

DEFAMATION PER SE AND TRANSGENDER STATUS: WHEN MACRO-LEVEL VALUE JUDGMENTS ABOUT EQUALITY TRUMP MICRO-LEVEL REPUTATIONAL INJURY

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*This Article uses the September 2017 defamation decision in *Simmons v. American Media, Inc.* as a springboard for examining defamatory meaning and reputational injury. Specifically, it focuses on cases in which judges acknowledge that plaintiffs have suffered reputational harm yet rule for defendants because promoting the cultural value of equality weighs against redress. In *Simmons*, a normative, axiological judgment—that the law should neither sanction nor ratify prejudicial views about transgender individuals—prevailed at the trial court level over a celebrity’s ability to recover for alleged reputational harm. *Simmons* sits at a dangerous intersection: a crossroads where a noble judicial desire to reject prejudicial stereotypes and to embrace equality collides head-on with an ignoble reality in which a significant minority of the population finds a particular false allegation (in *Simmons*, transgender status) to be defamatory. This Article examines how courts historically determined defamatory meaning and how once-defamatory per se statements about sexual orientation are not always considered so today. When viewed beyond a legal lens, however, research suggests transgender individuals have not witnessed the same benefits of that altered perspective. There is a key difference between attitudes about sexual orientation and attitudes about sexual identity. The Article concludes by proposing variables for courts to apply in future cases where a dispute exists over whether an allegation is defamatory per se, rather than leaving the decision to the discretion of judges untethered from formal criteria.*

INTRODUCTION

In September 2017, California Superior Court Judge Gregory Keosian¹ dismissed weight-loss legend² and aerobicizologist³ Richard Simmons' libel⁴ suit against the *National Enquirer* in *Simmons v. American Media, Inc.*⁵ In doing so, Keosian tackled what he called “an issue of first impression in California.”⁶ That question was whether falsely stating a person is transgender naturally tends to cause reputational harm.⁷ The judge ultimately concluded that “even if there is a sizeable portion of the population who would view being transgender as a negative,”⁸ he would “not validate those prejudices by legally recognizing them.”⁹

Because Keosian held that falsely labeling someone transgender was not defamatory per se,¹⁰ Simmons was forced under California

1. Keosian was appointed to the superior court in May 2002 by former California Governor Gray Davis. Kimberly Edds, *Davis Appoints Three Private Practitioners to Superior Court*, METROPOLITAN NEWS-ENTERPRISE (L.A.), May 23, 2002, at 1. As a litigator in private practice prior to his judgeship, Keosian focused “on civil tort litigation and representing plaintiffs in personal injury cases.” *Id.* Richard Simmons is not the only celebrity over whose case Keosian has presided. In October 2014, for example, he dismissed the case of a woman who sued National Basketball Association player Kris Humphries for allegedly giving her herpes. Cheryl Johnson, *Humphries May Sue Herpes Accuser*, STAR TRIB. (Minneapolis), Oct. 23, 2014, at 2B.

2. See, e.g., Donna Gable, *Simmons Drops by ‘Shade’ to Help Folks Drop Pounds*, USA TODAY, Nov. 9, 1992, at 3D (calling Simmons a “weight loss guru”); *Jumpin’ Jack Cash*, N.Y. POST, Sept. 6, 2017, at 12 (dubbing Simmons an “enigmatic fitness guru”).

3. Stanley Elkin, *Talk Up! The First Amendment as an Art Form*, GRAND STREET, Winter 1989, at 94, 101.

4. Under California law applicable in Simmons' case, libel—along with slander—is a subset of defamation. CAL. CIV. CODE § 44 (West 2017). Libel, in turn, is statutorily defined as “a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation.” *Id.* § 45.

5. Ruling at 1, *Simmons v. Am. Media, Inc.*, No. BC660633 (Cal. Super. Ct. L.A. Cty. Sept. 1, 2017) [hereinafter *Simmons Order*], https://www.scribd.com/document/358305250/Simmons-v-AMI-Ruling#from_embed.

6. *Id.* at 6.

7. *Id.*

8. *Id.* at 11.

9. *Id.* at 9.

10. *Id.* at 6; see also *Hayes v. Smith*, 832 P.2d 1022, 1024 (Colo. App. 1991) (“Historically, defamation was actionable *per se* only if the defamatory remark imputed a criminal offense; a venereal or loathsome and communicable disease; improper conduct of a lawful business; or unchastity by a woman.”); 1 ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS § 2:8.1

law to demonstrate special damages in order to prevail.¹¹ Special damages, as defined by the relevant statute in *Simmons*, are “damages that [the] plaintiff alleges and proves that he or she has suffered in respect to his or her property, business, trade, profession, or occupation, including the amounts of money the plaintiff alleges and proves he or she has expended as a result of the alleged libel, and no other.”¹² Unfortunately for the fitness guru, he “introduce[d] no evidence of any ‘special damages’ from the alleged defamation.”¹³ In fact, *Simmons* actually “appear[ed] to concede . . . that he did not suffer any special damages.”¹⁴

Keosian, thus, dismissed *Simmons*’ lawsuit¹⁵ under California’s anti-SLAPP¹⁶ statute.¹⁷ Adding pecuniary insult to alleged

(5th ed. 2012) (“A libelous or slanderous communication that, under the law of the relevant jurisdiction, can support a cause of action without proof of special damages is referred to as libel per se or slander per se, respectively. No concept in the law of defamation has created more confusion.”); Robert D. Richards, *Gay Labeling and Defamation Law: Have Attitudes Toward Homosexuality Changed Enough to Modify Reputational Torts?*, 18 COMMLAW CONSPECTUS 349, 356 (2010) (“Defamation per se is premised upon the notion that some statements are so inherently malevolent that they, without need for further elaboration, expose the subject to scorn.”).

11. See *Simmons Order*, *supra* note 5, at 6 (concluding that “misidentification of a person as transgender is not actionable defamation absent special damages”); see also CAL. CIV. CODE § 45a (West 2017) (“Defamatory language not libelous on its face is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a proximate result thereof.”). The Supreme Court of California explained more than half a century ago that “[t]he purpose of the rule requiring proof of special damages when the defamatory meaning does not appear on the face of the language used is to protect publishers who make statements innocent in themselves that are defamatory only because of extrinsic facts known to the reader.” *MacLeod v. Tribune Publ’g Co.*, 343 P.2d 36, 43 (Cal. 1959).

12. CAL. CIV. CODE § 48a(d)(2) (West 2017).

13. See *Simmons Order*, *supra* note 5, at 5.

14. *Id.*

15. *Id.* at 1.

16. SLAPP is an acronym “standing for Strategic Lawsuits Against Public Participation.” ROBERT D. RICHARDS, *FREEDOM’S: THE PERILOUS PRESENT AND UNCERTAIN FUTURE OF THE FIRST AMENDMENT* 4 (1998). Such lawsuits are “aimed at preventing citizens from exercising their political rights or punishing those who have done so.” *Simpson Strong-Tie Co. v. Gore*, 230 P.3d 1117, 1123 (Cal. 2010).

Anti-SLAPP statutes, in turn, are “laws enacted to deter strategic lawsuits against public participation (SLAPPs), or lawsuits that plaintiffs bring principally to chill the valid exercise of First Amendment speech and petition rights.” Lili Levi, *The Weaponized Lawsuit Against the Media: Litigation Funding as a New Threat to Journalism*, 66 AM. U. L. REV. 761, 822 (2017). Anti-SLAPP statutes, although varying in terms from state to state, “generally work in the same way: they provide defendants a special, expedited procedure to seek a quick dismissal of the case, and they install cost-shifting provisions that attempt to economically disincentivize the filing of a frivolous suit.” Robert T. Sherwin, *Evidence? We Don’t Need No Stinkin’ Evidence!: How Ambiguity in Some States’ Anti-SLAPP Laws Threatens to De-Fang a*

reputational injury, the judge also allowed the *National Enquirer* to file for attorneys' fees as the prevailing party under the anti-SLAPP law.¹⁸ Those fees totaled more than \$200,000¹⁹—a sum that Simmons' attorney Neville Johnson²⁰ blasted in January 2018 as a “billing fiesta”²¹ and “the kind of request that gives lawyers a bad name.”²²

The decision against the waggish workout buff was hailed by some as a victory for the Lesbian Gay Bisexual Transgender Queer (“LGBTQ”) community.²³ Furthermore, it comports with multiple

Popular and Powerful Weapon Against Frivolous Litigation, 40 COLUM. J.L. & ARTS 431, 433 (2017).

17. CAL. CODE CIV. PROC. § 425.16 (West 2017).

18. See Simmons Order, *supra* note 5, at 1; CAL. CODE CIV. PROC. § 425.16(c)(1) (West 2017) (providing that “a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney’s fees and costs”).

19. Tim Kenneally, *Richard Simmons Ordered to Pay National Enquirer’s Legal Fees in Transgender Story Lawsuit*, WRAP (Sept. 21, 2017), <https://www.thewrap.com/richard-simmons-ordered-to-pay-national-enquirers-legal-fees-in-transgender-story-lawsuit/>; *Richard Simmons’ Enquirer Lawsuit May Cost Him More than \$220k*, TMZ (Nov. 6, 2017), <http://www.tMZ.com/2017/11/06/richard-simmons-enquirer-lawsuit-attorneys-fees/>.

20. In a 2004 profile, Johnson was described as “the man to whom many plaintiffs now turn when it comes to suing the media” and who, along with Atlanta-based L. Lin Wood, is “the go-to attorney for plaintiffs seeking redress for disparaged reputations and privacy invasions.” Robert D. Richards & Clay Calvert, *Suing the Media, Supporting the First Amendment: The Paradox of Neville Johnson and the Battle for Privacy*, 67 ALB. L. REV. 1097, 1098 (2004).

21. Melissa Daniels, *Richard Simmons Slams ‘Billing Fiesta’ in Defamation Suit*, LAW360 (Jan. 31, 2018), <https://www.law360.com/articles/1007565/richard-simmons-slams-billing-fiستا-in-defamation-suit>.

