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“THEY SAY HE’S GAY”: THE ADMISSIBILITY OF EVIDENCE OF SEXUAL ORIENTATION

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I. INTRODUCTION

In the past decade, there has been a steady stream of high-profile cases involving, either directly or indirectly, issues of sexual orientation. Matthew Shepard, a gay student at the University of Wyoming, was murdered by two men who unsuccessfully attempted to invoke the “gay panic defense.”¹ Thousands of gay servicemembers have been discharged from the military based on their sexual orientation.² Diane Whipple, a lesbian in San Francisco, was killed

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¹ See *State v. McKinney*, Crim. Action No. 6381 (2d Jud. Dist. Ct., Albany County, Wyo. Oct. 30, 1999).

² See, e.g., *Steffan v. Perry*, 41 F.3d 677, 677 (D.C. Cir. 1994) (involving challenge to Department of Defense policy by openly gay Naval midshipman).

by a neighbor's dog,³ and counsel for the defense brought up the victim's sexual orientation at trial.⁴ Tom Cruise brought a defamation suit against a gay pornography actor who publicly stated that Cruise was gay and involved in a relationship with him.⁵

The press is relatively free to report all the titillating details about such cases, without regard to the logical relevance such details have to the case or the fact that their source is reporting the information secondhand. Yet ultimately, these news stories are all about trials that require the introduction of evidence that must conform to longstanding, formal rules.

Thus, when the forum is shifted from the court of public opinion to an actual courtroom, the unfiltered details that we read or hear about in the popular press must be sifted through the rules of evidence to weed out those details which, in the view of the drafters of the rules, are irrelevant, prejudicial, or of suspect reliability. However, any attempt to present the facts of these cases in a manner that conforms with the rules of evidence raises challenging doctrinal questions. These questions become all the more apparent when one considers that the modern rules of evidence were developed at a time when issues of sexual orientation were rarely discussed publicly, let alone litigated.

For example, when, if ever, is the sexual orientation of a victim, party, or witness "relevant" under the rules of evidence? Even if plausibly relevant, when should such evidence be excluded as prejudicial? Is a person's sexual orientation a form of "sexual predisposition," and thus evidence of the same, subject to exclusion under the rape-shield rule? Can a judge adjudicating a custody battle take judicial notice of the "fact" that being raised by a gay parent is detrimental to a child, or the "fact" that being raised by a gay parent is *not* detrimental to a child?

Moreover, assuming that evidence of a person's sexual orientation is relevant and not deemed prejudicial, how exactly does one go about proving that orientation? Is a lay witness qualified to give his opinion, based on his observations of a person, as to that person's

³ See *People v. Knoller*, No. 181813 (Super. Ct. for City & County of S.F. Mar. 27, 2001).

⁴ John Gallagher, *Homophobia for the Defense*, *ADVOCATE*, May 14, 2002, at 34-37.

⁵ See *Cruise v. Slater*, No. BG249690 (Super. Ct. for County of L.A. May 2, 2001).

sexual orientation? Is a declaration by a person that he is gay hearsay? And if so, does it fall into any of the recognized exceptions to the hearsay rule? Is a person's revelation of her sexual orientation to her physician or psychotherapist privileged? Moreover, evidence of sexual orientation itself aside, can a person invoke either of the spousal privileges when called as a witness against his same-sex partner?

These questions and others relating to the intersection between sexual orientation and the rules of evidence are given only perfunctory treatment in the case law, and virtually no consideration in the academic literature. This Article seeks to fill the existing gap. Part II of this Article discusses the ways in which the sexual orientation of a victim, party, or witness is relevant within the meaning of Federal Rule of Evidence 401 and its state-law analogues,⁶ as well as when such evidence, although relevant, is nonetheless excluded due to its potential prejudicial impact.⁷ Part III of this Article examines the hearsay rule and its exceptions to determine when, if ever, a person's assertion that he is gay can be admitted into evidence.⁸ Part IV of this Article discusses the applicability of the spousal privileges to same-sex couples,⁹ the protection afforded to conversations that gays and lesbians have with their physicians and psychotherapists about their sexual orientation,¹⁰ and one's ability to invoke the privilege against self-incrimination when asked about his sexual orientation.¹¹ Part V of this Article examines the rules governing the qualifications of witnesses to give opinion testimony,¹² including the admissibility of expert testimony on the "gay panic defense"¹³ and the ability of lay witnesses to give their opinion as to a person's sexual orientation.¹⁴ Part VI of this Article discusses

⁶ Because most state court rules of evidence are modeled after the federal rules, this Article focuses on the text and interpretation of the federal rules, noting where appropriate significant variations in state practice.

⁷ See *infra* notes 18-342 and accompanying text.

⁸ See *infra* notes 343-441 and accompanying text.

⁹ See *infra* notes 458-92 and accompanying text.

¹⁰ See *infra* notes 442-46 and accompanying text.

¹¹ See *infra* notes 447-57 and accompanying text.

¹² See *infra* notes 493-548 and accompanying text.

¹³ See *infra* notes 528-48 and accompanying text.

¹⁴ See *infra* notes 493-527 and accompanying text.

substitutes for evidence,¹⁵ including judicial notice of facts about gays and lesbians¹⁶ as well as legal presumptions about gays and lesbians.¹⁷

This Article concludes that the questions raised in many of these cases, although novel and often with little or any precedent, can be answered by examining the policies underlying the implicated rules of evidence. Furthermore, judges, in ruling on the admissibility of evidence regarding a person's sexual orientation, should exercise caution to ensure that their rulings do not reinforce existing, inaccurate stereotypes about gays and lesbians or create a risk that jurors will decide cases based on an improper use of such evidence.

II. THE RELEVANCE OF SEXUAL ORIENTATION

A. BACKGROUND ON RELEVANCE, PREJUDICE, CHARACTER EVIDENCE, AND THE RAPE-SHIELD RULE

The ordinary starting point for determining the admissibility of any item of evidence is to assess its relevancy.¹⁸ Federal Rule of Evidence 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."¹⁹ Rule 401 can be thought of as consisting of two prongs, a materiality prong and a probative worth prong, both of which must be satisfied for a piece of evidence to be deemed "relevant."²⁰

The materiality prong is encompassed by the language in the rule referring to "any fact that is *of consequence* to the determination of

¹⁵ See *infra* notes 549-90 and accompanying text.

¹⁶ See *infra* notes 549-73 and accompanying text.

¹⁷ See *infra* notes 574-90 and accompanying text.

¹⁸ See, e.g., *United States v. Schneider*, 111 F.3d 197, 202 (1st Cir. 1997); *United States v. Robinson*, 560 F.2d 507, 519 (2d Cir. 1977).

¹⁹ FED. R. EVID. 401.

²⁰ Although the text of the rule no longer contains the common law term "materiality," see FED. R. EVID. 401 advisory committee's note, the phrase is nonetheless convenient in distinguishing between the two different aspects of relevancy under the federal rules. See, e.g., CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *EVIDENCE UNDER THE RULES: TEXT, CASES, AND PROBLEMS* 62 (4th ed. 2000); MCCORMICK ON EVIDENCE § 185 (John W. Strong ed., 5th ed. 1999).

the action,” which requires an analysis of the underlying substantive claim or offense to determine the elements and any defenses.²¹ For example, in a proceeding brought by an employee injured on the job pursuant to a state worker’s compensation statute, evidence that the employee was acting in a negligent manner when he was injured would be immaterial, and hence irrelevant, because such statutes ordinarily provide compensation without regard to fault. Thus, the employee’s contributory negligence is not a recognized defense, and evidence supporting that defense is accordingly not “of consequence.”²² Relevance, therefore, is not an inherent characteristic of an item of evidence, but instead a relational concept that turns on the relationship between an item of evidence and a matter properly proved in the case.²³

In addition, the credibility of witnesses is always deemed material.²⁴ Furthermore, evidence that otherwise might not be material may nonetheless be admitted in rebuttal if the other party “opens the door” by first introducing evidence on that point.²⁵

The probative worth prong sets an extremely low standard, requiring that the evidence only have “*any* tendency” to make the existence of a material fact “more probable or less probable than it would be without the evidence.”²⁶ As the rulemakers point out, “[a] brick is not a wall,” and “[i]t is not to be supposed that every witness can make a home run,” making a low standard appropriate.²⁷ However, having “relevant” evidence within the meaning of Rule 401 is only a necessary threshold, and not a sufficient condition, for admitting evidence. Although Rule 402 clearly states that irrelevant evidence is inadmissible,²⁸ it does not quite say that the opposite is

²¹ JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S FEDERAL EVIDENCE § 401.04(3)(b), at 401-32 to 401-34 (2d ed. 1997 & Supp. 2002) (emphasis added); *see also* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 4.2, at 174 (2d ed. 1999).

²² ERIC D. GREEN ET AL., PROBLEMS, CASES, AND MATERIALS ON EVIDENCE 13 (3d ed. 2000).

²³ FED. R. EVID. 401 advisory committee’s note.

²⁴ WEINSTEIN & BERGER, *supra* note 21, § 401.04(4)(b), at 401-38 to 401-40.

²⁵ MUELLER & KIRKPATRICK, *supra* note 21, § 4.2, at 175-76.

²⁶ WEINSTEIN & BERGER, *supra* note 21, § 401.04(2)(c)(i), at 401-22.1; MUELLER & KIRKPATRICK, *supra* note 21, § 4.2, at 170-71.

²⁷ FED. R. EVID. 401 advisory committee’s note.

²⁸ FED. R. EVID. 402 (“Evidence which is not relevant is not admissible.”).

true. Rather, relevant evidence is presumptively admissible, unless “otherwise” excludable under the rules of evidence.²⁹

Rule 403 is chief among the rules under which relevant evidence might “otherwise” be excluded; it provides for the exclusion of evidence, although relevant, “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”³⁰ It is thus said that “[Rule] 401 giveth, but [Rule] 403 taketh away,” in that the fairly liberal standard of Rule 401, which is satisfied by evidence having even slight probative worth, is offset by Rule 403, which provides for the exclusion of evidence when its probative worth is outweighed by certain dangers and practical considerations.³¹ In effect, Rule 403 requires the judge to conduct a cost-benefit analysis in which she weighs the probative worth of the evidence against any undesirable side effects of admitting the evidence,³² although the requirement that the evidence be excluded only where its probative force is “*substantially* outweighed” by other considerations tilts the balance in favor of admissibility in most cases.³³ Moreover, in deciding whether to exclude evidence pursuant to Rule 403, courts consider the availability of alternative forms of proof that might be less prejudicial,³⁴ as well as the efficacy of giving a limiting instruction in lieu of excluding the evidence.³⁵

Because virtually all evidence is by its nature “prejudicial” to the party against whom it is admitted in that it negatively impacts that party’s position in the case (indeed, that is why the opposing party usually offers the evidence), Rule 403 provides that prejudice alone will not suffice to exclude the evidence; rather, the prejudice must be “unfair.”³⁶ Thus, “[u]nfair prejudice under Rule 403 does not mean

²⁹ *Id.* (“All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority.”).

³⁰ FED. R. EVID. 403.

³¹ MUELLER & KIRKPATRICK, *supra* note 20, at 82-83.

³² WEINSTEIN & BERGER, *supra* note 21, § 403.02(1)(a), at 403-06.

³³ MUELLER & KIRKPATRICK, *supra* note 21, § 4.9, at 190 (emphasis added).

³⁴ *Old Chief v. United States*, 519 U.S. 172, 184 (1997); *see also* FED. R. EVID. 403 advisory committee’s note.

³⁵ FED. R. EVID. 403 advisory committee’s note.

³⁶ WEINSTEIN & BERGER, *supra* note 21, § 403.04(1)(a), at 403-33; MUELLER &

the damage to a defendant's case that results from the *legitimate* probative force of the evidence."³⁷ Rather, "unfair prejudice" is defined as "an undue tendency to suggest decision on an *improper* basis, commonly, though not necessarily, an emotional one."³⁸ Under this provision, evidence can be excluded where it is inflammatory or sensational, unfairly puts the party in a negative light, or appeals to the jury's prejudices.³⁹ In the context of a criminal case involving evidence offered against the defendant, the concept "speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged."⁴⁰

Because the focus of Rule 403 is on the effect that admitting the evidence will have on the jury's decisionmaking process, it does not concern itself with potential harm to nonparties, such as witnesses, who may be placed in a bad light in the eyes of the jury or the community.⁴¹ Federal Rule of Evidence 611(a)(3) does, however, address potential harm to witnesses, providing that "[t]he court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to . . . protect witnesses from harassment or undue embarrassment."⁴²

Rule 403 is written in general terms, and trial court judges are given broad leeway in applying its balancing test; it is subject to review only for abuse of discretion and is rarely reversed on appeal.⁴³ However, certain types of evidence are offered with sufficient regularity that the drafters of the Federal Rules of Evidence enacted a series of rules, specifically Rules 404 through 412, which constrain

KIRKPATRICK, *supra* note 21, § 4.10, at 194.

³⁷ WEINSTEIN & BERGER, *supra* note 21, § 404.21(3)(b), at 404-68 (emphasis added).

³⁸ FED. R. EVID. 403 advisory committee's note (emphasis added).

³⁹ MUELLER & KIRKPATRICK, *supra* note 21, § 4.10, at 195.

⁴⁰ *Old Chief v. United States*, 519 U.S. 172, 180 (1997).

⁴¹ See FED. R. EVID. 412(b) advisory committee's note (noting that Rule 412 differs from Rule 403 in that it "puts 'harm to the victim' on the scale in addition to prejudice to the parties").

⁴² FED. R. EVID. 611(a)(3); *accord* *United States v. Colyer*, 571 F.2d 941, 946 n.7 (5th Cir. 1978); *State v. McDonough*, 507 A.2d 573, 575 & n.1 (Me. 1986).

⁴³ MUELLER & KIRKPATRICK, *supra* note 21, § 4.9, at 193-94; WEINSTEIN & BERGER, *supra* note 21, § 403.02(2)(d), at 403-21 to 403-24.

the discretion of judges by categorically excluding certain types of evidence when offered for particular purposes.⁴⁴

One such categorical rule of exclusion deals with the admission of “character” evidence. Rule 404(a) generally provides that “[e]vidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity therewith.”⁴⁵ The term “character” refers to “a person’s disposition or propensity to engage or not engage in various forms of conduct,” such as a propensity to be truthful, dishonest, reckless, careful, peaceable, or violent.⁴⁶

The theory behind Rule 404 is that, although a person’s propensities are a useful measure of *likely* behavior patterns over a period of time, they are less accurate when used to decide what actually happened on a *particular* occasion because people don’t *always* act in accordance with their propensities.⁴⁷ Thus, such evidence “is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge.”⁴⁸

⁴⁴ See FED. R. EVID. 401 advisory committee’s note (“[S]ome situations recur with sufficient frequency to create patterns susceptible of treatment by specific rules. Rule 404 and those following it are of that variety; they also serve as illustrations of the application of the present rule as limited by the exclusionary principles of Rule 403.”).

⁴⁵ FED. R. EVID. 404(a).

⁴⁶ MUELLER & KIRKPATRICK, *supra* note 21, § 4.11, at 201-02. Character differs from reputation in that character is what a person is, whereas reputation refers to what other people think a person is. WEINSTEIN & BERGER, *supra* note 21, § 404.02(1), at 404-08. However, evidence of a person’s reputation is one way of attempting to prove his character. MUELLER & KIRKPATRICK, *supra* note 21, at 246 n.3.

⁴⁷ MUELLER & KIRKPATRICK, *supra* note 21, § 4.11, at 203.

⁴⁸ *Michelson v. United States*, 335 U.S. 469, 475-76 (1948); FED. R. EVID. 404 advisory committee’s note:

Character evidence . . . tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened.

Id.; see also MUELLER & KIRKPATRICK, *supra* note 21, § 4.11, at 203-04:

Freely admitting evidence of past conduct would also divert the jury’s attention from the issue of what he did on the occasion in dispute to what he did at other times in the past. A defendant would be forced not only to answer the allegations in the indictment or complaint but to defend his entire personal history.

Notwithstanding the general bar on the admission of “character” evidence set forth in Rule 404(a),⁴⁹ there are several ways of circumventing the rule. The first is through a series of explicit exceptions set forth in the Federal Rules, which essentially provide that character evidence *may* in certain circumstances be offered to show action in conformity therewith.

The first explicit exception is set forth in Rule 404(a)(1), which provides that in criminal cases,⁵⁰ the accused may offer evidence of a “pertinent” trait of his own character—meaning one that is somehow relevant⁵¹—to support an inference that it was unlikely that he committed the offense.⁵² This includes, for example, evidence of a criminal defendant’s peaceable disposition when charged with having committed a violent crime.⁵³ Once the defendant offers evidence of a pertinent trait, however, he opens himself to rebuttal evidence by the prosecution on that same trait of character.⁵⁴

Normally, the prosecution is barred from offering evidence of the defendant’s character to show action in conformity therewith under Rule 404(a)(1), unless the defendant has first raised the issue of his character.⁵⁵ However, the Federal Rules provide two exceptions to this general rule. First, Rules 413, 414, and 415 implicitly amend Rule 404(a)(1) in civil and criminal cases involving sexual assault or child molestation; they allow for the admission of evidence of the defendant’s prior acts of sexual assault or child molestation for the purpose of allowing the jury to draw a propensity inference from prior conduct to the present case, even though the defendant has not raised the issue of his own character in this regard.⁵⁶ Second, if the

Id.

⁴⁹ FED. R. EVID. 404(a).

⁵⁰ Although not explicitly set forth in the text of the rule, the fact that Rule 404(a)(1) and Rule 404(a)(2) make reference to the “accused” and the “victim” are thought to limit these exceptions to criminal cases. WEINSTEIN & BERGER, *supra* note 21, § 404.11(1), at 404-17 to 404-19.

⁵¹ WEINSTEIN & BERGER, *supra* note 21, § 404.11(2)(a), at 404-21.

⁵² FED. R. EVID. 404(a)(1).

⁵³ MUELLER & KIRKPATRICK, *supra* note 21, § 4.12, at 205.

⁵⁴ FED. R. EVID. 404(a)(1).

⁵⁵ MUELLER & KIRKPATRICK, *supra* note 21, § 4.12, at 206.

⁵⁶ *Id.* § 4.35, at 311. These rules should not allow for the admission of any evidence related to the defendant’s prior instances of *consensual* homosexual activity, even if he was

defendant introduces evidence of a character trait of the *victim* pursuant to Rule 404(a)(2), as discussed below,⁵⁷ he opens himself to the introduction by the prosecution of evidence of the same trait of his *own* character.⁵⁸

The second explicit exception is set forth in Rule 404(a)(2), which provides that, in criminal cases, the defendant may offer evidence of a pertinent trait of character of the victim to show action in conformity therewith.⁵⁹ For example, in a homicide or assault case, evidence of the victim's character trait of violence or aggression may be introduced to support the defendant's claim that he acted in self-defense. Such evidence is thought to make it more likely that the victim was using unlawful force at the time of the incident, thus justifying the defendant's act in self-defense.⁶⁰ If the defendant introduces such evidence, he opens himself to rebuttal evidence by the prosecution on that same character trait of the victim, and as discussed above,⁶¹ on the same trait of his own character.⁶² Moreover, although the prosecution normally cannot introduce evidence of a pertinent trait of the victim's character until the defense has first introduced such evidence,⁶³ the prosecution in a homicide case is allowed to introduce such evidence if the defendant presents *any* evidence that the victim was the first aggressor.⁶⁴

Standing alone, Rule 404(a)(2) could be construed in cases involving date rape as allowing evidence of the victim's character for consenting to sex with other people into evidence to support a propensity inference that the victim likely consented on the occasion in question.⁶⁵ However, Rule 412 effectively modifies Rule 404(a)(2),⁶⁶ providing that, with certain exceptions, evidence offered

convicted under sodomy laws that cover consensual activity, because the definition of an "offense of sexual assault" refers to instances of sexual contact *without* consent. FED. R. EVID. 413(d) (emphasis added).

⁵⁷ See *infra* notes 59-64 and accompanying text.

⁵⁸ FED. R. EVID. 404(a)(1).

⁵⁹ FED. R. EVID. 404(a)(2).

⁶⁰ WEINSTEIN & BERGER, *supra* note 21, § 404.11(3)(a), at 404-29.

⁶¹ See *supra* notes 57-58 and accompanying text.

⁶² FED. R. EVID. 404(a)(2).

⁶³ MUELLER & KIRKPATRICK, *supra* note 21, § 4.13, at 212.

⁶⁴ FED. R. EVID. 404(a)(2).

⁶⁵ MUELLER & KIRKPATRICK, *supra* note 21, § 4.32, at 295.

⁶⁶ *Id.*

to prove “that any alleged victim engaged in other sexual behavior” or to prove “any alleged victim’s sexual predisposition” is not admissible in any civil or criminal proceeding “involving alleged sexual misconduct.”⁶⁷ The policy behind the rule is that such evidence has fairly low probative value on the issue of consent, but can be used to harass and embarrass victims, making them less likely to report rapes or pursue prosecutions.⁶⁸ Rule 412 applies without regard to whether the alleged victim is a party to the litigation.⁶⁹ It does not, however, apply to cases not “involving alleged sexual misconduct.”⁷⁰

The phrase “sexual behavior” refers to all activities that involve actual physical conduct, such as sexual intercourse or contact; those activities that imply sexual intercourse or sexual contact, such as evidence of use of contraceptives, birth of an illegitimate child, or a venereal disease; and even activities of the mind, such as fantasies or dreams⁷¹ and viewing pornography.⁷² The phrase “sexual predisposition” refers to any evidence that “may have a sexual connotation for the factfinder,” such as evidence relating to the “victim’s mode of dress, speech, or life-style.”⁷³

However, in criminal cases, there are the following three exceptions to the general rule set forth in Rule 412 under which this evidence is admissible: evidence of specific instances of sexual behavior by the victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence; evidence of specific instances of sexual behavior⁷⁴ by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent *or by the prosecution*; and evidence the exclusion of which would violate the defendant’s constitutional rights.⁷⁵ And in civil cases, evidence of any victim’s

⁶⁷ FED. R. EVID. 412(a).

⁶⁸ MUELLER & KIRKPATRICK, *supra* note 21, § 4.32, at 295-96.

⁶⁹ FED. R. EVID. 412 advisory committee’s note.

⁷⁰ *Id.*

⁷¹ FED. R. EVID. 412(a) advisory committee’s note.

⁷² *Wolak v. Spucci*, 217 F.3d 157, 160 (2d Cir. 2000).

⁷³ FED. R. EVID. 412(a) advisory committee’s note.

⁷⁴ This exception includes not only specific sexual activities, but also statements in which the victim expressed an intent to engage in sexual intercourse with the accused, or voiced sexual fantasies involving the accused. FED. R. EVID. 412(b) advisory committee’s note.

⁷⁵ FED. R. EVID. 412(b)(1).

sexual behavior or sexual predisposition is admissible if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party, with evidence of the victim's reputation admissible only if the victim has first placed that reputation in controversy.⁷⁶

A second way of circumventing Rule 404 is to offer evidence of a person's character trait not to show that a person acted in conformity with that character trait on a particular occasion, but instead because such evidence goes to an element of a crime, claim, or defense.⁷⁷ This might occur in a wrongful death case in which the issue of damages is an element of the claim and the victim's character may be relevant to the issue of damages. For example, the victim may have had a character for excessive drinking that shortened his life expectancy or reduced his likelihood of being gainfully employed and thus affected his expected future earnings.⁷⁸ Another example is a defamation action in which truth is raised as a defense, such as where the defamation action is premised on a statement that the plaintiff is a thief, and evidence is offered to show that the statement is true.⁷⁹

A third way of circumventing Rule 404 is via Rule 404(b), which acknowledges that "[e]vidence of other crimes, wrongs, or acts"⁸⁰ is not admissible to prove the character of a person in order to show

⁷⁶ FED. R. EVID. 412(b)(2).

⁷⁷ MUELLER & KIRKPATRICK, *supra* note 21, § 4.20, at 245-49; WEINSTEIN & BERGER, *supra* note 21, § 404.10(2), at 404-12 to 404-13; *see also* FED. R. EVID. 404(a) advisory committee's note ("Character may itself be an element of a crime, claim, or defense No problem of the general relevancy of character evidence is involved, and the present rule therefore has no provision on the subject.").

⁷⁸ MUELLER & KIRKPATRICK, *supra* note 20, at 478-79; WEINSTEIN & BERGER, *supra* note 21, § 404.10(2), at 404-14 to 404-15.

⁷⁹ MUELLER & KIRKPATRICK, *supra* note 20, at 478.

⁸⁰ Such "other crimes, wrongs, or acts" need not be criminal nor unlawful, and the acts may have occurred either before or after the conduct at issue in the case. MUELLER & KIRKPATRICK, *supra* note 21, § 4.15, at 216; WEINSTEIN & BERGER, *supra* note 21, § 404.20(2)(a), at 404-36 to 404-37. Moreover, the other act need not have resulted in a conviction or a formal charge, and indeed can be admitted even if the defendant was brought up on charges and acquitted, or pleaded *nolo contendere*. MUELLER & KIRKPATRICK, *supra* note 21, § 4.15, at 217-18; WEINSTEIN & BERGER, *supra* note 21, § 404.21(2)(b), at 404-53 to 404-54. Before admitting such evidence, the court must make a finding, pursuant to Rule 104(b), that a reasonable jury could find by a preponderance of the evidence that the defendant committed the other crime, wrong, or act. *Huddleston v. United States*, 485 U.S. 681, 689-91 (1988); *see also* FED. R. EVID. 104(b).

action in conformity therewith,” but that such evidence may be admissible in other instances where it is not being used to support a character inference, including as “proof of motive, opportunity, intent,⁸¹ preparation, plan, knowledge,⁸² identity,⁸³ or absence of mistake or accident.”⁸⁴ To be admitted under this proviso, the evidence must be relevant to an issue *other than* character or the defendant’s propensity to commit the charged offense, and it also must satisfy the balancing test of Rule 403.⁸⁵

In addition to making use of Rule 404(a)(2) to show the victim’s propensity for violent behavior, as discussed above,⁸⁶ there are two ways under Rule 404(b) in which such evidence may be admitted. First, evidence of prior threats or hostile behavior by the victim may be introduced under Rule 404(b) to prove the victim’s intent or plan to harm the defendant, which could support a claim of self-defense.⁸⁷ Second, the defendant can offer evidence of the victim’s prior

⁸¹ Evidence of prior incidents often is admitted under Rule 404(b) to prove intent, the idea being that after being involved in a number of similar incidents, the defendant must have a mental state that is inconsistent with innocence, accident, or inadvertence. WEINSTEIN & BERGER, *supra* note 21, § 405.22(1)(a), at 404-70 to 404-75. However, such evidence is not admissible if the defendant’s intent is not a genuine issue in the case, as where the defendant stipulates that the perpetrator acted with the requisite mental state but denies that he was the perpetrator, MUELLER & KIRKPATRICK, *supra* note 21, § 4.17, at 229-30, or presumably, where the crime charged requires no showing of any particular mental state, as in strict liability crimes such as statutory rape. See *Louisiana v. Frenzt*, 354 So. 2d 1007, 1009 (La. 1978); *Wisconsin v. Rushing*, 541 N.W.2d 155, 161 (Wis. 1995); cf. *Missouri v. Ermatinger*, 752 S.W.2d 344, 345-49 (Mo. 1988) (finding evidence of victim’s consent irrelevant because consent is not issue when alleged victim is minor).

⁸² Evidence of prior incidents is admitted under Rule 404(b) to prove knowledge, where the defendant claims that he was unaware that a criminal act was being perpetrated. The idea is that the likelihood of repeated instances of behavior, even if originally innocent, will have resulted in the defendant’s having the requisite state of knowledge by the time of the crime. WEINSTEIN & BERGER, *supra* note 21, § 404.22(2), at 404-93 to 404-97.

⁸³ Evidence of other crimes may be admitted to show the defendant’s identity as the perpetrator of the crime. *Id.* at 404-108.1 to 404-108.5; see also MUELLER & KIRKPATRICK, *supra* note 21, § 4.17, at 227. Often, this is accomplished by establishing a distinctive modus operandi, sometimes referred to as a “signature,” that the defendant has employed in prior crimes, and showing that the present crime displays a similar “signature.” MUELLER & KIRKPATRICK, *supra* note 21, § 4.17, at 232-33; WEINSTEIN & BERGER, *supra* note 21, § 404.22(5)(c), at 404-121 to 404-123.

⁸⁴ FED. R. EVID. 404(b). This list is meant to be illustrative, not exhaustive. MUELLER & KIRKPATRICK, *supra* note 21, § 4.15, at 214; *id.* § 4.18, at 233-37; WEINSTEIN & BERGER, *supra* note 21, § 405.20(1), at 404-34.

⁸⁵ WEINSTEIN & BERGER, *supra* note 21, § 405.21(1)(a), at 404-46.5.

⁸⁶ See *supra* notes 59-64 and accompanying text.

⁸⁷ MUELLER & KIRKPATRICK, *supra* note 21, § 4.18, at 236.

instances of violent behavior, coupled with evidence that the defendant had knowledge of such prior instances, to support a self-defense claim and an assertion that the defendant acted reasonably based on his knowledge of how the victim behaved in the past.⁸⁸

A fourth way of circumventing Rule 404(a) is to persuade the court that the evidence is not that of character, but instead that of habit. Unlike character evidence, which normally cannot be admitted to prove action in conformity therewith, Rule 406 provides for the admission of evidence of a person's habit to prove action in conformity with that habit.⁸⁹ Habit evidence differs from character evidence in that the former is a regular, semiautomatic or unreflective response to a repeated specific situation.⁹⁰ An example of "habit" includes going down a particular stairway two stairs at a time.⁹¹

Assuming that evidence of a person's character or trait of character is admissible for one of the reasons set forth above, Rule 405 regulates the manner in which evidence of the person's character or trait of character may be proven. As a general rule, Rule 405(a) allows for proving character only by way of reputation or opinion testimony as to a person's character, not by way of reference to specific instances of conduct.⁹²

For a witness to give reputation testimony, a foundation must be laid that the witness is familiar with that person's reputation in the relevant community, which may include his residence or where he works or some other organizational setting, and that knowledge must be drawn during a period reasonably close to the time of the conduct at issue and before the charge against him became publi-

⁸⁸ *Id.* at 236-37. In these latter two instances, the defendant is not limited to reputation or opinion testimony, but also may introduce evidence of specific instances of conduct. See *infra* notes 95-105 and accompanying text (describing situations in which evidence of specific instances of conduct are admissible because specific character trait is element of charge, claim, or defense).

