A BOTTOM-UP APPROACH TO LGB DEFAMATION: CRITICIZING NARRATIVES OF PUBLIC POLICY AND RESPECTABILITY

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INTRODUCTION

Courts and legal scholars have had a tough time dealing logically and fairly with defamation suits alleging injury from the false imputation of bisexuality[1] or homosexuality (lesbian, gay, and bisexual, or LGB[2] defamation). As a legal question, the court must decide whether an allegedly defamatory statement has the capability to be defamatory.[3] In the LGB context, judges must consider whether a substantial portion of the right-minded community would view a homosexual or bisexual person with scorn and aversion.[4]

This consideration induces the court to make decisions about policy, normative, and moral issues.[5] In deciding the legal merit of an LGB defamation claim, the judge must make a determination of (a) who is in the relevant community, (b) what proportion of that community is respectable, and (c) how those respectable people would view the imputation that the plaintiff is homosexual or bisexual.[6] This is not a simple task; although the general opinion about LGB individuals in the

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1. Although I was unable to find any cases in which the plaintiff filed suit due to the imputation that he or she was bisexual (as opposed to homosexual), I include the term bisexual throughout to illustrate that a claim of LGB defamation often arises without an explicit labeling of the plaintiff with a sexual identity. Rather, many cases revolve around the simple assertion that the plaintiff has same-sex attraction, notwithstanding any opposite-sex attraction. *See, e.g.*, Matherson v. Marchello, 473 N.Y.S.2d 998, 1000 (App. Div. 1984) (concerning remarks accusing plaintiff of having "boyfriend" in addition to his wife).

2. Note that I do not refer to this legal regime as LGB*T* defamation, as none of the cases or literature on this topic acknowledges the idea of a defamation suit concerning a false imputation of transgender identity. Since this status inherently incorporates discussions of gender and not just sexual orientation, and since the reputational situation of transgender persons is (arguably) different from lesbians, gays, and bisexuals, I consider a claim of transgender defamation outside the scope of this Note and do not address it.

3. *See, e.g.*, *Matherson*, 473 N.Y.S.2d at 1004.

4. *See* Randy M. Fogle, *Is Calling Someone "Gay" Defamatory?: The Meaning of Reputation, Community, Mores, Gay Rights, and Free Speech*, 3 LAW & SEXUALITY: REV. LESBIAN & GAY LEGAL ISSUES 165, 173 n.64 (1993) (citing as example Grant v. Reader's Digest Ass'n, 151 F.2d 733 (1945)).

5. *See* LAWRENCE MCNAMARA, REPUTATION AND DEFAMATION 192 (2007) ("[T]he court needs to form a sense of the values that operate as moral ties, binding people together not simply within geographic boundaries or as a polity or an economy but as a community in its true sense.")

6. *Id.* at 202 ("[T]he correct test refers not just to ordinary members of the community, but to ordinary *decent* members of the community.").

public discourse has tended upward, it is constantly in flux and not at all consistent by location.[7]

To make the courts' job harder, there is little helpful precedent for status-based defamation cases like the imputation of homosexuality. Only two other contexts seem analogous: racial misidentification cases, whereby a false assertion of a White person as Black served as *per se* defamation in much of the Jim Crow-era Southern United States,[8] and cases dealing with defendants asserting that the plaintiff was a communist before and during the Red Scare.[9] Although courts could once easily cognize these types of claims, contemporary judges have waning respect for LGB defamation suits.[10]

LGB defamation cases have existed for at least the past quarter-century.[11] Despite this history, courts have not yet articulated a universal basis for deciding such a claim for defamation.[12] While some courts frame LGB defamation claims as defamation *per quod,* denying the claim without proof of special damages,[13]others have ruled that it is defamation *per se*, meaning that the claim is made even without a showing of special monetary damages.[14] This level of disarray has continued despite the mandate in *Lawrence v. Texas*[15] that "the State

7. *See* Yuvraj Joshi, *Respectable Queerness*, 43 COLUM. HUM. RTS. L. REV. 415, 416 (2012) (discussing the change in LGBT politic and rhetoric from a liberation narrative in the 1970s to a respectability one today).

8. *See* Lyrissa Barnett Lidsky, *Defamation, Reputation, and the Myth of Community*, 71 WASH. L. REV. 1, 34 (1996) (discussing the analytical similarities between these types of cases).

9. Yonaty v. Mincolla, 945 N.Y.S.2d 774, 777 (App. Div. 2012), *appeal denied* 982 N.E.2d 1260 (N.Y. 2013) (discussing Mencher v. Chesley, 75 N.E.2d 257 (N.Y. 1947), a case involving accusation of communism on plaintiff, in deciding LGB defamation case).

10. *See* Fogle, *supra* note 4, at 172 (noting changing times in how sexual minority status is tied to reputation); Anthony Michael Kreis, Lawrence *Meets Libel: Squaring Constitutional Norms with Sexual-Orientation Defamation*, 122 YALE L.J. ONLINE 125, 140 (2012), http://yalelawjournal.org/2012/11/12/kreis.html (arguing that *Lawrence v. Texas*, 539 U.S. 558 (2003), changes the doctrine on LGB defamation).

11. *See* Eric K. M. Yatar, *Defamation, Privacy, and the Changing Social Status of Homosexuality: Re-Thinking Supreme Court Gay Rights Jurisprudence*, 12 LAW & SEXUALITY: REV. LESBIAN, GAY, BISEXUAL & TRANSGENDER LEGAL ISSUES 119, 130 (2003) (discussing *Dally v. Orange County Publications*, 497 N.Y.S.2d 947 (App. Div. 1986)).

12. *See id.* at 129-32 (reviewing inconsistencies in jurisprudence).

13. *See, e.g.*, Rejent v. Liberation Publ'ns, Inc., 611 N.Y.S.2d 866, 868 (App. Div. 1994).

14. *See, e.g.*, Robinson v. Radio One, Inc., 695 F. Supp. 2d 425, 428 (N.D. Tex. 2010).

15. 539 U.S. 558 (2003).

cannot demean [homosexuals'] existence."[16] Since *Lawrence*, LGB defamation claims have not disappeared, limiting the ability of sexual minority communities and mainstream LGBT rights organizations to know their status in the court, while also leaving vulnerable sexual minorities in impoverished and/or rural communities without access to a coherent or effective regime.[17]

As one method to mitigate this ambiguity, contemporary courts have begun to adjudicate LGB defamation cases as solely determined by state- and local-level public policy.[18] Focusing on relationship recognition and antidiscrimination statutes, some courts have articulated the mandate for a substantive community standard as an assessment of formal equality.[19] This means that courts have looked to the way the state treats LGB persons as a proxy for how individual communities of respectable people consider LGB persons. For example, in *Yonaty v. Mincolla*,[20] the New York Appellate Division employed this test to remove LGB defamation from the category of *per se* defamation.[21] Additionally, mainstream LGBT advocacy organizations like Lambda Legal that have encouraged this new test. This Comment argues that organizations like Lambda Legal encourage the new test in order to conflate political power with respect and present themselves and their constituents as respectable.[22]

Seen largely as a triumph for the LGB community, this approach to LGB defamation cases is problematic for potential plaintiffs who live in sub-communities where a false imputation of homosexuality could cause great harm to one's reputation and possibly endanger his or her life. This new method of assessing LGB defamation gives no redress to a potential plaintiff in such a sub-community, even if he or she suffers real

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16. *Id.* at 578.

17. *See, e.g.*, Matthew D. Bunker et al., *Not That There's Anything Wrong with That: Imputations of Homosexuality and the Normative Structure of Defamation Law*, 21 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 581, 590 (2011) (predicting that *Lawrence* "may be the death knell" for LGB defamation cases). *But see, e.g.*, Robinson, 695 F. Supp. 2d at 428 (denying a party's motion to dismiss a claim of LGB defamation after *Lawrence*).

18. *See* MCNAMARA, *supra* note 5, at 208-09.

19. *See*, *e.g.*, Yonaty v. Mincolla, 945 N.Y.S.2d 774, 778 (App. Div. 2012), *appeal denied* 982 N.E.2d 1260 (N.Y. 2013).

20. *Id.* at 774.

21. *Id.* at 776-77.

22. *See infra* Part IV. For more on this phenomenon in greater context, *see generally* Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561 (1997).

reputational damage due to the charge of homosexuality or bisexuality.[23] Further, focus on state- and local-level LGB victories makes such sub-communities invisible, or worse, "wrong-thinking."[24]

This Comment puts forward a new approach to reviewing LGB defamation claims. The point of this project is twofold. First, I wish to promote a legal regime that expands access to justice beyond just the groups and communities whose values are most aligned with lawmakers'. Second, on a more fundamental level, I wish to promulgate a mode of thinking about defamation that is more in line with how notions of reputation and community work day-to-day, keeping in mind that the concepts of reputation and community are inherently extralegal and more sociological, political, and philosophical.[25]

With this in mind, I proceed with the following thesis. In LGB defamation suits, courts usually employ a top-down (formal, then substantive) evaluation scheme that protects the respectability of the mainstream LGBT movement and celebrates the formal actions of the state (for example, ensuring marriage equality and employment discrimination protections). By using the top-down approach, courts severely limit the litigation ability of plaintiffs who are actually damaged by reputational harm, overly formalize the nebulous reputation and community standard dimensions of defamation, and ultimately hurt the progress of LGB persons in communities currently inhospitable to LGB identity.[26]

To avoid these pitfalls, I propose a new articulation of LGB defamation utilizing a bottom-up approach, focusing on the substantive position of sexual minorities within the relevant community before analyzing formal, state-sanctioned measures of equality. From this lens, decisions in LGB defamation cases will recognize real-world homophobia without endorsing it, and will allow plaintiffs to show damaged reputation within their own communities without regard to dominant social attitudes of tolerance and quasi-respect. Accordingly, courts should allow a plaintiff to prove special damages in his or her community (a specialized defamation *per quod*). This approach will produce a better-realized and more protective torts-based regime without limiting core First Amendment principles.