22. *Id.*

23. See, e.g., Kenzie Bryant, *Richard Simmons’s Loss Could be Transgender Rights’ Gain*, VANITY FAIR (Aug. 31, 2017), <https://www.vanityfair.com/style/2017/08/richard-simmons-transgender-libel-lawsuit> (asserting that “though Simmons will likely lose, it could prove an unlikely legal victory for transgender-rights advocates”); Michael Hiltzik, *By Tossing a Richard Simmons Libel Case, a Judge Strikes a Blow Against Transgender Discrimination*, L.A. TIMES (Sept. 1, 2017), <http://www.latimes.com/business/hiltzik/la-fi-hiltzik-simmons-transgender-20170901-story.html> (“This week, Judge Gregory Keosian issued a tentative ruling that could strike a major blow for gender equality before the law. He found that whether it’s true or not that Simmons underwent the transition as the *Enquirer* reported, it’s simply not libelous or defamatory to call someone transgender.”); Anthony Michael Kreis, *Judge: Calling Someone Trans Isn’t Defamatory Because There’s Nothing Wrong with Being Trans*, SLATE (Sept. 15, 2017), http://www.slate.com/blogs/outward/2017/09/15/richard_simmons_loses_lawsuits_on_transgender_defamation.html (asserting that “transgender Americans achieved a little-noticed but critical legal victory in a California state court. Judge Gregory Keosian announced he will dismiss fitness guru Richard Simmons’ defamation lawsuit in which Simmons claimed reputational harm after the *National*

recent rulings holding that a false accusation of being gay is not defamatory per se.²⁴ These opinions contrast with older cases reaching the opposite conclusion.²⁵

In the process of ruling for the *National Enquirer* and securing a supposed win for LGBTQ equality, Judge Keosian also seemingly gave short shrift to the reputational harm Simmons allegedly suffered. As Neville Johnson put it, “[t]his is not a victory for transgender rights, but rather for the ability to publish false information meant to impugn and ridicule another.”²⁶ In brief, “the clown prince of fitness”²⁷ was not laughing when his case was elevated from an individual lawsuit into a larger cultural battle over LGBTQ rights and when the greater good of societal equality triumphed over personal need—or, at least, desire—for redress. Simmons’ co-counsel Rodney Smolla bluntly called Keosian’s decision an “exercise of idealism” rather than “realism.”²⁸

Enquirer falsely called him a transgender woman”); Nico Lang, ‘*Calling Someone Transgender is Not An Insult: Landmark Ruling in Richard Simmons Case*, INTO (Aug. 31, 2017), <https://www.intomore.com/impact/calling-someone-transgender-is-not-an-insult-landmark-ruling-in-richard-simmons-case/7c95df4baa16412a> (reporting that “advocates say that the ruling is an unusual victory for LGBTQ rights,” and adding that “Lambda Legal, the national LGBTQ civil rights organization, applauded the judge’s ruling”).

24. See, e.g., *Cornelius-Millan v. Caribbean Univ., Inc.*, 261 F. Supp. 3d 143, 156 (D.P.R. 2016) (concluding that “falsely accusing someone of being a homosexual can no longer be considered slander per se”); *Stern v. Cosby*, 645 F. Supp. 2d 258, 275 (S.D.N.Y. 2009) (holding that statements “are not defamatory per se merely because they impute homosexuality,” with then-U.S. District Judge Denny Chin stating prior that “[w]hile I certainly agree that gays and lesbians continue to face prejudice, I respectfully disagree that the existence of this continued prejudice leads to the conclusion that there is a widespread view of gays and lesbians as contemptible and disgraceful”); *Albright v. Morton*, 321 F. Supp. 2d 130, 138 (D. Mass. 2004) (acknowledging that while “a segment of the community views homosexuals as immoral,” the judiciary “should not, directly or indirectly, give effect to these prejudices. If this Court were to agree that calling someone a homosexual is defamatory per se—it would, in effect, validate that sentiment and legitimize relegating homosexuals to second-class status”).

25. See, e.g., *Manale v. City of New Orleans Dep’t of Police*, 673 F.2d 122, 125 (5th Cir. 1982) (concluding that statements labeling the plaintiff “gay” and a “fruit” were defamatory per se).

26. Nancy Dillon, *Simmons’ ‘Trans Libel’ Suit Nixed*, DAILY NEWS (N.Y.), Sept. 6, 2017, at 3.

27. Kathy Mackay, *Former Fatty Richard Simmons is the Grand Duke of Diet and the Clown Prince of Fitness*, PEOPLE (Apr. 13, 1981), <http://people.com/archive/former-fatty-richard-simmons-is-the-grand-duke-of-diet-and-the-clown-prince-of-fitness-vol-15-no-14/>.

28. Nancy Dillon, *Sweatin’ it Out: Simmons Lawsuit Against Enquirer in Trouble*, DAILY NEWS (N.Y.), Aug. 31, 2017, at News 16.

This Article examines the tension laid bare in *Simmons* between individual recovery for reputational harm, on the one hand, and the legal system's desire not to endorse or validate prejudicial views against certain classes of individuals, on the other. Phrased as a research question: when should courts, "acting as guardians of public morality,"²⁹ hold that certain false accusations are not defamatory per se even when those accusations are viewed negatively by "a substantial and respectable minority"³⁰ of the community? More colloquially and colorfully, when is it okay for a judge to throw an individual who suffered reputational harm under the bus³¹ for the sake of a larger social cause?

To contextualize this issue, Part I analyzes *Simmons v. American Media, Inc.*, delving beyond the court's opinion and into the parties' pleadings and arguments, including the *National Enquirer's* motion to strike Simmons' complaint under California's anti-SLAPP statute.³² Part II has two sections—the first reviews how courts typically determine defamatory meaning, while the second analyzes the evolution of false allegations of homosexuality and other false allegations that once were defamatory per se but are not necessarily so today.³³ Next, Part III moves beyond the legal realm to explore data and research regarding current societal attitudes in the United States toward transgender individuals.³⁴ Finally, this Article concludes by suggesting criteria for courts to deploy in future cases like *Simmons* where individual reputational harm is pitted against the law's desire to reject rulings that embrace prejudice.³⁵

29. *Cohen v. California*, 403 U.S. 15, 22 (1971).

30. See Laura A. Heymann, *The Law of Reputation and the Interest of the Audience*, 52 B.C. L. REV. 1341, 1377 (2011) ("A statement can have a defamatory effect even if it resonates only with 'a substantial and respectable minority,' assuming that the audience is a creditable one.").

31. See *Word History: Why Do We 'Throw Someone Under the Bus'? Let's Blame the British*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/words-at-play/why-do-we-throw-someone-under-the-bus> (last visited Oct. 26, 2018) (discussing the origins and meaning of the phrase "throw someone under the bus").

32. See *infra* notes 36–121 and accompanying text.

33. See *infra* notes 122–227 and accompanying text.

34. See *infra* notes 228–84 and accompanying text.

35. See *infra* notes 285–302 and accompanying text.

I. THE LAWSUIT: A PRIMER ON RICHARD SIMMONS' CASE AGAINST THE NATIONAL ENQUIRER

Richard Simmons sued the *National Enquirer* and its owner, American Media, Inc., in state court in Los Angeles County, California in May 2017.³⁶ The suit, which now is on appeal,³⁷ features four causes of action for libel and one count of false light invasion of privacy.³⁸ It pivots on the June 20, 2016 issue of the tabloid.³⁹ That issue's cover claims Simmons had: (1) transitioned from a man to a woman; (2) undergone castration surgery; and (3) received a "secret boob job."⁴⁰

Inside the issue, an article leads with the claim that "[w]eight loss expert Richard Simmons has undergone shocking sex swap surgery to change from a man to a woman—and The National Enquirer has the eye-popping world exclusive photos to prove it."⁴¹ It adds, among other tidbits, that Simmons "hid in his nearly \$5 million Hollywood Hills mansion for two long years as he slowly transformed into a female with breast implants, hormone treatments and medical consultations on castration."⁴²

36. Complaint at 1, *Simmons v. Am. Media, Inc.*, No. BC660633 (Cal. Super. Ct. L.A. Cty. May 8, 2017) [hereinafter *Simmons Complaint*], <https://www.documentcloud.org/documents/3705625-Simmons.html>. The complaint also named as a defendant Radar Online, LLC, which—as with the *National Enquirer*—is owned by American Media and is the online counterpart to the *National Enquirer*.

37. Appellant's Opening Brief at 1, *Simmons v. Am. Media, Inc.*, Court of Appeal No. B285988 (Cal. Ct. App. Mar. 7, 2018).

38. *Simmons Complaint*, *supra* note 36, at 1. Under California law, false light invasion of privacy is considered substantively the same as libel, and a plaintiff suing for false light, thus, must prove the same requirements as libel. *Tamkin v. CBS Broad., Inc.*, 122 Cal. Rptr. 3d 264, 276 (Cal. Ct. App. 2011). A California statute, which targets such duplicativeness, makes it clear that:

No person shall have more than one cause of action for damages for libel or slander or invasion of privacy or any other tort founded upon any single publication or exhibition or utterance, such as one issue of a newspaper or book or magazine or any one presentation to an audience or any one broadcast over radio or television or any one exhibition of a motion picture. Recovery in any action shall include all damages for any such tort suffered by the plaintiff in all jurisdictions.

CAL. CIV. CODE § 3425.3 (West 2017).

39. *Simmons Complaint*, *supra* note 36, at 6, Ex. 1. Although the date on the issue is June 20, 2016, the issue was actually published earlier on June 8, 2016. *Id.* at 6.

40. *Id.* at 6, Ex. 1.

41. *Id.*

42. *Id.*

Shortly after the article was published, Simmons denounced it as false, claiming “he was not transitioning from a male to a female.”⁴³ The complaint in *Simmons* characterizes his public statement as an “unequivocal denial of the gender transitioning story.”⁴⁴

In a nutshell, Simmons’ complaint alleges that the article, headlines, photos, and cover of the June 20, 2016 edition of the *National Enquirer* falsely insinuate he “has and continues to undergo sex-change surgery.”⁴⁵ The complaint avers that Simmons’ “case is about a particularly egregious and hurtful campaign of defamations and privacy invasions, falsely asserting that Mr. Simmons is transitioning from a male to a female, including ‘shocking sex surgery,’ breast implants, hormone treatments, and consultations on medical castration.”⁴⁶

In July 2017, the *National Enquirer* filed a motion to strike the complaint under California’s anti-SLAPP statute.⁴⁷ To avoid having a cause of action dismissed under this provision, a plaintiff—here, Richard Simmons—must establish “a probability” of prevailing on the claim.⁴⁸ This means “a plaintiff must make a prima facie showing of facts which would, if proved, support a judgment in his or her favor.”⁴⁹

A key element, in turn, of establishing a libel claim in California is proving a statement conveys a defamatory meaning such that it: (1) exposes the plaintiff to hatred, contempt, ridicule, or obloquy; (2) causes the plaintiff to be shunned or avoided; or (3) injures the plaintiff in his occupation.⁵⁰ If, however, a statement is not libelous per se—if a defamatory meaning is not clear from the face of the statement and, instead, is recognized only with extrinsic

43. *Id.* at 7.

44. *Id.*

45. *Id.* at 10.

46. *Id.* at 2.

47. Notice of Motion and Special Motion to Strike Plaintiff’s First Amended Complaint; Supporting Memorandum of Points and Authorities at 1, *Simmons v. Am. Media Inc.*, No. BC660633 (Cal. Super. Ct. L.A. Cty. July 26, 2017) [hereinafter Motion to Strike].

48. CAL. CIV. PROC. CODE § 425.16(b)(1) (West 2017). In addition to the probability-of-prevailing facet, California’s anti-SLAPP statute applies only if the defendant (the target or victim of the SLAPP) was acting in furtherance of his “right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue.” *Id.* A discussion of the “public issue” element is beyond the scope of this Article.

49. *Walker v. Kiouisis*, 114 Cal. Rptr. 2d 69, 75 (Cal. Ct. App. 2001).

