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

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INTRODUCTION

In one episode of the popular television show *Seinfeld*, Elaine, George, and Jerry were having a conversation at their local coffee shop when Elaine noticed that a woman was eavesdropping on their conversation.[1] Elaine decided to give the woman the impression that Jerry and George were a gay couple.[2] Playing along, George tells Jerry that he is the only man George has ever loved.[3] Unfortunately for Jerry, the eavesdropping woman happened to be a New York University ("NYU") student newspaper reporter who was assigned to interview Jerry.[4]

Later, at a meeting at Jerry's apartment, the NYU reporter's suspicions that Jerry was a gay man were confirmed when she witnessed Jerry and George fight like a married couple.[5] After the frivolous argument ended, the reporter asked how the couple met and George told her that they met at the gym.[6] George explained that he was trying to climb a rope when he slipped and fell on Jerry's face—and they had been friends ever since.[7] George's words further fueled the reporter's belief that Jerry and George were romantically involved.[8] Based on her observations, the woman falsely reported in her article that Jerry Seinfeld was a

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[1] *Seinfeld: The Outing* (NBC television broadcast Feb. 11, 1993), *available at* http://www.imdb.com/title/tt0697745/plotsummary.

[2] *Seinfeld: The Outing* (NBC television broadcast Feb. 11, 1993), *available at* http://www.seinfeldscripts.com/TheOuting.htm.

[3] *Id.*

[4] *Seinfeld: The Outing*, *supra* note 1.

[5] *Id.*

[6] *Seinfeld: The Outing*, *supra* note 2.

[7] *Id.*

[8] *See id.*

homosexual.[9] To make matters worse for Jerry, newspapers all across the country picked up the story.[10] All of the false reports by the news media defamed Jerry, and he spent the rest of the episode trying to convince the female reporter and all his friends, that he had not been "outed" as a gay man, going so far as to date the reporter to convince her that he was heterosexual.[11] Each time that Jerry denied he was gay, he qualified the denial with the now familiar phrase, "[n]ot that there's anything wrong with that."[12]

Even though Jerry did not want to be known as a gay man, he had many gay friends and expressed the sentiment, "that's fine if that's who you are."[13] Though the episode treats the false imputation of homosexuality with its customary humor, it poses a greater question about the legal intersection between defamation and sexual orientation. How do the courts decide a defamation case when a person is incorrectly identified as being gay? And more specifically, what role does society's morals play in the court's decision? Would a court in Little Rock, Arkansas and a court in New York City find the same statement defamatory?

The community or society in which the alleged defamatory statement is uttered is critical because the community provides the context to determine whether the statement is defamatory, yet the community standard is often absent or ill-defined in court cases. 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.

For decades, courts have routinely found that wrongly identifying someone as gay was defamation per se because such an incorrect identification was believed to damage a person's reputation.[14] Defamation is an injury to one's reputation, and common law defamation requires the plaintiff to prove that the statement is: (1) published to a third party, (2) false, and (3) defamatory.[15] The threshold determination and critical assessment in every defamation action is whether the statement is defamatory.[16] Determining whether a statement is defamatory depends upon the community and the social construct of the community at the time

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[9] *See id.*

[10] *Seinfeld: The Outing* (NBC television broadcast Feb. 11, 1993), *available at* http://www.tbs.com/stories/story/0,,69111,00.html.

[11] *Id.*

[12] *Seinfeld: The Outing* (NBC television broadcast Feb. 11, 1993), *available at* http://www.amazon.com/Seinfeld-Season-4-Jerry/dp/B0007YXRCW. Urban Dictionary defines the phrase "not that there's anything wrong with that" as a "[d]isclaimer used when one is wrongly suspected of being homosexual." Urban Dictionary, Not That There's Anything Wrong with That, http://www.urbandictionary.com/define.php?term=Not+that+there's+anything+wrong+with+that. (last visited Jan. 29, 2010).

[13] *Seinfeld: The Outing*, *supra* note 2.

[14] See discussion *infra* Part III.

[15] RESTATEMENT (SECOND) OF TORTS § 559 (1977).

[16] *See* Erik K.M. Yatar, *Defamation, Privacy, and the Changing Social Status of Homosexuality: Rethinking Supreme Court Gay Rights Jurisprudence*, 12 L. & SEXUALITY: A REV. OF LESBIAN, GAY, BISEXUAL & TRANSGENDER LEGAL ISSUES 119, 123 (2003).

the statement was made.[17] A statement is defamation per se when it falsely accuses a person of a crime or a loathsome disease, calls into question the chastity of a woman, or the statement negatively affects a person's business, trade, or profession.[18] In recent years, however, in cases involving the false identification of an individual as gay, some courts have found the imputation to be defamation, and other courts have not.[19] Some courts have even found that calling someone gay is no longer defamation per se.[20]

This Note demonstrates that the community standard, as it is currently used, is not an accurate reflection of society's values when litigating this type of defamation cases, and proposes two reforms. First, courts should articulate the community standard. Courts can determine society's values by reviewing public opinion polls, legislation, recent case law, and/or testimony to define the community's values. Courts should be required to identify and articulate the relevant community standard that is used to define the defamatory statement because the transparency of the analysis would eliminate bias—hidden or otherwise—and/or prejudice. Moreover, plaintiffs from very different parts of the community should have his or her defamation action measured against his or her own community's values, as opposed to an ideal community or the prejudices of the judge presiding over the matter. Two recent cases have clearly identified the relevant community standard by clearly articulating the sources that formed the basis of the courts' decisions on what constituted the community values and mores.[21] Each court relied on secondary sources of the type this Note advocates, as has the Supreme Court.[22]

In the alternative, courts could borrow a similar standard that is used in obscenity law. Admittedly, obscenity and defamation make strange bedfellows, but the adjudication of whether a false imputation of homosexuality is defamatory and obscenity law share a common thread: sexuality. Applying the average contemporary person standard used in obscenity law would create a more uniform standard for deciding what constitutes defamation.[23]

Current defamation law is flawed because it has the potential to allow judicial bias into the critical analysis of what is defamatory. To cure this defect, the court

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[17] *See* Yatar, *supra* note 16, at 124; Randy M. Fogle, *Is Calling Someone "Gay" Defamatory: The Meaning of Reputation, Community Mores, Gay Rights, and Free Speech*, 3 L. & SEXUALITY: A REV. OF LESBIAN, GAY, BISEXUAL & TRANSGENDER LEGAL ISSUES 165, 170 (1993).

[18] *Id.*

[19] *See infra* Part III.

[20] *See generally* Stern v. Cosby, 645 F. Supp. 2d 258, 271 (S.D.N.Y. 2009) (stating that there has been a "veritable sea [of] change in social attitudes about homosexuality." Therefore, a statement imputing homosexuality cannot be defamation per se); Lawrence v. Texas, 539 U.S. 558 (2003) (finding a statute that criminalizes sexual conduct between individuals of the same sex unconstitutional).

[21] *See infra* Part IV.B.2.

[22] *Id.*

[23] *See generally* Miller v. California, 413 U.S. 15, 24-25 (1973) (setting forth the test in obscenity cases and applying the contemporary community standard).

should be clear in its defamation analysis by identifying who and what make up the community; or in the alternative, the community standard from obscenity law should be applied, which would create a more uniform approach to defamation law.

Part I of this Note will explore the social and legal history of sexuality in the United States, focusing on the treatment of women, homosexuals, and obscenity. Part II discusses and defines the community standards used in both defamation and obscenity law. Part III examines how the courts have used the concept of community standards to analyze defamation cases, concentrating on the imputation of homosexuality.

Finally, Part IV argues that defamation law's community standard is inadequate because it fails to be an accurate reflection of the community's values. This section analyzes two recent cases, *Albright v. Morton*[24] and *Stern v. Cosby*,[25] and suggests that the mode of analysis of these two courts should be followed. That is to say, a court should articulate how it determined whether a statement was defamatory by citing the sources referred to and ensure that deeming a particular statement defamatory truly reflects the community's values. Relying on unconventional authority is not novel, and Part IV examines Supreme Court cases where the Court has relied on secondary authority to support its holding. This section also offers an alternative to requiring a more transparent community standard definition: applying the community standard articulated in obscenity law jurisprudence. The conclusion, therefore, proposes two reforms: first, the court should simply be required to enunciate what it defines as the relevant community and its standards by citing examples of legislation, public polls, or testimony so that the court's decision reflects local values. In the alternative, the court should apply obscenity law's contemporary community standard.

I. EXPLORING THE RELATIONSHIP BETWEEN SEXUALITY, REPUTATION, COMMUNITY, AND OBSCENITY

Obscenity and the recent defamation cases involving homosexuality share sexuality as a common denominator. Just as the definition of obscenity has changed over time, so too have the views of American society changed regarding what is sexually acceptable, including homosexuality.

A. America's Sexual Norms

The first European settlers to America brought with them Protestant beliefs about what constituted proper expression of sexuality, namely sexual relations for reproductive purposes.[26] The Protestant concept of marriage and family was used

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[24] Albright v. Morton, 321 F. Supp. 2d 130, 136 (D. Mass. 2004).