⁸⁹ FED. R. EVID. 406 ("Evidence of the habit of a person . . . is relevant to prove that the conduct of the person . . . on a particular occasion was in conformity with the habit."); WEINSTEIN & BERGER, *supra* note 21, § 406.02(1), at 406-5.

⁹⁰ MUELLER & KIRKPATRICK, *supra* note 21, § 4.21, at 249-51; WEINSTEIN & BERGER, *supra* note 21, § 406.02(2), at 406-5 to 406-7.

⁹¹ FED. R. EVID. 406 advisory committee's note.

⁹² FED. R. EVID. 405(a).

cized.⁹³ For a witness to instead testify as to his opinion of the person's particular character trait, there first must be a showing that he has an adequate familiarity with the person to form such an opinion.⁹⁴

In two instances, Rule 405 explicitly allows for reference to specific instances of conduct. First, after a witness has given reputation or opinion testimony, "[o]n cross-examination, inquiry is allowable into relevant specific instances of conduct."⁹⁵ "The theory is that, since the reputation witness relates what he has heard, the inquiry tends to shed light on the accuracy of his hearing and reporting,"⁹⁶ and is thus designed to test the witness's knowledge and standards for good reputation.⁹⁷ If the witness says he is familiar with the prior specific bad act that he is asked about, then that casts doubt on the witness's judgment; if instead he says he is not familiar with the prior specific act, then that suggests that his opinion or knowledge of the person's reputation is not fully informed.⁹⁸

The second instance in which evidence of specific instances of conduct is permitted is "[i]n cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense."⁹⁹ Thus, in a defamation action in which truth is asserted as a defense, the plaintiff's character may be an element of the defense, as the defendant is entitled to prove the truth of an allegedly defamatory statement. In so doing, the defendant may

⁹³ MUELLER & KIRKPATRICK, *supra* note 21, § 4.19, at 238-39; WEINSTEIN & BERGER, *supra* note 21, § 405.03(1)(a)-(b), at 405-6 to 405-9. Although such evidence is technically hearsay—since it represents a distilled version of statements by persons in the community about an individual offered to prove the truth of those statements—it falls within an exception for "[r]eputation of a person's character among associates or in the community." FED. R. EVID. 803(21); MUELLER & KIRKPATRICK, *supra* note 21, § 4.19, at 239-40; WEINSTEIN & BERGER, *supra* note 21, § 405.03(1)(c), at 405-9.

⁹⁴ FED. R. EVID. 405(a); MUELLER & KIRKPATRICK, *supra* note 21, § 4.19, at 240.

⁹⁵ FED. R. EVID. 405(a).

⁹⁶ FED. R. EVID. 405 advisory committee's note.

⁹⁷ WEINSTEIN & BERGER, *supra* note 21, § 405.03(2)(a), at 405-11.

⁹⁸ MUELLER & KIRKPATRICK, *supra* note 21, § 4.19, at 242. In order to ensure that the questioner on cross-examination is not simply trying to throw a skunk into the jury box by asking about specific instances of prior conduct, the case law requires that the questioner have a good-faith basis for posing the question, and that the question is not simply based on rumor of such a prior instance of conduct. *Michelson v. United States*, 335 U.S. 469, 481 (1948).

⁹⁹ FED. R. EVID. 405(b).

offer evidence of specific instances of conduct bearing on the plaintiff's character trait at issue in the allegedly defamatory statement.¹⁰⁰ Similarly, in wrongful death cases, the character of the decedent often is viewed as an element of damages; thus specific evidence of his work habits, drunkenness, adultery, and other such forms of behavior is often received on the issue of likely future earnings as well as the emotional loss to survivors.¹⁰¹ Finally, in child custody cases, the fitness or character of each parent for good parenting is a central issue, thus making evidence of specific instances of conduct admissible.¹⁰²

A third instance in which evidence of specific instances of conduct is permitted—one not explicitly set forth in Rule 405—is where the evidence is being admitted pursuant to Rule 404(b), which expressly allows for evidence of specific instances of conduct.¹⁰³ Similarly, where evidence of prior acts of sexual assault or child molestation are offered pursuant to Rules 413 through 415,¹⁰⁴ the use of evidence of specific prior instances of conduct is expressly permitted by those rules.¹⁰⁵

One noteworthy exception to the general rule set forth in Rule 405 is where evidence normally admissible under Rule 404(a)(2) is excluded by Rule 412, but then allowed under one of the exceptions to Rule 412. In the exceptions set forth for criminal cases, the evidence *must* be of specific instances of conduct, and cannot be in the form of reputation or opinion testimony unless excluding such evidence would violate the defendant's constitutional rights.¹⁰⁶ Moreover, evidence of the victim's reputation in civil cases is

¹⁰⁰ MUELLER & KIRKPATRICK, *supra* note 21, § 4.20, at 248.

¹⁰¹ *Id.* at 248-49.

¹⁰² *Id.* at 249.

¹⁰³ FED. R. EVID. 404(b); MUELLER & KIRKPATRICK, *supra* note 21, § 4.19, at 238. Indeed, it appears that Rule 404(b) evidence *must* be proven through prior specific instances of conduct, and it cannot be proven through reputation or opinion testimony. *See id.* § 4.35, at 314.

¹⁰⁴ FED. R. EVID. 413-415.

¹⁰⁵ MUELLER & KIRKPATRICK, *supra* note 21, § 4.35, at 314. It appears that under Rules 413-415, evidence *must* be proven through prior specific instances of conduct, and cannot be proven through reputation or opinion testimony. *See id.*

¹⁰⁶ FED. R. EVID. 412(b) advisory committee's note.

admissible only if the victim has first placed that reputation into controversy.¹⁰⁷

B. RELEVANCE TO SUPPORT A DEFENSE IN HOMICIDE CASES

One of the more common fact patterns involving a proffer of evidence of a person's sexual orientation is in homicide cases in which the defendant seeks to impute responsibility for his conduct to the victim's alleged homosexuality. The typical fact pattern involves the victim making either an aggressive or a nonaggressive homosexual advance, and the defendant responding by killing the victim. Although frequently referred to loosely as the "gay panic defense," there are actually three variants of the defense based on insanity,¹⁰⁸ provocation,¹⁰⁹ and self-defense,¹¹⁰ each with different elements.

In its purest and original form, the phrase "gay panic defense" or "homosexual panic defense" is slang for a psychiatric disorder known as Homosexual Panic Disorder.¹¹¹ The clinical psychiatrist Edward J. Kempf identified the behavior in a study of World War I soldiers who were committed to a psychiatric institution, terming the behavior "acute homosexual panic" and defining the disorder as "a

¹⁰⁷ FED. R. EVID. 412(b)(2).

¹⁰⁸ See, e.g., *People v. Rodriguez*, 64 Cal. Rptr. 253, 255-56 (Cal. Ct. App. 1967) (holding that evidence that defendant met victim thirty minutes before defendant murdered victim, and believed during this meeting that victim was trying to engage in homosexual act, is admissible); *People v. Parisie*, 287 N.E.2d 310, 313-14 (Ill. App. Ct. 1972) (holding that jury's finding that defendant, who raised defense of insanity based on "homosexual panic," was sane was not against manifest weight of evidence); *Commonwealth v. Shelley*, 373 N.E.2d 951, 953 (Mass. 1978) (holding that evidence was correctly submitted to jury where defendant and Commonwealth agreed that defendant suffered dissociative reaction during killing, but where Commonwealth argued reaction was result of drunkenness and defendant argued it was result of homosexual panic).

¹⁰⁹ See, e.g., *People v. Page*, 737 N.E.2d 264, 275 (Ill. 2000) (holding that evidence that victim made sexual advance toward defendant on night of murder would not have entitled defendant to voluntary manslaughter instruction).

¹¹⁰ See, e.g., *Williamson v. State*, 692 P.2d 965, 967-68, 971 (Alaska Ct. App. 1984) (holding that testimony of defense witness that he had homosexual encounter with victim was admissible as probative of defendant's self-defense testimony portraying defendant as innocent victim of attempted assault).

¹¹¹ Christina Pei-Lin Chen, Note, *Provocation's Privileged Desire: The Provocation Doctrine, "Homosexual Panic," and the Non-Violent Unwanted Sexual Advance Defense*, 10 CORNELL J.L. & PUB. POL'Y 195, 201-02 (2000); Kara S. Suffredini, Note, *Pride and Prejudice: The Homosexual Panic Defense*, 21 B.C. THIRD WORLD L.J. 279, 288 (2001).

panic due to the pressure of uncontrollable sexually perverse cravings."¹¹²

According to Kempf, there are two character traits required for a diagnosis of Homosexual Panic Disorder: the individual must have a pronounced fear of his own homosexuality, and this terror must coexist with the individual's fear of heterosexuality.¹¹³ In his work, Kempf concluded that these traits became most pronounced and uncontrollable in same-sex environments.¹¹⁴ At the same time, Kempf found that the impulses were not triggered by the sexual advances of another person; rather, his patients reported difficulty controlling their own heightened sense of homosexual drives in this environment.¹¹⁵

However, once the panic state is triggered, the manifested symptoms do not suggest that the person afflicted with the panic will engage in crimes like murder or assault; indeed, none of Kempf's patients reported an ability to engage in violence.¹¹⁶ Instead, the individual turns inward with feelings of self-loathing; experiences "periods of introspective brooding, self-punishment, suicidal assaults, withdrawal, and helplessness"; and according to one study, is unable to function "at all."¹¹⁷ Thus, Homosexual Panic Disorder is marked by an individual's desire to punish and blame himself for his psychic inability to resolve the conflict between his sexual drives and fears.¹¹⁸ Moreover, the disorder was characterized in the literature not as a temporary episode, but instead as an "on-going illness."¹¹⁹

¹¹² Suffredini, *supra* note 111, at 288 (citing EDWARD J. KEMPF, *PSYCHOPATHOLOGY* 477 (1920)).

¹¹³ *Id.*

¹¹⁴ *Id.* Kempf attributed the disorder to the fact that his patients had been grouped together in a same-sex environment for a prolonged period during World War I. *Id.*

¹¹⁵ *Id.* Other literature notes similar conditions that precipitate the disorder. According to Robert Campbell's *Psychiatric Dictionary*, the panic state is triggered by "separation from a member of the same sex to whom the individual has become emotionally attached." *Id.* (quoting ROBERT J. CAMPBELL, *PSYCHIATRIC DICTIONARY* 328 (6th ed. 1989)).

¹¹⁶ *Id.* at 289 (citing Gary David Comstock, *Dismantling the Homosexual Panic Defense*, 2 *TUL. J.L. & SEXUALITY* 81, 84 (1992)).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

Yet there are several ways in which Homosexual Panic Disorder, as used in the legal system today, differs from its roots in Kempf's research. First, as described in Kempf's work, a sexual advance by the victim should render a person with Homosexual Panic Disorder helpless to act, not aggressive and violent as the cases suggest. Second, while one of the elements of Homosexual Panic Disorder is that the defendant himself is a latent homosexual, in many cases in which the defense is raised, the defendant never asserts that he is a latent homosexual.¹²⁰ Third, another element of Homosexual Panic Disorder is that the defendant has an aversion to heterosexuality, yet in most cases the defendants are involved in heterosexual relationships or try to establish their identification with heterosexuality by describing their aversion to homosexuality.¹²¹ Fourth, while Homosexual Panic Disorder is supposed to be long-term in nature, when raised as a defense, most defendants refer to it as a temporary violent episode.¹²²

Most cases invoking Homosexual Panic Disorder as a defense are really insanity defenses based on Acute Aggression Panic Disorder, a different disorder in which the person suffers from a predominating aggressive drive.¹²³ Yet this distinction is largely academic, as the psychiatric literature and the legal system have accepted the conflation of Homosexual Panic Disorder with the symptoms of Acute Aggressive Panic Disorder.¹²⁴

Over time, the defense of "homosexual panic" has been transformed from just an insanity defense into a second variant of the defense, a provocation or diminished capacity defense.¹²⁵ Such a defense differs from an insanity defense in that an insanity defense, if successful, means a finding that the defendant is not guilty of the offense because he was not responsible for his criminal conduct due

¹²⁰ See Suffredini, *supra* note 111, at 292-94 (citing *Commonwealth v. Shelley*, 373 N.E.2d 951 (Mass. 1978)); see also *People v. Rodriguez*, 64 Cal. Rptr. 253, 253-57 (Cal. Ct. App. 1967); *State v. Thornton*, 532 S.W.2d 37, 39-44 (Mo. Ct. App. 1975).

¹²¹ Suffredini, *supra* note 111, at 297.

¹²² *Id.* at 298.

¹²³ Burton S. Glick, *Homosexual Panic: Clinical and Theoretical Considerations*, 129 J. NERVOUS & MENTAL DISEASE 20, 28 (1959); Suffredini, *supra* note 111, at 289-91.

¹²⁴ Suffredini, *supra* note 111, at 291-92.

¹²⁵ Chen, *supra* note 111, at 201.

to a mental disease or defect,¹²⁶ while a defense of provocation or diminished capacity calls for reducing but not eliminating the defendant's culpability. This defense usually produces a sentence reduction from murder to manslaughter, if the defendant shows that he acted in a state of "extreme mental or emotional disturbance for which there is [a] reasonable explanation or excuse."¹²⁷

The provocation or diminished capacity defense, although often referred to as the homosexual panic defense, is technically the nonviolent homosexual advance defense (NHA).¹²⁸ The latter differs from the former in that, under the former, "the external stimulus merely precipitated the homosexual panic that triggered the acute psychotic reaction and temporary insanity that caused the latent homosexual to kill."¹²⁹ In other words, "the mental disorder of homosexual panic caused the killing" under the former, while under the latter, "the homosexual advance itself provokes the understandable loss of normal self-control that incites uncontrollable homicidal rage in any reasonable person, regardless of homosexual tendencies."¹³⁰ The stated logic behind this second variant of the defense is that:

[T]he law views the provocative act of the homosexual advance to be sufficient to engender reason-erasing anger in ordinary law-abiding citizens . . . anger prompted by a nonviolent homosexual advance is a "human weakness" deserving of the understanding and mercy of the jury. The killer who is provoked by such an act is thus thought to be less blameworthy than the calm, cool, and calculated killer.¹³¹

¹²⁶ MODEL PENAL CODE § 4.01(1) (2001).

¹²⁷ *Id.* § 210.3(1)(b).

¹²⁸ Chen, *supra* note 111, at 202-03.

¹²⁹ *Id.* at 203.

¹³⁰ *Id.*; see also *People v. Page*, 737 N.E.2d 264, 275 (Ill. 2000):

While [the gay panic] cases likewise involve fact scenarios where the victims made homosexual advances toward the defendants, the defendants' theories of voluntary manslaughter were based on the unreasonable belief in the need for self-defense, not on serious provocation, which is the theory advanced by defendant in this case.

Id.

¹³¹ Scott D. McCoy, Note, *The Homosexual-Advance Defense and Hate Crimes Statutes:*

In these first two variants of the defense, the alleged homosexual advance that prompted the killing is a nonviolent advance, and it is either a psychiatric disorder of the defendant or his “reasonable” response due to ordinary “human weakness” that prompts him to kill. Yet a third variant of the defense is true self-defense, such as when the defendant claims that he killed the victim when the latter tried forcibly to rape him. A person is justified in using force upon another person if he believes that the force is immediately necessary to protect himself against the exercise of unlawful force by the other.¹³² Deadly force, however, is unjustifiable unless a person believes that such force is necessary to protect himself against serious bodily injury, death, or forcible rape.¹³³

When any of these three variants of the gay panic defense are invoked, the defendant typically seeks to offer evidence of the victim’s homosexuality. The evidence proffered takes the form of evidence that the victim owned gay pornography,¹³⁴ testimony as to the victim’s reputation as a homosexual,¹³⁵ testimony as to specific prior instances of consensual homosexual conduct on the victim’s part,¹³⁶ evidence that the victim visited gay-oriented websites on his

Their Interaction and Conflict, 22 CARDOZO L. REV. 629, 642-43 (2001).

¹³² MODEL PENAL CODE § 3.04(1) (2001).

¹³³ *Id.* §§ 3.04(2)(b), 3.11(2).

¹³⁴ *See, e.g.*, *Page v. State*, 657 P.2d 850, 852 (Alaska Ct. App. 1983) (addressing admissibility of titles of pornographic books and magazines owned by victim); *State v. Lovin*, 454 S.E.2d 229, 236 (N.C. 1995) (addressing admissibility of two pornographic video tapes).

¹³⁵ *See, e.g.*, *People v. Limas*, 359 N.E.2d 1194, 1198-99 (Ill. App. Ct. 1977) (addressing appropriateness of attorney’s questions concerning witnesses’ knowledge of victim’s sexual activities); *People v. Parisie*, 287 N.E.2d 310, 324-25 (Ill. App. Ct. 1972) (addressing admissibility of evidence that victim had reputation as overt homosexual); *State v. Laws*, 481 S.E.2d 641, 642-43, 646 (N.C. 1997) (addressing admissibility of evidence of victim’s “general reputation . . . in terms of his sexual reputation”); *State v. Carter*, No. 82 CA 22, 1983 WL 4862, at *5-6 (Ohio Ct. App. Mar. 18, 1983) (addressing improper introduction of reputation testimony); *State v. Farmer*, No. 03CO1-9206-CR-00196, 1993 WL 247907, at *1 (Tenn. Crim. App. July 8, 1993) (addressing victim’s reputation of engaging in activities with young men); *State v. Bell*, 805 P.2d 815, 816 (Wash. Ct. App. 1991) (addressing admissibility of testimony of nine witnesses concerning victim’s reputation).

¹³⁶ *See, e.g.*, *State v. Flowers*, 574 So. 2d 448, 451-52 (La. Ct. App. 1991) (addressing admissibility of evidence that victim offered young men rides and made aggressive sexual advances); *Purtell v. State*, 761 S.W.2d 360, 368-69 (Tex. Crim. App. 1987) (addressing admissibility of testimony that victim had anonymous homosexual encounter in public restroom); *Bell*, 805 P.2d at 816 (addressing admissibility of testimony that victim grabbed witness).

computer,¹³⁷ or evidence of other prior homosexual advances by the victim toward other persons.¹³⁸

Such evidence is often excluded by courts for a variety of reasons. First, many courts characterize evidence of a person's homosexuality as a form of character evidence,¹³⁹ invoking Rule 405 to reject evidence of specific prior instances of homosexual conduct because a person's homosexuality can only be proven through reputation or opinion testimony.¹⁴⁰ Second, even where reputation evidence of the victim's homosexuality is offered, courts reject such evidence on the ground that the witness failed to lay a proper foundation to qualify to testify as to the victim's reputation.¹⁴¹

Such evidence is also often rejected for being "irrelevant" under either the materiality or probative worth prong of relevance. Under the materiality prong, such evidence is rejected when offered to support a claim of diminished capacity or provocation on the ground that no such defense exists as a matter of law.¹⁴² For example, in the highly publicized Matthew Shepard trial, the court refused to let the defendants offer evidence of "homosexual rage syndrome" by finding that Wyoming law did not recognize either the diminished capacity or temporary insanity variants of the gay panic defense.¹⁴³ Similarly, such evidence is irrelevant when the court finds the defense of

¹³⁷ See, e.g., *Washington v. Munguia*, 26 P.3d 1017, 1020 (Wash. Ct. App. 2001) (addressing admissibility of evidence that victim had visited gay-oriented Internet sites on his computer).

¹³⁸ See, e.g., *United States v. Whalen*, 940 F.2d 1027, 1034 (7th Cir. 1991) (addressing admissibility of victim's specific prior homosexual acts).

¹³⁹ The few courts that have considered the issue have refused to allow parties to circumvent the restrictions on character evidence by recharacterizing evidence of homosexuality or homosexual advances as habit rather than character evidence. See *Flowers*, 574 So. 2d at 452 (holding that testimony as to three similar, but not identical, acts did not rise to level of habit); cf. *State v. Gaines*, 926 P.2d 641, 650-51 (Kan. Ct. App. 1996) (holding that testimony from defendant's ex-wife that defendant sucked her big toe during intercourse on five occasions during the year they were married could not be admitted as habit evidence to support inference that defendant committed rape in which he was alleged to suck on victim's big toe).

¹⁴⁰ *United States v. Bautista*, 145 F.3d 1140, 1152 (10th Cir. 1998); *Flowers*, 574 So. 2d at 451-52; *Purtell*, 761 S.W.2d at 368-70.

¹⁴¹ *People v. Erickson*, 883 P.2d 511, 513-14 (Colo. Ct. App. 1994); *People v. Parisie*, 287 N.E.2d 310, 324-25 (Ill. App. Ct. 1972); *State v. Carter*, No. 82 CA 22, 1983 WL 4862, at *5-6 (Ohio Ct. App. Mar. 18, 1983).

¹⁴² *State v. Dietrich*, 567 So. 2d 623, 632-33 (La. Ct. App. 1990).

¹⁴³ See *State v. McKinney*, Crim. Action No. 6381 (2d Jud. Dist. Ct., Albany County, Wyo. Oct. 30, 1999) (order concerning "rage" defense) ("The defense is, in effect, either a temporary insanity defense or a diminished capacity defense, such as irresistible impulse, which are not allowed in Wyoming, because they do not fit within the statutory insanity defense construct.").

self-defense to be unavailable to the defendant because the facts he has alleged would not justify a reasonable person resorting to deadly force, as where the victim merely made a nonaggressive sexual advance.¹⁴⁴

Under the probative worth prong, several courts have drawn a distinction in self-defense cases between evidence of the victim's character for making violent sexual advances and mere evidence of the victim's homosexuality; the victim's homosexuality has no probative worth regarding the victim's propensity to engage in violent, homosexual attacks on others, and no probative worth in showing the defendant's claim that it is more probable that the victim attempted to sexually assault the defendant.¹⁴⁵ Where such evidence is admitted, it usually involves evidence of the victim's reputation for making aggressive and violent homosexual advances.¹⁴⁶

Arguably, a distinction can be drawn between the self-defense variation of the defense and the provocation and insanity variations. In the latter two, it is the victim's homosexuality and his propensity to make nonaggressive, nonviolent sexual advances that sets off the defendant, thus presumably making evidence of the victim's homosexuality relevant. In the former, by contrast, only evidence of aggressive, violent sexual advances would be relevant.

Finally, courts often note that such evidence, if admitted, would be unfairly prejudicial, and thus hold that the evidence would be excludable under Rule 403.¹⁴⁷ In any event, when evidence of the victim's homosexuality is admitted to support any of the variants of

¹⁴⁴ See *State v. Bell*, 805 P.2d 815, 817 (Wash. Ct. App. 1991).

¹⁴⁵ See, e.g., *United States v. Bautista*, 145 F.3d 1140, 1152 (10th Cir. 1998); *Page v. State*, 657 P.2d 850, 853 (Alaska Ct. App. 1983); *People v. Limas*, 359 N.E.2d 1194, 1199 (Ill. App. Ct. 1977); *Broome v. State*, 687 N.E.2d 590, 600-01 (Ind. Ct. App. 1998); *State v. Pletka*, 310 N.W.2d 525, 528 (Iowa 1981); *State v. Flowers*, 574 So. 2d 448, 451-52 (La. Ct. App. 1991); *State v. Laws*, 481 S.E.2d 641, 647 (N.C. 1997); *State v. Lovin*, 454 S.E.2d 229, 236 (N.C. 1995); *State v. Mungia*, 26 P.3d 1017, 1021 (Wash. Ct. App. 2001); see also *United States v. Woodyard*, 16 M.J. 715, 720 (A.F.C.M.R. 1983) (noting defendant's argument that admitting gay-oriented magazines to support inference that defendant engaged in forcible acts of sodomy is akin to admitting defendant's possession of *Playboy* to support inference of opposite-sex rape, or possession of Car & Driver to support inference of auto theft).

¹⁴⁶ See, e.g., *Williamson v. State*, 692 P.2d 965, 972 (Alaska 1984); *People v. Rowland*, 262 Cal. App. 2d 790, 796-97 (Cal. Ct. App. 1968).

¹⁴⁷ See, e.g., *Commonwealth v. Deagle*, 412 N.E.2d 911, 914 (Mass. App. Ct. 1980); *State v. Lovin*, 454 S.E.2d 229, 236 (N.C. 1995).

the gay panic defense, the prosecution is permitted to respond with evidence of the victim's heterosexuality, as Rule 404(a)(2) allows for such rebuttal evidence.¹⁴⁸

Thus far, the discussion has focused on when the *victim's* sexual orientation may be relevant. But when the defendant raises the insanity or provocation variations of the defense, evidence of the defendant's own history of engaging in consensual homosexual activity also becomes relevant, as this evidence might "tend to refute the claimed 'sense of outrage' " that goes along with such a defense.¹⁴⁹ However, where the defense is one of self-defense rather than provocation or insanity, evidence of the defendant's homosexuality becomes irrelevant,¹⁵⁰ as the claim under self-defense is not a sense of outrage or anger about homosexuality itself, but rather an effort to defend oneself from a violent rape, thus paralleling the like distinction between admitting evidence of the victim's homosexuality in provocation and insanity cases but not in self-defense cases.

Deviating from the standard practice of defendants bringing up the victim's homosexuality in homicide cases to support their various defenses, in one case, the prosecution successfully brought in evidence of the defendant's homosexuality to support its case under the theory of "homosexual overkill."¹⁵¹ In *State v. Dressler*,¹⁵² the

¹⁴⁸ See, e.g., *State v. Greene*, 967 P.2d 106, 111 (Ariz. 1998) (citing *State v. Rivera*, 733 P.2d 1090, 1101 (Ariz. 1987)); *State v. Rivera*, 733 P.2d 1090, 1100-01 (Ariz. 1987) (allowing state to introduce testimony by victim's wife and friends that he was "normal heterosexual").

¹⁴⁹ *People v. Mitchell*, 265 N.W.2d 163, 169 (Mich. 1978), *overruled on other grounds by* *McDougal v. Schanz*, 597 N.W.2d 148 (Mich. 1999); *accord* *People v. Lang*, 782 P.2d 627, 644 (Cal. 1989); *People v. Zatzke*, 202 P.2d 1009, 1010-11 (Cal. 1949); *Fitzgerald v. State*, 601 P.2d 1015, 1020 (Wyo. 1979).

¹⁵⁰ *Mitchell*, 265 N.W.2d at 166-67, 169; *Tobler v. State*, 688 P.2d 350, 354 (Okla. 1984).

¹⁵¹ The theory of homosexual overkill is discussed in the forensic pathology literature. See Michael D. Bell, M.D. & Raul I. Vila, M.D., *Homicide in Homosexual Victims: A Study of 67 Cases from the Broward County, Florida, Medical Examiner's Office (1982-1992), with Special Emphasis on "Overkill"*, 17(1) AM. J. FORENSIC MED. & PATHOLOGY 65, 65-69 (1996). The article cites several other articles that have found that "[h]omicides involving homosexual victims are often said to be more violent than heterosexual homicides," and that "in the 'majority of cases [there is] overkill: wounding far beyond that required to cause death.'" *Id.* at 65. However, the study looked only at the sexual orientation of the victim, not at that of the assailant. *Id.* at 69. In a letter responding to the article, two other physicians wrote, "overkill is generally defined as a phenomenon in which the multiplicity of wounds far outnumbers that required to cause death. Elements of sexuality, released rage, and intimate bonds between victim and perpetrator frequently exist." Mark L. Taff, *Gay Homicides and "Overkill"*, 17(4) AM. J. FORENSIC MED. & PATHOLOGY 350, 350-52 (1996). They further note that prosecutors often employ the phrase "overkill" and other emotionally charged words to sway the opinions

prosecution called, over the defendant's objection to any mention of his homosexuality, a forensic scientist to testify about "homosexual overkill."¹⁵³ The defendant, a gay man, was charged with a crime in which he severely mutilated the victim.¹⁵⁴ According to the prosecution's expert, "overkill crimes contain an element of homosexuality."¹⁵⁵ In his view, if there was homosexual pornography found at the scene or in possession of the perpetrator (as there was in this case), it would further lend support to the "homosexual overkill" theory.¹⁵⁶ The court found admissible evidence tending to show that the defendant was gay, such as prior instances of homosexual conduct and homosexual pornography, on the ground that evidence that he was gay would support the state's homosexual overkill theory.¹⁵⁷ In *Dressler v. McCaughtry*,¹⁵⁸ a federal habeas court agreed this evidence was admissible under the state's version of Rule 404(b), as it was admissible to show motive, intent, and plan to murder the victim, as well as lack of an accident.¹⁵⁹ The court reasoned that the evidence was relevant because someone who possesses photographs of homosexual acts coupled with depictions of extreme violence is more likely to commit a crime exhibiting the characteristics of homosexual overkill, and the violent pictures tend to prove the defendant's fascination with death and mutilation, which is probative of motive, intent, or plan.¹⁶⁰ Hence, the court found that the pictures of the homosexual acts, given the state's homosexual overkill theory, clearly went to motive.¹⁶¹

C. RELEVANCE TO SHOW PROPENSITY TO SEXUALLY ASSAULT CHILD OR ADULT OF THE SAME GENDER

of jurors. *Id.*

¹⁵² No. 92-2049-CR, 1993 WL 469759, at *1 (Wis. Ct. App. Nov. 17, 1993).

¹⁵³ *Id.* at *2-3.

¹⁵⁴ *Id.* at *1.

¹⁵⁵ *Id.* at *3.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at *4-5.

¹⁵⁸ 238 F.3d 908 (7th Cir. 2001).

¹⁵⁹ *Id.* at 913-14.

¹⁶⁰ *Id.* at 914.