50. CAL. CIV. CODE § 45 (West 2017).

“explanatory matter”⁵¹—then a plaintiff must additionally allege and prove special damages to prevail.⁵² Special damages, as noted earlier,⁵³ are those that a “plaintiff alleges and proves that he or she has suffered in respect to his or her property, business, trade, profession, or occupation, including the amounts of money the plaintiff alleges and proves he or she has expended as a result of the alleged libel, and no other.”⁵⁴

The *National Enquirer*’s motion to strike thus pivoted on two key arguments:

- (1) Richard Simmons could not establish a probability of winning because a false allegation of being transgender is not libelous per se;⁵⁵ and
- (2) Simmons failed to plead the requisite special damages to prevail when a statement is not libelous per se.⁵⁶

It is the first argument that lies at the heart of this Article. The *National Enquirer*’s logic here was straightforward, with the tabloid’s attorneys contending that:

[s]tatements that someone is transgender, or undergoing a gender transition, do not impute the kind of inherently shameful or odious characteristic that can support a defamation claim in modern times. Just as with false imputations of race or homosexuality, which once were

51. *Id.* § 45a. As a California appellate court described the difference between libel per se and libel per quod in the Golden State:

If . . . a reader would perceive a defamatory meaning without extrinsic aid beyond his or her own intelligence and common sense, then . . . there is a libel per se. But if the reader would be able to recognize a defamatory meaning only by virtue of his or her knowledge of specific facts and circumstances, extrinsic to the publication, which are not matters of common knowledge rationally attributable to all reasonable persons, then . . . the libel cannot be libel per se but will be libel per quod.

Barnes-Hind, Inc. v. Superior Court, 226 Cal. Rptr. 354, 359–60 (Cal. Ct. App. 1986); see also ROBERT TRAGER ET AL., *THE LAW OF JOURNALISM AND MASS COMMUNICATION* 156 (6th ed. 2018) (“Some kinds of statements convey such defamatory meaning that they are considered to be defamatory as a matter of law; on its face and without further proof, the content is defamatory. This is *libel per se*.”).

52. CAL. CIV. CODE § 45a (West 2017).

53. *Supra* note 12 and accompanying text.

54. CAL. CIV. CODE § 48a(d)(2) (West 2017).

55. Motion to Strike, *supra* note 47, at 12.

56. *Id.* at 12–13.

considered defamatory, being referred to as “transgender” cannot rationally be held by a court to impute negative characteristics.⁵⁷

Unpacking this statement reveals two key points. First, it stresses that what once was defamatory may not be so today.⁵⁸ Contemporary context, in other words, is key.⁵⁹ The *National Enquirer*, therefore, argued that “as society’s mores and values evolve, assertions that might have been offensive to a past generation may no longer be defamatory.”⁶⁰ Attorneys for the tabloid cited four examples of assertions that, although defamatory per se in the past, are no longer held so today by some courts. These include false allegations a person: (1) has cancer;⁶¹ (2) was born out of wedlock;⁶² (3) is black;⁶³ and (4) is homosexual.⁶⁴

The most recent of these to switch to non-defamatory per se status,⁶⁵ at least for some courts—although certainly not all⁶⁶—is

57. *Id.* at 12.

58. See CLAY CALVERT ET AL., MASS MEDIA LAW 164 (20th ed. 2018) (“What is considered defamatory will vary by location *and* change over time.”).

59. See Motion to Strike, *supra* note 47, at 20 (“Whether a statement is defamatory is not evaluated by any static test. Context is critical.”).

60. *Id.* at 21.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 22.

65. Importantly, a false imputation of homosexuality can still be held defamatory per quod, even if it is not defamatory per se. Haven Ward, “*I’m Not Gay, M’kay? Should Falsely Calling Someone a Homosexual be Defamatory?*,” 44 GA. L. REV. 739, 758–59 (2010) (“No court has ruled that the misidentification of someone as homosexual is not defamatory as a matter of law. Although all courts have found such statements defamatory, the courts are divided as to whether they constitute defamation per se or per quod.”).

66. In 2008, a federal district court in New York concluded that imputations of homosexuality are slanderous per se. *Gallo v. Alitalia-Linee Aeree Italiane-Societa Per Azioni*, 585 F. Supp. 2d 520, 550 (S.D.N.Y. 2008). United States District Judge Colleen McMahon largely based her decision in *Gallo* “on the fact that the prejudice gays and lesbians experience is real and sufficiently widespread so that it would be premature to declare victory. If the degree of this widespread prejudice disappears, this Court welcomes the red flag that will attach to this decision.” *Id.* at 549–50.

Two years later, a federal district court in Texas reasoned that “judicial caution requires the Court to acknowledge that the imputation of homosexuality might as a matter of fact expose a person to public hatred, contempt or ridicule.” *Robinson v. Radio One, Inc.*, 695 F. Supp. 2d 425, 428 (N.D. Tex. 2010). In doing so, Judge Reed O’Connor allowed the plaintiff to proceed with discovery and called the question of whether falsely labeling someone gay is defamatory per se “ripe for the

homosexuality.⁶⁷ Professor Jay Barth observes that “[h]istorically, American courts have generally found that falsely identifying someone as gay, lesbian, or bisexual (LGB) was defamation per se.”⁶⁸ The U.S. Supreme Court’s 2003 decision in *Lawrence v. Texas*,⁶⁹ however, propelled a shift away from this position.⁷⁰

In *Lawrence*, the Court declared an anti-sodomy statute unconstitutional, thereby decriminalizing gay sexual practices.⁷¹ This proved pivotal for libel law. Prior to *Lawrence*, “the large majority of the courts that [had] found an accusation of homosexuality to be defamatory per se emphasized the fact that such a statement imputed criminal conduct.”⁷² This logic, in turn, hinged on the fact that “[f]alse statements imputing criminal activity are among the categories of speech that are presumed to be defamatory per se.”⁷³ *Lawrence* rendered nugatory this criminal-activity rationale for declaring false accusations of homosexuality to be defamatory per se.⁷⁴

Critically for purposes of *Simmons*, however, California’s statutory definition of libel per se does not delineate it by specific categories of content such as imputations of criminal conduct.⁷⁵

clarification that comes from allowing litigation to proceed rather than the imposition of a single judge’s view.” *Id.* at 428 n.4.

67. In contrast to the homosexuality line of defamation cases, racial misidentification claims largely disappeared in the 1950s. See Lyrissa Barnett Lidsky, *Defamation, Reputation, and the Myth of Community*, 71 WASH. L. REV. 1, 30 (1996) (“Although a great many cases where plaintiffs sued over a false statement that they were African-American appeared in the reporters prior to 1950, after that date they began to disappear.”).

68. Jay Barth, *Is False Imputation of Being Gay, Lesbian, or Bisexual Still Defamatory? The Arkansas Case*, 34 U. ARK. LITTLE ROCK L. REV. 527, 527 (2012).

69. 539 U.S. 558 (2003).

70. See *Cornelius-Millan v. Caribbean Univ., Inc.*, 261 F. Supp. 3d 143, 155–56 (D.P.R. 2016) (noting that in light of *Lawrence*, “recent case law holds that falsely accusing a person of being a homosexual is not slander per se” and concluding that “falsely accusing someone of being a homosexual can no longer be considered slander per se”); *Stern v. Cosby*, 645 F. Supp. 2d 258, 274 (S.D.N.Y. 2009) (finding that “to the extent that courts previously relied on the criminality of homosexual conduct in holding that a statement imputing homosexuality subjects a person to contempt and ridicule . . . *Lawrence* has foreclosed such reliance”).

71. *Lawrence*, 539 U.S. at 578. The Texas statute at issue in *Lawrence* criminalized anal sex between members of the same sex, classifying it as deviant sexual intercourse. *Id.* at 562–63.

72. *Albright v. Morton*, 321 F. Supp. 2d 130, 137 (D. Mass. 2004).

73. Holly Miller, *Homosexuality as Defamation: A Proposal for the Use of the “Right-Thinking Minds” Approach in the Development of Modern Jurisprudence*, 18 COMM. L. & POL’Y 349, 356 (2013).

74. See *Lawrence*, 539 U.S. at 578.

75. See CAL. CIV. CODE § 45a (West 2017).

Rather, a statement is libelous on its face if its defamatory meaning exists “without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact.”⁷⁶ In other words, in California, “libel . . . is per se when defamatory on its face.”⁷⁷

This constitutes “an expansive view in interpreting the viability of a claim for libel per se,”⁷⁸ and California courts, in turn, “have used the libel statute to broaden the scope of per se liability.”⁷⁹ As Professor Robert Richards notes, “California has expanded the reach of defamation per se in other circumstances,”⁸⁰ stretching beyond “the traditional ground of imputation of criminal behavior.”⁸¹

It is only California’s definition of slander (the spoken form of defamation)⁸² that articulates a cause of action in terms of a statement that “[c]harges any person with crime, or with having been indicted, convicted, or punished for crime.”⁸³ All of this significantly mitigates, if not eliminates, the impact of *Lawrence*’s decriminalization of certain homosexual practices on the libel per se issue in California.

The second and related key point is the *National Enquirer*’s effort to analogize recent judicial acceptance of homosexuality as a non-defamatory per se state of *sexual orientation* to transgenderism as a state of *gender identity*. In other words, one might ask: if it is not defamatory per se today to falsely say someone is gay, then why should it not also be non-defamatory per se to falsely say someone is transgender? As the *National Enquirer* contended, “Simmons’ assertion that it is libelous to state a person is transitioning genders rests entirely on the same kind of outdated prejudices about transgender individuals that have been widely rejected in analogous circumstances.”⁸⁴

76. *Id.*

77. *Regalia v. Nethercutt Collection*, 90 Cal. Rptr. 3d 882, 887 (Cal. Ct. App. 2009).

78. Andrew Bossory, *Defamation Per Se: Be Prepared to Plead (and Prove!) Actual Damages*, AM. B. ASS’N (June 3, 2014), <https://www.americanbar.org/groups/litigation/committees/business-torts-unfair-competition/articles/2014/defamation-prepared-plead/>.

79. *Id.*

80. Richards, *supra* note 10, at 361.

81. *Id.*

82. See Leslie Yalof Garfield, *The Death of Slander*, 35 COLUM. J.L. & ARTS 17, 19 (2011) (defining slander as “spoken defamation” and libel as “written defamation”).

83. CAL. CIV. CODE § 46 (West 2017).

84. Motion to Strike, *supra* note 47, at 23.

A glaring threshold problem with this logic, however, is that sexual orientation and gender identity simply are not the same thing.⁸⁵ Sexual orientation, according to the Human Rights Campaign,⁸⁶ is “[a]n inherent or immutable enduring emotional, romantic or sexual attraction to other people.”⁸⁷ Gender identity, in contrast, “is the personal psychological experience of one’s own gender”⁸⁸ or, more simply, “a person’s internal sense of being male, female or something else.”⁸⁹ In brief, “sexual orientation is about who you are attracted to and fall in love with; gender identity is about who you are.”⁹⁰ This means that homosexuality and transgenderism are distinct—a fact that the U.S. Court of Appeals for the Ninth Circuit recently acknowledged.⁹¹ The difference between sexual orientation and gender identity and, in turn, the distinction between homosexuality and transgenderism inevitably clouds and convolutes the *National Enquirer’s* effort to analogize them.