[25] Stern v. Cosby, 645 F. Supp. 2d 258 (S.D.N.Y. 2009).

[26] JOHN D'EMILIO & ESTELLE B. FREEDMAN, INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA 4 (2d ed. 1997).

to justify sexual behavior by defining it as a duty between husband and wife.[27] Non-reproductive sexual activity inside or outside the marriage constituted sexual indiscretion.[28] These non-reproductive sexual practices defined early sodomy laws, which applied regardless of whether they were engaged in by same-sex or heterosexual couples.[29] Sodomy was defined as non-procreative sexual activity between two men, a man and an animal, or between a man and a woman.[30] Because the crime of sodomy was believed to be an unnatural sexual expression, sodomy was a capital offense.[31]

The Protestant notions of sexuality held firm over the next few centuries and sex was valued as a private act between consenting adults.[32] In the late 1800s, a sort of sexual commerce developed, offering single men the services of dance halls, prostitution, and erotic literature.[33] The tension between the competing ideas of sexuality, private and public expression took shape and as a result, obscenity laws were created to regulate society's sexual morals and purity.[34] An early English court defined obscenity as the tendency to "deprave and corrupt those whose minds [were] open to such immoral influences, and into whose hands a publication of this sort may fall."[35]

Anthony Comstock, a dry-goods salesman, began a personal effort to strengthen anti-obscenity laws by lobbying both the state and federal governments.[36] In 1873, Comstock succeeded when Congress passed An Act for the Suppression of Trade in, and Circulation of Obscene Literature and Articles of Immoral Use ("The Comstock Act").[37] The law made it illegal to mail obscene materials or articles that aided contraception or abortion.[38] Comstock's actions helped to reinforce the then contemporary notion that sexuality was to remain within the "private sphere," and that lust was "dangerous."[39] Not until 1957, in *Roth v. United States*, did the United States Supreme Court create a new standard for judging obscenity.[40]

The nineteenth century saw marked changes in marital sexuality due in part to economic, religious, and societal pressures.[41] Couples began to view sex beyond

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[27] *Id.* at 4-5. Husbands and wives were expected to experience pleasure during sexual intercourse in order to strengthen the marriage and to ensure the woman's fertility. *Id.* at 5.

[28] *Id.* at 5.

[29] D'EMILIO & FREEDMAN, *supra* note 26, at 16, 35.

[30] *Id.* at 30.

[31] *Id.*

[32] *Id.* at 130.

[33] *Id.*

[34] *Id.* at 156.

[35] Regina v. Hicklin, (1868) LR 3 Q.B.D. 360.

[36] D'EMILIO & FREEDMAN, *supra* note 26, at 159.

[37] The Comstock Act of 1873, ch. 258 17 Stat. 599 (current version 18 U.S.C. § 1461 (2006)).

[38] *See* D'EMILIO & FREEDMAN, *supra* note 26, at 159.

[39] *Id.* at 160.

[40] *See* Roth v. United States, 354 U.S. 476 (1957).

[41] *See* D'EMILIO & FREEDMAN, *supra* note 26, at 56-58. The marital fertility rate declined as the

the limitations of reproduction, and early feminists considered sexual rights as the ability to deny their husbands' demands for sex.[42] In the early 1900s, Margaret Sanger distributed a pamphlet she created called *Family Limitation* in which she discussed birth control methods for women.[43] Comstock's anti-obscenity law prohibited the distribution of the pamphlet through the mail, and Sanger fled the United States when she was indicted for nine counts of violating the Comstock anti-obscenity laws.[44] Undeterred, Sanger returned to the United States and opened a clinic in Brooklyn, New York where she provided birth control information without a physician's orders, which was in violation of the law.[45] Contraception signaled a shift in sexual expression by weakening the Protestant link between marriage, sex, and procreation, and the availability of birth control gave rise to increased frequency of premarital sex.

Even further sexual development occurred in the 1900s, as erotica became mainstream.[46] Self-gratification devices were initially created to cure the medical condition of "hysteria," defined literally as "that which proceeds from the uterus."[47] These devices were advertised in magazines such as *Good Housekeeping*, as well as in the Sears, Roebuck, and Company catalog.[48] Sexual expression and obscenity, yet again, intersected when some states began to outlaw the sale and distribution of vibrators under anti-obscenity statutes.[49]

In 1955, the Model Penal Code stated that private, consensual sexual relations should not possess criminal penalties, and did not limit its application to opposite-sex sexual relations.[50] Yet despite this recommendation, states began creating explicit laws forbidding same-sex sexual relations.[51] For instance, in 1973 Texas repealed its general prohibition on non-procreative sexual practices and enacted the Homosexual Conduct Law, which specifically criminalized consensual same-sex sexual relations.[52] Laws such as Texas's carried with them criminal penalties that the courts were left to enforce.

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century progressed, from over 7 children in 1800, to only 4.24 children per married couple in 1880. *Id.* at 58.

[42] *See id.* 57-58, 232.

[43] *Id.* at 232.

[44] *Id.*

[45] *Id.* at 233.

[46] *See id.* at 233-34.

[47] Kristin Fasullo, Note, *Beyond Lawrence v. Texas: Crafting a Fundamental Right to Sexual Privacy*, 77 FORDHAM L. REV. 2997, 3006 (2009).

[48] *Id.* at 3008.

[49] *Id.* at 3009.

[50] MODEL PENAL CODE § 213.2 cmt. 2 (1980).

[51] *See* Lawrence v. Texas, 539 U.S. 558, 570 (2003). The Court referred to the following state laws: "1977 Ark. Gen. Act no. 828; 1983 Kan. Sess. Laws p. 652; 1974 Ky. Acts p. 847; 1977 Mo. Laws p. 687; 1973 Mon. Laws p. 1339; 1977 Nev. Stats. P. 1632; 1989 Tenn. Pub. Acts ch. 591; 1973 Tex. Gen. Laws ch. 399." *Id.*

[52] TEX. PENAL CODE ANN. § 21.06 (2002).

B. Legal History of Sexuality

The Supreme Court has mirrored the history of sexual expression by also initially focusing on sexuality as a reproductive means, with its foray into sexuality beginning with a married woman's right to contraception. In *Griswold v. Connecticut*, the U.S. Supreme Court invalidated laws that prohibited the sale, use, or counseling of birth control and contraceptive devices.[53] Justice Douglas found that the right to privacy was a fundamental right implicit in the penumbras of the First, Third, Fourth, and Fifth Amendments.[54] In doing so, the Court recognized a right to privacy in the bedroom between married persons.[55]

The cases subsequent to *Griswold* expanded the notion that the right to privacy and liberty were not limited to married persons.[56] In 1972, the U.S. Supreme Court in *Eisenstadt v. Baird* invalidated a law that made it illegal to distribute contraception to unmarried persons.[57] The Court stated that if its decision in *Griswold* was to mean anything, the right to privacy must be extended equally to married and unmarried individuals.[58] In yet another contraception case, *Carey v. Population Services International*, the U.S. Supreme Court invalidated a law that prohibited the distribution of contraceptives to persons under the age of sixteen, or the display or advertisement of contraceptives.[59] Justice Brennan, writing for the majority, stated that the decision whether or not to have a child was constitutionally protected.[60] The Court's holding affirmed the right to privacy in sexual relations.

The right to privacy in sexual relations did not initially apply to same-sex relations.[61] In 1986 in *Bowers v. Hardwick*, the U.S. Supreme Court held that the right to engage in consensual sexual activity did not extend to same-sex relations.[62] The Court framed the issue as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy . . . ."[63] Despite the case law that expanded the right to privacy in matters of family, marriage and procreation, Justice White stated that homosexuals were not entitled to a right to

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[53] *See* Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965).

[54] *See id.* at 484.

[55] *See id.* at 484-85. The Court stated in *Griswold*, "would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship." *Id.* at 485. *See also* Meyer v. Nebraska 262 U.S. 390, 399 (1923) (holding in dicta that the Fourteenth Amendment guarantees the liberty "to marry, establish a home and bring up children . . . .).

[56] *See Lawrence*, 539 U.S. at 566.

[57] *See* Eisenstadt v. Baird, 405 U.S. 438, 454 (1972).

[58] *Id.* at 453.

[59] Carey v. Population Serv. Int'l, 431 U.S. 678 (1977).

[60] *See id.* at 685.

[61] *See* Bowers v. Hardwick, 478 U.S. 186 (1986).

[62] *Id.* at 192.

[63] *Id.* at 190.

privacy because homosexual activity did not fit within those rights.[64] The Court instead analogized illegal sexual relations in the bedroom to the possession of illicit drugs in a home, and stated that neither should escape the law.[65]

Overturning *Bowers*, *Lawrence v. Texas* held that states may not prohibit two consenting adults of the same sex from engaging in private consensual sexual activity.[66] The Court recognized sexual relations between two persons as "the most private human conduct" that occurs "in the most private of places, the home."[67] The recent laws and traditions of the last fifty years guided the *Lawrence* Court, which found that "[t]hese references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."[68] *Lawrence* stands for the proposition that consensual sexual activity is entitled to constitutional protection because it is a "fundamental right of personhood."[69] Therefore, right to privacy was officially extended to protect sexual expression for both heterosexual and same-sex couples.

