

THE TIDES OF TRANSGRESSIONS: AN ANALYSIS OF
DEFAMATION AND THE RIGHTS OF THE LGBT COMMUNITY

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There is an apparent and ever-growing trend of acceptance of the LGBT community (Lesbian, Gay, Bisexual and Transgender)¹ in present-day American society.² LGBT activism has led to numerous legal and societal victories for LGBT rights in a relatively short period of time.³ However, discrimination remains a pervasive threat. More work needs to be done to protect the rights and needs of the LGBT community. One recognized area in need of reform is within the legal realm of torts, in particular, defamation.⁴ False accusations

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¹ This acronym will be the preferred one used throughout this article. See, e.g., *ADL and the LGBT Community: A Commitment to Equal Rights*, ADL, <https://www.adl.org/education/resources/backgrounders/adl-lgbt-community-a-commitment-to-equal-rights> (last visited Sept. 29, 2018).

² For example, the Pew Research Center has found that 62% of Americans in 2017 support the legalization of gay marriage. See *Changing Attitudes on Gay Marriage*, PEW RESEARCH CTR. (June 26, 2017), <http://www.pewforum.org/fact-sheet/changing-attitudes-on-gay-marriage/>. Pew Research has also found that 92% of the members of the LGBT community feel that American society is more accepting in 2013. *A Survey of LGBT Americans*, PEW RESEARCH CTR. (June 13, 2013), <http://www.pewsocialtrends.org/2013/06/13/a-survey-of-lgbt-americans/>. Lastly, Pew Research has found that 60% of Americans in 2013 believe that society should accept homosexuality. See *The Global Divide on Homosexuality*, PEW RESEARCH CTR. (June 4, 2013), <http://www.pewglobal.org/2013/06/04/the-global-divide-on-homosexuality/>.

³ Note that the following landmark cases and legislation transpired in roughly two decades. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607–08 (2015) (establishing the right to gay marriage by striking down an anti-gay marriage statute); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (striking down anti-sodomy laws as unconstitutional); *Romer v. Evans*, 517 U.S. 620, 635 (1996) (recognizing equal protection rights for members of the LGBT under a more strict form of rational basis); *United States v. Windsor*, 570 U.S. 744, 752, 775 (2013) (striking down parts of the Defense of Marriage Act (DOMA) that violate the Fifth Amendment rights of the LGBT). The Matthew Shepard and James Byrd Act was also passed in 2009 that added sexual orientation as a criminalized motive under the federal hate crimes law. See 18 U.S.C. § 249(a)(2)(A) (2012); Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. 111-84, § 4707, 123 Stat 2190, 2839 (2009).

⁴ See generally Holly Miller, *Homosexuality as Defamation: A Proposal for the Use of the “Right-Thinking Minds” Approach in the Development of Modern Jurisprudence*, 18 COMM. L. & POLY 349, 352–53 (2013) (suggesting the end of defamation *per se* for false accusations of

of homosexuality have historically been recognized as grounds for defamation.⁵

Many question whether this precedent should be allowed to persist given the rapid societal progress of the LGBT movement.⁶ Arguments for and against each have nuanced and convincing points.⁷ The main argument in favor of viewing an accusation of homosexuality as not defamatory is that being “gay” should not be considered something inherently wrong or an insult.⁸ The opposing side posits that defamation for accusations of homosexuality is worthy of salvation because particular insular groups may suffer real and irreparable harm despite the growing acceptance of the LGBT movement.⁹

The purpose of this discussion is to examine the arguments, history, and possible solutions to considering a false imputation of homosexuality defamatory. It will show that the best solution is allowing this cause of action to continue under defamation *per quod*

homosexuality); Robert D. Richards, *Gay Labeling and Defamation Law: Have Attitudes Toward Homosexuality Changed Enough to Modify Reputational Torts?*, 18 *COMMLAW CONSPICUOUS* 349, 355, 356 (2010) (arguing that homosexual rights are still a contested issue and defamation should still be allowed for false accusation of homosexuality); Haven Ward, “*I’m Not Gay, M’Kay?*”: *Should Falsely Calling Someone a Homosexual be Defamatory?*, 44 *GA. L. REV.* 739, 742 (2010) (expressing concerns that courts would be enforcing homophobia by allowing defamation for homosexuality to continue); Abigail A. Rury, Note, *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, 657 (2011) (proposing changes to community standards used by courts in evaluating homosexual defamation cases).

⁵ See Rury, *supra* note 4, at 656; Ward, *supra* note 4, at 742; see also Miller, *supra* note 4, at 356, 357 (“[T]he misidentification of someone as homosexual [has been held] to be defamatory *per se* because it implied unchastity.”).

⁶ See Miller, *supra* note 4, at 352–53; Richards, *supra* note 4, at 355, 356; Ward, *supra* note 4, at 741; Rury, *supra* note 4, at 656.

⁷ For instance, some convincingly point out that the very nature of defamation implies that there is something inherently wrong with homosexuality and the courts are enforcing homophobic values. See Ward, *supra* note 4, at 742 (voicing concerns that courts would be enforcing homophobia by allowing defamation for homosexuality to continue). Others persuasively identify that a unilateral prohibition will deny those who live in communities where homosexuality is not accepted a well needed cause of action. See Richards, *supra* note 4, at 355, 356 (acknowledging that homosexuality has not been accepted in every part of the nation and ending defamation will leave certain populations in danger).

⁸ See Randy M. Fogle, *Is Calling Someone “Gay” Defamatory?: The Meaning of Reputation, Community Mores, Gay Rights, and Free Speech*, 3 *LAW & SEXUALITY* 165, 165–66 (1993); Miller, *supra* note 4, at 352.

⁹ See Fogle, *supra* note 8, at 198–99 (suggesting the values of a local community should determine whether a false accusation of homosexuality is defamatory); Eric K. M. Yatar, *Defamation, Privacy, and the Changing Social Status of Homosexuality: Re-Thinking Supreme Court Gay Rights Jurisprudence*, 12 *LAW & SEXUALITY* 119, 157–58 (2003) (acknowledging that defamation causes of action would still be useful in communities where homosexuality is not yet reached acceptance); Miller, *supra* note 4, 373 (suggesting defamation *per quod* for false accusations of homosexuality rather than *per se* to avoid the stigmatization of the LGBT).

as opposed to defamation *per se*. In addition, it will examine whether a false accusation of being transgender or “mis-gendering” should be the basis of a defamation cause of action. The solution of defamation *per quod* will then be applied to determine if it will provide guidance in navigating these burgeoning transgender issues in defamation law.

I. THE HISTORY OF HOMOSEXUALITY AND DEFAMATION PER SE IN NEW YORK STATE

In order for a statement to be considered defamatory, it must subject the person to scorn or ridicule.¹⁰ Defamation can be simplified to “a false statement that harms . . . an individual’s reputation in the eyes of his or her community.”¹¹ But such a simple definition of defamation fails to strike at the heart of defamation. All intentional torts aim to reinforce and cement societal norms and mores while discouraging anti-social behaviors.¹² But unlike other torts, the immediate harm of defamation is not physical injury or direct psychological or emotional suffering.¹³ Rather, the harm is more attenuated. It is hinged upon what the community will think about the statements and whether their views on the matter will cause the person emotional and psychological suffering.¹⁴

The most basic formulation of defamation can be found in the *Second Restatement of Torts*:

(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.¹⁵

Harm in defamation exists in two forms: irrespective of special

¹⁰ See Lyrissa Barnett Lidsky, *Defamation, Reputation and the Myth of Community*, 71 WASH. L. REV. 1, 5 (1996) (“This element, the ‘defamatoriness inquiry,’ is both a logical and necessary point to seek understanding of the tort, for not only is the existence of a defamatory communication the threshold element in every defamation case; it is also the element freighted with the philosophical baggage of the tort.”).

¹¹ *Id.* at 5–6.

¹² *See id.* at 13–14.

¹³ *See id.* at 14.

¹⁴ *Id.* at 6–7.