¹⁶¹ *Id.*

In some sexual assault cases involving an adult male defendant and an adult male victim, prosecutors seek to offer evidence of the defendant's homosexuality. Prosecutors argue that this evidence is relevant because if the defendant is gay, this makes it more likely that he is a person who would commit a same-sex sexual assault than if he were a heterosexual, an argument that some courts accept.¹⁶² Often, these courts get around the bar on character evidence in Rule 404(a)¹⁶³ by finding that it satisfies one of the Rule 404(b) exceptions,¹⁶⁴ such as intent to commit forcible sodomy,¹⁶⁵ or that the defendant "opened the door" to this evidence by asserting at trial that he was heterosexual.¹⁶⁶

In child sexual assault cases involving a male defendant and a male child, prosecutors also sometimes seek to offer evidence of the defendant's homosexuality, arguing that such evidence is relevant to show the defendant's propensity to seek out children of the same gender with whom to have sex.¹⁶⁷ Courts are split on the relevance of such evidence. A few courts find that evidence of the defendant's sexual orientation has some relevance, accepting the inference that a person who is attracted to adults of the same sex is more likely to

¹⁶² See, e.g., *State v. Ford*, 926 P.2d 245, 250 (Mont. 1996) (finding that, because defendant was charged with raping someone of same gender, evidence of homosexuality would be probative of whether defendant fit profile of someone who would commit such act, noting that given nature of crime, not all members of society would fit perpetrator's profile).

¹⁶³ See FED. R. EVID. 404(a).

¹⁶⁴ See FED. R. EVID. 404(b).

¹⁶⁵ See, e.g., *United States v. Whitner*, 51 M.J. 457, 461 (C.A.A.F. 1999) (finding defendant's possession of magazines and videotapes involving homosexual activity relevant to show intent, motive, plan, or method); *United States v. Woodyard*, 16 M.J. 715, 720 (A.F.C.M.R. 1983) (finding that defendant's possession of magazines of nude males engaged in homosexual acts was evidence of the accused's intent to commit sodomy); *United States v. Marcey*, 9 C.M.A. 182, 186-87 (1958) ("[A] person who practices homosexuality is likely to assault for the purpose of satisfying his perverted sexual cravings, and proof of previous deviations from the sexual norm is a valuable ingredient in establishing specific intent in subsequent offenses of the same kind.").

¹⁶⁶ See, e.g., *Florence v. State*, 755 So. 2d 1065, 1071-72 (Miss. 2000) ("The defense challenged [the defendant's] capacity to commit a male-on-male sexual assault, something the vast majority of the population finds hard to conceive or envision. The presence of sexually explicit materials, depicting male homosexuality, in [the defendant's] house has some tendency to make his homosexual tendencies more probable."); *Kolb v. State*, 542 So. 2d 265, 270 (Miss. 1989) (finding that defendant on trial for sexually assaulting child of same sex opened door to evidence of his homosexuality by testifying on direct examination that he was not homosexual).

¹⁶⁷ *Blakeney v. State*, 911 S.W.2d 508, 513 (Tex. App. 1995).

sexually assault a child of the same sex.¹⁶⁸ Many courts, however, find this evidence irrelevant. One court, for example, held that “[h]aving a homosexual encounter with a consenting adult is completely different from assaulting a sleeping child . . . the fact that one has intercourse with another adult is not proof of the identity of one who commits a sexual assault on a child.”¹⁶⁹ Courts have also reasoned that “[i]t is no more reasonable to assume that a preference for same gender adult sexual partners establishes a proclivity for sexual gratification with same gender children than it is to assume that preference for opposite gender adult sexual partners establishes a proclivity for sexual gratification with opposite gender children,”¹⁷⁰ and that “[t]he belief that homosexuals are attracted to prepubescent children is a baseless stereotype.”¹⁷¹

Even when courts find that such evidence is arguably relevant, however, many nevertheless exclude it as improper character evidence introduced against the defendant to support an inference

¹⁶⁸ *See id.* (expressing skepticism about logical leap from attraction to adult males to propensity to seek out male children for sex, but holding that “reasonable persons could differ when determining whether to accept an inference that a bisexual or homosexual is likely to seek out same-sex child partners”); *see also* *Roberson v. State*, 447 S.E.2d 640, 643 (Ga. Ct. App. 1994) (“Evidence of homosexuality (and indications of such sexual preferences) are admissible to show a defendant’s bent of mind toward the sexual activity with which he was charged.”); *Williams v. State*, 420 S.E.2d 781, 782 (Ga. Ct. App. 1992) (“In the case sub judice, there is evidence that the victim was the subject of a homosexual act. Under these circumstances, we cannot say that evidence of defendant’s bi-sexual nature is totally irrelevant.”); *State v. Taylor*, 663 So. 2d 336, 340-41 (La. Ct. App. 1995) (stating that defendant’s sexual orientation has “some relevance” in that it shows that defendant is interested in having sex with male, which victim was in this case).

¹⁶⁹ *State v. Rushing*, 541 N.W.2d 155, 162 (Wis. Ct. App. 1995); *see also id.* at 163 (Myse, J., concurring):

The State’s theory is that because [the defendant] is a homosexual, he is likely to have committed this homosexual act. This evidence is inadmissible because it is character evidence demonstrating the character trait of homosexuality, which the State attempts to use to prove [the defendant] committed a specific homosexual act.

Id.

¹⁷⁰ *State v. Ellis*, 820 S.W.2d 699, 702 (Mo. Ct. App. 1991).

¹⁷¹ *State v. Bates*, 507 N.W.2d 847, 852 (Minn. Ct. App. 1993); *see also* *State v. Lee*, 525 N.W.2d 179, 183 (Neb. 1994) (finding evidence that defendant possessed pornographic material depicting adult homosexual activity is not, standing alone, relevant to support charge that defendant engaged in pedophilic homosexual felatio); *State v. Tizard*, 897 S.W.2d 732, 744-45 (Tenn. Crim. App. 1994) (finding evidence that defendant had videotapes and booklet depicting sexually explicit acts between males not relevant to showing intent to commit same-sex sexual battery).

that he acted in conformity with a character trait.¹⁷² Courts usually reject efforts to circumvent this general rule via Rule 404(b).¹⁷³ Moreover, courts often exclude such evidence under Rule 403, finding that it poses the risk that the jury will convict the defendant due to animus against homosexuals rather than on the basis of the evidence in the case.¹⁷⁴

One situation where courts usually will admit evidence like magazines, videotapes, and books depicting homosexual conduct is not to support a character inference that the defendant's homosexuality increased the likelihood of a same-sex assault, but instead where they are part of the *res gestae*, or connected to the events at issue in the case. Thus, for example, where the defendant is accused of sexually assaulting a minor, pornographic homosexual pictures that the defendant showed to the minor are admissible because they were used to seduce the child, and therefore can be used to connect the defendant to the crime.¹⁷⁵ However, in such instances, the jury

¹⁷² See, e.g., *Blakeney v. State*, 911 S.W.2d 508, 515 (Tex. App. 1995); *State v. Rushing*, 541 N.W.2d 155, 160-61 (Wis. Ct. App. 1995).

¹⁷³ See, e.g., *Guam v. Shymanovitz*, 157 F.3d 1154, 1157-58 & n.9 (9th Cir. 1998) (rejecting effort to use defendant's possession of homosexual magazines to show knowledge of how to engage in homosexual sex, reasoning that knowledge is not element of offense); *Rushing*, 541 N.W.2d at 161 (rejecting effort to use evidence of defendant's prior consensual homosexual experiences to show intent, reasoning that statute barred intercourse with persons below certain age without regard to defendant's intent). *But see* *United States v. LeProwse*, 26 M.J. 652, 655-56 (A.C.M.R. 1988) (noting defendant's possession of homosexual magazines relevant to negate lack of intent); *Williams v. State*, 420 S.E.2d 781, 782-83 (Ga. Ct. App. 1992) (noting that such evidence is "admissible to prove intent, motive, plan, scheme and bent of mind").

¹⁷⁴ See, e.g., *Shymanovitz*, 157 F.3d at 1160 (excluding such evidence under Rule 403 because "the jury's inference that [the defendant] was gay could in all likelihood have caused it also to infer that he deviated from traditional sex norms in other ways, specifically that he engaged in illegal sexual conduct with minors," and that "the introduction of this evidence also suggested that he might be interested in or even engage in other sorts of sexual activity that the jurors would perceive as deviant"); *State v. Taylor*, 663 So. 2d 336, 341 (La. Ct. App. 1995) (excluding such evidence on ground that it was likely to mislead and confuse jury); *Blakeney v. State*, 911 S.W.2d 508, 515-16 & n.5 (Tex. App. 1995) (noting that introducing such evidence "could only serve to send to the jury the message that all homosexual men are also molesters of little boys," and that "such practices are considered improper, immoral, and highly offensive by segments of the population and hence testimony linking Appellant to such conduct could have unduly prejudiced some of the jurors against the Appellant").

¹⁷⁵ *Shymanovitz*, 157 F.3d at 1157 n.3 (citing *United States v. Yazzie*, 59 F.3d 807, 811 (9th Cir. 1995) (finding gay-oriented materials admissible when used as "instruments" of offense, to wit, when used to arouse child); *United States v. Woodyard*, 16 M.J. 715, 720 (A.F.C.M.R. 1983); see also *State v. Lee*, 525 N.W.2d 179, 183-84 (Neb. 1994); *State v. Tizard*, 897 S.W.2d 732, 743-44 (Tenn. Crim. App. 1994); *State v. King*, 429 P.2d 914, 159-16 (Wash. 1967). Similarly, where the defendant is accused of kidnapping someone of the same gender and

needs to be given a limiting instruction that the evidence is not to be used to draw a propensity inference, but only to corroborate the victim's testimony.¹⁷⁶

D. RELEVANCE TO SHOW CONSENT OF VICTIM IN SAME-SEX SEXUAL ASSAULT CASES

In cases in which the defendant is on trial for committing sexual assault on someone of the same gender, defendants will often seek to introduce evidence that the victim is gay, theorizing that it tends to support their claim that the intercourse was consensual. The proffered logic is that the act in question was a homosexual act and that the victim's homosexuality makes it more likely that he would have consented to the act.¹⁷⁷ Most courts refuse to admit such evidence on the issue of consent, finding that their rape-shield rules apply with equal vigor where a man is a victim of rape by another man as they do where a female is the victim.¹⁷⁸ Courts reason that evidence of the victim's sexual orientation goes to the victim's "sexual predisposition" within the meaning of the rape-shield rule,¹⁷⁹ or alternatively that it is so closely related to past sexual conduct that it is akin to offering such evidence.¹⁸⁰ This interpretation of "sexual predisposition" makes sense because evidence of pregnancy, venereal disease, or use of contraceptives are covered by the phrase

attempting to sexually assault him, a gay-oriented magazine found in the defendant's car is admissible where it corroborates the victim's testimony that the person who kidnapped him had that magazine on the passenger seat, and thus goes to identity. *State v. Weidenhof*, 533 A.2d 545, 552 (Conn. 1987).

¹⁷⁶ *Id.* at 552-53.

¹⁷⁷ See *United States v. Grant*, 49 M.J. 295, 297 (C.A.A.F. 1998); *Kvasnikoff v. State*, 674 P.2d 302, 304 (Alaska Ct. App. 1983); *People v. Murphy*, 919 P.2d 191, 192-93 (Colo. 1996); *People v. Hackett*, 365 N.W.2d 120, 126-27 (Mich. 1984); *Commonwealth v. Quartman*, 458 A.2d 994, 997 (Pa. Super. Ct. 1983); *State v. Whaley*, No. 03CO1-9101-CR-00025, 1992 WL 167342, at *1, *5-6 (Tenn. Crim. App. 1992).

¹⁷⁸ See, e.g., *Kvasnikoff v. State*, 674 P.2d 302, 306 (Alaska Ct. App. 1983); *State v. Hart*, 678 N.E.2d 952, 953-54 (Ohio 1996); *Commonwealth v. Quartman*, 458 A.2d 994, 995 n.2 (Pa. Super. Ct. 1983).

¹⁷⁹ See, e.g., *United States v. Grant*, 49 M.J. 295, 297 (C.A.A.F. 1998); *Gretzinger v. Univ. of Haw. Prof'l Assembly*, No. CV-94-00684-BMK, 1998 WL 403357, at *2 n.2 (9th Cir. July 7, 1998) ("Evidence regarding sexual orientation is covered by Rule 412"); see also FED. R. EVID. 412 advisory committee's note (stating that, unless specified exceptions are met, "evidence such as that relating to the alleged victim's . . . life-style will not be admissible.").

¹⁸⁰ *People v. Murphy*, 919 P.2d 191, 195 (Colo. 1996).

“sexual behavior” since they imply sexual conduct.¹⁸¹ Yet at least one state court has held otherwise, finding that its rape-shield rule, on its face, only applies to rape cases involving a male defendant and a female victim.¹⁸²

The rape-shield rule aside, many courts conclude that the evidence is “irrelevant” under Rule 401, reasoning that a person’s homosexuality or his history of engaging in consensual homosexual acts has no bearing on the question of whether he consented on a subsequent occasion involving a different person.¹⁸³ Moreover, in sexual assault cases involving an underage victim, courts find such evidence irrelevant because consent is not a valid defense if the victim is a minor.¹⁸⁴ Furthermore, many courts exclude such evidence under Rule 403, finding that the evidence might play to jury biases and cause the jury to decide the case on an improper basis.¹⁸⁵ However, the courts also hold that, notwithstanding the rape-shield rule, the prosecution can “open the door” to evidence of the victim’s sexual orientation if it offers evidence suggesting that the victim is a heterosexual and thus unlikely to have consented.¹⁸⁶

There remain some questions as to the scope of the rape-shield rule. One question is whether the rule excludes evidence of a victim’s sexual predisposition or prior sexual behavior where offered

¹⁸¹ FED. R. EVID. 412 advisory committee’s note; *see also* MUELLER & KIRKPATRICK, *supra* note 21, § 4.33, at 305 (“Evidence of the complainant’s sexual orientation is rarely appropriate because the underlying policies of FRE 412 apply as well in the case of homosexual assaults.”). Courts have rejected efforts to draw a distinction between the status of being gay and specific sexual activities, reasoning that the status refers to the person’s sexual activities with persons of the same gender. *People v. Kemblowski*, 559 N.E.2d 247, 250 (Ill. App. Ct. 1990).

¹⁸² *See, e.g.*, *State v. Dixon*, 668 S.W.2d 123, 125 (Mo. 1984).

¹⁸³ *See, e.g.*, *United States v. Grant*, 49 M.J. 295, 297 (C.A.A.F. 1998); *Blackmon v. Buckner*, 932 F. Supp. 1126, 1128 (S.D. Ind. 1996); *People v. Hackett*, 365 N.W.2d 120, 126-27 (Mich. 1984). *See also* *State v. Whaley*, 1992 WL 167342, at *5 (Tenn. Crim. App. 1992).

¹⁸⁴ *See, e.g.*, *State v. Ermatinger*, 752 S.W.2d 344, 345-49 (Mo. Ct. App. 1988); *Commonwealth v. Battista*, No. 3940-93, 1995 WL 864097, at *1, *3 (Pa. Ct. Com Pl. Apr. 19, 1995).

¹⁸⁵ *See, e.g.*, *Kvasnikoff v. State*, 674 P.2d 302, 305-06 (Alaska Ct. App. 1983):

[T]he jury might presume consent simply as a result of their own prejudices or hostilities against homosexuals The trial judge in this case was understandably concerned that the main issue in the trial would become the sexuality of the victim rather than the conduct of the defendant on the occasion in question.

Id.; *see also* *Tobler v. State*, 688 P.2d 350, 354 (Okla. Crim. App. 1984).

¹⁸⁶ *See, e.g.*, *People v. Murphy*, 919 P.2d 191, 195 (Colo. 1996); *State v. Lang*, 403 S.E.2d 677, 678 (S.C. Ct. App. 1991); *State v. Rodgers*, No. 01-C-019011CR00312, 1991 WL 155715, at *2-3 (Tenn. Crim. App. Aug. 16, 1991).

not to support an inference that the victim consented, but instead to support the defendant's "mistake of fact" (and thus lack of criminal intent) defense that based on the victim's reputation, he reasonably believed that the victim consented.¹⁸⁷ Most courts, however, have rejected this argument, reasoning that knowledge of the victim's prior reputation is not a legally valid basis for forming a reasonable belief that the victim consented.¹⁸⁸ Moreover, even where this argument is viable, evidence of the victim's reputation is irrelevant if there is no evidence in the record that the defendant was aware of that reputation at the time the alleged sexual assault took place.¹⁸⁹

Another open question is what sort of cases are covered by the rape-shield rule. Rule 412 provides that it applies in "any civil or criminal proceeding involving alleged sexual misconduct,"¹⁹⁰ and the advisory committee notes make clear that this includes rape, civil sexual battery, and sexual harassment cases, but does not include defamation cases.¹⁹¹ Beyond that, the scope of the rule is unclear. Consider, for example, the murder cases discussed above in which the defendant claims that he acted in self-defense to repel a sexual assault by the victim.¹⁹² Is that a case "involving alleged sexual misconduct"? Strictly speaking, the answer would seem to be yes, as the language of the rule does not specify that the sexual misconduct has to be that of the defendant, only that the case "involv[e]" such misconduct. Yet the few courts that have considered the matter have found the rape-shield statute to be inapplicable in such cases,

¹⁸⁷ *Doe v. United States*, 666 F.2d 43, 46-48 (4th Cir. 1981).

¹⁸⁸ *See, e.g., People v. DeSantis*, 9 Cal. Rptr. 2d 628, 659 (Cal. 1992):

Knowledge of past consensual gay sex alone is not sufficient to establish a reasonable belief in consent. There must be evidence during the encounter in question which reasonably led to a belief in consent. The evidence would become relevant only if it were combined with [other] factors . . . such as prior activity demonstrating particular communicative behavior or special circumstances giving the evidence higher probative value.

Id.; *see also Commonwealth v. McGregor*, 655 N.E.2d 1278, 1279-80 (Mass. App. Ct. 1995).

¹⁸⁹ *State v. Whaley*, NO. 03C01-9101-CR-00025, 1992 WL 167342, at *6 (Tenn. Crim. App. July 21, 1992).

¹⁹⁰ FED. R. EVID. 412.

¹⁹¹ FED. R. EVID. 412 advisory committee's note.

¹⁹² *See supra* notes 132-33 and accompanying text.

and that such evidence is admissible, subject to the strictures of Rules 404(a)(2) and 405(a).¹⁹³

Parties also have sought to offer evidence of the victim's sexual orientation in sexual assault cases involving a male defendant and a female victim, with interesting results. In one case, the *prosecution* sought to offer evidence that the victim was a lesbian, reasoning that such evidence would tend to rebut the defendant's claim that she consented to a heterosexual encounter, but the court excluded the evidence, reasoning that the rape-shield rule "leaves no room for introduction of reputation or specific act evidence from *any* party" and that it "prohibits *anyone* from introducing evidence of the victim's sexual history."¹⁹⁴ Given the rationale for the rape-shield rule, this ruling makes some sense, because the rule is designed to protect the victim from having her sexual history dragged out, and this protection should extend to efforts by overzealous prosecutors who are more concerned with obtaining a conviction than they are with the victim's privacy. But a sensible interpretation would allow a victim to waive the protection of the rule. Indeed, several courts have allowed female victims of heterosexual rape to testify that they are lesbians, and therefore were unlikely to have consented on the occasion in question, but also allowed the defendant to rebut with evidence that the victim has engaged in heterosexual conduct.¹⁹⁵ These courts reasoned that the defendant's Confrontation Clause rights require that he be given the opportunity to present such evidence, an exception recognized in Rule 412(b)(1)(C).¹⁹⁶

¹⁹³ *People v. Miller*, 981 P.2d 654, 657-58 (Colo. Ct. App. 1999); *see also Williamson v. State*, 692 P.2d 965, 972 (Alaska Ct. App. 1984) ("Concern for the sensibilities of the victim deserves substantially less weight in a murder case where the issue is self-defense and where the jury must determine who was the initial aggressor.").

¹⁹⁴ *People v. Kemblowski*, 559 N.E.2d 247, 250 (Ill. App. Ct. 1990) (first emphasis added) (citation omitted).

¹⁹⁵ *See, e.g., State v. Lessley*, 601 N.W.2d 521, 526-28 (Neb. 1999); *State v. Williams*, 477 N.E.2d 221, 228 (Ohio Ct. App. 1984).

¹⁹⁶ *Meaders v. United States*, 519 A.2d 1248, 1256-57 (D.C. 1986) (Gallagher, J., concurring in part and dissenting in part) ("It is almost too obvious to mention that—where consent is the issue (as here)—if the complaining witness offers on direct examination, among other things, that she is a lesbian, this may seriously impair a defense of consent to the charged rape."); *Lessley*, 601 N.W.2d at 526-28; *Williams*, 477 N.E.2d at 228; *see also* U.S. CONST. amend. VI. *But see Meaders v. United States*, 519 A.2d 1248, 1253-54 (D.C. 1986).

Where evidence involving the victim's sexual orientation provides a possible motive for the victim to fabricate the charges against the defendant, the defendant's Confrontation Clause rights usually require that he be permitted to offer such evidence.¹⁹⁷ However, if evidence of the motive to fabricate the charges can be made without making reference to the victim's sexual orientation, courts will exclude the sexual history evidence.¹⁹⁸

Finally, in civil cases, the standards of Rule 412 are less stringent, providing for the admission of evidence if its probative value substantially outweighs the harm to any victim and unfair prejudice to any party.¹⁹⁹ Thus, for example, in a case in which the plaintiff sues the defendant for intentional infliction of emotional distress, the defendant may be permitted to offer evidence of the plaintiff's sexual orientation to show that the victim's alleged distress had a source not attributable to the defendant's conduct, which mitigates the damages.²⁰⁰ Nonetheless, even in civil cases, care must be taken to ensure that the evidence is not used "for purposes of exploiting stereotypes or subjecting a party or witness to gratuitous embarrassment and invasion of privacy."²⁰¹

E. RELEVANCE TO IMPEACH THE CREDIBILITY OF A WITNESS

¹⁹⁷ See *United States v. Carter*, 47 M.J. 395, 396-97 (A. Ct. Crim. App. 1998) (suggesting that, were adequate foundation laid, defendant could introduce evidence that victim was in homosexual relationship with her roommate, and that victim fabricated charge of rape against him because roommate walked in on them and she did not want it to negatively impact her relationship with roommate); *Johnson v. Virginia*, 385 S.E.2d 223, 227 (Va. Ct. App. 1989) (allowing defendant, male pastor at church, charged with raping two girls, to offer evidence that alleged victims decided to fabricate charges against him as means of preventing him from intervening, at request of one of girls' mothers, to terminate their relationship); *MUELLER & KIRKPATRICK*, *supra* note 21, § 4.33, at 302.

¹⁹⁸ See, e.g., *Ohio v. Hart*, 678 N.E.2d 952, 955 (Ohio Ct. App. 1996) (allowing defendant to offer evidence that his stepchildren were biased against him, and thus they fabricated charges of sexual assault because he disciplined them harshly; but not allowing evidence of reason for discipline, which was that stepchildren had engaged in homosexual conduct).

¹⁹⁹ FED. R. EVID. 412(b)(2).

²⁰⁰ *Gretzinger v. Univ. of Haw. Prof'l Assembly*, No. 97-15123, 1998 WL 403357, at *2 (9th Cir. July 7, 1998).

²⁰¹ *Blackmon v. Buckner*, 932 F. Supp. 1126, 1128 (S.D. Ind. 1996) (excluding evidence of plaintiff's prior consensual homosexual encounters to prove consent in § 1983 suit against jail officials for failing to protect plaintiff from sexual assault).

Often, a party will ask questions or introduce extrinsic evidence designed to impeach a witness's credibility, a practice recognized and permitted by the Federal Rules of Evidence. Federal Rule of Evidence 607 provides that "[t]he credibility of a witness may be attacked by any party, including the party calling the witness,"²⁰² and Federal Rule of Evidence 611(b) provides that the proper scope of cross-examination includes "matters affecting the credibility of the witness."²⁰³ Of course, the mere fact that a witness is gay or associates with gay people cannot, standing alone, be used to impeach his credibility as a witness.²⁰⁴ However, there are several instances when the sexual orientation of a party or a witness is raised in the context of impeaching the witness under one of the recognized forms of impeachment.

One common form of impeaching a witness is by showing that the witness is somehow biased:

Bias is a term used in the "common law of evidence" to describe the relationship between a party and a witness that might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party. Bias may be induced by a witness' like, dislike, or fear of a party, or by the witness' self-interest.²⁰⁵

The Supreme Court has held that "[p]roof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony."²⁰⁶

Proof of bias may be shown by, *inter alia*, a personal relationship between the witness and a party based on friendship, family ties, sexual involvement, or common membership in clubs or organiza-

²⁰² FED. R. EVID. 607.

²⁰³ FED. R. EVID. 611(b).

²⁰⁴ *United States v. Nuccio*, 373 F.2d 168, 171 (2d Cir. 1967); *United States v. Auguste*, No. ACM S27276, 1987 CMR LEXIS 309, at *4 (A.F.C.M.R. Apr. 8, 1987); *State v. Lewis*, 602 A.2d 618, 622 (Conn. App. Ct. 1992); *State v. Miller*, 485 S.W.2d 435, 440-41 (Mo. 1972).

²⁰⁵ *United States v. Abel*, 469 U.S. 45, 52 (1984).

²⁰⁶ *Id.* at 51-52. The Court held that Rules 607 and 611(b) implicitly recognize a right to impeach parties for bias. *Id.* at 51.

tions.²⁰⁷ Bias can be proven not only by asking the witness on cross-examination about the alleged bias, but also through the introduction of extrinsic evidence of that bias, such as documentary evidence or witness testimony.²⁰⁸

Consequently, where a witness has a current homosexual relationship with one of the parties, courts have typically held that the opposing party should be permitted to bring up that fact in order to show that the witness may be biased.²⁰⁹ Moreover, courts allow witnesses to be asked whether they made a homosexual advance toward a party that was rebuffed, reasoning that the refusal of the advance may have created hostility and thus bias against that party.²¹⁰ Similarly, courts have allowed a party to introduce evidence that a witness harbors hostility toward the defendant because he has somehow interfered with the witness's homosexual relationship with another person.²¹¹ Also, one court has permitted a party to offer evidence of a witness's sexual orientation where the witness was a lesbian and the party was a major supporter of a political candidate with antigay views.²¹² Although the probative

²⁰⁷ MUELLER & KIRKPATRICK, *supra* note 21, § 6.20, at 533 nn.1-4; WEINSTEIN & BERGER, *supra* note 21, § 607.04(5), at 607-36 to 607-38; *see also* Abel, 469 U.S. at 52.

²⁰⁸ Abel, 469 U.S. at 52.

²⁰⁹ *See, e.g.*, United States v. Santos, 201 F.3d 953, 964 (7th Cir. 2000); Tinker v. United States, 417 F.2d 542, 544 (D.C. Cir. 1969); United States v. Johnson, 20 M.J. 610, 610 (A.F.C.M.R. 1985); State v. Wargo, 680 P.2d 206, 209 (Ariz. Ct. App. 1984); Doepel v. United States, 434 A.2d 449, 457 n.8 (D.C. 1981); Stanley v. State, 648 So. 2d 1268, 1269 (Fla. Dist. Ct. App. 1995); State v. Wells, No. 94-CA-2255, 1995 WL 502249, at *5 (Ohio Ct. App. Aug. 23, 1995); State v. Eben, 610 N.E.2d 1109, 1112-13 (Ohio Ct. App. 1992); Denton v. State, No. 03-96-00006-CR, 1998 Tex. App. LEXIS 4981, at *42-43 (Tex. App. 1998) (citing Vaughn v. State, 888 S.W.2d 62, 74-75 (Tex. App. 1994)); Kirk v. Commonwealth, 464 S.E.2d 162, 166 (Va. Ct. App. 1995); *see also* State v. Woodard, 769 A.2d 379, 382-83 (N.H. 2001) (prosecution permitted to show that victim's mother was in lesbian relationship with defendant as way of explaining why she did not immediately report abuse of daughter by defendant).

²¹⁰ *See, e.g.*, United States v. Wright, 489 F.2d 1181, 1186 (D.C. Cir. 1973); United States v. Nuccio, 373 F.2d 168, 171 (2d Cir. 1967); Arias v. State, 593 So. 2d 260, 264 (Fla. Dist. Ct. App. 1992).

²¹¹ *See, e.g.*, Blackmon v. Buckner, 932 F. Supp. 1126, 1129 (S.D. Ind. 1996) (allowing defendant prison official to prove that witness had bias against him because he had separated witness from his homosexual lover in prison); Zawacki v. State, 753 N.E.2d 100, 101-03 (Ind. Ct. App. 2001) (allowing defendant to prove that victim had motive to falsely accuse him of sexual assault because he refused to allow his daughter to have lesbian relationship with her).

²¹² Santos, 201 F.3d at 964. *But see* Smith v. Mankato State Univ., Nos. C2-95-98, C2-95-99, 1995 WL 450811, at *3-4 (Minn. Ct. App. Aug. 1, 1995) (refusing to permit party suing university for investigating him for improprieties from questioning affirmative action officer, who had investigated allegations that plaintiff had made homophobic remarks about her

worth of such evidence may be deemed to outweigh any risk of prejudice,²¹³ where feasible, courts have rightly sought ways to avoid potential prejudice by allowing parties to demonstrate bias without allowing them to bring up the sexual nature of the relationship. Courts instead allow testimony that the two people are “close,”²¹⁴ were “very close friends,”²¹⁵ had a “close relationship,”²¹⁶ or courts simply avoid reference to gender where possible.²¹⁷

An unusual variation on this form of impeachment took place in the San Francisco “dog mauling” trial, in which Diane Whipple, a lesbian, was killed by a neighbor’s dog.²¹⁸ Counsel for the defense twice brought up the victim’s sexual orientation at trial.²¹⁹ In one instance, she raised the issue to show a motive for the prosecution withholding certain exculpatory evidence from the jury by asking, “[W]hat is the prosecution’s excuse for keeping this evidence from you? . . . Maybe he wants to curry favor with the homosexual and gay folks who were picketing . . . and demanding justice for Diane Whipple.”²²⁰ It also appears as though the issue was used to impeach the decedent’s surviving partner, who had a parallel wrongful death action.²²¹ The attorney stated, “Sharon Smith has every right to sue for the wrongful death of her girlfriend. But she has no right to come here with false testimony and try to frame Marjorie Knoller for murder.”²²² Evidently, the basis for impeaching Smith was that she stood to gain financially in the wrongful death

sexual orientation).