II. WHO DEFINES THE COMMUNITY?

Defamation is premised on the protection of a person's reputation,[70] and includes the twin torts of libel and slander.[71] To be defamatory and thus harm the reputation of an individual, a false statement must be made to a third person.[72] The determination of whether the statement is defamatory depends upon the community and its social constructs at the time the statement was made.[73] Every person in the community, or even a majority of the community, need not find the statement prejudicial in order for the statement to be deemed defamatory.[74]

The test for defamation is whether the false statement harms the reputation of the individual within her community,[75] as measured by the opinion others have or

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[64] *Id.* at 190-91. Justice White stated, "we think it evident that none of the rights announced in these decisions bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy . . . ." *Id.* at 190-91.

[65] *See id.* at 195.

[66] *See* Lawrence v. Texas, 539 U.S. 558, 567 (2003).

[67] *Id.* Writing for the majority, Justice Kennedy stated: "To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse." *Id.*

[68] *Id.* at 571-72.

[69] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 846 (3d ed. 2006). *But cf.* Williams v. Attorney Gen., 378 F.3d 1232, 1236 (11th Cir. 2004) (finding that *Lawrence* did not expressly recognize a fundamental right to sexual privacy).

[70] Lisa R. Pruitt, *Her Own Good Name: Two Centuries of Talk about Chastity*, 63 MD. L. REV. 401, 409 (2004).

[71] PROSSER AND KEETON ON THE LAW OF TORTS 771 (W. Page Keeton et al. eds., 5th ed. 1984) [hereinafter PROSSER AND KEETON]. Libel is written defamation and slander is spoken defamation. *Id.*

[72] BLACK'S LAW DICTIONARY 479 (9th ed. 2009). *See also* PROSSER AND KEETON, *supra* note 71, at 773.

[73] *See* Yatar, *supra* note 16, at 124; Fogle, *supra* note 17, at 170.

[74] *See* RESTATEMENT (SECOND) OF TORTS § 559 cmt. e. (1977).

[75] RESTATEMENT (SECOND) OF TORTS § 559 (1977). *But see* RESTATEMENT (SECOND) OF TORTS §

may have of the person.[76] Whether the statement is capable of a defamatory meaning is a threshold question for the court;[77] therefore, the court must first decide in which community the individual belongs, so as to determine whether the individual has suffered harm.[78] Often, courts define the relevant community as one where those who belong are "right-thinking" or a "substantial and respectable minority."[79] "Right-thinking" or "right-mindedness" excludes criminals or those who sympathize with criminals, as well as individuals who carry prejudicial beliefs that are inconsistent with what society deems acceptable.[80] Similarly, the "substantial and respectable minority" focuses not on the majority's universally held opinions, but rather a particular social group's beliefs.[81]

Obscenity law also maintains a community standard by which it judges the obscene nature of the material in question.[82] However, obscenity law uses an "average person" measure, as made up not from the most liberal or conservative, but more akin to the reasonable, moderate individual.[83]

A. Defamation Law's "Community" Defined

The law of defamation mirrors society's attitudes towards morality and sexuality is constantly evolving.[84] Society imposes "rules of civility" as a sort of social contract to monitor the way people treat each other, and to determine who and what is acceptable within the community.[85] Defamation law, therefore, protects an individual's dignity by his or her membership in the community.[86] However, the question of who or what constitutes the community is not a simple one and is the first definitional hurdle.

1. The Number of People Required to Constitute a Community

The first limitation on a community is the size or number that makes up the group.[87] The defamatory or unprivileged false statement does not require universal

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559 cmt. d (1977) ("Actual harm to reputation is not necessary to make communication defamatory.").

[76] PROSSER AND KEETON, *supra* note 71, at 771.

[77] Lyrissa Barnett Lidsky, *Defamation, Reputation, and the Myth of Community*, 71 WASH. L. REV. 1, 5, 11 (1996).

[78] *Id.* at 6-7.

[79] *See id.* at 7.

[80] *See* Fogle, *supra* note 17, at 173-74.

[81] Lidsky, *supra* note 77, at 16-17.

[82] *See* Miller v. California, 413 U.S. 15, 24 (1973).

[83] *Id.*

[84] MICHAEL F. MAYER, THE LIBEL REVOLUTION: A NEW LOOK AT DEFAMATION AND PRIVACY xvi (1987).

[85] Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691, 711 (1986).

[86] *Id.* ("The dignity that defamation law protects is thus the respect (and self-respect) that arises from full membership in society.").

[87] *See Notes, The Community Segment in Defamation Actions: A Dissenting Essay*, 58 YALE L.J. 1387, 1390 (1949) [hereinafter *Notes*].

hatred, nor that it be known by all; it merely requires that the statement causes an appreciable number of persons to regard the plaintiff with hatred, contempt, or ridicule.[88] For example, if an individual's reputation is harmed in the eyes of only a handful of people, and those individuals' opinions are not legally significant, then the statement would be characterized as merely gossip and the action would fail the court's defamation analysis.[89] To combat this dilemma, American courts have focused on the consequence or significance of the damage done as measured against the "substantial and respectable minority."[90] As a result, courts make a quantitative examination as to what constitutes a "substantial minority" and a qualitative analysis as to who is "respectable."[91]

The "substantial and respectable minority" standard originated in the United States Supreme Court's 1909 case, *Peck v. Tribune Co.*[92] In *Peck*, the Chicago Tribune printed a woman named Mrs. Schuman's endorsement of *Duffy's Pure Malt Whiskey* with a caption that identified her as a nurse who uses whiskey as a cure-all.[93] Unfortunately, the photograph was of Mrs. Peck, who was not a nurse, who was an abstainer of alcohol, and who had not consented to the publication.[94] Mrs. Peck sued for defamation, claiming that the advertisement disgraced her in the eyes of her community.[95] The Seventh Circuit Court of Appeals believed it was not libelous to call a person a nurse, or that the nurse used or recommended the use of the whiskey.[96] However Justice Holmes stated, "such inquiries are besides the point."[97] According to Holmes, "liability [was] not a question of majority vote," supporting the contention that it was not a question of the number of people who thought less of the plaintiff.[98] Defamation "need not entail universal hatred" because nothing is known by everyone in the world.[99] Rather the question, Justice Holmes stated, is whether the advertisement would harm the plaintiff in the opinion of "an important and respectable part of the community."[100] The Court considered that Mrs. Peck, who held herself to a higher, or different, moral standard than the rest of her community, was harmed by such an advertisement, and concluded that it was sufficient that an "appreciable fraction" regarded her with contempt.[101]

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88 *See* Peck v. Tribune Co., 214 U.S. 185, 190 (1909).

89 *See Notes*, *supra* note 87, at 1390.

90 *See* PROSSER AND KEETON, *supra* note 71, at 777 ("American courts have taken a more realistic view [than English courts have], recognizing that the plaintiff may suffer real damage if he is lowered in the esteem of any substantial and respectable group, even though it may be a quite small minority.").

91 *See* Lidsky *supra* 77, at 7.

92 *See* Peck v. Tribune Co., 214 U.S. 185 (1909).

93 *Id.* at 188.

94 *Id.*

95 *Id.*

96 Peck v. Tribune Co., 154 F. 330, 333 (7th Cir. 1907).

97 *Peck*, 214 U.S. at 189.

98 *Id.* at 190.

99 *Id.*

100 *Id.*

101 *Id.*

Similarly, the Court expressed that, if a doctor advertised whiskey as a tonic and was harmed in his profession by the misrepresentation, the physician segment of the community was a sufficient community even if the rest of the society did not think less of the doctor for the advertisement.[102] Therefore, the "appreciable fraction" of society in the example was physicians, and not society as a whole.[103]

However, the membership in a community is important if the plaintiff is a member of a minority group.[104] For instance, being called a Communist, today, does not have the same implications that it had during the McCarthy Era.[105] However, for a Vietnamese-American, being falsely called a Communist carries significant negative implications.[106] For example, a man named Tuan Joseph Pham quit school and joined the South Vietnamese army at the age of eighteen to fight the North Vietnamese Communists.[107] After the fall of Saigon in 1975, the North Vietnamese Communists imprisoned Mr. Pham for two years before releasing him, whereby he organized other Vietnamese citizens and fled to Indonesia, before finally immigrating with his family to Rochester, Minnesota.[108] Once in the United States, Mr. Pham purchased a building and formed and incorporated the Vietnamese Community of Minnesota, the largest Vietnamese community in Minnesota.[109] A rival Vietnamese group disparaged Mr. Pham, calling him a Communist lackey, despite all that he had done to escape communism.[110] The Minnesota Court of Appeals held that the rival group's statements that Mr. Pham and the Vietnamese Community of Minnesota were Communist lackeys were not protected speech under the First Amendment, and affirmed a lower court's defamation award.[111] In *Pham*, the Court determined that the Vietnamese community in Minnesota was "respectable" enough to garner the law's attention and respect.[112] Additionally, the Vietnamese community, though only a small amount of Minnesota's population, constituted an important "minority."[113]

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102 *Id.*

103 *Id.*

104 *Notes, supra* 87, at 1390.

