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# IS FALSE IMPUTATION OF BEING GAY, LESBIAN, OR BISEXUAL STILL DEFAMATORY? THE ARKANSAS CASE

*Jay Barth*[*]

## I. INTRODUCTION

Historically, American courts have generally found that falsely identifying someone as gay, lesbian, or bisexual (LGB) was defamation *per se*. That is, such identification was inherently tied to damaging that individual's reputation, setting the stage for libel or slander claims. In recent years, however, courts have become conflicted on whether a false imputation of a person as LGB is defamatory; a few have gone so far as to reject the notion entirely, arguing that societal change in the area of attitudes towards LGB individuals and same-sex sexual behavior has changed the legal landscape in this area. This historical legal analysis examines the roots of defamation law as it relates to sexual minorities and then examines these questions:

- At what point does a false identification of another as LGB lose its defamatory status?

- To what degree should local "community standards" drive such determination, or in an increasingly mobile nation, does a national standard make more sense?

- Whether a local or national standard should rule in this area of the law, and what should be the basis of the determination of the negative impact on one's reputation of being falsely identified as LGB (public opinion polls, legislation on LGB-related policies in a locale, etc.)?

- To what degree is *any* legal recognition of the harm to reputation for being LGB a perpetuation of the *status quo* for sexual minorities and, thus, an encouragement for individuals who are actually LGB to remain closeted?

After this introductory analysis, the paper will then use the state of Arkansas as a case study to test the theory. Arkansas provides an interesting test case because public opinion surveys indicate that antipathy towards LGB individuals and expression of same-sex sexual behavior remains rela-

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tively strong in the state compared to others. Yet, the state's sodomy law was declared unconstitutional by the Arkansas Supreme Court before the 2003 *Lawrence v. Texas*[1] decision, relatively few anti-gay laws have been passed in the state (excepting a super-DOMA constitutional amendment), and those that have passed have been routinely rejected by the state's courts.[2] Thus, the application of the legal theory to Arkansas will provide insight into its meaning in the type of locale, i.e. away from the East and West Coasts, where an increasingly large percentage of sexual minorities are making their home according to recent U.S. Census analysis.[3]

## II. OVERVIEW OF DEFAMATION LAW

The tort of defamation has its roots in common law and was originally separated into two separate causes of action—libel (written untruths damaging to their subject's reputation) and slander (spoken statements with the same characteristics). Over time, these two torts merged, for most purposes, into a single tort: defamation.[4] Because of the role of "reputation" in shaping whether or not an untruth is defamatory, communities have had a powerful role in shaping what is and what is not defamatory.[5] Moreover, defamation law was applied at the local level through state civil law courts, and, on the occasions when defamation was written into the state's criminal code, in state criminal law courts.

Because of the limited protections provided by the First Amendment through most of the nation's history, the obvious conflicts between the free expression rights of publishers and speakers and defamation law were not recognized. The First Amendment was meaningless in terms of state-level actions until incorporation of the free speech provision of the Amendment to cover actions at the state level in *Gitlow v. New York*.[6] Even after the Supreme Court began to give some meaning to the First Amendment, defama-

1. 539 U.S. 558 (2003).

2. *See, e.g.*, *Ark. Dept. of Human Servs. v. Cole*, 2011 Ark. 145, ___ S.W.3d ___.

3. For the most thorough analysis of recent demographic trends, see Gary J. Gates & Abigail M. Cooke, *United States Census Snapshot: 2010*, WILLIAMS INSTITUTE, UNIV. OF CAL. AT LOS ANGELES SCHOOL OF LAW, 2011, http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot-US-v2.pdf (last visited Feb. 28, 2012).

4. For a concise history of defamation law, see RESTATEMENT (SECOND) OF TORTS § 568 (1977).

5. Particularly relevant when a statement might be embarrassing, defamation has often been partnered with a separate tort called the invasion of privacy. Invasion of privacy becomes viable when a statement is true but where the public disclosure of intimate facts about the person places the individual in an unfavorable light. *Accord* RESTATEMENT (SECOND) OF TORTS § 652D (1997). Although outside the purview of this paper, invasion of privacy obviously becomes quite relevant in cases where a person's LGB status has been disclosed contrary to his or her wishes.

6. 268 U.S. 652 (1925).

tory statements—no matter their content or who was being defamed—were seen as outside the turf protected by the First Amendment because of their harm to society and their absence of content that would contribute to the "marketplace of ideas."

As the Supreme Court of the United States began to enliven the Bill of Rights, including the free speech and free press provisions of the First Amendment, the inevitable conflict between the chill created by defamation tort law and the freedoms granted in the First Amendment was addressed. The first step came in the 1964 landmark case *New York Times Co.* v. *Sullivan*,[7] where a newspaper challenged a ruling by the Alabama courts holding the paper and other civil rights activists liable for defamatory falsehoods against Montgomery Public Safety Commissioner L. B. Sullivan and other police officers in the state in a paid advertisement imploring donations to assist in the criminal defense of Rev. Martin Luther King, Jr.[8] On appeal, the Supreme Court reversed the state court ruling because of its implications for the First Amendment.[9] Writing for a Court, unanimous in its vote if not its reasoning, Justice William J. Brennan established a constitutional principle that a defamatory statement about public officials could be sanctioned only when the plaintiff can prove that it was made with "actual malice," that is, publishing a falsehood with the knowledge that it was false or doing so with a "reckless" lack of investigation into its truthfulness that goes beyond a mere failure to fact check appropriately.[10] In his concurring opinion, Justice Black criticized the standard in noting the difficulty in ever proving or disproving "actual malice" in a case.[11] Indeed, defamation cases involving public officials engaged in public affairs have been found in the plaintiff's favor in only a handful of cases since the 1964 decision.[12]

In the 1967 case *Curtis Publishing Co. v. Butts*,[13] the "actual malice" standard was extended to also cover "public figures," those non-governmental officials who have public influence primarily because of their media fame.[14] The Supreme Court later clarified who fit the definition of

7. 376 U.S. 254 (1964).

8. *Id.* at 256–58. The most important overview of the history of the case and its implications for freedom of the press in the United States is ANTHONY LEWIS, MAKE NO LAW: THE *SULLIVAN* CASE AND THE FIRST AMENDMENT (1992).

9. *Sullivan*, 376 U.S. at 264–65.

10. *Id.* at 279–80.

11. *Id.* at 293 (Black, J., concurring).

12. Courts have interpreted the definition of "public official" broadly, extending it to civil servants well down the bureaucratic food chain. *See* Rosenblatt v. Baer, 383 U.S. 75 (1966).

13. 388 U.S. 130 (1967).

14. *Id.* at 155.