²¹³ See, e.g., *Kirk*, 464 S.E.2d at 166.

²¹⁴ *Quark, Inc. v. Harley*, No. 96-1061, 1998 WL 161035, at *4 (10th Cir. Mar. 4, 1998).

²¹⁵ *Demps v. Wainwright*, 805 F.2d 1426, 1429 (11th Cir. 1986).

²¹⁶ *Chumbler v. Commonwealth*, 905 S.W.2d 488, 492 (Ky. 1995).

²¹⁷ *Hughey v. State*, 729 So. 2d 828, 831 (Miss. Ct. App. 1998) (finding that defendant could raise fact that witness had incentive to steal for prostitution, but not for homosexual prostitution, where witness allegedly accused defendant of stealing in order to cover up his own theft of money for homosexual prostitutes).

²¹⁸ *People v. Knoller*, No. 181813 (Super. Ct. for City & County of S.F. Mar. 27, 2001).

²¹⁹ John Gallagher, *Homophobia for the Defense*, *ADVOCATE*, May 14, 2002, at 34-37.

²²⁰ *Id.* at 34. The defense did not, however, point out that the prosecutor himself was gay. *Id.*

²²¹ CNN, *Jury Reaches Partial Verdict in Dog Mauling Case* (Mar. 20, 2002), available at <http://www.cnn.com/2002/LAW/03/20/dog.mauling.trial/index.html> (last visited Mar. 5, 2003); see also *Smith v. Knoller*, No. 319532 (Super. Ct. for City & County of S.F. Mar. 12, 2001).

²²² *Id.*

action, and a conviction in the criminal case would support her civil claim.

A second common form of impeaching a witness is to contradict him. In other words, one may show that something the witness said is not true, casting doubt not just on the specific testimony given by the witness on that point, but more generally raising questions about the witness's overall veracity.²²³ But under the collateral-matter rule a witness cannot be contradicted through the introduction of extrinsic evidence on "collateral" matters, meaning that the evidence is not admissible unless it also would tend to prove some other point, such as bearing on a substantive issue in the case; indicating bias, a defect in capacity, or untruthful disposition (all methods of impeachment that could normally be proven through extrinsic evidence); or refuting a so-called "telltale" fact about which the witness simply could not be mistaken were he being truthful.²²⁴ Thus, where a witness denies being gay or having a homosexual relationship with a particular person, extrinsic evidence of the witness's homosexuality is not admissible to contradict him under the collateral-matter rule unless it is otherwise relevant in the case.²²⁵

A third common method of impeaching a witness is to introduce evidence of the defendant's prior felony convictions, pursuant to Federal Rule of Evidence 609(a).²²⁶ This method of impeachment is grounded in the common law, which provided that convicted felons were incompetent to be witnesses, and has developed into a modern rule which allows them to testify, but allows evidence of their criminal records to come in on the theory that persons with a criminal past are less likely to testify truthfully than law-abiding citizens.²²⁷ However, recognizing that bringing in prior convictions poses special risks for a criminal defendant—as the impeachment evidence may cause the jury to convict the defendant for being a bad person unworthy of sympathy—the rule for criminal defendants as

²²³ MUELLER & KIRKPATRICK, *supra* note 21, § 6.43, at 598-99; WEINSTEIN & BERGER, *supra* note 21, § 607.06(1), at 607-72 to 607-74.

²²⁴ MUELLER & KIRKPATRICK, *supra* note 21, § 6.47, at 614-18.

²²⁵ See *State v. Porretto*, 468 So. 2d 1142, 1148 (La. 1985).

²²⁶ FED. R. EVID. 609(a).

²²⁷ WEINSTEIN & BERGER, *supra* note 21, § 609.02(1), at 609-8.

witnesses is weighted in favor of excluding such evidence.²²⁸ Moreover, for any type of witness, convictions that are more than ten years old are not admissible unless a much stricter standard is satisfied.²²⁹

One factor in deciding whether or not to admit a prior conviction under Rule 609(a)(1) is the nature of the prior crime and its bearing on veracity.²³⁰ Certain crimes, like sex offenses and prostitution convictions, are thought to have little if any bearing on veracity, and thus are more likely to be excluded.²³¹ Moreover, where the “crime” is that of consensual homosexual sodomy, there is a risk that introducing evidence of such a conviction will result in unfair prejudice against the party based on his evident sexual orientation. Thus, although a few courts appear to have allowed impeachment for a prior conviction of consensual homosexual sodomy,²³² other courts refuse to allow such convictions to be used to impeach a witness, reasoning that doing so is “an ugly tactic that is prohibited by [Rule] 403,”²³³ and that it is “a highly inflammatory and prejudicial matter brought in to degrade the defendant in the eyes of the jury.”²³⁴

F. RELEVANCE TO SHOW DEFENDANT’S MOTIVE TO COMMIT CRIME

²²⁸ Federal Rule of Evidence 609(a)(1) provides:

For the purpose of attacking the credibility of a witness, evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused.

FED. R. EVID. 609(a)(1); *see also* MUELLER & KIRKPATRICK, *supra* note 21, § 6.31, at 562.

²²⁹ *See* FED. R. EVID 609(b) (excluding evidence of such convictions “unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect”).

²³⁰ MUELLER & KIRKPATRICK, *supra* note 21, § 6.31, at 562-63 (citing *Gordon v. United States*, 383 F.2d 936 (D.C. Cir. 1967)).

²³¹ MUELLER & KIRKPATRICK, *supra* note 21, § 6.31, at 563 & nn.6-7.

²³² *Stowe v. Bowlin*, 531 S.W.2d 955, 957-58 (Ark. 1976); *Minnesota v. Scheweppe*, 237 N.W.2d 609, 615 (Minn. 1975).

²³³ *United States v. Person*, No. 97-4599, 2000 WL 223336, at *3 (4th Cir. Feb. 28, 2000).

²³⁴ *United States v. Provoo*, 215 F.2d 531, 534 (2d Cir. 1954) (involving allegation of sodomy for which subject was arrested but never tried).

Although motive is not normally an element of a crime, it may be relevant either to proving the defendant's intent to commit, or identifying the defendant as, the one who committed the crime.²³⁵ It shows that the defendant had a reason to commit the act charged, from which it may be inferred that the defendant did in fact commit the act.²³⁶

Thus, in murder or assault cases, courts have admitted evidence of a homosexual relationship between the accused and the victim as relevant to motive or intent for an emotionally motivated murder or assault.²³⁷ Similarly, evidence that the defendant had a homosexual relationship with a third person who was married to or otherwise involved in a relationship with the victim is likewise relevant to show motive.²³⁸

Furthermore, some courts hold that evidence of the defendant's homosexuality is relevant to support the state's claim that the motive for the killing was the victim's threat to expose the defendant as a homosexual, reasoning that the fact that the defendant is gay lends support to such a theory.²³⁹ However, one court has rejected such evidence, reasoning that only evidence that the victim threatened the defendant with exposure of an allegation that he was a homosexual matters, with the truth of that allegation being of slight additional probative value to motive while being extremely prejudicial.²⁴⁰

²³⁵ MUELLER & KIRKPATRICK, *supra* note 21, § 4.17, at 227.

²³⁶ WEINSTEIN & BERGER, *supra* note 21, § 404.22[3], at 404-101 to 404-105.

²³⁷ See, e.g., *Smith v. United States*, 381 A.2d 258, 259-60 (D.C. 1977); *Welborn v. State*, 372 S.E.2d 220, 220-21 (Ga. 1988); *State v. Schweppe*, 237 N.W.2d 609, 615 (Minn. 1975); *Gilpin v. State*, No. A14-90-00700-CR, 1991 WL 84067, at *1-2 (Tex. Crim. App. May 23, 1991).

²³⁸ See, e.g., *Guthrie v. State*, 637 So. 2d 35, 35-36 (Fla. Dist. Ct. App. 1994); *People v. Roza*, 708 N.E.2d 1229, 1232 (Ill. App. Ct. 1999); *Chumbler v. Commonwealth*, 905 S.W.2d 488, 492-93 (Ky. 1995); see also *Scroggins v. State*, 401 S.E.2d 13, 21 (Ga. Ct. App. 1991), *overruled on other grounds* by *Dunagan v. State*, 502 S.E.2d 726 (Ga. 1998) (allowing evidence of homosexual relationship between defendants to support charge of affray, reasoning that emotional relationship may have affected their conduct). The crime of "affray" refers to "[t]he fighting, by mutual consent, of two or more persons in some public place, to the terror of onlookers." BLACK'S LAW DICTIONARY 60 (7th ed. 1999).

²³⁹ See *State v. Statewright*, 300 So. 2d 674, 678 (Fla. 1974); *State v. Ross*, 395 S.E.2d 148, 150-51 (N.C. Ct. App. 1990); see also *State v. Roberts*, 622 A.2d 1225, 1236 (N.H. 1993) (finding, in prosecution for witness tampering, evidence of defendant's homosexual relationship with underage witness relevant to his motive for trying to remove him as witness in order to avoid prosecution for statutory rape).

²⁴⁰ *United States v. Ham*, 998 F.2d 1247, 1250-53 (4th Cir. 1993). The government's

Evidence of homosexuality also has arisen in some rather uncommon fact scenarios. For example, one case held that evidence of the defendant's homosexuality coupled with evidence that the victim, a relative with whom he lived, had barred him from engaging in homosexual activity while living in the home, was relevant to show motive to kill the victim.²⁴¹

Although courts recognize that a jury may use the evidence for an impermissible purpose, such as to suggest that the defendant is an immoral or bad person and inviting conviction on that basis, most courts find that the evidence is nevertheless admissible for use in supporting a potential motive for the crime. Courts find that the risk of prejudice is minimized by a limiting instruction²⁴² or ensuring that the evidence is presented in a way that is not unduly inflammatory.²⁴³

G. RELEVANCE TO DEFENSE OF TRUTH IN A DEFAMATION CASE

As a general rule in defamation actions, truth is a complete defense to liability.²⁴⁴ Thus, where a plaintiff such as Tom Cruise alleges that a person defamed him by stating or writing that he is gay, evidence that he is in fact gay is a complete defense to liability²⁴⁵ and is relevant evidence as it supports the claimed

relevancy argument was that, by proving the accusations to be true, the government could show that the victim was truly a threat to the defendant and not a mere nuisance. *Id.* at 1252.

²⁴¹ *State v. Brecht*, 421 N.W.2d 96, 98-99, 105-06 (Wis. 1998).

²⁴² *See, e.g., Guthrie v. State*, 637 So. 2d 35, 36 (Fla. Dist. Ct. App. 1994); *State v. Brecht*, 421 N.W.2d 96, 105-06 (Wis. 1998).

²⁴³ *See, e.g., Smith v. United States*, 381 A.2d 258, 259-60 (D.C. 1977).

²⁴⁴ *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 489-90 (1975); RESTATEMENT (SECOND) TORTS § 581A (1977) ("One who publishes a defamatory statement of fact is not subject to liability for defamation if the statement is true.").

²⁴⁵ *See Prince v. Out Publ'g, Inc.*, No. B140475, 2002 WL 7999, at *5 (Cal. Ct. App. Jan. 3, 2002) ("[T]he only aspect that is 'of and concerning' plaintiff is that he was at a party and that he is gay. As to this aspect of plaintiff's case, defendants have a complete defense to the libel causes of action: truth, since plaintiff acknowledges that he is in fact gay."); *Froelich v. Adair*, 516 P.2d 993, 995 (Kan. 1973) (in suit in which defendant's former husband sued her for defamation for stating that he was gay and that particular individual was his lover, wife entitled to obtain evidence relevant to truth of her statements from alleged lover); *Dominick v. Index Journal Co.*, No. 99-CP-24-370, 2001 WL 1763977, at *3 (S.C. Mar. 15, 2001) ("[T]o the extent [his] cause of action for defamation is based on any alleged inference . . . that he is gay, the [defendant] has an absolute defense because he is.").

defense. Moreover, such evidence is not barred by the character propensity rule; the evidence is not offered to show that the person acted in conformity with that character trait on a particular occasion, but offered rather to support the defense of truth.²⁴⁶ In such cases, proof of the plaintiff's sexual orientation need not be made solely by reputation or opinion evidence, but also may be made using evidence of specific instances of conduct that demonstrate the plaintiff's sexual orientation.²⁴⁷

In light of greater social acceptance of gay people in recent years, it may come as somewhat of a surprise that labeling someone gay can be deemed defamatory, yet no court has held that it is not. However, differing degrees of social acceptance of gay people have split the courts on the question whether a statement that someone is gay is defamation *per se* or defamation *per quod*.²⁴⁸ The former means that the statement is "defamatory in and of itself and is not capable of an innocent meaning,"²⁴⁹ and the latter means "[d]efamation that either (1) is not apparent but is proved by extrinsic evidence showing its injurious meaning or (2) is apparent but is not a statement that is actionable *per se*."²⁵⁰ The main difference between the two is that special damages need to be proven for defamation *per quod*, but not for defamation *per se*.²⁵¹ Defamation *per se* benefits the plaintiff by presuming certain damages, such as loss of reputation, and the plaintiff need not prove that the statements were defamatory within the context in which they were made.²⁵²

²⁴⁶ See *supra* notes 77-79 and accompanying text.

²⁴⁷ See *supra* notes 99-100 and accompanying text.

²⁴⁸ Compare *Hayes v. Smith*, 832 P.2d 1022, 1025 (Colo. Ct. App. 1991), and *Nacinovich v. Tullet & Tokyo Forex, Inc.*, 685 N.Y.S.2d 17, 19 (N.Y. App. Div. 1999), and *Privitera v. Town of Phelps*, 435 N.Y.S.2d 402, 404 (N.Y. App. Div. 1981), and *Head v. Newton*, 596 S.W.2d 209, 210 (Tex. App. 1980) (citing *Buck v. Savage*, 323 S.W.2d 363 (Tex. App. 1959)), with *Regehr v. Sonopress, Inc.*, No. 2:99CV69815, 2000 WL 33710902, at *4 (D. Utah Apr. 14, 2000), and *Q-Tone Broad. Co. v. Musicradio of Md., Inc.*, No. CIV. A. 93C-09-021, 1994 WL 555391, at *8 (Del. Super. Ct. Aug. 22, 1994), and *Donovan v. Fiumara*, 442 S.E.2d 572, 580 (N.C. Ct. App. 1994), and *Key v. Ohio Dep't of Rehab. & Corr.*, 598 N.E.2d 207, 209 (Ohio Ct. App. 1990), and *Lehman v. Wellens*, No. 86-1665, 1987 WL 267191, at *1 (Wis. Ct. App. Apr. 8, 1987).

²⁴⁹ BLACK'S LAW DICTIONARY 427 (7th ed. 1999).

²⁵⁰ *Id.*

²⁵¹ See, e.g., *United Ins. Co. of Am. v. Murphy*, 961 S.W.2d 752, 755 (Ark. 1998); *Donovan*, 442 S.E.2d at 575.

²⁵² *Hayes*, 832 P.2d at 1024.

Historically, defamation was actionable *per se* only if the defamatory remark imputed a criminal offense; a venereal or loathsome and communicable disease; conduct that is incompatible with the exercise of a lawful business, trade, profession, or office; or unchastity by a woman.²⁵³ And the Restatement of Torts has left open the issue of whether a statement that someone is gay should be deemed defamation *per se*.²⁵⁴ Most of the courts holding that a false imputation of homosexuality is defamatory *per se* focus on the fact that sodomy, particularly same-sex sodomy, is a criminal activity,²⁵⁵ and hold that the imputation that someone is gay implies that he commits the crime of sodomy, thus making it fall within the historical defamation *per se* category of imputing a criminal offense.²⁵⁶ Other courts hold that it is merely defamation *per quod* on several grounds. Some courts rely on state law no longer criminalizing sexual conduct between consenting adults of the same sex.²⁵⁷ One court reasons that the label “gay” or “homosexual” refers only to status and does not necessarily connote sexual conduct at all.²⁵⁸ And some courts reason that it is offensive to gay people to label a false accusation of homosexuality defamatory *per se*. For example, one court declared, “A court should not classify homosexuals with those miscreants [such as thieves, murderers and prostitutes] who have engaged in actions that deserve the reprobation and scorn which is implicitly a part of the slander/libel *per se* classifications.”²⁵⁹

²⁵³ RESTATEMENT (FIRST) OF TORTS § 569-54 (1938).

²⁵⁴ RESTATEMENT (SECOND) OF TORTS § 574 (1977).

²⁵⁵ The United States Supreme Court has recently granted certiorari for a case challenging the constitutionality of such laws. See *Lawrence v. State*, 41 S.W.3d 349 (Tex. 2001), cert. granted, 123 S. Ct. 661 (2002).

²⁵⁶ See, e.g., *Nazeri v. Mo. Valley Coll.*, 860 S.W.2d 303, 312 (Mo. 1993):

Despite the efforts of many homosexual groups to foster greater tolerance and acceptance, homosexuality is still viewed with disfavor, if not outright contempt, by a sizeable proportion of our population. Moreover, engaging in deviant sexual intercourse with another person of the same sex is still a class A misdemeanor in this state.

Id.; *Head v. Newton*, 596 S.W.2d 209, 210 (Tex. App. 1980) (citing *Buck v. Savage*, 323 S.W.2d 363 (Tex. App. 1959) (“[T]he statement that someone was a ‘queer’ is slanderous *per se* because it imputes the crime of sodomy.”)).

²⁵⁷ See, e.g., *Hayes v. Smith*, 832 P.2d 1022, 1025 (Colo. Ct. App. 1991); *Lehman v. Wellens*, No. 86-1665, 1987 WL 267191, at *1 (Wis. Ct. App. Apr. 8, 1987).

²⁵⁸ See, e.g., *Donovan v. Fiumara*, 442 S.E.2d 572, 577 (N.C. Ct. App. 1994).

²⁵⁹ *Hayes*, 832 P.2d at 1025. Such courts also note social trends of greater tolerance and

H. RELEVANCE TO DAMAGES IN WRONGFUL DEATH AND PERSONAL INJURY CASES

Perhaps even more surprising than defamation cases are wrongful death and personal injury cases in which the defendants seek to introduce evidence regarding the victim's sexual orientation as relevant to the issue of damages.²⁶⁰ One might wonder how a victim's sexual orientation could be relevant to the issue of damages. In such cases, there are two components to the damages claim. First, there are economic losses, such as lost future wages and additional expenses resulting from the injury.²⁶¹ Second, there are noneconomic losses, including pain and suffering and loss of enjoyment of life.²⁶² In estimating damages for economic losses, an expert economist evaluates such factors as the victim's likely wages, household services, life expectancy, and his probability of being employed.²⁶³ To determine a victim's likely wages, economists consult statistical tables that report median wages based on age and gender.²⁶⁴ To estimate household services, experts often use studies that show the dollar value of household contributions based on age, gender, and number of children.²⁶⁵ Life expectancy tables show life expectancy based on age, gender, and race.²⁶⁶ Further statistics based on age and gender estimate the likelihood of participating in and remaining in the labor force.²⁶⁷

acceptance of gays and lesbians. *See Hayes*, 832 P.2d at 1025:

For a characterization of a person to warrant a *per se* classification, it should, without equivocation, expose the plaintiff to public hatred or contempt. However, there is no empirical evidence in this record demonstrating that homosexuals are held by society in such poor esteem.

Indeed, it appears that the community view toward homosexuals is mixed.

Lehman, 1987 WL 267191, at *1 (noting state laws prohibiting employment and housing discrimination based on sexual orientation).

²⁶⁰ *Roby v. Kingsley*, 492 So. 2d 789, 792 (Fla. Dist. Ct. App. 1986); *Brandon ex rel. Estate of Brandon v. County of Richardson*, 624 N.W.2d 604, 626 (Neb. 2001); *Mears v. Colvin*, 768 A.2d 1264, 1268 (Vt. 2000).

²⁶¹ WILLIAM GARY BAKER & MICHAEL K. SECK, DETERMINING ECONOMIC LOSS IN INJURY AND DEATH CASES § 1.04 (2d ed. 1993 & Supp. 2001).

²⁶² *Id.* § 1.05.

²⁶³ *Id.* §§ 1.13, 1.15, 1.17-.19.

²⁶⁴ *Id.* §§ 7.10-.11.

²⁶⁵ *Id.* §§ 9.02-.05.

²⁶⁶ *Id.* §§ 11.06, 12.

²⁶⁷ *Id.* §§ 13.02, 13.04.

Noneconomic losses, such as pain and suffering and loss of enjoyment of life, cannot be estimated by experts such as economists.²⁶⁸ Pain and suffering damages can include actual physical pain, fright, anxiety, and indignity.²⁶⁹ Loss of enjoyment of life may call for the jury to subjectively evaluate the victim's hobbies, interests, and number of friends.²⁷⁰ Sometimes jurors are asked to use their "collective enlightened conscience" in determining such awards.²⁷¹ Furthermore, many jurisdictions allow jurors to use a "per diem" method, or the jury determines an award of injury for pain and suffering based on a specific unit of time, and applies that to the total amount of time plaintiff has been and will be injured.²⁷²

Although few cases have addressed the issue, one can imagine a number of ways in which defendants might try to argue that sexual orientation is a determinative factor in calculating, and reducing, economic loss. Wages, the value of household services, mortality rates, and employment retention all might vary with sexual orientation. For example, a defendant might point to statistics that state that gay men are more likely than straight men to contract HIV,²⁷³ or that gay people are more likely to have drinking problems,²⁷⁴ smoke,²⁷⁵ or use illicit drugs,²⁷⁶ all of which would affect life expectancy and employment participation and retention.²⁷⁷ A defendant also might argue that a gay person is less likely to have

²⁶⁸ *Id.* § 1.05.

²⁶⁹ Mark Geistfeld, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 CAL. L. REV. 773, 781 (1995).

²⁷⁰ 1 STUART M. SPEISER ET AL., RECOVERY FOR WRONGFUL DEATH AND INJURY § 3:41 (3d ed. 1992).

²⁷¹ Geistfeld, *supra* note 269, at 782 (citing GRAHAM DOUTHWAITE, JURY INSTRUCTIONS ON DAMAGES IN TORT ACTIONS §§ 6-17 (2d ed. 1988)).

²⁷² *Id.*

²⁷³ Joseph A. Cantania et al., *The Continuing HIV Epidemic Among Men Who Have Sex with Men*, 91 AM. J. PUB. HEALTH 907, 907 (2001).

²⁷⁴ Carrie Jaffe et al., *The Prevalence of Alcoholism and Feelings of Alienation in Lesbian and Heterosexual Women*, J. GAY & LESBIAN PSYCHOTHERAPY, Winter 2000, at 25; Barbara G. Valanis et al., *Sexual Orientation and Health*, 9 ARCHIVES OF FAM. MED. 843, 849-50 (2000).

²⁷⁵ Ronald D. Stall et al., *Cigarette Smoking Among Gay and Bisexual Men*, 89 AM. J. PUB. HEALTH 1875, 1875 (1999); Valanis et al., *supra* note 274, at 849-50.

²⁷⁶ William F. Skinner, *The Prevalence and Demographic Predictors of Illicit and Licit Drug Use Among Lesbians and Gay Men*, 84 AM. J. PUB. HEALTH 1307, 1309 (1994).

²⁷⁷ See generally Paul Cameron et al., *Does Homosexual Activity Shorten Life?*, 83 PSYCHOL. REP. 847 (1998) (claiming homosexual activity could shorten life expectancy by twenty to thirty years).

children, which could affect the value of household services. Moreover, a defendant could argue that gay youth are more likely to engage in risky behaviors²⁷⁸ or attempt suicide.²⁷⁹ Finally, the simple fact of discrimination and the lack of statutory protection²⁸⁰ might reduce a victim's likelihood of retaining employment, as future earnings of the decedent or the injured person are relevant to the issue of damages in wrongful death actions and personal injury actions.²⁸¹

For the noneconomic portion of the damages award, a defendant might point to real or likely estrangement from family because of sexual orientation, thus reducing loss of consortium awards sometimes given to a victim's family.²⁸² Or perhaps a defendant would simply hope that the jury would arrive at its own conclusion that the life of a gay person is worth less than the life of a heterosexual person.

When an individual victim is known to be an alcoholic²⁸³ or HIV positive,²⁸⁴ such evidence has been admitted by courts as relevant to damages. The question is whether statistics showing that gay people are more likely to be alcoholics or HIV positive, or be estranged from their families, can be used as a way of reducing damages.

²⁷⁸ Robert Garofalo et al., *The Association Between Health Risk Behaviors and Sexual Orientation Among a School-based Sample of Adolescents*, PEDIATRICS, May 1998, at 895.

²⁷⁹ James Orlando, *Homosexuality is a Risk Factor for Teen Suicide*, in TEEN SUICIDE 19-20 (2000). *But see* Delia M. Rios, *The Extent of Homosexual Teen Suicide is Exaggerated*, in TEEN SUICIDE 88-90 (2000).

²⁸⁰ See H.R. 2692, 107th Cong. (2001) (prohibiting employment discrimination on basis of sexual orientation in proposed bill).

²⁸¹ WEINSTEIN & BERGER, *supra* note 21, § 401.08(7), at 401-62.3.

²⁸² See, e.g., *Voelker v. Frederick Bus. Prop. Co.*, 465 S.E.2d 246, 251-52 (W. Va. 1995) (finding evidence of beneficiary's relationship to decedent relevant to issue of damages).

²⁸³ *Humble v. Mountain State Constr. Co.*, 441 F.2d 816, 819 (6th Cir. 1971) (allowing physician testimony regarding decedent's alcoholism to show that decedent's capacity to work was seriously impaired at times); *Appel v. Quilantang*, 629 So. 2d 1004, 1004-05 (Fla. Dist. Ct. App. 1993); *Kraus v. Taylor*, 710 A.2d 1142, 1143-44 (Pa. Super. Ct. 1998) (finding plaintiff's alcoholism relevant to issue of life expectancy where plaintiff submitted actuarial tables to jury); *Perkins v. Olson*, No. 15269-3-III, 1997 Wash. App. LEXIS 1033, at *6 (Wash. Ct. App. July 1, 1997); *Kramer v. J.I. Case Mfg. Co.*, 815 P.2d 798, 806-07 (Wash. Ct. App. 1991).

²⁸⁴ *Agosto v. Trusswal Sys. Corp.*, 142 F.R.D. 118, 120 (E.D. Pa. 1992) (holding HIV-related information relevant to life expectancy). *But see* *Sacramona v. Bridgestone/Firestone, Inc.*, 152 F.R.D. 428, 431 (D. Mass. 1993) (refusing to order plaintiff who admitted to having risky lifestyle to submit to blood test, finding possibility that plaintiff might be HIV positive too attenuated to be relevant to issue of life expectancy and damages).

As discussed above,²⁸⁵ life expectancy and wage tables are usually based on age, race, and gender.²⁸⁶ Such differentials result in different damage awards based on the use of “status” categories.²⁸⁷ That is, the categories ignore the individual conduct of the victim. While the use of such categories has been criticized,²⁸⁸ no case law discusses its relevancy to damages. Using sexual orientation as a factor to determine life expectancy or lost wages involves similar issues. A defendant might argue that the victim’s status is relevant, while a plaintiff would want the jury to consider only the victim’s actual conduct.

Two examples show how, in calculating damages, juries might be asked to consider general statistics about a segment of a population, and not a victim’s individual circumstances. First, life expectancy tables that use race as a factor show a lower life expectancy for African-Americans.²⁸⁹ Yet social science studies generally show that a higher mortality rate for African-Americans is based on socio-economic conditions.²⁹⁰ Homicide, for example, is a leading cause of death for African-American men.²⁹¹ However, not all African-Americans are exposed to this increased risk of mortality.

Second, wage earning tables based on gender show lower lifetime earnings for women.²⁹² Some believe that such differentials are based on workplace discrimination and the glass-ceiling phenomenon.²⁹³ Yet, not all women earn less than their male counterparts.

²⁸⁵ See *supra* notes 264-67 and accompanying text.

²⁸⁶ See WILLIAM GARY BAKER & MICHAEL K. SECK, DETERMINING ECONOMIC LOSS IN INJURY AND DEATH CASES §§ 11.05-.06 (2d ed. 1993).

²⁸⁷ See Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463, 482 (1998).

²⁸⁸ *Id.*

²⁸⁹ WILLIAM GARY BAKER & MICHAEL K. SECK, DETERMINING ECONOMIC LOSS IN INJURY AND DEATH CASES § 12.02 (2d ed. 1993).

²⁹⁰ See, e.g., Sharon A. Jackson et al., *The Relation of Residential Segregation to All-Cause Mortality: A Study in Black and White*, AM. J. PUB. HEALTH, Apr. 2000, at 615 (concluding that minority residential segregation may influence mortality risk).

²⁹¹ *Homicide A Major Factor In Shorter Life Expectancy For Blacks: Study*, JET, Oct. 15, 2001, at 36.

²⁹² BAKER & SECK, *supra* note 286, §§ 11.05-.06. Notably, wage earning tables are usually only used where the wage earning history of a plaintiff cannot be concretely established. WILLIAM GARY BAKER & MICHAEL K. SECK, DETERMINING ECONOMIC LOSS IN INJURY AND DEATH CASES § 7.18 (2d ed. 1993).

²⁹³ See, e.g., Chamallas, *supra* note 287, at 482.