The second problem with this reasoning is that although prejudices may be “outdated,” it does not mean that they do not exist and that transgender individuals do not suffer precisely the type of negative consequences for which libel law is intended to compensate. In other words, outdated prejudices—politically incorrect views, in the parlance of our times—still: (1) expose transgender individuals

85. The American Psychological Association explains that “[g]ender identity and sexual orientation are not the same. *Sexual orientation* refers to an individual’s enduring physical, romantic, and/or emotional attraction to another person, whereas *gender identity* refers to one’s internal sense of being male, female, or something else.” AM. PSYCHOL. ASS’N, ANSWERS TO YOUR QUESTIONS ABOUT TRANSGENDER PEOPLE, GENDER IDENTITY, AND GENDER EXPRESSION 2 (2014), <http://www.apa.org/topics/lgbt/transgender.pdf>.

86. The Human Rights Campaign is “the largest civil rights organization working to achieve equality for lesbian, gay, bisexual, transgender and queer Americans.” *About Us*, HUM. RTS. CAMPAIGN, <http://www.hrc.org/hrc-story/about-us> (last visited Oct. 27, 2018).

87. *Glossary of Terms*, HUM. RTS. CAMPAIGN, <http://www.hrc.org/resources/glossary-of-terms> (last visited Oct. 27, 2018).

88. David M. Buck, *Defining Transgender: What Do Lay Definitions Say About Prejudice?*, 3 PSYCHOL. SEXUAL ORIENTATION & GENDER DIVERSITY 465, 465 (2016).

89. AM. PSYCHOL. ASS’N, ANSWERS TO YOUR QUESTIONS ABOUT TRANSGENDER PEOPLE, GENDER IDENTITY, AND GENDER EXPRESSION 1 (2014), <http://www.apa.org/topics/lgbt/transgender.pdf>.

90. *Transgender FAQ*, GLAAD, <https://www.glaad.org/transgender/transfaq> (last visited Oct. 27, 2018).

91. *Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1081 (9th Cir. 2015) (“While the relationship between gender identity and sexual orientation is complex, and sometimes overlapping, the two identities are distinct.”).

to hatred, ridicule, and contempt; (2) cause them to be shunned and avoided; and (3) detrimentally affect them in their jobs.⁹² As Simmons' attorney Rodney Smolla put it, the ruling against his client was an "exercise of idealism" rather than "realism."⁹³

Beyond the *National Enquirer's* dual foundational arguments—that what is defamatory changes over time, and that shifts in how courts treat false allegations of homosexuality are analogous to how they should treat assertions of being transgender—the tabloid made a broader argument. As the motion to strike put it:

The legal rule Simmons proposes—that gender transition is somehow shameful or odious— . . . would be contrary to California law and public policy, which recognize the dignity of transgender individuals and *their right to equal treatment*. California *prohibits discrimination against transgender people*, including in housing, employment, public accommodations, health insurance and school activities. California also was the first state to ban the "trans panic" defense in homicide cases.⁹⁴

The problem with this logic, of course, is that the legal right to equal treatment does not mean that, in the reality of their day-to-day lives, transgender people are treated equally. In other words, California laws might bar discrimination against transgender individuals, but statutory symbolism does not mirror the real-world treatment of and attitudes toward transgender Californians. Part III of this Article, in fact, provides data and scholarly research revealing the discrimination that transgender people experience daily.⁹⁵

To address this apparent weakness in its argument, the *National Enquirer* averred that while "there are still people who are biased against gay people,"⁹⁶ it violates public policy for courts to recognize such prejudice via a defamatory per se classification. As the motion to strike contended, "[t]ransgender individuals may still face

92. See CAL. CIV. CODE § 45 (West 2017) (defining libel, in key part, as a publication that "exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation").

93. Dillon, *supra* note 28, at News 16.

94. Motion to Strike, *supra* note 47, at 23 (emphasis added).

95. See *infra* notes 228–84.

96. Motion to Strike, *supra* note 47, at 22.

prejudice, but that does not justify finding, as a legal matter, that they are contemptible or disgraceful.”⁹⁷

In September 2017, Judge Keosian granted the *National Enquirer*'s motion to strike.⁹⁸ Critical to this decision was Keosian's analysis of the question, as he framed it, of whether “falsely reporting that a person is transgender [has] a natural tendency to injure one's reputation.”⁹⁹ The “natural tendency” language reflects how California courts have interpreted the state's libel per se statute¹⁰⁰ for deciding if a statement, in fact, is libelous per se.¹⁰¹ That statute provides that “[a] libel which is defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact, is said to be a libel on its face.”¹⁰² Keosian concluded here that:

because courts have long held that a misidentification of certain immutable characteristics do not naturally tend to injure one's reputation, even if there is a sizeable portion of the population who hold prejudices against those characteristics, misidentification of a person as transgender is not actionable defamation absent special damages.¹⁰³

The “immutable characteristics”¹⁰⁴ line of cases Keosian cited supporting this proposition included decisions addressing medical conditions, racial misidentification, and homosexuality.¹⁰⁵ Focusing on false allegations of homosexuality, the judge noted that while “there is no connection between homosexuality and being transgender, both characteristics relate to sex and gender.”¹⁰⁶ In brief, he cursorily dismissed the vital differences between sexual orientation (homosexuality) and gender identity (transgenderism)

97. *Id.* at 24.

98. Simmons Order, *supra* note 5, at 1.

99. *Id.* at 6.

100. CAL. CIV. CODE § 45a (West 2017).

101. See *MacLeod v. Tribune Publ'g Co.*, 343 P.2d 36, 41 (Cal. 1959) (“The Code definition of libel is very broad and has been held to include almost *any language which, upon its face, has a natural tendency to injure a person's reputation*, either generally, or with respect to his occupation.”) (emphasis added) (quoting *Bates v. Campbell*, 2 P.2d 383, 385 (Cal. 1931)).

102. CAL. CIV. CODE § 45a (West 2017).

103. Simmons Order, *supra* note 5, at 6.

104. *Id.*

105. *Id.* at 7–8.

106. *Id.* at 8.

described earlier,¹⁰⁷ perhaps for purposes of judicial expediency or for smoothing the path to reach his ultimate conclusion against Simmons.

Although acknowledging that transgender individuals “may be held in contempt by a portion of the population,”¹⁰⁸ Keosian decided “not [to] validate those prejudices by legally recognizing them.”¹⁰⁹ Keosian threw a sop to the discrimination faced by transgender individuals, noting he reviewed “the deplorable statistics relating to”¹¹⁰ them and contending his ruling did not imply “that the difficulties and bigotry facing transgender individuals is minimal or nonexistent.”¹¹¹ What was paramount for Keosian, however, was not giving legal force and effect to prejudices against transgender individuals, regardless of whether “there is a sizeable portion of the population who view being transgender as negative.”¹¹²

Thus, in a nifty bit of judicial jiu-jitsu, Keosian readily acknowledged substantial prejudice against transgender individuals yet simultaneously concluded “that being misidentified as transgender is not libelous per se because such identification does not expose ‘any person to hatred, contempt, ridicule, or obloquy, or which causes him to be to be shunned or avoided, or which has a tendency to injure him in his occupation.’”¹¹³ He worked his way around such apparent cognitive dissonance¹¹⁴ by focusing on the negative public policy ramifications of libel law recognizing a false accusation of being transgender as defamatory per se.¹¹⁵

Viewed harshly and cynically, Judge Keosian ripped libel law from its venerable moorings as a dignitary tort¹¹⁶ designed to provide individual redress for reputational harm.¹¹⁷ He transformed

107. See *supra* notes 85–91 and accompanying text.

108. Simmons Order, *supra* note 5, at 9.

109. *Id.*

110. *Id.* at 11.

111. *Id.*

112. *Id.*

113. *Id.* at 9 (quoting CAL. CIV. CODE § 45 (West 2017)).

114. See Leon Festinger, *Cognitive Dissonance*, 207 SCI. AM. 93, 93 (1962) (stating cognitive dissonance theory “centers around the idea that if a person knows various things that are not psychologically consistent with one another, he will, in a variety of ways, try to make them more consistent”).

115. Simmons Order, *supra* note 5, at 9.

116. See David S. Ardia, *Freedom of Speech, Defamation, and Injunctions*, 55 WM. & MARY L. REV. 1, 9 (2013) (“Defamation, which encompasses both libel and slander, is a dignitary tort directed at remedying harm to a plaintiff’s reputation caused by false statements of fact.”)

117. See TRAGER, *supra* note 51, at 145 (“Libel law is meant to protect an individual’s reputation. It allows a person who believes his or her reputation has

it into a vehicle for judges to render feel-good, symbolic rulings that ostensibly promote equality and condemn prejudice. One might wonder, in turn, whether this is a task better left to a legislative body than to a lone judge hearing an individual tort case.

Under Keosian's view in *Simmons*, a plaintiff suing for libel per se under California Civil Code § 45a¹¹⁸ must do more than simply prove that a message conveys a defamatory meaning "without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact."¹¹⁹ Furthermore, he must do more than just prove that, in Keosian's words, "a sizeable portion of the population"¹²⁰ views the meaning in a defamatory light. Keosian adds a third burden on top of these two hurdles—namely, a plaintiff must demonstrate that judicial recognition of this meaning as redressable does not convey or send a message of inferiority to a class or group of individuals.¹²¹

The next Part of this Article explores in greater detail the typical standards in American libel law for measuring and evaluating defamatory meaning. It also goes into more depth on the shifting of views about homosexuality in libel law—the closest, albeit flawed, analog for transgender status—by reviewing judicial opinions and the works of other legal scholars who have examined this evolution.

II. NORMATIVE JUDGMENTS ABOUT DEFAMATORY MEANING: THE HEART OF DEFAMATION LAW

This Part has two sections. Section A reviews the standards that courts commonly invoke to determine if a message conveys a defamatory meaning. Section B then returns to the question of whether falsely calling someone homosexual conveys a defamatory meaning, examining both case law and legal scholarship on this topic. That question merits further consideration here because, although not the same, it both approximates and sheds light on the issue of whether falsely labeling someone transgender is defamatory per se.

been injured to file a claim against the party responsible, asking for monetary damages to compensate for harm and to restore his or her reputation.”).

118. See *Barnes-Hind, Inc. v. Superior Court*, 226 Cal. Rptr. 354, 356 (Cal. Ct. App. 1986) (“Libel per se is distinguished from libel per quod in Civil Code section 45a.”).

119. CAL. CIV. CODE § 45a (West 2017).

120. *Simmons Order*, *supra* note 5, at 6.

121. *Simmons Order*, *supra* note 5, at 9.