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23. *See* Matherson v. Marchello, 473 N.Y.S.2d 998, 1005 (App. Div. 1984) (recognizing potential harm for homosexuals and those falsely accused of being homosexual).

24. Fogle, *supra* note 4, at 173 (describing the exclusion of racists from defamation law's conception of community).

25. *See* MCNAMARA, *supra* note 5, at 29-30 (discussing community as a moral construct).

26. *See infra* Part V.

This Comment consists of five parts. Part I gives a short legal background of defamation law and the reputation and right-thinking community standards courts use to assess whether a defendant's statement is susceptible to defamatory meaning. I also use this space to explore those notions of reputation and community for their normative and moral implications. In Parts II and III, I review the history of status-based defamation claims. Part II focuses on two categories of defamation claims that are analogous to LGB defamation claims: racial misidentification cases and imputation of communism cases. Part III reviews the history of LGB defamation cases and includes a short analysis of the constitutional implications of an LGB defamation claim today under *Lawrence* and *Boy Scouts of America v. Dale*.[27] I conclude this section by examining three New York cases that implement the top-down approach to LGB defamation to varying degrees.

In Part IV, I delineate the problems with the top-down approach to LGB defamation, especially as they relate to members of minority and rural communities. Here, I discuss not only how an emphasis on formal equality is a poor measure of community standards, but also how the top-down perspective excludes minority sub-communities who may have more conservative views than the state. Ultimately, I use this Part to posit that the top-down perspective ignores plaintiffs who may have real injury and rewards defamers who may hide behind friendly state laws even in an unfriendly setting.

Part V concludes by offering a potential bottom-up view of the community standard as a better alternative. This approach asks the plaintiff in an LGB defamation case to show how the imputation of non-heterosexuality is viewed in his or her sub-community rather than the community at large, and then requires a showing of special damages flowing from that reputational damage. This final Part concludes with a plea to courts and mainstream LGB advocacy organizations to cease the top-down approach for the good of the sexual minority population and the LGB cause.

I. BACKGROUND: DEFAMATION, REPUTATION, AND THE RIGHT-THINKING COMMUNITY STANDARD

Defamation law encompasses logic and methods from the realms of both tort law and First Amendment law, introducing notions of the freedom of association and the ability to recover from an unjustified hit to one's reputation.[28] As such, it incorporates ideas about interpersonal interactions and society, and it has been shaped by history into its

27. 530 U.S. 640 (2000).

28. Fogle, *supra* note 4, at 183.

present state.[29] A thorough understanding of the doctrine is thus important for an analysis of how the court should handle LGB defamation cases going forward.

A. The Rules of Defamation

Defamation is simultaneously an old and new tort; the new version of defamation combines the classic torts of libel and slander into one regime.[30] For a private plaintiff in a defamation case,[31] he or she must show that (i) the defendant communicated to (ii) a third party (iii) a false and (iv) defamatory (tending to "deter third persons from associating" with the plaintiff)[32] comment (v) concerning the plaintiff.[33] Such comment may be actionable without proof of damages, e.g., defamatory *per se*,[34] or may require proof from the plaintiff that the defendant's actions caused special damages, e.g., defamation *per quod*.[35] At common law, defamation *per se* only applies to declarations that are "so inherently malevolent that they, without need for further elaboration, expose the subject to scorn."[36] Historically, these comments include statements implying (a) a serious criminal offense, (b) a loathsome disease, (c) a serious injury to one's trade or business relations, or (d) serious sexual misconduct,[37] usually articulated as "unchastity of a woman."[38] These

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29. MCNAMARA, *supra* note 5, at 15-16.

30. *See* Fogle, *supra* note 4, at 167 (describing this coalescence).

31. Public figures suing for defamation must also show that the defendant made the defamatory comment with *actual malice*, a high standard used to enhance the freedoms of speech and press and prevent defamation law from quashing criticism of public officials and known figures. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 282 (1964) ("[A]ll [states] hold that all officials are protected unless actual malice can be proved.").

32. RESTATEMENT (SECOND) OF TORTS § 558, 59 (1977).

33. Fogle, *supra* note 4, at 167.

34. *See* Yonaty v. Mincolla, 945 N.Y.S.2d 774, 777 (App. Div. 2012).

35. *See* Bunker et al., *supra* note 17, at 594; Matherson v. Marchello, 473 N.Y.S.2d 998, 1000 (App. Div. 1984).

36. Robert D. Richards, *Gay Labeling and Defamation Law: Have Attitudes Towards Homosexuality Changed Enough to Modify Reputational Torts?*, 18 COMMLAW CONSPECTUS 349, 356 (2010). *See also* RESTATEMENT (SECOND) OF TORTS § 559 cmt. b (1977) ("Communications are often defamatory because they tend to expose another to hatred, ridicule or contempt.").

37. *See* Richards, *supra* note 36 (quoting RESTATEMENT (SECOND) OF TORTS § 570).

38. *See* Nazeri v. Missouri Valley College, 860 S.W.2d 303, 312 (Mo. 1993) (generalizing the unchastity of a woman standard to "any false allegation of serious

four categories are not exclusive, however, and some courts have declared any statement can be *per se* defamation whenever it is "so severe that serious injury to the plaintiff's reputation can be presumed."[39]

Defamatory statements claimed under a *per quod* regime do not have to fall within special categories above.[40] As long as there is proof of special or actual damages, the plaintiff can prevail.[41] Special damages in defamation cases include any economic harm not associated with the plaintiff's emotional distress.[42] These damages must "result from the conduct of a person other than the defamer or the defamed, and such conduct must be directly caused by the defamation."[43] The burden of proving this damage and the connection between it and the defendant's defamatory statement lies with the plaintiff.[44]

In LGB defamation cases specifically, the central question of law is whether a statement implying that the plaintiff is homosexual or bisexual is capable of a defamatory meaning.[45] Thus, where the plaintiff relayed a message through a third party to the defendant's girlfriend that the defendant was engaging in homosexual acts, all the factors for defamation are met except for the capability—as a matter of law—for that message to be defamatory.[46] Without meeting this burden, courts will not hear a defamation case, regardless of the amount of reputational damage done.[47]

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sexual misconduct.") (internal quotations omitted). *Cf.* Stern v. Cosby, 645 F. Supp. 2d 258, 273 n.9 (S.D.N.Y. 2009) (calling into question the ability under New York law for statements implying unchastity to only be defamatory for women and not for men).

39. *Stern*, 645 F. Supp. 2d at 290.

40. *See* Patrice S. Arend, *Defamation in an Age of Political Correctness: Should a False Public Statement that a Person is Gay be Defamatory?*, 18 N. ILL. U. L. REV. 99, 106 (1997).

41. *Id. See also* Bunker et al., *supra* note 17, at 596.

42. *See* Bunker et al., *supra* note 17, at 596. *See also*, Arend, *supra* note 40, at 106 ("Special damages, to be recoverable, must be of a material, or generally of a pecuniary, nature.").

43. Arend, *supra* note 40, at 106.

44. *See id.*; Richards, *supra* note 36, at 369.

45. *See, e.g.*, Rejent v. Liberation Publ'ns, Inc., 611 N.Y.S.2d 866, 866 (App. Div. 1994) (concerning an appeal of trial court's denial of motion to dismiss LGB defamation case as legally deficient).

46. Yonaty v. Mincolla, No. 2009-1003, 2011 N.Y. Misc. LEXIS 2685, ***1-2 (N.Y. Sup. Ct. June 8, 2011), *aff'd as modified*, 945 N.Y.S.2d 774 (App. Div. 2012).

47. *Id. See also* Bytner v. Capital Newspaper, 112 A.D. 2d 666, 667 (1985), *aff'd* 492 N.E. 2d 1228 (N.Y. 1986) (finding summary judgment for defendant where plaintiff failed to show that photograph that misidentified plaintiff could hold a defamatory meaning).

B. Defamation as Injury to Reputation

Defamation, at its very core, concerns an injury to reputation.[48] Lawrence M. Friedman, who has written extensively about reputation, notes that one's reputation is based on "[a] dense, subtle network of social norms—rules and standards of behavior, thought, [and] action."[49] An individual with a good reputation conforms with and strictly adheres to applicable social norms, at least publicly.[50] Social norms differ by gender, sex, class, urbanity, geographic area, age, and mental, physical, and social ability.[51] Reputation matters most, however, to those who have the most to lose economically from a damaged reputation.[52] Defamation recognizes this fact by providing a legal claim that helps restore a reputation "for decency and good moral values" later damaged by another person's false statements.[53]

Reputation deals with both a right in property over one's reputation and a personal right in dignity.[54] Each individual has the right to publicity—the ability to profit from his or her reputation, which is built through work in the marketplace and the community.[55] This property-based conception of reputation embraces a wide spectrum of defamation suits, including whenever another's statement causes economic damage to one's reputation.[56] Dignity is an important concept to defamation because only those with full membership in the community—those with dignity—have the highest reputations.[57] Here,

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48. *See* MCNAMARA, *supra* note 5, at 21 (claiming that "defamation law has defined reputation.").