¹⁵ RESTATEMENT (SECOND) OF TORTS § 558 (AM. LAW INST. 1977).

harm, known as defamation *per se*, or with special harm,¹⁶ known as defamation *per quod*.¹⁷

Defamation *per se* is based in specified categories and the party does not need to prove actual monetary damages.¹⁸ These categories have historically included imputations: “(1) . . . of criminal behavior; (2) . . . of loathsome disease; (3) . . . of unchastity or that expose a plaintiff to public hatred, contempt or ridicule; and (4) . . . affecting a person in his or her business or profession.”¹⁹ Historically, homosexuality has either fallen under criminal behavior or exposure to public hatred.²⁰

New York has a rather interesting history with respect to whether homosexuality should be categorized as defamation *per se*.²¹ Perhaps the earliest case in New York involving imputations of homosexuality was *Stein v. Trager*²² in 1962. In that case, a research fellow at the University of Buffalo sued his professor for defamatory statements including “‘psychopath’, ‘very destructive’, ‘anti-social’, ‘son-of-a-bitch’, ‘intellectually incompetent’, ‘immoral’, ‘liar’, [and] ‘homosexual’”²³ The professor also accused him of making “up all the data for his Master’s thesis.”²⁴ The Supreme Court of Erie County began their analysis by noting the difference between a homosexual and a person engaging in the crime of sodomy, which included gay sex.²⁵ It recognized that only the latter can be the grounds for defamation *per se* because sodomy is recognized as a crime, while simply being homosexual is not.²⁶

This distinction is important. Although sodomy was illegal at the time,²⁷ the court recognized the humanity of the LGBT community by acknowledging that homosexuality itself is not a crime and calling someone a homosexual is not defamation *per se*.²⁸ This decision set

¹⁶ See Miller, *supra* note 4, 355.

¹⁷ See *id.*

¹⁸ See Patricia C. Kussmann, Annotation, *Imputation of Homosexuality as Defamation*, 7 A.L.R.6th 135, § 2 (2005).

¹⁹ Miller, *supra* note 4, at 355.

²⁰ See *id.* at 356.

²¹ See David Klufft, *What is More Defamatory? A False Accusation of Homophobia or of Homosexuality?* FOLEY HOAG LLP (Sept. 3, 2014), <http://www.trademarkandcopyrightlawblog.com/2014/09/whatismore/>.

²² *Stein v. Trager*, 232 N.Y.S.2d 362 (Sup. Ct. 1962).

²³ *Stein*, 232 N.Y.S.2d at 363.

²⁴ *Id.*

²⁵ See *id.* at 364.

²⁶ See *id.* (citing *Gurtler v. Union Parts Mfg. Co.*, 140 N.Y.S.2d 254 (App. Div. 1st Dep’t 1955), *aff’d*, 132 N.E.2d 889 (1956); *Morrisette v. Beatte*, 17 A.2d 464 (R.I. 1941)).

²⁷ See Klufft, *supra* note 21.

²⁸ See *id.*

New York apart from other states that recognized homosexuality as defamation *per se* because it was considered sexual perversion.²⁹ The decision in *Stein* was bolstered by *People v. Onofre*³⁰ which found the New York State sodomy law prohibiting homosexual sex unconstitutional more than twenty years before the Supreme Court in *Lawrence v. Texas*.³¹

However, the Fourth Department, in *Privitera v. Phelps*,³² included “homosexual behavior” as a new defamation *per se* category.³³ The facts in *Privitera* were unrelated to homosexuality and the creation of the category is *dicta*.³⁴ Creating homosexual behavior as a distinct category of defamation *per se* is in apparent disagreement with *Stein v. Trager*.³⁵ The origins of this new category lacked any legal citations or precedents.³⁶ Nevertheless, it appears to have been accepted in some New York courts as a new rule.³⁷ Most courts in New York, even today, adopt either the *Privitera* or *Stein* rule because there is no Court of Appeals decision to settle the matter.³⁸

Stern v. Cosby,³⁹ was the next significant case, and was decided by the Southern District of New York.⁴⁰ The facts of the case are sensational. A former boyfriend of Anna Nicole Smith sued the author of a book for accusing Anna Nicole Smith’s former boyfriend and him of engaging in homosexual acts.⁴¹ The Southern District refused to recognize the status of being homosexual or engaging in homosexual acts as defamation *per se* stating “such prejudice on the part of some does not warrant a judicial holding that gays and lesbians, merely because of their sexual orientation, belong in the same class as criminals.”⁴² Because the Court of Appeals had not yet decided whether an accusation of “homosexual behavior” constitutes defamation *per se*, the Southern District chose not to follow

²⁹ See, e.g., *id.*; Miller, *supra* note 4, at 356.

³⁰ *People v. Onofre*, 415 N.E.2d 936 (N.Y. 1980).

³¹ See *Onofre*, 415 N.E.2d at 937; *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

³² *Privitera v. Phelps*, 435 N.Y.S.2d 402 (App. Div. 4th Dep’t 1981).

³³ *Id.* at 404; Kluft, *supra* note 21.

³⁴ See *id.* at 403.

³⁵ Compare *Privitera*, 435 N.Y.S.2d at 404 (“words constitute slander *per se* if they impute . . . homosexual behavior”) with *Stein v. Trager*, 232 N.Y.S.2d 362 (Sup. Ct. 1962) (“We conclude, therefore, that the use of th[e] phrase [“homosexual”] does not constitute words which charge a punishable crime and that this word is not slanderous *per se*.”).

³⁶ See Kluft, *supra* note 21.

³⁷ See *id.*

³⁸ See *id.*

³⁹ *Stern v. Cosby*, 645 F. Supp. 2d 258 (S.D.N.Y. 2009).

⁴⁰ *Id.*

⁴¹ See *id.* at 263.

⁴² *Id.* at 275.

Privitera.⁴³ Because *Stern* is a federal case, many New York courts have ignored this ruling and continue to follow the precedent set in *Privitera*.⁴⁴

The crowning jewel of New York jurisprudence in this line of defamation *per se* cases is the recent *Yonaty v. Mincolla*.⁴⁵ In this 2012 case, the defendant spread rumors that the plaintiff was gay or bisexual in hopes that his girlfriend would hear it and break up with him.⁴⁶ The Third Department refused to recognize homosexuality attributed to a person as defamation *per se* because:

[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. In fact, such a rule necessarily equates individuals who are lesbian, gay or bisexual with those who have committed a “serious crime”—one of the four established *per se* categories.⁴⁷

The Third Department’s decision was directly contrary to the Fourth Department’s ruling in *Privitera* and its categorization of “homosexual behavior.”⁴⁸ The Third Department continued to be consistent with its reasoning in *Stein v. Trager* and the federal court in *Stern v. Cosby*.⁴⁹ The Third Department’s reasoning in *Yonaty* is clear: allowing a defamation *per se* category based on homosexual behavior is demeaning to the LGBT community because it essentially constitutes judicial affirmation of their existence as “shameful” or “disgraceful.”⁵⁰ This sentiment is in line with the growing trend of social acceptance of the LGBT community.⁵¹

⁴³ *See id.*

⁴⁴ *See* Kluft, *supra* note 21.

⁴⁵ *Yonaty v. Mincolla*, 945 N.Y.S.2d 774 (App. Div. 3d Dep’t 2012).

⁴⁶ *See id.* at 776.

⁴⁷ *Id.* at 777 (citing *Liberman v. Gelstein*, 605 N.E.2d 344, 347 (N.Y. 1992)).

⁴⁸ *See Privitera v. Phelps*, 435 N.Y.S.2d 402, 404 (App. Div. 4th Dep’t 1981).

⁴⁹ *See* Kluft, *supra* note 21.

⁵⁰ *See Yonaty*, 945 N.Y.S.2d at 777.

⁵¹ *See Changing Attitudes on Gay Marriage*, *supra* note 2.

II. ARGUMENTS FOR AND AGAINST THE CONTINUATION OF DEFAMATION BASED ON HOMOSEXUALITY

A. *Arguments Advocating for the End of Defamation Based on Homosexuality*

The argument for the end of defamation based on homosexuality generally shares the same rationale as *Yonaty* in that this cause of action is demeaning to the LGBT community. Those who argue for the end of this cause of action posit that harm to one's reputation in a community is inherent to the tort.⁵² This means that being seen as homosexual is the harm itself and causes the plaintiff to suffer scorn in the community.⁵³ Those who follow this view believe that the tort cannot be reformed because the tort will inherently hurt the dignity of the LGBT community.⁵⁴ Their main arguments include: (1) the subjective community standard will adversely affect the LGBT community; and (2) the bias of the judges applying the standard may lead to judicial affirmation of homophobia.⁵⁵

1. The Community Standard Is Unreliable, Inequitable, and Discretionary

The “community” in a defamation case is shaped by a judge.⁵⁶ This results in one person determining the defining social mores and beliefs of a community.⁵⁷ The judges, in a sense, speak for the communities that sit within their jurisdictions.⁵⁸ The judge is also able to pick out subsets of the community to speak for the whole community under the “‘right-thinking’ members of the community or in the eyes of a ‘substantial and respectable minority’ of the community.”⁵⁹ However, judges rarely reach out to the community at large or any particular subset to gain their opinions: “courts rarely resort to polls, surveys or even witness testimony to determine the

⁵² See Lidsky, *supra* note 10, at 7.

