

Defamation, Privacy, and the Changing Social Status of Homosexuality: Re-Thinking Supreme Court Gay Rights Jurisprudence

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I. INTRODUCTION

Determining whether an imputation of homosexuality as against another person is defamatory so as to support the viability of a cause of action for defamation raises some rather compelling issues that challenge the very substance and values of the homosexual community. Moreover, such a determination also raises serious implications for the viability of a

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cause of action for invasion of privacy insofar as there is an element of offensiveness required to be proven. In addition to the challenges posed to defamation and invasion of privacy tort law, the resulting determination yields significant concern for the continued relevance, power, and persuasiveness of prevailing Supreme Court jurisprudence regarding issues that specifically affect the rights of homosexual persons. These issues raise huge red flags because of the constitutionalization of the traditionally common law tort claims of defamation and invasion of privacy, as evidenced by the Supreme Court's fairly recent development of its First Amendment jurisprudence.

Clearly, defamation and invasion of privacy causes of action implicate the First Amendment's guarantee of the freedom of speech insofar as both allege injurious speech acts. The Supreme Court has spoken to the protection the First Amendment accords speech that is alleged to have injured a person and her reputation. Accordingly, the basic causes of action for defamation and invasion of privacy are not only premised on the basic elements of the actual torts, but they also raise constitutional concerns that invoke the protections and guarantees provided thereunder. It is important to note, however, that despite the constitutionalization of these torts, the Supreme Court has refused to speak to the fundamental constitutionality of these torts as to dismiss them outright and totally. Instead, the Court has delimited certain boundaries within which these torts may remain viable and outside the protections of the First Amendment.

In light of the remaining viability of these tort causes of action, coupled with the Supreme Court's jurisprudence in this area, the specific issue of the imputation of homosexuality presents an extremely curious quandary given the Supreme Court's precedent as concerns the rights of homosexual persons. Namely, this quandary warrants a revisiting of the Court's decision in *Bowers v. Hardwick*,¹ in particular, as well as other Supreme Court decisions that have addressed issues specific to homosexual persons. Because the standards that determine what is defamatory may change over time, as evidenced by various courts' current refusal to recognize imputations of race or ethnic identity as defamatory,² the defamatoriness of an imputation of homosexuality arguably hangs in the balance, especially given the changing social conditions and mores as regards homosexuality and homosexual persons. It is in this vein that arguments are often asserted for not recognizing the

1. 478 U.S. 186 (1986).

2. See, e.g., *Ledsinger v. Burmeister*, 318 N.W.2d 558 (Mich. App. 1982) (holding that although they are offensive, racial slurs are not necessarily defamatory).

viability of defamation and/or invasion of privacy claims for an imputation of homosexuality.³

This Article, therefore, looks at the imputation of homosexuality in the common law tort context and the implications judicial determinations in this realm have for the continuing validity and persuasiveness of the Supreme Court's jurisprudence vis-à-vis the rights of homosexual persons. Part II of this Article examines the nature of the common law tort causes of action of both defamation and invasion of privacy, primarily focusing on the meaning of what is "defamatory" for purposes of defamation and what is "highly offensive" for purposes of invasion of privacy. This section also examines the current case law concerning homosexuality under both causes of action. Part III examines the changing social status of and attitudes toward homosexuality and homosexual persons in modern American society, and the potential difficulties these changing norms pose to the viability of such tort claims. This section not only attempts to provide an understanding of the basic nature of the tort causes of action, but also an understanding of how homosexuality is currently treated under the law in these areas. Moreover, this section elucidates how the status of homosexuals in society has changed and the implications such change might have for the future of tort law in this area.

Part IV then looks to the treatment of homosexuality and homosexual persons in Supreme Court jurisprudence, particularly the Court's rationale in *Hardwick*, as well as subsequent cases that have addressed the rights of homosexuals. This section addresses the Court's characterization of homosexuality and the value-laden assumptions that underlie its decisions. Lastly, Part V presents arguments that have been propounded for and against the determination that homosexuality imputations are defamatory and/or highly offensive and some of the problems with and inadequacies of these arguments. This section, in part, contends that recognizing an imputation of homosexuality as defamatory or highly offensive should not be read as endorsing homophobia or the continued socio-structural marginalization of homosexuals, but should rather be read as recognizing the reality of today's society and as an effort to punish homophobic individuals who choose to use homosexuality to injure another. Moreover, the Article concludes that if courts are to refuse to recognize an imputation of

3. See, e.g., David H. Pollack, *Forced Out of the Closet: Sexual Orientation and the Legal Dilemma of "Outing"*, 46 U. MIAMI L. REV. 711, 731-32 (1992) (highlighting the arguments made for the non-recognition of an imputation of homosexuality as defamatory or as highly offensive to a reasonable person).

homosexuality as defamatory, then such refusal must first require the Supreme Court to rethink and reevaluate its prevailing “gay rights” jurisprudence (or lack thereof), and, second, force a radical reexamination and reformulation of current federal and even state and local laws that exclude homosexuals from their protections and/or discriminate outright against homosexuals.

II. BACKGROUND AND THE CURRENT STATE OF THE LAW

A. *Defamation*

Because the law of defamation is rooted in the common law, which traces its origins to the ecclesiastical courts of the Middle Ages,⁴ the fundamental elements comprising this cause of action are somewhat murky and ill-defined.⁵ The tort itself grew out of the two separate causes of action of libel and slander that have now merged into the singular tort of defamation.⁶ Whatever form is employed to convey a defamatory message, they both involve injury to a person’s reputation in the community.⁷ Fundamentally, the tort involves injury not to an individual *per se*, but rather to an individual’s reputation as it is perceived by others in that individual’s community. Thus, as outlined in the *Restatement (Second) of Torts (Restatement)*, liability for defamation will be found where there is:

- 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.⁸

4. For a brief history of the law of defamation, see RESTATEMENT (SECOND) OF TORTS § 568 cmt. b (1977).

5. See W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 111, at 772-74 (5th ed. 1984) (explaining the historical development of defamation law and its “haphazard development” under the common law).

6. Libel is “the publication of defamatory matter by written or printed words, by its embodiment in physical form or by any other form of communication that has the potentially harmful qualities characteristic of written or printed words.” RESTATEMENT, *supra* note 4, § 568(1). Slander, on the other hand, involves “spoken words, transitory gestures or by any form of communication other than those [that constitute libel].” *Id.* § 568(2). For more discussion on the distinction between libel and slander, see KEETON ET AL., *supra* note 5, § 112, at 785-97.

7. See KEETON ET AL., *supra* note 5, § 111, at 771 (describing defamation as “an invasion of the interest in reputation and good name” and its unique relational interest between the plaintiff and his or her community).

8. RESTATEMENT, *supra* note 4, § 558.

The requirement that the statement be false is utterly fundamental to the cause of action.⁹ The truth of the statement alleged to be defamatory is an absolute defense to a cause of action for defamation.¹⁰ Furthermore, even where the statement is published for no other purpose than to harm the reputation of the individual subject, if the statement is in fact true, generally no liability for defamation will be found.¹¹ In the alternative, however, where an alleged defamatory statement is in fact true, a cause of action for invasion of privacy may be viable.¹²

Of particular importance to the purposes of this Article is the requirement that the statement be defamatory. While there is a general understanding of what types of words or statements could be conceived of as being defamatory, it is a rather amorphous concept that does not necessarily lend itself to easy definition. The *Restatement* defines a defamatory communication as one that “tends . . . to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.”¹³ Prosser and Keeton explain that the usual definition given for a defamatory communication is that “which tends to hold the plaintiff up to hatred, contempt or ridicule, or to cause him to be shunned or avoided.”¹⁴ They go on, however, to disclaim this definition as too narrow and suggest that defamation should be conceived of as “injur[ing] ‘reputation’ in the popular sense; to diminish the esteem, respect, goodwill or confidence in which the plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him . . . involv[ing] the idea of disgrace.”¹⁵ As such, a communication that speaks to an individual plaintiff’s personal morality or integrity may therefore be defamatory insofar as it would deter others from associating with that plaintiff.¹⁶

9. See *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1986).

10. See RESTATEMENT, *supra* note 4, § 581A (stating that “[o]ne who publishes a defamatory statement of fact is not subject to liability for defamation if the statement is true”).

11. See *id.* § 581A cmt. a (explaining that “malicious motives” are insufficient to constitute defamation where the statement made is actually true, and calling into question the constitutionality of judicial decisions denying a defense of truth in such situations).

12. See discussion *infra* Part II.B.

13. RESTATEMENT, *supra* note 4, § 559.

14. KEETON ET AL., *supra* note 5, § 111, at 773 (citing *Kimmerle v. New York Evening Journal, Inc.*, 262 N.Y. 99, 102 (1933) (holding that defamatory communications are those “words which tend to expose one to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation or disgrace, or to induce an evil opinion of one in the minds of right-thinking persons, and to deprive one of their confidence and friendly intercourse in society”); *Parmiter v. Coupland*, 6 M. & W. 105, 151 Eng. Rep. 340 (1840)).

15. KEETON ET AL., *supra* note 5, § 111, at 773 (citations omitted).

16. See RESTATEMENT, *supra* note 4, § 559 cmt. b, c; see also KEETON ET AL., *supra* note 5, § 112, at 788-93. The *Restatement* explains that some forms of slanderous statements are

Determining whether a communication is defamatory depends in large part on the community within which the plaintiff's reputation is perceived. Consequently, to be defamatory, the communication must produce an adverse effect on the plaintiff's reputation *within her community*, not simply that the plaintiff herself finds it disparaging. However, the reference point as to what constitutes the relevant community is not the entire population or all of the plaintiff's associates, or even the majority of the community or associates, but rather the communication need only tend to negatively affect the plaintiff "in the eyes of a substantial and respectable minority of them."¹⁷ This substantial and respectable minority must not be so extreme or maintain anti-social views such that the courts could not recognize them, and the third party who receives the communication need not think it defamatory where the community in general would so regard it.¹⁸

The second basic element for a defamation cause of action requires that the communication be an unprivileged publication to a third party. Thus, a statement made by one individual to the plaintiff cannot be considered as fulfilling this requirement insofar as the alleged reputational injury could not be demonstrated where no other person in the community would or could have heard the pejorative statement. The statement must actually be "published" to others, that is, it must be communicated to a person other than the plaintiff.¹⁹ Furthermore, there must not be a privilege which attaches to the communication such that the speaker may be immunized from liability.²⁰

In order to sustain a successful claim for defamation, a plaintiff must also prove some level of fault on the part of the defendant in communicating the allegedly false and defamatory statement to a third party. Much of the constitutionalization of the tort of defamation has occurred in this area, commencing in large part with the United States

actionable even without proof of damages because they are defamatory *per se*, or on their face, such that proof of the defamation is sufficient enough to establish damages. These exceptions include: an imputation of a crime involving moral turpitude, loathsome disease, those affecting the plaintiff in his or her business, trade, profession, office, or calling, and the imputation of unchastity or deviate sexual behavior.

17. *Id.* § 559 cmt. e.

18. *See id.*

19. *See* KEETON ET AL., *supra* note 5, § 113, at 797-802 (defining "publication" for purposes of defamation as involving communication to a third party that includes not only printed or written communications, but also oral statements, gestures, or the exhibition of a picture or statue); *see also* RESTATEMENT, *supra* note 4, §§ 577-78 (construing what constitutes publication).

20. *See* RESTATEMENT, *supra* note 4, §§ 583-612 (outlining the situations in which defamatory statements are privileged and therefore protect the speaker from liability).