Determining the relevance of a victim's sexual orientation to the issue of damages would pose a similar conflict between making generalizations and analyzing circumstances individual to the victim. That is, to argue that a victim's sexual orientation is relevant to his or her life expectancy or capacity to earn wages, a defendant likely would point to general studies and statistics. Plaintiff, on the other hand, would want to argue that the jury should only consider those circumstances that actually exist in the victim (*i.e.*, his actual health or prior wage earnings). Arguing that a gay victim has a statistically higher chance than his heterosexual counterpart of contracting HIV and therefore a statistically lower life expectancy, the argument might go, is based on stereotypes and negative assumptions. Instead, a plaintiff would want the jury to look at the victim's actual behaviors and HIV status. However, the routine use of race and gender in wage earning and life expectancy tables²⁹⁴ lends support to a defense position that sexual orientation, too, is a status that affects potential earnings and mortality, regardless of actual conduct. If the use of race and gender to determine a victim's likely lifetime earnings or life expectancy reflects deep bias and assumptions in our culture,²⁹⁵ then it could be just as likely that sexual orientation is another layer in the calculation. Arguably, in the case of sexual orientation, the prejudicial nature of the admission outweighs the probative value.

The few cases that have considered the issue have uniformly rejected the admission of evidence of the victim's sexual orientation on the issue of damages. In *Mears v. Colvin*,²⁹⁶ the defendant in a wrongful death action, over the plaintiff's objection, introduced testimony that the plaintiff (the decedent's wife) was having a lesbian affair, and was planning on divorcing him.²⁹⁷ On appeal the court noted that evidence of an extramarital affair, like evidence of the decedent's relationship with his children, is relevant to claims of loss of companionship or loss of consortium.²⁹⁸ However, the court

²⁹⁴ See *supra* notes 286-93 and accompanying text.

²⁹⁵ See Chamallas, *supra* note 287, at 466 (contending that "bias finds its way into the law, not through explicit differential treatment . . . but through reliance on implicit hierarchies of values and dichotomous thinking").

²⁹⁶ 768 A.2d 1264 (Vt. 2000).

²⁹⁷ *Id.* at 1266.

²⁹⁸ *Id.* at 1267-68.

held that the nature of the extramarital affair, because it was a homosexual affair, “added virtually nothing of probative value,” and that “[t]he only effect, if not indeed the purpose of defense counsel’s repeated probing of the witness . . . concerning the homosexual aspect of the alleged relationship was to appeal to homophobic prejudices.”²⁹⁹

In *Roby v. Kingsley*,³⁰⁰ a mother brought suit on behalf of herself and her son, a teenager who sustained brain damage from a car accident that occurred while hitchhiking in one of the defendants’ cars.³⁰¹ The trial court admitted evidence of the teenager’s prior homosexual relationship, and the appeals court reversed on this ground finding that “the evidence was irrelevant to his injuries and could have been prejudicial.”³⁰² Moreover, the court found that “[e]ven if [the evidence] were relevant it would be inadmissible since its value would be substantially outweighed by the danger of unfair prejudice.”³⁰³

Finally, in *Brandon ex rel. Estate of Brandon v. County of Richardson*,³⁰⁴ the victim was murdered, and the mother brought a wrongful death action.³⁰⁵ There was evidence that the victim suffered from a gender identity disorder in that she was a woman who held herself out to be a man.³⁰⁶ The trial court reduced the jury’s award for loss of society, comfort, and companionship to nominal or zero damages.³⁰⁷ The appeals court noted that “[e]vidence regarding the quality and extent of the parent-child relationship may . . . be utilized in determining the amount of those damages.”³⁰⁸ The defendant argued that the nominal damages award was appropriate because the relationship between the victim and the mother was “strained and undeveloped” due to the gender identity disorder, but the court held that the victim’s “personal

²⁹⁹ *Id.* at 1268.

³⁰⁰ 492 So. 2d 789 (Fla. 1986).

³⁰¹ *Id.* at 791.

³⁰² *Id.* at 792.

³⁰³ *Id.*

³⁰⁴ 624 N.W.2d 604 (Neb. 2001).

³⁰⁵ *Id.* at 610.

³⁰⁶ *Id.* at 611.

³⁰⁷ *Id.* at 625.

³⁰⁸ *Id.* at 625-26.

problems are relevant only to the extent that they impacted her relationship with [her mother].”³⁰⁹

Thus, it appears as though the few courts that have considered the issue reject statistical arguments that a gay life is somehow worth less than a straight one, demanding evidence of an actual negative impact before allowing such evidence in, and even then, avoiding reference to the person’s sexual orientation where feasible. These decisions not only express a concern that the jury will misuse the evidence to make its own value judgment on the victim’s life based on their personal prejudices regarding gays and lesbians, but also reject the premise that stereotypes about gays and lesbians are relevant indicators of their actual behavior.³¹⁰

I. RELEVANCE IN DOMESTIC RELATIONS MATTERS

The issue of a natural or adoptive parent’s sexual orientation sometimes arises in child custody disputes. In some states, such as Florida, a potential adoptive parent’s sexual orientation is relevant, because a state statute bars gay people from adopting children,³¹¹ although in other states, it is not a relevant consideration.³¹²

Where a couple divorces, in part because one of the two is gay, the issue of the gay natural parent’s sexual orientation sometimes plays a role in deciding custody of the couple’s children. A few courts find that the mere fact that a parent is gay is a relevant factor that can be used to deny custody.³¹³ However, even these courts typically provide that the parent’s homosexuality alone cannot be the sole or dispositive factor in making the child custody determination.³¹⁴

³⁰⁹ *Id.* at 626.

³¹⁰ *Cf.* *People v. Collins*, 438 P.2d 33, 71 (Cal. 1968) (holding that trial court erred in admitting mathematical probability evidence to prove defendant’s guilt based on personal characteristics).

³¹¹ FLA. STAT. ANN. § 63.042(3) (West 1997).

³¹² *See, e.g., In re C.M.A.*, 715 N.E.2d 674, 679 (Ill. App. Ct. 1999) (citing *In re* Petition of K.M., 653 N.E.2d 888, 892 (Ill. App. Ct. 1995)).

³¹³ *See, e.g., Morris v. Morris*, 783 So. 2d 681, 693 (Miss. 2001) (holding sexual orientation of parent relevant to moral fitness, because homosexual conduct violates state sodomy statutes); *Pascarella v. Pascarella*, 512 A.2d 715, 716-17 (Pa. Super. Ct. 1986) (holding that parent’s homosexuality creates presumption of detriment to child); *Bottoms v. Bottoms*, No. 2157-96-2, 1997 WL 421218, at *2 (Va. Ct. App. July 29, 1997).

³¹⁴ *Morris*, 783 So. 2d at 693 (holding that parent’s homosexuality cannot be sole factor); *Bottoms*, 1997 WL 421218, at *2 (holding that other factors, including parental conduct and impact on children, also must be considered).

Moreover, most courts hold that the parent's sexual orientation, standing alone, is irrelevant, absent evidence that the parent's conduct resulting from sexual orientation has a negative impact on the children.³¹⁵ Because the fitness or character of the parent is at issue in child custody cases, introducing evidence of either parent's sexual orientation is not barred by the character inference rule, and the orientation can be proven by specific instances of conduct rather than reputation or opinion evidence.³¹⁶

The issue of a person's sexual orientation also has arisen when a party is seeking an annulment³¹⁷ or fault-based divorce, and states as a ground that the other partner is gay. Most courts have recognized homosexuality as grounds for annulling a marriage (although often finding inadequate proof of the same),³¹⁸ but failure to disclose a prior homosexual relationship has been held not to be grounds for an annulment.³¹⁹ Where the spouse has engaged in extramarital homosexual conduct, most courts have held that this falls within the definition of adultery and is thus grounds for divorce,³²⁰ although a few decisions hold that it does not fall within the definition of adultery.³²¹ The latter courts will sometimes, however, hold that such conduct falls within the definition of "cruel and inhuman treatment," another typical basis for divorce.³²² A

³¹⁵ See, e.g., *Pleasant v. Pleasant*, 628 N.E.2d 633, 642 (Ill. App. Ct. 1993) ("Sexual orientation is not relevant to a parent's visitation rights. It is relevant only if it directly harms [the child]."); *D.H. v. J.H.*, 418 N.E.2d 286, 291, 293 (Ind. Ct. App. 1981) (holding that homosexuality, standing alone, without evidence of adverse effect on child, cannot be used as basis for denying custody); *Boswell v. Boswell*, 721 A.2d 662, 672-73 (Md. 1998) (holding that parent's sexual orientation is not relevant absent showing of actual harm to child from same-sex relationship); *T.C.H. v. K.M.H.*, 784 S.W.2d 281, 282-85 (Mo. Ct. App. 1989) (holding that homosexual parent not *per se* unfit to have custody, and can be denied custody only where evidence shows that parent's homosexuality harms child).

³¹⁶ See *supra* notes 77-79, 99-102 and accompanying text.

³¹⁷ Unlike a divorce, an annulment establishes that the marriage never existed in law. BLACK'S LAW DICTIONARY 89 (7th ed. 1999).

³¹⁸ See, e.g., *Sampson v. Sampson*, 50 N.W.2d 764, 765-66 (Mich. 1952); *Sophian v. Von Linde*, 253 N.Y.S.2d 496, 497 (N.Y. App. Div. 1964); *Freitag v. Freitag*, 242 N.Y.S.2d 643, 644 (N.Y. Sup. Ct. 1963).

³¹⁹ *Woy v. Woy*, 737 S.W.2d 769, 770, 773-74 (Mo. Ct. App. 1987).

³²⁰ See, e.g., *Adams v. Adams*, 357 So. 2d 881, 882 (La. Ct. App. 1978); *S.B. v. S.J.B.*, 609 A.2d 124, 126-27 (N.J. Super. Ct. Ch. Div. 1992); *R.G.M. v. D.E.M.*, 410 S.E.2d 564, 567 (S.C. 1991).

³²¹ See, e.g., *H. v. H.*, 157 A.2d 721, 726 (N.J. Super. Ct. App. Div. 1959); *Cohen v. Cohen*, 103 N.Y.S.2d 426, 426 (N.Y. Sup. Ct. 1951).

³²² See *H. v. H.*, 157 A.2d at 726:

persistent course of homosexual conduct by one of the spouses may also constitute constructive desertion, which is yet another basis for divorce.³²³ Moreover, one court has drawn a distinction between the *status* of homosexuality, finding that not to be a ground for divorce, and the *conduct* of homosexual adultery, which is a potential ground, although it noted that many courts allow for divorce due to one spouse's homosexual status under the rubric of "cruel and inhuman treatment."³²⁴

J. RELEVANCE IN COURT MARTIAL PROCEEDINGS BASED ON "DON'T ASK, DON'T TELL"

Evidence of sexual orientation has arisen in court martial proceedings in which a servicemember is being discharged for engaging in homosexual conduct. Although such discharges are for homosexual conduct and not homosexual status, the courts have held that evidence of the status—such as gay-oriented magazines and videotapes and a gay pride button—is relevant because it supports an inference that the person engages in homosexual activity.³²⁵ A person facing such a discharge may rebut with evidence of heterosexuality under Rule 404(a)(1),³²⁶ although such evidence is viewed as equivocal, given that it is consistent not just

It is difficult to conceive of a more grievous indignity to which a person of normal psychological and sexual constitution could be exposed than the entry by his spouse upon an active and continuous course of homosexual love with another. Added to the insult of sexual disloyalty *per se* (which is present in ordinary adultery) is the natural revulsion arising from knowledge of the fact that the spouse's betrayal takes the form of a perversion.

Id.; see also *Morris v. Morris*, 783 So. 2d 681, 689-90 (Miss. 2001); *M.V.R. v. T.M.R.*, 454 N.Y.S.2d 779, 783-84 & n.10 (N.Y. 1982); *Steinke v. Steinke*, 357 A.2d 674, 676 (Pa. Super. Ct. 1976).

³²³ *Richardson v. Richardson*, 304 A.2d 1, 6-7 (Md. Ct. Spec. App. 1973).

³²⁴ *M.V.R.*, 454 N.Y.S.2d at 783-84 & n.10. Much of this discussion, however, is somewhat academic, given the widespread availability of no-fault divorce. Ira Mark Ellman & Sharon Lohr, *Marriage as a Contract, Opportunistic Violence, and Other Bad Arguments for Fault Divorce*, 1997 U. ILL. L. REV. 719, 722-23.

³²⁵ *Jackson v. United States Dep't of Air Force*, No. 96-15949, 1997 WL 759144, at *1 (9th Cir. Nov. 3, 1997).

³²⁶ See FED. R. EVID. 404(a)(1).

with heterosexuality, but also with bisexuality, which is likewise prohibited.³²⁷

K. THE PREJUDICIAL EFFECT OF EVIDENCE OF HOMOSEXUALITY

Someone who is gay, or who believes in equal rights for gay people, might find it troubling to try to block evidence of sexual orientation from being admitted on the ground that it is “prejudicial,” as that somehow seems to connote that being gay is wrong, embarrassing, or something to keep hidden. Yet to object to the admission of evidence under Rule 403 on the ground that it is prejudicial is not a judgment about being gay, but rather a judgment about the capacity of jurors.³²⁸ It is thus merely a realization that “[t]here will be, on virtually every jury, people who would find the lifestyle and sexual preferences of a homosexual or bisexual person offensive,” and that “our criminal justice system must take the necessary precautions to assure that people are convicted based on evidence of guilt, and not on the basis of some inflammatory personal trait.”³²⁹ On the other hand, it is possible that the potential bias of the jury may differ depending on where the jury is drawn, such that what results in unfair prejudice before a jury in Colorado Springs may not result in unfair prejudice before a jury in San Francisco.³³⁰

One of the purposes of Rule 403 is to allow judges to exclude evidence where the ostensibly legitimate purpose asserted for proffering the evidence appears to be little more than a pretext for getting evidence of a highly prejudicial nature before the jury.³³¹

³²⁷ *United States v. Gagan*, 43 M.J. 200, 201-04 (C.A.A.F. 1995); *see also* *People v. Sellers*, 230 P.2d 398, 399 (Cal. Dist. Ct. App. 1951) (allowing jury to weigh evidence regarding defendant’s reputation in community as nonhomosexual).

³²⁸ *See* FED. R. EVID. 403.

³²⁹ *State v. Ford*, 926 P.2d 245, 250 (Mont. 1996); *see also* *Blakeney v. State*, 911 S.W.2d 508, 516 n.5 (Tex. App. 1995) (noting that being gay is “considered improper, immoral, and highly offensive by segments of the population and hence testimony linking Appellant to such conduct could have unduly prejudiced some of the jurors against the Appellant”).

³³⁰ *See* *Doepel v. United States*, 434 A.2d 449, 457 (D.C. 1981) (“[I]n a jurisdiction where the elected legislative body has repealed a law making homosexual intercourse a crime, we can scarcely infer widespread community prejudice against persons of such sexual orientation [sufficient to justify excluding evidence of a party’s homosexuality.]”).

³³¹ *United States v. Di Tullio*, No. CRIM. A. 87-286-01, 1988 WL 29316, at *1 (E.D. Pa.

Thus, when a prosecutor seeks to admit evidence of the defendant's sexual orientation in a child molestation case, the covert message that the prosecutor is trying to send to the jury is something to the effect of "this guy is a 'pervert,' and he's charged here with an act of perversion, you know what to do."³³² Defendants also try to bring into evidence the victim's sexual orientation in the hopes that the jury will have less sympathy for the victim because of the jurors' own prejudices against gay people. Thus, to protect the integrity of the fact-finding process, judges must exclude evidence of sexual orientation where the stated reason for admitting the evidence is merely a pretext for appealing to the jury's prejudices.

Such evidence, even if it has marginal relevance, may be prejudicial for yet another reason. Evidence of sexual orientation may, to the jurors, "seem much more relevant than it is, and therefore may be prejudicial."³³³ In this sense, jurors might overvalue the probative worth of such evidence, causing them to ignore or undervalue other evidence that might be more salient in making their factual findings.

Although Rule 403 suggests that a limiting instruction should be employed where available in lieu of excluding such evidence or ordering a new trial where the evidence is improperly brought before the jury,³³⁴ the reality is that giving the jury such an instruction is like trying to "unring" a bell that's already been rung,³³⁵ and the only likely effect of a limiting instruction is to emphasize rather than cure any potential prejudice of admitting the evidence of the person's sexual orientation.³³⁶ Perhaps the best solution, where exclusion of such evidence is not feasible or desirable, is to allow for screening of jurors during *voir dire* so as to exclude any who might hold prejudices against gay people.³³⁷

Mar. 24, 1988).

³³² *State v. Taylor*, 663 So. 2d 336, 340 (La. App. Ct. 1995); see also *Blakeney*, 911 S.W.2d at 515 (noting that introducing evidence "could only serve to send to the jury the message that all homosexual men are also molesters of little boys").

³³³ ERIC D. GREEN ET AL., *CASES AND MATERIALS ON EVIDENCE* 70 (3d ed. 2000); see also *State v. O'Key*, 899 P.2d 663, 676 (Or. 1995) ("[W]hen the jury is likely to overvalue or be misled into giving the evidence undue weight, the likelihood of exclusion under [Rule] 403 is enhanced.").

³³⁴ FED. R. EVID. 403 advisory committee's note.

³³⁵ *United States v. Millen*, 594 F.2d 1085, 1088 (6th Cir. 1979).

³³⁶ *State v. Woodard*, 769 A.2d 379, 383 (N.H. 2001).

³³⁷ See *United States v. Phillips*, 52 M.J. 268, 272-73 (C.A.A.F. 2000).

L. THE POLITICS OF RULE 401

It is clear enough that courts determine whether evidence is “relevant” under the materiality prong of Rule 401 by reference to the underlying substantive law. But how is it that courts determine whether something is “relevant” under the probative worth prong of Rule 401? Rule 401 defines relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”³³⁸ But how is it that one judge decides that the fact that a defendant in, for example, a child sexual assault case is gay has some tendency to make more probable the accusation that the defendant sexually assaulted a child of the same gender, while another judge finds just the opposite?

Rule 401 does not set out any mechanical formula for determining whether something is “relevant.” Thus, in determining whether a piece of evidence is relevant in the sense of having probative worth, each individual judge draws on her own experiences, conceptions, and general knowledge of the universe and the people in it to determine whether the evidence has probative value.³³⁹ Thus, the

³³⁸ FED. R. EVID. 401.

³³⁹ See WEINSTEIN & BERGER, *supra* note 21, § 401.03(2)(b), at 401-9 to 401-10.

Each judge brings to the determination of relevance a general knowledge of the world and the meaning of words, and trial judges are allowed great flexibility in drawing on personal experience to evaluate the factors on which relevance turns. Rule 401, by furnishing no standards for the determination of relevance, implicitly recognizes that questions of relevance cannot be resolved by mechanical resort to legal formulae. Thus, the judge’s own experience and conceptions, rather than legal precedents, will often furnish the basis for determinations.

Id.; see also MUELLER & KIRKPATRICK, *supra* note 21, § 4.2, at 171 (“In ruling upon relevancy, the court must draw on its own experience, knowledge, and common sense in assessing whether a logical relationship exists between proffered evidence and the fact to be proven.”); WEINSTEIN & BERGER, *supra* note 21, § 401.04(1), at 401-14 (“Courts cannot employ a precise, technical, legalistic test for relevance; instead, they must apply logical standards applicable in every day life.”); Vaughn C. Ball, *The Myth of Conditional Relevancy*, 14 GA. L. REV. 435, 461-62 (1980):

[F]or evidence to be relevant[, t]he relevancy proposition must be found by the judge to be acceptable[, and t]he judge must determine that the connecting proposition is sufficiently probable that it would be reasonable for a juror to use it in making a new and changed estimate of the probability of the conclusion, after receiving the evidence. The judge may, and

judge's personal and political views about gays and lesbians undoubtedly play a role in her decision whether to label evidence of an individual's sexual orientation relevant or irrelevant, thus explaining variations in the relevancy determinations across judges and even by region of the country.

Moreover, it is possible that a judge may, in his own mind, recognize that such evidence is "relevant" in the sense of having some minuscule probative worth, but nevertheless may hold it to be "irrelevant" because of the social norms and values that his decision will project on society.³⁴⁰ Thus, even if a judge believes there is some probative value in showing that a defendant is gay or possesses gay-oriented magazines, he nonetheless may hold it irrelevant because of the stigmatizing message that a contrary holding would send to society—that being gay has some relevance to determining whether you are a child molester, or an unfit parent, or the like.³⁴¹ Although Rule 403 remains at the judge's disposal to keep out evidence with low probative worth and a high tendency to prejudice the jury,³⁴² holding the evidence to be relevant under Rule 401 but excludable under Rule 403 sends a very different message to society than does merely excluding the evidence as irrelevant under Rule 401. The former stigmatizes gay people by sending a message that there is some truth to the link between the evidence and the point

usually does, decide this question by a form of judicial notice, drawing on what he knows as a reasonable judge about the behavior of the universe, including the humans in it If the judge finds the offered generalization not acceptable . . . the evidence lacks relevance because the connection is lacking at the time of the offer.

Id.

³⁴⁰ See GREEN ET AL., *supra* note 22, at 15-16:

[As the judge, you] might recognize the relevance of the evidence yet nevertheless want to exclude it because you understand the superstition and do not want a conviction (apparently) based upon it [W]e may be led to conclude that the operative concept of relevance in the system is a reflection of the underlying social, political, and economic interests the system is serving.

Id.; Ronald J. Allen, *The Myth of Conditional Relevancy*, 25 LOY. L.A. L. REV. 871, 877-82 (1992).

³⁴¹ *Cf. Guam v. Shymanovitz*, 157 F.3d 1154, 1159 (9th Cir. 1998) (expressing concern that ruling books about murder mysteries could be admitted to support inference that defendant has propensity to engage in murder might have undesirable side-effect of compelling people "to choose contents of their libraries with considerable care").

³⁴² See FED. R. EVID. 403.

that it is being offered to prove, but that it is being excluded only because the jury may make improper use of the evidence. The latter approach, on the other hand, refuses to even credit the stigmatizing claim. While exclusion of evidence under Rule 403 is concerned with the message that admitting the evidence will send to the jury and a judgment about the capacity of the jury, exclusion pursuant to Rule 401 is concerned with the message that will be sent to society at large. Thus, while some judges merge their analysis of evidence under Rules 401 and 403, which rule they ultimately employ to exclude the evidence makes an enormous difference in the message that their judgment sends to society.

III. STATEMENTS ABOUT SEXUAL ORIENTATION AND THE HEARSAY RULE

Assume that evidence about the sexual orientation of a victim, party, or witness is relevant for one of the reasons discussed in Part II of this Article³⁴³ and is not subject to exclusion under Rule 403 or any of the categorical rules of exclusion set forth in Rules 404 through 412. How, exactly, does one go about proving someone's sexual orientation? Perhaps one might seek to accomplish this by calling a witness to testify that he heard the person say that he was gay or make reference to a sexual encounter involving someone of the same gender, by providing evidence that the person had a gay pride bumper sticker on his car or gay pride button on his jacket, or by soliciting testimony from a witness that he saw the person marching in a gay pride parade or has heard that the person is gay from other people in the community. However, if this is the manner in which one wishes to prove a person's sexual orientation, one runs up against another potential barrier to admissibility, namely the hearsay rule.³⁴⁴

Under the Federal Rules of Evidence, "hearsay" is defined as "a statement, other than one made by the declarant³⁴⁵ while testifying

³⁴³ See *supra* notes 18-342 and accompanying text.

³⁴⁴ See, e.g., *Gay v. Gay*, 253 S.E.2d 846, 848 (Ga. Ct. App. 1979); *State v. Spell*, 399 So. 2d 551, 555-56 (La. 1981); *State v. McCauley*, 272 So. 2d 335, 343 (La. 1973); *Downey v. State*, 731 P.2d 350, 351-52 (Nev. 1987); *Harwood v. State*, 961 S.W.2d 531, 538 (Tex. App. 1997).

³⁴⁵ According to the Federal Rules, "A 'declarant' is a person who makes a statement."

at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”³⁴⁶ The hearsay rule provides that “[h]earsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.”³⁴⁷

The word “statement” is not limited to oral statements. The federal rules define a “statement” as “(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.”³⁴⁸ Because the definition of hearsay includes written assertions, the hearsay rule excludes testimony about the contents of bumper stickers, t-shirts, buttons, and tattoos, to the extent that such evidence is being offered into evidence to prove the truth of the matter asserted.³⁴⁹ Thus, it should exclude any of these items that express in words that the bearer of the label is gay. It should also exclude those written assertions that do not use words, but instead use symbols, such as a pink triangle or a rainbow flag,

FED. R. EVID. 801(b).

³⁴⁶ FED. R. EVID. 801(c).

³⁴⁷ FED. R. EVID. 802.

³⁴⁸ FED. R. EVID. 801(a).

³⁴⁹ In addition, the best evidence rule might require producing the bumper sticker, tattoo, or t-shirt itself rather than testimony about the same. See FED. R. EVID. 1002 (“To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.”). However, the federal rules further provide that a duplicate of a writing is admissible in lieu of producing the original in most circumstances. See FED. R. EVID. 1003 (“A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.”). Furthermore, a “duplicate” is defined as including a photograph of an original writing. See FED. R. EVID. 1001(4) (“A ‘duplicate’ is a counterpart produced . . . by means of photography.”); MUELLER & KIRKPATRICK, *supra* note 21, § 10.5, at 1205 (“A ‘duplicate’ also includes a photograph of a writing, an inscribed chattel, or another photograph.”). Moreover, things such as cars with bumper stickers, t-shirts with mottos, or people with tattoos might be viewed as inscribed chattels, and thus may not be viewed as “writings,” thus falling outside the best evidence rule. See *United States v. Duffy*, 454 F.2d 809, 812 (5th Cir. 1972) (holding that shirt with laundry mark on it containing defendant’s name was not subject to best evidence rule because it is inscribed chattel rather than writing). And even if deemed to be a writing, if a tattoo were on a person who is now dead and buried, and whose body is decomposed, production of the original likely would be excused, thus allowing in testimony as to the contents of the tattoo. See FED. R. EVID. 1004(1) (“The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if . . . All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith.”).

because these are intended to assert, through a symbol, that the person displaying the symbol is gay.³⁵⁰

Moreover, as the second part of the definition of “statement” indicates, it includes nonverbal conduct of a person, if intended by the person to be an assertion.³⁵¹ Thus, testimony that the person was, for example, marching in a gay pride parade should fall within the definition of “statement,” since doing that is usually intended to assert something, for example, that the person marching in the parade is gay and proud of it. Indeed, even testimony that the person was holding hands or kissing another person of the same gender in public, to the extent that the person was trying to express a public message about his sexuality, would fall within the definition of “statement.”

Although the hearsay rule on its face appears to be a substantial barrier to admitting into evidence much testimony about a person’s sexual orientation, there are several ways in which testimony as to verbal and nonverbal assertions about a person’s sexual orientation, although falling within the definition of “statement” for purposes of the hearsay rule, are nonetheless admissible.

A. OFFERING THE EVIDENCE FOR REASONS OTHER THAN TO PROVE THE TRUTH OF THE MATTER ASSERTED

³⁵⁰ See MUELLER & KIRKPATRICK, *supra* note 21, § 8.7, at 797:

Sometimes people express and communicate by code words, symbols, or behavior. Such codes may be set up by agreement or grow out of practice or custom For hearsay purposes, such coded expressions should be viewed as statements, which means they are hearsay if offered to prove what they assert. This conclusion follows directly from the definition of statement contained in FRE 801(a) that embraces all assertions and conduct, provided that the declarant or actor has assertive intent. By definition, coded expressions differ from standard nonverbal cues (like nodding the head) in being essentially obscure (or at least ambiguous) to ordinary observers. Sometimes the actor is trying to avoid being understood by outsiders. Often there is no room to doubt that he has an expressive and communicative purpose, as is usually true in cases of written symbols, spoken words, and gestures, and the task is to decode what is said.

Id.

³⁵¹ According to the drafters, “[t]he key to the definition is that nothing is an assertion unless intended to be one,” and that “[t]he rule is so worded as to place the burden upon the party claiming that the intention existed; ambiguous and doubtful cases will be resolved against him and in favor of admissibility.” FED. R. EVID. 801(a) advisory committee’s note.

As the definition of hearsay indicates, a “statement” fits the definition of hearsay only when the evidence is offered “to prove the truth of the matter asserted.”³⁵² Thus, “[i]f the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay.”³⁵³ There are several examples of ways in which a statement about a person’s sexual orientation might be offered not for its truth, but for some other reason.

One way a statement can be offered for a reason other than to prove the truth of the matter asserted is when it is offered for impeachment purposes. Thus, if a witness has made a prior statement, and later gives testimony that is inconsistent with that prior statement, the prior statement can be offered to impeach the witness’s credibility. The idea when offering the evidence for such a purpose is that what is relevant is not the truth or falsity of the statement, but rather the fact that there is inconsistency between what the witness says at one moment and what he says at another moment, and thus sheds light on his credibility as a witness.³⁵⁴ For example, if the witness is asked on the stand if he is gay, and he says that he is not, statements made by him to the contrary—including statements implicit in his actions—presumably could be introduced to impeach his credibility.³⁵⁵ However, because such prior statements are not admissible for their truth under the hearsay rule, and because they could be misused by a jury for their truth where the truth of the statements is relevant, a party cannot call the witness as his own witness—knowing that he will deny that he is gay—so that he may introduce the prior statements purportedly to impeach him but in fact “as a mere subterfuge to get before the jury evidence not otherwise admissible.”³⁵⁶

A second way in which a statement can be offered for a reason other than to prove the truth of the matter asserted is when the words or symbols therein are used as identifying characteristics,

³⁵² FED. R. EVID. 801(c).

³⁵³ FED. R. EVID. 801(c) advisory committee’s note.

³⁵⁴ MUELLER & KIRKPATRICK, *supra* note 21, § 8.17, at 823-24.

³⁵⁵ However, the ability to introduce extrinsic evidence to impeach a witness by contradiction is subject to the collateral-matter rule. *See supra* notes 223-25 and accompanying text.