⁵³ See Ward, *supra* note 4, at 742.

⁵⁴ See *id.*

⁵⁵ See *id.* at 742, 760–61.

⁵⁶ See C. Scott Bowen Jr., *The Times They are a Changin': New York's Slow Progression Towards Eradicating Judicial Affirmation of Homophobia*, 5 CHARLOTTE L. REV. 471, 486 (2014).

⁵⁷ See *id.*

⁵⁸ See *id.* at 487.

⁵⁹ Lidsky, *supra* note 10, at 7 (“The standard ostensibly embodies the traditional liberal values of tolerance and respect for diversity necessary in a multi-cultural, multi-ethnic society.”); Rury, *supra* note 4, at 666–67.

values held by the community”⁶⁰ Thus, the judges have free rein to rely on their own biases, personal history, and beliefs instead of reflecting the community they claim to speak for.⁶¹ Rarely do judges state their reasons for picking one particular community over another or what morals or beliefs they prescribe to them.⁶²

The judge is also an unreliable conduit for the mores and morals of a community.⁶³ Defamation is “a false statement that harms . . . an individual[] . . . in the eyes of [the] community.”⁶⁴ If the judges are able to cherry-pick the communities and the values they attribute to them:

[A] plaintiff’s recovery is contingent on neither actual harm to reputation (due to defamation’s anomalous doctrine of presumed harm) nor an actual community in whose eyes the plaintiff’s reputation has been harmed. And even though the choice of community “is one of the chief determinants of liability,” “it is rare for a court to articulate its reasons for choosing one community segment rather than another.” Instead, courts rely on their own intuitive judgments about who constitutes the relevant community, what values that community shares, and whether those values are respectable.⁶⁵

In addition, if the choice of community and values is left to each individual judge, it will result in each one applying defamation law differently.⁶⁶ It makes sense that there would be a degree of variation in defamation law *prima facie* due it being based on a “community standard” and each being unique in its composition and values.⁶⁷ But if judges are basing their determinations on their own beliefs and perceptions, this might lead to inequitable application of the laws even if they pick the same communities that supposedly hold the same values. This would reinforce negative stereotypes or

⁶⁰ Lidsky, *supra* note 10, at 7.

⁶¹ See Gregory K. Davis, *A Bottom-Up Approach to LGB Defamation: Criticizing Narratives of Public Policy and Respectability*, 13 *DUKEMINIER AWARDS* 1, 28 (2014); Lidsky, *supra* note 10, at 8; Rury, *supra* note 4, at 667.

⁶² See Lidsky, *supra* note 10, at 8; Rury, *supra* note 4, at 666–67.

⁶³ See Lidsky, *supra* note 10, at 7–8; Rury, *supra* note 4, at 657.

⁶⁴ Lidsky, *supra* note 10, at 5–6.

⁶⁵ *Id.* at 7–8.

⁶⁶ See Bowen, *supra* note 56, at 472 (“Various legal commentators have attributed the lack of uniformity among state and federal courts to the lack of definition of ‘community’ within the realm of defamation.”).

⁶⁷ See *id.*

homophobia of the LGBT community would be perpetrated. At best, the judge might enforce outdated norms and views.

2. Defamation Per Se and the Judicial Enforcement of Bigotry

Another argument is that a cause of action for homosexuality false imputations of homosexuality suggest that homosexuality is wrong in itself and forces the courts to judicially enforce this belief.⁶⁸ Placing homosexuality within defamation *per se* implies that it is “criminal behavior,” or “expose[s] a plaintiff to public hatred, contempt or ridicule[.]”⁶⁹ A more obscure argument would be that an allegation of homosexuality is an implied attack on a person’s chastity.⁷⁰

In order for homosexuality to fall under the criminal behavior category, either being homosexual or engaging in homosexual behavior would have to be a crime. This sort of mentality has been rejected by many courts.⁷¹ As mentioned by the Third Department in *Yonaty*, considering homosexuality as defamatory may impute that being gay or lesbian is a crime, and this is a detestable conclusion.⁷²

The sentiment that a person would be subjected to ridicule has also been rejected by many courts.⁷³ For instance, the Southern District Court of New York ruled in *Stern v. Cosby* “[w]hile I certainly agree that gays and lesbians continue to face prejudice, I respectfully disagree that the existence of this continued prejudice leads to the conclusion that there is a widespread view of gays and lesbians as contemptible and disgraceful.”⁷⁴ This sentiment reflects the view that growing acceptance of the LGBT community would also make this category nonsensical.⁷⁵ There will come a time that homosexuality is so commonplace that it would not subject any person to ridicule or shame.

Lastly, the category of chastity has rarely been used in relation to homosexuality despite the long history of its use by women.⁷⁶

⁶⁸ See Ward, *supra* note 4, at 763.

⁶⁹ See Miller, *supra* note 4, at 352, 355.

⁷⁰ See *id.* at 357–58.

⁷¹ See *id.* at 357.

⁷² *Yonaty v. Mincolla*, 945 N.Y.S.2d 774, 777 (App. Div. 3d Dep’t 2012) (citing *Liberman v. Gelstein*, 605 N.E.2d 344, 347 (N.Y. 1992)).

⁷³ See Miller, *supra* note 4 at 352.

⁷⁴ *Stern v. Cosby*, 645 F. Supp. 2d 258, 275 (S.D.N.Y. 2009).

⁷⁵ See *id.*

⁷⁶ See Miller, *supra* note 4, at 357–58 (“Typically, unchastity claims involved statements that alluded to a woman’s pre- or extra-marital sexual encounters with men, but some courts have expanded this category to include allegations of . . . homosexual acts.”).

However, some courts have applied this category to both homosexual men and women under the impression that “everyone has a right to . . . enjoy an unsullied reputation of restraint.”⁷⁷ For instance in *Schomer v. Smidt* in 1980, the Court of Appeal of California, Fourth Appellate District, upheld a woman’s defamation claim based on an allegation of homosexuality and unchastity.⁷⁸ The plaintiff and defendant were co-workers and the latter told several other employees that the former was a lesbian.⁷⁹

In sum, if a statement falls within a category of defamation *per se* and the court finds it to be defamatory, many believe that this is the court judicially affirming anti-gay sentiments.⁸⁰ This powerful rationale posits that if homophobic statements are defamatory, the courts are sanctioning bigotry under the power of law.⁸¹ This sends a larger message to society that being gay is “bad” or “offensive” regardless of the individual harm suffered in the lawsuit.⁸² It causes long-lasting psychological and emotional harm to the members of the LGBT community due to institutional oppression caused by the courts.⁸³ The most damaging is that a homophobic community chosen as the subject community in a defamation suit is found to be a “right thinking” community.⁸⁴

B. Arguments Advocating for the Reform of Defamation Based on Homosexuality

The opposing view of defamation based on a false imputation of homosexuality is that defamation is not dysfunctional enough to “throw the baby out with the bath water.”⁸⁵ Proponents of this view state that this form of defamation is still worthy of reformation.⁸⁶ While there have been numerous suggestions for reforming defamation based on homosexuality,⁸⁷ the rest of this paper will only focus on advocating for defamation *per quod* instead of *per se*.

⁷⁷ *Schomer v. Smidt*, 170 Cal. Rptr. 662, 666 (Ct. App. 1980).

⁷⁸ *See id.*

⁷⁹ *See id.* at 664.

⁸⁰ *See Yatar, supra* note 9, at 155.

⁸¹ *See id.*; Ward, *supra* note 4, at 742.

⁸² *See Yatar, supra* note 9, at 155.

⁸³ *See id.* at 155; Ward, *supra* note 4, at 762.

⁸⁴ *See Yatar, supra* note 9, at 155.

⁸⁵ *See id.* at 156.