Supreme Court's seminal decision in *New York Times Co. v. Sullivan*.²¹ According to the Court, the Constitution, vis-à-vis the First Amendment guarantees of freedom of speech and of the press, protects the communication of false and defamatory statements in certain contexts, depending upon the status or social standing of the plaintiff.²² If the plaintiff can be classified as a public official or public figure,²³ then the constitutional protection attaches to the mass media dissemination of false and defamatory statements concerning the figure's fitness, conduct, or role in his or her capacity as a public official or figure.²⁴

In *Gertz v. Robert Welch, Inc.*,²⁵ the Court extended this protection to cover public media who release defamatory statements about private individuals and private matters.²⁶ As a result, the only way a plaintiff may recover under a defamation cause of action is through proof of fault on the part of the media defendant. Under *Sullivan*, a plaintiff must show "actual malice" on the part of the media defendant, such that the media defendant either knew the statement was false and nevertheless published it or that the media defendant published the statement with a reckless disregard for its truth or falsity.²⁷ The Supreme Court, in its decision in *Gertz*, extended this fault requirement to defamatory statements made against private individuals or otherwise concerning private matters by media defendants.²⁸ The Court, while expanding the constitutionalization of the common law tort of defamation, decided to leave it to the states to determine for themselves the appropriate standard of liability, but effectively ruled strict liability unconstitutional.²⁹ This has led, for the most part, to a prevailing standard of negligence as concerns false and defamatory statements made against a private individual or concerning a private matter, as well as to defamation actions in general.³⁰

As to the existence or lack of special harm accompanying a false and defamatory statement, many courts require specific proof of

21. 376 U.S. 254 (1964).

22. *See id.* at 273.

23. *See* RESTATEMENT, *supra* note 4, § 580A cmts. b & c (explaining the nuances of the public official and public figure distinction).

24. *See Sullivan*, 376 U.S. at 279-80. *See generally* RESTATEMENT, *supra* note 4, § 580A (articulating the liability requirements for the defamation of a public official or figure).

25. 418 U.S. 323 (1974).

26. For more on the public-private distinction, see KEETON ET AL., *supra* note 5, § 113, at 805-08.

27. *See* 376 U.S. at 279-80.

28. *See* 418 U.S. at 346-47; *see also* RESTATEMENT, *supra* note 4, § 580B cmts. c-f (describing the constitutional effects of the Court's *Gertz* decision and the scope of the fault requirement).

29. *Gertz*, 418 U.S. at 347-50.

30. *See* RESTATEMENT, *supra* note 4, § 580B cmts. g-k.

damages such that without proof of actual harm to an individual's reputation in the community a plaintiff may not recover where the statements are made in slander form.³¹ There are, however, exceptions to this rule where the slanderous statements are so base or vile or effectively subject the plaintiff to social ostracism; these exceptions do not require any specific proof of damages.³² With respect to libelous statements, damages have been generally presumed to follow regardless of the plaintiff's ability to prove specific harm to his or her reputation.³³ As a result of the Court's decision in *Gertz*, however, the constitutionality of this presumption of damages rule is rather suspect, especially with regard to media defendants.³⁴

B. *Invasion of Privacy*

The right to privacy is a much-debated issue, the scope of which has been largely undefined although various zones have been narrowly drawn by the courts in an attempt to give substance to this right without totally isolating the individual from society and legitimate state action.³⁵ In 1890, Justices Samuel D. Warren and Louis D. Brandeis argued for the recognition of a right to privacy that would safeguard the "sacred precincts of private and domestic life" by keeping the press within "the obvious bounds of propriety and of decency."³⁶ Simply described as the right "to be let alone,"³⁷ the right to privacy remains an illusive concept, much like defamation, though there is a common understanding that individuals need to be protected from "the unjustifiable infliction of mental pain and distress" that accompanies the exploitation or revelation of fundamentally private facts.³⁸

The right to privacy in the tort context essentially "involves interference with the interest of the individual in leading, to some reasonable extent, a secluded and private life, free from prying eyes, ears

31. See KEETON ET AL., *supra* note 5.

32. See RESTATEMENT, *supra* note 4.

33. See KEETON ET AL., *supra* note 5, § 112, at 793-97 (discussing the issue of special damages and the necessity for proving harm of some kind).

34. See 418 U.S. at 350 (holding that the First Amendment does not allow recovery of presumed or punitive damages in the absence of actual injury such that the plaintiff must, at the very least, establish by "clear and convincing evidence" that the media defendant knew of the falsity of the statement or otherwise acted in reckless disregard of its truth).

35. See KEETON ET AL., *supra* note 5, § 18 at 856-69.

36. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195, 196 (1890).

37. *Id.* at 195 (citing COOLEY ON TORTS 29 (2d ed. 1888)).

38. KEETON ET AL., *supra* note 5, § 117, at 850.

and publications of others.”³⁹ As such, there are four basic types of invasion of privacy that reflect different privacy interests an individual may have, but that ultimately recognize the individual’s overarching right to be let alone if only to a very circumscribed and limited extent.⁴⁰ The four types of invasion of privacy include:

1. an unreasonable intrusion upon the seclusion of an individual;
2. the appropriation of an individual’s name or likeness;
3. unreasonable publicity given to an individual’s private life; and
4. publicity that places an individual in a false light before the public.⁴¹

For the purposes and scope of this Article, the invasion of privacy that results in the unreasonable publicity given to an individual’s private life is a critical type of tortious activity because it may give rise to a valid cause of action for the aggrieved individual to whom homosexuality is imputed. This “public disclosure of private facts” form of invasion of privacy possibly offers a route to recovery for the individual who is accused of or revealed as being a homosexual where such accusation or revelation is in fact true, and a defamation cause of action is therefore precluded. Because truth is an absolute defense to a claim of defamation, the individual whose homosexuality is involuntarily given public exposure may have possible recourse under such a theory of invasion of privacy.⁴²

According to the *Restatement*, the public disclosure of private facts will give rise to liability for the invasion of the plaintiff’s right to privacy, if the private facts that are disclosed are of a kind that:

- a. would be highly offensive to a reasonable person, and
- b. are not of a legitimate concern to the public.⁴³

Effectively, then, in order to recover under this theory of invasion of privacy, the plaintiff must prove that: (1) there was an actual public disclosure, as opposed to a private one; (2) what was disclosed were private facts and not public ones; and (3) a reasonable person of ordinary sensibilities would find the disclosure of such facts to be highly offensive or objectionable.⁴⁴

39. RESTATEMENT, *supra* note 4, § 652A cmt. b.

40. *Id.* at 652A(2)(a)-(d).

41. *Id.*

42. *Id.* § 652D cmt. b.

43. *Id.* § 652D.

44. See KEETON ET AL., *supra* note 5, § 117, at 856-57 (citations omitted).

As to the element of publicity, the tort requires that “the matter [be] made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge.”⁴⁵ The communication, therefore, may take any form, verbal, written, or otherwise, but it must, or at least be certain to, reach the public.⁴⁶ This, clearly, is different from the simpler publication requirement under a defamation cause of action, which only requires that the false and defamatory statement be communicated to a single third party.⁴⁷ Here, in contradistinction to defamation, the statements must be communicated to or reach a large audience in order to invade a person’s privacy.⁴⁸

Much of the determination as to liability for invasion of privacy will turn on whether the facts revealed about a person are public or private.⁴⁹ Matters contained in public records, activities that take place out in the open, and a person’s dealings with the public are generally considered to be public facts the publicity of which raises no legal issues.⁵⁰ In fact, in *Cox Broadcasting Co. v. Cohn*, the U.S. Supreme Court held that the publicity given to matters or facts contained in accessible public records are protected under the First Amendment such that no liability for invasion of privacy can be imposed.⁵¹ Thus, for purposes of maintaining an invasion of privacy suit, the plaintiff must show that the facts revealed involved personal facts that were not exposed to the public such that they were kept entirely secret or at the most were only revealed to family or close personal friends.⁵² Private facts, generally, are those intimate details of a person’s life that are normally not in the public gaze, such as sexual relations, family disagreements, loathsome diseases, intimate correspondence, among others, and that are not of legitimate public concern.⁵³

The facts disclosed must be of such a private nature that publicity of them would be highly offensive or objectionable.⁵⁴ Much like the requirement that the false statement also be defamatory in a defamation claim, the highly offensive publicity requirement for invasion of privacy

45. RESTATEMENT, *supra* note 4, § 652D cmt. a.

46. *Id.* § 52D cmt. b.

47. *Id.* § 558B.

48. *Id.* § 652D.

49. *Id.* § 652D cmt. b.

50. *See id.* § 652D cmt. b.

51. 420 U.S. 469, 470 (1975).

52. *See* RESTATEMENT, *supra* note 4, § 652D cmt. b.

53. *See id.*

54. RESTATEMENT, *supra* note 4, § 652D cmt. c.

is a subjective judgment that is, in large part, determined by the mores of the specific community in which the publicity takes place.⁵⁵ Accordingly, the plaintiff's privacy interests will be adjudged "relative to the customs of the time and place, to the occupation of the plaintiff and to the habits of his neighbors and fellow citizens."⁵⁶ Determining whether a fact that is publicized is highly offensive, therefore, is largely dependent upon what the relevant community finds to be highly offensive rather than what the individual plaintiff or defendant may or may not think is objectionable.⁵⁷

The final element the plaintiff must satisfy in order to prove an invasion of privacy is that the facts revealed do not involve matters of legitimate public concern. This requirement is a constitutional prerequisite to any finding of invasion of privacy, as directed by the Supreme Court in *Cox Broadcasting*.⁵⁸ Other than matters contained in public records, facts that are considered to be "news" or "newsworthy" will likely also come within the ambit of the kinds of information that are of legitimate public concern, and therefore are privileged as against any asserted privacy interest.⁵⁹ There are, however, restrictions on the extent of this news privilege: unwarranted or outrageous publicity of the truth or publicity given to embarrassing events that occurred so long ago as to have lost its newsworthy character will not necessarily circumvent the privacy rights of the individual subject so as to receive First Amendment protection.⁶⁰

C. *Imputations of Homosexuality in Defamation Case Law*

Determining whether a false imputation of homosexuality is defamatory, such that it would harm an individual's reputation, is a

55. See KEETON ET AL., *supra* note 5, § 117, at 857 (stating that liability arises where publicity is given to those things which are highly objectionable as regarded by the customs and ordinary views of the community)(citation omitted); see also RESTATEMENT, *supra* note 4, § 652D cmt. h.

56. RESTATEMENT, *supra* note 4, § 652D cmt. c.

57. See *id.*

58. See 420 U.S. at 495-96 (holding that matters of legitimate concern to the public, especially those contained in public records, are protected under the First Amendment such that publicity of those matters is not an invasion of privacy).

59. KEETON ET AL., *supra* note 5, § 117, at 860 (quoting *Sweenek v. Pathe News*, 16 F. Supp. 746, 747 (E.D.N.Y. 1936)). Such matters include "all events and items of information which are out of the ordinary humdrum routine, and which have 'that indefinable quality of information which arouses public attention.'" *Sweenek*, 16 F. Supp. at 747.

60. See, e.g., *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *Briscoe v. Reader's Digest Ass'n*, 483 P.2d 34 (Cal. 1971); *Sidis v. F-R Publ'g Corp.*, 113 F.2d 806 (2d Cir. 1940). For a brief discussion on the diminished expectation of privacy of the public official and public figure, see KEETON ET AL., *supra* note 5, § 117, at 859-63.

somewhat complicated endeavor given the changing social status of homosexuals in modern American society. So, too, the existence of varied communities that span the country, let alone within any one state, makes it even more difficult to generalize as to how a court would likely or should rule in such a case. Nonetheless, courts, on the whole, have been rather uniform in their treatment of imputations of homosexuality in the defamation context. The changing status of homosexuality in modern American society, discussed below, implicates the future of tort law in this area and the validity of current decisions from various jurisdictions on the issue.

In New York, both state and federal district courts have held that an imputation of homosexuality is defamatory. In *Dally v. Orange County Publications*, in which a deputy sheriff filed a defamation claim against a local newspaper for publishing an advertisement in the classifieds section incorrectly listing him as the contact person for a gay community center, the Second Department of the Appellate Division of the New York Supreme Court held that an imputation of homosexual behavior constitutes libel *per se* because many people still view homosexuality as immoral.⁶¹ Although the plaintiff here was a public official, the court noted that a showing of actual malice (i.e. a reckless disregard for the truth of the advertisement) on the part of the defendant newspaper would be sufficient to overcome the protections accorded under the First Amendment as held in *New York Times Co. v. Sullivan*.⁶² Likewise, the First Department of the Appellate Division of the New York Supreme Court held that cartoons depicting the plaintiff as a homosexual are defamatory *per se*, negating any parody or caricature defense, such that the mere implication that the plaintiff might be homosexual is sufficiently defamatory.⁶³ Moreover, in *Murphy v. Pizzario*, a federal district court held that under New York law, a published statement imputing homosexuality is defamatory *per se*, even, whereas here, the statement was made by a prison guard against a prisoner.⁶⁴

In *Bohdan v. Alltool Manufacturing Co.*, a case involving an employee harassed by his co-workers, the Court of Appeals of Minnesota ruled that false implications of homosexuality are “at least reasonably

61. 117 A.D.2d 577, 578, 497 N.Y.S.2d 947, 948 (N.Y. App. Div. 1986).