49. LAWRENCE M. FRIEDMAN, GUARDING LIFE'S DARK SECRETS: LEGAL AND SOCIAL CONTROLS OVER REPUTATION, PROPRIETY, AND PRIVACY 1 (2007).

50. *See id.* at 1-2 ("Reputation – good reputation – depends . . . on compliance with social norms. Or at least the *appearance* of compliance.").

51. *See id.* at 7 ("Reputation has different meanings in different societies and is gained and lost in different ways").

52. *See id.* at 8.

53. *Id.* at 26 (adding, "But below a certain threshold – at a certain level of poverty and destitution – respectability vanished."). *See also* Joshi, *supra* note 7, at 418.

54. Fogle, *supra* note 4, at 170-71 ("Although modern society and the present legal system do not operate on the basis of status, there are two concepts of reputation that the law of defamation is meant to protect: property and dignity.").

55. *See id.* at 171 ("[R]eputation is something that is worked for and is a marketable commodity, like goodwill.").

56. *See id.*

57. *See id. See also* Yatar, *supra* note 11, at 156 (discussing right to privacy associated with dignity in the defamation context).

not a specific claim for economic damages, but a depreciated reputation among the greater community, is the basis for the suit.[58] Thus, the property and dignity frames of defamation sometimes confront each other in LGB defamation cases, where a plaintiff's reputation may depreciate considerably in her sub-community, i.e. her property right to her reputation is damaged, but the court is unsure if the damage exists only within special populations or extends to the greater community.[59]

C. The Importance of the Right-Thinking Community

Reputation is inherently public and only exists to further or hinder one's status in a community.[60] As Lyrissa Barnett Lidsky puts it, "The goal of defamation law is to define a realm of 'socially unreasonable' communication and, at least in theory, to compensate individuals for a particular type of harm resulting from such communications—harm to reputation."[61] What is socially reasonable and unreasonable is reflective of a community's values.[62] Here, a community—in order to have any evaluative or legal weight—cannot be characterized as a geographic area or an ethnic enclave.[63] It is the morality and values-based aspects of a group that gives the group a common identity and makes it a community.[64] Indeed, a community can only be defined as "a group of people that see themselves united by the values that they consider they share."[65]

Defamation law must identify a community by its values and further decide whether the allegedly defamatory statement goes against those standards.[66] This is a difficult task, as judges often have little

58. *See* Fogle, *supra* note 4, at 171.

59. *See*, *e.g.*, *Stern*, 645 F. Supp. 2d at 290 (holding that although the accusation that the plaintiff was homosexual was not defamatory *per se*, it did have a great potential to injure him in his trade, business, or profession).

60. *See* Lidsky, *supra* note 8, at 12.

61. *Id.* at 14.

62. *See* Jay Barth, *Is False Imputation of Being Gay, Lesbian, or Bisexual Still Defamatory? The Arkansas Case*, 34 U. ARK. LITTLE ROCK L. REV. 527, 528 (2012) (remarking how powerful a community's role is in determining the bounds of defamation law).

63. *See* Note, *The Community Segment in Defamation Actions: A Dissenting Essay*, 58 YALE L.J. 1387, 1387 (1949) (calling into question the exact geographic boundaries of 'North' and 'South' in racial misidentification defamation cases).

64. *See* MCNAMARA, *supra* note 5, at 26 ("The point I wish to draw from the sociology of community is that 'community' is a moral construct.").

65. *Id.*

66. *See* Lidsky, *supra* note 8, at 16.

theoretical basis to determine who fits within a plaintiff's community;[67] moreover, judges often lack the sociological acumen to accurately gauge if and to what extent a particular statement is defamatory.[68] Worse, courts seldom articulate how they determine the community standard, with some scholars concluding that a court's judgments of whether a statement can have a legally defamatory meaning is based almost entirely on the judge's own perception, rather than a community norm.[69]

In *Peck v. Tribune Co.*,[70] the Supreme Court set the bar for this problem. Here, the defendant included the plaintiff's portrait in an advertisement for their whiskey and related the following quote to her: "After years of constant use of [defendant's] Pure Malt Whiskey, both by myself and as given to patients in my capacity as nurse, I have no hesitation in recommending it as the very best tonic and stimulant for all local and run-down conditions."[71] The plaintiff—a lifelong abstainer and not even a nurse—sued for defamation.[72] Justice Holmes, writing for the Court, ruled that even though "there was no general consensus . . . that to drink whisky is wrong,"[73] liability for defamation could still arise "[i]f the advertisement obviously would hurt the plaintiff in the estimation of *an important and respectable part* of the community,"[74] even without a majority consensus.

This "important and respectable minority" standard has been a part of defamation jurisprudence ever since. The analysis asks not whether a defamatory statement negatively impacted the plaintiff's reputation for all of his or her associates, but rather for a substantial

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67. *See id.* at 26 ("[E]very defamation case involving a statement about which there is a division of opinion in society requires the judge to decide which community to assist in the maintenance of its cultural norms and which values to reject as deviant.").

68. *See id*; Elizabeth M. Koehler, *The Variable Nature of Defamation: Social Mores and Accusations of Homosexuality*, 76 JOURNALISM & MASS COMM. Q. 217, 224 (1999) ("There is, of course, no reliable gauge by which to measure this [community] temperament.").

69. *See* Koehler, *supra* note 68 (". . . it is possible that the written opinions in these [LGB defamation] cases primarily reflect only the judge's *perceptions* of social norms and not the norms themselves."); Abigail A. Rury, *He's So Gay . . . Not That There's Anything Wrong with That: Using a Community Standard to Homogenize the Measure of Reputational Damage in Homosexual Defamation Cases*, 17 CARDOZO J.L. & GENDER 655, 656 (2011) ("Judicial decisions that find a statement defamatory without explanation may not accurately reflect the community's values and may reveal judicial biases, which ultimately harm a plaintiff in a defamation action.").

70. 214 U.S. 185 (1909).

71. *Id.* at 188.

72. *Id.*

73. *Id.* at 189.

74. *Id.* at 190 (emphasis added).

number of them.[75] The court discounts these persons' opinions of the plaintiff, however, if their views are not respectable, meaning that they are not those of right-thinking persons.[76]

The court must, therefore, determine as a matter of law questions of a sociological, demographic, and moral nature, including: the number of the plaintiff's associates who would think less of the plaintiff due to the defamatory remark; the significance of their size in proportion to the universe of the plaintiff's community, and; whether these people are right-thinking in the first place.[77] Plainly, these questions are difficult for a plaintiff to prove and for a judge to presume, and many commentators have decried this test as extrajudicial.[78]

In response to these concerns, some courts have looked at other approaches to determining the community's standard for defamation. Often, this includes an analysis of state public policy, including recent legislation and public opinion polling.[79] From this perspective, one way to find that a group's perspective is "wrong-thinking" is to find it contrary to the state's law, public policy, or recent political acts, or else simply within the moral minority.[80] For example, in *Stern v. Cosby*,[81] the United States District Court for the Southern District of New York highlighted a recent poll showing 51 percent support of same-sex marriage among the state's residents and used it to show that the imputation of homosexuality could no longer be defamatory *per se* in the state.[82] In the LGB defamation context, even a slim majority support for the extension

75. Yatar, *supra* note 11, at 124.

76. Michael J. Tommaney, Note, *Community Standards of Defamation*, 34 ALB. L. REV. 634, 637 (1970) ("Recovery will be denied if the views held by the members of the group are deemed to be antisocial.").

77. *See* Lidsky, *supra* note 8, at 7 ("[C]ourts must undertake both a quantitative inquiry to determine whether the community segment is 'substantial' and a normative inquiry to determine whether it is 'respectable.'"). *See also* Haven Ward, *"I'm Not Gay, M'Kay?": Should Falsely Calling Someone a Homosexual be Defamatory?*, 44 GA. L. REV. 739, 748 (2010).

78. *See*, *e.g.,* Rury, *supra* note 69, at 667 ("[W]hich community the court chooses becomes a policy choice, reflecting what the court believes is the dominant or valued group in society. In doing so, the court makes a normative analysis as to who in the community qualifies as 'right-thinking' or 'respectable.'").

79. *See*, *e.g.,* Mencher v. Chesley, 297 N.Y. 94, 101 (1947) (citing to both public opinion polls and legislative/executive orders in determining the defamatory power of accusing that one is a communist).

80. *See* Fogle, *supra* note 4, at 198 (celebrating this perspective).

81. 645 F. Supp. 2d 258 (S.D.N.Y. 2009).

82. *Id.* at 274.

of civil rights for sexual minorities is enough to overcome the expectation that those who think ill of homosexuality are right-thinking.[83]

Courts that employ analyses of state and local public policy are using a *top-down* perspective at solving the defamation question as it relates to the imputation of bisexuality or homosexuality. This mode of analysis first asks whether the elected body has considered the moral worth of sexual minorities and then picks and chooses examples of legislative action to determine that the entire electorate is (or is not) a community inclusive of sexual minorities. This perspective is different from a *bottom-up* perspective, which asks the plaintiff to first show damage to his or her reputation in the relevant community, and then asks if the community presented is worthy of respect under the state's laws and public policy. Neither perspective is required for a court to determine that a particular statement is capable of a defamatory meaning, but it is important to mark how these decisions are being made.