A. Determining Defamatory Meaning

Lyrissa Lidsky, dean of the University of Missouri School of Law, observed more than two decades ago that “[t]he threshold inquiry in every defamation action is whether the statement at issue is capable of a defamatory meaning.”¹²² As Lidsky noted, a “judge must determine whether the words used are ‘defamatory,’ that is, whether they are the type of words that have the tendency to harm reputation.”¹²³ This, in turn, requires a court to make “both a linguistic inquiry to discover the ‘tendencies’ of words and a sociological inquiry to discover the attitudes and beliefs of the community, for what is defamatory is a function of defamation law’s unique conception of reputational harm.”¹²⁴

In whose eyes, then, must a person’s reputation be sullied? United States Supreme Court Justice Oliver Wendell Holmes, Jr. opined more than one century ago that a statement must “hurt the plaintiff in the estimation of an important and respectable part of the community.”¹²⁵ Similarly, the *Restatement (Second) of Torts* holds that a message conveys a defamatory meaning if it harms an individual’s reputation in the eyes of “a substantial and respectable minority” of the community.¹²⁶

Neither Holmes nor the *Restatement*, therefore, mandates that the statement must hurt a person’s reputation in the eyes of a majority of the community. As Holmes put it, “liability is *not* a question of a majority vote.”¹²⁷ Ultimately, as Rodney Smolla observes, Holmes’ approach in *Peck* “became the prevailing American view.”¹²⁸ Some courts have slightly tweaked the standard by substituting “considerable and respectable”¹²⁹ for “important and respectable.”¹³⁰

New York applies a right-thinking person approach for evaluating defamatory meaning. As the U.S. Court of Appeals for the

122. Lidsky, *supra* note 67, at 11 (citing *Romaine v. Kallinger*, 537 A.2d 284 (N.J. 1988)).

123. *Id.* (citing MARE A. FRANKLIN & DAVID A. ANDERSON, *MASS MEDIA LAW* 196, 201, 203 (5th ed. 1995)).

124. *Id.*

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

126. *RESTATEMENT (SECOND) OF TORTS* § 559 cmt. e (AM. LAW INST. 1977).

127. *Peck*, 214 U.S. at 190 (emphasis added).

128. RODNEY A. SMOLLA, *LAW OF DEFAMATION* § 4:4 (2d ed., 2008).

129. *Stanton v. Metro Corp.*, 438 F.3d 119, 125 (1st Cir. 2006). In *Stanton*, the U.S. Court of Appeals for the First Circuit applied Massachusetts’ defamation law. *Id.* at 124–25.

130. *Peck*, 214 U.S. at 190.

Second Circuit recently wrote in *Elias v. Rolling Stone*,¹³¹ the question in the Empire State is whether a statement would “expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons.”¹³² Kentucky also applies a right-thinking person standard.¹³³

In California, the venue for *Simmons*, the state’s Supreme Court held that what matters is “the impact of communications between ordinary human beings”¹³⁴ and “the natural and probable effect upon the mind of the average reader.”¹³⁵ But as Judge Robert Sack points out in his treatise on libel, the nature of the audience for whom a message is intended affects who constitutes the average reader.¹³⁶ He contends that “[c]ommunications are thus judged on the basis of the impact that they will probably have on those who are likely to receive them.”¹³⁷

In *Simmons*, that means average readers of the *National Enquirer*. Therefore, one would need to determine if an important/substantial and respectable minority of average readers of the *National Enquirer* would consider falsely labeling someone transgender to be defamatory. According to the tabloid’s 2018 media kit, the median age and household income of a *National Enquirer* reader are 52.3 years and \$60,942,¹³⁸ and 62% of readers are female.¹³⁹

131. 872 F.3d 97 (2d Cir. 2017).

132. *Id.* at 104 (quoting *Stepanov v. Dow Jones & Co.*, 120 A.D.3d 28, 34 (N.Y. App. Div. 2014)).

133. *CMI, Inc. v. Intoximeters, Inc.*, 918 F. Supp. 1068, 1083 (W.D. Ky. 1995).

134. *MacLeod v. Tribune Publ’g Co.*, 343 P.2d 36, 44 (Cal. 1959).

135. *Id.* at 41–42.

136. SACK, *supra* note 10, § 2:4.3.

137. *Id.*

138. According to a September 2017 report by the U.S. Census Bureau, the \$60,942 figure is just slightly above the country’s median household income figure of \$59,039 from 2016. JESSICA L. SEMEGA ET AL., INCOME AND POVERTY IN THE UNITED STATES: 2016, U.S. CENSUS BUREAU 5 (2017), <https://www.census.gov/content/dam/Census/library/publications/2017/demo/P60-259.pdf>.

139. *National Enquirer 2018 Media Kit*, NAT’L ENQUIRER (2017), https://www.americanmediainc.com/sites/americanmediainc.com/files/2018_NEQ_MEDIA_KIT_r.pdf.

*B. False Imputations of Homosexuality: Analyzing Recent
Judicial Rulings and Legal Scholarship*

As addressed in Part I, the *National Enquirer* and Judge Keosian both relied on shifting judicial winds regarding whether a false accusation of homosexuality is defamatory per se. This section initially examines three cases in which courts determined that this label is no longer defamatory per se. It then analyzes legal scholarship that both praises and criticizes such rulings.

1. The Cases

This subsection surveys a trio of cases in which courts held that falsely labeling someone homosexual was not defamatory per se: *Albright v. Morton*,¹⁴⁰ *Stern v. Cosby*,¹⁴¹ and *Cornelius-Millan v. Caribbean University, Inc.*¹⁴² These decisions were chosen for analysis because they not only come from different jurisdictions but also because they cut across a significant swath of time, spanning from 2004 through 2016. Exploring these opinions, from oldest to most recent, illuminates the judges' reasons for abandoning precedent and casting aside the principle of *stare decisis*¹⁴³ in a post-*Lawrence* world.

140. 321 F. Supp. 2d 130 (D. Mass. 2004), *aff'd*, Amrak Prods., Inc. v. Morton, 410 F.3d 69 (1st Cir. 2005).

141. 645 F. Supp. 2d 258 (S.D.N.Y. 2009).

142. 261 F. Supp. 3d 143 (D.P.R. 2016).

143. See Richard M. Garner, *Flexible Predictability: Stare Decisis in Ohio*, 48 AKRON L. REV. 15, 15 (2015) (observing that the doctrine of stare decisis "holds that similar cases should be decided by similar legal principles rather than by the personal views of an ever-changing judiciary"); Randy J. Kozel, *Stare Decisis in the Second-Best World*, 103 CALIF. L. REV. 1139, 1143 (2015) (noting that "essence of stare decisis is a preference for keeping faith with the past"); Larry J. Pittman, *The Federal Arbitration Act: The Supreme Court's Erroneous Statutory Interpretation, Stare Decisis, and a Proposal for Change*, 53 ALA. L. REV. 789, 811 (2002) (noting that "for opinions involving statutory interpretation, the Court employs a presumption against the overruling of precedent, as an essential feature of its stare decisis doctrine").

a. *Albright v. Morton*

Albright, decided in 2004, arose under Massachusetts law.¹⁴⁴ It centered on a claim by James Albright, a former bodyguard and love interest of pop icon Madonna, that the book *Madonna* was defamatory per se because Albright's name was mistakenly used to identify another person—an openly gay man—in a photograph.¹⁴⁵

In Massachusetts, “whether a communication is reasonably susceptible of a defamatory meaning is a question of law for the court.”¹⁴⁶ United States District Judge Nancy Gertner, exercising this power, bluntly rejected Albright's theory.¹⁴⁷ She concluded—just one year after the U.S. Supreme Court in *Lawrence v. Texas*¹⁴⁸ struck down an anti-sodomy statute—that “[i]n 2004, a statement implying that an individual is a homosexual is hardly capable of a defamatory meaning.”¹⁴⁹

Lawrence proved crucial to Gertner's conclusion. Under Massachusetts law, “the imputation of a crime is defamatory per se, requiring no proof of special damages.”¹⁵⁰ Indeed, Gertner noted that “the large majority of the courts that have found an accusation of homosexuality to be defamatory per se emphasized the fact that such a statement imputed criminal conduct.”¹⁵¹ *Lawrence*, she found, “extinguished” this rationale.¹⁵²

In addition to relying on *Lawrence*, Gertner turned to a broader public policy rationale in ruling against Albright—namely, that judicial recognition of homosexuality as a defamatory per se allegation would be tantamount to “relegating homosexuals to second-class status.”¹⁵³ Thus, while readily acknowledging “that a segment of the community views homosexuals as immoral,”¹⁵⁴ she reasoned “that courts should not, directly or indirectly, give effect to these prejudices.”¹⁵⁵ To further elucidate this point, Gertner framed

144. See *Albright v. Morton*, 321 F. Supp. 2d 130, 134–35 (D. Mass. 2004) (setting forth the general principles of Massachusetts defamation law applicable in the case).

145. *Id.* at 132.

146. *Phelan v. May Dep't Stores Co.*, 819 N.E.2d 550, 554 (Mass. 2004).

147. *Albright*, 321 F. Supp. 2d at 132.

148. 539 U.S. 558 (2003).

149. *Albright*, 321 F. Supp. 2d at 132.

150. *Phelan*, 819 N.E.2d at 554.

151. *Albright*, 321 F. Supp. 2d at 137.

152. *Id.*

153. *Id.* at 138.

154. *Id.*

155. *Id.*

her decision in a historical context: “[I]f Albright claimed that he was a white person wrongfully labeled African-American, the statement would not be defamation per se, even if segments of the community still held profoundly racist attitudes.”¹⁵⁶

Finally, Gertner stressed that “the category ‘defamation per se’ should be reserved for statements linking an individual to the category of persons ‘deserving of social approbation’ like a ‘thief, murderer, prostitute, etc.’”¹⁵⁷ The notion that homosexuals belong among those groups, Gertner made clear, “is nothing short of outrageous.”¹⁵⁸ She added that Albright was simply “trading in the same kinds of stereotypes that recent case law and good sense disparage.”¹⁵⁹

In 2005, the U.S. Court of Appeals for the First Circuit affirmed the decision.¹⁶⁰ The First Circuit, however, simply found that the miscaptioned photograph did not impute homosexuality to Albright.¹⁶¹ The appellate court, thus, did “not decide whether such an imputation constitutes defamation *per se* in Massachusetts.”¹⁶²

b. *Stern v. Cosby*

Stern, which was decided in 2009, arose under New York defamation law.¹⁶³ It pivoted on attorney Howard K. Stern’s claim that Rita Cosby’s “explosive tell-all book,”¹⁶⁴ *Blonde Ambition: The Untold Story Behind Anna Nicole Smith’s Death*, falsely imputed he was gay and that this allegation was defamatory per se.¹⁶⁵ Specifically, the book alleged that: (1) Stern and Larry Birkhead, the father of the child of Stern’s late wife Anna Nicole Smith,¹⁶⁶ had oral

156. *Id.*

157. *Id.* at 139 (quoting *Hayes v. Smith*, 832 P.2d 1022, 1025 (Colo. App. 1991)).

158. *Id.*

159. *Id.*

160. *Amrak Prods., Inc. v. Morton*, 410 F.3d 69, 71 (1st Cir. 2005).

161. *Id.* at 73.

162. *Id.*

163. *See Stern v. Cosby*, 645 F. Supp. 2d 258, 271 (S.D.N.Y. 2009) (“I begin by discussing the legal standard applicable to a defamation claim under New York law.”).