62. *See id.*

63. *See Nacinovich v. Tullet & Tokyo Forex, Inc.*, 257 A.D.2d 523, 524, 685 N.Y.S.2d 17 (N.Y. App. Div. 1999); *see also Rejent v. Liberation Publ'n, Inc.*, 197 A.D.2d 240, 611 N.Y.S.2d 866 (1994) (holding that a model, whose photo was featured in an advertisement of a magazine advocating homosexuality, had a viable claim for defamation *per se* because such an advertisement implies sexual misconduct on the part of the plaintiff).

64. No. 94 CIV. 0471 (JFK), 1995 WL 565990, at *3 (S.D.N.Y. Sept. 22, 1995).

susceptible of a defamatory meaning.”⁶⁵ Accordingly, the court denied summary judgment because it found that a genuine issue of material fact existed as to whether the plaintiff was in fact defamed by such an imputation.⁶⁶ Similarly, in *Nazeri v. Missouri Valley College*, the Supreme Court of Missouri, sitting *en banc*, unanimously held that a false statement concerning homosexuality is defamatory because it is particularly harmful as an allegation of “serious sexual misconduct,” and the damage caused to an individual’s reputation by such an allegation is thereby tantamount to that caused by an allegation concerning adulterous conduct.⁶⁷ Acknowledging the work of various homosexual groups to engender social tolerance and acceptance of homosexuality, the court nevertheless recognized the prevailing disfavor with which homosexuality is viewed and the outright contempt that “a sizeable proportion of [the Missouri] population” has for homosexuals.⁶⁸ Moreover, the court took judicial notice of the fact that same-sex sexual intercourse is a class A misdemeanor in Missouri, and characterized such sexual activity as “deviant.”⁶⁹

In Ohio, one court held that a false accusation that an individual is homosexual “is sufficient . . . to constitute the utterance of a defamatory statement.”⁷⁰ The court, however, refused to recognize such a claim as defamatory *per se*, requiring the plaintiff to prove special and actual damages resulting from the defamatory statement.⁷¹ In another case involving an imputation of homosexuality, the Court of Appeals of Ohio held that the plaintiff’s humiliation and embarrassment are enough to constitute special damages for purposes of her defamation cause of action.⁷² Correspondingly, the Colorado Court of Appeals has ruled that while an imputation of homosexuality may not warrant a strict *per se* classification, the plaintiff may nevertheless maintain a valid cause of

65. 411 N.W.2d 902, 907 (Minn. Ct. App. 1987) (citing *Phipps v. Clark Oil & Refin. Co.*, 408 N.W.2d 569, 573 (Minn. 1987)).

66. *See id.*

67. 860 S.W.2d 303, 312 (Mo. 1993) (citing *Balderre v. Beeman*, 837 S.W.2d 309, 323 (Mo. Ct. App. 1992)).

68. *Id.*

69. *Id.* (citation omitted).

70. *Key v. Ohio Dep’t of Rehab. & Corr.*, 598 N.E.2d 207, 209, 62 Ohio Misc. 2d 242, 245 (Ohio Ct. Cl. 1990).

71. *See id.*

72. *See Stokes v. Meimaris*, 675 N.E.2d 1289, 1295, 111 Ohio App. 3d 176, 185 (Ohio Ct. App. 1996).

action upon proof of damages resulting from the alleged defamatory statements.⁷³

A federal district court in Maryland, in *Thomas v. BET Sound-Stage Restaurant/Brettco, Inc.*, found that a false statement alleging that the plaintiff is a lesbian was sufficiently defamatory insofar as it would expose the plaintiff to contempt and ridicule, “even in today’s society.”⁷⁴ Furthermore, in *Q-Tone Broadcasting Co. v. Musicradio of Maryland*, the Superior Court of Delaware held that a false statement suggesting that the plaintiff is homosexual is “clearly defamatory” because it would interfere with the plaintiff’s business position and could have other personal ramifications for him in the community.⁷⁵

What these various court decisions have in common is that they all recognize the viability of a cause of action for defamation due to an imputation of homosexuality. This is the general sentiment throughout the country as concerns the defamatory nature of imputations of homosexuality.⁷⁶ Whether courts have found imputations of homosexuality to be defamatory *per se* or otherwise require proof of damages, the result is the same: a false imputation of homosexuality generally satisfies the defamatory requirement of a defamation cause of action.

D. Disclosures of Homosexuality in Invasion of Privacy Case Law

As discussed above, when an imputation of homosexuality is in fact true, the plaintiff is completely barred from recovering under a

73. See *Hayes v. Smith*, 832 P.2d 1022, 1023-25 (Colo. Ct. App. 1991). In fact, the court in *Hayes* went on to explain that because the same-sex sexual activity was no longer illegal in Colorado, an implication that one so engages in such activity could not rise to such a character that slander *per se* would be an appropriate categorization. *Id.* at 1025. The court was adamant that no empirical evidence existed to show that homosexuals are held in such low esteem in society, stating that “[a] court should not classify homosexuals with those miscreants who have engaged in actions that deserve reprobation and scorn which is implicitly a part of the slander/libel *per se* classifications.” *Id.* (citation omitted).

74. 61 F. Supp. 2d 448, 457 (D. Md. 1999) (citations omitted).

75. 1996 WL 494177, at *1 (Del. Super. Ct. Apr. 22, 1996).

76. See *Anson v. Paxson Communications Corp.*, 736 So. 2d 1209, 1210 (Fla. Dist. Ct. App. 4th 1999); *Facchina v. Mutual Benefits Corp.*, 735 So. 2d 499 (Fla. Dist. Ct. App. 4th 1999); *Buendorf v. Nat’l Pub. Radio, Inc.*, 822 F. Supp. 6 (D.C. Dist. Ct. 1993); *Manale v. City of New Orleans*, 673 F.2d 122 (5th Cir. 1982); *Schomer v. Smidt*, 113 Cal. App. 3d 828, 170 Cal. Rptr. 662 (1980); *Buck v. Savage*, 323 S.W.2d 363 (Tex. 1959). *But see* *Lehman v. Wellens*, No. 86-65, 1987 WL 267191 (Wis. Ct. App. Apr. 8, 1987) (refusing to recognize the plaintiff’s defamation claim after he was allegedly called “fag” or “faggot” during a bar-room fight, noting the changes in societal views of homosexuality and the mere name-calling nature of the communication); *cf. Donovan v. Fiumara*, 442 S.E.2d 572, 573 (N.C. Ct. App. 1994) (expressing ambivalence over whether an imputation of homosexuality is defamatory given the changing times, and therefore requiring the plaintiff to prove special damages).

defamation claim. The plaintiff, in the alternative, may wish to seek an invasion of privacy cause of action such that the issue of his or her homosexuality is arguably a private fact,⁷⁷ the disclosure of which would be highly offensive to a reasonable person of ordinary sensibilities, and is not of legitimate public concern. How the courts will treat such a cause of action will depend for the most part on the specific facts of the case and the mores of the community within which the publicity took place. The following is a sampling of case law in this area.

In the recent decision of *Uranga v. Federated Publishing, Inc.*, the plaintiff brought an action for invasion of privacy after the defendant newspaper published a forty year-old statement implicating the plaintiff in homosexual activity.⁷⁸ The Supreme Court of Idaho held that such publicity given to private facts concerning the plaintiff's sexuality was a sufficient prima facie showing of an invasion of privacy.⁷⁹ In so holding, the court explained that the plaintiff's subjective expectation of privacy in his sexuality was one that "society is willing to accept as reasonable," but that whether the publicized statements are newsworthy (i.e., of legitimate public concern) or otherwise highly offensive is a matter for the jury to determine in accordance with the mores of the community.⁸⁰

The Fifth Circuit, in *Cinel v. Connick*, confronted an invasion of privacy claim brought by a former Catholic priest against various state agents, as well as members of the news media, for the public release of a homemade video of the plaintiff priest engaged in homosexual activity.⁸¹ The court focused on the issue of whether the plaintiff's homosexual activity portrayed in the videotape was a matter of legitimate public concern for purposes of the invasion of privacy tort claim.⁸² While tacitly acknowledging the embarrassing and highly offensive nature of the facts revealed, the court found that the contents of the videotape were in fact matters of legitimate public concern as they "related to [the plaintiff's] guilt or innocence of criminal conduct," especially because homosexual sodomy is classified as a "crime against nature" in the State of Louisiana.⁸³

In *Sipple v. Chronicle Publishing Co.*, the California Court of Appeals for the First District addressed the issue of whether the

77. This assumes, of course, that the plaintiff, who is in fact a homosexual, is unavowedly so and was at the time of the disclosure, for all intents and purposes, in the "closet."

78. No. 27118, 2001 WL 693891 (Idaho June 21, 2001).

79. *See id.* at *10.

80. *Id.*

81. 15 F.3d 1338 (5th Cir. 1994).

82. *See id.* at 1345-46.

83. *Id.* at 1346 (citing LA. REV. STAT. ANN. § 14:89 (West 1989)).

plaintiff's homosexuality was a private fact, the public disclosure of which would give rise to an invasion of privacy claim.⁸⁴ Sipple, a gay ex-Marine, became an involuntary public figure after he foiled an assassination attempt on the life of then-President Gerald Ford, and a newspaper article following the event exposed his homosexuality.⁸⁵ In finding that Sipple's sexuality was not a private fact, the court explained that because Sipple was an avowed homosexual who lived an openly gay life in San Francisco, he could no longer claim that his sexual orientation was a private matter, despite the fact that he secreted such information from his parents who lived in Detroit.⁸⁶ Although the court did not recognize Sipple's claim to an invasion of privacy on the grounds that his homosexuality was not a private matter, the court left open the question as to whether sexual orientation is ever a private fact⁸⁷ and thus whether the public disclosure of such a fact would be highly offensive.

Effectively, what the few invasion of privacy cases that involve a public disclosure of an individual's homosexuality reveal is that much depends on the specific facts of the case.⁸⁸ The secrecy with which the plaintiff safeguards his or her sexual orientation will likely be dispositive as regards the private facts prong. Moreover, the community within which the publicity takes place will assuredly be controlling as to the determination of the legitimacy of the public's concern over the plaintiff's sexuality. As to the offensiveness prong, it seems as though this factor is taken for granted, and is in accord with the line of defamation cases that hold that an imputation of homosexuality is defamatory, as discussed above, and the publicity of which is therefore highly offensive and objectionable.⁸⁹

III. HOMOSEXUALITY AND THE CHANGING OF SOCIAL NORMS

In many of the cases discussed in the preceding section, the courts acknowledged or took note of the social and political changes that have taken place with regard to homosexuality and the more active and visible

84. 201 Cal. Rptr. 665 (Ct. App. 1st 1984).

85. *See id.* at 666.

86. *See id.* at 669; *see also* Dan Morain, *Sorrow Trailed a Veteran Who Saved a President and Then Was Cast in an Unwanted Spotlight*, L.A. TIMES, Feb. 13, 1989, at V1.

87. *See* Pollack, *supra* note 3, at 724-31 (discussing the inherent problems of characterizing sexuality as a purely private issue and arguing that the determinative focus of a privacy tort action should not be on the private-public distinction but rather on the purpose of the public disclosure of a person's sexuality).

88. *See id.* at 722 (explaining that "relatively few actions against outers have made their way through the legal system" because most cases have been dismissed for failure to state a claim) (citations omitted).

89. *But cf.* sources cited *supra* note 76.

roles of openly homosexual persons in the community. Nevertheless, courts have generally found that imputations or disclosures of homosexuality are defamatory and/or highly offensive, though sometimes requiring the plaintiff to prove actual and special damages. It is important, however, to examine and understand these alleged changes because of the potential ramifications and repercussions they may or may not have for the future of tort law in this area and the viability of claims for defamation and invasion of privacy when an imputation or disclosure of homosexuality is involved.