⁸⁶ *See, e.g., Fogle, supra* at note 8, 199; Richards, *supra* note 4, at 374; Rury, *supra* note 4, at 680.

⁸⁷ *See, e.g., Rury, supra* note 4, at 657 (suggesting reassessing the community standard elements of defamation law).

1. Distinct and Insular Communities and Varying Levels of Acceptance of the LGBT Across the United States

There are distinct communities where a false imputation of homosexuality would cause irreparable harm.⁸⁸ But some commentators argue that “the plaintiff in an LGB[T] defamation claim [would be] considered a bigot . . . 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.”⁸⁹

Proponents of reform point to the flawed premise that the acceptance of the LGBT community is uniform across every community in the United States.⁹⁰ There are certain and distinct communities where homosexuality is not widely accepted or practiced openly.⁹¹ Examples of those who may suffer harm from a false imputation of homosexuality include celebrities,⁹² politicians,⁹³ and those who live in conservative⁹⁴ and religious communities.⁹⁵ This section will introduce each group and the unique problems that they face in relation to homosexuality. Those who advocate for reform of defamation for homosexuality claim that ending the tort will leave those in these distinct communities without redress.⁹⁶ For them, this would be an unjust result.⁹⁷

⁸⁸ See Fogle, *supra* note 8, at 189–90; 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, 608 (2011).

⁸⁹ Davis, *supra* note 61, at 30.

⁹⁰ See, e.g., Fogle, *supra* note 8, at 178–79.

⁹¹ See *id.* at 178–79; Bunker et al., *supra* note 88, at 598.

⁹² See, e.g., Fogle, *supra* note 8, at 180; Hilary E. Ware, Note, *Celebrity Privacy Rights and Free Speech: Recalibrating Tort Remedies for “Outed” Celebrities*, 32 HARV. C.R.-C.L. L. REV. 449, 450 (1997); Gabriel Arana, *Queer Eye for the Libel Guy: Should Stars Really Be Able to Sue for Libel if Someone Says They’re Gay?*, SLATE (Feb. 27, 2009), http://www.slate.com/article/s/news_and_politics/jurisprudence/2009/02/queer_eye_for_the_libel_guy.html; Michael Ellison, *Tom Cruise Sues Wrestler for Gay ‘Slur’*, GUARDIAN (May 3, 2001), <https://www.theguardian.com/world/2001/may/04/filmnews.film>; Michael Hiltzik, *By Tossing a Richard Simmons Libel Case, a Judge Strikes a Blow Against Transgender Discrimination*, L.A. TIMES (Sept. 1, 2017), <http://www.latimes.com/business/hiltzik/la-fi-hiltzik-simmons-transgender-20170901-story.html>.

⁹³ See, e.g., Fogle, *supra* note 8, at 175–76; Kathleen Guzman, *About Outing: Public Discourse, Private Lives*, 73 WASH. U. L.Q. 1531, 1566–67 (1995); David H. Pollack, Comment, *Forced Out of the Closet: Sexual Orientation and the Legal Dilemma of “Outing”*, 46 U. MIAMI L. REV. 711, 738–39 (1992); Ware, *supra* note 92, at 450–51; Arana, *supra* note 92.

⁹⁴ See, e.g., Miller, *supra* note 4, at 372; Arana, *supra* note 92.

⁹⁵ See, e.g., Bunker et al., *supra* note 88, at 598; Miller, *supra* note 4, at 373; Arana, *supra* note 92.

⁹⁶ See Davis, *supra* note 61, at 30; Fogle, *supra* note 8, at 178.

⁹⁷ See Fogle, *supra* note 8, at 172, 185 (“Clearly, the first limiting factor is not at issue in the case of an imputation of homosexuality because acceptance of homosexuality is not universal.

i. Celebrities

The most notable case involving a celebrity and defamation based on homosexuality is when Tom Cruise sued a male “erotic wrestler” who alleged that they had an affair.⁹⁸ Cruise sued for \$100 million and won \$10 million.⁹⁹ Ironically, he stated that he had nothing against gay people or their lifestyles when initiating the litigation.¹⁰⁰

The Supreme Court has recognized that celebrities and public figures are distinct from the rest of the population when it comes to defamation.¹⁰¹ The Court affords different levels of protection to public figures as opposed to private individuals.¹⁰² The Supreme Court defined public figures in *Gertz v. Welch* as “[t]hose who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public’s attention” are in the public eye.¹⁰³

The Supreme Court affords more protection to private individuals as opposed to public figures due to their ample opportunities and resources to combat the defamatory charge.¹⁰⁴ “Private individuals are . . . more vulnerable to injury, and the state[’s] interest in protecting them is correspondingly greater.”¹⁰⁵ There is also a belief that celebrities assume the risk that their privacy will be violated because they willingly expose their lives to the public.¹⁰⁶

As a result of their lack of privacy, celebrities are more prone to having their sexuality attacked than a private individual.¹⁰⁷ When their sexuality is in question, it will be divulged across the country and through multiple media sources.¹⁰⁸ Homophobia is also rampant in the entertainment industry and it “often manifests itself in the invisibility of lesbians and gay men.”¹⁰⁹ Celebrities can influence public opinion and how the country views the LGBT community for better or worse: “[t]elling the world that a major heartthrob is

Therefore, the relevant minority population considered will almost never be negligible.”)

⁹⁸ Ellison, *supra* note 92; see Gary Susman, *Tom Cruise Wins \$10 Million in Gay Lawsuit*, ENT. WKLY (Jan. 16, 2003), <http://ew.com/article/2003/01/16/tom-cruise-wins-10-million-gay-lawsuit/>.

⁹⁹ See Ellison, *supra* note 92; Susman, *supra* note 98.

¹⁰⁰ See Ellison, *supra* note 92.

¹⁰¹ See Ware, *supra* note 92, at 449.

¹⁰² See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974).

¹⁰³ *Id.* at 342.

¹⁰⁴ *Id.* at 344.

¹⁰⁵ *Id.*

¹⁰⁶ Guzman, *supra* note 93, at 1564; See Pollack, *supra* note 93, at 741.

¹⁰⁷ See Ware, *supra* note 92, at 449 (“A celebrity’s sexual life has never been more open to public scrutiny.”).

¹⁰⁸ See *id.* at 451–52, 453.

¹⁰⁹ *Id.* at 458.

homosexual may shape public views about how ‘normal’ homosexuality is, and therefore may affect public views about the regulation of homosexual activity.”¹¹⁰

ii. Politicians

Politicians are another population that has achieved a level of notoriety that makes them no longer “one of us” common, every-day people.¹¹¹ Instead of fame and glamour, politicians are elected into office to represent their constituents in political position.¹¹² The Supreme Court originally defined public official in relation to their official duties in *New York Times Co v. Sullivan*.¹¹³ The Supreme court clarified this definition in *Rosenblatt v. Baer*: “[w]here a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees”¹¹⁴ Public officials, like celebrities, are afforded less privacy than the average citizen.¹¹⁵ Similar to celebrities, this lack of privacy makes a politician more vulnerable to attack based on their sexuality.¹¹⁶ It also leads to similar issues, such as homosexuality influencing public opinion and the media disseminating information about their own sexuality across the nation.¹¹⁷

However, politicians face unique challenges. Politicians, “[u]nlike actors in the private arena [or the general public], public figures owe their allegiance to the people who put them in office.”¹¹⁸ The ethics, morals, views, positions and community standing of the politician matters to the public.¹¹⁹ Members of the public vote and rally behind public officials based on who they are and what they stand for.¹²⁰ In addition, the politician’s views on homosexuality or whether they are homosexual, has an effect on public policy.¹²¹

¹¹⁰ *Id.* at 459.

¹¹¹ *See* Pollack, *supra* note 93, at 738–39.

¹¹² *See id.* at 739.

¹¹³ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

¹¹⁴ *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966).

¹¹⁵ *See* Ware, *supra* note 92, at 451 (“Even when public officials are not legislating or making policy decisions on gay rights issues, the indirect influence they exert on such matters may have a sufficient impact to justify subjecting their private lives to public scrutiny.”).

¹¹⁶ *See id.* at 450–51.

¹¹⁷ *See* Pollack, *supra* note 93, at 738–39; Ware, *supra* note 92, at 465.

¹¹⁸ Pollack, *supra* note 93, at 738–39.

¹¹⁹ *See id.* at 739.