164. Christina Boyle, *Anna Guys in Book Bombshell*, DAILY NEWS (N.Y.), Sept. 2, 2007, at 2.

165. *Stern*, 645 F. Supp. 2d at 263.

166. Smith, a former *Playboy* magazine centerfold who later went on to star in a reality television show and become a spokesperson for TrimSpa supplements, died at thirty-nine years of age in Florida in early 2007. Abby Goodnough & Margalit Fox, *Anna Nicole Smith is Found Dead at a Florida Hotel*, N.Y. TIMES, Feb. 9, 2007, at A12.

sex at a party; (2) Smith regularly watched a video of Stern and Birkhead having sex; and (3) Smith called Stern gay.¹⁶⁷ United States District Judge Denny Chin ultimately found the statements were “not defamatory per se merely because they impute homosexuality to Stern.”¹⁶⁸

Whether a statement is defamatory per se in New York is a question of law for a judge to decide.¹⁶⁹ New York’s highest appellate court holds that a statement is defamatory per se, such that proof of special damages is unnecessary, “if it tends to expose a person to hatred, contempt or aversion, or to induce an evil or unsavory opinion of him in the minds of a substantial number of the community, even though it may impute no moral turpitude to him.”¹⁷⁰ This determination “depends, among other factors, upon the temper of the times, the current of contemporary public opinion, with the result that words, harmless in one age, in one community, may be highly damaging to reputation at another time or in a different place.”¹⁷¹ As Chin aptly noted in *Stern*, “whether a statement is defamatory per se can evolve from one generation to the next.”¹⁷²

Chin largely based his opinion on the principle that what is defamatory per se is transitory. He asserted that “[t]he past few decades have seen a veritable sea change in social attitudes about homosexuality.”¹⁷³ Chin pointed to the U.S. Supreme Court’s 2003 decision in *Lawrence v. Texas*¹⁷⁴ that overturned an anti-sodomy law—the same type of statute courts previously relied on to find false allegations of homosexuality were defamatory due to an association with criminal behavior.¹⁷⁵ Furthermore, Chin cited a then-recent poll indicating that a majority of New Yorkers supported gay marriage as evidence they also would not regard allegations of homosexuality as something that would expose a person to “contempt, ridicule, aversion or disgrace.”¹⁷⁶

167. *Stern*, 645 F. Supp. 2d at 267.

168. *Id.* at 275.

169. *Geraci v. Probst*, 938 N.E.2d 917, 922 (N.Y. 2010).

170. *Mencher v. Chesley*, 75 N.E.2d 257, 259 (N.Y. 1947) (citing *Katapodis v. Brooklyn Spectator, Inc.*, 38 N.E.2d 112, 113 (N.Y. 1941)).

171. *Id.*

172. *Stern*, 645 F. Supp. 2d at 273.

173. *Id.*

174. 539 U.S. 558 (2003).

175. *Stern*, 645 F. Supp. 2d at 273–74.

176. *Id.* at 274.

This ruling contravened another decision from the same federal district in New York just one year prior.¹⁷⁷ In that case, Judge Colleen McMahon largely attributed her decision to widespread homophobia and prejudice gays and lesbians continued to face.¹⁷⁸ Addressing his deviation, Chin explained:

I respectfully disagree that the existence of this continued prejudice leads to the conclusion that there is a widespread view of gays and lesbians as contemptible and disgraceful. Moreover, the fact of such prejudice on the part of some does not warrant a judicial holding that gays and lesbians, merely because of their sexual orientation, belong in the same class as criminals.¹⁷⁹

Ultimately, while Chin held that false allegations of homosexuality are not defamatory per se, he allowed Stern to proceed on other claims.¹⁸⁰ The case settled in November 2009 for an undisclosed sum of money.¹⁸¹

c. *Cornelius-Millan v. Caribbean University, Inc.*

Cornelius-Millan, which was decided in 2016, applied Puerto Rican defamation law.¹⁸² The case centered on whether it was slanderous per se for a professor to call his student “homosexual.”¹⁸³ Although U.S. Magistrate Judge Bruce McGiverin dismissed the defamation cause of action on other grounds,¹⁸⁴ he held that “falsely accusing someone of being a homosexual can no longer be considered slander per se.”¹⁸⁵

177. *Gallo v. Alitalia-Linee Aeree Italiane-Societa Per Azioni*, 585 F. Supp. 2d 520, 549–50 (S.D.N.Y. 2008).

178. *Id.*

179. *Stern*, 645 F. Supp. 2d at 275 (citing *Albright v. Morton*, 321 F. Supp. 2d 130, 138 (D. Mass. 2004)).

180. *Id.*

181. Bruce Golding, *Anna Lawyer Settles Gay Suit*, N.Y. POST, Nov. 21, 2009, at 7.

182. *See Cornelius-Millan v. Caribbean Univ., Inc.*, 261 F. Supp. 3d 143, 154 (D.P.R. 2016) (reviewing key principles and sources of defamation law in Puerto Rico).

183. *Id.* at 155–56.

184. *See id.* at 154–55 (noting that case law has established that face-to-face altercations involving name-calling and epithets are not considered defamatory).

185. *Id.* at 156.

As with the judges in *Albright* and *Stern* described above, McGiverin relied heavily on the Supreme Court's *Lawrence v. Texas*¹⁸⁶ decision in reaching this conclusion.¹⁸⁷ In doing so, McGiverin cited favorably for support the rulings in both *Albright* and *Stern*.¹⁸⁸ Specifically, he cited those cases to buttress twin propositions—namely, that:

- “*Lawrence* has extinguished the rationale underlying cases”¹⁸⁹ that previously held it defamatory per se to label someone homosexual because it imputed criminal conduct; and
- “[R]ecent case law holds that falsely accusing a person of being a homosexual is not slander per se.”¹⁹⁰

In brief, there was a growing body of decisions by 2016 such as *Albright* and *Stern* on which McGiverin could rely to make his ruling slightly easier and less controversial than those that came before it on the same question. With these three cases in mind, the next subsection examines legal scholarship addressing the nexus between defamation per se and false allegations of homosexuality.

2. The Scholarship

The cases above illustrate that the judicial tide is turning against branding false imputations of homosexuality defamatory per se.¹⁹¹ Some scholars laud this change for embracing societal and legal advances and removing what amounted to court-sanctioned discrimination.¹⁹² Other experts, however, criticize these opinions for allegedly ignoring lingering problems that gays and lesbians face today.¹⁹³

186. 539 U.S. 558 (2003).

187. *Cornelius-Millan*, 261 F. Supp. 3d at 155–56.

188. *Id.*

189. *Id.* at 155 (citing *Stern v. Cosby*, 645 F. Supp. 2d 258, 275 (S.D.N.Y. 2009)).

190. *Id.*

191. *See supra* Part II.B.1.

192. *See infra* Part II.B.2.a.

193. *See infra* Part II.B.2.b.

a. Praise for Eliminating Defamatory Per Se Status for False Assertions of Homosexuality

Professor Matthew Bunker observes in a 2011 article that courts increasingly are “taking judicial notice of changing social attitudes toward alternative sexualities.”¹⁹⁴ And just as the judiciary evolved in racial misidentification cases, Bunker argues that “public policy should not permit the law to symbolically endorse discriminatory attitudes or conduct, even if such attitudes are common.”¹⁹⁵ Why? Because “[t]he imprimatur of the law is a powerful symbolic force that normalizes certain social understandings,”¹⁹⁶ and “[b]asing legal decisions on discriminatory beliefs and behaviors, whether in libel law or child custody cases, validates those beliefs and behaviors.”¹⁹⁷

Bunker, therefore, offers a bright-line proposal. Specifically, he posits that unlike false imputations regarding “voluntary misconduct or malfeasance,”¹⁹⁸ those targeting an immutable characteristic—race, sexual preference, illness, or disability, for example—or an involuntary status must never carry a defamatory meaning.¹⁹⁹ He insists that courts adopt this standard “regardless of a judge’s or a jury’s sense of how the *Restatement’s* ‘substantial and respectable’ group of so-called right-thinking citizens would view a statement.”²⁰⁰ In a nutshell, Bunker avers that defamatory injuries based on immutable traits must cede to equality interests in order to prevent a judicial stamp of approval on social stigma and discrimination.²⁰¹

This tack is necessary, Bunker contends, because even though the U.S. Supreme Court’s 2003 ruling in *Lawrence v. Texas*²⁰² eliminated the “criminal foundation”²⁰³ for holding false allegations of homosexuality defamatory per se, “some post-*Lawrence* courts

194. Matthew D. Bunker et al., *Not That There’s Anything Wrong with That: Imputations of Homosexuality and the Normative Structure of Defamation Law*, 21 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 581, 601 (2011).

195. *Id.* at 602.

196. *Id.* at 608.

197. *Id.*

198. *Id.* at 603.

199. *Id.*

200. *Id.*; see also *id.* at 609 (“Our proposal suggests that courts decline to recognize as defamatory statements that stigmatize a class of persons based on some immutable characteristic or involuntary status.”).

201. *Id.* at 608.

202. 539 U.S. 558 (2003).

203. Bunker, *supra* note 194, at 590.

have still applied pre-*Lawrence* precedent.”²⁰⁴ These courts “continue to find the false imputation of homosexuality to be defamatory per se solely on the grounds that it either implies unchastity, or has the tendency to expose a person to public hatred, contempt or ridicule.”²⁰⁵

Professors Courtney Joslin and Lawrence Levine hail the rulings in lower court cases such as *Albright*²⁰⁶ as consistent with both legal and social strides made by the lesbian and gay community.²⁰⁷ In a 2014 article, they explain that “in light of both cultural and constitutional law developments, it is hard to justify a rule that permits a false imputation of LGBT status to be defamatory.”²⁰⁸ As with Professor Bunker, they analogize this change to a false imputation that a white person was black—a statement no longer defamatory per se.²⁰⁹

Joslin and Levine further call for the American Law Institute (the publisher of the *Restatement (Second) of Torts*) to adopt the approach taken by recent courts:

If and when the [American Law Institute] revisits the tort of defamation, the ALI should explicitly endorse the emerging trend in the case law and make clear that, as is true for false imputations of race, false imputations of homosexuality should not give rise to a cognizable defamation claim. A determination that sexual-orientation defamation cannot be actionable would be a substantial step toward recognizing the dignity of the LGBT community.²¹⁰

This recommendation, they believe, would “clarify one of the most complex and confused areas of American tort law.”²¹¹

Pointing to the U.S. Supreme Court’s ruling in *Lawrence v. Texas*²¹² as eliminating the criminal-conduct justification for holding false imputations of homosexuality to be defamatory per se,²¹³

204. *Id.*

205. *Id.* at 591.

206. See *supra* Part II.B.1.a (discussing *Albright v. Morton*, 321 F. Supp. 2d 130 (D. Mass. 2004)).

207. Courtney G. Joslin & Lawrence C. Levine, *The Restatement of Gay(?)*, BROOK. L. REV. 621, 660 (2014).

208. *Id.* at 659.

209. *Id.*

210. *Id.* at 661.

211. *Id.* at 658.