A. *The Changing Social Status of and Attitudes Towards Homosexuals*

Over the nearly two decades since the U.S. Supreme Court handed down its crushing decision in *Bowers v. Hardwick* in 1986, significant changes have occurred in the social condition and treatment of homosexual persons. Major national organizations, such as the Lambda Legal Defense and Education Fund, the Gay & Lesbian Alliance Against Defamation (GLAAD), the Human Rights Campaign (HRC), the Servicemembers Legal Defense Network (SLDN), Parents, Families, and Friends of Lesbians and Gays (PFLAG), and the American Civil Liberties Union (ACLU) Lesbian & Gay Rights Project, among others, have served as the vanguard of the gay rights movement, gaining national recognition and respect for their groundbreaking work and advocacy. Such groups have been able to make serious in-roads into both the legal and legislative arenas to advance the twin causes of gay rights and equality. Because of the relentless work of these and other groups, the social, legal, and political developments in the area of gay rights have been profoundly and positively impacted.

As a result of the groundwork these organizations and others have laid, homosexuals in American society today arguably experience much greater social tolerance and acceptance than was the case just over a decade ago. According to a recent article by Frank Newport of the Gallup Organization, there has been a gradual shift in American public opinion about homosexuality over the past couple of decades.⁹⁰ A nationwide poll taken in mid-May 2001 revealed that fifty-two percent of

90. Frank Newport, *American Attitudes Toward Homosexuality Continue to Become More Tolerant* (June 4, 2001), GALLUP POLL NEWS Svc., available at <http://www.gallup.com/poll/releases/pr010604.asp>. For a similar study, specifically surveying university student attitudes towards homosexuality and gay civil rights and liberties issues, see Henry F. Fradella et al., *Sexual Orientation, Justice, and Higher Education: Student Attitudes Towards Gay Civil Rights and Hate Crimes*, 11 TUL. J.L. & SEXUALITY 11 (2002).

Americans believe that homosexuality is an acceptable alternative lifestyle, which is up from forty-four percent five years ago in 1996, thirty-eight percent in 1992, and thirty-four percent in 1982.⁹¹ As Newport explains, “over the 19-year period from 1982 to 2001, Americans moved from leaning against the acceptability of homosexuality to a slight majority acceptance on the issue.”⁹²

Attitudes toward other “gay” issues have also been evolving over time, leading to a seemingly greater social awareness and consciousness of the homosexual experience. On the issue of the legalization of homosexual relations between consenting adults, a slight majority of Americans, fifty-four percent, feel that such relations should be legal, with only forty-two percent expressing the belief that homosexual relations should be illegal, and four percent having no opinion at all on the issue.⁹³ This marked shift becomes evident where in 1996 only forty-four percent believed homosexuality should be legalized, which was up from a low of thirty-three percent in September of 1986, and which was down from forty-three percent in 1977, when this survey was first taken.⁹⁴ Moreover, as concerns the issue of homosexual service in the armed forces, a January 2000 survey showed that forty-one percent of those surveyed believe that homosexual servicemembers should be allowed to serve openly in the military, with only seventeen percent stating that homosexuals should be barred from military service altogether.⁹⁵ Interestingly, an even more recent poll shows that seventy-two percent of Americans believe that homosexuals should be hired for service in the armed forces, with only twenty-three percent saying homosexuals should not be hired for such an occupation.⁹⁶ Yet another survey reveals that “[t]he majority of Americans (eighty-three percent) believe that homosexuals should have equal rights when it comes to job

91. *Id.*; but cf. *infra* note 126 and accompanying text.

92. *Id.*

93. *Id.*

94. *Id.* Newport asserts that the major drop in attitudes seen in the mid-1980s was probably a result of “either the conservative environment ushered in by the Reagan administration, or the beginning of the widespread publicity surrounding AIDS and its prevalence in the homosexual community.” *Id.*

95. Gallup Poll News Service, *Military and National Defense* (Jan. 13-16, 2000), available at <http://www.gallup.com/poll/indicators/indmilitary.asp>. The survey also showed that another thirty-eight percent of those polled believe that homosexuals should be allowed to serve in the military but only under the current “Don’t Ask, Don’t Tell Policy” introduced by President Clinton in 1993. *Id.* The remaining four percent of those surveyed had no opinion on the issue. *Id.*

96. Newport, *supra* note 90. The survey was taken during the period May 10-14, 2001, and of the remaining respondents, two percent said that it “depends” as to whether homosexuals should be hired in the armed forces and three percent expressed no opinion on the issue. *Id.*

opportunities.”⁹⁷ In fact, the same survey was taken three months later, and those responding in the affirmative rose to eighty-five percent;⁹⁸ this figure is up from seventy-one percent in 1989, and up from only fifty-six percent in June 1977, when the survey was first taken.⁹⁹

This gradual liberalization of societal attitudes toward homosexuality and the greater acceptance of homosexual persons are also reflected in other areas. As of July 2001, twenty-six states and the District of Columbia have repealed their sodomy laws through legislative action.¹⁰⁰ Another nine states have had their sodomy statutes struck down as unconstitutional by their respective state courts.¹⁰¹ The elimination of these statutes arguably speaks to the greater recognition of the existence of homosexual relationships and also lends a certain sense of legitimacy to such relationships.

One of the most dramatic developments in the law as concerns homosexuals and their relationships was the landmark 1999 decision of the Vermont Supreme Court in *Baker v. State*.¹⁰² In *Baker*, three homosexual couples applied for and were denied marriage certificates by the state, and subsequently brought suits challenging the denials as in violation of the Vermont marriage statutes and the state constitution.¹⁰³ The Vermont Supreme Court held that the state’s marriage statutes had been so implemented as to exclude same-sex couples, in violation of the Common Benefits Clause of the Vermont Constitution.¹⁰⁴ The court went on to direct the state’s legislature to extend the benefits and protections

97. Darren K. Carlson, *Americans Divided on Cause of Homosexuality*, GALLUP POLL NEWS SVC. (May 9, 2001), available at <http://www.gallup.com/poll/releases/pr010509c.asp>. Only thirteen percent of respondents stated that homosexuals should not have equal rights in terms of job opportunities, with two percent saying it “depends” and the remaining two percent having no opinion on the issue. *Id.*

98. Newport, *supra* note 90.

99. *Id.*

100. ACLU, *‘Crime’ and Punishment in America: State-by-State Breakdown of Sodomy Laws*, available at <http://www.aclu.org/issues/gay/sodomy.html> (last updated July 2001). The states that have repealed their sodomy statutes through legislative action include: Alaska (1980); Arizona (2001); California (1976); Colorado (1972); Connecticut (1971); Delaware (1973); Hawaii (1973); Illinois (1962); Indiana (1977); Iowa (1978); Maine (1976); Nebraska (1978); Nevada (1993); New Hampshire (1975); New Jersey (1979); New Mexico (1975); North Dakota (1973); Ohio (1974); Oregon (1972); Rhode Island (1998); South Dakota (1977); Vermont (1977); Washington (1976); West Virginia (1976); Wisconsin (1983); and Wyoming (1977). *Id.* Washington, D.C.’s sodomy statute was repealed in 1993. *Id.*

101. *See id.* The nine states whose courts found their sodomy statutes in violation of their state constitutions are: Arkansas, Georgia, Kentucky, Maryland, Minnesota, Montana, New York, Pennsylvania, and Tennessee. *Id.*

102. 744 A.2d 864 (Vt. 1999).

103. *Id.* at 867-68.

104. *Id.* at 864, 867.

traditionally accorded heterosexual married couples under the state marriage statutes to same-sex couples.¹⁰⁵ This was almost immediately followed by the enactment of the Vermont Civil Union Act, which granted state recognition of same-sex relationships and extended to them the various benefits and protections afforded married heterosexual couples under the state marriage statutes.¹⁰⁶ The *Baker* decision was preceded by an instructive decision of the Hawaii Supreme Court, in a pair of cases, which found that the restriction barring same-sex couples from state-sanctioned marriage was sex-based discrimination and held that the state's marriage statutes were unconstitutional under the Equal Rights Amendment of the Hawaii Constitution, until so amended.¹⁰⁷ The Hawaii state legislature then passed the Reciprocal Beneficiaries Act as a compromise, to afford same-sex couples the benefits and protections provided to opposite-sex married couples.¹⁰⁸

While most jurisdictions have yet to follow the example of Vermont or Hawaii, numerous states, cities, and counties have enacted domestic partnership acts that attempt to provide to same-sex couples the benefits and protections traditionally offered to married heterosexual couples without having to address the controversial issues of same-sex marriage or civil unions.¹⁰⁹ Domestic partnership schemes have been established to equalize the receipt of work-related and other economic and legal benefits that traditionally are available only to a spouse in a state-certified marriage, such as health insurance, standing for wrongful death suits, Medicaid benefits, and other family-based benefits.¹¹⁰ These

105. *Id.* at 867; *see also id.* at 883-84 (listing many of the benefits extended to married couples, from which same-sex couples have been historically excluded from receiving).

106. *See* H.B. 847, 1999-2000 Adjourned Sess. (Vt. 2000), which became 2000 Vt. Acts & Resolves 91 (creating "civil unions," passed by the Vermont legislature and signed into law by Governor Howard Dean in April 2000).

107. *See generally* Baehr v. Lewin 852 P.2d 44 (Haw. 1993) (remanding the case to a lower court to allow the state to present a compelling interest for its prohibition of same-sex marriage); Baehr v. Miike, No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996), *aff'd*, 950 P.2d 1234 (Haw. 1997) (table decision) (finding that the state had not met its burden of proving any compelling interest in prohibiting same-sex marriage).

108. *See* Reciprocal Beneficiaries Act, Act 383 (July 8, 1997); HAW. REV. STAT. ANN. § 572 (Michie 1997).

109. For more information on Fortune 500 companies, other private companies, nonprofit organizations, unions, colleges and universities, and state and local governments offering domestic partnership benefits as well as insurance companies that write domestic partner policies, *see* Human Rights Campaign, *Domestic Partner Benefits*, available at <http://www.hrc.org/worknet/dp/index.asp> (last visited Nov. 29, 2001).

110. For an in-depth study of the issues involved in the development and establishment of domestic partnership schemes, *see generally* Nancy K. Kubasek et al., *Fashioning a Tolerable Domestic Partners Statute in an Environment Hostile to Same-Sex Marriages*, 7 TUL. J.L. & SEXUALITY 55 (1997); Thomas F. Coleman, *The Hawaii Legislature Has Compelling Reasons to*

schemes have been established at both the state and local levels, as well as by private sector employers wishing to extend benefits to the same-sex partners of their employees.¹¹¹

Further developments in the domestic relations realm have occurred that safeguard the rights of homosexual individuals to create families of their own, without the fear that because they do not conform to the traditional hetero-normative nuclear family model they are not worthy of protection. For example, the New Jersey Supreme Court, in its *V.C. v. M.J.B.* decision, recognized the parental status of a non-biological lesbian caregiver, whose former partner had conceived and given birth to twins during the course of their relationship.¹¹² Utilizing the “psychological parent doctrine,” the court recognized the non-biological mother as a legal parent, and was therefore able to protect her rights as a parent vis-à-vis the care, custody, control, and support of the children.¹¹³ This decision effectively gave legal recognition to the rights of homosexual persons to create families and to have those creations protected under the laws of New Jersey.

Furthermore, a plethora of state, city, and county laws and ordinances have been enacted that prohibit employment discrimination on the basis of sexual orientation, applicable to both state, local, and private employers. In fact, eleven states and the District of Columbia prohibit discrimination based on sexual orientation and/or gender identity in private employment.¹¹⁴ Another seven states protect only state employees from discrimination based on sexual orientation and/or gender identity, either by executive order or civil service rule.¹¹⁵ At the city level, 106 cities around the country prohibit discrimination on the basis of

Adopt a Comprehensive Domestic Partnership Act, 5 TUL. J.L. & SEXUALITY 541, 571 (1995) (providing a detailed framework for a Comprehensive Domestic Partnership Act, with a draft statute); Philip S. Horne, *Challenging Public- and Private-Sector Benefit Schemes which Discriminate Against Unmarried Opposite-Sex and Same-Sex Partners*, 4 TUL. J.L. & SEXUALITY 35 (1994). For an example of an actual domestic partnership act in effect, see, e.g., NEW ORLEANS, LA., CODE art. V, §§ 86-161 to -168 (1993).