¹²⁰ *See id.* at 738–39.

¹²¹ *See id.* at 739.

False imputations of homosexuality will affect a politician's chances of being elected.¹²² If the politician denies the allegation, this might hurt their reputation with the LGBT community.¹²³ On the other hand, failure to deny a homosexuality allegation will ruin their reputation with religious or conservative communities.¹²⁴

iii. Religious Communities and Conservative Communities

Certain religions, such as the Abrahamic religions, believe homosexuality is a sin, an abomination, or worthy of death.¹²⁵ Thus, a false accusation within a religious community may cause reputational harm to a member.¹²⁶ Those who argue for reform, state that ending defamation based on allegations of homosexuality would cause undue suffering to these people because of their religious beliefs and the particular community they live in.¹²⁷ The same can be said for conservative, often rural and small communities that are hostile toward the LGBT community.¹²⁸ The main issue in these lawsuits would be the "community standard" element of defamation.

In some predominately religious communities, homophobic views would be held by the majority of the population and therefore "right-thinking" community.¹²⁹ The person in this community would be able to win a defamation suit if he or she could prove that a false imputation of homosexuality would harm their standing within their community.¹³⁰ However, a person in a less religious or conservative community would not be successful because the "right-thinking" community would regard such a defamation suit as homophobic.¹³¹

Denying defamation suits, across the board, based on a false imputation of homosexuality would leave these groups no redress despite the statement clearly being defamatory within their religious

¹²² See *id.* at 738–39.

¹²³ Cf. *id.* at 739–40 ("The fact that gay politicians would choose to ignore issues that affect a substantial minority of their constituency, particularly when that group looks to them for leadership, says something about their fitness as leaders.").

¹²⁴ See Arana, *supra* note 92.

¹²⁵ See *Leviticus* 18:22 ("You shall not lie with a male as with a woman; it is an abomination."); *Leviticus* 20:13 ("If there is a man who lies with a male as those who lie with a woman, both of them have committed a detestable act; they shall surely be put to death. Their bloodguiltiness is upon them."); 1 *Corinthians* 6:9-10; *Romans* 1:26-28.

¹²⁶ See Ware, *supra* note 92, at 455–56.

¹²⁷ See Davis, *supra* note 61, at 30.

¹²⁸ See Arana, *supra* note 92.

¹²⁹ See Miller, *supra* note 4, at 373.

¹³⁰ See *id.* at 372–73.

¹³¹ See Davis, *supra* note 61, at 30.

or conservative community.¹³² It would also allow intentionally malicious or deplorable behavior on behalf of the defendant to go unpunished.¹³³ Defamation suits would also force the views and beliefs of outside communities, or a national standard, upon the subject religious or conservative communities.¹³⁴ The community standard would be a legal fiction because it would no longer apply to the actual community of the lawsuit.¹³⁵

This raises the related point that it would be unwise to assume that homosexuality has been accepted everywhere in the United States.¹³⁶ There are some states and cities that adopt laws hostile to the LGBT community or deny them the basic rights to which they are entitled.¹³⁷ For instance, twenty states do not have hate crime laws that cover the LGBT community, twenty-nine states do not have laws prohibiting establishments from discriminating against their LGBT customers, and twenty-eight states do not have laws for employment discrimination based on sexuality or gender expression.¹³⁸ The states' treatment of their LGBT citizens may show that the country should not be ready to end defamation based on homosexuality.

III. DEFAMATION PER QUOD, THE PROPOSED SOLUTION

Defamation *per quod* for a false claim of homosexuality is perhaps the desirable middle-ground between two opposing sides.¹³⁹ It will protect both the needs of the LGBT community as well as insular and distinct communities like celebrities and religious communities if they can successfully prove actual damages.¹⁴⁰ The first section will discuss defamation *per quod* in comparison to defamation *per se* and examine why defamation *per se* for a false imputation of

¹³² *See id.*

¹³³ *See id.*

¹³⁴ *See id.* at 27.

¹³⁵ *See id.* at 29.

¹³⁶ *See id.* at 30; Bunker et al., *supra* note 88, at 598, 601–02; Fogle, *supra* note 8, at 178–79.

¹³⁷ *See* Frank Bruni, *The Worst (and Best) Places to Be Gay in America*, N.Y. TIMES, (last updated Aug. 25, 2017) <https://www.nytimes.com/interactive/2017/08/25/opinion/sunday/worst-and-best-places-to-be-gay.html>.

¹³⁸ *Id.*

¹³⁹ *See e.g.*, Fogle, *supra* note 9, at 199 (describing a community approach to assessing defamation); Richards, *supra* note 4, at 361 (explaining that courts are willing to stretch its recognition of defamation).

¹⁴⁰ *See* RESTATEMENT (SECOND) OF TORTS § 575 (AM. LAW INST. 1977); Andrew Bossory, *Defamation Per Se: Be Prepared to Plead (and Prove!) Actual Damages*, A.B.A. (June 3, 2014), <https://apps.americanbar.org/litigation/committees/business torts/articles/spring2014-0513-defamation-prepare-plead-prove-actual-damages.html>.

homosexuality should be abolished. The second section will briefly explain why allowing defamation *per quod* to continue is a favorable alternative to abolition of the cause of action and why defamation *per quod* is a better alternative than defamation *per se*.

A. *Defamation Per Quod Distinguished and Why Defamation Per Se Based in Homosexuality Should Be Abolished*

Defamation *per quod* is harder to prove than defamation *per se*, requiring special harm “is the loss of something having economic or pecuniary value.”¹⁴¹ Essentially, the person would have to prove that they suffered some actual harm due to the defamatory statement rather than having the harm implied by the statement itself. The harm itself need not be monetary, it can be any manifestation of psychological, emotional or physical harm.¹⁴² “As a practical matter, ‘the bulk of the money paid out in damage awards in defamation suits is to compensate for psychic injury, rather than to compensate for any objectively verifiable damage to one’s community standing.’”¹⁴³

Homosexuality should no longer be considered defamation *per se* because it no longer falls within any of the pre-existing categories. First, homosexual conduct, can no longer be considered a crime since *Lawrence v. Texas* which struck down criminal sodomy laws as unconstitutional.¹⁴⁴ As the court in *Stern v. Cosby* states “[t]hus, to the extent that courts previously relied on the criminality of homosexual conduct in holding that a statement imputing homosexuality subjects a person to contempt and ridicule, *Lawrence* has foreclosed such reliance.”¹⁴⁵

Second, an imputation of unchastity cannot serve as the basis for defamation *per se* because unchastity has traditionally been used only for heterosexual women and has fallen out of favor even in respect to them.¹⁴⁶ Unchastity is based on outdated sexist notions that no longer apply in today’s society.¹⁴⁷ Unchastity has been rarely used in the homosexual context and it makes sense that unchastity based on homosexuality will also fall out of favor because it is based

¹⁴¹ RESTATEMENT (SECOND) OF TORTS § 575 cmt. b (AM. LAW INST. 1977).

¹⁴² *See id.*

¹⁴³ Lidsky, *supra* note 10, at 15.

¹⁴⁴ *See Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

¹⁴⁵ *Stern v. Cosby*, 645 F. Supp. 2d 258, 274 (S.D.N.Y. 2009) (citing *Plumley v. Landmark Chevrolet*, 122 F.3d 308, 310–11 (5th Cir. 1997)).

¹⁴⁶ *See Lisa R. Pruitt, Her Own Good Name: Two Centuries of Talk About Chastity*, 63 Md. L. Rev. 401, 404 (2004).

¹⁴⁷ *See id.* at 447 n.242, 459.

on outdated homophobic notions.¹⁴⁸

Third, homosexuality no longer “expose[s] a plaintiff to public hatred, contempt or ridicule” or another category of defamation *per se*.¹⁴⁹ As the Third Department recognized in *Yonaty*, it would be ridiculous to think that being homosexual is something that itself is worthy of ridicule or should expose someone to hatred.¹⁵⁰ This appears to be the sentiment of most Americans.¹⁵¹ According to The Pew Research Center, in 2017, 62% of Americans supported the legalization of gay marriage, and in 2013, 60% of Americans believed homosexuality should be accepted.¹⁵²

In addition, considering homosexuality a category of *per se* defamation is founded on questionable doctrinal grounds.¹⁵³ The facts in *Privitera* had no relation to homosexuality.¹⁵⁴ Therefore, homosexuality-based *per se* defamation should no longer be a valid cause of action.