From all of the above, we now know that defamation is about much more than hurt feelings or even lost friends.[84] It incorporates our collective moral and social sense of order and dignity.[85] Accordingly, only some harms to a plaintiff's reputation are ameliorable—namely those that impact his or her respectability among a significant number of right-thinking persons.[86] The court, charged with the unfortunate task of settling these disputes, has come to use state public policy and public opinion data—along with its own perspective—to discern whether statements can have a defamatory meaning that the court is willing to accept.[87] In determining which types of statements are potentially defamatory and which are not, the court has found the biggest quandary in cases involving the imputation of a status, with LGB defamation as just the latest chapter.[88]

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83. *Id. See also* Richards, *supra* note 36, at 363 (criticizing the result and rationale of *Stern* for this very reliance).

84. *See* Arend, *supra* note 40, at 106 ("The loss of friends and associates . . . is not enough to prove damages, unless their assistance was such that it could be considered a pecuniary benefit.").

85. *See* MCNAMARA, *supra* note 5, at 192.

86. *See id.* at 34 ("To make a decision [regarding defamation], the court must form a view about who the ordinary, decent, right-thinking folk are that will be the benchmark for its judgment.").

87. *See* Fogle, *supra* note 4, at 173 ("Although it is not for the court to decide who is morally 'right' or 'wrong' 'right-mindedness' appears to exclude those people whose attitudes directly conflict with public policy.").

88. *See* Arend, *supra* note 40, at 107 (detailing how courts have trouble determining what constitutes sufficient reputational damage in these types of cases).

II. STATUS-BASED DEFAMATION CASES: RACIAL MISIDENTIFICATION AND IMPUTATION OF COMMUNISM

Defamation claims usually occur when the defendant has claimed that the plaintiff has done something, for example, that he has committed a crime or that she is a corrupt businesswoman. However, some defamation claims arise when the plaintiff is accused of *being* something as opposed to *doing* something. A White man can be mistakenly described as Black, a loyal civil servant described as a communist, or a notable lawyer as a closeted homosexual. The court has traditionally looked at the "temper of the times" in determining the cognizability of these claims—a highly community-based and volatile determination.[89] Today, a racial or communism-based misidentification case could not be cognizable in a court of law as against public policy, but an LGB defamation claim is still available.[90]

A. Racial Misidentification Defamation Claims

Courts have heard racial misidentification claims—almost invariably involving the publication of a White plaintiff as Black[91]—for at least the past 125 years.[92] During the late nineteenth and early twentieth centuries, these cases often accepted the notion that being misidentified as Black could cause real reputational damage, despite the formal racial equality guaranteed by the Fourteenth Amendment.[93]

The simple truth, to these courts, was that even though Blackness "impute[d] no crime, no misconduct, no mental, moral, or physical fault for which one may justly be held accountable to public opinion,"[94] the imputation of Blackness on a White plaintiff marked him or her as

89. MCNAMARA, *supra* note 5, at 196. *See also* Bunker et al., *supra* note 17, at 586 (pointing to racial misidentification cases as a powerful example of defamation claims changing with the times).

90. *See, e.g.*, Yonaty v. Mincolla, 945 N.Y.S.2d 774 (App. Div. 2012), *appeal denied* 982 N.E. 2d 1260 (N.Y. 2013).

91. *See* Ward, *supra* note 77, at 750 ("Because [defamation] law expressed and reinforced the social hierarchy as it existed, it was presumed that no harm could flow from [the imputation that a Black person was White].") (internal quotation marks omitted) (quoting Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1736 (1993)).

92. *See, e.g.*, Spotorno v. Fourichon, 4 So. 71 (La. 1888).

93. *See, e.g.*, Upton v. Times-Democrat Publ'g Co., 28 So. 970 (La. 1900) (upholding defamatory meaning despite constitutional amendment). *See also* MCNAMARA, *supra* note 5, at 194 (describing this conflict).

94. Flood v. News & Courier Co., 50 S.E. 637, 639 (S.C. 1905).

morally inferior and less dignified.[95] In the 1907 case *Wolfe v. Georgia Railway & Electric Co.*,[96] a Georgia court made this determination painfully clear: "It is a matter of common knowledge that, viewed from a *social* standpoint, the [N]egro race is in mind and *morals* inferior to the Caucasian."[97] The courts of these times saw the insult of racial misidentification as "obvious," and were not afraid to recognize this social norm, particularly in the South and West.[98]

B. Communism-Based Defamation Claims

Not unlike the racial misidentification cases, accusing someone of being a communist had the potential to cause major reputational damage in the early- and mid-twentieth century.[99] Between World War I and the end of the McCarthy Era, some courts considered the false assertion that the plaintiff was a communist an actionable defamation claim.[100] Many of these claims concerned a charge of communism against a politician or government employee—endangering the plaintiff's employability as well as his or her personal liberty.[101]

Nevertheless, the important legal question in these cases concerned the right-minded public's perception of communists—a matter that can change with the times. In *Mencher v. Chesley*,[102] for example, the New York Supreme Court stressed that defamation occurs when a communication "tends to expose a person to hatred, contempt or aversion . . . in the minds of a substantial number of the community, even though *it may impute no moral turpitude to him.*"[103] Although the court recognized that communism was a legitimate political party, this

95. *See* MCNAMARA, *supra* note 5, at 194; John C. Watson, *Defamation by Racial Misidentification: A Study of the Social Tort*, 4 RUTGERS RACE & L. REV. 77, 94 (2002).

96. 58 S.E. 899 (Ga. Ct. App. 1907).

97. *Id.* at 901 (emphases added).

98. Samuel Brenner, *"Negro Blood in His Veins": The Development and Disappearance of the Doctrine of Defamation* per se *by Racial Misidentification in the American South*, 50 SANTA CLARA L. REV. 333, 347 (2010) (citing O'Connor v. Dallas Cotton Exch., 152 S.W.2d 266, 268 (Tex. Civ. App. 1941)).

99. *See* Mencher v. Chesley, 297 N.Y. 94, 101 (1947).

100. *See, e.g.*, Kaminsky v. Am. Newspapers, Inc., 28 N.E.2d 971 (N.Y. 1940) (affirming judgment against newspaper for claiming that plaintiff was a communist).

101. *See, e.g.*, *Mencher*, 297 N.Y. at 98 (charge of communism against plaintiff, then head of a governmental office).

102. 297 N.Y. 94 (1947).

103. *Mencher*, 297 N.Y. at 100 (emphasis added) (citing Katapodis v. Brooklyn Spectator, Inc., 287 N.Y. 17, 20 (1941)).

was "no answer."[104] What mattered to the court was that both public opinion polls and legislative and executive acts treated communists with disapprobation.[105] Considering these claims legally sufficient to be defamatory, the court remanded the plaintiff's claim for a jury determination of defamation.[106]

C. Race- and Communism-Based Defamation Claims Today

In today's courts, however, neither a claim of racial misidentification nor an accusation of the plaintiff's communist leanings is considered defamatory.[107] After the 1950s, racial misidentification cases began to disappear, and those few that courts heard them deemed them uncognizable.[108] Defamation claims over allegations of communism declined during World War II, then reemerged during the 1950s, and have quieted since.[109] There are three reasons why these types of claims are no longer defamatory in U.S. courts, all of which are most salient in the racial misidentification context. First, most judges concur that being racist today is "wrong-minded" and that the segment of the community that would view a plaintiff negatively if she were suddenly perceived to be Black is not part of the set of "right-minded" people.[110] Despite the fact that there are still groups who think less of Blacks than Whites, their opinions are "so anti-social that the court [can] not recognize them."[111] Most of these claims are not made with the support of empiricism, but rather on the perceptions of the individual judges making these claims.[112]

These judges also make such claims from a public policy approach. Using a colorblind approach, many jurists today refuse to give credit to

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104. *Id.* at 101.

105. *Id.* at 100-01.

106. *Id.* at 102.

107. *See, e.g.*, Thomason v. Times-Journal, Inc., 379 S.E.2d 551, 553 (Ga. Ct. App. 1989) (court summarily dismissing racial libel claim as absurd); Lidsky, *supra* note 8, at 32.

108. *See* Lidsky, *supra* note 8, at 30-31 ("Whereas the earlier cases take the attitude that it obviously is defamatory to call someone a Negro, the more modern cases (to the extent that they exist) tend to assume it is equally obvious that such an allegation is not defamatory.").

109. *See* Watson, *supra* note 95, at 86; Tommaney, *supra* note 76, at 639-40 (remarking on this decline).

110. *See, e.g.*, *Thomason*, 379 S.E.2d at 553; Polygram Records, Inc. v. Superior Court, 216 Cal. Rptr. 252 (Cal. Ct. App. 1985) (both making this point).

111. MCNAMARA, *supra* note 5, at 196.

112. *See* MCNAMARA, *supra* note 5, at 195.

the argument that any association to a race or racial group could ever be defamatory. For example, in *Ledsinger v. Burmeister*,[113] the plaintiff sued the manager of an auto parts store after the manager called him a "nigger" and told him to get his "[B]lack ass out of the store."[114] Here, the Michigan court upheld the dismissal of the plaintiff's slander claim, considering the term "nigger" to be merely a slang connotation for Blackness in its "natural and ordinary import," and not capable of being defamatory.[115] In this decision, the court applied a colorblind lens to blind itself to any possible loss of reputation related to race.