111. See generally Human Rights Campaign, *supra* note 109.

112. 748 A.2d 539 (N.J. 2000).

113. See *id.* at 555. For a thorough discussion of the psychological parent doctrine, see JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* (1973).

114. See ACLU, *National Perspective: Municipal and State Laws Prohibiting Sexual Orientation Job Discrimination* (Jan. 2000), available at http://www.aclu.org/issues/gay/pedreira_laws.html (citing NATIONAL GAY AND LESBIAN TASK FORCE, *LEGISLATING EQUALITY* (2000)). The eleven states include: California, Connecticut, Hawaii, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, Rhode Island, Vermont, and Wisconsin. *Id.*

115. *Id.* The seven states include: Illinois, Iowa, Maryland, New Mexico, New York, Pennsylvania, and Washington. *Id.*

sexual orientation and/or gender identity in private employment, while 18 jurisdictions prohibit such discrimination on a county-wide basis.¹¹⁶

A number of other state and local laws have been passed that prohibit general workplace discrimination as against lesbians and gay men. Specifically, ten states and the District of Columbia have enacted laws that directly prohibit such discrimination, while 165 city and county ordinances have been passed.¹¹⁷ At the national level, while no affirmative protections have been extended to homosexuals in any realm, the Hate Crimes Statistics Act of 1990, enacted by Congress on April 23, 1990, mandates that the Attorney General establish guidelines and collect data on bias motivated crimes based on the perceived sexual orientation of the victim.¹¹⁸ Although the Act does not provide for any enforcement mechanisms on the part of the FBI,¹¹⁹ it, at the very least, acknowledges the existence of the violence perpetrated against homosexuals because of a bias or prejudice against their (perceived) sexuality. Moreover, the data collected, which is published annually, can effectively be used for research and other statistical purposes to advance the equal protection issues of concern to homosexuals.

Thus, there is indeed a growing sense of the changing social attitude toward and treatment of homosexuals, both at the community perception level and at the level of policy making. Over the past few decades, there has been a rise in the number of protective legislation enacted at both the state and local levels to afford some security to homosexuals, especially as against discrimination in employment and in general workplace discrimination. Even at the national level, there is some semblance of a congressional recognition of the discrimination perpetrated against homosexuals that can ultimately manifest itself in very violent ways. In the area of domestic relations and family law, there have been even more significant and profound developments that have advanced the rights of homosexuals under legal regimes that have historically ignored and excluded homosexuals and their relationships; these have, however, been

116. *Id.*

117. ACLU, *State and Local Laws Protecting Lesbians and Gay Men Against Workplace Discrimination*, available at <http://www.aclu.org/issues/gay/gaylaws.html> (last updated Oct. 31, 1998). The ten states include: California, Connecticut, Hawaii, Massachusetts, Minnesota, New Hampshire, New Jersey, Rhode Island, Vermont, and Wisconsin. *Id.*

118. See Hate Crimes Statistics Act, 28 U.S.C. § 534 note (1990); see also FBI, U.S. DEP'T OF JUSTICE, HATE CRIME DATA COLLECTION GUIDELINES (revised Oct. 1999).

119. In fact, the Act expressly provides that "[n]othing in this section creates a cause of action or a right to bring an action, including an action based on discrimination due to sexual orientation." Hate Crimes Statistics Act § 1(b)(3). The Act goes on to state that "[n]othing in this Act shall be construed, nor shall any funds appropriated to carry out the purpose of the Act be used, to promote or encourage homosexuality." *Id.* § 2(b).

piecemeal changes that have met with tremendous resistance and continue to face enormous challenges as to their validity under the law. The tides of change that wash over the country are slow moving, but the effects can surely be seen at many different levels.

B. The Continuing Marginalization of and Discrimination Against Homosexuals

While there has most certainly been much accomplished in the advancement of gay rights and equality issues, there is still a very sober reality that homosexual individuals face on a daily basis that fails to account for, and is in stark contrast to, the significant changes highlighted in the previous section.¹²⁰ Not only do homosexuals experience continued marginalization in the legal and political arenas, they must also endure unfettered discrimination and harassment in all spheres of their lives. Despite the advances and greater societal acceptance levels, many homosexuals nevertheless remain in the proverbial “closet” for fear of abandonment, rejection, and persecution, a fear that is very real and justified.¹²¹

There is still a great amount of social and cultural stigma associated with homosexuality that persists in modern American society, in spite of its increased acceptability as an alternative lifestyle.¹²² According to Patricia Beattie Jung and Ralph F. Smith, there is “a pattern of discrimination . . . [that] pervades most dimensions of our cultural life,” and that is rooted in a heterocentric system that “shapes our legal, economic, political, social, interpersonal, familial, historical, educational,

120. See 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, 461-63 (1997) (explaining that outing an individual as a homosexual can “destroy lives and careers,” and noting the persistent prejudice in society against homosexuals and the lack of protection under the law for homosexuals).

121. See Joanne DiPlacido, *Minority Stress Among Lesbians, Gay Men, and Bisexuals: A Consequence of Heterosexism, Homophobia, and Stigmatization*, in STIGMA AND SEXUAL ORIENTATION: UNDERSTANDING PREJUDICE AGAINST LESBIANS, GAY MEN, AND BISEXUALS 138, 139, 147 (Gregory M. Herek ed., 1998) (explaining that many homosexuals experience stress and internalized homophobia as a result of their socialization with anti-homosexual biases sanctioned by Western culture and their consequent culturally ascribed inferior status).

122. See Newport, *supra* note 90; see also Douglas Alan Strand, *Civil Liberties, Civil Rights, and Stigma: Voter Attitudes and Behavior in the Politics of Homosexuality*, in STIGMA AND SEXUAL ORIENTATION: UNDERSTANDING PREJUDICE AGAINST LESBIANS, GAY MEN, AND BISEXUALS 108, 110-11 (Gregory M. Herek ed., 1998) (arguing that there is a need to distinguish between stigma and preferences for the legal treatment of the stigmatized such that many people might regard homosexuality as wrong or immoral but may have differing views as to whether homosexuals should be imprisoned, tolerated, or protected).

and ecclesial [*sic*] institutions.”¹²³ This pattern of discrimination is what Jung and Smith call heterosexism, which they define as “a reasoned system of bias regarding sexual orientation” that places heterosexuality as the normative form of human sexuality and thereby connotes prejudice against anyone who falls outside of that form.¹²⁴ Moreover, this heterosexist ideology manifests itself in various structural restrictions that institutionally marginalize and discriminate against homosexuals, limiting the development of same-sex relationships and thereby stigmatizing and de-legitimizing such relationships.¹²⁵

In contradistinction to the increasing acceptability of homosexuality as an alternative lifestyle, according to a mid-May 2001 national survey on the perceived morality of a variety of contemporary issues ranging from medical testing on animals to human cloning, a majority (fifty-three percent) of Americans expressed the belief that homosexual behavior is “morally wrong.”¹²⁶ In fact, national leaders and sports celebrities have publicly condemned homosexuality, which does not only send the message that they personally believe homosexuality is wrong, but also implicitly endorses the continued stigmatization of homosexuals and signals approval of discrimination against them.¹²⁷

While successes have been realized with regard to the legal recognition of homosexual relationships and the parental rights of homosexuals, a majority of Americans are opposed to creating legal civil unions between same-sex partners, with fifty-four percent saying they would vote against such a law.¹²⁸ Moreover, in direct response to the

123. PATRICIA BEATTIE JUNG & RALPH F. SMITH, HETEROSEXISM: AN ETHICAL CHALLENGE 14 (1993).

124. *Id.* at 13.

125. See TIM EDWARDS, EROTICS & POLITICS: GAY MALE SEXUALITY, MASCULINITY AND FEMINISM 112-14 (1994).

126. Gallup Poll News Service, *Moral Issues* (May 10-14, 2001), available at <http://www.gallup.com/poll/indicators/indmoral.asp>. The survey further revealed that only forty percent of Americans believe that homosexuality is “morally acceptable,” three percent believe that it would depend on the situation, one percent believe that homosexuality is not a moral issue at all, and another three percent expressed no opinion on the issue whatsoever. *Id.*

127. See Frank Newport, *Americans Remain More Likely to Believe Sexual Orientation Due to Environment, Not Genetics*, GALLUP POLL NEWS SVC. (July 25, 1998), available at <http://www.gallup.com/poll/releases/pr980725.asp> (reporting that then-Senate Majority Leader Trent Lott and professional football player Reggie White denounced homosexuality as a sin and that Lott publicly compared homosexuality to alcoholism and kleptomania).

128. Wendy W. Simmons & Frank Newport, *Issue Referendum Reveals Mix of Liberal and Conservative Views in America Today*, GALLUP POLL NEWS SVC. (Nov. 1, 2000), available at <http://www.gallup.com/poll/releases/pr001101.asp>. The national survey revealed that forty-two percent would vote for a proposal legalizing civil unions between same-sex partners, with Democrats twice as likely to support such a proposal and forty-five percent of women surveyed

Hawaii ruling in *Baehr* and as a precursor to the Vermont ruling in *Baker*, both discussed above, the United States Congress enacted the Defense of Marriage Act (DOMA), which was signed into law by President Clinton on September 21, 1996.¹²⁹ While marriage and its incidents have, for the most part, always been a matter of state law, DOMA made a federal issue of the same-sex marriage debate that was being fought at the state level. DOMA defines marriage as a union between one man and one woman,¹³⁰ and permits the states to ignore their full faith and credit obligations under the United States Constitution as concerns any marriage or union between members of the same sex performed or officiated in any other state.¹³¹ Accordingly, thirty-four states have followed suit, enacting similar laws that mirror the language and purposes of DOMA.¹³² Further, there have been arguments asserted for the proposal of another amendment to the United States Constitution that would incorporate the language of DOMA, thereby precluding same-sex couples from seeking legal recognition of their relationships under marriage statutes and excluding them from the benefits and protections afforded only to married heterosexual couples.¹³³ Professor Robert P. George, of Princeton University, has argued that the proposed Federal Marriage Amendment should be ratified for the specific and narrow purpose of “preserving the institution of marriage for future generations of Americans” by eliminating “the *actual threat* of the imposition of same-sex marriage and civil unions.”¹³⁴

While these attempts to block the in-roads made by gay rights advocates for equality have attacked the marriage/civil union question, there have also been continued efforts aimed at blocking the rights of homosexual parents. In several jurisdictions, homosexuality is regarded as a negative factor that may be considered when determining custodial rights over children subsequent to divorce.¹³⁵ Moreover, many states still

supporting the proposal, while only thirty-nine percent of the men surveyed said they would support it. *Id.*

129. See 29 U.S.C. § 1738C (1996).

130. See *id.*; see also 1 U.S.C. § 7 (defining marriage under federal law as the legal union between one man and one woman and that a spouse is a person of the opposite sex who is a husband or a wife).

131. See *id.* (creating an exception to the Full Faith and Credit Clause, U.S. CONST. art. IV, § 1).

132. See Robert P. George, *The 28th Amendment*, NAT'L REV., July 23, 2001, at 33; see also ACLU, *Statewide Anti-Gay Marriage Laws*, available at <http://www.aclu.org/issues/gay/gaymar.html> (last updated Jan. 1998).

133. See George, *supra* note 132, at 34.

134. *Id.* (emphasis added).