"public figure" in *Gertz* v. *Robert Welch, Inc.*[15], separating that larger group into two types:

- *All-purpose public figures*: Individuals who hold "positions of such persuasive power and influence that they are deemed public figures for all purposes." These individuals "invite attention and comment" and have access to the media that allows them to respond to such falsehoods.[16]

- *Limited-purpose public figures*: Individuals who have thrust themselves into the public spotlight "in order to influence the resolution of the issues involved." They would be deemed "public figures" on matters related to those issues but not to unrelated matters.[17]

After a period of conflicting cases involving defamations against private individuals, *Gertz* remains the key to understanding the bulk of defamation law in the United States. Following an analysis that determined that Chicago attorney Elmer Gertz was a private individual for purposes of defamation law despite his role in the high-profile case representing a family whose son was killed by a police officer, Justice Lewis Powell ruled that states should maintain their traditional role in shaping defamation law when private individuals (or limited-purpose public figures) were the subjects of the statements.[18]

That said, Powell's five-member majority ruled that state defamation action must respect the First Amendment's interest in the free exchange of ideas.[19] Therefore, state courts could not impose a "strict liability" standard in defamation cases, meaning that plaintiffs had to prove negligence of some sort on the part of those who had disseminated the falsehood.[20] Moreover, the Court stated that awards in defamation cases must be limited to actual damages.[21] Only in cases where the plaintiff could prove actual malice would punitive damages (like those originally awarded to Gertz) be allowed.[22]

So, while the Supreme Court has established free expression boundaries—created by the First Amendment—into which the tort of defamation may not intrude, defamatory statements remain ultimately outside the protection of the First Amendment. This is particularly the case when the subjects of the statements are neither public officials nor general purpose public

15. 418 U.S. 323 (1974).
16. 418 U.S. 323, 345 (1974).
17. *Id.*
18. *Id.* at 345–46.
19. *Id.* at 339–40.
20. *Id.* at 347–48.
21. *Id.* at 350.
22. *Gertz*, 418 U.S. at 350.

figures.[23] Moreover, as a result of the *Gertz* decision, defamation remains an area driven by state law; as a result, the common law foundations of defamation law continue to play a central role in this area of the law.[24]

As such, it is important to note the distinction between defamation *per se* and defamation *per quod*. Under common law, the doctrine of defamation *per se* presumed reputational damage when falsehoods were expressed in certain general areas.[25] Although these categories varied somewhat across the states as common law was altered by later rulings, New York law provides a typical articulation: (1) statements that accuse the plaintiff of a serious crime; (2) statements that injure another in trade, business, or occupation; (3) statements that accuse one of having a "loathsome disease"; or (4) statements that "imput[e] unchastity to a woman."[26] When a statement that falls into one of these categories is ascertained, damage is presumed and the size of the claim is all that needs to be determined.[27] That said, courts have recognized that what is defamatory at one point in time may become nondefamatory as society changes: "[W]hether a statement is defamatory per se can evolve from one generation to the next."[28]

Defamation *per quod* focuses on the reputational impact of a falsehood in a particular case. To prove defamation *per quod*, the plaintiff must provide evidence of the cost to his/her reputation brought about by the untruth.[29] Thus, a burden is shifted to the plaintiff that would not be present if the falsehood were defamation *per se*. That said, even in a state that recognized some areas as defamation *per se*, a plaintiff could still provide evidence of the damaging impact of an area outside of the categories that were inherently deemed defamatory, and make a case on *per quod* grounds.[30] Across time, a handful of states have become defamation *per quod*-only states, requiring individuals to prove damage to their reputation in all cases to make a tort claim.[31]

Clearly, the burden of proof is different in the two types of cases, producing a vital legal distinction between defamations *per se* and *per quod*. However, for the purposes of this paper, I argue that the historic distinction between defamation *per se* and defamation *per quod* has only limited importance. It is individual judges and juries who make the evaluation on whether

23. *E.g.*, RESTATEMENT (SECOND) OF TORTS § 580B cmt. a (1977).

24. *Id.* § 580B, cmt. b.

25. Liberman v. Gelstein, 80 N.Y.2d 429, 435 (1992).

26. *Id.* at 435.

27. *Id.*

28. Stern v. Cosby, 645 F. Supp. 2d 258, 273 (S.D.N.Y. 2009).

29. *See, e.g.*, Heike v. Guevara, 654 F. Supp. 2d 658, 675 (E.D. Mich. 2009).

30. *E.g.*, Lott v. Levitt, 556 F.3d 564, 568 (7th Cir. 2009).

31. Arkansas is one of six states that no longer recognizes the doctrine of defamation per se. Faulkner v. Arkansas Children's Hosp., 347 Ark. 941, 957, 69 S.W.3d 393, 403 (2002). The other states are Arizona, Mississippi, Missouri, Oregon, and Tennessee.

or not a false imputation of a characteristic is defamatory no matter the case. In the case of defamation *per se,* courts determine whether societal change maintains the place for the characteristic in a *per se* category as inherently defamatory. In the case of defamation *per quod,* judges and juries determine whether the falsehood is defamatory in the case at hand by finding special damages, but that determination is driven by the same analyses that guide whether or not the characteristic remains *per se* defamatory.[32] As a federal district court wrote in the 2009 case *Stern v. Cosby,* discussing *per se* defamation: "[W]ords, harmless in one age, in one community, may be highly damaging to reputation at another time or in another community."[33]

## III. FALSE IMPUTATION OF HOMOSEXUALITY/BISEXUALITY ACROSS TIME [34]

Historically, being falsely declared LGB has been seen as defamation *per se.*[35] That remains the norm in a series of cases decided by courts in the United States in the modern era.[36] Often, this view that false imputation of the status was defamatory was driven by the fact that sodomy was a serious offense in most locales until the 1960s. For example, in the 1959 Texas case of *Buck v. Savage,* 323 S.W.2s 363 (Tex. Civ. App. 1959), the Texas Court of Appeals upheld a lower court ruling concluding that calling someone "queer" and stating that he is "going together" with another man was defamatory *per se* because it imputed the crime of sodomy.[37] Other courts reiterated this logic in later cases before the state's law was overturned in the landmark 2003 *Lawrence v. Texas* decision.[38] In the 1980 case *Head v. Newton,*[39] the Texas Court of Appeals stated that "the statement that someone was a 'queer' is slanderous per se because it imputes the crime of sodomy."[40] The Fifth Circuit Court of Appeals, in reviewing a Texas federal district court's decision in *Plumley v. Landmark Chevrolet, Inc.*, 122 F.3d 308 (5th Cir. 1997), came to the same conclusion regarding the use of the word "faggot" in reference to a heterosexual.[41]

While less explicit in referencing Louisiana's sodomy law, which was in effect until just before the 2003 *Lawrence* ruling, the Fifth Circuit Court

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32. *See, e.g.*, Sykes v. Hengel, 394 F. Supp. 2d 1062, 1072–73 (S.D. Iowa 2005).

33. 645 F. Supp. 2d at 273 (quoting Mencher v. Chesley, 297 N.Y. 94, 100 (1947)).

34. The author wishes to express his appreciation to Derek Cash for his assistance in doing research for this section of the paper.

35. Patricia C. Kussman, *Imputation of Homosexuality as Defamation*, 7 A.L.R. 6th 135 (2005).

36. For an annotated collection of these cases through 2004, *see id.*

37. 323 S.W.2d 363, 367–68 (Tex. Civ. App. 1959).

38. 539 U.S. 558 (2003).