Lastly, the Fourteenth Amendment's Equal Protection Clause creates an impediment to giving legal legitimacy to status-based defamation claims. Within this lens, courts cannot pass down any legal ruling that gives credit or credence to the concept of racial inferiority.[116] The United States Supreme Court ruled in *Palmore v. Sidoti*[117] that the Equal Protection Clause prevented courts from giving any legal recognition of "private biases," even indirectly.[118] Courts have taken this cue to limit the ability of plaintiffs to recover from lost reputations based on a racial misidentification.[119] Because racial minorities maintain a suspect classification under the Fourteenth Amendment, the court has determined that those who look down on Black people (or else find them less dignified than Whites) are not part of the "right-minded" community, negating their views in the defamation context.[120]

The racial misidentification- and communism-based defamation cases show that courts sometimes recognize status-based prejudice in the community and allow defamation suits. At other times, courts will not allow the biases of a subgroup speak for the social norms of the

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113. 318 N.W.2d 558 (Mich. Ct. App. 1982).

114. *Id.* at 560 (internal quotation marks omitted).

115. *Id.* at 563.

116. *See* MCNAMARA, *supra* note 5, at 194 ("[In racial misidentification cases] the legal question was whether the imputation [of Blackness] was actionable in light of the equal protection clause [sic] of the Fourteenth Amendment.").

117. 466 U.S. 429 (1984).

118. *Id.* at 433 ("The Constitution cannot control such prejudices [based on racial animus] but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.").

119. *See, e.g.*, Polygram Records Inc. v. Superior Court, 216 Cal. Rptr. 252, 262 (Cal. Ct. App. 1985) (citing *Palmore* in denying a defamation claim against an audio producer that released a comedy record relating plaintiff's wine with Black people).

120. *See* Lidsky, *supra* note 8, at 33 ("Even in *Polygram* it is clear that the court has chosen to support a particular community's values – the community of presumably more enlightened non-racists – over another community's values – the community of racists.").

majority. Invariably, the courts will look to "right-minded" members of the community, local and state public policy, as well as constitutional promises to prevent or allow a plaintiff's recovery.

III. STATUS-BASED DEFAMATION CASES: LGB DEFAMATION AND THE NEW YORK CASES

In the LGB defamation case set, few courts delved deeply into any of these three contexts—right-mindedness, public policy, or constitutional restrictions—much less developed a universal mechanism for settling these cases.[121] Three interrelated aspects make these cases different from the racial misidentification cases and communist-based defamation claims discussed in the previous Part: the unsettled popular opinion of LGB persons, the inability of the courts to articulate a definite and consistent stance on laws that affect LGB persons, and (relatedly) the differential constitutional stance that courts take with homophobia and racism.[122] With each, it becomes clear that the question of whether right-thinking members of the community and state public policy require that courts throw out LGB defamation claims is a difficult and tense one, with no clear historical or contemporary mandate.

A. Distinguishing LGB Defamation Cases from Other Status-Based Defamation Actions

First, the popular opinion of homosexuals and bisexuals is hardly settled. As more and more states accept marriage equality as fundamental to full civil rights,[123] other creators of social mores, particularly the Catholic Church, are taking stances firmly against the LGB community.[124] Homophobia is still a part of the everyday experience for LGB Americans, but the conditions are getting better, particularly in

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121. *See*, Rury, *supra* note 69, at 676-77 (noting that courts like the U.S. District Court in like Stern v. Cosby (645 F. Supp. 2d 258, 274 (S.D.N.Y. 2009)) "were not lurking in the shadows, possibly relying on their own biases or skewed societal perceptions regarding homosexuality.") Instead, these courts were "upfront and open regarding how they reached their decisions, relying in part on the modem authority of social science research." *s.*

122. *See supra* parts III.A-C.

123. As of this writing, thirty-five states and the District of Columbia allow same-sex couples to wed *See States*, FREEDOM TO MARRY, http://www.freedomtomarry.org/states/ (last updated Nov. 22, 2014).

124. *See* Eric W. Dolan, *Archbishop of San Francisco Calls Rhode Island Marriage Equality 'A Serious Injustice'*, THE RAW STORY, May 5, 2013, http://www.rawstory.com/rs/2013/05/05/archbishop-of-san-francisco-calls-rhode-island-marriage-equality-a-serious-injustice/.

major metropolitan areas and gay ethnic enclaves in major cities such as Los Angeles, Chicago, and New York City.[125]

Second, courts and legislatures are unable to give a definitive answer as to how to treat sexual minorities within the law. While some law and jurisprudence is very open to the concept of sexual liberty and individual dignity,[126] in other arenas LGB persons find that their arguments for legal equality are ignored.[127] The former areas—including increased employment discrimination protection[128] and family and relationship recognition[129] —possibly persuade legal thinkers into believing that the greater American community finds homophobia wrong in all places and all cases.[130]

Third, the constitutional framework that prevents U.S. courts from giving effect to racism is not as strong or solid in the context of sexual orientation. Where *Palmore v. Sidoti*[131] explicitly prevents the courts from effectuating discrimination claims based on race (even indirectly),[132] the strongest case on point in the context of sexual orientation is *Lawrence v. Texas*.[133] There, the Supreme Court invalidated state anti-sodomy laws that prohibited private, consensual sexual contact between adults.[134] In large part, the Court overturned these laws to remove the stigma of

125. *See generally* Luke A. Boso, *Urban Bias, Rural Sexual Minorities, and the Courts*, 60 UCLA L. REV. 562 (2013) (discussing the lack of protections for LGB people in rural America compared to the abovementioned centers).

126. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 578 (2003).

127. *See, e.g.*, Boy Scouts of America v. Dale, 530 U.S. 640, 642 (2000) (ignoring claims of dignity and respect to gay Boy and Eagle Scouts in deciding the scope of appellant's association rights).

128. *See* Zachary A. Kramer, *Heterosexuality and Title VII*, 103 NW. U. L. REV. 205, 207 (2009) (delineating how sexual orientation-based employment discrimination cases receive no legal protection under Title VII).

129. *See* Amanda K. Baumle & D'Lane R. Compton, *Legislating the Family: The Effect of State Family Laws on the Presence of Children in Same-Sex Households*, 33 L. & POL'Y 82, 83 (2011), *available at* http://onlinelibrary.wiley.com/doi/10.1111/j.1467-9930.2010.00329.x/abstract (examining the effects of positive and negative state-level family laws on the formation of families in same-sex coupled households).

130. *See* Bunker et al., *supra* note 17, at 593 (discussing the sentiment of Matherson v. Marchello, 473 N.Y.S.2d 998 (App. Div. 1984)).

131. Palmore v. Sidoti, 466 U.S. 429 (1984).

132. *Id.* at 432.

133. 539 U.S. 558 (2003).

134. *Id.* at 578.

criminality from homosexuals and bisexuals, many of whom lived otherwise respectable lives.[135]

Although the *Lawrence* Court explicitly forestalls the state from "demean[ing homosexuals'] existence,"[136] it does much less work to prevent possible LGB defamation claims than *Palmore*. Part of the rationale in *Palmore* is that race-based discriminations receive strict scrutiny, and any court recognition of reputational differences by race was an improper racial distinction against the edict of the Equal Protection Clause.[137] In *Lawrence* the Supreme Court refused to review cases involving sexual orientation discrimination with anything other than rational basis review—a level that has not changed.[138] Further, the Court in *Lawrence* explicitly limits its decision to the private realm, refusing to pass any judgment on "public conduct" (including relationship recognition) regarding homosexuality or bisexuality.[139]

B. The Constitutional Argument: The Impact of Lawrence *and* Dale

From the language and logic of *Lawrence*, a court would have a weaker foundation to support the conclusion that the Constitution restricts courts from accepting that the false imputation of homosexuality or bisexuality is potentially defamatory. *Boy Scouts of America v. Dale*[140] (a case *Lawrence* refuses to address, much less overrule) further weakens this argument.[141] In *Dale*, the Court prevented the state of New Jersey from using its public accommodations law to require the Boy Scouts to readmit scouts previously dismissed because of their homosexuality.[142] In giving credit to the Boy Scouts' expressive association right to exclude homosexuals, the Court noted, "It is not the

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135. *See id.* at 575 ("The stigma this criminal statute [against homosexual sodomy] imposes . . . is not trivial.") *See also* Stern v. Cosby, 645 F. Supp. 2d 258, 274 (S.D.N.Y. 2009) (pointing to *Lawrence* as removing criminality associated with LGB status).

136. *Lawrence*, 539 U.S. at 578.

137. Palmore v. Sidoti, 466 U.S. 429, 432 (1984).

138. *See* Susan Austin Blazier, Note, *The Irrational Use of Rational Basis Review in* Lawrence v. Texas*: Implications for Our Society*, 26 CAMPBELL L. REV. 21, 31 (2004) (describing this development in *Lawrence*); Shoshana Zimmerman, Note, *Pushing the Boundaries?: Equal Protection, Rational Basis, and Rational Decision Making by District Courts in Cases Challenging Legislative Classifications on the Basis of Sexual Orientation*, 21 S. CAL. INTERDISC. L.J. 727, 729 (2012) (describing this standard since).

139. *Lawrence*, 539 U.S. at 578.

140. 530 U.S. 640 (2000).