135. See, e.g., LA. CIV. CODE ANN. art. 134(6) (stating that a court may take into account the “moral fitness of each party”); see also *Lundin v. Lundin*, 563 So. 2d 1273 (La. App. 1st Cir.

maintain an express ban on the adoption of children by homosexual adults. For example, in a recent decision by a federal district court, a Florida statutory provision prohibiting adoptions by homosexuals was held to be constitutional such that it does not violate the Equal Protection Clause of the Fourteenth Amendment.¹³⁶ According to the court, the state's asserted interests in continuing the ban on homosexual adoptions were sufficiently and rationally related.¹³⁷ The state asserted that the ban serves the purpose of reflecting the moral disapproval of homosexuality that, while insufficient on its own to justify the ban, was a corollary to another state interest in promoting the child's best interests.¹³⁸ The state further asserted, and the court accepted, that it is in the child's best interest "to be raised in a home stabilized by marriage, in a family consisting of both a mother and a father."¹³⁹ Thus, because homosexual couples cannot marry, and because such a couple would not consist of a mother and father (by sex designation), they are therefore precluded from adopting by state law and apparently with the sanction of the United States Constitution.¹⁴⁰

Although many state sodomy statutes have either been repealed or struck down by judicial order, as discussed earlier, the fact remains that some states in this country ardently maintain their sodomy statutes and actively enforce them as against homosexuals. As of July 2001, four states still have sodomy laws that target only same-sex acts, with penalties ranging from a \$500 fine to ten years imprisonment.¹⁴¹ Nine other states and the Commonwealth of Puerto Rico have existing sodomy statutes that prohibit any form of sodomy, regardless of the parties involved, with penalties ranging from sixty days in prison and a \$500 fine (Florida) to five years to life (Idaho).¹⁴² Furthermore, another three states have sodomy statutes on their books, the validity of which is in doubt due to judicial decisions that have indicated possible

1990) (considering homosexuality of a mother, under the moral fitness prong, as a negative factor in decision awarding custody to father). Most jurisdictions utilize a "nexus test" whereby the homosexuality of a parent only becomes a factor if it has had or is likely to have an adverse impact on the well-being of the child. See *M.A.B. v. R.B.*, 510 N.Y.S.2d 960 (N.Y. Sup. 1986).

136. See *Lofton v. Kearney*, 157 F. Supp. 2d 1372 (S.D. Fla. 2001).

137. See *id.* at 1385.

138. *Id.* at 1382-83.

139. *Id.* at 1383.

140. *Id.*

141. ACLU, *supra* note 100. The four states and their penalties are: Kansas (six months imprisonment with a \$1000 fine); Missouri (one year in jail with a \$1000 fine); Oklahoma (ten years imprisonment); and Texas (\$500 fine). *Id.*

142. *Id.* The other states include: Alabama, Louisiana, Mississippi, North Carolina, South Carolina, Utah, and Virginia. *Id.*

unconstitutionality or other limitations; these states include Massachusetts, Michigan, and Missouri.¹⁴³ Such sodomy statutes have been used by state agents to discriminate against homosexuals, by, for example, denying funds to a gay student group at a public university in Alabama, refusing a custody transfer of a child from an abusive situation in Mississippi, and stopping foster care placements in Texas.¹⁴⁴

Despite the fact that many Americans believe homosexuals should be allowed to serve openly in the military, and that even more Americans believe homosexuals should be hired for an occupation in the armed forces,¹⁴⁵ the federal government continues to openly, systematically, and proudly discriminate against prospective homosexual candidates and current homosexual servicemembers. Under the current “Don’t Ask, Don’t Tell, Don’t Pursue” policy, the military is allowed to discriminate against openly gay or lesbian individuals and may lawfully fire openly homosexual servicemembers.¹⁴⁶ The policy, which requires that homosexuals who wish to serve in the military remain in the closet and be celibate, allows for and arguably encourages the unrestrained outing of individuals who are suspected of being gay.¹⁴⁷

The military has adamantly asserted, and it is now codified into law, that homosexuality is incompatible with military service because it endangers “the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.”¹⁴⁸ This unevidenced assertion is used to justify the “Don’t Ask, Don’t Tell, Don’t Pursue” policy and to authorize the discharge of servicemembers accused of being homosexual.¹⁴⁹ Further, the discharge of servicemembers based on their homosexuality effectively destroys their

143. *See id.*

144. *See* ACLU, *Sodomy Laws: Clear and Present Danger*, available at http://www.aclu.org/issues/gay/sodomy_examples.html (last visited Nov. 21, 2001).

145. *See* discussion *supra* Part III.A. and notes 95-96.

146. *See* 10 U.S.C.A. § 654 (West 2001). The policy has repeatedly been upheld in a series of cases challenging its constitutionality. *See, e.g.*, *Philips v. Perry*, 106 F.3d 1420 (9th Cir. 1997); *Able v. United States*, 88 F.3d 1280 (2d Cir. 1996). For a comprehensive history and exploration of the U.S. military’s policy against and treatment of homosexuality and homosexual servicemembers, see R.L. Evans, *U.S. Military Policies Concerning Homosexuals: Development, Implementation, and Outcomes*, 11 TUL. J.L. & SEXUALITY 113 (2002).

147. *See* 10 U.S.C.A. § 654(b)(1)-(2) (stating that a servicemember shall be discharged if s/he engages in, attempts to engage in, has a propensity to engage in, intends to engage in, or solicits another to engage in a homosexual act(s), or if the servicemember states that s/he is a homosexual or bisexual).

148. 10 U.S.C.A. § 654 (a)(15).

149. The U.S. Department of Defense has established guidelines for dealing with and adjudicating accusations of homosexuality as against a current servicemember. *See* GUIDELINES FOR FACT-FINDING INQUIRIES INTO HOMOSEXUAL CONDUCT, U.S. DEP’T OF DEFENSE, Directive No. 1332.14.

future job prospects and results in the loss of not only their “job [with the military, but also their] income, pension, health and life insurance, and all the other benefits” of being a member of the armed forces.¹⁵⁰

Even though an overwhelming majority of Americans believe that homosexuals should be afforded equal rights to job opportunities,¹⁵¹ and the fact that many states, cities, and counties prohibit discrimination based on sexual orientation, the same cannot be said of the federal government and the protections afforded under federal employment law. Title VII of the Civil Rights Act of 1964 prohibits private and state and local government employers from discriminating against an employee with respect to the terms, conditions, or privileges of her employment because of the employee’s race, color, religion, sex, or national origin.¹⁵² Unfortunately, Title VII has been interpreted by the courts as not protecting individuals from discrimination based on sexual orientation.¹⁵³ In its decision in *Oncale v. Sundowner Offshore Services, Inc.*, the U.S. Supreme Court held that while Title VII does not prohibit sexual orientation discrimination,¹⁵⁴ same-sex sexual harassment may in fact occur where the plaintiff can prove that the discrimination perpetrated against him or her was based on “sex,” and not sexual orientation.¹⁵⁵ Thus, employers or their agents may continue to discriminate against and harass employees because of their (perceived) homosexuality, so long as they do not cross the line into sexual discrimination/harassment.

Furthermore, governing the provision of housing, one of the most fundamental of human needs, the federal government enacted the Fair Housing Act, under Title VIII of the Civil Rights Act of 1968, as amended in 1988, which protects individuals against discrimination in the sale, rental, advertising for sale or rental, provision of brokerage services, or in residential real estate-related transactions on the basis of the individual’s race, religion, color, sex, disability, familial status, or

150. *McVeigh v. Cohen*, 983 F. Supp. 215, 221 (D.D.C. 1998).

151. See discussion *supra* Part III.A.; see also *supra* notes 97-98 and accompanying text.

152. See 42 U.S.C. § 2000e-2(a)(1) (1994).

153. See, e.g., *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69,70 (8th Cir. 1989); *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979).

154. See 523 U.S. 75, 80 (1998) (stating that “Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at ‘discriminat[ion] . . . because of . . . sex.’”).

155. See *id.* at 82. For a discussion as to the limitations and problems of the *Oncale* decision and why sexual orientation discrimination and harassment should be prohibited under Title VII, see B.J. Chisholm, *The (Back)door of Oncale v. Sundowner Offshore Services, Inc.: “Outing” Heterosexuality as a Gender-Based Stereotype*, 10 TUL. J.L. & SEXUALITY 239 (2001).

national origin.¹⁵⁶ Unfortunately, the Fair Housing Act's protection does not extend to homosexuals who are discriminated against in the provision of housing and other real estate-related services on the basis of their sexual orientation.¹⁵⁷ Other federal laws, such as the Equal Credit Opportunity Act,¹⁵⁸ while protecting various classes of persons, unfortunately do not extend their protections to homosexuals who are discriminated against because of their sexual orientation.

Lastly, as to hate and other bias motivated crimes perpetrated against homosexuals, the Hate Crimes Statistics Act only mandates that the Attorney General collect data as to such crimes.¹⁵⁹ The Act expressly does not allow for any enforcement on the part of the FBI or for causes of action to be brought by such victims.¹⁶⁰ The data that has been collected, however, paints quite a bleak picture. According to the statistics gathered by the U.S. Department of Justice for the year 2000, of the 8152 hate crime incidents reported to law enforcement representing 84.2% of the Nation's population, 1517 offenses were committed with a bias against sexual orientation.¹⁶¹ This figure, which represents only reported crimes and only those that were then reported by state and local enforcement to the FBI, was up from the 1487 sexual orientation bias offenses, out of a total of 9301 hate crimes, reported in 1999.¹⁶²

The facts highlighted in this section reveal the stark reality that homosexual individuals must confront on a daily basis, no matter in what community they live. Despite the many developments and other battles that have been won by various gay rights and anti-discrimination groups, these facts serve as a sobering wake-up call stressing the point that the fight for equality and even the mere recognition of homosexual relationships must continue. The existence of even just one sodomy law

156. 42 U.S.C. §§ 3601-3619 (1968); *see also* Fair Housing Amendments Act of 1988, Pub. L. No. 100-430 (1988).

157. *See* *Neithamer v. Brenneman Property Servs., Inc.*, 81 F. Supp. 2d 1, 4 (D.D.C. 1999); *see also* U.S. DEP'T OF JUSTICE, *Frequently Asked Questions*, available at <http://www.usdoj.gov/crt/housing/faq.htm> (last updated Feb. 7, 2000).

158. 15 U.S.C. § 1691 (1997) (protecting applicants in all aspects of a credit transaction from discrimination on the basis of race, color, religion, national origin, sex, marital status, age, and source of income).

159. *See* discussion *supra* Part III.A.

160. *See supra* note 119.

161. *See* U.S. DEP'T OF JUSTICE, *Crime in the United States, 2000* (Oct. 22, 2001), available at <http://www.fbi.gov/pressrel/pressrel01/cius2000.htm> (last visited Oct. 31, 2001).

162. *See* U.S. DEP'T OF JUSTICE, HATE CRIME STATISTICS 10 (1999). Of the 1487 sexual orientation bias offenses reported in 1999, 1025 were perpetrated against (perceived) male homosexuals, 216 were against (perceived) lesbians, 205 were anti-homosexual in general, and twenty-five were against (perceived) bisexuals. *Id.* Alabama did not report any hate crimes for the entire year 1999. *Id.*

in this country speaks to this sobering reality. Furthermore, the statistics as to hate crimes are revealing as to the continued prejudice against homosexuals that manifests itself in violence, and the various legal loopholes that leave homosexual victims without protection serve to validate such violence and maintain a heterosexist system that discriminates against and punishes those who fall outside of the prescribed (heterosexual) norm.

IV. SUPREME COURT “GAY RIGHTS” JURISPRUDENCE: REVISITING *BOWERS V. HARDWICK*

In *Bowers v. Hardwick*, the United States Supreme Court handed down a decision that dealt a crushing blow to the advancement of gay rights and equality for homosexuals in American society.¹⁶³ The plaintiff, Michael Hardwick, brought a suit challenging the constitutionality of the Georgia sodomy statute under which he had been charged as violating when he was found having consensual sexual intercourse with another man in the bedroom of his apartment.¹⁶⁴ Justice White, writing for a bare majority of the Court, narrowly framed the issue presented as “whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy.”¹⁶⁵ In holding that the state sodomy statute was, in fact, constitutional, the Court found that no fundamental right exists for homosexuals to engage in sodomy and that no alleged privacy right would protect such activity.¹⁶⁶

In *Hardwick*, the Court took great pains to examine whether the fundamental right propounded by the plaintiff could actually be recognized under the Constitution, using the standards set forth in *Palko v. Connecticut* and in *Moore v. City of East Cleveland* to make such a determination.¹⁶⁷ Thus, the Court analyzed the history of sodomy laws, from the founding of the Nation to the time of its decision, and declared that “[p]roscriptions against [sodomy] have ancient roots . . . [it] was a criminal offense at common law and was forbidden by the laws of the

163. 478 U.S. 186 (1986).