212. 539 U.S. 558 (2003).

213. See Barth, *supra* note 68, at 538.

Professor Jay Barth contends “there is no continuing justification for deeming false imputation of an individual as being gay, lesbian, or bisexual defamatory even in locales where ‘community standards’ exhibit sharply negative attitudes about LGB individuals.”²¹⁴ He adds that “gay defamation cases serve only as state-driven perpetuation of denigration of sexual minorities in direct conflict with the trajectory of American law regarding sexual orientation.”²¹⁵ Similarly, attorney Haven Ward argues that decisions holding allegations of homosexuality to be defamatory are wrong because this stance “endorses homophobia and demeans the lives of homosexuals. Due to our country’s firm commitment to civil rights and opprobrium of invidious prejudice, judges should hold the false imputation of homosexuality non-defamatory as a matter of law.”²¹⁶

In summary, many scholars have advocated for eliminating defamatory per se status for false allegations of homosexuality. Yet, as noted below, other scholars—albeit writing more than a half-decade ago—have cautioned against this change.

b. Arguments Against Removing Defamatory Per Se Status for
False Allegations of Homosexuality

Wary of the judiciary jumping the gun, Professor Robert D. Richards contended in 2010 that there was still some time to go before libel law could truly reflect the cultural realities of contemporary society.²¹⁷ He cautioned that courts should “avoid creating legal fictions of society having reached some aspirational level of tolerance” that is not yet prevalent.²¹⁸ Richards explained that “sizable pockets of society still hold gays and lesbians to the obloquy, ridicule, and contempt that define defamation per se”²¹⁹ and that judicial denial of this fact “does not eradicate that prejudice from reality.”²²⁰

Likewise, Professor David Ardia emphasized in a 2010 article that societal “norms do not change overnight.”²²¹ He noted that “[w]hen even members of the LGBT community are conflicted over

214. *Id.* at 548.

215. *Id.*

216. Ward, *supra* note 65, at 767.

217. Richards, *supra* note 10, at 368.

218. *Id.*

219. *Id.* at 369.

220. *Id.*

221. David S. Ardia, *Reputation in a Networked World: Revisiting the Social Foundations of Defamation Law*, 45 HARV. C.R.-C.L. L. REV. 261, 298 (2010).

which strategy to pursue in their efforts to change social norms, judges seem especially ill-equipped to make these decisions, particularly when they are doing so through guise of defamation law.”²²² Despite benevolent intentions by courts, Ardia explains that “judges are forced to decide whether they should take society as it exists, warts and all, or as they desire it to be.”²²³ Indeed, this taps directly into the dilemma faced by Judge Keosian in *Simmons v. American Media, Inc.*

Ultimately, decisions like *Lawrence v. Texas*²²⁴ and *Obergefell v. Hodges*²²⁵ are clear victories for the rights of *gays and lesbians* and signal judicial opprobrium and disdain for holding false allegations of homosexuality defamatory per se. They do not mean, however, that *transgender* individuals no longer face blatant discrimination and stigmatization.

As the U.S. Court of Appeals for the Ninth Circuit cogently observed in 2015, “laws recognizing same-sex marriage may do little to protect a transgender woman . . . from discrimination, police harassment, and violent attacks in daily life.”²²⁶ The Ninth Circuit added that “significant evidence suggests that transgender persons are often especially visible, and vulnerable, to harassment and persecution due to their often public nonconformance with normative gender roles.”²²⁷

The next Part of this Article moves beyond the legal realm to analyze data and other evidence about societal attitudes and actions toward transgender individuals. It is essential to review this material because it may indicate that falsely labeling someone transgender still harms that person’s reputation today in the eyes of a considerable and respectable segment of the American population.

222. *Id.* at 300.

223. *Id.* at 300–01.

224. 539 U.S. 558 (2003).

225. 135 S. Ct. 2584 (2015). In *Obergefell*, the Court concluded that: same-sex couples may exercise the fundamental right to marry in all States. It follows that the Court also must hold—and it now does hold—that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.

Id. at 2607–08.

226. *Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1080 (9th Cir. 2015).

227. *Id.* at 1081.

III. TRANSGENDER AND PUBLIC SENTIMENT: SEARCHING FOR SHIFTING ATTITUDES AND ACTIONS OF ACCEPTANCE

In holding that it was no longer defamatory per se to falsely call a person homosexual in 2012, a New York appellate court emphasized what it called “the *tremendous evolution in social attitudes* regarding homosexuality.”²²⁸ Similarly, in ruling against Howard K. Stern in *Stern v. Cosby*,²²⁹ U.S. District Judge Denny Chin cited “a *veritable sea change* in social attitudes about homosexuality.”²³⁰ Has there been, however, a similar “tremendous evolution” and “veritable sea change” in societal attitudes today toward transgender individuals—an evolution sufficient enough to jettison false allegations of transgender status from the domain of defamatory per se statements?

A fitting starting point for examining this query and, in turn, modern attitudes and actions toward²³¹ transgender individuals is definitional: What exactly does transgender mean?

A 2017 article in the *Journal of Endocrinological Investigation* provides that “transgenderism is an umbrella term describing individuals whose gender identity, expression, or behavior can differ from those typically associated with their assigned gender.”²³²

228. *Yonaty v. Mincolla*, 945 N.Y.S.2d 774, 778 (N.Y. App. Div. 2012) (emphasis added).

229. See *supra* Part II.B.1.a (discussing *Stern v. Cosby*, 645 F. Supp. 2d 258 (S.D.N.Y. 2009)).

230. *Stern*, 645 F. Supp. 2d at 273 (emphasis added).

231. Attitudes and actions often are related, with attitudes generally predicting behaviors. See, e.g., Min-Sun Kim & John E. Hunter, *Attitude-Behavior Relations: A Meta-Analysis of Attitudinal Relevance and Topic*, 43 J. COMM. 101, 132 (1993) (finding that “evidence from the accumulated literature affirms the following position: *Relevant attitudes strongly predict volitional behavior*”); Nancy Rhodes et al., *Persuasion as Reinforcement: Strengthening the Pro-Environmental Attitude-Behavior Relationship Through Ecotainment Programming*, 19 MEDIA PSYCHOL. 455, 459 (2016) (noting that “[a]ccessible attitudes have been found to be strongly associated with attention, behavioral intent, and future behavior”). Because reputational harm in libel law is reflected in both negative attitudes and behaviors towards a plaintiff, examining both attitudes about and actions toward transgender individuals is exceedingly relevant. See Clay Calvert, *Harm to Reputation: An Interdisciplinary Approach to the Impact of Denial of Defamatory Allegations*, 26 PAC. L.J. 933, 940 (1995) (“While reputational harm may take the form of negative attitudes and opinions, it also includes changes in physical conduct or behavior toward the plaintiff.”).

232. A.D. Fisher et al., *Who Has the Worst Attitudes Toward Sexual Minorities? Comparison of Transphobia and Homophobia Levels in Gender Dysphoric*

Similarly, the National Center for Transgender Equality defines transgender as “[a] term for people whose gender identity, expression or behavior is different from those typically associated with their assigned sex at birth. Transgender is a broad term and is good for non-transgender people to use.”²³³

The notion that transgender is an expansive label is echoed by the Lesbian, Gay, Bisexual and Transgender (LGBT) National Help Center. It describes transgender as an:

umbrella term that includes different things, all having to do with gender identity. This can include someone who occasionally enjoys dressing in the clothing of the opposite sex (cross-dresser) or someone who knows that the gender that they feel on the inside of their body does not match the gender that they appear to be on the outside of their body (transsexual).²³⁴

More specifically, a transgender man is “a transgender person who currently identifies as a man,”²³⁵ while a transgender woman is “a transgender person who currently identifies as a woman.”²³⁶

With these definitions in mind, the pivotal issue in libel cases is whether it is defamatory in 2018 to falsely state that someone is transgender. In other words, is being transgender something that might, under the California law applicable in *Simmons*, cause a person to be: (1) hated, ridiculed, or treated with contempt; (2) shunned or avoided; or (3) injured in his or her occupation?²³⁷

Although there is a paucity of comprehensive survey research in the United States today on attitudes toward transgender individuals,²³⁸ the answer appears to be a resounding yes.

Individuals, the General Population and Health Care Providers, 40 J. ENDOCRINOLOGICAL INVESTIGATION 263, 264 (2017).

233. *Tips for Journalists*, NAT'L CTR. FOR TRANSGENDER EQUALITY (Jan. 26, 2014), <https://transequality.org/issues/resources/fact-sheet-writing-about-transgender-people-and-issues>.

234. *Frequently Asked Questions: What Does “Transgender” Mean, and What Does It Include?*, LGBT NAT'L HELP CTR., <https://www.glbthotline.org/faqs.html> (last visited Oct. 31, 2018).

235. *Tips for Journalists*, *supra* note 233.

236. *Id.*

237. CAL. CIV. CODE § 45 (West 2017).

238. See Andrew R. Flores et al., *Challenged Expectations: Mere Exposure Effects on Attitudes About Transgender People and Rights*, 39 POL. PSYCHOL. 197, 198 (2018) (observing that “[t]here are few studies on public attitudes about transgender people”); Yasuko Kanamori & Jeffrey H.D. Cornelius-White, *Big Changes, but Are They Big Enough? Healthcare Professionals’ Attitudes Toward*

Transphobia is a “prejudice against gender nonconforming persons”²³⁹ and “an emotional disgust toward”²⁴⁰ such individuals. It “manifests itself in the fear that personal acquaintances may be trans or disgust upon encountering a trans person”²⁴¹ and percolates through society.

As a 2015 article in *Sociological Forum* encapsulates it, “transgender people are systematically oppressed and experience high rates of discrimination and violence in the United States.”²⁴² Similarly, a 2016 article in the scholarly journal *Sex Roles* asserts that while “contemporary U.S. society struggles with accepting diversity in various human characteristics, deviations from the norm in terms of sexuality and gender tend to incite particularly strong and persistent negative reactions.”²⁴³

There are, of course, several high-profile indicators that transgender status is stigmatized. These include President Donald Trump’s effort in 2017 to ban transgender people from military service,²⁴⁴ as well as ongoing battles over bathroom access.²⁴⁵ A

Transgender Persons, 17 INT’L J. TRANSGENDERISM 165, 165 (2016) (noting that “research into attitudes toward transgender persons sorely lags behind research into attitudes toward lesbians and gays”); Yasuko Kanamori et al., *Development and Validation of the Transgender Attitudes and Beliefs Scale*, 46 ARCHIVES SEXUAL BEHAV. 1503, 1503 (2017) (calling it “surprising to note that only five empirical studies of U.S. attitudes toward transgender persons have been conducted in the last decade”).

239. Kanamori et al., *supra* note 238, at 1504.

240. Darryl B. Hill & Brian L.B. Willoughby, *The Development and Validation of the Genderism and Transphobia Scale*, 53 SEX ROLES 531, 533 (2005).

241. *Id.* at 533–34.

242. Lisa R. Miller & Eric Anthony Grollman, *The Social Costs of Gender Nonconformity for Transgender Adults: Implications for Discrimination and Health*, 30 SOC. F. 809, 809 (2015).