39. 596 S.W.2d 209, 210 (Tex. App. 1980).

40. *Id.* at 210.

41. *Id.*

of Appeals affirmed a defamation verdict in the 1982 case *Manale v. City of New Orleans*.[42] The court found that a police sergeant's near daily reference to a subordinate as a "little fruit" during roll call, admitted by the sergeant, constituted defamation *per se* under Louisiana law because it fell in the category of statements "having a tendency to deprive a person of the benefit of public confidence or to injure him in his occupation or reputation."[43] Finally, in another state where sodomy was illegal at the time, the Minnesota Court of Appeals held in its 1987 decision, *Bohdan v. Alltool Manufacturing, Co.*, 411 N.W. 2d 902 (Minn. Ct. App. 1987), that statements of fellow workers that implied the plaintiff was "other than heterosexual" were "at least reasonably susceptible to defamatory meaning" because any statement that "tend[s] to harm the plaintiff's reputation and to lower him or her in the estimation of the community" was defamatory in the state.[44]

However, a variety of other courts, focusing on public opinion regarding LGB individuals, have made clear that defamation *per se* exists when LGB status is imputed falsely even in contexts where engaging in same-sex sexual behavior is not illegal. In 1980, the California Court of Appeals found for the plaintiff in a case where the defendant had spread a rumor of the female plaintiff's affair with another woman.[45] Under California law, a statement was considered slanderous *per se* if it "[i]mputes to him (*sic*) impotence or a want of chastity."[46] While rejecting some of the language used by the lower court (the lower court had deemed lesbianism "abnormal"), the Court of Appeals found in *Schomer* v. *Smidt*, 113 Cal. App. 3d 828 (1980). that a false imputation of the commission of a homosexual act remained defamatory *per se* in the state.[47]

Four years later, in *Matherson v. Marchello*, 473 N.Y.S. 2d 998 (N.Y. App. Div. 1984), a New York appellate court found that, because a false imputation of homosexuality is "reasonably susceptible of a defamatory connotation," a husband and wife did not have to show special damages in a libel action against an entertainer who alleged the husband was gay.[48] The Court stated, "It cannot be said that social opprobrium of homosexuality does not remain with us today. Rightly or wrongly, many individuals still view homosexuality as immoral."[49]

42. 673 F.2d 122 (5th Cir. 1982). In the case, the defamed party, Manale, appealed the size of the civil award by the federal district court; the city cross-appealed the defamation ruling. *Id.* at 123.

43. *Id.* at 125.

44. *Id.* at 906–07 (Minn. Ct. App. 1987) (internal quotation marks omitted).

45. Schomer v. Smidt, 113 Cal. App. 3d 828, 832 (1980), *modified by* Miller v. Nestande, 192 Cal. App. 3d 191 (1981).

46. *Id.* at 833 (internal quotation marks omitted).

47. *Id.* at 835.

48. *Id.* at 1005 (N.Y. App. Div. 1984) (internal quotation marks omitted).

49. *Id.*

The *Matherson* ruling was reaffirmed in two more recent New York cases—by the State Court of Appeals in the 2007 case of *Klepetko v. Reisman*[50] and by a New York State District Court in the 2011 case of *Yonaty v. Mincolla*.[51] In *Yonaty*, involving a chain of comments resulting in the dissolution of a relationship by a woman involved with a man rumored to be gay, the district court wrote, "While the law may, at some point, change in response to evolving social attitudes regarding homosexuality, the existing law in New York, as expressed by the Appellate Divisions—which this court is bound to follow—is that imputation of homosexuality constitutes defamation per se."[52] Notably, the decision was handed down only days before the New York Legislature voted to allow same-sex marriage in the state.[53]

Finally, in neighboring New Jersey, a state appellate court ruled in the plaintiff's favor in a 2001 case, *Gray v. Press Communcations, LLC*, 775 A.2d 678 (N.J. Super. Ct. App. Div. 2001), in which a radio disc jockey referred to a former television personality as a "lesbian cowgirl" on air.[54] In concluding that the slur against "Sally Starr" was defamatory under New Jersey law because of its impact on the plaintiff's reputation in the community, the court stated that "[a]lthough society has come a long way in recognizing a persons' right to freely exercise his or her sexual preferences, unfortunately, the fact remains that a number of citizens still look upon homosexuality with disfavor."[55]

In contrast to this line of cases, a different series of cases across a similar timeframe came to an opposite conclusion. An Illinois Court of Appeals found that falsely calling someone a "fag" was not slander *per se* as early as 1977.[56] The court noted "the changing temper of the times" in rejecting imputation of homosexuality's categorization as *per se* defamatory.[57] In 1991, a Colorado Court of Appeals said that slanderous *per se* statements should be limited to those that "without equivocation, expose the plaintiff to public

50. 839 N.Y.S.2d 101 (N.Y. App. Div. 2007). The *Klepetko* case was ultimately dismissed by the supreme court because the article in question was deemed "opinion" and the insinuation of homosexuality in it was vague. *Id.* at 103. Still, the court did reaffirm *Matherson* in the ruling. *Id.* at 102–03.

51. N. 2009-1003, 2011 WL 2237847 (N.Y. Sup. Ct. June 8, 2011).

52. *Id.* at *30.

53. Geraldine Baum & Tina Susman, *New York votes to allow same-sex marriage*, L.A. TIMES, June 24, 2011, http://articles.latimes.com/2011/jun/24/nation/la-naw-0625-ny-gay-marriage-20110625.

54. 775 A.2d 678, 681 (N.J. Super. Ct. App. Div. 2001).

55. *Id.* at 684.

56. Moricoli v. Schwartz, 361 N.E.2d 74 (Ill. App. Ct. 1977). Notably, Illinois was the first state to decriminalize sodomy, in 1961.

57. *Id.* at 76.

hatred or contempt."[58] Instead, citing Colorado's elimination of the state's sodomy law, other local ordinances that provided antidiscrimination protections to individuals on the basis of sexual orientation, and empirical data showing some public support for LGB individuals, the court said that public attitudes towards the group were much more "mixed."[59]

Finally, in *Donovan* v. *Fiumara*,[60] the North Carolina Court of Appeals found that calling someone "gay" or "bisexual" falsely was not slanderous *per se* in 1994, despite the fact that North Carolina retained a prohibition against sodomy in its legal code. The Court emphasized that those terms merely imputed a *status*, not an *act*.[61] While individual situations might justify rulings of defamation *per quod*, allegations of homosexual status did not meet the threshold for defamation *per se*.[62]

More recently, several federal courts in northeastern states have rejected the notion of false imputation of homosexuality being defamation *per se*. In 2004, a Massachusetts federal district court found against the plaintiff's defamation claim involving a suggestion, through an unclear photo caption in a biography of the singer Madonna, that he was gay.[63] Making clear that defamation *per se* required reputational diminishment for large swaths of the public rather than a small group, the court stated that allegations of homosexuality do not now discredit one in the minds of any *considerable and respectable class* in the community noting a variety of state laws, promoting equal treatment of LGB individuals in Massachusetts.[64] The court found that defamation *per se* should be reserved for categories warranting widespread social disapproval, such as being a murderer; "to suggest that homosexuals should be put into this classification is nothing short of outrageous."[65]