105 *See, e.g.*, Rose v. Koch, 154 N.W.2d 409, 417 (Minn. 1967) (finding that being called a Communist sympathizer or collaborator is defamatory).

106 Tuan J. Pham v. Thang Dinh Le, 2007 WL 2363853 (Minn. App.) at *1 (Aug. 21, 2007).

107 *Id.*

108 *Id.*

109 *Id.*

110 *Id.*

111 *Id. at* *5. *See also* Nguyen-Lam v. Cao, 90 Cal. Rptr. 3d 205, 208 (Cal. Ct. App. 2009) (affirming the lower court's motion to strike defendant's anti-SLAPP motion and finding that a Vietnamese-American public school administrator might prevail on defamation case whereby defendant called Ms. Lam a Communist.)

112 Lidsky, *supra* note 77, at 20.

113 *See* PROSSER AND KEETON, *supra* note 71, at 777 ("American courts have taken a more realistic view [than English courts have], recognizing that the plaintiff may suffer real damage if he is lowered in the esteem of any substantial and respectable group, even though it may be a quite small minority."); RESTATEMENT (SECOND) OF TORTS § 559 cmt. e. (1977).

Peck and *Pham* illustrate the vast discretion the court has in defining the parameters of a community and determining whose opinions are worthy of the court's attention.[114] The judge's exclusive discretion is objectionable because the court is making implicit normative analyses.[115] If the "substantial and respectable minority" doctrine fails to identify which of the community's values define public opinion, and if multiple communities have contrary views, how does the court decide which subgroup's opinion matters more?[116]

2. Who Are the "Right-Thinking" Members of the Community?

The "right-thinking" standard originated in *Kimmerle v. New York Evening Journal* in 1933.[117] The New York Court of Appeals addressed whether an article published in the *New York Evening Journal* was defamatory when it stated that a murderer courted Mrs. Kimmerle five days after he married another woman.[118] Mrs. Kimmerle was blithely unaware of the gentlemen's previous marriage, or his criminal past.[119] The Court expressed regret and sympathy for Mrs. Kimmerle and the position in which the gentlemen put her, but the court did not find that the article harmed Mrs. Kimmerle's reputation.[120] The Court found that a person's reputation is injured by public hatred, contempt, and ridicule, among others, and measured such findings against the "minds of [the] right-thinking" members of society.[121] *Kimmerle* did not define or explain who the right-thinking members of society were.[122] Instead, the Court found that "right-thinking" members of society would not believe that being courted constituted immoral relations, and the Court also found that Mrs. Kimmerle would not have reason to know that the man courting her was a murderer.[123] Although Mrs. Kimmerle was presumably embarrassed by the encounter, the Court said such discomfort did not expose her to hatred, shame, or ridicule so as to injure her reputation.[124]

Courts also often use a "right-thinking" community standard to determine if a statement is defamatory.[125] Despite the antiquated language, courts continue to apply both the "substantial and respectable minority" and "right-thinking"

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114 Lidsky, *supra* note 77, at 20.

115 *Id.*

116 *Id.*

117 Kimmerle v. NY Evening Journal, 186 N.E. 217 (N.Y. 1933).

118 *Id.* at 217.

119 *Id.*

120 *Id.* at 218.

121 *Id.* Specifically, the court stated "[r]eputation is said in a general way to be injured by words which tend to expose one to hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation or disgrace . . . ." *Id.*

122 *See id.*

123 *Id.*

124 *Id.*

125 Lidsky, *supra* note 77, at 7.

standards in defamation actions.[126] The court makes the determination as to which standard to apply, although courts rarely articulate their reasons for selecting which community is "right-thinking" or the "substantial and respectable minority."[127] The right-minded community may include "'readers of reasonable understanding, discretion, and candor' [and] 'reasonable and fair minded men.'"[128] Courts rely on their own experiences and knowledge to define what the courts believe to be common knowledge and common sense.[129] However, which community the court chooses becomes a policy choice, reflecting what the court believes is the dominant or valued group in society.[130] In doing so, the court makes a normative analysis as to who in the community qualifies as "right-thinking" or "respectable."[131]

In *Peck*, Justice Holmes did not define which individuals made up the important and respectable part of the community, and left open the possibility that a wrong-thinking segment of the community could be used as a measure of public opinion in defamation cases.[132] While courts are not supposed to establish who in the community is morally right or wrong, courts often make such assessments and do not frequently recognize injury caused by "wrong-thinking" persons.[133] In fact, the Restatement (Second) of Torts asserts that even if a falsehood prejudices a person so as to be otherwise defamatory, the statement will not be so considered if the group's "standards are so anti-social that it is not proper for the courts to recognize them."[134]

Take, for example, *Connelly v. McKay*, where the court refused to acknowledge a statement as defamatory because it was contrary to public interest.[135] Connelly owned a service station and rooming house that catered to truck drivers.[136] Connelly claimed that McKay defamed him because McKay falsely reported to Connelly's business clientele that Connelly operated as an informer for the Interstate Commerce Commission and reported truckers who violated its rules.[137] The court explicitly stated that under no circumstances would the statement be defamatory because Connelly's reputation would only diminish in the eyes of "violators of the law."[138] The court stated that because the plaintiff's reputation was only lowered in the view of the wrong-thinking community,

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126 *See infra* Part III.B.

127 *Notes*, *supra* note 87, at 1387.

128 *Id.* at 1387 n.1.

129 Lidsky, *supra* note 77, at 7.

130 *Id.* at 9 ("This idealized community often reflects not the views of a given plaintiff's actual community but the views of the dominant groups in society or, more aptly, what the judge believes to be the dominant groups in society.").

131 *Id.* at 7.

132 Peck v. Tribune Co., 214 U.S. 185, 190 (1909).

133 Fogle, *supra* note 17, at 173. *See also Notes*, *supra* note 87, at 1391.

134 RESTATEMENT (SECOND) OF TORTS § 559 cmt. e (1977).

135 Connelly v. McKay, 28 N.Y.S.2d 327, 329 (Sup. Ct. Broome Co. 1941).

136 *Id.* at 328.

137 *Id.*

138 *Id.* at 329.

specifically criminals, it would not recognize those interests even where the outcome punished the law-abiding informers in society.[139] The court substituted its own values for that of a pre-existing community because the court did not feel the subgroup's conduct was tolerable in the civilized community.[140] Ignoring the community subgroup's values, the court instead used what it *wished* the subgroup's values had been, namely those of law-abiding citizens.[141] Moreover, the court's decision that certain groups are not respectable or right-thinking marginalizes the plaintiff in his or her community and removes the protections of the law.[142] As applied to the context of homosexuality, it appears that depending on a judge's proclivities, falsely identifying a person as homosexual can receive radically different treatment under defamation law's community standards, and again, the plaintiff is not afforded the protections of the law.

B. Obscenity Law's Community Standard

The Constitution's right to freedom of speech and expression does not protect every utterance,[143] as has been illustrated by defamation cases. Likewise, constitutional limits are also placed on materials deemed obscene.[144] Obscenity is material involving sex that appeals to the "prurient interest."[145] The U.S. Supreme Court, in the landmark obscenity case *Miller v. California*, created a three-part test to determine whether material is obscene and therefore unworthy of constitutional protection.[146] The test asks: (a) whether an "average person, applying contemporary [local] community standards find[s] that the work, taken as a whole, appeals to the prurient interest"; (b) "whether the work depicts or describes, in a patently offensive way, sexual conduct," as defined by the state law; and (c) whether the work in question "lacks serious literary, artistic, political, or scientific value."[147] A proposed jury instruction defines obscenity by what is not obscene; for instance, something is not obscene simply because a person does not like it, it involves sex or nudity, or it offends personal taste.[148]

Unlike the mythical and undefined community in defamation, the *Miller* Court made clear that there was no such thing as a national community standard, describing such a standard as "hypothetical and unascertainable."[149] The Supreme

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139 *Id.*

140 Lidsky, *supra* note 77, at 24.

141 *Id.* at 21.

142 *Id.* at 22.

143 U.S. CONST. amend. I.

144 Miller v. California, 413 U.S. 15, 23 (1973). *See also* 50 AM. JUR. 2D *Lewdness, Indecency, Etc.* § 4 (2010).

145 Roth v. United States, 354 U.S. 476, 487 (1957).

146 *Miller*, 413 U.S. at 23.

147 *Id.* at 24.

148 *See* S. Saltzburg & H. Perlman, Federal Criminal Jury Instructions § 40.02 (1985) (defining obscenity).

149 *Miller*, 413 U.S. at 30-31.