164. *See id.* at 187-88.

165. *Id.* at 190. The Georgia sodomy statute in question criminalized all forms of sodomy, regardless of the sex of the parties involved. *See id.* at 188 n.1.

166. *Id.* at 189.

167. *See id.* at 191-92. In *Palko*, the Court set forth its standard of review when determining whether a fundamental right exists under the Constitution: whether the proffered right is a fundamental liberty “‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if [they] were sacrificed.’” *Id.* at 191-92 (citing *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937)). In *Moore*, Justice Powell described fundamental liberties as “those liberties that are ‘deeply rooted in this Nation’s history and tradition.’” *Id.* at 192 (citing *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977)).

original thirteen States.”¹⁶⁸ Accordingly, the Court found that given such a history, to assert that homosexual sodomy is a fundamental right to be protected by the Constitution “is, at best, facetious.”¹⁶⁹ Moreover, in debunking the plaintiff’s argument that public morality is never a legitimate government interest as to justify a law that creates and burdens a classification in order to express society’s moral disapproval of the group so classified, the Court declared that since all laws are “constantly based on notions of morality,” the courts need not bother with such cases because to do so would open the proverbial floodgates.¹⁷⁰ Thus, the Court effectively gave credence to the majority sentiment that homosexual sodomy is immoral and unacceptable as to justify the legislation and passage of laws that criminalize such conduct, and then constitutionalize such laws.¹⁷¹

In a concurring opinion, Justice Burger made special and specific mention of the fact that “homosexual conduct [has] been subject to state intervention throughout the history of Western civilization,” and that the condemnation of sodomy was “firmly rooted in Judeo-Christian [sic] moral and ethical standards,” and “was a capital crime under Roman law.”¹⁷² Moreover, Justice Burger cited *Blackstone* in his characterization of sodomy as “the infamous crime against nature” and as “an offense of ‘deeper malignity’ than rape” that is “heinous” and “a disgrace to human nature.”¹⁷³ Thus, he contended that a “millennia of moral teaching” should not be cast aside.¹⁷⁴

The Court’s obsessive focus on the history of sodomy laws, their roots in Christianity, and the morality (or rather the immorality) of homosexuality reduces homosexuals to a single sex act and characterizes that act as sinful and utterly alien to the “American” way of life. Justice Burger’s succinct concurrence minced no words in its entrenchment in the moral teachings of Christianity, despite the acclaimed American tradition of separation of church and state, of which the opinion makes no mention.¹⁷⁵ The Court’s reliance on the ancient roots of sodomy laws is both naïve and unpersuasive. Many other issues that have arguably even deeper roots in American history, such as slavery, segregation,

168. *See id.*

169. *Id.* at 194.

170. *Id.* at 196.

171. *Id.*

172. *Id.* at 196 (Burger, J. concurring) (citations omitted).

173. *Id.* at 197 (citation omitted).

174. *Id.*

175. *See generally id.*

unregulated child labor, and anti-miscegenation laws, have since been found unlawful.

While the Court's decision in *Romer v. Evans*, in which a Colorado constitutional amendment prohibiting any government action from giving protected status to homosexuals was struck down as unconstitutional, was a seemingly new supreme judicial view on the gay rights cause, it was actually decided because of the outrageousness of its animus; the amendment would have made it unreasonably more difficult for only one group of persons (i.e., homosexuals) to seek protection under the law.¹⁷⁶ In fact, the Court never even mentioned its *Hardwick* decision, although Justice Scalia relied heavily on it in his vigorous dissent.¹⁷⁷ Justice Scalia argued that the state should be able to preserve traditional sexual mores as against homosexuals, and that the Supreme Court "has no business . . . pronouncing that 'animosity' toward homosexuality . . . is evil."¹⁷⁸ Indeed, buttressing his argument with the *Hardwick* ruling, Justice Scalia argued that if it is rational to criminalize homosexual sodomy, as held in *Hardwick*, then it should be rational to deny protection to homosexuals.¹⁷⁹ This line of reasoning is understandable, given his opinion for the Court in *Oncale v. Sundowner Offshore Services, Inc.*, in which the Court resolutely excluded homosexuals from the protections afforded under Title VII as to sexual orientation-based discrimination in employment.¹⁸⁰

In another Supreme Court case dealing with gay rights issues, *Boy Scouts of America v. Dale*, the Court held that the First Amendment right of expressive association protects the Boy Scouts' policy of discrimination against homosexuals such that any state law that burdens that right is unconstitutional.¹⁸¹ As the Court stated, "[t]he presence of an avowed homosexual and gay rights activist in an assistant scoutmaster's uniform sends a distinctly different message from the presence of a heterosexual assistant scoutmaster who is on record as disagreeing with Boy Scouts policy."¹⁸² Accordingly, an openly homosexual person is again, like in *Hardwick*, reduced to the essence of a single sex act and is inescapably so homosexual that the totality of her being is bound up in her homosexuality. Because of this, the homosexual individual is

176. 517 U.S. 620 (1996). The case was decided on purely equal protection grounds, and not the substantive due process guaranteed by the Fourteenth Amendment.

177. *Id.* at 636 (Scalia, J. dissenting).

178. *Id.*

179. *See id.* at 642.

180. 523 U.S. 75 (1998); *see also* discussion *supra* Part III.B.

181. 530 U.S. 640 (2000).

182. *Id.* at 655-56.

incapable of being or becoming anything other than homosexual, which unfortunately, as here, is a negative. The sexual orientation of the individual person becomes the totality of her being. Justice Stevens' dissent makes this fact clear, arguing that the majority's holding rests on an assumption "that homosexuals are simply so different from the rest of society that their presence alone . . . should be singled out for special First Amendment treatment."¹⁸³ Moreover, he explains that the Court's justification of the social ostracism of homosexuals because of their openness "is tantamount to a constitutionally prescribed symbol of inferiority."¹⁸⁴

Obviously, the Supreme Court holds a place of special prominence in the hierarchy of the legal system, and its decisions are looked to with exacting scrutiny and utmost regard. As the highest court in the nation and the final arbiter of all cases and controversies, not only are the Court's decisions binding on all lower courts throughout the country, but they also provide the standard with which all future cases shall be judged. Effectively, the way in which the Supreme Court treats homosexual legal issues and characterizes homosexuality and homosexual persons is instructive of the manner in which the legal system as a whole will regard homosexuals in general and homosexual legal issues in particular.

The decisions discussed above become relevant to this Article's discussion of the common law torts of defamation and invasion of privacy not only because of the Supreme Court's prominence, but also because the Court has inserted itself and the Constitution into these common law torts via its First Amendment jurisprudence discussed earlier. From its seminal decision in *Hardwick* in 1986 to its more recent decisions in *Oncale* and *Dale*, the Court has laid the foundation with which homosexuality and homosexuals should be and are to be regarded under the law.

V. RE-THINKING AND REFORMULATING A GAY RIGHTS JURISPRUDENCE

In Part I of this Article, the critical question presented was whether an imputation of homosexuality is "defamatory" for purposes of a defamation claim, and whether it or its publicity would (or should) be considered "highly offensive" for purposes of an invasion of privacy. Because defamation involves a relational interest insofar as the injury sustained is to the reputation of the individual vis-à-vis the opinion of her in the community, the issue of the imputation of homosexuality raises

183. *Id.* at 696 (Stevens, J. dissenting).

184. *Id.* (citation omitted).

various questions with respect to how homosexuality is perceived in today's society, how it has been treated in this area of the law, and how it is dealt with in other areas of the law. Thus, Part II reviewed the basic elements of both defamation and invasion of privacy claims and the treatment of homosexuality under existing case law in these areas, with Part III looking at the general treatment of homosexuals in society and under various areas of the law, especially those dealing with civil rights and civil liberties issues. Lastly Part IV examined the Supreme Court's treatment of homosexual legal issues and the implications such treatment has for the ways in which we can expect homosexuality and homosexual legal issues to be treated subsequent thereto.

As discussed in Part II, for a communication to be defamatory, it must in the very least injure the reputation of the individual such that s/he is lowered in the estimation of or disgraced in the eyes of the community.¹⁸⁵ Further, for a disclosure to be highly offensive it must, as in defamation, be objectionable according to the standards and mores of the community.¹⁸⁶ Thus, in the case of homosexuality, whether an individual's reputation would be harmed by a false accusation or whether an accurate revelation or "outing" would be highly offensive will turn on how the community at large, or a substantial and respectable minority therein, would perceive it. Thus, courts look to how homosexuality is perceived in the community to determine whether the individual's reputation has been so harmed or if it is so highly offensive.¹⁸⁷ Accordingly, the courts of various jurisdictions have generally held that an imputation of homosexuality is defamatory and would be so highly offensive as to invade privacy in that it would injure a person's reputation in the community.¹⁸⁸ These decisions have been made with reference to relevant communities within the jurisdictions of the cases. The discussion in Part III.A. addressed many of the changes that have occurred over the past decade in regard to the social condition and treatment of homosexuals. Indeed, significant changes in social views and attitudes toward homosexuals, along with major developments in political and legal realms have occurred. These changes and developments have serious implications for the future of tort law and court decisions in this area.

One argument has been made that because of such changes in the social condition and treatment of homosexuals, with the increased

185. See discussion *supra* Part II.A.

186. See discussion *supra* Part II.B.

187. *Id.*

188. *Id.*

visibility of homosexuals in the media, and the political and economic power wielded by gay rights and lobbying groups, an imputation of homosexuality should not be considered defamatory or highly offensive under the law.¹⁸⁹ Problematic with this argument is the fact that despite the significant changes that have occurred over the past couple of decades in the social standing and perception of homosexuality, there still exists a strong and continuing social and institutional marginalization of homosexuality and homosexuals in particular. Discrimination against homosexuals has by no means diminished over the past years, and it may arguably have increased because of the heightened visibility and alleged or perceived political and economic power of such a minority group.¹⁹⁰ Serious harm can be inflicted against homosexuals and those who are perceived to be homosexual not only because of the social/moral opprobrium attached to homosexuality that effectively sanctions such harm,¹⁹¹ but also because of the utter lack of real protection at all levels, from state to federal.¹⁹² Failing to recognize the harm that can be accomplished by falsely imputing homosexuality to someone or by disclosing someone's homosexuality who is not otherwise openly gay would be a travesty indeed, leaving truly injured plaintiffs with no recourse and no remedy at law.¹⁹³

189. See Barbara Moretti, *Outing: Justifiable or Unwarranted Invasion of Privacy? The Private Facts Tort as a Remedy for Disclosures of Sexual Orientation*, 11 CARDOZO ARTS & ENT. L.J. 857, 872 note 78 and accompanying text (1993); see also Patrice S. Arend, *Defamation in the Age of Political Correctness: Should a False Public Statement That a Person Is Gay Be Defamatory?*, 18 N. ILL. U. L. REV. 99 (1997) (asserting that it would be politically correct for courts not to recognize a defamation claim for an imputation of homosexuality, but arguing that courts should require proof of special damages as a middle ground in accepting the reality of the harm that flows from being categorized as a homosexual while not sending a message from the bench that homosexuality is bad or wrong).

190. See discussion on hate crimes *supra* Part III.B; see also Aklilu Dunlap, *The Bellows of Dying Elephants: Gay-, Lesbian-, and Bisexual-Protective Hate Crime Statutes After R.A.V. v. City of St. Paul*, 12 LAW & INEQ. 205, 223 (1993) (reporting that “[d]espite having made some significant political and social gains, gay people remain the most frequent targets of hate crimes or gay-bashing”).

191. See Gallup Poll News Service, *supra* note 126 and accompanying text (reporting that a majority of Americans find homosexuality to be “morally wrong”). *But cf. supra* notes 90-92 and accompanying text.