In 2009, a New York federal district court similarly cited public opinion polls and ongoing legislative efforts to approve marriage equality in the state as evidence of the "current of contemporary opinion" counter to the "shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation or disgrace" necessary for an untruth to be considered defamation *per se* in a case involving a book's assertion that the former companion of the late celebrity Anna Nicole Smith was gay.[66] This federal court

58. Hayes v. Smith, 832 P.2d 1022, 1025 (Colo. App. 1991).
59. *Id.*
60. 442 S.E.2d 572 (N.C. Ct. App. 1994).
61. *Id.* at 576–77.
62. *Id.* at 577.
63. Albright v. Morton, 321 F. Supp. 2d 130, 133–34 (D. Mass. 2004).
64. *Id.* at 138.
65. *Id.* at 139.
66. Stern v. Cosby, 645 F. Supp. 2d 258, 273–74 (S.D.N.Y. 2009) (internal quotation marks omitted).

decision, however, conflicts with the series of New York state court decisions discussed earlier.

Most recently, in the case of *Murphy v. Millennium Radio Group LLC*,[67] New Jersey Federal District Court Judge Joel Pisano ruled in another "shock jock" case that accusing someone of being LGB is not defamatory under any circumstance. In the most far-reaching case to date, and in a ruling contrary to the 2001 *Gray*[68] decision, the court contended that deeming an inference of homosexuality as derogatory would "legitimize discrimination of gays and lesbians."[69] On appeal, a three-judge panel of the Third Circuit Court of Appeals vacated the district court decision and remanded the case for rehearing.[70]

All told, there is a recent pattern of more courts rejecting the traditional view that imputation of LGB status or behavior is defamatory in states without prohibitions on same-sex sexual behavior and with other legal trends favoring equality towards LGB individuals. That said, it remains clear that no consensus has emerged on the topic, even in the aftermath of the 2003 *Lawrence* decision, and even in locales that are some of the most progressive on LGB-related issues generally. With this legal history regarding cases involving false imputations of LGB status having been recounted, this paper now turns to the normative issues at the heart of this project.

## IV. HOW SHOULD COURTS ANALYZE SUCH CASES?

With this varied legal history in mind, how should state courts deal with false imputations of LGB status for private individuals and for limited-purpose public figures whose notoriety does not link to LGB-related issues?[71]

First, it seems clear that as long as criminal sodomy statutes remained on the books in a given state, a defamation judgment in such a case was justifiable. For most of the twentieth century, sodomy laws (some covering both heterosexual and homosexual sodomy and some only the latter) were in place in all states; it was not until Illinois eliminated its criminal ban in 1961 as part of a criminal code overhaul that states began to remove their sodomy

67. Civ. A. No. 08-1743 JAP, 2010 WL 1372408, at *7 (D.N.J. Mar. 31, 2010), *vacated by* Murphy v. Millennium Radio Group, LLC, 650 F.3d 295 (3rd Cir. 2011).

68. *See supra* note 53 and accompanying text.

69. *Murphy*, 2010 WL 1372408 at *7.

70. Murphy v. Millennium Radio Group LLC, 650 F.3d 295, 310 (3rd Cir. 2011).

71. *See* Gertz v. Robert Welch, Inc., 418 U.S. at 327–28 (1974). For instance, a false imputation of LGB-status against a locally prominent minister who was readily identified with support for a "family values" platform should be evaluated employing an actual malice standard in accordance with the *Gertz* decision.

laws from the books.[72] In many of these states, the crime of sodomy was considered a felony offense, and individuals convicted of sodomy faced significant prison sentences.[73] Falsely accusing someone of a felony offense falls under the most conservative definition of defamation, whether it is categorized as defamation *per se* or examined on a *per quod* basis.

The North Carolina court in *Donovan*, differentiated between homosexual acts and status.[74] Undeniably, such a differentiation is technically accurate as not all LGB individuals engage in sodomy, and not all individuals who have sex with those of the same sex identify as LGB. That said, the Supreme Court of the United States, in its two sodomy decisions—*Bowers v. Hardwick*[75] and *Lawrence v. Texas*[76]—melded behavior and status together in fundamental ways, albeit with different results. In the 1986 *Bowers* decision, Michael Hardwick is described by the Court majority as a "practicing homosexual" suggesting that engaging in sodomy is an important component of his identity as a gay man.[77] Justice White's majority opinion notes the "ancient roots" of bans on sodomy as grounded in moral judgments and reaffirmed by Georgia's elected officials in supporting the law;[78] as such, the declaration of LGB individuals' entire identity as an immoral choice is defended by the five-Justice majority.[79] In one of the few analyses of the topic of this paper, Eric Yatar has argued for the crucial link between the framing of LGB status by the *Hardwick* court and defamation law:

> The judicial construction of the homosexual has not only created a monolithic figure that is defined by a single sex act, but it has also fostered a belief that homosexuality is wrong and sinful. . . . Until the Supreme Court re-visits and re-evaluates its decision and its rationale in *Hardwick*, courts would be remiss in finding that an imputation of homosexuality is anything other than defamatory and highly offensive—the Supreme Court thinks so.[80]

In 2003, the Court did re-evaluate its *Hardwick* ruling in the *Lawrence* case as Texas's sodomy law was deemed violative of the promise of "liber-

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72. For a complete state-by-state history of sodomy laws, see *Sodomy Laws in the United States*, GAY & LESBIAN ARCHIVES OF THE PACIFIC NORTHWEST, http://www.glapn.org/sodomylaws/usa/usa.htm (last visited April 1, 2012).

73. *Id.*

74. *Donovan*, 442 S.E.2d at 579–80.

75. 478 U.S. 186 (1986).

76. 539 U.S. 558 (2003).

77. *Bowers*, 478 U.S. at 188.

78. *Id.* at 191.

79. *Id.* at 192–96.

80. Eric K.M. Yatar, *Defamation,, Privacy, and the Changing Social Status of Homosexuality: Re-Thinking Supreme Court Gay Rights Jurisprudence*, 12 L. & SEXUALITY REV. 119, 157–58 (2003).

ty" protected by the Fourteenth Amendment's Due Process Clause.[81] Again, however, same-sex sodomy and the status of LGB individuals were melded together as acts of sodomy were described as "sexual practices common to a homosexual lifestyle."[82] But, a much more sympathetic Court, led by Justice Anthony Kennedy, saw the damaging aspects of the sodomy laws that went well beyond their possible criminal sanctions, stating that such laws "demean [LGB individuals'] existence."[83] Moreover, the laws have ramifications for the lives of gay men and lesbians that are more pragmatic: "When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres."[84] Thus, while some would like to separate behavior and status in a tidy manner, the Supreme Court has made clear that such separation is impossible.