141. *Lawrence*, 539 U.S. at 603 (Scalia, J., dissenting) (reaffirming *Dale* without comment from the majority).

142. *Dale*, 530 U.S. at 644.

role of the courts to reject a group's expressed values because they disagree with those values."[143] The Court in *Dale* explicitly embraced the values of a group that did not respect homosexuals, or at least embraced the ability for groups to make this decision,[144] limiting the argument that constitutional virtues prevent courts from accepting a LGB defamation claim.

C. The New York Cases: Gallo, Stern, *and* Yonaty

In the LGB defamation context, precedent has been inconsistent in the framing, articulation, and solving of the legal question. Most courts experience great difficulty in deciding whether the imputation of homosexuality is defamatory and do not rely on any organized or uniform reasoning. An early California case, *Schomer v. Smidt*,[145] concerned the accusation that a flight attendant engaged in lesbian activity in a hotel room.[146] In affirming the jury instruction that "[t]he charge of lesbianism implies unchastity and abnormal sexual behavior,"[147] the court here had few qualms with finding a false imputation of homosexuality as potential defamation.[148]

As LGB politics have transitioned away from viewing homosexuality as sexual deviancy and morally suspect to a seeing it through an inclusive sexual liberty framework, the LGB defamation cases have been haphazard. Even within the courts of a single state there is conflicting precedent regarding whether the imputation of homosexuality or bisexuality can rise to an actionable cause of defamation. In New York, three such cases in the last five years serve as examples: *Gallo v. Alitalia-Linee Aeree Italiane-Societa per Azioni*,[149] *Stern v. Cosby*,[150] and *Yonaty v. Mincolla*.[151]

Gallo, a 2008 federal district court case, concerned the firing of a consultant after the defendants allegedly harassed him continuously

143. *Id.* at 651.

144. *See id.* at 660 (deciding that, notwithstanding the change in public perception regarding homosexuality, the Court could not reject the associational rights of the Boy Scouts).

145. 170 Cal. Rptr. 662 (Cal. Ct. App. 1980).

146. *Id.* at 663.

147. *Id.* at 664 (internal quotation marks omitted).

148. *Id.* at 666.

149. 585 F. Supp. 2d 520 (S.D.N.Y. 2008).

150. 645 F. Supp. 2d 258 (S.D.N.Y. 2009).

151. 945 N.Y.S.2d 774 (App. Div. 2012).

about his sexuality.[152] Defining defamatory comments in New York as ones that tend to "induce an evil opinion of [the plaintiff] in the minds of right-thinking persons"[153] the court upheld existing precedent[154] and ruled that the imputation of homosexuality or bisexuality could be *per se* defamation.[155] Despite the holding being five years after *Lawrence*, the judge noted that "homophobia is [still] sufficiently widespread and deeply held."[156] Interestingly, the court here makes this claim without pointing to any empirical basis in state action or public opinion.[157] Although the court should have backed this normative stance with empirical data, its conclusions are not out of step with some scholars'.[158]

Moreover, the court in *Gallo* also makes an effort to position its decision as recognizing but not endorsing community homophobia. The court considered the stigmatizing implications of its ruling and warned that its decision "should not be interpreted as endorsing prejudicial views against gays and lesbians," but rather "on the fact that the prejudice gays and lesbians experience is real and sufficiently widespread so that it would be *premature to declare victory*."[159]

However, the court declared victory the next year in *Stern*. In that case, Howard K. Stern, the former lawyer of the deceased socialite and entertainer Anna Nichole Smith, sued the writer and publisher of a book about Stern for insinuating that he was a homosexual who engaged in sex acts with clients.[160] The district court in *Stern*, articulating defamation *per se* differently than *Gallo*,[161] concluded that the

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152. *Gallo*, 585 F. Supp. 2d at 528.

153. *Id.* at 549 (internal quotation marks omitted) (quoting *Foster v. Churchill*, 665 N.E.2d 153, 587, 751 (N.Y. 1996)).

154. *See* Matherson v. Marchello, 473 N.Y.S.2d 998, 1004 (App. Div. 1984) (setting this precedent in the Second Department of New York State's Appellate Division).

155. *Gallo*, 585 F. Supp. 2d at 549.

156. *Id.*

157. *Id.*

158. *See* Yatar, *supra* note 11, at 156 ("[A]ccepting that an imputation of homosexuality is defamatory or that its publicity is highly offensive should . . . be viewed . . . as a recognition of the actual reality that homosexuals face on a daily basis.")

159. *Gallo*, 585 F. Supp. 2d at 549-50 (emphasis added) (adding, "If the degree of this widespread prejudice disappears, this Court welcomes the red flag that will attach to this decision.").

160. Stern v. Cosby, 645 F. Supp. 2d 258, 263 (S.D.N.Y. 2009).

161. *Id.* at 273 ("The question, then, is whether the New York Court of Appeals, in 2009, would hold that a statement imputing homosexuality connotes the same degree of 'shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation or disgrace' as statements accusing someone of serious criminal conduct,

imputation of homosexuality or bisexuality could never constitute defamation *per se*.[162] Noting "a veritable sea change in social attitudes about homosexuality"[163] over the past few decades, hallmarked by public opinion polls and the Supreme Court's decision in *Lawrence*, the court refused to reach the conclusion that "there is a widespread view of gays and lesbians as contemptible and disgraceful,"[164] explicitly disagreeing with the decision in *Gallo*.

To back up its sea change perspective, the court in *Stern* looked immediately to the actions of state and federal actors to dismiss homophobia as antique.[165] Pointing to the *Lawrence* decision and supportive dicta from New York's highest court,[166] the *Stern* court looked to the actions of the judiciary to help determine the community's views on homosexuality and LGB persons.[167] Also looking to changing public opinion language in an earlier state supreme court case, the *Stern* court highlights this top-down, state action-emphasizing perspective directly: "The [New York] Court of Appeals' opinion in *Hernandez*[168] is simply inconsistent with the notion that gays and lesbians are the subject of scorn and disgrace."[169]

This trend continued in *Yonaty*, decided in 2012 by New York State's Third Appellate Division.[170] In this case, the court overturned state-level precedent, ruling that the plaintiff's complaint (that the defendant caused plaintiff's relationship to fail by spreading the rumor that he was gay or bisexual) required a showing of special damages—a showing of defamation *per quod*.[171] Whereas the trial court simply

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impugning a person in his or her trade or profession, implying that a person has a 'loathsome disease,' or imputing unchastity to a woman.") (internal citations removed).

162. *Id.*

163. *Id.*

164. *Id.* at 275.

165. *Id.* at 273-74.

166. Hernandez v. Robles, 855 N.E.2d 1 (N.Y. 2006) (rejecting a state constitutional challenge to mandate same-sex marriage in New York but taking judicial notice of changing attitudes on gays and lesbians).

167. *Stern*, 645 F. Supp. 2d at 274.

168. Hernandez v. Robles, 7 N.Y. 3d 338, 361 (2006) (finding that although the New York Constitution did not compel the recognition of same-sex marriages, New Yorkers' positive opinions of gays and lesbians did increase dramatically from just a few years prior).

169. *Id.*

170. Yonaty v. Mincolla, 945 N.Y.S.2d 774 (App. Div. 2012), *appeal denied* 982 N.E.2d 1260 (N.Y. 2013).

171. *Id.* at 776.

followed the "existing law,"[172] the court on appeal found the application of defamation *per se* rules in these cases contrary to *Lawrence*: "[T]he prior cases categorizing statements that falsely impute homosexuality as defamatory per se are based upon the flawed premise that it is shameful and disgraceful to be described as lesbian, gay or bisexual."[173]

The *Yonaty* decision, to a greater extent than *Stern*, uses a top-down perspective in removing LGB defamation cases from the category of *per se* defamation. Specifically, the court pointed to the New York state Human Rights Law of 2002,[174] which prohibited sexual orientation discrimination, and the then-recent New York state Marriage Equality Act,[175] to illustrate that the community accepted and embraced sexual minorities.[176] Interestingly, the court in *Yonaty*, like the court in *Stern*, ignored the fact that there were 108 sexual orientation-based hate crimes reported in New York State in 2011—19.5 percent of all hate crimes committed in the state that year.[177] This unfortunate oversight and the emphasis on formal rather than substantive forms of privilege and equality connects *Yonaty* and *Stern* and sets them apart from the five-year-old *Gallo*.

Another important factor separates *Yonaty* and *Stern* from *Gallo*. Lambda Legal, "the oldest and largest national legal organization whose mission is to achieve full recognition of the civil rights of lesbians, gay men, bisexuals, [and] transgender people,"[178] submitted amicus briefs for both *Stern*[179] and *Yonaty*[180] but they did not do so for *Gallo*. In these

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172. Yonaty v. Mincolla, No. 2009-1003, 2011 N.Y. Misc. LEXIS 2685, 7 (N.Y. Sup. Ct. June 8, 2011), *aff'd as modified*, 945 N.Y.S.2d 774 (App. Div. 2012). *See also Tort Law – Defamation – New York Appellate Division Holds that the Imputation of Homosexuality is No Longer Defamation Per Se* – Yonaty v. Mincolla, *945 N.Y.S.2d 774 (App. Div. 2012)*, 126 HARV. L. REV. 852 (2013) [hereinafter Harvard Law Review on *Yonaty*] (explaining the prior case law).

173. *Yonaty*, 945 N.Y.S.2d 774 at 777.