Court stated "our Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 states in a single formulation."[150] The States are permitted to enact legislation that defines the geographical boundaries of the community.[151] The community, in an obscenity case tried in federal district court, is the judicial district in which the court sits.[152] In *Hamling v. United States*, the U.S. Supreme Court defines the community even more narrowly and instructs the juror to make the define her community, based on her own knowledge of the views of the average person in the community from which she comes.[153]

Justice Frankfurter stated in his concurring opinion in *Smith v. California* that he would require that evidence be admitted to define the contours of the community, but, as yet, expert testimony is not required.[154] The trial court in *Miller* admitted expert testimony from a police officer who specialized in obscenity offenses, and who had conducted an extensive statewide survey, to give evidence on California community standards.[155]

The community is not comprised of a particular subgroup of people, such as the young, immature, prudish, or even the most sophisticated.[156] Rather, the obscenity test inquires whether the average person—applying contemporary community standards—finds that the work taken as a whole, appeals to the prurient interest.[157] "Prurient" is defined as an excessive or unusual interest in matters involving sex.[158] The "average person" is understood to be comparable to the "reasonable person" in civil tort litigation.[159]

The *Miller* and *Smith* courts were highly sensitive to the subjective limitations that time and location placed on the community standard. Just as there were differences in what was deemed obscene in 1959 versus 1859,[160] the people of Georgia or Mississippi may find different material obscene than those in Massachusetts or New York City.[161] Obscenity law's community standard allows

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150 *Id.* at 30.

151 Jenkins v. Georgia, 418 U.S. 153, 157 (1974).

152 *See* Hamling v. U.S., 418 U.S. 87, 105-06 (1974).

153 *Id.* at 104-05.

154 Smith v. California, 361 U.S. 147, 165-67 (1959). Justice Harlan likewise agreed that due process requires that a litigant be required to offer proof of the community. *Id.* at 171-72.

155 *Miller*, 413 U.S. at 31 n.12.

156 *See, e.g.*, Roth v. U.S., 354 U.S. 476, 489-90 (1957); *Miller*, 413 U.S. at 33.

157 *Miller*, 413 U.S. at 24.

158 BLACK'S LAW DICTIONARY 578 (3d ed. 2006) ("[c]haracterized by or arousing inordinate or unusual sexual desire.").

159 *See* Hamling v. U.S., 418 U.S. 87, 104-05 (1974) (finding "[a] juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a 'reasonable' person in other areas of the law"); State v. Nelson, 95 N.W.2d 678, 681 (Neb. 1959) (holding that the average person in obscenity law is comparable to the reasonable person in tort litigation).

160 *Smith*, 361 U.S. at 165-66.

161 *Miller*, 413 U.S. at 32.

each particular community's values to control. Adopting such a standard in defamation law would also allow each particular community's values to determine if a person's reputation has been damaged.

Obscenity, therefore, forbids certain sexual expression because it goes against what society deems is decent. Homosexuality is frequently defined by its sexual activity. Because a defamatory statement imputing homosexuality implies certain sexual behavior, there is a correlation between homosexuality and obscenity. Obscenity and the imputation of homosexuality in defamation litigation share sex as a common denominator. For this reason, applying obscenity law's contemporary community standard for defamation is practicable.

III. DEFAMATORY IMPUTATIONS OF HOMOSEXUALITY

For decades, courts have routinely found that falsely identifying someone as gay damaged a person's reputation and was deemed defamatory.[162] In recent years, however, courts have reached divergent results regarding the imputation of homosexuality.[163] Among cases that address the false imputation of homosexuality, there is a clear trend of the haves and have-nots: some courts have a clearly identified the relevant community, but most have not.[164] The lack of a clearly identified community allows too much judicial discretion and bias into the court's determination of whether a statement is defamatory.[165] While some courts have been able to identify the relevant community, there is still lack of consensus

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[162] *See, e.g.*, Manale v. City of New Orleans, Dept of Police, 673 F.2d 122 (5th Cir. 1982) (finding that statements alleging officer was a homosexual injured his reputation and deprived officer of benefit of public confidence); Nazeri v. Missouri Valley College, 860 S.W.2d 303, 312 (Mo. 1993) (finding statement that woman lives with lesbian defamatory because matters of sex and sexuality are intensely private); Schomer v. Smidt, 113 Ca. App. 3d 828, 170 Cal. Rptr. 662 (1980) (holding that lesbianism implies unchaste and immoral behavior, therefore, false accusation of homosexual conduct is slanderous per se).

[163] *See, e.g.*, Stern v. Cosby, 645 F. Supp. 2d 258 (S.D.N.Y. 2009) (finding that falsely identifying a person as a homosexual does not constitute defamation per se); Albright v. Morton, 321 F. Supp. 2d 130 (D. Mass. 2004) (holding that wrongly identifying a person as a homosexual was not defamation per se); Regehr v. Sonopress, Inc., No. 2:99CV690K, 2000 WL 33710902, at *1 (D. Utah Apr. 14, 2000) (finding that homosexual status does not fit into any of the defined defamation categories, and declining to create a new category, plaintiff's claim for defamation is dismissed); Wilson v. Harvey, 842 N.E.2d 83, 89 (Ohio Ct. App. 2005) (finding against plaintiff's defamation claim because homosexuality is not a crime, and it is not a disease).

[164] *E.g.*, Albright, 321 F. Supp. 2d at 130 (defining the community as a considerable and respectable class); Donovan v. Fiumara, 442 S.E.2d 572, 576-77, 580 (N.C. Ct. App. 1994) (finding that being called a homosexual is not per se defamatory because of changing social mores, but does not attempt to define the community); Nazeri, 860 S.W.2d at 312 (finding statement that woman lives with lesbian defamatory because matters of sex and sexuality are intensely private and defining the community ambiguously as 'society'); Moricoli v. Schwartz, 361 N.E.2d 74, 76 (Ill. App. Ct. 1977) (holding that being called fag is not per se because of changing temper of the times, but not using a community standard to determine the changing temper of the times)

[165] *See* Patricia C. Kussman, *Imputation of Homosexuality as Defamation*, 7 A.L.R. 6th 135 (2005), for an exhaustive list of cases that have addressed imputation of homosexuality as defamation.

on the outcome of these defamation cases.[166] Some courts have held that calling a person gay was defamatory, while other courts have not.[167]

A. The Lack of a Clearly Identified Community

Many of the cases that decide whether the imputation of homosexuality is defamatory do not identify a community in their defamation analyses[168] and they seldom identify expert testimony, surveys, or polls from which the court can glean the prevailing values and attitudes of the community.[169] Rather, courts often apply their own standard, blended from personal experiences, to achieve a judicially desirable outcome.[170] Sometimes, however, the damage to a person's reputation can be so great that the court's non-finding of a clearly identified community is justifiable in accordance with defamation per se. Defamation is an injury to one's reputation by making a false statement to a third person.[171] A statement is defamation per se when the statement itself is not capable of "an innocent meaning,"[172] Statements that are considered defamation per se include the following: "[statements] charging plaintiff with a serious crime; [statements] tend[ing] to injure plaintiff in its business, trade, or profession; [statements] that plaintiff has some loathsome disease; or [statements] that impute unchastity."[173] Thus, many of the cases that decide whether the imputation of homosexuality is defamatory seemingly do not have a requisite community standard because the accusation itself is so egregious that it will always be considered defamatory.

A number of courts have decided the issue of whether being falsely identified as a homosexual is actionable simply based upon the whether the statement suggests someone committed a crime. For example, in *Moricoli v. Schwartz*, the Illinois Appellate Court held that calling a nightclub singer a "fag" did not constitute defamation per se because the statement did not suggest the accusation of a crime.[174] The court held that simply being called a homosexual was not construed as committing a crime.[175] Likewise, the New York Supreme Court concluded in *Stein v. Trager* that a person must be charged with a punishable crime in order for defamation per se to apply, and being a homosexual was not a crime.[176] Moreover, the U.S. Supreme Court's decision in *Lawrence v. Texas*, which decriminalized consensual same-sex sexual relations, removed the

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166 *See* discussion *infra* Part III.B.

167 *See infra* Part III.B.

168 *See Notes*, *supra* note 87, at 1.

169 Lidsky, *supra* note 77, at 7.

170 *See id.* at 7, 24; *Notes*, *supra* note 87, at 1391.

171 RESTATEMENT (SECOND) OF TORTS § 559 (1977).

172 BLACK'S LAW DICTIONARY 479 (9th ed. 2009).

173 50 AM. JUR. 2D *Libel and Slander* § 24 (2010).

174 Moricoli v. Schwartz, 361 N.E.2d 74, 76 (Ill. App. Ct. 1977).

175 *Id.*

176 Stein v. Trager, 232 N.Y.S.2d 362, 364 (Sup. Ct. Erie Co. 1962).

implication that a person committed a crime of moral turpitude by engaging in consensual homosexual conduct from the defamation per se categories.[177]

A number of courts have found that the imputation of homosexuality is defamation per se under a number of the other per se categories. For example, in *Buck v. Savage*, the Texas Court of Civil Appeals found slander per se when the chief stockholder and company president called a former employee "queer" and stated that he was "going together" with another man.[178] The Court held that "going together" implies an unnatural sexual relationship.[179] Additionally, in *Schomer v. Smidt*, the California Court of Appeal found that calling a female airline attendant a lesbian implies abnormal sexual behavior and a lack of chastity.[180] Chastity, the Court held, applies to being called a lesbian because it affects a woman's prospect of marriage just as the implication of adultery does.[181] In *Manale v. City of New Orleans, Department of Police*, the United States Court of Appeals for the Fifth Circuit held that a coworker's repeated remarks calling Manale "a little fruit" and gay in front of other officers were defamatory per se because the comments "deprived [Manale] of the benefit of public confidence" and injured his reputation.[182] The above-mentioned cases reflect the view that the imputation of homosexuality itself is offensive enough to qualify under one of the defamation per se classifications and does not require a community standard from which to measure society's contemporary values.