192. See discussion on Title VII and the Fair Housing Act *supra* Part III.B.

193. See *generally* Pollack, *supra* note 3, at 733 (arguing that “[t]o deny the existence of prejudice because acknowledging it seems politically incorrect does a disservice to society and robs homosexuals of the very instrument of power many require to defend themselves”). One could conceivably argue the same about imputations of race or ethnic identity where racism and race-based crimes have not diminished despite considerable advances by people of color. However, race/ethnicity is already a protected status, as are national origin and color, under most, if not all, civil rights laws and therefore enjoys protections that sexual orientation/homosexuality does not.

Another argument that has been advanced in dealing with the question of whether an imputation of homosexuality is defamatory or highly offensive suggests that the determination should rest on the laws of the community within which the imputation or outing occurred.¹⁹⁴ Basing the defamatoriness determination on the existence of either sodomy laws or gay rights legislation of a given community would arguably reflect a particular community's attitudes toward homosexuality and would "allow[] the community to set its own value system and provide clear guidance when dealing with the amorphous nature of reputation."¹⁹⁵ This argument calls for a context or jurisdiction specific approach to the question and requires the plaintiff to prove damages within the specific jurisdiction that would find homosexuality imputations defamatory/highly offensive.¹⁹⁶

One of the problems with this approach is that it fails to provide any consistency or uniformity, resulting in unpredictable outcomes and uncertain expectations, such that a particular plaintiff in community *A* may be left without a remedy, but another plaintiff in next-door community *B* would have an otherwise valid claim. Furthermore, this approach does not account for 'communities' with contradictory laws, such as New Orleans, which has 'gay rights legislation' such as a domestic partnership scheme,¹⁹⁷ but is located within the State of Louisiana that has a sodomy statute. Nor does this approach address communities that have neither criminal sodomy statutes nor gay rights legislation, whose "value system" would therefore be unascertainable. The approach also does not take into account that, as Justice Scalia so aptly noted, "the society that eliminates criminal punishment for homosexual acts does not necessarily abandon the view that homosexuality is morally wrong and socially harmful."¹⁹⁸ Hence, simply because a community has no law on its books criminalizing or otherwise punishing sodomy does not necessarily mean that imputing homosexuality is not defamatory and that no harm from such an imputation may flow to the plaintiff within that specific community. Lastly, it would seem that in this age of mass media and rapid internet access, this approach encourages forum shopping such that an aggrieved

194. See Randy M. Fogle, Comment, *Is Calling Someone "Gay" Defamatory?: The Meaning of Reputation, Community Mores, Gay Rights, and Free Speech*, 3 TUL. J.L. & SEXUALITY 165 (1993).

195. *Id.* at 199.

196. *Id.*

197. See *supra* note 110 and accompanying text.

198. *Romer v. Evans*, 517 U.S. 620, 645 (1996) (Scalia, J. dissenting); see also Strand, *supra* note 122.

plaintiff is compelled to try to have her action tried in a jurisdiction where she believes she will receive the most favorable judgment.

Yet another and, perhaps, the most challenging argument for the nonrecognition of an imputation of homosexuality as a defamatory utterance or a highly offensive publicity, whether true or false, is that to do so would be tantamount to a judicial endorsement of homophobia, sending a message to the community that homophobia is both acceptable and “right-thinking.”¹⁹⁹ The central premise of the argument is that because “language and ideas heavily influence culture and self-image, and . . . how people perceive homosexuals is tied directly to how they are treated by the media and other social institutions,”²⁰⁰ then how courts define homosexuals with regard to defamation will have a profound impact on how homosexuals are treated outside of the courtroom.²⁰¹ The argument is based on the idea that courts have a unique power to effect social change such that “[a]s long as the law continues to reinforce the notion that being a homosexual is ‘bad’ or ‘offensive’ . . . gay people will continue to suffer institutional and psychological oppression.”²⁰² As a result, in finding that an imputation of homosexuality is defamatory or that its publicity is highly offensive, courts are effectively promoting homophobic sentiment and sanctioning society’s continued discrimination against homosexuals, whereas the alternative would be true if courts did not so find.

I concede that this line of argument may in fact be true to some extent as concerns the social and political power the judiciary maintains in hotly debated topics and that institutional reform may be the best place to start the transformation of social understanding and acceptance of homosexuality. However, there remain two issues that need to be addressed—a desire to “punish” malevolent homophobes and those who

199. See, e.g., Gabriel Rotello, *Why I Oppose Outing*, OUTWEEK, May 29, 1991, at 10-11; see also Gabriel Rotello, *The Ethics of “Outing”: Breaking the Silence Code on Homosexuality*, 2 FINELINE: NEWSL. ON JOURNALISM ETHICS 6 (May 1990).

200. Pollack, *supra* note 3, at 731.

201. See Lyrissa Barnett Lidsky, *Defamation, Reputation, and the Myth of Community*, 71 WASH. L. REV. 1, 38-39 (1996) (explaining that “the determination of whether a statement is defamatory becomes a mechanism for defining which groups and which values are worthy of inclusion within the community . . . [and that t]he process of validating society’s rules of civility therefore becomes a process for designating the boundaries of community”).

202. Pollack, *supra* note 3, at 732; cf. GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991) (arguing that courts need political support to produce significant social reform because of the constraints placed on them by political, social, and economic forces by virtue of the tripartite system of American government, but that if the constraining conditions can be overcome then a “Dynamic Court” can have important extra-judicial effects such as educating Americans, heightening understanding of constitutional rights and responsibilities, dramatizing issues, and spurring action and the mobilization of groups).

maliciously pry into people's private lives, on the one hand, and the problem of the doctrine of *stare decisis* and the legacy of *Hardwick* on the other. These issues, I believe, warrant the continued finding that individuals to whom homosexuality is falsely imputed and individuals whose homosexuality is involuntarily disclosed to the public have viable claims for defamation and invasion of privacy, respectively.

First, accepting that an imputation of homosexuality is defamatory or that its publicity is highly offensive should not be viewed as an endorsement of homophobia, but rather as a recognition of the actual reality that homosexuals face on a daily basis and a punishment for homophobic speech acts/conduct.²⁰³ The unfettered discrimination and violence perpetrated against homosexuals, coupled with the continued lack of protection afforded to homosexuals under both federal and state civil rights statutes are examples of the reality that is modern American society.²⁰⁴ Further, the tort action is a form of punishment as against the defendant. The defendant in this cause of action is a person who pejoratively uses homophobic epithets to not only injure the reputation of the plaintiff but also to continue the social subordination of homosexuals and the marginalization of homosexuality through the use of language. In an invasion of privacy action, the court would be punishing those who unreasonably pry into the private lives of others and maliciously publicize their findings so as to cause embarrassment and to diminish the individual's sense of privacy and security.

Tort causes of action provide a legal recourse for those who are wronged by the conduct of others. The civil remedies that successful tort actions provide not only compensate the aggrieved plaintiff for injury caused, but also reflect the community's disapproval of the defendant's conduct, especially as to defamation and invasion of privacy actions. Moreover, in the defamation and privacy contexts, the tort action allows a plaintiff to rehabilitate his or her reputation in the community and to reclaim a sense of security in his or her privacy to the extent that the right to privacy is upheld, if only in theory. As concerns homosexuality, the tort cause of action allows a plaintiff to seek redress in the face of a society that does not fully accept homosexuality and that breeds homophobia and its discontents. For in a society that engenders hatred and its consequent violent manifestations and that sanctions the discrimination of persons based on their alleged sexuality, one cannot

203. See Ware, *supra* note 120, at 489 (arguing that "[t]ort law has an obligation to be responsive to social reality at the same time as it pushes society in the direction of fairness and tolerance").

204. See discussion *supra* Part III.B.

expect the famed “reasonable person” to not also think that an imputation of homosexuality is defamatory and highly offensive. Thus, defamation and invasion of privacy claims are only logical.

Second, the Supreme Court’s ruling in *Hardwick* was a crushing setback for the movement for equality. By constitutionalizing the criminalization of sodomy—in specific homosexual sodomy—the Court struck a near fatal blow to the advancement of gay rights and equality. The decision itself, with its characterization of homosexual sodomy as immoral, sinful, and deviant, and using such a characterization to justify its decision sent a powerful message to all lower courts and to the entire country that homosexuality is not worthy of protection but is in fact acceptably criminal. It is under this framework of institutionalized homophobia and sanctioned criminality, together with federal and state laws that purposely exclude homosexuals from protection and policies that directly discriminate against homosexuals, that defamation causes of action are decided. As the highest court in the nation whose decisions are binding on lower courts throughout the country and have a symbolic import that goes far beyond their legal relevance, the Supreme Court’s decision in *Hardwick* has set the stage on which cases that address homosexual legal issues will play out. 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. Hence, a finding that a homosexual imputation is defamatory or highly offensive is consistent with the tone of prevailing Supreme Court jurisprudence since *Hardwick*, insofar as it is instructive of how all courts are to regard and treat homosexuality—as immoral and criminal. Until the Supreme Court re-visits and re-evaluates its decision and its rationale in *Hardwick*,²⁰⁵ courts would be remiss in finding that an

205. The Supreme Court recently granted certiorari in a case involving the application of a state sodomy law against two homosexual males for engaging in consensual sex acts. See *Lawrence v. Texas*, 41 S.W.3d 349 (Tex. App. 2001), *cert. granted*, 123 S. Ct. 661, 71 U.S.L.W. 3387 (U.S. Dec. 2, 2002) (No. 02-102). In *Lawrence*, John G. Lawrence and Tyron Garner were convicted of engaging in homosexual sodomy under TEX. PENAL CODE ANN. § 21.06 (Vernon 1994), which criminalizes same-sex sexual intercourse as a class C misdemeanor. 41 S.W.3d at 350. The Texas Court of Appeals summarily dismissed the two men’s appeal of their conviction on the grounds that the Texas statute in question violated both equal protection and privacy rights under the United States and Texas constitutions. *Id.* at 350, 359. The court upheld the constitutionality of Texas’ sodomy statute, which criminalizes only same-sex sexual intercourse. *Id.* at 362. In their petition for writ of certiorari to the U.S. Supreme Court, the petitioners presented the following three questions for the Court to decide:

1. Whether Petitioners’ criminal convictions under the Texas “Homosexual Conduct” law—which criminalizes sexual intimacy by same-sex couples, but not identical behavior by different-sex couples—violate the Fourteenth Amendment guarantee of equal protection of the Laws?

imputation of homosexuality is anything other than defamatory and highly offensive—the Supreme Court thinks so.

VI. CONCLUSION

The tort causes of action for defamation and invasion of privacy create avenues through which wronged individuals may recover for injury to reputation. In modern American society, and among the more educated sectors of society, an acceptance of the fact that an imputation of homosexuality is defamatory and highly offensive is seemingly unpalatable. However, when understood in the context of the socio-political marginalization of homosexuals and the undeniable reality of homophobic violence, these tort causes of action come to reveal a viable course of redress that is in line with the prevailing judicial treatment of homosexuality in general and homosexual parties in particular.

If we are to move beyond this heteronormative paradigm that treats the homosexual as a negative, then we need to seriously reevaluate current federal, state, and local laws that exclude homosexuals from their protections and even go so far as to discriminate outright against homosexuals. Laws that continue to marginalize homosexuals and that sanction discrimination against them need to be transformed to bring homosexuality as a protected category in order to ensure equal protection of the laws and to remedy past discrimination perpetrated against homosexuals. More fundamentally, the Supreme Court will need to radically re-think its current jurisprudence vis-à-vis the rights of homosexuals to be free from discrimination. The judicial creation of the monolithic homosexual needs to be deconstructed in such a way that does not reduce the homosexual individual to a single sex act, but that acknowledges that individual's right to engage in that sex act in a consensual encounter. Until and unless homosexuality is removed of this stigma by the very Supreme Court that so branded it, we cannot expect the lower courts to deviate.

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2. Whether Petitioners' criminal convictions for adult consensual sexual intimacy in the home violate their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment.
 3. Whether *Bowers v. Hardwick*, 478 U.S. 186 (1986), should be overruled?

Petition for certiorari at 1, *Lawrence v. Texas*, 41 S.W.3d 349 (Tex. App. 2001), *petition for cert. filed*, (U.S. July 16, 2002)(No. 02-102), *available at* http://supreme.lp.findlaw.com/supreme_court/briefs/02-102/02-102.pet.pdf.