174. N.Y. EXEC. LAW § 296 (McKinney 2010).

175. N.Y. DOM. REL. LAW § 10-a (McKinney 2011).

176. *Yonaty*, 945 N.Y.S.2d 774 at 778.

177. ANDREW WHEELER, N.Y. STATE DIV. CRIMINAL JUSTICE SERV., HATE CRIME IN NEW YORK STATE: 2011 ANNUAL REPORT 9 (2012), *available at* http://www.criminaljustice.ny.gov/crimnet/ojsa/2011-hate-crime.pdf.

178. *About Us*, LAMBDA LEGAL, http://www.lambdalegal.org/pages/about-us (last visited Apr. 17, 2014).

179. Brief for Lambda Legal Defense and Education Fund, Inc. as Amicus Curiae Supporting Defendants, Stern v. Cosby, 645 F. Supp. 2d 258 (S.D.N.Y. 2009) (No. 1:07-cv-08536-DC), [hereinafter *Stern* - Lambda Amicus Brief], *available at* http://data.lambdalegal.org/in-court/downloads/stern_ny_20090313_amicus-lambda-legal.pdf.

amicus briefs, Lambda Legal expresses a desire to remove the stigma perpetuated on LGB persons[181] and sees overturning precedent like *Gallo* as an important step to do that. In each brief, Lambda Legal argues for the dismantling of LGB defamation classes as necessary under New York public policy.[182] It reiterates this point strongly: "Indeed, in many significant ways, New York *prohibits* treating [LGB persons] as shameful and odious."[183]

Both Lambda Legal amicus briefs, each explicitly cited in their respective opinions,[184] place heavy emphasis on formal and legal victories while ignoring on-the-ground issues like anti-gay hate crimes and everyday discrimination.[185] There is also a strong emphasis on the sentiment of *Lawrence*, while disregarding the limits of that argument.[186] The courts of both *Stern* and *Yonaty*, in turn, emphasize state-level public policy in their conclusions in a way that LGB defamation claims cannot survive.[187]

The top-down perspective employed by *Stern* and *Yonaty* and championed by Lambda Legal helps maintain the respectability of organizations like Lambda Legal and the people who fund them.[188] In this sense, it is easy to understand why Lambda Legal would go out of its way to write amicus briefs in these civil suits. In changing the law and making LGB defamation cases less likely to succeed, however, organizations like Lambda Legal do themselves and their constituents a disservice in the name of recognition of formal dignity. This stance

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180. Brief for Lambda Legal Defense and Education Fund, Inc. & Empire State Pride Agenda as Amici Curiae Supporting Respondent, Yonaty v. Mincolla, 945 N.Y.S.2d 774 (App. Div. 2012) (No. 512996), [hereinafter *Yonaty* – Lambda/ESPA Amici Brief], *available at* http://www.lambdalegal.org/sites/default/files/yonaty_ny_20120119_amici-lambda-legal-espa.pdf.

181. *Stern* - Lambda Amicus Brief, *supra* note 179, at 2; *Yonaty* – Lambda/ESPA Amici Brief, *supra* note 180, at 1-2.

182. *Stern* - Lambda Amicus Brief, *supra* note 179, at 2; *Yonaty* – Lambda/ESPA Amici Brief, *supra* note 180, at 4 ("[The] question [concerning the viability of LGB defamation claims] should be answered by taking into account the ways in which New York public policy respects people who are lesbian, gay or bisexual.").

183. *Yonaty* – Lambda/ESPA Amici Brief, *supra* note 180, at 4.

184. *See* Stern v. Cosby, 645 F. Supp. 2d 258, 275 n.10; *Yonaty*, 97 A.D. 3d at 144 n. 1.

185. *See supra* note 182 and accompanying text.

186. *See supra* notes 133-41 and accompanying text.

187. *Stern*, 645 F. Supp. 2d at 274; Yonaty v. Mincolla, 945 N.Y.S.2d 774, 777 n.1 (App. Div. 2012).

188. *See* Joshi, *supra* note 7, at 416 (pointing out that this respectability stance is necessary to ensuring a certain type of recognition from greater society).

impacts both real plaintiffs in LGB defamation cases as well as members of sub-communities who may be negatively affected by this jurisprudence.

IV. CRITIQUING THE TOP-DOWN PARADIGM: CAUTIONING AGAINST ITS USE IN LGB DEFAMATION CASES

Some of the more recent LGB defamation cases, including *Stern* and *Yonaty*, employ a top-down perspective, settling the question of how the right-thinking community considers lesbians, gays, and bisexuals with an analysis of state- and local-level public policy.[189] Although this perspective may, with changing times and more inclusivity,[190] prevent the government from giving support to the idea that being viewed as an LGB person can be inherently harmful, it is not without its theoretical limitations and practical drawbacks.[191] Namely, the top-down perspective confuses and improperly manipulates the concept of "community" by equating state law with community standards of respectability and conflating the era of tolerance with one of respect. This model also confuses who or what is a right-thinker, creating a scheme whereby only those who agree with public policy are right-thinking and worthy of judicial respect for their opinions.

In addition, these cases ignore and improperly denigrate minority sub-communities that may not be as open to LGB persons as state law makes it seem, a result that projects a false sense of sexual inclusion. Lastly, a top-down perspective places undue influence on defamation's community prong and too little emphasis on the relational/injury prong. This in turn limits the ability of plaintiffs to recover when their reputation has been truly damaged, especially if that damage occurs in a sub-community that views homosexuality differently than state public policy would indicate.

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189. *See Stern*, 645 F. Supp. 2d at 274; *Yonaty*, 945 N.Y.S.2d at 777.

190. *See Stern*, 645 F. Supp. 2d at 273 (discussing the supposed "sea change" in social attitudes about sexual orientation). *But see* City of Kalispell v. Miller, 230 P.3d 792, 794 (Mont. 2010) (cautioning that, on appeal of *voir dire* procedure at trial, "[s]ociety does not yet view homosexuality or bisexuality in the same manner as it views heterosexuality. Because there remains strong potential that a juror will be prejudiced against a homosexual or bisexual individual, courts must safeguard against such potential prejudice.").

191. *See* Fogle, *supra* note 4, at 187; Arend, *supra* note 40, at 112; Lidsky, *supra* note 8, at 22 (each describing disadvantages of a defamation regime that focuses on state public policy).

A. Community ≠ Government: The Problems of Legitimizing Only Formal Policy

The primary theoretical problem of the top-down perspective is that it conflates the actions of the state with the community standards of the polity.[192] Although this is an easy mistake to make—the community elects officials, who in turn create policy; therefore, the state public policy is the community standard—it is a mistake nonetheless.[193] Centrally, the acts of elected officials only represent the views and interests of politically powerful and popular groups, which are possibly, but not necessarily, equal to those of the right-thinking members of the community. In defamation suits, the views of the right-thinking minority trump those of the wrong-thinking majority.[194] Accordingly, courts should discern the applicable community standards and *then* assess their moral weight, rather than assuming that the state public policy encompasses both.

Lawrence McNamara, in his text on the relationship between reputation and defamation, discusses this issue at length.[195] McNamara directly argues against the use of public policy, citing several possible arenas for misapplication of the community standard prong, including "establishing whether the laws are an accurate reflection of community attitudes about homosexuality," and "the difficulty of interpreting community values about homosexuality when there are conflicting laws."[196] The author notes the problems of this perspective, remarking that "without a remarkably strong and consistent legislative regime, the reliance on statutes as a standard of public policy will at best *legitimize a choice made by the courts* rather than provide a clear indicator of moral standards that should be applied by the courts."[197] Here, McNamara notes the importance of having a real articulable rationale for

192. *See*, Arend, *supra* note 40, at 112 (disassociating community standards and state policy).

193. *Id.* at 113.

194. *See* Harvard Law Review on *Yonaty*, *supra* note 172, at 859 ("Many courts have held that an attitude can support a defamation claim without being held by a majority of the community . . . ."); Peck v. Tribune Co., 214 U.S. 185, 190 ("If [a defamatory statement] obviously would hurt the plaintiff in the estimation of *an important and respectable part of the community*, liability is not a question of majority vote.") (emphasis added).

195. *See* MCNAMARA, *supra* note 5, at 208-10.

196. *Id.* at 209.

197. *Id.* (emphasis added).

determining whether a community is right-thinking, and that reliance on legislative and executive choices only obscures this standard.[198]

B. The Exclusion of Minority Sub-communities from the "Right-Minded Thinkers"

Minority groups and their community standards are disregarded in the law if they do not conform to the court's articulated public policy.[199] When courts conflate public policy and right-thinking community standards, minority groups with discordant standards are often ostracized in the law. In these cases, groups are considered "eccentric" at best and "anti-social" at worst,[200] pulling minority groups away from what is considered normal or right without the benefit of moral or philosophical analysis.

From this top-down perspective, the moral weight of minority groups is not an assessment but rather a "*presumption*[]."[201] In a world of moral diversity and pluralistic communities, the views of these minority populations are only valid in the defamation context if the state public policy lens is "displaced by the judicial recognition of competing moral taxonomies."[202] In this way, adherence to public policy is just another articulation of judicial bias; without clearly articulating the relevant community and independently assessing its moral right-mindedness, the selective use of public policy serves as a mask for adherence to the tenets of normativity and respectability.[203]

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198. *Id.*

199. *See* Bunker et al., *supra* note 17, at 587 (discussing these groups).