In recent years, however, based on changing social mores, some courts are finding that the false accusation of homosexuality is not defamation per se. For instance, in 1990, the Florida Court of Appeals found that the "modern view" of homosexuality reflects that the accusation of being a homosexual can no longer constitute slander per se.[183] After finding that being a homosexual is not a crime, the North Carolina Court of Appeals held in *Donovan v. Fiumara* that due to changing social mores the court was unable to find the accusation of homosexuality to be defamatory per se.[184] The court reasoned that in the mid 1990s, the court was "unable to rule the bare allegation that an individual is 'gay' or 'bisexual' constituted an accusation which, as a matter of law . . . holds that individual up to 'disgrace, ridicule or contempt.'"[185] Similarly, in *Moricoli v. Schwartz*, the New York Supreme Court held that "in view of the changing temper of the times," the court did not wish to create an additional per se category for the imputation of

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177 *See* Lawrence v. Texas, 539 U.S. 558 (2003).

178 Buck v. Savage, 323 S.W.2d 363, 367 (Tex. App. 1959).

179 *Id.*

180 Schomer v. Smidt, 170 Cal. Rptr. 662, 665 (Cal. Ct. App. 1980).

181 *Id.* at 666.

182 Manale v. City of New Orleans, Dep't of Police, 673 F.2d 122, 125-26 (5th Cir. 1982).

183 Boehm v. American Bankers Ins. Group, Inc., 557 So. 2d 91, 94 (Fla. Dist. Ct. App. 1990).

184 Donovan v. Fiumara, 442 S.E.2d 572, 576-77, 580 (N.C. Ct. App. 1994).

185 *Id.* at 580.

homosexuality.[186] The courts in both *Moricoli* and *Donovan* found that society's opinion of homosexuals was not sufficiently damaging to a person's reputation to justify finding the imputation to be defamatory as a matter of law.

These cases illustrate why some commentators have declared defamation law to be confusing, and unclear.[187] Defamation per se categories are intended to represent society's unilateral view of certain classifications of statements. However—as the cases illustrate—even the recognized per se categories are not immune to changing social mores, and yet again, a single judge's normative decision of society's beliefs determines whether a particular statement is defamatory.

B. How and When a Community is Defined and Used in Defamation Cases

Two recent cases articulated a clear and identifiable community in their analyses.[188] *Albright v. Morton*, a 2004 Federal District Court case in Massachusetts, held that the imputation of homosexuality does not constitute defamation per se.[189] What is notable about *Albright* is not the holding of the case, but rather, the way in which the Massachusetts District Court reached its conclusion. *Albright* measured the alleged defamatory statement against the "considerable and respectable class of the community," and then went on to articulate how it defined the considerable and respectable class.[190] The court stated that since the U.S. Supreme Court's decision in *Lawrence v. Texas*, same-sex relations have continued to be classified as imputing a crime, "demean[ing] the lives of homosexual persons."[191]

Rejecting as "offensive" the contention that homosexuals are less than reputable members of the community, *Albright* provided multiple examples of what constituted its "considerable and respectable" community.[192] First, the court referenced the Massachusetts Supreme Judicial Court's decision in *Goodridge v. Department of Public Health*,[193] which held that prohibiting same-sex couples from marrying was unconstitutional.[194] At the time of the decision in 2004, Massachusetts was the first and only state in the nation to allow same-sex couples

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[186] Moricoli v. Schwartz, 361 N.E.2d 74, 76, (Ill. App. Ct. 1977). The court noted that William Prosser pushed for the creation a fifth defamation per se category to cover the imputation homosexuality, because of the "popular feelings on the matter." *Id.*

[187] *See* Robert M. Ackerman, *Bringing Coherence to Defamation Law Through Uniform Legislation: The Search for an Elegant Solution*, 72 N.C. L. REV. 291, 293 (1994) (finding defamation "one of the most uncertain areas of modern American jurisprudence.").

[188] *See* Albright v. Morton, 321 F. Supp. 2d 130 (D. Mass. 2004); Stern v. Cosby, 645 F. Supp. 2d 258 (S.D.N.Y. 2009).

[189] *See Albright*, 321 F. Supp. 2d at 136.

[190] *Id.*

[191] *Id.* at 137 (quoting Lawrence v. Texas, 539 U.S. 558, 575 (2003)).

[192] *Id.*

[193] *Id.* at 137; Goodridge v. Department of Public Health, 798 N.E.2d 941 (Mass. 2003) (finding that the State does not have a rational basis with which to deny same-sex couples the right to marry).

[194] *See Albright*, 321 F. Supp. 2d at 137-38.

to marry. *Albright* also noted several state statutes prohibiting discrimination on the basis of sexual orientation in housing, services, and employment, as well as hate crimes legislation based on sexual orientation.[195]

In *Stern v. Cosby*, a 2009 New York Federal District Court case, the court held that falsely identifying a person as a homosexual does not constitute defamation per se.[196] *Stern* did not pinpoint a specific community, such as the substantial and respectable minority or the right-thinking community, to determine whether a statement was defamatory. Instead the court stated that whether a statement is defamatory depends "upon the temper of the times, [and] the current of contemporary public opinion."[197] Like the court in *Albright*, the *Stern* court noted that the Supreme Court's decision in *Lawrence* removed one of the categories of defamation per se: the accusation of a crime.[198] The court acknowledged that New York Governor David Paterson introduced a same-sex marriage bill just a few months before the court's decision.[199] Additionally, the court cited opinion polls from Quinnipiac University finding that a clear majority of New York residents supported civil unions and fifty-one percent supported gay marriage.[200] Thus *Stern*, like *Albright*, identified who and what the community represented, not by judicial fiat, but rather by surveying each state's perceptions of homosexuality and concluding that contemporary public opinion in each state "does not support the notion that [the state's citizens] view gays and lesbians as shameful or odious."[201]

In assessing whether a statement was defamatory per se, the Colorado Court of Appeals in *Hayes v. Smith* focused on whether homosexuals belonged in a category with persons deserving social approbation and concluded that they did not.[202] There was not any empirical evidence presented to indicate that homosexuals were held in disfavor by society in Colorado; in fact, the court found that "the community view toward homosexuals [was] mixed," and cited different city human rights laws to support its assertion.[203] Although the *Hayes* court refers simply to "society," it measured society's opinions in order to reach its conclusion that the statements concerning plaintiff's homosexuality did not constitute defamation per se.[204]

Courts have also used the community standard to find that the imputation of homosexuality is defamatory. For example, in *Nazeri v. Missouri Valley College*, the Supreme Court of Missouri held that falsely calling someone a homosexual was

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195 *See id.* at 137.

196 *See* Stern v. Cosby, 645 F. Supp. 2d 258, 276 (S.D.N.Y. 2009).

197 *Id.* at 273.

198 *See id.* at 274.

199 *See id.*

200 *See id.*

201 *Id.*

202 *See* Hayes v. Smith, 832 P.2d 1022, 1025 (Colo. App. 1991).

203 *Id.*

204 *Id.* at 1025-26.

defamatory.[205] Finding that defamation was defined by the characteristics of the plaintiff and the society around the plaintiff, the Court stated that homosexuality was "viewed with disfavor, if not outright contempt, by a sizeable proportion of [Missouri's] population."[206] However, the Court did not articulate how it reached its conclusion, nor did it provide public opinion polls, legislation, or even testimony to substantiate its conclusion that Missouri viewed homosexuals with contempt.[207] The court went further and stated that "[i]n this society, an untruthful declaration concerning homosexual orientation must be considered damaging to reputation . . ."[208] Without identifying authority to support its proposition, there is no way to know for sure upon whose values the court relied.

Regardless of the outcomes of the above cases, *Albright* and *Stern* illustrate a model that should be followed: identify the relevant community and corroborate the finding with support such as public opinion polls, testimony, legislation, or case law. Doing so removes any implicit or explicit biases and the outcome ensures a true reflection of the community's views.

IV. THE NEED FOR A REFLECTIVE COMMUNITY STANDARD

"People in different states vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity."[209] Although the U.S. Supreme Court was referring to the community standard used in its groundbreaking obscenity case, *Miller v. California*, the statement is just as applicable in defamation law.[210] The false imputation of homosexuality has proven that there is no consistency in defamation law. A rigid or national community standard is unacceptable because each community views homosexuality according to the community's values and mores, and not that of a fictitious or national standard.

However, because society is constantly evolving, the community standard utilized in defamation law must adapt and develop over time. To remedy this problem, the courts could adopt the contemporary community standard used in obscenity law, which would reflect the average person's view in any given contemporary community. Although defamation and obscenity do not seem to have much in common at first blush, the adjudication of whether the false imputation of homosexuality is defamatory and obscenity law are both rooted in sexuality. Homosexuality and obscenity imply certain sexual behaviors. Although vastly different, both defamation and obscenity law share a focus on community standards. Because of the inherent overlap between subject matter and the societal

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205 *See* Nazeri v. Missouri Valley College, 860 S.W.2d 303, 312 (Mo. 1993).

