust against Jews. UNDER THE SHADOW OF WEIMAR 47 (Louis Greenspan & Cyril Levitt eds., 1993). This Act attempts to combine both approaches by allowing the Attorney General to control the action so as to prevent frivolous or borderline claims but also to allow representatives of the affected racial or ethnic group, who would be the most motivated, to bring the action. Political realities might also lead an Attorney General to turn the action over to designated racial or ethnic representatives.

SECTION 4: SOLE REMEDY

(A) The sole and appropriate remedy under this Act shall be an action for declaratory judgment, whether or not such a remedy would be appropriate under any other law of this state, and no other relief, including monetary damages, temporary restraining orders, or injunctions either permanent or temporary, shall be awarded.

(B) Either party shall have the right to a jury, and if such right is invoked, the judge shall enter a declaratory judgment in accordance with the jury verdict.

(C) This Act does not abolish or restrict any remedies that might otherwise exist under the common law or statutory law of this state.

Comment: *The* Restatement (Second) of Torts *§ 623, the Libel Reform Project of the Annenberg Washington Program, H.R. 2846, 99th Congress (1985), and other reforms in the 1980s offered a declaratory approach as an alternative to money damages in a civil defamation action, even though they were not concerned with group defamation. As for Subsection 4(B), the predominant view is that declaratory actions historically preceded equitable actions and are largely governed by statutes in modern times. 1 Walter H. Anderson, Actions for Declaratory Judgments, § 1, at 1 ("older than the equitable system of jurisprudence"). Thus, no tradition would suggest that a jury not be available. Indeed, the community sense of what constitutes a discrediting statement to reputation, whether*

individual or group, is particularly suitable for jury resolution. Defamation is one of a few tort actions where England still normally permits juries. 37 Halsbury's Laws of England para. 1075 (4th ed. Reissue, Butterworth Lexis Nexis 2001) (juries permitted to hear claims of fraud, defamation, malicious prosecution, and false imprisonment). In case of a bench trial, the judge would, of course, need to find defamation before issuing a declaratory judgment.

SECTION 5: TRUTH

Substantial truth shall constitute a complete defense to any alleged defamation under this Act, but the burden of proving the truth of the alleged defamation shall be borne by the defendant.

Comment: *Public officials and public figures who sue for defamation must allege and prove the falsity of the statement. Even private plaintiffs who are a subject of public concern must prove falsity.* Philadephia Newspapers v. Hepps, *476 U.S. 767 (1986). Whether or how the Supreme Court would classify a racial or ethnic group within these categories of plaintiffs is not completely clear. But this constitutional mandate requiring such plaintiffs to prove falsity rather than a defendant to prove truth as an affirmative defense arose only in the context of a defamation action for money damages with a potential chilling of First Amendment rights. Section 5 represents the traditional common law unaffected by First Amendment considerations.*

SECTION 6: STATE OF MIND

The defendant's state of mind at the time of uttering any defamation under this Act, whether it be with knowledge or reckless disregard of a defamatory statement's falsity or negligence in failing to use reasonable care before uttering any defamation or any other state of mind, is irrelevant under this Act and shall constitute neither an element of a claim nor of a defense.

Comment: *New York Times "actual malice" has spawned extensive litigation. Since this constitutional rule has only been applied to defamation lawsuits seeking damages, the disadvantages of the rule can be avoided. For example, editors will no longer be forced to reveal their internal thought process in depositions seeking to establish "actual malice" and to that extent will enjoy greater freedom of thought and expression.* Herbert v. Lando, *441 U.S. 153 (1979) (money damages).*

SECTION 7: CLASSIFICATION OF DEFAMATION

The common law categories of defamation *per se* or defamation *per quod* are abolished insofar as this Act is concerned, and only the general meaning of defamation under the common law is to be used.

> Comment: *The sometimes bizarre and historically hoary distinctions between defamation per se and defamation per quod, which have generated much criticism, would be bypassed. Like the bypassing of* New York Times *"actual malice," this will expedite the trial of a defamation action under this model statute. The distinctions should still be kept in the typical defamation action involving individuals.*

SECTION 8: PRIVILEGES

Any privileges, be they absolute or conditional, that exist under the common or statutory law of this state remain as defenses under this Act, except that any defense based on the common law of fair comment is subject to Section 2(C) of this Act.