B. Why Per Quod Is a More Desirable Solution than Abolition or Reform

Society has not progressed enough to allow defamation based on a false imputation of homosexuality to disappear in its entirety despite the fact that the defamation *per se* subset should no longer be justified as a cause of action. As scholar Robert D. Richards states: “despite some progressive and positive changes in attitudes toward homosexuality—such as increased visibility in entertainment programming—a stigma still attaches to same-sex orientation in a large enough segment of society that falsely labeling someone a homosexual could cause undue injury to one’s reputation.”¹⁵⁵

¹⁴⁸ See *Yonaty v. Mincolla*, 945 N.Y.S.2d 774,778–79 (App. Div. 3d Dep’t 2012).

¹⁴⁹ Miller, *supra* note 4, at 355; see *Privitera v. Phelps*, 435 N.Y.S.2d 402, 404 (App. Div. 4th Dep’t 1981).

¹⁵⁰ See *Yonaty*, 945 N.Y.S.2d at 777.

¹⁵¹ See, e.g., *Changing Attitudes on Gay Marriage*, PEW RESEARCH CTR. (June 26, 2017) <http://www.pewforum.org/fact-sheet/changing-attitudes-on-gay-marriage/>; *The Global Divide on Homosexuality: Greater Acceptance in More Secular and Affluent Countries*, PEW RESEARCH CTR. (June 4, 2013) <http://www.pewglobal.org/2013/06/04/the-global-divide-on-homosexuality/>.

¹⁵² *Changing Attitudes on Gay Marriage*, *supra* note 151; *The Global Divide on Homosexuality Greater Acceptance in More Secular and Affluent Countries*, *supra* note 151.

¹⁵³ See Kluft, *supra* note 21 (discussing *Privitera*, 435 N.Y.S.2d at 404 (“Judge Richard Simons of the New York Appellate Division listed the categories of *per se* slander in his routine statement of the law. In addition to the four traditional categories, Judge Simons added a new category: ‘homosexual behavior.’”)).

¹⁵⁴ See Kluft, *supra* note 21; see also *Privitera*, 435 N.Y.S.2d at 403–04 (“[Plaintiffs] claim that DeBar refused to issue the [building] permit because, as he stated to the Durhams, plaintiff Samuel Privitera is a ‘member of the Mafia,’ [and] ‘a criminal.’”).

¹⁵⁵ Richards, *supra* note 4, at 356.

Second, it would be ignorant to assume that enlightened parts of the country speak for the whole.¹⁵⁶ A national or majoritarian standard of “right thinking” individuals would defeat the purpose of having a community standard in the first place.¹⁵⁷ Defamation is based on a person’s reputation in a community and adopting a standard that rejects what the individual’s community believes would strike at the heart of the tort.¹⁵⁸

Third, there are certain groups that will be denied a cause of action when they face malicious attacks on their sexuality that lead to irreparable harm.¹⁵⁹ This would leave groups like celebrities, politicians, conservative and religious communities without redress.¹⁶⁰ Those who advocate for the end of this cause of action cite it as demeaning to gay men and lesbian women.¹⁶¹ However, ending this cause of action for the LGBT community will affect other groups.¹⁶² Reform would ensure that both group’s interests are preserved, rather than elevating one group’s rights over another’s.

Defamation *per quod* is a pre-existing legal doctrine that would be easier to implement than other recommended reforms of defamation with respect to homosexuality.¹⁶³ Due to its presence in the Restatement of Torts, it should not be an unknown concept to most lawyers and judges. No extra time or resources would be necessary for its implementation because it is not a novel cause of action. In addition, it is less likely to have pushback or resistance. Since defamation *per quod* is harder to prove, it will ensure only legitimate lawsuits, where a person has suffered real harm, will be able to recover.¹⁶⁴ This is not to say that no future reform should be implemented. Any legal cause of action needs to either evolve or be abandoned.

¹⁵⁶ See *id.* at 353 (acknowledging that homosexuality has not been accepted in every part of the nation and ending defamation will leave certain populations in danger).

¹⁵⁷ See Fogle, *supra* note 8, 197 (suggesting the values of a local community should determine whether a false accusation of homosexuality is defamatory).

¹⁵⁸ See *id.* at 198.

¹⁵⁹ See Richards, *supra* note 4, at 356.

¹⁶⁰ See *supra* Part II(B)(1).

¹⁶¹ See Ward, *supra* note 4, at 742 (voicing concerns over that courts would be enforcing homophobia by allowing defamation for homosexuality to continue).

¹⁶² See *supra* Part II(B)(1).

¹⁶³ See RESTATEMENT (SECOND) OF TORTS, § 575 cmt. a (AM. LAW INST. 1977); Bossory, *supra* note 140.

¹⁶⁴ See Miller, *supra* note 4, at 355.

IV. APPLYING DEFAMATION PRINCIPLES FROM HOMOSEXUALITY TO EMERGING TRANSGENDER ISSUES

Transgender legal issues are the newest burgeoning LGBT area to enter the public arena. Transgender issues were thrust into the mainstream starting around 2016 in Charlotte, North Carolina, when “the city council passed an ordinance that transgender people may use the bathroom according to the gender with which they identify.”¹⁶⁵ The state legislature overturned the law and passed a statute “which bans cities from passing anti-discrimination ordinances that protect gay and transgender people in any way, bathrooms or otherwise.”¹⁶⁶ The North Carolina law is only one example of the growing awareness of transgender issues.¹⁶⁷ For instance, a Pew Institute poll shows that 54% of Americans say “that whether someone is a man or a woman is determined by the sex they were assigned at birth,” and 32% think that transgender acceptance has gone too far.¹⁶⁸ Therefore, it appears that transgender men and women do not share the societal acceptance on the same level as their gay and lesbian compatriots. There has been little to no case law regarding transgenderism and defamation.¹⁶⁹

This section will examine if mis-gendering a transgender person or a false imputation of transgenderism can be considered defamatory and if so, whether this cause of action would fall under defamation *per se*. Lastly, this section will examine whether the *pro quod* solution and principles developed from homosexuality jurisprudence can serve as guidance for this emerging area of law.

¹⁶⁵ Matthew Teague, *North Carolina’s Transgender Bathroom Battle: What Sparked It, and What’s Next*, THE GUARDIAN (May 14, 2016) <https://www.theguardian.com/us-news/2016/may/14/north-carolina-bathroom-bill-hb2-transgender-rights>.

¹⁶⁶ *Id.*

¹⁶⁷ See *Understanding Transgender Access Laws*, N.Y. TIMES (Feb. 24, 2017), <https://nyti.ms/2kVv7A1>. For instance, some cities such as “Austin, Tex.; Berkeley, Calif.; Philadelphia; Santa Fe, N.M.; and Seattle were among the first to pass laws requiring single-user all-gender restrooms, following a pattern emerging at schools and universities.” *Id.*

¹⁶⁸ Anna Brown, *Republicans, Democrats Have Starkly Different Views on Transgender Issues*, PEW RESEARCH CTR. (Nov. 8, 2017), <http://www.pewresearch.org/fact-tank/2017/11/08/transgender-issues-divide-republicans-and-democrats/>.

¹⁶⁹ The only example the author could find was a 2017 case involving Richard Simmons, the fitness icon, suing the National Inquirer for Libel based on their allegation that he transitioned into being a woman. See *Simmons v. Am. Media, Inc.*, No. BC660633, 2017 WL 5325381, at *1 (Cal. Super. 2017); see generally Hiltzik, *supra* note 92 (“[The Judge] place[d] sexual identity on the same plane where imputations about race and homosexuality have been for years—as not inherently defamatory.”).