206 *Id.*

207 *See Nazeri*, 860 S.W.2d 303.

208 *Id.*

209 Miller v. California, 413 U.S. 15, 33 (1973).

210 *Id.*

measure of what is deemed prurient or harmful to reputation, obscenity law's community standard should be used in defamation cases. Alternatively, courts should abandon the antiquated right-thinking and respectable minority standards and simply articulate what authority is used to determine if a statement is defamatory.

A. Application of Obscenity Law

The U.S. Supreme Court has recognized the right to engage in consensual sexual relations as a fundamental right.[211] Many in the public define homosexuality as an issue of sex and many sociological and medical studies establish that homosexuality is an immutable trait.[212] Obscenity, likewise, is also about sex, although obscenity laws limit themselves to acts deemed offensive or lacking artistic merit. Ignoring the technical differences in the law, obscenity and defamation share many traits because the imputation of homosexuality in defamation cases is based on society's attention to and view of sex. This is the same with obscenity cases. However, obscenity and defamation laws deal with sex in different ways based upon how the court defines the community's values. Obscenity law's contemporary community standard is superior to defamation law's community standard, as it is currently applied, because the contemporary community standard is a more accurate reflection of the individual community's values. The contemporary community standard is geographic specific and reflects the current social climate.

Openly discussing the formulation of a community would allow for transparency in the judicial process. Using obscenity law's contemporary community standard would ensure that the measure of a defamatory statement could evolve from one generation to the next. Obscenity law succeeds because the application of the contemporary community standard permits evaluation of what is and is not obscenity in any given community. Moreover, the average person represents the majority's opinion; he or she is neither too liberal nor too conservative, too old or too young. An average person standard is an improvement over standards based upon the fictitious right-thinking or respectable minority.

B. Why Albright *and* Stern *Got it Right—Modern Authority*

The courts in *Albright* and *Stern* articulated their findings by citing recent case law, legislation, and public opinion polls to define community.[213] Both cases provided a justification for their findings so that the community standard, and the

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[211] *See supra* Part I.B.

[212] *See* Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915, 937-38 (1989).

[213] *See* Albright v. Morton, 321 F. Supp. 2d 130 (D. Mass. 2004); Stern v. Cosby, 645 F. Supp. 2d 258 (S.D.N.Y. 2009).

courts' analysis, was separately identifiable.[214] The courts were not lurking in the shadows, possibly relying on their own biases or skewed societal perceptions regarding homosexuality.[215] Instead the courts were upfront and open regarding how they reached their decisions, relying in part on the modern authority of social science research.[216] There is important precedent for this approach in *Brown v. Board of Education*.[217]

1. *Brown v. Board of Education* as Precedent

The Supreme Court has likewise relied on unconventional sources in one of the country's most important civil rights cases, *Brown v. Board of Education*.[218] The opinion began by stating that the history surrounding the adoption of the Fourteenth Amendment was "[a]t best . . . inconclusive" and that the status of public education provided little help in resolving the case before it.[219] *Brown* struggled with how to overcome the precedent of *Plessy v. Ferguson*'s[220] infamous separate but equal doctrine, and focused on whether the Fourteenth Amendment granted the Court the power to end segregation.[221]

Chief Justice Warren, writing for a unanimous Court, stated that, "in the field of public education the doctrine of 'separate but equal' has no place."[222] Without case law as a basis, the Court concluded that historical and legislative analysis was not enough to reach a conclusion, and instead examined the issue from the present day importance of education.[223] In its decision, the Court asked: "Does

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214 *See Albright*, 321 F. Supp. 2d 130; *Stern*, 645 F. Supp. 2d 258.

215 *Id.*

216 *Id.*

217 *See* Brown v. Board of Educ., 347 U.S. 483 (1954).

218 *Id.* at 493-95 (finding "separate but equal" unconstitutional under the Fourteenth Amendment). The Supreme Court in 1952 granted certiorari to review five consolidated cases that challenged the "separate but equal" doctrine in the context of primary and secondary education. *Id.* at 486-88. After the first round of oral arguments, the Court issued a *per curiam* order scheduling a second round of oral arguments. MICHAEL D. DAVIS & HUNTER R. CLARK, THURGOOD MARSHALL: WARRIOR AT THE BAR, REBEL ON THE BENCH 165 (1992). However, before the second round of arguments could be heard, Chief Justice Fred Vinson died of a sudden heart attack, and President Eisenhower appointed California politician Earl Warren to the position of Chief Justice. *Id.* at 170. At a conference of the justices following re-argument, Warren was first to speak, and he stated that segregation was intolerable: "Personally, I can't see how today we can justify segregation based solely on race." *Id.* at 174.

219 *Brown*, 347 U.S. at 489-90.

220 Plessy v. Ferguson, 163 U.S. 537, 551 (1896) (holding that segregation did not violate the Fourteenth Amendment, and that any "badge of inferiority" due to segregation was the result of the psychological "construction" that "colored people" themselves attached to the stigma).

221 *Id.* at 166. *See also* Brief of Appellants at 13-14, *Brown*, 347 U.S. 483 (No. 1) 1953 WL 48699. For the second round or arguments, the parties were asked to answer five questions that focused on whether the Fourteenth Amendment granted the Court the power to end segregation. *Id.* The questions specifically asked whether the history and the intent of the State legislatures and conventions that ratified the Fourteenth Amendment contemplated the end of segregation; does the Court have the power to end segregation in the nation's public schools; and if the Court abolishes segregation, how should the Court remedy the then-existing segregation. *Id.*

222 *Brown*, 347 U.S. at 495.

223 *Id.* at 489-90.

segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does."[224]

Notably lacking in the decision is judicial precedent.[225] The lack of favorable case law did not stop the Justices: "In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation."[226] To further support its conclusion that "separate but equal" was unconstitutional, the Court cited the "modern authority" of seven social science reports.[227] Chief Justice Warren included the reports "because [he] thought the point it made was the antithesis of what was said in *Plessy*"[228] and also because it's possible that, without the social science reports, the Court might not have passed *Brown* unanimously.[229] Just as the U.S. Supreme Court relied on secondary sources to support its decision in *Brown*,[230] so too can courts in defamation actions rely on similar authority to define the community and assess the applicable standard.

2. Other Examples of the United States Supreme Court Employing Modern Authority

Brown was not the first time the U.S. Supreme Court relied on modern authority to support its ruling. The first time the Court did so was in *Muller v. Oregon* when the Court upheld a state law that set the maximum number of hours a woman could work in a day to ten hours.[231] Louis D. Brandeis, as counsel for the state of Oregon, submitted a brief to the Court full of empirical data including medical conclusions, social worker reports, expert testimonials, and factory

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[224] *Id.* at 493. The Court may have framed the question this way because the Court in *Sweatt v. Painter*, 339 U.S. 629 (1950), was able to side step the constitutional question of "separate but equal" based on grossly unequal tangibles. Sweatt v. Painter, 339 U.S. 629, 634 (1950). The University of Texas Law School, one of the nation's top ranking law schools, had sixteen full-time and three part-time faculty members, and the black-only law school had only five faculty of its own. *Id.* at 632-33. Additionally, the University of Texas Law School had 65,000 books in its library, 850 enrolled students, a law review, and moot court facilities. *Id.* at 633-34. Conversely, the Texas State University of Negroes was not accredited, had only 16,500 volumes in the library, and twenty-three students. *Id.* at 633. The Court found the black-only law school was in violation of the Equal Protection Clause of the Fourteenth Amendment because the educational opportunities afforded to white and black law students were not substantially equivalent. *Id.* at 634-36.

[225] *See Brown*, 347 U.S. 483.

[226] *Id.* at 492-93.

[227] *Id.* at 494 n.11.

[228] RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 706 (1975).

[229] ERWIN CHEMERINSKY, *supra* note 69, at 670.

[230] *See Brown*, 347 U.S. at 493-94.

[231] Muller v. Oregon, 208 U.S. 412 (1908).

inspector observations.[232] The brief later became known as the "Brandeis Brief," and its data was relied on by the Court to support its conclusion that "when women worked long hours, it was destructive to their health and morals."[233]

Similarly, in *Lawrence*, the U.S. Supreme Court also relied on secondary sources when it held that states may not prohibit two consenting adults of the same sex from engaging in private consensual sexual activity.[234] As if heralding its holding in *Brown*, the Court stated, "history and tradition are the starting point but not in all cases the ending point . . . ."[235] The Court went on to illustrate a trend towards recognizing that laws prohibiting same-sex sexual relations should be invalidated.[236] The Court provided as an example the fact that although a number of states had sodomy statutes on the books, most were ignored.[237] The British Parliament repealed its laws prohibiting same-sex sexual relations in 1967.[238] In 1981, the European Court of Human Rights held that Northern Ireland's law that forbids consensual same-sex relations was invalid under the European Convention on Human Rights.[239] In conclusion, the Court held that "[t]he State cannot demean [homosexuals'] existence[s] or control their destiny by making their private sexual conduct a crime."[240]

3. Putting It All Together

The *Brown*, *Muller*, and *Lawrence* decisions offer examples from the U.S. Supreme Court whereby the Court relied on secondary authority to reach or support its decisions. Just as the Supreme Court has done so, state and federal courts can also rely on secondary authority to clearly and articulately define the community in defamation cases. Since the Court relied on social science reports, case law, legislation, and expert testimony, so too should all the courts use the same sort of modern authority to define the community. There has been criticism concerning the use of social science data, especially as it relates to the Court's decision in *Brown*, finding that the data was "methodologically unsound."[241] Despite the criticism, however, courts continue to utilize social science.[242] Moreover, the

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232 CHEMERINSKY, *supra* note 69, at 617-18.