> Comment: *Because money damages are not involved under this Act, it might be argued that the privileges should not apply. However, the privileges typically represent social interests that are considered to offset what otherwise would be a defamatory statement. It would seem that these social interests should still be paramount, even where only a declaratory judgment is requested. The privilege of fair comment has been virtually swallowed up by* New York Times v. Sullivan, *376 U.S. 254 (1964),* Gertz v. Robert Welch, Inc., *418 U.S. 323 (1974), and their numerous offspring. But given that New York Times and Gertz do not apply under this Act, the qualified privilege of fair comment may spring back into use. Its use, however, is modified in Section 2(C) as required by* Lorain Journal Co. v. Milkovich, *497 U.S. 1 (1990) in its constitutional parsing of actionable and non-actionable opinions.*

SECTION 9: DEMAND FOR RETRACTION, CORRECTION, OR RIGHT OF REPLY

(A) No action for defamation shall be commenced against any defendant unless the complaint alleges that a timely demand for a full and fair retraction or a timely demand for a correction or a timely demand for a full and fair opportunity to reply on behalf of the affected racial or ethnic group was reasonably made and either

refused or ignored.

(B) If a defendant agrees to provide an opportunity to reply to the alleged defamation, as provided in Section 9(A), this agreement shall include the right of access to and use of the defendant's facilities that were originally used to communicate the alleged defamation to the end that the reply may as far as possible reach the same audience that heard the alleged defamation, unless the Attorney General or the representatives designated by the Attorney General waive this right of access and use.

(C) It is an absolute defense that a defendant has reasonably offered a full and fair opportunity to reply under Section 9(A) when an opportunity to reply has been demanded or has reasonably offered or made the demanded correction or a mutually agreed correction when a correction has been demanded.

(D) It is an absolute defense that a defendant has offered or made a full and fair retraction, whether the Plaintiff has demanded either a retraction, a correction, or an opportunity to reply.

> Comment: *This section is based on the Uniform Correction Or Clarification Of Defamation Act and the North Dakota version of that Act. N.D. Cent.Code § 32–43–05 (1995). By counteracting any harm by the devices of retraction or correction, litigation can be reduced. The right of reply and use of a media defendant's facilities avoids the constitutional limitations of* Miami Herald Pub. Co. v. Tornillo, *418 U.S. 241 (1974) because the right to reply would remain the choice of the media defendant. This avoids the prohibited forced intrusion into editorial judgment and editorial control over media publications. See* Miami Herald Pub. Co. v. Tornillo, *418 U.S. 241 (1974).*

SECTION 10: LEGAL ENTITIES

(1) Corporations, partnerships, and all legal entities other than natural persons, whether for profit or not-for-profit, shall not be deemed a racial or ethnic group, even though the protection of such groups may be within their corporate purpose.

(2) Such corporations, partnerships, and all other artificial persons at law retain whatever rights they have under the common or statutory law of this state to sue for defamation of the corporate person, and they may be designated as a representative of an affected racial or

ethnic group at the sole discretion of the Attorney General.

> Comment: *This avoids the claim that the Act will protect a single legal entity organized for racial or ethnic purposes on the ground that, though legally it is one artificial person, it actually represents a racial or ethnic group, such as Operation Push or the Polish National Alliance. The Act should protect living individuals from the indignity and insult of racial or ethnic defamation, whether or not they are organized into a legal entity.*

SECTION 11: STATUTE OF LIMITATIONS

Any cause of action brought under this Act shall be brought within one year after the cause of action accrues.

> Comment: *A one-year limitation is common for defamation actions. The short period is further protection against less meritorious claims or evidence impaired by the passage of time. A "discovery rule," which would extend the time for filing to a period within one year after knowledge of the defamation or after knowledge should reasonably have been acquired, has been omitted. It is most unlikely that a racial or ethnic defamation of any significance would escape the attention of the Attorney General, given the numerous interested members of a racial or ethnic group who would immediately report the defamation to the Attorney General. In any case, the discovery rule generally has been confined to medical malpractice cases.*

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