³⁵⁶ *Whitehurst v. Wright*, 592 F.2d 834, 839 (5th Cir. 1979).

known as verbal objects.³⁵⁷ Thus, for example, if a witness to a hit-and-run accident testifies that the car that hit him had a rainbow flag on it, or if a witness testifies that the person he saw running from the scene of the crime had a pink triangle tattooed to his left forearm, these uses of the evidence are not excluded by the hearsay rule because the statements are being admitted not for their “assertive” aspect, but instead as elements in a physical description of the person who committed the crime or the car used to commit an offense.³⁵⁸

A third way in which a statement can be offered for a reason other than to prove the truth of the matter asserted is when it is offered to prove what effect the words had on the person who heard or read them, in order to prove what the person knew at the time.³⁵⁹ Thus, for example, in the “true” self-defense cases discussed above,³⁶⁰ if the defendant had heard that the victim had previously committed violent sexual assault against other males, that would be relevant to his claim that he feared the victim based on what he had heard about him. This evidence would assist the jury in determining whether he acted reasonably in killing the victim. In this situation, the statement is not offered for the truth of the matter asserted therein, but rather to show the defendant’s knowledge at the time of the incident.³⁶¹ Alternatively, evidence that the defendant heard that the victim was gay might be used to provide a motive for the killing in a hate-crime case, and such evidence would not be offered into evidence to prove the truth of the victim’s sexual orientation, but merely the defendant’s belief of it and thus his possible motivation for committing the crime.³⁶²

B. STATUTORY NONHEARSAY AND THE HEARSAY EXCEPTIONS

³⁵⁷ MUELLER & KIRKPATRICK, *supra* note 21, § 8.19, at 825-26.

³⁵⁸ *Id.*

³⁵⁹ *Id.* § 8.18, at 824-25.

³⁶⁰ *See supra* notes 132-33 and accompanying text.

³⁶¹ *Id.* § 4.18, at 236-37; *cf. Berry v. Commonwealth*, 84 S.W.3d 82, 89 (Ky. Ct. App. 2001) (finding testimony that victim’s father told him that defendant was homosexual relevant and admissible to show victim’s state of mind); *Applegate v. State*, 904 P.2d 130, 137 (Okla. Crim. App. 1995) (same).

³⁶² *Cf. People v. Davis*, 402 P.2d 142, 146 (Cal. 1965) (finding written note suggesting that defendant’s wife was involved in lesbian affair with victim relevant to showing defendant’s state of mind when he killed victim).

Even if a person's statement about his sexual orientation is offered into evidence for the truth of the matter asserted, one can nonetheless circumvent the hearsay rule and admit such evidence if the statement is either statutory nonhearsay or falls within an exception to the hearsay rule. Rule 801(d) provides that eight types of statements that fall within the formal definition of hearsay are nevertheless "not hearsay."³⁶³ Rule 803 sets forth a list of twenty-three unrestricted exceptions to the hearsay rule.³⁶⁴ They are so named because they apply without requiring a showing that the declarant is unavailable; the rationale is that long-standing experience has shown the statements in these categories, although hearsay, are reliable.³⁶⁵ Rule 804 sets forth a list of five restricted exceptions to the hearsay rule, which apply only if the declarant is "unavailable"³⁶⁶ to testify as a witness.³⁶⁷ Finally, Rule 807 provides a "catchall" exception for statements that do not fall within any of the recognized exceptions, but that have equivalent guarantees of trustworthiness.³⁶⁸ Several of these exceptions and statutory nonhearsay categories are potentially available to admit declarations of sexual orientation.

Perhaps the most significant of these is Rule 801(d)(2), which provides that statements made or adopted by a party or made by a party's agent or co-conspirator, when offered into evidence against the party, are not hearsay.³⁶⁹ The statement need not be against the

³⁶³ FED. R. EVID. 801(d).

³⁶⁴ FED. R. EVID. 803.

³⁶⁵ WEINSTEIN & BERGER, *supra* note 21, § 803.02, at 803-12 to 803-13.

³⁶⁶ The definition of "[u]navailability as a witness" is set forth in Federal Rule of Evidence 804(a) and includes a witness who is exempted from testifying due to privilege, refuses to testify despite a court order to do so, testifies to a lack of memory of the subject matter of the statement, is unable to be present because of death or physical or mental illness, or is absent from the hearing and the proponent was unable to procure his attendance through process or other reasonable means. FED. R. EVID. 804(a).

³⁶⁷ FED. R. EVID. 804.

³⁶⁸ FED. R. EVID. 807.

³⁶⁹ Federal Rule of Evidence 801(d)(2) provides:

A statement is not hearsay if . . . [t]he statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or

speaker's interest when made, because *any* statement made by a party outside of court qualifies as an "admission" within the meaning of this provision.³⁷⁰ Consequently, if the sexual orientation of the defendant in a criminal case or a party in a civil case is at issue, any statements the criminal defendant or civil party made regarding his sexual orientation will fall within this provision and be admissible.³⁷¹ However, where what is at issue is the sexual orientation of a nonparty—and a victim in a criminal case is *not* a "party"³⁷²—this provision will not be available.

A series of three unrestricted hearsay exceptions set forth in Rules 803(1), 803(2), and 803(3), all of which evolved from the doctrine of *res gestae*,³⁷³ at least theoretically might allow for the admission of declarations of sexual orientation. Rule 803(1), the exception for present sense impressions, provides an exception for "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter."³⁷⁴ And Rule 803(2), the exception for excited utterances, provides an exception for "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."³⁷⁵ Whether either of these exceptions would apply to declarations of one's sexual orientation would depend on whether being gay is a "condition" within the meaning of the exceptions. The rule nowhere defines what is meant by "condition," nor is there any discussion of the meaning of the word "condition" in the case law or treatises, which focus instead on the word "event."³⁷⁶ With respect to the

(E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

FED. R. EVID. 801(d)(2).

³⁷⁰ MUELLER & KIRKPATRICK, *supra* note 21, § 8.27, at 866; WEINSTEIN & BERGER, *supra* note 21, § 801.30(1)(a), at 801-45.

³⁷¹ State v. Lee, 569 So. 2d 1038, 1041 (La. Ct. App. 1990).

³⁷² *Ex parte* Dunaway, 746 So. 2d 1042, 1049 (Ala. 1999); Willover v. State, 70 S.W.3d 841, 847 n.10 (Tex. Crim. App. 2002).

³⁷³ William Gorman Passannante, *Res Gestae, the Present Sense Impression Exception and Extrinsic Corroboration Under Federal Rule of Evidence 803(1) and Its State Counterparts*, 17 FORDHAM URB. L.J. 89, 89-90 (1989).

³⁷⁴ FED. R. EVID. 803(1).

³⁷⁵ FED. R. EVID. 803(2).

³⁷⁶ See MUELLER & KIRKPATRICK, *supra* note 21, §§ 8.35-.36, at 904-16.

present sense impression exception, to the extent that being gay is a condition, one more or less continually “perceives” that condition. Thus, no concern with the timing of the statement, a typical concern with the present sense impression,³⁷⁷ should exist. With respect to the excited utterance exception, the declarant’s statement as to his sexual orientation would fit this exception, provided that sexual orientation is a “condition” and the declarant was still under the “stress of excitement caused by the event or condition.”³⁷⁸ Since self-discovery of one’s homosexuality certainly causes a great deal of stress for many people, this situation might fit the exception.

Perhaps a clearer fit would be the third rule derived from the doctrine of *res gestae*, Rule 803(3), the exception for statements regarding then-existing mental, emotional, or physical condition. This rule provides an exception for “[a] statement of the declarant’s then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health).”³⁷⁹ The exception is a specialized application of the present sense impression rule,³⁸⁰ and here we have the same question: would one’s statement that he is gay qualify as a description of a mental or emotional “condition”? The state of mind exception has been interpreted by some courts as including statements regarding love for a particular person,³⁸¹ so it would not seem a stretch to include a statement of sexual orientation generally, which in point of fact is an expression of love for persons of the same gender.

³⁷⁷ FED. R. EVID. 803(1), (2) advisory committee’s note (noting that, for present sense impression, only “a slight lapse is allowable”).

³⁷⁸ FED. R. EVID. 803(2).

³⁷⁹ FED. R. EVID. 803(3).

³⁸⁰ FED. R. EVID. 803(3) advisory committee’s note (“Exception (3) is essentially a specialized application of Exception (1), presented separately to enhance its usefulness and acceptability.”).

³⁸¹ See, e.g., *Montgomery v. State*, 781 So. 2d 1007, 1019 (Ala. Crim. App. 2000) (noting that exception applies to statement “I love you”); *Fomby v. Popwell*, 695 So. 2d 628, 632 (Ala. Civ. App. 1996) (noting that exception includes “[a] statement directly asserting or circumstantially indicating the existence in the declarant of an emotion such as love”); *State v. Roe*, No. 02CO1-9702-CR-00054, 1998 WL 7107, at *11 (Tenn. Crim. App. Jan. 12, 1998) (noting that exception covers “statements of love,” such as “I love Karen”); *Norton v. State*, 771 S.W.2d 160, 168 (Tex. App. 1989) (Bleil, J., concurring) (“Most commonly, the rule is applied to a declaration as to hatred or affection.”).

Moreover, at least one court has suggested that statements about a person's sexual orientation might fall within this exception.³⁸²

Another possible unrestricted exception is for statements made for purposes of medical diagnosis or treatment, which provides an exception for "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."³⁸³ Two examples might fit this exception. First, because of the nature of sex between men, gay men are susceptible to certain medical risks, and for their medical doctors to better treat and advise them, it may be necessary for sexually active gay patients to disclose their sexual orientation to their medical doctors. Second, many people visit psychiatrists and psychologists³⁸⁴ to deal with various issues associated with their sexual orientation, and disclosure of their sexual orientation to the psychiatrist or psychologist is a necessary part of the treatment.³⁸⁵ Of course, any use of this exception would have to be considered in conjunction with any privilege that may exist for such communications,³⁸⁶ as discussed below.³⁸⁷

Another applicable exception is Rule 803(21), which sets forth an exception for reputation³⁸⁸ testimony as to character.³⁸⁹ When

³⁸² Long v. Am. Red Cross, 145 F.R.D. 658, 662 (S.D. Ohio 1993).

³⁸³ FED. R. EVID. 803(4).

³⁸⁴ See United States v. Newman, 965 F.2d 206, 210 (7th Cir. 1992) (noting that exception applies to psychiatrists and psychologists, and may even apply to social workers).

³⁸⁵ See, e.g., State v. Roberts, 622 A.2d 1225, 1233-34 (N.H. 1993) (holding admissible under exception victim's discussions with his psychologist about his homosexual relationships with defendant, reasoning that discussion was pertinent to treatment).

³⁸⁶ See Rivera v. W. Jefferson Med. Ctr., 678 So. 2d 602, 612 (La. Ct. App. 1996) (discussing healthcare provider/patient privilege and hearsay exception for medical diagnosis); H.R. REP. NO. 93-650 at 14 (1973) (noting that House Judiciary Committee approves of exception "with the understanding that it is not intended in any way to adversely affect present privilege rules or those subsequently adopted").

³⁸⁷ See *infra* notes 442-46 and accompanying text.

³⁸⁸ See 5 WIGMORE ON EVIDENCE § 1612, at 583-84 (1974):

Reputation . . . is distinguished from mere rumor in two respects. On the one hand, reputation implies the definite and final formation of opinion by the community; while rumor implies merely a report that is not yet finally credited. On the other hand, a rumor is usually thought of as signifying a particular act or occurrence, while a reputation is predicated upon a general trait of character; a man's reputation, for example, may declare

someone testifies that a person has a reputation as being gay that testimony is technically hearsay, because testimony about reputation is a summary of the aggregate views in the community about the person.³⁹⁰ Rule 803(21) makes clear that, when reputation testimony as to a person's character is permitted under Rule 404(a) and Rule 405(a), such testimony is admissible notwithstanding the hearsay rule,³⁹¹ provided that the witness establishes a foundation for having the necessary familiarity with the witness's reputation.³⁹²

If a person wrote about his sexual orientation in, for example, a diary or letter that is over twenty years old,³⁹³ it might be admissible under Rule 803(16), which provides an exception for "[s]tatements in a document in existence twenty years or more the authenticity of which is established."³⁹⁴ A special provision provides that such a document can be authenticated by showing that it "(A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered."³⁹⁵

Evidence of a person's sexual orientation also might be admitted via one of a series of six rather obscure exceptions to the hearsay rule that deal with statements about personal or family records as well as family, public, and religious records of marriages and other similar events.³⁹⁶ These exceptions might provide an indirect means of introducing evidence of a person's sexual orientation by introducing evidence of his having entered into a civil union or a domestic partnership, or simply his being involved in a long-term relationship with someone of the same gender.

him honest, and yet today a rumor may have circulated that this reputed honest man has defaulted yesterday in his accounts.

Id.

³⁸⁹ FED. R. EVID. 803(21).

³⁹⁰ MUELLER & KIRKPATRICK, *supra* note 21, § 8.61, at 1000; WEINSTEIN & BERGER, *supra* note 21, § 803.27, at 803-127.

³⁹¹ FED. R. EVID. 803(21) advisory committee's note.

³⁹² *See, e.g.*, *Turner v. Calderon*, 281 F.3d 851, 877 (9th Cir. 2002); *State v. Lewis*, 602 A.2d 618, 622 (Conn. App. Ct. 1992); *State v. Frentz*, 354 So. 2d 1007, 1010-11 (La. 1978).

³⁹³ *See* MUELLER & KIRKPATRICK, *supra* note 21, § 8.58, at 994 (discussing ancient document exception).

³⁹⁴ FED. R. EVID. 803(16).

³⁹⁵ FED. R. EVID. 901(b)(8).

³⁹⁶ FED. R. EVID. 803(9), (11), (12), (13), (19); FED. R. EVID. 804(b)(4).

The first of these is Rule 803(9), the vital statistics exception, which provides an exception for “[r]ecords or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.”³⁹⁷ Vermont, for example, provides same-sex couples the opportunity to enter into civil unions and requires that town clerks maintain records of civil unions.³⁹⁸ Such records could be viewed as analogous to records of marriages, thus paving the way for admitting such evidence under this exception. However, here one might run into a potential problem with the Defense of Marriage Act (DOMA)³⁹⁹ in federal court, which defines “marriage” as referring only to “a legal union between one man and one woman as husband and wife,”⁴⁰⁰ although it is not entirely clear that DOMA applies to interpretation of the Federal Rules of Evidence.⁴⁰¹ However, DOMA would not present a problem in state courts, such as those in Vermont, applying the analogous hearsay exception under state law, except in those states that have enacted statutes similar to DOMA.

The second of these is Rule 803(11), the exception for records of religious organizations.⁴⁰² It provides an exception for “[s]tatements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.”⁴⁰³ Because some religious organizations will perform marriage or commitment ceremonies between people of the same sex, records of such ceremonies should be admissible, except for the potential problem with DOMA. However, the exception here is broader than the vital statistics exception,⁴⁰⁴ and includes the phrase “or other

³⁹⁷ FED. R. EVID. 803(9).

³⁹⁸ VT. STAT. ANN. tit. 18, §§ 5001-5012 (2000).

³⁹⁹ Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. §§ 1, 7; 28 U.S.C. § 1738C).

⁴⁰⁰ 1 U.S.C. § 7 (2000) (“In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife.”).

⁴⁰¹ See *infra* note 484 and accompanying text.

⁴⁰² FED. R. EVID. 803(11).

⁴⁰³ *Id.*

⁴⁰⁴ See FED. R. EVID. 803(9).

similar facts of personal or family history.”⁴⁰⁵ Certainly, a marriage-like union between two persons of the same sex should be viewed as a piece of “personal or family history,” and DOMA should thus pose no obstacle here.

The third of these is Rule 803(12), the exception for marriage, baptismal, and similar certificates, which creates an exception for:

[s]tatements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.⁴⁰⁶

Although DOMA may pose a problem with respect to the word “marriage,” this exception, like the religious records exception, is broader than that for vital statistics in that it also includes the language “or other ceremony,” which could be construed as including a ceremony involving a same-sex union.

The fourth of these is Rule 803(13), the family records exception.⁴⁰⁷ It provides an exception for “[s]tatements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.”⁴⁰⁸ There is no reason why any of these items, especially a genealogy, could not make reference to a same-sex relationship, which ought to be considered a statement of “personal or family history,” in which case this exception could apply.

The fifth of these is Rule 803(19), the exception for reputation concerning personal or family history.⁴⁰⁹ It provides an exception for

⁴⁰⁵ FED. R. EVID. 803(11).

⁴⁰⁶ FED. R. EVID. 803(12).

⁴⁰⁷ FED. R. EVID. 803(13).

⁴⁰⁸ *Id.* One state has broadened this exception to include statements concerning personal or family history on tattoos. WASH. R. EVID. 803(a)(13).

⁴⁰⁹ FED. R. EVID. 803(19).

“[r]eputation among members of a person’s family by blood, adoption, or marriage or among a person’s associates, or in the community, concerning a person’s birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.”⁴¹⁰ Historically, this was allowed to show such things as reputation as to a person’s race when distinctions were made in the right to vote and other rights based on race,⁴¹¹ so it is possible that it also could include other characteristics, such as sexual orientation.

The sixth of these is Rule 804(b)(4), the exception for statements of personal or family history, an exception that applies only if the declarant is “unavailable” as a witness.⁴¹² It provides an exception for:

(A) A statement concerning the declarant’s own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other’s family as to be likely to have accurate information concerning the matter declared.⁴¹³

Rule 804(b)(4) differs from Rule 803(19) in that the former involves testimony as to what an unavailable declarant said about his own birth, marriage, or other similar facts of personal or family history, while the latter is testimony about a person’s reputed personal or family history among members of that person’s family or associates.⁴¹⁴ For similar reasons to those stated with respect to

⁴¹⁰ *Id.*

⁴¹¹ 5 WIGMORE ON EVIDENCE § 1605, at 574-75 (1974); *see also, e.g.*, *Woolsey v. Williams*, 61 P. 670, 672 (Cal. 1900) (applying exception to fact of enlisting in Army and being killed in Civil War).

⁴¹² FED. R. EVID. 804(b)(4).

⁴¹³ *Id.*

⁴¹⁴ WEINSTEIN & BERGER, *supra* note 21, § 803.21[1], at 803-127.

Rule 803(19), this exception should cover statements regarding sexual orientation because of its similar reference to “personal or family history.” Moreover, it reaches statements made by the declarant regarding the personal or family history of another person if the declarant was “intimately associated with the other’s family.” Given this language, it is possible that this exception also could be used to allow a witness to testify as to what one member of a same-sex couple said about the other’s personal or family history.

There is very little case law on what qualifies as “personal or family history,” although one case suggests that a person’s sexual orientation falls within the definition of that phrase. In *Long v. American Red Cross*,⁴¹⁵ a woman who received blood from the Red Cross and her husband brought suit against the Red Cross after the woman contracted HIV from the blood transfusion.⁴¹⁶ One of the plaintiffs’ theories of negligence was that the Red Cross should have asked questions about whether the donor was gay.⁴¹⁷ Although the donor had died and thus could not have testified as to whether he would have answered such a question in the affirmative, if the plaintiffs were told the donor’s identity, they could ask his family members whether he was reputed to be an “open homosexual,” which would suggest that he might have been willing to answer such questions.⁴¹⁸ The court noted that, although some of such information from friends or family members would be inadmissible hearsay, some might be admissible.⁴¹⁹ The court cited Rule 803(19), the exception for testimony as to reputation concerning personal or family history, as a possible means of overcoming the hearsay problem.⁴²⁰

The final codified exception that might be applicable is the exception for statements against interest, an exception that applies only if the declarant is unavailable.⁴²¹ It provides an exception for:

⁴¹⁵ 145 F.R.D. 658 (S.D. Ohio 1993).

⁴¹⁶ *Id.* at 659.

⁴¹⁷ *Id.* at 661-62.

⁴¹⁸ *Id.* at 662.

⁴¹⁹ *Id.*

⁴²⁰ *Id.*; see also FED. R. EVID. 803(19).

⁴²¹ FED. R. EVID. 804(b)(3).

[a] statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.⁴²²

For this exception to apply, it is important that, at the time of the making of the statement, the declarant must have been aware of the fact that making the statement would be against his interest, although absent evidence to the contrary, the courts usually will attribute to a declarant the knowledge and interests of a reasonable person.⁴²³

That said, there are three interests that might be implicated when one makes a statement that he is gay. One is his pecuniary interest, in that—especially in a state that does not protect against employment discrimination based on sexual orientation—it may cause the person to risk losing his job.⁴²⁴ A second is penal interest, because even though being gay is not illegal, in certain states same-sex sodomy is.⁴²⁵ And just as one can invoke the privilege against self-incrimination to refuse to answer a question about his sexual orientation because the answer might lead to a charge of sodomy, answering here ought to be viewed as potentially incriminating and

⁴²² *Id.*

⁴²³ MUELLER & KIRKPATRICK, *supra* note 21, § 8.72, at 1042; WEINSTEIN & BERGER, *supra* note 21, § 804.06, at 804-53.

⁴²⁴ See *United States v. Hsia*, 87 F. Supp. 2d 10, 14 (D.D.C. 2000) (quoting *Gichner v. Antonio Troiano Tile & Marble Co.*, 410 F.2d 238, 242 (D.C. Cir. 1969)) ("A statement is admissible under Rule 804(b)(3) as being against pecuniary or proprietary interest 'when it threatens the loss of employment, or reduces the chances for future employment.'"); *United States v. Grooters*, 35 M.J. 659, 663 (A.C.M.R. 1992) (declining to find statement about engaging in homosexual acts against interest where there was no evidence that it would have adversely affected defendant's employment); MUELLER & KIRKPATRICK, *supra* note 21, § 8.73, at 1049 ("In general, statements that tend to subject the speaker . . . to loss of job or employment opportunity fit the exception.").

⁴²⁵ See *Grooters*, 35 M.J. at 663 (refusing to find statement that declarant engaged in homosexual act against penal interest because such acts not illegal where performed). The United States Supreme Court has recently granted certiorari in a case challenging the constitutionality of such laws. See *Lawrence v. State*, 41 S.W.3d 349 (Tex. 2001), *cert. granted*, 123 S. Ct. 661 (2002).

this against penal interest.⁴²⁶ However, the link in this case may not be sufficiently strong to satisfy the requirement that it “so far tended to subject the declarant to . . . criminal liability.”⁴²⁷ In any event, to the extent it was ever used against the person to prosecute him for sodomy, it would likely come in under the admissions doctrine of Rule 801(d)(2)⁴²⁸ anyway.

The Advisory Committee proposed including so-called statements against social interest, or statements tending to expose declarant to “hatred, ridicule, or disgrace,”⁴²⁹ but Congress deleted this provision on the ground that it lacked sufficient guarantees of reliability.⁴³⁰ However, a minority of states recognize the exception for statements against social interest,⁴³¹ and at least one court has held that a statement that one is gay or has engaged in homosexual acts is the sort of statement that could fit the exception.⁴³²

One of the challenges to making use of the exception for statements against social interest is that there can be difficulty in deciding what constitutes the relevant community. A statement that is for interest (or at least neutral) in one community could be against interest in another.⁴³³ Thus, for example, a statement that one is

⁴²⁶ See *infra* notes 447-57 and accompanying text.

⁴²⁷ FED. R. EVID. 804(b)(3).

⁴²⁸ See FED. R. EVID. 801(d)(2).

⁴²⁹ FED. R. EVID. 804(b)(3) advisory committee’s note.

⁴³⁰ Pub. L. No. 93-595, H.R. Rep. No. 93-650, at 7089 (Nov. 15, 1973).

⁴³¹ See, e.g., CAL. EVID. CODE § 1230 (West 1995 & Supp. 2002); KAN. STAT. ANN. § 60-460(j) (1994); NEB. REV. STAT. § 51.345 (2001); P.R. LAWS ANN. § 64(B)(3) (1983); WIS. STAT. ANN. § 908.045(4) (West 2000 & Supp. 2001); ARK. R. EVID. 804(b)(3); ME. R. EVID. 804(b)(3); MONT. R. EVID. 804(b)(3); N.J. R. EVID. 803(c)(25); N.D. R. EVID. 804(b)(3); TEX. R. EVID. 803(24); see also Edward J. Imwinkelried, *Declarations Against Social Interest: The (Still) Embarrassingly Neglected Hearsay Exception*, 69 S. CAL. L. REV. 1427, 1430 & nn.11-12 (1996) (listing jurisdictions that have codified or embraced against social interest exception).

⁴³² See, e.g., *Purtell v. State*, 761 S.W.2d 360, 368-69 (Tex. Crim. App. 1988).

⁴³³ See *Heddings v. Steele*, 526 A.2d 349, 353 (Pa. 1987):

In *Dovico*, the Second Circuit approved exclusion of the hearsay statement of one Gangi, a federal prisoner, that he had acted alone in committing a drug offense for which both he and the defendant *Dovico* had been convicted. The *Dovico* court first noted that this statement was not against Gangi’s penal interest as he had already been convicted. The court also rejected the argument that the statement should have been admitted as a statement against Gangi’s social interest. The case demonstrates the possibly unmanageable nature of a “social interest” exception. Appellant asserts that both the admission of guilt and the withholding of the information of *Dovico*’s innocence were against Gangi’s social interest. But

gay may not be against interest in San Francisco, but may be against interest in conservative Orange County, California. The answer to this question will depend on a person's social circle and geographic location, which makes it unworkable in practice.⁴³⁴ As a practical matter in those states that recognize the exception, a statement will be considered against social interest if a statement imputing that conduct to the person would, if untrue and stated by another person, be defamatory.⁴³⁵ Given that false imputations of homosexuality appear to be viewed as defamatory everywhere,⁴³⁶ it appears as though this might fit the exception in those states recognizing this exception.

Finally, if the evidence at issue is found not to fit any of the recognized hearsay exceptions, it is possible to have the statement admitted under the residual exception, Federal Rule of Evidence 807.⁴³⁷ The rule provides that a statement "not specifically covered"⁴³⁸ by any of the exceptions set forth in Rules 803 or 804 may

this assertion leaves many questions unanswered. What is the relevant community: Gangi's group in prison; the whole prison; prison generally; his friends outside prison; his community outside prison; the reasonable community, etc.? Because Dovico and Gangi had been friends, and also because Gangi might have been attempting to dispel the illusion that he was cooperating with the government, was the statement so clearly against his social interests as to make it reliable? Depending on the community selected and on the motivation of Dovico's discerned, the declaration could be both for and against social interest. Many difficulties would beset such a broadening of the exception. It would be difficult to define any reliable "against social interest" exception, and surely we could not recognize one so amorphous as that sought here, without a complete abandonment of the hearsay rule.

Id.
⁴³⁴ *See id.*:

The *Dovico* opinion aptly illustrates the slippery nature of the proposed exception for statements against social interest. Its use would require a trial judge to first determine the habits, customs and mores of the community within which the declarant lives. An utterance made by a member of a motorcycle gang while in the company of his peers does not tend to make the declarant an object of hatred, ridicule or disgrace in his community whereas the identical statement proffered by a member of this Court may subject him to social disapproval among his brethren.

Id.
⁴³⁵ Imwinkelried, *supra* note 431, at 1434-35 & 1435 nn.52-53.

⁴³⁶ *See supra* notes 248-59 and accompanying text.

⁴³⁷ FED. R. EVID. 807.

⁴³⁸ There is a dispute among the circuits as to what is meant by the phrase "not specifically covered by Rules 803 or 804." *See* FED. R. EVID. 807. Under the majority view, this means only

nonetheless be admitted if the court determines that it has equivalent circumstantial guarantees of trustworthiness⁴³⁹ to evidence admitted under other hearsay exceptions, and “is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts.”⁴⁴⁰ However, Congress, in enacting this exception, intended that it be used sparingly,⁴⁴¹ and the need to invoke it here is doubtful given the possible fit with several of the recognized exceptions to the hearsay rule.

IV. SEXUAL ORIENTATION AND THE RULES OF PRIVILEGE

A. APPLICABILITY OF PRIVILEGE LAW TO EXCLUDE EVIDENCE ABOUT ONE’S SEXUAL ORIENTATION

Even if evidence regarding a person’s sexual orientation is relevant and not excludable as hearsay or under one of the categorical rules of exclusion, the evidence nevertheless may be excluded if

that, if the statement fits one of the recognized exceptions, that exception should be used instead of the residual exception, but if it is similar to a statement defined by a specific exception but does not actually qualify for admission under that exception, it still may be considered under the residual exception. *See, e.g., United States v. Earles*, 113 F.3d 796, 800 (8th Cir. 1997); WEINSTEIN & BERGER, *supra* note 21, § 807.03(4), at 807-26 to 807-27. However, under the minority view, a statement is “specifically covered” by an exception, and thus cannot be considered under the residual exception, if it is similar to a statement defined by an exception yet it narrowly misses being admissible under that exception. *See, e.g., United States v. Vigoa*, 656 F. Supp. 1499, 1504 (D.N.J. 1987). *See also* WEINSTEIN & BERGER, *supra* note 21, § 807.03(4), at 807-27.

⁴³⁹ *See* WEINSTEIN & BERGER, *supra* note 21, § 807.03(2)(b), at 807-14:

In determining the trustworthiness of hearsay offered under the residual exception, courts consider such factors as: (1) the character of the statement; (2) whether it is written or oral; (3) the relationship of the parties; (4) the probable motivation of the declarant in making the statement; and (5) the circumstances under which it was made.

Id.

⁴⁴⁰ FED. R. EVID. 807.

⁴⁴¹ *See* Pub. L. No. 93-595, S. Rep. No. 93-1277, at 7066 (Oct. 11, 1974):

It is intended that the residual hearsay exceptions will be used very rarely, and only in exceptional circumstances. The committee does not intend to establish a broad license for trial judges to admit hearsay statements that do not fall within one of the other exceptions contained in rules 803 and 804(b).