Between 1961 and 2003, sodomy laws disappeared from the criminal codes of individual states through the actions of state legislatures and state courts.[85] When those decisions were made, one key justification for defamation rulings for false imputation of homosexuality went away. In 2003, however, when the Supreme Court struck down the sodomy laws of fourteen states and Puerto Rico, this rationale for such defamation rulings disappeared nationwide.[86]

Although this crucial justification for a defamation finding is now absent across the nation, many would argue that fundamental biases exist against individuals who identify as gay, lesbian, or bisexual that supports, in most locales in the country, an analysis of untruths involving LGB status that would justify defamation claims. As Robert Richards argues in his critique of the 2009 *Stern v. Cosby* decision:[87]

> Refusing to recognize that sizable pockets of society still hold gays and lesbians to the obloquy, ridicule, and contempt that define defamation per se does not eradicate that prejudice from reality. Perhaps one day, societal attitudes will have changed to the point that cases finding the imputation of homosexuality to be de-

81. *Lawrence*, 539 U.S. at 578.
82. *Id.* at 560.
83. *Id.* at 578.
84. *Id.* at 575.
85. *E.g.*, Justin Reinheimer, *What Lawrence Should Have Said: Reconstructing an Equality Approach*, 96 CAL. L. REV. 505, 510 (2008).
86. It should be noted that the *Lawrence* decision did not eliminate the sodomy provisions found in Article 125 of the Uniform Code of Military Justice. *See Lawrence*, 539 U.S. 588. As such, a claim of defamation for a false statement regarding a member of the military's sexual orientation might maintain merit even after the repeal of the so-called "Don't Ask, Don't Tell" law.
87. 645 F. Supp. 2d 258 (S.D.N.Y. 2009).

> famation per se will appear anachronistic. However, that day and society as a whole, have not yet reached that point.[88]

In particular, Richards sees United States District Judge Denny Chin as pollyannaish and selective in his employment of public opinion data and pro-LGB legislative efforts in New York to justify his determination that false imputations of being gay remains defamatory.[89] Richards, in response, employs various pieces of anecdotal evidence to highlight the continued costs of being LGB in American life and law.[90]

Richards is correct in his argument that the legal and social landscape in the United States remains a difficult one for LGB individuals. However, he shortchanges the evidence put forward by the court in the *Stern* case. In his justification that the "current of contemporary opinion" had shifted significantly, Judge Chin—using both New York-specific public opinion and legislative data—refused to be driven to adopt a view that a small number of anti-LGB individuals in a locale could justify a defamatory environment when it comes to false imputations of homosexuality.[91]

Judge Chin's decision answers Abigail Rury's 2011 critique of the somewhat sloppy evidence traditionally provided in such cases in evaluating "community standards" in gay defamation cases.[92] Rury argues that judges should be clear in articulating the "relevant community" in the case at hand (avoiding the normative impact that comes with the traditional use of a community's "considerable and respectable class" in defamation law[93]) and by clearly presenting evidence (like legislation or polling data) from that community.[94] The failure to do so, Rury argues, means that judges' own personal attitudes about LGB individuals will fill that void.[95] When such empirical data is unavailable, Rury contends that the court should borrow from the *Miller* v. *California*[96] obscenity case, and employ the "contemporary community standard" that looks to the "average person" in the commu-

88. Robert D. Richards, *Gay Labeling and Defamation Law: Have Attitudes toward Homosexuality Changed Enough to Modify Reputational Torts*, 18 COMMLAW CONSPECTUS 349, 367–70 (2010).

89. *Id.* at 362–64.

90. *Id.* at 364–65.

91. *See Stern*, 645 F. Supp. 2d at 273–76. It should be noted that the case was handed down in advance of the New York state legislature's passage of a marriage equality bill in 2011.

92. Abigail A. Rury, *He's So Gay . . . Not that There's Anything Wrong With That: Using a Community Standard to Homogenize the Measure of Reputational Damage in Homosexual Cases*, 17 CARDOZO J.L. & GENDER 655, 655–57 (2010–11).

93. *Id.*

94. *Id.* at 673–75.

95. *Id.*

96. 413 U.S. 15 (1973).

nity as a guide rather than the most liberal or conservative elements of that community in evaluating attitudes about LGB persons.[97]

Assuming the impact on a plaintiff in a given community of a libelous or slanderous statement, as has been the traditional view in defamation law (either *per se* or *per quod*), Rury's view is a well-reasoned one. Moreover, as will be noted in the next section of the paper, it is recognized that significant variation of attitudes on LGB individuals and LGB-related policies vary significantly across the United States. That said, two vital objections to the continued employment of a "contemporary community standard" in gay defamation cases come to the forefront.

First, just as the *Miller* community standard is under assault because of the Internet's influence in the area of pornography, it is crucial to note the role of the web in the (re)distribution of false information regarding even private individuals that potentially undermines the locale-based nature of traditional defamation tort law. In *United States* v. *Kilbride*,[98] the Ninth Circuit, citing separate concurrences by Justices O'Connor and Breyer in *Ashcroft* v. *ACLU*,[99] adopted a national standard in obscenity cases involving electronic distribution of the material (email, in the case at hand).[100] Just as in cases involving materials alleged to be obscene, untruthful information is increasingly originated in or repeated via the Internet; therefore, today it is often the Internet that drives its negative impact on the plaintiff's reputation.

Second, and even more fundamentally problematic for traditional defamation law in the area of sexual orientation claims, the continued acceptance of false imputation of homosexuality gives credence to negative attitudes toward lesbians and gays, creating a *de facto* barrier to social change. Moreover, the state, acting through the courts, becomes the enforcer of this cementing of attitudes about LGB individuals in symbolic conflict with the constitutional commitment to equal protections.

In her critique of the 2001 New Jersey decision in *Gray v. Press Comm., LLC*,[101] Rachel Wrightson makes the clear case that the gay-defamation decision was in conflict with a series of legislative and judicial decisions in the state broadening equal protection for sexual minorities and combating homophobia (through, for instance, passage of hate crimes laws).[102] The *Gray* decision, in contrast, was "tantamount to declaring ho-

97. Rury, *supra* note 92, at 668–70.

98. 584 F.3d 1240, 1250 (9th Cir. 2009).

99. 535 U.S. 564 (2002).

100. *Kilbride*, 584 F.3d at 1250.

101. 775 A.2d 678 (N.J. Super. Ct. App. Div. 2001).