233 *Id.*

234 Lawrence v. Texas, 539 U.S. 558, 567-71 (2003).

235 *Id.* at 572 (citation omitted).

236 *Id.* at 572-74.

237 *Id.* at 572.

238 *Id.* at 572-73.

239 *Id.* at 573. The European Convention on Human Rights was authoritative in twenty-one European nations at the time of the decision. *Id.*

240 *Id.* at 578.

241 Mark G. Yudof, *School Desegretation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court*, 42 LAW & CONTEMP. PROBS. 57, 70 (1978) (finding that "[v]irtually everyone who has examined the question now agrees that the Court erred.").

242 *See, e.g.*, Alan J. Tomkins & Kevin Oursland, *Social and Social Scientific Perspectives in Judicial Interpretations of the Constitution*, 15 LAW & HUM. BEHAV. 101, 103 (1991) (finding that "despite the fact that there has been a historical *tension* between social science and the law . . . this does

modern authority that courts should employ does not rely exclusively on empirical evidence, but encompasses a wide array of resources to gauge society's makeup as it relates to homosexuality.

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, as measured by the opinion others have or may have of the person.[243] The citation of public opinion polls, legislation proposed or in effect, and trends in case law suggest to the reader that the statement was deemed defamatory based upon society's real, articulated values. 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. Judicial biases do not accurately define what is defamatory in any community, and more importantly, do not provide proper relief to the plaintiff who has been defamed.[244]

CONCLUSION

The false imputation of homosexuality in defamation cases has impacted defamation law by revealing a community standard which may not be a true reflection of the community's values. This is a crippling limitation because the threshold determination in every defamation matter is whether the false statement harms the reputation of the individual within his or her community, as measured by the opinions others have or may have of the person. This limitation is especially apparent in the context of the imputation of homosexuality. There is no uniform criterion by which to gauge the defamatory statement. Often, courts use the "right-thinking" members of the community, or a "substantial and respectable minority,"[245] but the court's choice of the relevant community in effect becomes a policy choice reflecting the court's personal values and not those of the community. As such, the community, or lack thereof, often reveals a judge's bias and personal values.

There are two alternatives the courts could use to create either a more uniform standard to decide whether a particular statement is defamatory, other than simply requiring the court to identify the contours of the "community" used. First, the courts should articulate their findings by citing trends in legislation, public polls, or rely on expert testimony. Requiring the courts to identify the relevant community removes any implicit or explicit biases, and provides an articulable basis on which future courts may rely. Courts should rely on a whole range of

not imply that social science has been *excluded* from the courts"); Richard Lempert, *"Between Cup and Lip": Social Science Influences on Law and Policy*, 10 LAW & POL'Y 167, 192 (1988) (stating that "social science is used directly by trial courts, and it is used increasingly with each passing year").

243 PROSSER & KEETON, *supra* note 71, at 771.

244 Lidsky, *supra* note 77, at 17-20.

245 *See supra* Parts II.A.1, II.A.2.

modern authority to determine how society views homosexuality to determine if the statement is defamatory. For instance, Massachusetts, Connecticut, Iowa, Vermont, and New Hampshire issue marriage licenses to same-sex couples.[246] Eighteen states and the District of Columbia offer benefits to same-sex partners of state employees.[247] Contrast this with California's voters defining marriage as between a man and a woman by proposition in November 2008, overturning a California Supreme Court decision that held same-sex couples had a state constitutional right to marry.[248] Additionally, Maine defeated legislation approving same-sex marriage by referendum in November 2009,[249] and Hawaiian lawmakers decided to permanently postpone the vote on a bill that would legalize same-sex unions in January 2009.[250]

Alternatively, courts could employ the contemporary community standard that is used in obscenity law. Using the contemporary community standard would remove the subjective determination of a "rightful thinking" or "respectable" class of citizens, and instead replace it with the "average" person as made up from a limited or targeted geographical area. Furthermore, the contemporary community standard is constantly evolving as the "average" person condones or favors the current societal change. Just as Part I.A and I.B of this Note demonstrated, what society deems sexually acceptable is constantly evolving. In order for potential plaintiffs to have adequate recourse in their specific geographic location, a change needs to be adopted, and either proposed reform in this Note would add transparency and accuracy to defamation analysis.

When the NYU reporter defamed Jerry Seinfeld's character in *Seinfeld*, Jerry tried to protect his reputation as a heterosexual male by telling everyone that he was not gay. As a plaintiff, if Jerry chose to sue the reporter for defamation, either of the two proposed reformations would present a more just model for defining Jerry's New York City community.[251] If the court relied on modern authority, the court

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[246] National Conference of State Legislatures, Same Sex Marriage, Civil Unions and Domestic Partnerships, http://www.ncsl.org/IssuesResearch/HumanServices/SameSexMarriage/tabid/16430/Default.aspx (last visited Feb. 13, 2010).

[247] National Conference of State Legislatures, States Offering Benefits for Same-Sex Partners of State Employees, http://www.ncsl.org/Default.aspx?TabId=16315 (last visited Feb. 13, 2010). The states include Vermont (1994), New York (1995), Hawaii (1997), Oregon (1998), California (1999), Connecticut (2000), Maine (2001), Rhode Island (2001), Washington (2001), Iowa (2003), New Mexico (2003), New Jersey (2004), Montana (2005), Alaska (2006), Illinois (2006), Arizona (2008), Wisconsin (2009), and Maryland (2009). *Id.*

[248] *See* Jesse McKinley & Laurie Goodstein, *Bans in 3 States On Gay Marriage*, N.Y. TIMES, Nov. 6, 2008 at A1.

[249] Susan Sharon, *Maine Voters Reject Gay Marriage* (NPR radio broadcast Nov. 4, 2009) *available at* http://www.npr.org/templates/story/story.php?storyId=120080859.

[250] Mark Niesse, *Hawaii Nixes Same-Sex Civil Unions Bill*, WASHINGTON POST, Jan. 29, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/01/29/AR2010012903706.html.

[251] Assuming, of course, if a lawsuit was filed this year, there would not be a statute of limitations issue.

could use a June 23, 2009 Quinnipiac University poll that showed fifty-one percent of New York voters indicated that they supported same-sex marriage.[252] The court could also rely on the laws of its state, which prevent discrimination in employment decisions, housing, adoption, and legislation that protects individuals based of their sexual orientation.[253] Additionally, New York recognizes same-sex marriage licenses from other states.[254] However, the court could also consider that although Governor David Paterson introduced legislation in favor of same-sex marriage, the New York Senate voted down the bill 38-to-24.[255] Regardless of the court's decision in Jerry's defamation case, citing any or all of these authorities would reflect New York's community values, and not simply judicial bias.

If Jerry's hypothetical defamation case used the contemporary community standard from obscenity law, the judge or jury would examine how an average person in New York City viewed homosexuality. The judge or jury might also look to legislation or public opinion polls, but would ultimately focus on how the average person, applying contemporary community standards, viewed homosexuality. The benefit of the obscenity community standard is that what is deemed obscene, or in this case, defamatory, evolves with society's mores. Applying either of the community standards in New York City, a judge may find that Jerry was defamed by the news media when it reported that Jerry was a homosexual, "not that there's anything wrong with that."[256]

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[252] *See* Quinnipiac University, *New York State Voters Support Same-Sex Marriage Quinnipiac University Poll Finds*, June 23, 2009, http://www.quinnipiac.edu/x1318.xml?ReleaseID=1340. *See also* Reuters, New Yorkers Supportive of Gay Marriage: Poll, http://www.reuters.com/article/idUSTRE55M4IL20090623. (last visited Jan. 21, 2010).

[253] *See, e.g.*, N.Y. CIV. RIGHTS § 40-c (McKinney 2011) (stating all citizens entitled to equal protection of the laws and shall not be discriminated against because of sexual orientation "by any other person or by any firm, corporation or institution, or by the state or any agency or subdivision of the state"); N.Y. DOM. REL. § 110 (McKinney 2011) (allowing adoption of children regardless of sexual orientation); N.Y. EXEC. § 291 (McKinney 2011) (prohibiting employment discrimination based on sexual orientation).

[254] *See* Martinez v. County of Monroe, 850 N.Y.S.2d 740, 742 (N.Y. App. Div. 4th Dep't 2008).

[255] Jeremy W. Peters, New York *Senate Turns Back Bill on Gay Marriage*, N.Y. TIMES, Dec. 3, 2009, at A1.

[256] *See Seinfeld: The Outing*, *supra* note 12.