A. *What Is Transgender?*

Transgender is a general term used to describe a person whose gender identity or expression does not match the gender they were assigned at birth or their sex characteristics.¹⁷⁰ Gender identity refers to “a person’s internal sense of being male, female or something else; gender expression refers to the way a person communicates gender identity to others through behavior, clothing, hairstyles, voice or body characteristics.”¹⁷¹ Many transgender individuals develop characteristics of gender dysphoria, or “a conflict between a person’s physical or assigned gender and the gender with which he/she/they identify[,]” sometimes at a very young age.¹⁷² While some grow out of their feelings of gender dysphoria and later do not identify as transgender, there are others who have continuing feelings of gender dysphoria into adulthood.¹⁷³

It is common for many transgender individuals to take steps to “transition” to the gender they identify with or express.¹⁷⁴ “This might include physical procedures (involving surgery or hormones), changes in the way one dresses or behaves, and new markers of identification (such as a different name or gender-related pronouns).”¹⁷⁵ It is important to note that many people identify as transgender and do not take these steps to transition.¹⁷⁶ The Williams Institute estimates that at least 0.6% of the American population identifies as transgender.¹⁷⁷

B. *Whether Misidentification of Gender Expression or a False Imputation of Transgenderism Can Be Defamatory*

As a framing device for this discussion of whether mis-gendering can constitute defamation against a transgender person, the following hypothetical will be used:

¹⁷⁰ See *Transgender People, Gender Identity and Gender Expression: What Does Transgender Mean?*, AM. PSYCHOL. ASS’N, <http://www.apa.org/topics/lgbt/transgender.aspx> (last visited Oct. 5, 2018); *Transgender FAQ*, GLAAD, <https://www.glaad.org/transgender/transfaq> (last visited Oct. 5, 2018); *What is Transgender?*, PSYCHOL. TODAY, <https://www.psychologytoday.com/basic/s/transgender> (last visited Oct. 5, 2018).

¹⁷¹ *Transgender People, Gender Identity and Gender Expression*, *supra* note 170.

¹⁷² *What Is Gender Dysphoria?*, AM. PSYCHOL. ASS’N, <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria> (last visited Oct. 5, 2018).

¹⁷³ See *What is Transgender?*, *supra* note 170.

¹⁷⁴ See *Transgender FAQ*, *supra* note 170.

¹⁷⁵ *What is Transgender?*, *supra* note 170.

¹⁷⁶ See *id.*

¹⁷⁷ ANDREW R. FLORES ET AL., HOW MANY ADULTS IDENTIFY AS TRANSGENDER IN THE UNITED STATES? 3 (Williams Inst. eds. 2016).

Charlotte Jones Hart is a thirty-year old world-renowned popular singer. She has toured the world multiple times during her long career. One day, the ill-reputed magazine, *The Muckdregs*, published a piece calling Ms. Jones Hart a “man,” “boy,” not a “true woman” and “pretending to be a female.” It is not well known that Ms. Jones Hart was actually assigned male at birth and her original name was Charles Richard Jones. She identifies as a transgender woman and has been struggling with her gender identity her entire life. Ms. Jones Hart lived the first 18 years of her life identifying as a male and using the name she was given at birth. The star promptly sued the *Muckdreg* for defamation claiming that their hit piece caused her public ridicule and hurt her reputation. The magazine raises the defense of truth claiming that their piece is based on Ms. Jones Hart being assigned male at birth and living most of her life as a male, therefore, none of their statements are false.

A statement that is true cannot be defamatory.¹⁷⁸ The Second Restatement of Torts states that “[t]here can be no recovery in defamation for a statement of fact that is true, although the statement is made for no good purpose and is inspired by ill will toward the person about whom it is published and is made solely for the purpose of harming him.”¹⁷⁹ The fact that a statement cannot be considered defamatory if it is proven to be true is often called the “defense of truth.”¹⁸⁰ This is impactful on our hypothetical because it matters whether Charlotte Jones Hart formerly being a male is considered “true” or whether her current gender identification is “true.”

There is an argument that the celebrity was born a male, and lived 18 years of her life as a man, therefore, it is true that she was a man. At the same time, referring to her as a man would be considered derogatory and insulting to her sense of self. It is also true now that Ms. Jones Hart now identifies as a woman despite her past. Whether the defense of truth succeeds ultimately depends on whether the court decides the “truth” of her gender in relation to her identity at

¹⁷⁸ See RESTATEMENT (SECOND) OF TORTS § 581A (AM. LAW INST. 1979).

¹⁷⁹ *Id.* at cmt. a.

¹⁸⁰ David A. Elder, *Truth, Accuracy and Neutral Reportage: Beheading the Media Jabberwock's Attempts to Circumvent New York Times v. Sullivan*, 9 VAND. J. ENT. & TECH. L. 551, 557–58 (2007).

birth or her current identity.

Since no court has grappled with this issue thus far, which “truth” should be adopted has no clear answer.¹⁸¹ A related question that will offer some insight would be whether a transgender person can change their birth certificate to reflect the gender they identify with.¹⁸² If a birth certificate can be changed, this would appear to lean the “truth” towards Ms. Jones Hart being a woman, and the statements being defamatory. However, this result is controversial.¹⁸³ Some commentators believe this would be altering history or would create security risks.¹⁸⁴ People need “identity documents that really reflect who they are in the world—[in] the interest of security.”¹⁸⁵ Refusing to allow birth certificates to be altered would give credence to the *Muckdregs* argument that Ms. Jones Hart was a male and the birth certificate is a legal document that reflects this fact.

Currently, “[t]he District of Columbia, New York City and 10 states—California, Oregon, Washington, New York, Connecticut, Maryland, Vermont, Massachusetts, Hawaii and Minnesota” allow a birth certificate to be altered with “a notarized doctors note that a person has received the treatment deemed necessary by the individual and their doctor to live their life in a way that is consistent with their gender identity.”¹⁸⁶ Some states require proof of sex reassignment surgery in order to make the change.¹⁸⁷ Three states expressly forbid a person to change the gender on their birth certificate.¹⁸⁸ At this point, it is uncertain how a court would determine whether Ms. Jones Hart’s past as a man or her current identification is the “truth.” Ultimately, this would be left up to each jurisdiction based on their community and laws, including their birth

¹⁸¹ This would also depend if the jurisdiction makes truth an element of defamation to place on the plaintiff or an affirmative defense placed upon the defendant. See RESTATEMENT (SECOND) OF TORTS § 581A cmt. a.

¹⁸² See Janell Ross, *How Easy is it to Change the Sex on Your Birth Certificate?*, THE WASHINGTON POST, (May 18, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/05/18/the-next-frontier-in-the-bathroom-law-debate-changing-birth-certificates/?utm_term=.36a2c366a5ac.

¹⁸³ See Jamilah King, *The Next Battleground for Trans Rights Isn't Bathrooms — It's Birth Certificates*, BUS. INSIDER (Jun. 9, 2016), <http://www.businessinsider.com/new-trans-rights-controversy-about-birth-certificates-not-bathrooms-2016-6> (“[W]hether [a transgender individual’s] birth certificate is an accurate reflection of [their] gender identity largely depends on the state in which [they] were born.”).

¹⁸⁴ See *id.*

¹⁸⁵ *Id.*

¹⁸⁶ Ross, *supra* note 182.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

certificate laws.

Another issue is whether the statements against Ms. Jones Hart would be considered defamatory, if found not to be true. Is the statement defamatory because it imputes that she is a man or transgender woman? For the former, it is unlikely that any community or court would find the simple state of being a man “to expose another to hatred, ridicule or contempt.”¹⁸⁹ Approximately 49.1% of the population between 2000 and 2010 identified as male.¹⁹⁰ It is simply unconvincing that the simple state of being a part of almost 50% of the population would subject a person to ridicule in their community.

Conversely, women make up around 50.9% of the population.¹⁹¹ In comparison, “3.5% of Americans identify as lesbian, gay, or bisexual, while 0.3% are transgender.”¹⁹² It is easier to marginalize the LGBT community rather than biological genders due to the majority of the population identifying as either male or female.¹⁹³ Most people would not be offended by a person being labeled a male or a female because they either identify with one of these sexes or know a majority of people who do so.¹⁹⁴ The community standard will be full of members of both sexes, but less likely to include members of the LGBT community due to their small population size.¹⁹⁵ This makes it more likely that falsely identifying a person as a member of the LGBT community will be considered more defamatory because the group is less ubiquitous and prone to stigmatization.

A more novel argument would be that the defendant purposely misidentified or “mis-gendered.” There are some who argue that purposefully mis-gendering causes mental suffering and is a form of violence.¹⁹⁶ However, defamation is a tort built around harm to a

¹⁸⁹ RESTATEMENT (SECOND) OF TORTS § 559 cmt. b (AM. LAW INST. 1979).

¹⁹⁰ LINDSAY M. HOWDEN & JULIE A. MEYER, AGE AND SEX COMPOSITION: 2010 CENSUS BRIEFS 2 tbl.1 (U.S. CENSUS BUREAU eds. 2011).