102. Rachel M. Wrightson, *Gray Cloud Obscures the Rainbow: Why Homosexuality as Defamation Contradicts New Jersey Public Policy to Combat Homophobia and Promote Equal Protection*, 10 J.L. & POL'Y 635, 670–71 (2002).

mosexuality offensive."[103] As a result, Wrightson contends, "*Gray* effectively relegates gays and lesbians in a position of political and legal second-class citizenship."[104]

By this logic, in all parts of the country, gay defamation cases are in conflict with the pro-equality logic guiding both the *Lawrence* decision, discussed earlier, and, even more clearly, the 1996 *Romer v. Evans*[105] case. *Lawrence* was not an equal protections case, but Justice Kennedy's decision argues that protecting the freedoms of LGB individuals to engage in consensual, private sexual behavior was part of the continuing advancement of the nation towards the promise of liberty.[106] In the concluding section of his opinion, Justice Kennedy clearly states this belief in articulating the promise found in the words of the framers of the Fifth and Fourteenth Amendments Due Process Clauses: "[The Framers] knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress."[107] Justice Kennedy also wrote for the majority in *Romer*, in which a Colorado ballot initiative that barred antidiscrimination laws focused on sexual orientation was struck down as being in violation of the Equal Protection Clause.[108] While the Court employed a rational basis test in the decision, Kennedy, writing for the six-Justice majority, determined that "animus toward the class that it affects" was the sole purpose for the illegitimate ballot measure and was, thus, a fundamental violation of Equal Protection.[109] While less expansive than the state laws examined in Wrightson's piece, together these two landmark LGB judgments by the Supreme Court establish a trend towards promotion of LGB equality for the nation along the lines of those laid out by Wrightson in her analysis of *Gray*.[110]

In addition to these cases that cover the entire country, even the most conservative states in the country often have judicial or legislative actions on the books explicitly or implicitly promoting equality for LGB individuals. Gay defamation cases are clearly contrary to the spirit of such legal statements. As Judge Pisano concluded in *Murphy v. Millennium Radio*

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103. *Id.* at 674.

104. *Id.* at 677–78

105. 517 U.S. 620 (1996).

106. Lawrence v. Texas, 539 U.S. 558, 562 (2003).

107. *Id.* at 579.

108. *Romer*, 517 U.S. at 637–39.

109. *Id.* at 632. Justice O'Connor's concurring opinion in *Lawrence*, an equal protections-based judgment grounded in *Romer*, also should be seen as part of this thread of pro-equality rulings by the Supreme Court.

110. These Supreme Court cases are joined, of course, by federal legislative actions such as the repeal of "Don't Ask, Don't Tell" in 2011 and the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009, that also have promoted LGB-equality and legislative statements against homophobia.

*Group LLC*, an inference of homosexuality as derogatory serves only to "legitimize discrimination against gays and lesbians."[111] Thus, while such proceedings are meant to undo harm to an individual whose reputation has been marred, they actually cause harm to an entire class of individuals in the state by perpetuating the assumption that being gay, lesbian, or bisexual is worth being embarrassed about. By extension, gay defamation rulings discourage LGB individuals from being open about their sexuality. We know, from a line of social science works, that sexual minorities' openness about their sexuality with friends, family, and co-workers is a vital force in reshaping attitudes about LGB individuals as a group in a positive direction.[112] Therefore, the law plays a role in "maintaining the closet," stymieing attitude change that occurs through personal contact with gays and lesbians.

In summation, falsely stating that an individual is breaking a law, particularly a felony offense, would clearly be defamatory. Thus, while sodomy was illegal in a given state, false imputation of being LGB (even if explicit references to sexual behavior were not made) would justify a defamation verdict. However, since 2003 (and prior to that as states eliminated their sodomy laws through legislative or court action), I argue that such verdicts serve only as unjustified state-based perpetuation of antipathy towards sexual minorities even when the overwhelming majority of the locale's citizens have negative attitudes towards gays and lesbians, and such a false imputation might indeed have negative repercussions for the plaintiff. In its final section, this paper applies this normative argument to defamation law in the interesting state of Arkansas, a critical case because of the clear antipathy towards LGB individuals as shown in public opinion data but where the legal landscape offers a clearly more pro-LGB environment based on recent court rulings.

## V. THE CASE OF ARKANSAS

False imputation of LGB status in written or spoken word would be a question of first impression under Arkansas law. While some LGB-focused defamation cases have been initiated in other states in the modern era, no case has been dealt with by an Arkansas court in that period. Can the normative analysis above, arguing that defamation claims in such cases are inherently problematic, be justified even in a state as culturally conservative as Arkansas?

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111. *Murphy*, 2010 WL 1372408, at *7.

112. For a complete discussion of this literature, see Jay Barth, L. Marvin Overby, & Scott H. Huffmon, *Community Context, Personal Contact, and Support for an Anti-Gay Rights Referendum*, 62 POL. RES. Q. 355 (2009).

Until 1998, Arkansas retained the traditional *per se/per quod* differentiation in defamation law. Certain statements were deemed inherently defamatory—and, thus, not requiring proof of harm in the case at hand to gain damages—while other statements were evaluated on a case-by-case basis for their cost in reputation to the subject of the spoken or written statements.[113] In *United Insurance Company of America* v. *Murphy*,[114] however, the Arkansas Supreme Court definitively eliminated defamation *per se* from the state's jurisprudence because of its bluntness as a legal tool (this conclusion had been hinted at in previous Court rulings).[115] As Chief Justice "Dub" Arnold wrote for the court,

> by allowing presumed damages for certain words that fit within the *per se* categories but precluding actual damages for other words without additional proof of damages, the common-law rule 'creates unjustifiable inequities for plaintiffs and defendants alike.' We believe that the better and more consistent rule . . . is to require plaintiffs to prove reputational injury in all cases.[116]

Thus, in Arkansas cases, judges and juries gauge the facts of individual cases for their reputational damage, no matter the content of the untruth. That said, this hurdle has not been a particularly tough one to clear based on key defamation rulings. Most tellingly, in the 1997 case of *Little Rock Newspapers, Inc.* v. *Fitzhugh*, the Arkansas Supreme Court upheld a $500,000 verdict against the *Arkansas Democrat-Gazette* for its misidentification of the plaintiff in a photograph accompanying news coverage of the Whitewater federal court cases.[117] In its appeal of a lower court verdict, the newspaper argued that Fitzhugh had failed to prove that he suffered a specific, actual injury to his reputation, because there was no testimony that the article/photograph had caused others to think less of Fitzhugh.[118] Upholding the verdict, the supreme court stated that reputational damage can be proven in two ways: by proving that individuals believed the plaintiff to be guilty of the conduct suggested by the article (in this case, that Fitzhugh was involved in the Whitewater investigation), or by proving that others "thought less of the plaintiff" because of the article's untrue content.[119]

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113. Lisa R. Pruitt, *The Law of Defamation: An Arkansas Primer*, 42 ARK. L. REV. 915, 915–1026 (1989) (describing Arkansas defamation law until the late 1980s).

114. 331 Ark. 364, 961 S.W.2d 752 (1998).

115. *Id.* at 370.

116. *Id.* at 370, 961 S.W.2d at 756.

117. 330 Ark. 561, 564, 954 S.W.2d 914, 916 (1997).

118. *Id.* at 571, 954 S.W.2d at 919.

119. *Id.* at 574, 954 S.W.2d at 921. For more on the *Fitzhugh* case, see Mitch Berry, *Arkansas Supreme Court Clarifies Plaintiff's Burden for Proving Damage to Reputation*, 21 U. ARK. LITTLE ROCK L. REV. 721 (1999).