Id.

it is protected by some sort of privilege. Consider the examples set forth above in which a patient discusses his sexual orientation with his psychiatrist or psychologist, or discloses it to his physician.⁴⁴² Such disclosures to a psychotherapist would be protected by the psychotherapist-patient privilege, which is recognized in federal courts and in all state courts.⁴⁴³ And although no physician-patient privilege is recognized on the federal level,⁴⁴⁴ most states recognize such a privilege.⁴⁴⁵ Thus, where the source of the evidence of a person's sexual orientation is his physician or psychotherapist, it may be possible to invoke one of these testimonial privileges to bar admission of such evidence.⁴⁴⁶

Moreover, a party or witness may be able to invoke the privilege against self-incrimination to avoid being questioned as to his own sexual orientation. The Fifth Amendment provides that "[n]o person shall be . . . compelled in any criminal case to be a witness against himself."⁴⁴⁷ The privilege can be invoked "in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory,"⁴⁴⁸ and can be invoked by parties as well as by nonparty witnesses.⁴⁴⁹

Key to its application in this context is that it "not only extends to answers that would in themselves support a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant."⁴⁵⁰ Thus, even though being gay is not illegal, because some states still maintain sodomy laws (a few of which are limited to same-sex sodomy),⁴⁵¹ an admission by a person that he is gay is a link in a chain that might lead

⁴⁴² See *supra* notes 383-87 and accompanying text.

⁴⁴³ *Jaffee v. Redmond*, 518 U.S. 1, 10-13 (1996).

⁴⁴⁴ WEINSTEIN & BERGER, *supra* note 21, § 514.02, at 514-7. However, a federal court adjudicating a state law cause of action must apply state privilege law. FED. R. EVID. 501.

⁴⁴⁵ WEINSTEIN & BERGER, *supra* note 21, § 514.11, at 514-10 to 514-11. The physician-patient privilege normally survives death and may be claimed by the patient's personal representative. *Id.* § 514.12(2), at 514-2.

⁴⁴⁶ See, e.g., *State v. Ermatinger*, 752 S.W.2d 344, 349-50 (Mo. Ct. App. 1988).

⁴⁴⁷ U.S. CONST. amend. V.

⁴⁴⁸ *Kastigar v. United States*, 406 U.S. 441, 444 (1972).

⁴⁴⁹ *McCarthy v. Arndstein*, 266 U.S. 34, 40 (1924).

⁴⁵⁰ *Hoffman v. United States*, 341 U.S. 479, 486-88 (1951).

⁴⁵¹ The United States Supreme Court has recently granted certiorari in a case challenging the constitutionality of such laws. See generally *Lawrence v. State*, 41 S.W.3d 349 (Tex. 2001), *cert. granted*, 123 S. Ct. 661 (2002).

investigators to evidence that would incriminate the person on charges of sodomy.⁴⁵²

For the privilege to apply, the witness need only have “reasonable cause to apprehend danger from a direct answer.”⁴⁵³ It does not apply, however, where the danger is of an “imaginary and unsubstantial character. . . .”⁴⁵⁴ It would thus not apply, for example, where the statute of limitations has expired.⁴⁵⁵ However, the privilege depends on the *possibility* rather than the *likelihood* of prosecution, and thus can be invoked short of a showing that no possibility exists, such as the running of the statute of limitations, a grant of immunity, or double jeopardy.⁴⁵⁶ Yet so long as a sodomy statute remains on the books, the witness should be able to invoke the privilege, notwithstanding the fact that the statute, as a matter of practice, is no longer invoked against consenting adults.⁴⁵⁷

⁴⁵² *United States v. Colyer*, 571 F.2d 941, 944-45 & n.3 (5th Cir. 1978); *United States v. Dagenais*, 15 M.J. 1018, 1019-20 (A.F. Ct. Crim. App. 1983); *Rosado v. Bridgeport Roman Catholic Diocesan Corp.*, No. CV93302072, 1995 WL 348181, at *1 n.4 (Conn. Super. Ct. May, 31, 1995); *Ellison v. State*, 528 A.2d 1271, 1273 (Md. 1987); *State v. Miller*, 485 S.W.2d 435, 440-41 (Mo. 1972); *see also Steffan v. Cheney*, 920 F.2d 74, 75 (D.C. Cir. 1990) (noting that witness invoked privilege, but deciding case on other grounds); *Neal v. United States*, 177 Ct. Cl. 937 (1966) (noting that person was warned of right against self-incrimination); *cf. Payne v. Payne*, 366 A.2d 405, 409-10 (Md. Ct. Spec. App. 1976) (upholding husband’s refusal to answer question whether he had sexual relations with other women during his marriage, reasoning that such answer might open him up to criminal charge of adultery); Martin J. Siegel, *For Better or For Worse: Adultery, Crime & The Constitution*, 30 J. FAM. L. 45, 58-86 (1991).

⁴⁵³ *Hoffman v. United States*, 341 U.S. 479, 486 (1951). The Supreme Court said, “To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.” *Id.* at 486-87.

⁴⁵⁴ *Brown v. Walker*, 161 U.S. 591, 599 (1896).

⁴⁵⁵ *Id.* at 598.

⁴⁵⁶ *In re Folding Carton Antitrust Litig.*, 609 F.2d 867, 872 (7th Cir. 1979) (citing *In re Master Key Litig.*, 507 F.2d 292, 293 (9th Cir. 1974); *United States v. Johnson*, 488 F.2d 1206, 1210-11 (1st Cir. 1972); *United States v. Miranti*, 253 F.2d 135, 138-42 (2d Cir. 1958)); *accord United States v. Sharp*, 920 F.2d 1167, 1171 (4th Cir. 1990).

⁴⁵⁷ *See, e.g., State v. Miller*, 485 S.W.2d 435, 440-41 (Mo. 1972); *cf. Murphy v. Murphy*, 36 Va. Cir. 96, 99-100 (Va. Cir. Ct. 1995) (noting that privilege applies when witness is asked about adulterous affairs even though adultery prosecutions in state are rare).

B. APPLICABILITY OF THE SPOUSAL PRIVILEGES TO SAME-SEX COUPLES

A second question that arises with respect to testimonial privileges has nothing to do with trying to prove an individual's sexual orientation in court. Rather, it has to do with the applicability of either of the two spousal privileges to same-sex couples. The marital confidences privilege protects confidential communications between husband and wife, and is recognized in the federal courts as well as in virtually all of the states.⁴⁵⁸ The adverse spousal testimony privilege blocks testimony by a potential witness against her spouse about anything, including observations and nonconfidential communications, and it is recognized on the federal level and in some of the states.⁴⁵⁹ Could either of these privileges be invoked to prevent a witness from testifying against her same-sex partner?

The answer to this question requires an understanding of the way in which privileges are developed at the federal level. In 1974, Congress rejected a series of detailed privilege rules promulgated by the Supreme Court, opting instead to allow privilege law to develop on a case-by-case basis.⁴⁶⁰ Federal Rule of Evidence 501 provides that "the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."⁴⁶¹ As written, the rule thus "leave[s] the door open for change" based on evolving social norms.⁴⁶²

One factor to which the federal courts look in deciding whether to recognize a new privilege, or to alter the parameters of an existing one, are the trends in the states. Thus, in *Trammel v. United States*, the Supreme Court opted to change the federal rule regarding the adverse spousal testimony privilege to make the witness-spouse rather than the defendant-spouse the holder of the privilege.⁴⁶³ The

⁴⁵⁸ MUELLER & KIRKPATRICK, *supra* note 21, § 5.32, at 456; *see also, e.g.*, COLO. REV. STAT. Ann. § 13-90-107(1)(a)(I) (West, 1997); O.C.G.A. § 24-9-21(1) (2001); N.Y. C.P.L.R. § 4502(b) (Consol. 1978).

⁴⁵⁹ *Trammel v. United States*, 445 U.S. 40, 53 (1980); *see also, e.g.*, CAL. EVID. CODE § 970 (West, 1995); WASH. REV. CODE ANN. § 5.60.060(1) (1995).

⁴⁶⁰ WEINSTEIN & BERGER, *supra* note 21, § 501.02(1)(a), at 501-06.

⁴⁶¹ FED. R. EVID. 501.

⁴⁶² *Trammel v. United States*, 445 U.S. 40, 47 (1980).

⁴⁶³ *Id.* at 40.

Court noted “[t]he trend in state law toward divesting the accused of the privilege to bar adverse spousal testimony.”⁴⁶⁴ Similarly, the Supreme Court, in *Jaffee v. Redmond*,⁴⁶⁵ in deciding to recognize a federal psychotherapist privilege, held:⁴⁶⁶

That it is appropriate for the federal courts to recognize a psychotherapist privilege under Rule 501 is confirmed by the fact that all 50 States and the District of Columbia have enacted into law some form of psychotherapist privilege. We have previously observed that the policy decisions of the States bear on the question whether federal courts should recognize a new privilege or amend the coverage of an existing one. . . . Because state legislatures are fully aware of the need to protect the integrity of the factfinding functions of their courts, the existence of a consensus among the States indicates that “reason and experience” support recognition of the privilege.⁴⁶⁷

To date, there is little consensus among the states as to the applicability of the spousal privileges to same-sex couples. Vermont is the only state to recognize such a privilege for those who enter into civil unions.⁴⁶⁸ And only one reported judicial decision has expressly considered and rejected such a privilege for same-sex couples.⁴⁶⁹

When federal courts decide whether to recognize a new privilege, or to alter the parameters of an existing one, they also look to the proposed privileges that were rejected by Congress in favor of Rule 501 back in 1974. Proposed Federal Rule of Evidence 505 provided for a privilege of an accused not to have his spouse testify against him, named the “Husband-Wife Privilege,” but contained no

⁴⁶⁴ *Id.* at 49-50.

⁴⁶⁵ 518 U.S. 1 (1996).

⁴⁶⁶ *Id.* at 3.

⁴⁶⁷ *Id.* at 12-13 (citing *Trammel v. United States*, 445 U.S. 40, 48-50 (1980); *United States v. Gillock*, 445 U.S. 360, 368 n.8 (1980)).

⁴⁶⁸ VT. STAT. ANN. tit. 15, § 1204(e)(15) (1989 & Supp. 2002).

⁴⁶⁹ *Greenwald v. H&P 29th St. Assocs.*, 659 N.Y.S.2d 473, 474 (N.Y. App. Div. 1997).

privilege specifically for same-sex couples.⁴⁷⁰ Although the absence of a privilege from the list of proposed rules does not mean that it cannot be recognized under Rule 501, the absence of a privilege from the list suggests that the privilege is not “indelibly ensconced in our common law.”⁴⁷¹ However, this factor is hardly dispositive, and has not stopped the federal courts from recognizing a psychotherapist-patient privilege that covers social workers,⁴⁷² or a spousal communications privilege,⁴⁷³ even though neither of those are found in the proposed privileges.⁴⁷⁴

The rationale for the adverse spousal testimony privilege is “its perceived role in fostering the harmony and sanctity of the marriage relationship” by preventing marital dissension.⁴⁷⁵ A second rationale is the repugnancy of requiring a person to condemn or be condemned by his spouse.⁴⁷⁶ The rationale for the spousal communications privilege is to protect the privacy and trust of the marital relationship and enable spouses to freely communicate and confide in one another.⁴⁷⁷ There is no reason why these very same policies, which prevent domestic dissension and protect privacy, would not support similar privileges for same-sex couples.

Although there have been no federal cases addressing this issue, many federal and state decisions have refused to extend the spousal privileges to unmarried heterosexual couples, including those who are engaged but not yet married.⁴⁷⁸ Few of such decisions set forth a detailed rationale, although one federal case reasoned that these

⁴⁷⁰ FED. R. EVID. 505 (proposed 1974), *reprinted in* PROPOSED FEDERAL RULES OF EVIDENCE 81-82 (John R. Schmertz, Jr. ed., 1974).

⁴⁷¹ *United States v. Gillock*, 445 U.S. 360, 367-68 (1980).

⁴⁷² *Jaffee v. Redmond*, 518 U.S. 1, 15 (1996).

⁴⁷³ *Trammel v. United States*, 445 U.S. 40, 45 n.5 (1980).

⁴⁷⁴ *See* FED. R. EVID. 504, 505 (proposed 1974), *reprinted in* PROPOSED FEDERAL RULES OF EVIDENCE 81-82 (John R. Schmertz, Jr. ed., 1974).

⁴⁷⁵ *Trammel*, 445 U.S. at 44.

⁴⁷⁶ 8 WIGMORE ON EVIDENCE §§ 2228, 2241 (1961).

⁴⁷⁷ MUELLER & KIRKPATRICK, *supra* note 21, § 5.32, at 456.

⁴⁷⁸ *See, e.g.*, *United States v. Acker*, 52 F.3d 509, 514-15 (4th Cir. 1995); *State v. Watkins*, 614 P.2d 835, 839-40 (Ariz. 1980); *People v. Hunt*, 184 Cal. Rptr. 197, 205 (Cal. Ct. App. 1982); *People v. Delph*, 156 Cal. Rptr. 422, 425-26 (Cal. Ct. App. 1979); *Holt v. State*, 481 N.E.2d 1324, 1326 (Ind. 1985); *Karlos v. State*, 476 N.E.2d 819, 824 (Ind. 1985); *State v. Kaufman*, 331 So. 2d 16, 22-23 (La. 1976); *State v. Williams*, 688 So. 2d 1277, 1280-81 (La. Ct. App. 1997); *Commonwealth v. Diaz*, 661 N.E.2d 1326, 1329 (Mass. 1996); *State v. French*, 460 N.W.2d 2, 10 (Minn. 1990); *People v. Suarez*, 560 N.Y.S.2d 68, 70 (N.Y. Sup. Ct. 1990); *Weaver v. State*, 855 S.W.2d 116, 120-21 (Tex. App. 1993).

heterosexual couples are trying to obtain a benefit of marriage without taking on the responsibilities that go along with it.⁴⁷⁹ Thus, a distinction can be drawn between unmarried same-sex couples and unmarried heterosexual couples, because same-sex couples are unable to marry even if they want to, while no legal obstacle prevents most heterosexual couples from marrying.⁴⁸⁰

To be sure, concerns may be raised about administering such a privilege, since it is not as easy as just looking to whether or not the couple has a marriage license.⁴⁸¹ However, for same-sex couples, it is simply a matter in some cases of asking if they have registered as domestic partners or have entered into a civil union (if those options are available), or asking them to provide evidence that they live together and share basic living expenses.⁴⁸² Moreover, the existing spousal privileges for heterosexual couples are not quite as simple as merely determining whether the couple has a marriage license, for courts will sometimes look behind the license and deny the privileges where they find the marriage to be moribund or a sham.⁴⁸³

The Defense of Marriage Act should not pose a bar to recognizing such a privilege. The Act provides in relevant part that:

[i]n determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.⁴⁸⁴

⁴⁷⁹ *United States v. Acker*, 52 F.3d 509, 515 (4th Cir. 1995).

⁴⁸⁰ Jennifer R. Brannen, *Unmarried With Privileges? Extending the Evidentiary Privilege to Same-Sex Couples*, 17 REV. LITIG. 311, 318-20, 335 (1998).

⁴⁸¹ *Cf. State v. Watkins*, 614 P.2d 835, 840 (Ariz. 1980) (citing administrative difficulty as rationale for not extending privilege to unmarried heterosexual couples).

⁴⁸² Brannen, *supra* note 480, at 337-40.

⁴⁸³ MUELLER & KIRKPATRICK, *supra* note 21, § 5.31, at 453; *see also, e.g.*, *Lutwak v. United States*, 344 U.S. 604, 614-15 (1953) (sham); *United States v. Porter*, 986 F.2d 1014 (6th Cir. 1993) (moribund).

⁴⁸⁴ 1 U.S.C. § 7 (2000).

Rule 501 is not an act of Congress, nor is it issued by an administrative agency. In any event, by simply recognizing a privilege that is not called a marital privilege, but instead a same-sex partners privilege, the rule need not use the terms "marriage" or "spouse," and thus the Defense of Marriage Act need not be implicated.

The fact that Vermont now has such a privilege for same-sex couples that have entered into civil unions raises interesting questions when causes of action grounded in Vermont law are filed or removed to federal court. Although federal privilege law applies when a case in federal court involves a federal criminal action or a federal civil action, Rule 501 further provides that "in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State or political subdivision thereof shall be determined in accordance with State law."⁴⁸⁵ Thus, in a typical diversity case in federal court in Vermont, the federal court would apply Vermont's privilege for same-sex couples. However, consider a case in federal court in Vermont that has both federal and state law claims. Assuming that federal law does not extend the spousal privileges to same-sex couples, what would a federal court do in this situation?

The Senate recognized, but did not resolve, what to do in a situation in which there was both a federal and a state law claim in the same case, noting that such a situation "might require use of two bodies of privilege law," and suggesting that "[i]f the rule proposed here results in two conflicting bodies of privilege law applying to the same piece of evidence in the same case, it is contemplated that the rule favoring reception of the evidence should be applied."⁴⁸⁶ Thus, under the Senate's proposed solution, the privilege granted by state law would be ignored. However, this suggested solution was not adopted as part of the House-Senate Conference Report.⁴⁸⁷

The Supreme Court in *Jaffee* noted, but did not resolve, what to do in the situation in which evidence is privileged under state law but not under federal law, and solved the problem at bar by

⁴⁸⁵ FED. R. EVID. 501.

⁴⁸⁶ S. REP. NO. 93-1277, at 12 n.17 (1974).

⁴⁸⁷ Pub. L. No. 93-595, H.R. Rep. No. 93-1597, at 7100-01 (Dec. 15, 1974); see also MUELLER & KIRKPATRICK, *supra* note 21, § 5.7, at 345 n.16.

extending federal privilege law to make it consistent with state privilege law.⁴⁸⁸ The *Jaffee* court, in the context of the psychotherapist-patient privilege, reasoned that:

given the importance of the patient's understanding that her communications with her therapist will not be publicly disclosed, any State's promise of confidentiality would have little value if the patient were aware that the privilege would not be honored in a federal court. Denial of the federal privilege therefore would frustrate the purposes of the state legislation that was enacted to foster these confidential communications.⁴⁸⁹

The same argument could be made with respect to Vermont's privilege for same-sex couples. Denying the privilege in federal court would undermine the state's promise of such a privilege, suggesting that it should be extended not only to cases arising in federal court that involve both federal and state claims, but also to actions in federal court involving only federal claims.

Theoretically, the court could give the jury a limiting instruction to consider a piece of evidence for the federal but not the state claim, but in practice this would be confusing⁴⁹⁰ and probably would not be that effective. In reality, federal courts in such situations have tended to apply federal privilege law where a conflict between federal and state law exists, thus effectively nullifying the state privilege.⁴⁹¹ Some courts, however, have held that the appropriate solution is to sever or dismiss the state law claims and let those be adjudicated in a state court before a different fact-finder.⁴⁹²

V. LAY AND EXPERT OPINION TESTIMONY ON SEXUAL ORIENTATION

⁴⁸⁸ *Jaffee v. Redmond*, 518 U.S. 1, 15 n.15 (1996).

⁴⁸⁹ *Id.* at 13.

⁴⁹⁰ WEINSTEIN & BERGER, *supra* note 21, § 501.02(2)(c), at 501-16.

⁴⁹¹ WEINSTEIN & BERGER, *supra* note 21, § 501.02(2)(c), at 501-16 to 501-16.1; *see also, e.g.*, *Hancock v. Hobbs*, 967 F.2d 462, 466-67 (11th Cir. 1992); *Von Bulow v. Von Bulow*, 811 F.2d 136, 141 (2d Cir. 1987).

⁴⁹² WEINSTEIN & BERGER, *supra* note 21, § 501.02(2)(c), at 501-17; *see also, e.g.*, *Research Inst. for Med. and Chemistry, Inc. v. Wis. Alumni Research Found.*, 114 F.R.D. 672, 675 n.2 (W.D. Wis. 1987).

A. LAY OPINION TESTIMONY ON SEXUAL ORIENTATION

Assume that a person's sexual orientation is somehow relevant in a case and not subject to exclusion under the categorical rules of exclusion, yet most of the person's statements about his own sexual orientation are subject to exclusion under the hearsay rule and the rules of privilege. Is it permissible for a witness who is familiar with the person to testify that the person "looked" or "seemed" gay? Consider in this regard the following testimony by a witness when asked about an encounter with a teacher at a private religious school:

[H]e didn't seem right . . . he looked like more of a faggot To me he looked gay, the way he talked and his motions with his hands, like he was very delicate.⁴⁹³

At issue in the case was whether the school was liable for negligent hiring and supervision of the teacher, who was alleged to have sexually assaulted a child.⁴⁹⁴ The plaintiff's theory was that the teacher was "obviously" gay, and that the school was thus on notice that he was a risk to children.⁴⁹⁵ The court rejected the evidence on relevancy grounds, refusing to give credence to a link between homosexuality and pedophilia.⁴⁹⁶ Left out of the court's opinion, however, was any discussion about whether a lay witness is qualified to opine about a person's sexual orientation based on his observations of a person.

Federal Rule of Evidence 701 sets forth the standard for when a lay witness may testify in the form of an opinion, limiting lay witnesses to giving only those opinions which are "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue."⁴⁹⁷

⁴⁹³ Doe v. X Corp., No. CV930351397, 1997 WL 66486, at *8 n.7 (Conn. Super. Ct. Jan. 30, 1997).

⁴⁹⁴ *Id.* at *1.

⁴⁹⁵ *Id.* at *1, *8.

⁴⁹⁶ *Id.* at *8. See also *supra* notes 167-71 and accompanying text.

⁴⁹⁷ FED. R. EVID. 701. The rule further requires that the testimony not be based on scientific, technical, or other specialized knowledge within the scope of Rule 702. *Id.* This

The first limitation—that the testimony be “rationally based on the perception of the witness”—is merely a restatement of the requirement in Federal Rule of Evidence 602 that testimony be based on the witness’s personal knowledge.⁴⁹⁸ Rule 602 provides that “[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.”⁴⁹⁹ Personal knowledge has two components to it, perception and memory.⁵⁰⁰ A witness cannot testify to perceptions that he cannot remember, and he cannot testify to memories that are not based on his own perceptions.⁵⁰¹ Evidence to prove that a witness’s testimony is based on personal knowledge may consist entirely of the witness’s own testimony.⁵⁰²

In most cases, including the above example, the requirement that the lay opinion testimony be based on the witness’s own perceptions is easily satisfied. The more significant hurdle, then, is the second limitation that the testimony be “helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue.”⁵⁰³ This limitation provides that whether a lay witness may give his “opinion” on a matter or simply relate the bare facts to the trier of fact depends upon the degree to which an “opinion” by the witness would be helpful to the jury.⁵⁰⁴ This limitation thus sets forth a preference for testimony that is more specific or fact-like in nature over testimony that is more general or opinion-like in nature; the rationale of the limitation is that the trier of fact usually will be in a better position to determine what happened if it is given more

additional limitation is designed to prevent parties from evading the expert witness disclosure requirement in the Federal Rules of Civil Procedure by calling an expert witness in the guise of a lay witness. FED. R. EVID. 701 advisory committee’s note.

⁴⁹⁸ FED. R. EVID. 701 advisory committee’s note.

⁴⁹⁹ FED. R. EVID. 602.

⁵⁰⁰ MUELLER & KIRKPATRICK, *supra* note 21, § 6.5, at 487.

⁵⁰¹ *Id.*

⁵⁰² FED. R. EVID. 602. Rule 602 is “a specialized application of the provisions of Rule 104(b) on conditional relevancy.” FED. R. EVID. 602 advisory committee’s note. As such, it is ultimately for the jury to decide whether the witness satisfies the requirement of having personal knowledge, with the judge playing only a screening role, and allowing the witness to testify so long as enough evidence of personal knowledge is offered to enable a reasonable jury to conclude that he had it. MUELLER & KIRKPATRICK, *supra* note 21, § 1.13, at 54.

⁵⁰³ FED. R. EVID. 701.

⁵⁰⁴ MUELLER & KIRKPATRICK, *supra* note 21, § 7.4, at 691-93.

detail.⁵⁰⁵ Moreover, testimony in the form of an opinion will not be “helpful” if it represents too long of an inferential leap from the facts observed.⁵⁰⁶

When testimony in the form of an “opinion” is preferable to testimony in the form of “facts” is best demonstrated by the so-called “collective facts” doctrine, which allows a lay witness to testify that the person he observed seemed frightened, upset, or shocked, or use other descriptive words that, in effect, are an “opinion” of a series of more detailed facts that he observed and processed based on his basic understanding of human nature.⁵⁰⁷ The witness’s “opinion” that the person looked frightened, shocked, or upset is likely to be more helpful to the jury than a bare reciting of the details that the witness observed (if indeed it is even possible to articulate such details).⁵⁰⁸ Thus, the rationale behind the doctrine is that there is no other feasible alternative by which to communicate that observation to the trier of fact.⁵⁰⁹ It would be very difficult for a witness to articulate, for example, what gasoline smells like, and we therefore allow lay witnesses to testify that they smelled a gasoline-like odor, even though this is in a sense an opinion.⁵¹⁰ Indeed, the “[k]ey to the [collective facts] doctrine [is that] the lay witness cannot verbalize all the underlying sensory data supporting the opinion.”⁵¹¹ In deciding whether to allow a lay witness to testify in the form of an opinion, the judge asks himself whether lay persons commonly draw this type of inference, and whether it would be practical for a lay witness to articulate all of the underlying factual data.⁵¹²

The question, then, is whether a lay witness’s opinion that a person “looked” or “seemed” gay is “helpful” to the jury within the meaning of Rule 701.⁵¹³ A few courts have given at least qualified support for allowing such testimony. One court has held that

⁵⁰⁵ MUELLER & KIRKPATRICK, *supra* note 21, § 7.1, at 688. The rule recognizes that the fact/opinion dichotomy is somewhat artificial, and is thus more of a continuum. FED. R. EVID. 701 advisory committee’s note.

⁵⁰⁶ MUELLER & KIRKPATRICK, *supra* note 21, § 7.3, at 692.

⁵⁰⁷ *Id.* § 7.4, at 693-96.

⁵⁰⁸ *Id.*

⁵⁰⁹ Clifford v. Commonwealth, 7 S.W.3d 371, 374-75 (Ky. 2000).

⁵¹⁰ *Id.*

⁵¹¹ MICHAEL H. GRAHAM, 2 HANDBOOK OF FEDERAL EVIDENCE § 701.1 n.15 (5th ed. 2001).

⁵¹² *Id.*

⁵¹³ See FED. R. EVID. 701.

“[h]omosexuality and its outward signs are matters of conversation and also of frequent discussion in the press and periodical literature,” and while conceding that “[i]t may be difficult for a witness to testify respecting the particular trait of [homosexuality] with the same degree of accuracy and certainty as possible respecting other traits,” the court concluded that “[t]his would affect the weight of the evidence rather than its admissibility.”⁵¹⁴ Yet another court held that a lay witness may testify that a person “comes across” as gay, reasoning that:

while [a person’s] propensity to engage in stereotypical “homosexual” behaviors may indicate little or nothing about his true sexual orientation, most lay people are familiar with the social import of certain gestures, speech patterns, and styles of walking and standing, and are competent to give opinions about whether a given individual engages in stereotypical “homosexual” behavior, and thus “comes across” as homosexual or bisexual.⁵¹⁵

But there are several problems with allowing lay witnesses to opine as to a person’s sexual orientation. As the above decisions indicate,⁵¹⁶ much of the testimony appears to be based on the witnesses’ observations of the person’s speech and behavioral patterns. Yet such an opinion is bound to be fraught with error. One study on the accuracy of one’s ability to detect a person’s sexual orientation based on observation of the person found that “[c]lose to 80% of [its] subjects were unable to identify accurately the sexual orientation of the target . . . beyond chance expectations,” and that no behavioral cue, such as speech or appearance, emerged as an accurate predictor of sexual orientation.⁵¹⁷ Another study found that people, although able to detect sexual orientation of others at better than chance levels of accuracy, were far from perfect, with the

⁵¹⁴ O’Kon v. Roland, 247 F. Supp. 743, 748 (S.D.N.Y. 1965).

⁵¹⁵ Griswold v. Fresenius USA, Inc., 978 F. Supp. 718, 722 (N.D. Ohio 1997).

⁵¹⁶ See *supra* notes 513-15 and accompanying text.

⁵¹⁷ Gregory Berger et al., *Detection of Sexual Orientation by Heterosexuals and Homosexuals*, 13(4) J. HOMOSEXUALITY 83, 90-95 (1987).

typical person being correct only fifty-five to seventy percent of the time.⁵¹⁸ Thus, the inferential leap from the observed facts to the conclusion that a person seemed gay appears too long a leap to allow a lay witness to take.

Moreover, even assuming that such a consideration goes only to the weight rather than the admissibility of such evidence, and assuming that stereotypical speech and behavior patterns have any bearing on a person's sexual orientation, it is questionable whether this is the sort of thing that would fall within the "collective facts" doctrine. For when a person testifies that a person "looked" gay, he usually is pointing to stereotypical speech and behavioral cues that he can easily articulate. Indeed, in the example set forth above, the witness based his opinion that the person was gay on "the way he talked and his motions with his hands."⁵¹⁹ Thus, this is hardly akin to such testimony as the smell of gasoline, the look of fright, or other perceptions and sensations that are difficult to articulate in fact-like form.

Consider in this regard a pair of recent cases where the court approved of lay witness testimony that a person "sounded black."⁵²⁰ These courts considered such evidence admissible under the "collective facts rule," reasoning that the witness's "inability to more specifically describe or demonstrate 'how a black man sounds' merely proves the reason for the collective facts rule, *i.e.*, that it would be difficult or impossible for the witness to give such a description or demonstration."⁵²¹ Although permitting such testimony has been criticized as being only eighty to ninety percent accurate, one court has held that such a consideration goes only to the weight and not the admissibility of such evidence.⁵²² But even accepting the validity of these decisions, lay witness testimony on sexual orientation still

⁵¹⁸ Nalini Ambady et al., *Accuracy of Judgments of Sexual Orientation from Thin Slices of Behavior*, 77(3) J. PERSONALITY & PSYCHOL. 538, 543, 544, 546 (1999).

⁵¹⁹ *Doe v. X Corp.*, No. CV930351397, 1997 WL 66486, at *8 & n.7 (Conn. Super. Ct. Jan. 30, 1997).

⁵²⁰ *United States v. Card*, 86 F. Supp. 2d 1115, 1116-18 (D. Utah 2000); *Clifford v. State*, 7 S.W.3d 371, 374-76 (Ky. 2000).