200. *See* Fairley v. Peekskill Star Corp., 445 N.Y.S. 2d156, 158 (describing minority community standards as "peculiarities of taste found in eccentric groups," which could not form the basis of a defamation action); RESTATEMENT (SECOND) OF TORTS § 559 cmt. e (1977) ("The fact that a communication tends to prejudice another in the eyes of even a substantial group is not enough if the group is one whose standards are so anti-social that it is not proper for the courts to recognize them.").

201. MCNAMARA, *supra* note 5, at 212.

202. *Id.*

203. *See* Rury, *supra* note 69, at 680 ("The determination of what constitutes the community in defamation actions is critical because the test for whether a statement is defamatory turns on whether the false statement harms the reputation of the individual within his or her community. . . . The lack of a clearly identifiable community may contribute to a decision that does not accurately reflect the specific community's values, but rather reflects judicial bias.").

C. Ignoring Plaintiffs and Rewarding Defamers: The Practical Faults of a Top-Down Analysis

The top-down perspective threatens to place the most immediate harm upon the plaintiff.[204] Public policy-based perspectives that view the community as obviously accepting of LGB persons remove the ability of plaintiffs to file suit when their standing in their community is actually damaged, a strong possibility in both rural and inner-city areas.[205] In cases like *Yonaty*, the real reputational damage that can happen to plaintiffs when the defendant spreads a falsehood about the plaintiff's sexual orientation takes a procedural backseat to the extent that the government has celebrated (some) LGB persons in the state.[206]

This analysis is backward; the plaintiff gets no opportunity to illustrate the relevant community to his or her defamation suit, and the procedure "rewards the defamer by giving him [or her] license to defame again."[207] Within this top-down perspective, the plaintiff in an LGB defamation claim is considered a bigot (for suing for something as inert as having others think of him or her as bisexual or homosexual) who comes from a "wrong-thinking" community, and has no right to recover for a damaged reputation from the person who damaged it, even if the defendant did it maliciously. Those who advocate for a top-down, public policy-based framework to LGB defamation claims and want to see courts hold these claims unavailable to the tort of defamation are not concerned with individual plaintiffs; they only want to advance the presentation of respectability for sexual minorities in the greater social body.[208]

V. TOWARD A BOTTOM-UP PERSPECTIVE IN DETERMINING COMMUNITY

In determining whether the false imputation that one is bisexual, gay, or lesbian is capable of being legally defamatory in our contemporary

204. *See* Bunker et al., *supra* note 17, at 608.

205. *See*, *e.g.*, Boso, *supra* note 125, at 624 (noting, "Rural sexual minorities widely report environmental resistance to sexual difference and a perceived need to assimilate and conform to gender and sexual norms. Courts cannot gloss over these common facts of rural life when a person's access to legal justice is at stake.").

206. These analyses do not consider the position of all gay, lesbian, and bisexual persons, just those of the *respectable* ones, and if then, only in the formal (rather than substantive) context. For more on this issue, *see generally* Joshi, *supra* note 7; M.V. Lee Badgett, *Social Inclusion and the Value of Marriage Equality in Massachusetts and the Netherlands*, 67 J. SOC. ISSUES 316 (2011).

207. Bunker et al., *supra* note 17, at 608 (quoting *Lidsky*, supra note 8, at 23).

208. *See id.*; Lidsky, *supra* note 8, at 47-48 (endorsing the public-policy perspective in spite of the potential harm to plaintiffs).

society, we must ask ourselves several important questions. First we must ask whether such a statement is capable of harming anyone's reputation in the eyes of anyone else. Obviously, in the LGB defamation context, the answer is yes.[209] Next, we must consider, in each case, whether the statement defamed the plaintiff's reputation in his or her own community—the settings where the plaintiff feels most accepted and the persons whose opinions of the plaintiff are most important. If that answer is in the affirmative, the inquiry should then move to the moral and philosophical rationales causing the imputation to be defamatory and whether or not those rationales are held by right-thinking persons in the community.

This method—a bottom-up perspective—looks at the position of gays, lesbians, and bisexuals on the ground, i.e., within the communities important to the plaintiff in a defamation suit—and realistically views how those communities would disparage a plaintiff for the reputation of sexual minority status. In contrast to the top-down perspective, the bottom-up perspective does not completely discount the communities' views if they are at odds with greater cultural norms. This articulation is fairer to the plaintiff. It gives her the opportunity to prove reputational damage without having to show that her community comports with both the norms of respectability and the political articulations of the state.

In order to implement this system, plaintiffs should lobby courts to hear defamation cases under a different standard than that employed in *Stern*[210] and *Yonaty*.[211] Simply, courts need to change the analysis of a claim's ability to be defamatory from a legal question to a factual or quasi-factual question. Although courts should not entertain all

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209. Sadly, even parents can sometimes stop supporting their minor children upon discerning that their child is LGB. *See* LAURA E. DURSO & GARY J. GATES, SERVING OUR YOUTH: FINDINGS FROM A NATIONAL SURVEY OF SERVICES PROVIDERS WORKING WITH LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH WHO ARE HOMELESS OR AT RISK OF BECOMING HOMELESS 4 (2012), *available at* http://escholarship.org/uc/item/80x75033 (indicating that 43% of homeless LGBT youth report being forced out of their homes by disapproving parents). Recently, two viral stories provided dramatically different narratives about the ways coming out can affect parents' views on their children. *Compare* Emily Thomas, *Twins Come Out to Their Parents and Catch It All on Camera*, HUFFINGTON POST (Aug. 24, 2014, 8:54AM), http://www.huffingtonpost.com/2014/08/29/twins-come-out-together-monastero_n_5732648.html (revealing the surprise and support of parents discovering that their sons are both gay), *with* Cavan Sieczkowski, *Watch: Family has Horrifying, Violent Reaction to Son's Coming Out as Gay*, HUFFINGTON POST (Aug. 28, 2014, 6:59PM), http://www.huffingtonpost.com/2014/08/28/family-son-coming-out-gay-video_n_5731462.html (detailing parents disowning their gay son and forcing him to leave their house).

210. 645 F. Supp. 2d 258, 275 (S.D.N.Y. 2009). *See also supra* Part III.C..

211. Yonaty v. Mincolla, 945 N.Y.S.2d 774, 778-79 (App. Div. 2012), *appeal denied* 982 N.E.2d 1260 (N.Y. 2013). *See also, supra* Part III.C..

defamation claims out of courtesy, they should also not abandon every LGB defamation claim made in states that may have beneficial legislation for LGB persons or powerful mainstream LGBT lobbying groups. In adopting a bottom-up approach, courts will allow plaintiffs to show real reputational damage.

Importantly, this perspective, which looks to the plaintiff's community and its value system first, does not create an easy road for LGB defamation plaintiffs. Inherent in this articulation is a burden on the plaintiff to demonstrate (a) what his or her community is, (b) what the community's values are, and (c) to what degree those values comport with the right-thinking values required of public policy. All of these determinations rely on a factual argument from the plaintiff and probing inquiry from the judge as to whether the amount of reputational damage to the pertinent community rises to a level sufficient to sustain a legal claim.

This burden lines up with the freedom-of-association-related claims of *Dale*[212] and the respect-for-dignity requirements of *Lawrence*[213] by giving communities freedom to control their own values but only giving those values legal effect where they are not infused with indignity and disrespect. What's more, the bottom-up approach facilitates and encourages the plaintiff to show special damages. Under this scheme, the plaintiff would need to demonstrate the scope and range of his or her reputational damage in his or her specific community at the same time she demonstrates what the community is. This mechanism acts as another barrier to LGB defamation claims that are spurious or weak, but offers meritorious claims and avenue to justice without placing undue emphasis on top-down community perspectives. In this way, LGB defamation claims will have more to do with the day-to-day factors affecting the plaintiff's life and less to do with the political value of LGB persons generally.

CONCLUSION

This Comment has examined LGB defamation claims at a point in time where the cultural appreciation and acceptance of LGB-identified people is an open question. By providing a background on defamation law and the community standard inquiry, I began to unsettle the normative assumptions made by courts in concluding that a particular defamation claim is or is not valid.

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212. *Dale*, 530 U.S. at 653 ("[W]e must also give deference to an association's view of what would impair its expression.").

213. *Lawrence*, 539 U.S. at 578 ("The petitioners are entitled to respect for their private lives. The State cannot demean their existence . . . .").

By exploring and evaluating status-based defamation claims in Parts II and III, I revealed a top-down approach taken by a few courts today in LGB defamation cases. These courts rely on the state's view of LGB persons and the advocacy of mainstream LGBT organizations as a proxy for what respectable communities think of LGB people. Thus, the courts using a top-down approach fail to inquire as to what the relevant community is and what level of approbation or scorn that community exhibits towards LGB individuals. The exclusion of the relevant community's ideals is not fair, and it does real damage to individuals in communities where public understanding of one as an LGB person can cause lasting reputational damage.

Although the trajectory of LGB defamation suits is not yet settled, the recent trend of courts focusing almost entirely on state-level public policy in determining the right-thinking community standard is troubling. While this approach superficially provides a clear and bias-free standard by which to make the community-standard determination, it in effect substitutes the currents of political respectability for a plaintiff's community-centered moral analysis. To remedy this, and to bring LGB defamation cases back in line with the spirit of defamation cases generally, we must reverse our prospective and focus from the bottom up.