It seems clear that, applying the *Fitzhugh* precedent, an Arkansas jury would likely find that members of the community "thought less" of a plaintiff if a private citizen faced an untruth about their sexual orientation. Moreover, a jury would have justification based on the type of empirical data called for by other analysts of the topic. While Arkansas has a libertarian streak not found in neighboring states, as a southern state, Arkansas generally reflects the traditionalistic political culture.[120] While maintenance of the racial status quo was a cornerstone of that traditionalism, it is also important to note that the protection of other social hierarchies—including those related to gender, sexuality, and religion—was also tied into the state's traditionalism.[121]

Moreover, a 2005 Arkansas poll conducted by the University of Arkansas provides clarity about where contemporary Arkansans stand regarding attitudes towards LGB individuals.[122] At that time, there was little to indicate any significant shifts in the aggregate numbers; nearly two-thirds of Arkansans deemed such sexual relationships as "always" being wrong, while only 13.6 percent believed such behavior to be "not wrong at all."[123] In contrast, California's field poll, conducted just months after the Arkansas poll, found that only half as many Californians (thirty-two percent) viewed same-sex sexual relations as "always wrong."[124] National numbers from recent years place all Americans somewhere between these two states.[125] The Arkansas poll also shows similar results in Arkansans' general attitudes toward gay men and lesbians. The 2005 survey asked respondents' attitudes toward gays and lesbians on a five-point scale.[126] Only 14.9 percent of Arkansans view gay and lesbians as "very favorable" or "favorable"; this contrasts with the forty-three percent of Californians who evaluate gays and lesbians "warmly" on a 100-point feeling thermometer.[127] Thus, by these gauges, traditionalism

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120. *See, e.g.*, DANIEL J. ELAZAR, AMERICAN FEDERALISM 99–102 (2d ed. 1972).

121. *See* DIANE D. BLAIR & JAY BARTH, ARKANSAS POLITICS AND GOVERNMENT 26–28 (2005).

122. For full explication and analysis of this data, see Jay Barth & Janine Parry, *Political Culture, Public Opinion, and Policy (Non)Diffusion: The Case of Gay- and Lesbian-Related Issues in Arkansas*, 90 SOC. SCI. Q. 309 (2009).

123. *Id.* at 313–14.

124. *Id.* Attitudinal data of this sort is relatively rare at the state level, making comparative analysis difficult and, as Rury suggests, leading judges who adopt a "community standards" approach to gay defamation to rely on speculation regarding accurate gauges of public attitudes towards LGB individuals. See *Rury*, *supra* note 92.

125. *See* Patrick Egan & Kenneth Sherrill, *Neither an In-Law Nor an Outlaw Be: Trends in Americans' Attitudes Toward Gay People*, PUBLIC OPINION PROS (2005), http://www.publicopinionpros.norc.org/features/2005/feb/sherrill_egan.asp (last visited April 1, 2012).

126. Barth & Parry, *supra* note 121, at 314.

127. *Id.* at 314–15. Unsurprisingly, it is Arkansans' religious beliefs that are most forceful in shaping their attitudes about gay men and lesbians even when controlling for other impor-

reigns on Arkansans' views of sexual mores that deviate from the perceived norms. Therefore, this public opinion data strongly suggests that, in Arkansas, there is some reputational cost in the "community" by false imputation of homosexuality or bisexuality. However, as the normative analysis in this paper concluded, analysis of the topic should not stop there.

In the previous section, I argued that the most important aspect in cases involving false gay labeling is whether engaging in same-sex sexual behavior has been decriminalized in the state. Importantly, Arkansas's sodomy law was overturned in advance of the *Lawrence* decision (albeit only months before) in an expansive ruling that analyzed a same-sex only sodomy law passed in 1977 on both privacy and equal protections grounds.[128] Writing for the court in *Jegley v. Picado*,[129] Justice Annabelle Clinton Imber found that public morality was not a sufficient justification for the law, and thus, it failed to pass a rational basis test on equal protections grounds.[130] However, the case went much further in articulating a broad right to privacy under the Arkansas Constitution. As Imber wrote, "[i]n considering our constitution together with the statutes, rules, and case law mentioned above, it is clear to this court that Arkansas has a rich and compelling tradition of protecting individual privacy and that a fundamental right to privacy is implicit in the Arkansas Constitution."[131] Obviously, the law could not pass the strict scrutiny test created by its intrusion into a fundamental right. *Jegley* took away the most legitimate justification for a successful gay defamation ruling.

In addition, other legal decisions beyond the wide-ranging *Jegley* decision are suggestive of a relatively pro-LGB legal environment that would be contradicted by a successful gay defamation verdict at this point in time. Most of these cases emanate out of the complicated story related to attempts to ban adoption or foster care by same-sex couples in Arkansas. In 1999, a state executive board overseeing foster care policies in the state established a rule that "no person may serve as a foster parent if any adult member of that person's household is a homosexual."[132] The trial court published an extensive finding of fact that gay and lesbian parents were not less capable of successful parenting than heterosexual parents, concluding "that there is no correlation between the health, welfare, and safety of foster children and the blanket exclusion of any individual who is a homosexual or who lives in

tant factors such as sex, age, education, and personally knowing someone who is gay or lesbian.

128. 349 Ark. 600, 80 S.W.3d 332 (2002).

129. *Id.*

130. *Id.* at 633, 80 S.W.3d at 351.

131. *Id.* at 631–32, 80 S.W.3d at 349–50.

132. *Dep't of Human Servs. & Child Welfare Agency Review Bd. v. Howard*, 367 Ark. 55, 58, 238 S.W.3d 1, 3 (2006).

a household with a homosexual."[133] As such, the circuit court found that the rule barring foster care placements violated the separation of powers because the state board was applying morality-based judgments rather than policies that would promote the health and safety of children.[134] The Arkansas Supreme Court affirmed the lower court ruling in *Department of Human Services and Child Welfare Agency Review Bd. v. Howard*,[135] and, along the way, reiterated forty-seven statements of fact that concluded that gays, lesbians, and gay couples were in no way less effective as prospective foster parents than heterosexuals.[136]

Two years later, after a failed legislative effort to overturn the *Howard* decision, an initiated act know as "Act 1"—barring unmarried cohabitating couples, no matter their sex, from adopting or foster parenting children in the state—was placed on the ballot and passed by the state's voters.[137] That act, however, was struck down in 2011 in *Arkansas Department of Human Services v. Cole*.[138] The right to privacy established in the *Jegley* case was crucial in the court's ruling. While the case did not deal with LGB rights directly, the court reiterated its respect for the value of sexual relationships outside of marriage:

> In the case before us, the burden dispensed by the State is either to remove the ability to foster or adopt children, should sexual partners live together, or to intrude into the bedroom to assure that cohabitators who adopt or foster are celibate. We conclude that, in this case as in *Jegley*, the burden is direct and substantial.[139]

By the court's action, Arkansas shifted from being one of the state's least respective of gay parenting, to one where LGB parenting is most protected constitutionally through the explication of the privacy right. Just before the *Cole* decision, the supreme court in *Bethany v. Jones*[140] had upheld, as being in the best interest of the child, a trial court's ruling providing visitation rights to a lesbian who had been the primary caretaker for the child during the early years of the child's life while she was partnered with the

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133. *Id.* at 65, 238 S.W.3d at 8.