⁵²¹ *Card*, 86 F. Supp. 2d at 1116-18; *Clifford*, 7 S.W.3d at 374-76; see also Lis Wiehl, "Sounding Black" in the Courtroom: Court-Sanctioned Racial Stereotyping, 18 HARV. BLACKLETTER L.J. 185, 190-95 (2002).

⁵²² *Card*, 86 F. Supp. 2d at 1118.

seems objectionable, both because the accuracy rates are far lower than with racial identification, and because the basic facts underlying opinion testimony on sexual orientation can be articulated with relative ease, thus making it a poor fit for the collective facts doctrine.

The dissent in one of the cases approving of lay witness testimony that a person “sounded black” would have held that “[r]ace, that is skin color, must be perceived by sight.”⁵²³ Moreover, “[t]o say that a person is capable of ascertaining another’s race solely by hearing his voice is tantamount to saying that one can ‘hear a color’ or ‘smell a sound’ or ‘taste a noise.’”⁵²⁴ The same holds true for sexual orientation, which also can be perceived by neither sight nor sound, but rather is inside the person and cannot be detected unless the person either self-identifies as such or engages in same-sex relationships that would be indicative of his orientation.

There is another reason why allowing this testimony is objectionable. In a recent article, Professor Lis Wiehl takes issue with the cases allowing testimony that the perpetrator of a crime “sounded black,” reasoning that, aside from concerns about reliability, such evidence should be excluded under Rule 403. Wiehl posits that “statements referring to the race of an accused can move the jury to decide the case on an improper basis,”⁵²⁵ and concludes that to allow such testimony “is to embrace court sanctioned racial stereotyping.”⁵²⁶ A similar concern applies to testimony regarding perceived sexual orientation. To the extent that a person’s sexual orientation is somehow relevant, courts should not allow a party to rely on inaccurate stereotypes to prove sexual orientation, as doing so only reinforces the stereotypes. This reinforcement is akin to the way in which a court, by finding evidence that someone is gay to be “relevant” to show a likelihood of sexually assaulting someone of the same gender under Rule 401⁵²⁷ validates in society’s eyes the stigmatizing stereotype contained therein.

⁵²³ *Clifford*, 7 S.W.3d at 378 (Stumbo, J., dissenting).

⁵²⁴ *Id.*

⁵²⁵ Wiehl, *supra* note 521, at 185.

⁵²⁶ *Id.*

⁵²⁷ See *supra* notes 338-42 and accompanying text.

B. EXPERT OPINION TESTIMONY ON SEXUAL ORIENTATION

Experts frequently testify about matters related to sexual orientation. In child custody cases, for example, experts often testify about the effect that a parent's sexual orientation has on his children.⁵²⁸ And in criminal cases in which the defendant raises the gay-panic defense, experts frequently testify about the syndrome.⁵²⁹

Federal Rule 702 sets forth three limitations on expert testimony: the testimony must be helpful to the trier of fact, the witness must be qualified to provide the trier of fact with that assistance, and the proposed testimony must be reliable or trustworthy.⁵³⁰

The helpfulness requirement generally excludes testimony that is within the knowledge and experience of ordinary lay people,⁵³¹ matters committed exclusively to the trier of fact (*e.g.*, assessing the credibility of witnesses),⁵³² or testimony that is essentially speculative.⁵³³ As to the second requirement, having a formal education in a given field, even without any experience, is sufficient but not necessary to be qualified as an expert in that field, as one can become qualified on the basis of experience alone without any formal education or training.⁵³⁴

Much litigation regarding the admissibility of expert testimony centers on the third requirement. In *Daubert v. Merrell Dow Pharmaceuticals*,⁵³⁵ the Supreme Court interpreted Rule 702 as containing an implied requirement that trial courts exclude scientific

⁵²⁸ See, *e.g.*, *J.P. v. P.W.*, 772 S.W.2d 786, 793 (Mo. Ct. App. 1989); *L. v. D.*, 630 S.W.2d 240, 243 (Mo. Ct. App. 1982); *In re J.S. & C.*, 324 A.2d 90, 92 (N.J. 1974); *Chicoine v. Chicoine*, 479 N.W.2d 891, 896-97 (S.D. 1992) (Henderson, J., concurring in part and dissenting in part); *Dailey v. Dailey*, 635 S.W.2d 391, 393 (Tenn. Ct. App. 1982).

⁵²⁹ See, *e.g.*, *State v. Rodriguez*, 64 Cal. Rptr. 253, 255 (Cal. Ct. App. 1967); *People v. Parisie*, 287 N.E.2d 310, 314 (Ill. App. Ct. 1972); *State v. Shelley*, 373 N.E.2d 951 (Mass. 1978).

⁵³⁰ FED. R. EVID. 702; see also WEINSTEIN & BERGER, *supra* note 21, § 702.02(3), at 702-10.

⁵³¹ WEINSTEIN & BERGER, *supra* note 21, § 702.03(2)(a), at 702-33; see also FED. R. EVID. 702 advisory committee's note (noting that this involves "common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute").

⁵³² WEINSTEIN & BERGER, *supra* note 21, § 702.03(3), at 702-38.

⁵³³ MUELLER & KIRKPATRICK, *supra* note 21, § 7.6, at 703.

⁵³⁴ *Id.* § 7.5, at 697-98; WEINSTEIN & BERGER, *supra* note 21, § 702.04(1)(a), at 702-42 to 702-43.

⁵³⁵ 509 U.S. 579 (1993).

expert testimony that lacks reliability.⁵³⁶ The Supreme Court subsequently extended this requirement to all expert testimony, scientific as well as nonscientific.⁵³⁷ In *Daubert*, the Supreme Court set forth a nondefinitive checklist of the types of factors that a trial court should take into account in determining reliability, including: (1) whether the theory or technique can be and has been tested; (2) whether it has been published and subject to peer review; (3) the known or potential rate of error experienced in application of the technique or theory; (4) the existence of standards and controls for the application of the technique the witness has applied in arriving at his or her opinion, and whether the witness applied those standards and controls in the specific application of the technique; and (5) whether the theory or technique is generally accepted in a definable relevant community of experts.⁵³⁸ Other pertinent factors include:

- (1) Whether experts are “proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying”;
- (2) Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion;
- (3) Whether the expert has adequately accounted for obvious alternative explanations;
- (4) Whether the expert is being as careful as he would be in his regular professional work outside his paid litigation consulting; [and]
- (5) Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.⁵³⁹

⁵³⁶ *Id.* at 590-91.

⁵³⁷ *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-53 (1999).

⁵³⁸ *Daubert*, 509 U.S. at 593-94. While some states have adopted *Daubert*, see, e.g., *Commonwealth v. Lanigan*, 641 N.E.2d 1342, 1349 (Mass. 1994), others have retained the so-called *Frye* general acceptance standard, which is in essence the fifth *Daubert* factor, see, e.g., *People v. Leahy*, 882 P.2d 321, 331 (Cal. 1994).

⁵³⁹ FED. R. EVID. 702 advisory committee's note.

However, no factor is dispositive, other factors may be relevant,⁵⁴⁰ and the trial court's determination of reliability is reviewed only for abuse of discretion.⁵⁴¹ Interestingly, no court has assessed the admissibility of expert testimony about gay-panic syndrome under *Daubert*, implicitly accepting its reliability.

Typically, experts giving "syndrome" testimony are barred from saying: whether they think the subject is being truthful (as this is an assessment of credibility committed exclusively to the jury and is thus not "helpful"); whether he suffered from the syndrome; or whether the syndrome operated in the case or explains what happened.⁵⁴² The syndrome most similar to gay-panic syndrome is probably battered woman syndrome, which is used by battered wives as a defense to explain why they used deadly force against their abuser even when not under actual or imminent attack.⁵⁴³ Typically when such evidence is offered to support a claim of self-defense, the experts are barred from testifying that the actions of the defendant were the product of battered woman syndrome, that she suffers from battered woman syndrome, or that battered woman syndrome shows that her story is truthful.⁵⁴⁴ Thus, following established precedent dealing with battered woman syndrome, an expert testifying about the gay-panic defense should at most be allowed to give the jury the background on the syndrome to the extent it is deemed "helpful," but should not be permitted to give his conclusion as to whether the defendant in fact suffered from the syndrome, leaving it to the jury to make that determination.⁵⁴⁵

Is it possible for someone to give "expert" testimony that someone is or is not gay? There exists in the gay community a concept—commonly known as "gaydar"—which refers to the

⁵⁴⁰ *Id.*

⁵⁴¹ *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 143 (1997).

⁵⁴² MUELLER & KIRKPATRICK, *supra* note 21, § 7.22, at 769; *see also, e.g.*, *People v. Christel*, 537 N.W.2d 194, 201 (Mich. 1995); *State v. Hennem*, 441 N.W.2d 793, 799 (Minn. 1989).

⁵⁴³ MUELLER & KIRKPATRICK, *supra* note 21, § 7.22, at 770.

⁵⁴⁴ *Id.* § 7.22, at 771; *see also, e.g.*, *Christel*, 537 N.W.2d at 201; *Hennem*, 441 N.W.2d at 799.

⁵⁴⁵ *Cf. State v. Haynes*, No. 4310, 1988 Ohio App. LEXIS 3811, at *4-5, *10-11 (Ohio Ct. App. Sept. 21, 1988) (refusing to allow prosecution to offer testimony that timing in case between unsolicited homosexual encounter and murder indicated that it was not result of gay panic but instead anger-retaliatory killing, reasoning that it was for jury to make that determination).

“apparent ability [of gays and lesbians] to recognize each other by cues too subtle for heterosexuals” to detect.⁵⁴⁶ Presumably, another gay person could “qualify” as an expert on the subject based on his life experience in identifying other people of the same sexual orientation. It is doubtful, however, that such testimony would pass the *Daubert* test of reliability.⁵⁴⁷ A recent study has found that gay men and lesbians perceive sexual orientation slightly more accurately than their heterosexual counterparts, yet it found that the difference was not that large and was not consistently higher.⁵⁴⁸ Thus, the rate of error and the lack of sufficient acceptance in the scientific community at this point are likely to be significant barriers to the admission of such expert testimony.

VI. EVIDENTIARY SUBSTITUTES: JUDICIAL NOTICE AND PRESUMPTIONS

A. JUDICIAL NOTICE

Federal Rule of Evidence 201 governs judicial notice of so-called adjudicative facts,⁵⁴⁹ the facts of a particular case that relate to the parties, their activities, and their properties, or in other words, the “who did what, where, when, how and with what motive or intent.”⁵⁵⁰ When a court takes judicial notice of a fact, there is no need for presenting formal evidence to prove the fact, and in civil cases, the jury is instructed to accept the fact as conclusively proven and parties are barred from offering evidence before the jury to disprove the judicially noticed fact.⁵⁵¹

⁵⁴⁶ Mary Coombs, *Interrogating Identity*, 11 BERKELEY WOMEN'S L.J. 222, 232 n.57 (1995).

⁵⁴⁷ See *supra* notes 535-40 and accompanying text.

⁵⁴⁸ Nalini Ambady et al., *Accuracy of Judgments of Sexual Orientation from Thin Slices of Behavior*, 77(3) J. PERSONALITY & SOC. PSYCHOL. 538, 543, 545 (1999).

⁵⁴⁹ FED. R. EVID. 201(a) & advisory committee's note.

⁵⁵⁰ WEINSTEIN & BERGER, *supra* note 21, § 201.02(1), at 201-8; see also FED. R. EVID. 201(a) advisory committee's note.

⁵⁵¹ FED. R. EVID. 201(g); FED. R. EVID. 201 advisory committee's note; WEINSTEIN & BERGER, *supra* note 21, § 201.02(2), at 201-9. In criminal cases, the court instructs the jury that it may, but is not required to, accept as conclusive any fact judicially noticed, due to a concern about the defendant's Sixth Amendment right to a jury trial. FED. R. EVID. 201(g); Pub. L. No. 93-595, H.R. Rep. 93-650, at 7080 (Nov. 15, 1973). Moreover, in all cases, a party opposing the taking of judicial notice of a fact is entitled to an opportunity to be heard on the

Because of the inability to introduce counterproof once judicial notice of a fact has been taken, the rule limits taking judicial notice of adjudicative facts only in “clear cases” where the fact to be noticed is “beyond reasonable controversy.”⁵⁵² Thus, the rule provides that “[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.”⁵⁵³

To be generally known within the territorial jurisdiction of the trial court, the fact should be part of the “common knowledge” of the community⁵⁵⁴ or generally known by “well-informed persons” within the court’s jurisdiction.⁵⁵⁵ This includes facts covered extensively in the news media,⁵⁵⁶ as well as matters of geography, history, politics, and economic conditions.⁵⁵⁷ Even if a fact is not of general knowledge within the court’s jurisdiction, it can be judicially noticed under Rule 201(b)(2) if it “can be determined from unimpeachable sources,”⁵⁵⁸ such as maps, dictionaries, encyclopedias, public records, almanacs, and the like.⁵⁵⁹

In addition, courts sometimes take judicial notice of legislative facts. In contrast to adjudicative facts, legislative facts are more general and are not limited to the immediate parties. They include facts that have relevance to the court in interpreting or extending legislative enactments or in developing the common law.⁵⁶⁰ One example of a legislative fact is the Supreme Court’s refusal in *Hawkins v. United States*⁵⁶¹ to discard the common law adverse spousal testimony privilege based on the “fact” that allowing a spouse to testify against another spouse would “destroy almost any

propriety of taking such notice. FED. R. EVID. 201(e).

⁵⁵² FED. R. EVID. 201 advisory committee’s note; see also WEINSTEIN & BERGER, *supra* note 21, § 201.10(1), at 201-16 to 201-17.

⁵⁵³ FED. R. EVID. 201(b).

⁵⁵⁴ WEINSTEIN & BERGER, *supra* note 21, § 201.11(1)-(2), at 201-21 to 201-22.

⁵⁵⁵ MUELLER & KIRKPATRICK, *supra* note 21, § 2.6, at 86.

⁵⁵⁶ WEINSTEIN & BERGER, *supra* note 21, § 201.11(2), at 201-22 to 201-22.1.

⁵⁵⁷ MUELLER & KIRKPATRICK, *supra* note 21, § 2.6, at 87-88.

⁵⁵⁸ *Id.* § 2.7, at 89.

⁵⁵⁹ WEINSTEIN & BERGER, *supra* note 21, § 201.12(1), at 201-27 to 201-29.

⁵⁶⁰ *Id.* § 201.51(1), at 201-85.

⁵⁶¹ 358 U.S. 74, 79 (1958).

marriage.”⁵⁶² Another example arose in the Supreme Court’s decision in *Brown v. Board of Education*⁵⁶³ striking down separate-but-equal based on the “fact” that it had a negative impact on minority children.⁵⁶⁴ No rule governs judicial notice of legislative facts.⁵⁶⁵ Thus, unlike judicial notice of adjudicative facts, courts can take judicial notice of legislative facts even when they are not indisputable, nor easily verifiable.⁵⁶⁶

In the area of child custody, the issue of judicial notice involving a question of sexual orientation has frequently arisen. In several cases, trial courts have denied a gay parent custody of his natural child, taking judicial notice of the “fact” that a homosexual environment has an adverse effect on children, but such cases have been overturned by appeals courts on the ground that this is not the sort of thing that is beyond reasonable controversy and thus not the sort of thing subject to judicial notice.⁵⁶⁷ In refusing to take judicial notice, these courts viewed the question as one involving an adjudicative fact, and found that it failed to satisfy the requirements of Rule 201 or the state’s equivalent rule.⁵⁶⁸

Yet the line between legislative facts and adjudicative facts is sometimes slippery, and therefore courts sometimes circumvent the restrictions on noticing legislative facts by classifying the noticed fact as legislative.⁵⁶⁹ Classifying a fact as adjudicative or legislative requires distinguishing questions of fact from questions of law, as follows: if classified as the former, it is an adjudicative fact, but if classified as the latter, it is a legislative fact.⁵⁷⁰

⁵⁶² FED. R. EVID. 201 advisory committee’s note.

⁵⁶³ 347 U.S. 483, 494 (1954).

⁵⁶⁴ WEINSTEIN & BERGER, *supra* note 21, § 201.03(2), at 201-12 to 201-13 n.4.

⁵⁶⁵ FED. R. EVID. 201 advisory committee’s note.

⁵⁶⁶ FED. R. EVID. 201 advisory committee’s note; WEINSTEIN & BERGER, *supra* note 21, § 201.51(3), at 201-88.

⁵⁶⁷ *Maradie v. Maradie*, 680 So. 2d 538, 541-42 (Fla. 1996); *Bezio v. Patenauude*, 410 N.E.2d 1207, 1216 (Mass. 1980); *Doe v. Doe*, 284 S.E.2d 799, 805-06 (Va. 1981).

⁵⁶⁸ *Maradie*, 680 So. 2d at 541-42; *Bezio*, 410 N.E.2d at 1216; *Doe*, 410 N.E.2d at 1216.

⁵⁶⁹ KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 15.3, at 528 (1980) (noting that many facts are not readily classifiable as either adjudicative or legislative); MUELLER & KIRKPATRICK, *supra* note 21, § 2.3, at 78-79 (citing *United States v. Gould*, 536 F.2d 216 (8th Cir. 1976)) (upholding trial court’s taking judicial notice that cocaine hydrochloride was derivative of coca leaves, hence Schedule II controlled substance, on ground that fact noticed was legislative not adjudicative); WEINSTEIN & BERGER, *supra* note 21, § 201.51(3), at 201-88.

⁵⁷⁰ *Greenfield v. United States*, 341 F.2d 411, 412 (D.C. Cir. 1964) (holding that whether

Consider, for example, a court that is asked to interpret whether its state adoption laws allow for so-called second-parent adoptions in which both partners in a same-sex couple are permitted to adopt a child together. If, as in the above cases, the inquiry is whether the parents satisfy a requirement that they are “fit” to further the “best interests of the child,”⁵⁷¹ the court would be making a factual finding about the parent’s fitness, an adjudicative fact subject to the constraints of Rule 201.⁵⁷² But if instead the court is interpreting the language of the statute to decide whether the statute allows for such adoptions as a matter of law, it is now dealing with a legislative fact, and can take judicial notice free of the constraints of Rule 201.⁵⁷³

B. PRESUMPTIONS

A presumption is “[a] legal inference or assumption that a fact exists, based on the known or proven existence of some other fact or group of facts.”⁵⁷⁴ Stated a different way, “if a basic fact (Fact A) is established, then the fact-finder must accept that the presumed fact (Fact B) has also been established unless the presumption is rebutted.”⁵⁷⁵

Under Federal Rule of Evidence 301, unless Congress has provided otherwise, in civil cases a presumption shifts only the burden of production—or the burden of coming forward with sufficient evidence to rebut the presumption and thus to avoid a directed verdict—and it does not shift the burden of persuasion, or the “burden of proof in the sense of the risk of nonpersuasion,” which remains at all times with the party on whom it was originally cast.⁵⁷⁶ For a civil presumption to be constitutional, there must be some

soda pop bottle is dangerous weapon is question of fact for jury); MUELLER & KIRKPATRICK, *supra* note 21, § 2.3, at 78 & n.29 (citing *Green v. United States*, 405 F.2d 1368, 1369 (D.C. Cir. 1968) (holding that whether gun is deadly weapon is question of law for court)).

⁵⁷¹ *Bezio v. Patenaude*, 410 N.E.2d 1207, 1214 (Mass. 1980).

⁵⁷² See FED. R. EVID. 201.

⁵⁷³ See, e.g., *In re Adoption of Caitlin*, 622 N.Y.S.2d 835, 840-41 (N.Y. Fam. Ct. 1994).

⁵⁷⁴ BLACK’S LAW DICTIONARY 1203 (7th ed. 1999).

⁵⁷⁵ WEINSTEIN & BERGER, *supra* note 21, § 301.02(1), at 301-7.

⁵⁷⁶ FED. R. EVID. 301; see also WEINSTEIN & BERGER, *supra* note 21, § 301.02(2), at 301-9 to 301-11.

rational connection between the basic fact and the presumed fact such that the inference of the presumed fact from proof of the basic fact is not so unreasonable as to be purely arbitrary.⁵⁷⁷

Rule 301 applies only where “not otherwise provided for by Act of Congress.”⁵⁷⁸ Thus, Congress can provide that a statutory presumption shifts not only the burden of production, but also the burden of persuasion, which trumps the default rule set forth in Rule 301.⁵⁷⁹

An interesting application of an evidentiary presumption involving sexual orientation and the potential for courts to circumvent Rule 301 via the “otherwise provided” proviso is the United States military’s “Don’t Ask, Don’t Tell” policy. Under that policy, codified in a statute by Congress, a servicemember can be discharged⁵⁸⁰ for engaging in homosexual acts,⁵⁸¹ marrying or attempting to marry someone known to be of the same gender,⁵⁸² or stating that one is gay and failing to rebut a presumption that then arises that he or she engages in homosexual acts.⁵⁸³ Thus, although the statute is aimed at discharging those who engage in homosexual acts and not merely those who are gay, it nonetheless contains a

⁵⁷⁷ *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 28 (1976); *Tot v. United States*, 319 U.S. 463, 467-68 (1943); *Mobile, Jackson & Kansas City R.R. Co. v. Turnipseed*, 219 U.S. 35, 43 (1910).

⁵⁷⁸ FED. R. EVID. 301.

⁵⁷⁹ *Am. Coal Co. v. Benefits Review Bd.*, 738 F.2d 387, 390 (10th Cir. 1984); *Ala. By-Products Corp. v. Killingsworth*, 733 F.2d 1511, 1515 (11th Cir. 1984).

⁵⁸⁰ Such discharges are considered civil and not criminal in nature, thus making the analogy to the rule governing presumptions in civil cases an appropriate one. *See, e.g.*, *Thomasson v. Perry*, 80 F.3d 915, 948 n.18 (4th Cir. 1996); *Selland v. Perry*, 905 F. Supp. 260, 265 (D. Md. 1995).

⁵⁸¹ 10 U.S.C. § 654(b)(1) (2000).

⁵⁸² *Id.* § 654(b)(3).

⁵⁸³ *See id.* § 654(b)(2):

A member of the armed forces shall be separated from the armed forces under regulations prescribed by the Secretary of Defense if one or more of the following findings is made and approved in accordance with procedures set forth in such regulations[:] That the member has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, made and approved in accordance with procedures set forth in the regulations, that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

Id.

rebuttable presumption that those persons who declare that they are gay engage in homosexual conduct.⁵⁸⁴

The courts have held that there is a rational relationship between the basic fact (statement regarding homosexual orientation) and the presumed fact (homosexual conduct) so as to satisfy constitutional concerns, reasoning that although the fit is not perfect, a perfect fit is not required, and that the presumption certainly is a rational one.⁵⁸⁵

The other important question is whether this presumption merely shifts the burden of production to the servicemember, or if it also shifts to him the burden of persuasion. In other words, does it shift to him only the burden of coming forward with *some* evidence to rebut the presumption that he engages in homosexual conduct, or must he actually prove that he has not engaged in such conduct? Interestingly, the military rules of evidence do not contain a provision analogous to Federal Rule of Evidence 301,⁵⁸⁶ and are thus silent on the issue.⁵⁸⁷ A Department of Defense Directive dealing with the “Don’t Ask, Don’t Tell” policy provides that, in cases involving the presumption that a servicemember who declares his homosexuality also engages in homosexual conduct, the burden of persuasion by a preponderance of the evidence is shifted to the servicemember.⁵⁸⁸ Thus, even if Federal Rule of Evidence 301

⁵⁸⁴ *Richenberg v. Perry*, 97 F.3d 256, 262 (8th Cir. 1996).

⁵⁸⁵ *See, e.g., Holmes v. Cal. Army Nat’l Guard*, 124 F.3d 1126, 1135 (9th Cir. 1997); *Able v. United States*, 88 F.3d 1280, 1296-97 (2d Cir. 1996); *Thomasson v. Perry*, 80 F.3d 915, 930 (4th Cir. 1996); *Steffan v. Perry*, 41 F.3d 677, 686 (D.C. Cir. 1994).

⁵⁸⁶ *See* FED. R. EVID. 301.

⁵⁸⁷ *See* UNITED STATE MANUAL FOR COURTS-MARTIAL pt. III (2000); *see also* WEINSTEIN & BERGER, *supra* note 21, at T-29 (noting that military rules of evidence have no rule comparable to Federal Rule of Evidence 301). Evidently, it was not enacted because the members of the group drafting the military rules did not fully grasp their importance. *See* Fredric I. Lederer, *The Military Rules of Evidence: Origins and Judicial Implementation*, 130 MIL. L. REV. 5, 19 (1990):

[P]resumptions were not codified as part of the [military] rules To the best of my memory, presumptions were not codified, not because of their inherent difficulty and complexity, but rather because members of the Working Group failed to understand fully their importance. Instead, the Working Group quickly accepted the decision of the framers of the Federal Rules of Evidence not to codify presumptions in criminal cases and refused to adopt Federal Rule 301 because of its application to civil cases.

Id.

⁵⁸⁸ *See* Department of Defense Directive No. 1332.14, ¶ E3.A1.1.8.1.2.2 (Dec. 21, 1993)

applied in military proceedings, it is possible that courts might circumvent it by construing Congress as having “otherwise provided,” as the Department of Defense directive appears to have done.

Of course, the distinction between shifting the burden of production and shifting the burden of persuasion probably means the difference between the servicemember winning and losing in most cases. The presumption, as interpreted by the Department of Defense, has tilted the odds substantially against servicemembers subject to discharge under the policy. Although Department of Defense directives interpreting federal military statutes are entitled to deference by the courts⁵⁸⁹ and legislative history evinces an intent to shift the burden of persuasion to servicemembers,⁵⁹⁰ parties facing

(amended Mar. 4, 1994):

A member shall be separated under this section if one or more of the following approved findings is made The member has made a statement that he or she is a homosexual or bisexual, or words to that effect, unless there is a further approved finding that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts. A statement by a Service member that he or she is a homosexual or bisexual, or words to that effect, creates a rebuttable presumption that the Service member engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts. The Service member shall be advised of this presumption and given the opportunity to rebut the presumption by presenting evidence demonstrating that he or she does not engage in, attempt to engage in, have a propensity to engage in, or intent to engage in homosexual acts. Propensity to engage in homosexual acts means more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts. In determining whether a member has successfully rebutted the presumption that he or she engages in, attempts to engage in, or has a propensity or intent to engage in homosexual acts, some or all of the following may be considered: Whether the member has engaged in homosexual acts; the member's credibility[;] Testimony from others about the member's past conduct, character, and credibility[;] The nature and circumstances of the member's statement[;] Any other evidence relevant to whether the member is likely to engage in homosexual acts.

Id.; see also *id.* ¶ E3.A1.1.1.8.2 (“See paragraphs E3.A1.1.8.4.5. and E3.A1.1.8.4.6., below, for guidance as to the burden of proof and when a finding regarding retention is required.”); *id.* ¶ E3.A1.1.8.4.5 (“The member shall bear the burden of proving throughout the proceeding, by a preponderance of the evidence, that retention is warranted under the limited circumstances described in subparagraphs E3.A1.1.8.1.2.1 and E3.A1.1.8.1.2.2.”).

⁵⁸⁹ See, e.g., *Able v. United States*, 88 F.3d 1280, 1298 (2d Cir. 1996); *Thorne v. United States Dep't of Defense*, 916 F. Supp. 1358, 1366 (E.D. Va. 1996).

⁵⁹⁰ See S. REP. NO. 103-112, at 294 (1993):

The committee intends that . . . once the government introduces evidence

discharge under the statute have open to them an argument that the Department of Defense's interpretation of the statute is incorrect in light of the traditional understanding that presumptions shift only the burden of production and not the burden of persuasion.

VII. CONCLUSION

Cases involving questions of sexual orientation present a challenge when analyzed under the Federal Rules of Evidence, as promulgated in 1975, when issues of sexual orientation were still seldom discussed in public, let alone litigated. Yet, as challenging as these questions are, many can be answered by reference to the basic policies that underlie each of the rules of evidence. Thus, for example, when asking whether the rape-shield rule applies to bar admission of evidence of a person's sexual orientation, one need only look to the policy underlying the rule—to prevent putting the victim on trial—to determine that evidence of the victim's sexual orientation should be excluded under that rule. Or, when asking whether

that the member has stated that he or she is a homosexual, the burden shifts to the member and remains with the member throughout the proceeding to demonstrate that he or she is not a homosexual as defined in the statute (i.e., a person who engages in, attempts to engage in or has the propensity or intent to engage in homosexual acts)

[I]f the member in rebuttal offers evidence to the effect that he or she does not engage in homosexual acts or has a propensity or intent to do so, that does not shift the burden to the government. Because the burden remains on the member throughout the proceeding, the member bears the burden of persuading the fact-finder by a preponderance of the evidence that the rebuttal is more credible than the original statement (e.g., by proving that the original statement was made in jest). If the fact-finder determines that the evidence in rebuttal does not overcome the presumption, the evidence is legally sufficient to sustain a discharge.

Id.; see also H.R. REP. NO. 103-200, at 288 (1993):

This section would provide that the service member facing separation for homosexual conduct would be afforded an opportunity to establish certain facts to avoid separation. The facts to be established vary, depending on whether the separation is for acts, marriage, or statements. However, in all cases separation is required unless the service member establishes the facts by a preponderance of the evidence.

Id.

communications between same-sex couples should be protected by the spousal privileges, one need only look to the policies underlying the spousal privileges, namely protecting privacy and the sanctity of the relationship, to determine that such conversations should be privileged.

Moreover, in their role in interpreting the rules of evidence, courts should be mindful of the fact that their decisions to admit or exclude evidence project social norms onto society. Thus, courts should take care not to reinforce inaccurate stereotypes of gays and lesbians by crediting as relevant arguments that are based on such stereotypes.

Finally, courts should not turn a blind eye to the fact that assertions of ostensibly legitimate purposes for proffering evidence of a person's sexual orientation are often little more than a pretext for trying to get information before the jury that will play to the jurors' preexisting prejudices, leading them to decide the case on an improper basis. To safeguard the integrity of the fact-finding process, courts should employ the discretion given to them in Rule 403 to guard against such unsavory litigation tactics.