¹⁹¹ *Id.*

¹⁹² Joan Greve, *LGBT America: By the Numbers*, PUB. BROADCASTING SERV. (June 15, 2016), <http://www.pbs.org/weta/washingtonweek/blog-post/lgbt-america-numbers>. While it does not impact the argument, it may be important to note the statistics used in this source are based on outdated figures. See FLORES, *supra* note 177, at 3.

¹⁹³ See *id.*; Howden, *supra* note 190, at 2 tbl. 1.

¹⁹⁴ See Howden, *supra* note 190, at 2 tbl. 1.

¹⁹⁵ See Greve, *supra* note 192; Howden, *supra* note 190, at 2 tbl. 1; Miller, *supra* note 4, at 355 (“[I]f only a small group of individuals would view the statement as defamatory, that would be legally insufficient.”).

¹⁹⁶ See *Doubly Victimized: Reporting on Transgender Victims of Crime*, GLAAD, <https://www.glaad.org/publications/transgendervictimsofcrime> (last visited Oct. 5, 2018) (“Transgender people, and particularly transgender women of color, are disproportionately affected by hate violence. Sadly, the tragedy of these incidents is often compounded by reporting that does not

person's reputation within a community, not their mental anguish caused or violence against the person.¹⁹⁷ In addition, this argument would still suffer from the same problems as imputing the person to be the opposite gender, now with an intent to misidentify the gender of the subject individual. The tort is not built to compensate psychological harm inflicted upon a person unless the damage is reputational.¹⁹⁸ A court would be unconvinced that a malicious or intentional attack on either 49.1% of the male population or 50.9% would make a statement more defamatory.¹⁹⁹ Therefore, it is unlikely for the judge hearing the case and by extension the community would find mis-gendering to be defamatory.

C. *Should It Be Considered Defamation Per Se?*

A more convincing argument would not be based on mis-gendering but rather on a false imputation of being transgender. Transgender individuals face intense discrimination and hatred in society, so this provides a firmer basis for a defamation cause of action.²⁰⁰ There is a strong chance that a false imputation of transgenderism would result in "public hatred, contempt or ridicule." For instance, "[t]he victims of anti-transgender violence are overwhelmingly transgender women of color, who live at the dangerous intersections of transphobia, racism, sexism, and criminalization, which often lead to high rates of poverty, unemployment, and homelessness."²⁰¹ In addition, the National Coalition of Anti-Violence Programs stated in a 2017 report that as of "August of 2017 . . . 19 hate-violence related homicides of transgender and gender non-conforming people this year, compared to 19 reports for the entire year of 2016."²⁰² Based on these statistics, there is a real danger that a false imputation of being transgender would "expose another to hatred, ridicule or contempt."²⁰³ Therefore, there may be a basis for defamation *per se* based on exposure to "public hatred, contempt or ridicule" due to the current discrimination and victimization that transgender people

respect (or even exploits and sensationalizes) the victim's gender identity.").

¹⁹⁷ See RESTATEMENT (SECOND) OF TORTS § 559 (AM. LAW INST. 1979).

¹⁹⁸ See *id.*

¹⁹⁹ See *id.* at cmt. e; Howden, *supra* note 190, at 2 tbl.1.

²⁰⁰ See *Doubly Victimized*, *supra* note 196.

²⁰¹ *Id.*

²⁰² Emily Waters & Sue Yacka-Bible, *A Crisis of Hate A Mid-Year Report on Lesbian, Gay, Bisexual, Transgender and Queer Hate Violence Homicides*, NAT'L COALITION OF ANTI-VIOLENCE PROGRAMS (Aug. 19, 2017) <http://avp.org/wp-content/uploads/2017/08/NCAVP-A-Crisis-of-Hate-Final.pdf>.

²⁰³ RESTATEMENT (SECOND) OF TORTS § 559 cmt. b (AM. LAW INST. 1977).

face. On the other hand, similar to the arguments against a false imputation of homosexuality,²⁰⁴ this might be considered demeaning to transgender people and imply that being transgender is inherently wrong. A court might, therefore, find a false imputation of transgenderism to be defamatory *per se* under this category.

However, the mere state of being transgender is unlikely to be considered a crime. There are no statutes that criminalize the mere state of being transgender. The most analogous laws would be banning cross dressing, which have been consistently struck down as unconstitutional.²⁰⁵ Also, related is that transgender people are more likely to be accused and targeted by police for suspicion of prostitution.²⁰⁶ However, transgender people lack the history of anti-sodomy laws that faced homosexual people. Anti-sodomy laws resulted in this category of defamation *per se* applying to homosexuality²⁰⁷ while transgender people lack an analog.

D. Whether Defamation Per Quod Can Be a Solution

If a court finds the statement to be defamatory, but not defamatory *per se*, could it be considered defamation *per quod*? Returning to the hypothetical, there is a real possibility that a person like Ms. Jones Hart would suffer irreparable financial or emotional harm if it is disseminated that she was born and used to identify as a man. Perhaps the person did not want the world to know that they were transgender and was “passing” as the gender with which they currently identify. They may also suffer reputational harm and might be subjected to hate, ridicule or violence. If the subject person is a not a transgendered individual, allowing this cause of action to persist might deter others from purposely accusing others of being transgender.

However, unlike homosexuality, defamation *per quod* in this area

²⁰⁴ See *Yonaty v. Mincolla*, 945 N.Y.S.2d 774, 779 (App. Div. 3d Dep’t 2012) (“[I]t cannot be said that current public opinion supports a rule that would equate statements imputing homosexuality with accusations of serious criminal conduct . . .”); Miller, *supra* note 4, at 362; Ward, *supra* note 4, at 742 (“Courts should not give effect to homophobia by holding such statements defamatory . . .”).

²⁰⁵ See *Know Your Rights, Transgender People and the Law*, AM. C. L. UNION, <https://www.aclu.org/know-your-rights/transgender-people-and-law> (last visited Oct. 5, 2018).

²⁰⁶ See Emma Whitford, *When Walking While Trans Is a Crime, The NYPD Says It’s Taking a More Sensitive Approach to Sex Work, But Not Everyone Benefits*, THE CUT, <https://www.thecut.com/2018/01/when-walking-while-trans-is-a-crime.html> (last visited Oct. 5, 2018).

²⁰⁷ See generally, Kluft, *supra* note 21 (“In most states, a false accusation of homosexuality was considered *per se* defamation because it implicated one or more of the[] traditional categories.”).

does not currently exist. Protecting those who are accused of being transgender or mis-gendering would require the creation of a cause of action. A court, similar to *Yonaty*, might reject this cause of action as demeaning to transgender people. Another court might find Ms. Jones Hart's case rather sympathetic and allow her to recover the harm she suffered to her reputation. There also might be communities, such as politicians, celebrities and conservative or religious communities that may be more vulnerable to attack based on allegations of being transgender. These group's gender may be scrutinized just as much by their communities as those who are alleged to be homosexual.

However, the main difference between basing defamation on homosexuality as opposed to transgenderism is that the latter allows the court more discretion because it can act without the constraints of *stare decisis*. The debate about and the history of defamation based on a false imputation of homosexuality, should serve as guidance in this burgeoning area of law. Courts and lawyers should take the history and debate regarding defamation and homosexuality into account before determining whether a cause of action based on a false imputation of transgenderism or mis-gendering should be a viable cause of action.

V. CONCLUSION

Despite much progress, more must be done to protect the LGBT community. This should be accomplished without throwing away a viable cause of action such as defamation based on a false imputation of homosexuality. There are certain groups such as politicians, celebrities and conservative and religious communities, which remain vulnerable. On the other hand, allowing this cause of action to persist could be as demeaning to the LGBT community. Out of any alternative, defamation *per quod* would be the perfect middle ground to protect the rights of the greatest number of people on both sides of the argument. Acknowledging the reality of both sides reflects that "[l]ife involves other people and it is a compromise."²⁰⁸ The history and debate around defamation based on a false imputation of homosexuality may also be instructive in creating a cause of action based on a false imputation of transgenderism.

²⁰⁸ Damian Carrington, *Kevin McCloud: I Am a Big Fan of Composting Toilets*, THE GUARDIAN (May 8, 2013), <https://www.theguardian.com/environment/damian-carrington-blog/2013/may/08/kevin-mccloud-fan-composting-toilets>.