134. *Id.*, 238 S.W.3d at 8.

135. 367 Ark. 55, 238 S.W.3d 1 (2006).

136. *Id.* at 66, 238 S.W.2d at 8–9.

137. *See, e.g.*, Catherine L. Hartz, *Arkansas's Unmarried Couple Adoption Ban: Depriving Children of Families*, 63 ARK. L. REV. 113 (2010) (giving a history and analysis of the topic leading up to the trial court verdict).

138. 2011 Ark. 145, ___ S.W.3d ___.

139. *Id.* at 17, ___ S.W.3d at ___. Notably, the trial court did see *Cole* as a LGB-rights case emphasizing that homosexual couples were denied the right to marry and, as such, were being "targeted" by the law.

140. 2011 Ark. 67, ___ S.W.3d at ___.

child's biological mother.[141] These judicial rulings, along with the *Jegley* decision, suggest a not insignificant, though still young, tradition of promoting LGB equality in Arkansas.

Moreover, and very interesting considering the public opinion of the state towards LGB individuals, Act 1 was one the few anti-LGB laws passed in Arkansas since the 1977 sodomy law. Employing other parts of the 2005 Arkansas Poll data, the traditionalism that promotes citizens' disdain of their fellow gay and lesbian citizens butts up against another aspect of the state's political culture sympathetic to the notion that government should not become entangled with those individuals' personal lives.[142] The place of sexual minorities within this cultural tableau has been similarly complicated. As Brock Thompson has noted in his recent historical work on same-sex desire in Arkansas, queer Arkansans have regularly been able to carve out physical spaces that were their own, and in which they were generally protected from intrusion from straight Arkansans and their social norms.[143] In addition, Thompson argues that, in many additional cases, expressions of queer life quietly showed themselves within "straight" communities and were allowed to exist with the tacit approval of a majority that was outwardly disapproving of deviation from sexual norms.[144] Thus, the dance between strong protection of traditional morality (borrowed from the traditionalistic political culture) and libertarianism (borrowed from a different cultural streak in the state's history) has shown itself on matters related to LGB Arkansans across time. While Arkansans strongly oppose any state sanctioning of homosexuality, public opinion polling shows that they also tend to oppose the sanctioning of discrimination against gays and lesbians by that government with the clear exception of same-sex marriage and civil union policies (in 2004, the state's voters overwhelmingly passed a so-called "super-DOMA" marriage amendment[145]).[146]

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141. *Id.* at 11–13, ___ S.W.3d at ___.

142. Barth & Parry, *supra* note 121, at 318–24. (arguing that because both the landed aristocracy was less numerous in Arkansas—it is estimated that less than one hundred Arkansans ever owned more than one hundred slaves—and because the frontier with its anti-aristocratic influences was much nearer, elitism never played the role in Arkansas that it did in other parts of the South). These were people who preferred taking care of their own needs, basically believing that government was an inconsequential nuisance and that "politicians are the source of all disillusionment." SHIRLEY ABBOTT, WOMEN FOLKS 59 (1983). Moreover, this sentiment, traditionally most common in the northwest part of the state, was not absent from other parts of a state filled with the ancestors of pioneers. The competition with the traditionalism common throughout the rest of the state resulted in a political culture more complex than that found elsewhere in the South. *Id.*

143. BROCK THOMPSON, THE UN-NATURAL STATE: ARKANSAS AND THE QUEER SOUTH 9–10 (2010).

144. *Id.* at 10.

145. *See, e.g.*, *Arkansas*, DOMA WATCH, http://www.domawatch.org/stateissues/arkansas/index.html (last visited April 1, 2012).

Much in Arkansas defamation law would suggest that a plaintiff would be favored in a false imputation of homosexuality case even though she or he would have the burden of proof under Arkansas's *per quod* standard. Moreover, in line with Rury's critique of previous gay defamation cases, that plaintiff would have empirical evidence to buttress whatever anecdotal evidence was brought forward in trial. However, I contend that Arkansas courts would be right to resist the instinct to "do right" by the harmed plaintiff because of the much greater harm done in perpetuating stigmatization of LGB Arkansans at a time when constitutional doctrine in the state is sending a decidedly different message.

## VI. CONCLUSION

Defamation law, a remnant of common law, becomes particularly fascinating when faced with an attribute, like LGB status, about which American society is quickly changing its views but with varying swiftness across the country. While courts would have automatically deemed false imputation of homosexuality defamatory during the days of criminalized sodomy, American law and life has been made anew on all matters related to sexual orientation across the fifty years since Illinois's legislature repealed its sodomy law. The recent history of cases involving the false imputation of LGB status shows the confusion emanating from these changes with courts across America somewhat randomly ruling gay defamation legitimate or not.

In this paper, I argue that there is no continuing justification for deeming false imputation of an individual as being gay, lesbian, or bisexual defamatory even in locales where "community standards" exhibit sharply negative attitudes about LGB individuals. Following the nationwide abolition of sodomy laws, gay defamation cases serve only as state-driven perpetuation of denigration of sexual minorities in direct conflict with the trajectory of American law regarding sexual orientation.

Applying this argument to Arkansas, a state where this legal issue would be novel, is relevant because the socially conservative state is one of the most challenging tests of the paper's normative theory. Despite the state's elimination of its sodomy law (just before the *Lawrence* ruling), traditional defamation law would tend towards an acceptance that such a falsehood regarding the plaintiff's sexuality is, indeed, harmful to his or her

146. An exception to this agnostic attitude on LGB issues was the passage of an anti-bullying bill in 2011, specifically enumerating sexual orientation and gender identity as categories deserving protection in schools. 2011 Ark. Acts 907 (codified at ARK. CODE ANN. § 6-18-514(b)(1)(Supp. 2011). This is one of only a handful of state anti-bullying laws that explicitly protects LGB youth and school employees. *E.g.*, *States with Safe Schools*, GAY LESBIAN AND STRAIGHT EDUCATION NETWORK, http://www.glsen.org/cgi-bin/iowa/all/library/record/2344.html?state=media (last visited April 1, 2012).

reputation; moreover, the plaintiff would not have to rely upon conjecture or anecdote because empirical evidence of Arkansans' attitudes toward homosexual behavior and status is so clear (and so clearly negative). Despite this reality, even in Arkansas legal patterns suggest a shift towards equality towards gays and lesbians. Deeming false imputation of homosexuality defamatory would serve only to stymie this pro-equality shift in law, perpetuating inequality. Increasing numbers of LGB Americans are living in locales, like Arkansas, that have not been the traditional retreats for individuals living as openly gay or lesbian individuals. For this reason, battles over LGB rights will increasingly be fought in states away from the two coasts. While the issue of gay defamation is destined to be barely a skirmish in the larger legal and social war over gay rights, courts' refusal to perpetuate biases against gays, lesbians, and bisexuals is symbolically and substantively important. For this is an area where, to borrow from Justice Kennedy's *Lawrence* opinion, "laws once thought necessary and proper in fact serve only to oppress."[147]

147. Lawrence v. Texas, 539 U.S. 558, 579 (2003).