243. Holger B. Elischberger et al., “Boys Don’t Cry”—or Do They? *Adult Attitudes Toward and Beliefs About Transgender Youth*, 75 SEX ROLES 197, 197 (2016).

244. Julie Hirschfeld Davis & Helene Cooper, *Trump Surprises Military with a Transgender Ban*, N.Y. TIMES, July 27, 2017, at A1. Trump’s effort ultimately failed. Spencer S. Hsu & Ann E. Marimow, *Judge Rejects Delay of Trans Military Recruiting*, WASH. POST, Dec. 12, 2017, at A3. The government’s legal efforts to stay the trial court’s injunction against the ban were blocked by the U.S. Court of Appeals for the District of Columbia. *Doe v. Trump*, No. 17-5267, 2017 U.S. App. LEXIS 26477, at *3 (D.C. Cir. Dec. 22, 2017). Trump voluntarily dismissed his appeal in January 2018. *Doe v. Trump*, No. 17-5267, 2018 U.S. App. LEXIS 296, at *3–4 (D.C. Cir. Jan. 4, 2018).

245. Richard Fausset, *Deal on Bathroom Law Would Expand Transgender Protections*, N.Y. TIMES, Oct. 19, 2017, at A15. See generally Stephen Rushin & Jenny Carroll, *Bathroom Laws as Status Crimes*, 86 FORDHAM L. REV. 1 (2017) (analyzing the legality and criminal implications of a growing number

recent article in the *New England Journal of Medicine* emphasizes that laws such as North Carolina's now-repealed bathroom statute²⁴⁶ “send a message that transgender people are not welcome in workplaces or schools, reinforcing the stigma, bias and fear that fuel discrimination against transgender people.”²⁴⁷ Indeed, a 2016 Pew Research Center study reveals that a substantial minority of those surveyed would discriminate against transgender individuals by requiring them to use a bathroom matching their gender at birth:

About half of U.S. adults (51%) say transgender individuals should be allowed to use public restrooms that correspond with the gender they currently identify with But nearly as many (46%) take the opposite position—on the side of the North Carolina law—and say transgender people should be required to use bathrooms that match the gender they were born into.²⁴⁸

The markers and signs that being transgender carries the likelihood of being ridiculed, shunned, or harmed in one's occupation, however, stretch far beyond such legal skirmishes.

For instance, *USA Today* in January 2018 reported the results of a Harris poll which found that “[f]or the first time in four years, Americans are *less* accepting of LGBTQ people.”²⁴⁹ Specifically, 31% of those surveyed said they would be either uncomfortable or very uncomfortable having their child placed in a class with an LGBTQ teacher.²⁵⁰ Furthermore, 31% said they would be either uncomfortable or very uncomfortable learning their doctor was

of so-called bathroom laws that typically require individuals to use a single-sex bathroom that matches their gender as identified on their original birth certificate).

246. See Mark Berman & Amber Phillips, *N.C. Repeals Bathroom Law but Riles Rights Groups Anew*, WASH. POST, Mar. 31, 2017, at A2 (“North Carolina lawmakers retreated from the state's controversial law that restricted which public restrooms transgender people could use, repealing it . . . in the face of economic pressure in favor of a new bill that LGBT rights groups attacked as discriminatory.”).

247. Mark A. Schuster et al., *Beyond Bathrooms—Meeting the Mental Health Needs of Transgender People*, 375 NEW ENG. J. MED. 101, 101–02 (2016).

248. Michael Lipka, *Americans Are Divided over Which Public Bathrooms Transgender People Should Use*, PEW RES. CTR. (Oct. 3, 2016), <http://www.pewresearch.org/fact-tank/2016/10/03/americans-are-divided-over-which-public-bathrooms-transgender-people-should-use/>.

249. Susan Miller, *Americans Show Less Acceptance of LGBTQ People*, *Survey Says*, USA TODAY, Jan. 26, 2018, at 3A (emphasis added).

250. *Id.*

LGBTQ.²⁵¹ These figures indicate that a false allegation of being transgender would harm one in the occupational roles of both teacher and doctor among a respectable and significant minority of the population.

GLAAD, the organization that commissioned the poll noted immediately above, argues that “acceptance of LGBTQ people is slipping, and discrimination is increasing, in the face of attacks, bias, and erasure by the Trump administration.”²⁵² Sarah Kate Ellis, GLAAD’s president and chief executive officer, contends the “change [could] be seen as a dangerous repercussion in the tenor of discourse and experience over the last year.”²⁵³ She points here to anti-LGBTQ headlines regarding Trump’s proposed transgender military ban, recently confirmed Supreme Court Justice Neil Gorsuch’s opposition to marriage equality, and the religious freedom law passed in Mississippi.²⁵⁴

Marketing research firm Ipsos released a report in January 2018 that compared attitudes toward transgender individuals in sixteen countries around the world.²⁵⁵ Disturbingly, it found that:

Among western countries, the United States is most likely to believe that transgender people have a mental illness (32%) and the most likely out of all countries surveyed to believe that transgendered people are committing a sin (32%). Americans are the most likely to say that society has gone too far in allowing people to dress and live as one sex even though they were born another (36%).²⁵⁶

The U.S. Commission on Civil Rights released a report in November 2017²⁵⁷ that brings into high relief how being falsely

251. *Id.*

252. *Accelerating Acceptance 2018: Executive Summary*, GLAAD (2018), <http://www.glaad.org/files/aa/Accelerating%20Acceptance%202018.pdf>.

253. *Id.*

254. *Id.*; see Alan Blinder, *Southern Lawmakers Put Culture Wars on Hold*, N.Y. TIMES, Jan. 23, 2018, at A10 (explaining that “Mississippi passed, and has so far successfully defended in court, a law allowing people to use their religious beliefs to justify refusing to provide services to gay people”).

255. *Global Attitudes Toward Transgender People*, IPSOS (Jan. 22, 2018), https://www.ipsos.com/sites/default/files/ct/news/documents/201801/transgender_global_data_writeup_01.22.18.pdf. The sixteen countries surveyed were: Argentina, Australia, Belgium, Canada, France, Germany, Great Britain, Hungary, Italy, Japan, Poland, Serbia, South Korea, Spain, Sweden, and the United States. *Id.*

256. *Id.*

257. U.S. COMM’N ON CIVIL RIGHTS, WORKING FOR INCLUSION: TIME FOR CONGRESS TO ENACT FEDERAL LEGISLATION TO ADDRESS WORKPLACE

labeled transgender harms a person in his occupation:

LGBT individuals often face lower wages, increased difficulty in finding jobs, promotion denials, and/or job terminations due to their sexual orientation or gender identity. Studies have found that anywhere from 21 to 47 percent of LGBT adults faced employment discrimination because they were gay or transgender. A summary of numerous studies of LGBT employee survey respondents showed that ten to 28 percent reported receiving negative performance evaluations or were passed over for promotion because they were gay or transgender, and seven to 41 percent experienced verbal and/or physical abuse in the workplace. More staggering is that 90 percent of transgender employees report experiencing some form of harassment or mistreatment on the job.²⁵⁸

Such hard data about workplace discrimination against transgender individuals only scratch the surface of a deeper problem. As a column in *The New York Times* recently noted:

Statistics regarding transgender people who lose their jobs because of their gender identities reveal only the cases in which such bias was blatant. Lost within these numbers are the more ambiguous stories—of managers who may have rejected a request for a uniform that reflected an employee's gender, workers terminated for requests to change their names on internal documents or employees whose presence was shown, through the actions of colleagues and superiors, to be unwelcome.²⁵⁹

DISCRIMINATION AGAINST LESBIAN, GAY, BISEXUAL, AND TRANSGENDER AMERICANS (2017) [hereinafter CIVIL RIGHTS COMMISSION REPORT], https://www.usccr.gov/pubs/docs/LGBT_Employment_Discrimination2017.pdf; U.S. COMM'N ON CIVIL RIGHTS, WORKING FOR INCLUSION: TIME FOR CONGRESS TO ENACT FEDERAL LEGISLATION TO ADDRESS WORKPLACE DISCRIMINATION AGAINST LESBIAN, GAY, BISEXUAL, AND TRANSGENDER AMERICANS (2017), <http://www.usccr.gov/press/2017/11-29-LGBT-PR.pdf> (summarizing findings and recommendations of the report).

258. CIVIL RIGHTS COMMISSION REPORT, *supra* note 257, at 11.

259. Cyrée Jarelle Johnson, *Medicaid Work Requirements Are Yet Another Burden for Trans Workers*, N.Y. TIMES (Feb. 5, 2018), <https://www.nytimes.com/2018/02/05/opinion/medicaid-transgender-workers.html>.

Likewise, negative perceptions of transgender individuals can have detrimental effects in healthcare. Although progress has been made,²⁶⁰ at least eight studies dating from 1992 through 2010 revealed a positive correlation between nurses' negative attitudes toward LGBT patients and reduced willingness to care for them.²⁶¹ A survey conducted by the National Center for Transgender Equality in 2015 found that one-third of transgender individuals who saw a healthcare provider the prior year reported at least one negative experience, such as "being refused treatment, verbally harassed, or physically or sexually assaulted, or having to teach the provider about transgender people in order to get appropriate care."²⁶² Additionally, the study reported that nearly a quarter of respondents elected not to see a doctor, even when they needed care, because they feared being mistreated.²⁶³

Negative attitudes toward transgender individuals often are unintentionally communicated. A 2016 review in the *Journal of Sex Research* categorizes the immense impact of microaggressions as "subtle, often unconscious forms of discrimination."²⁶⁴ Microaggressions are further defined as "behaviors and statements, often unconscious or unintentional, that communicate hostile or derogatory messages, particularly to members of targeted social groups."²⁶⁵ A 2015 study found that a whopping 71% of transgender individuals surveyed reported everyday transphobic discrimination.²⁶⁶ The perpetuation of microaggressions, although inadvertent, can lead to "a multitude of potential negative implications."²⁶⁷

Persistent intolerant behavior manifests itself in detrimental ways among the transgender population. For example, a 2016 article

260. See Kanamori & Cornelius-White, *supra* note 238, at 173 (finding that "healthcare professionals today strongly affirm the intrinsic value of transgender persons" and that "they displayed ease in interacting with transgender persons").

261. Caroline Dorsen, *An Integrative Review of Nurse Attitudes Towards Lesbian, Gay, Bisexual, and Transgender Patients*, 44 CANADIAN J. NURSING RES. 18, 33 (2012).

262. NAT'L CTR. FOR TRANSGENDER EQUAL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY: EXECUTIVE SUMMARY 8 (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Executive-Summary-Dec17.pdf>.

263. *Id.*

264. Kevin L. Nadal et al., *Microaggressions Toward Lesbian, Gay, Bisexual, Transgender, Queer, and Genderqueer People: A Review of the Literature*, 53 J. SEX RES. 488, 488 (2016).

265. *Id.*

266. Miller & Grollman, *supra* note 242, at 817.

267. Nadal et al., *supra* note 264, at 488.

in the *New England Journal of Medicine* links discrimination to “increased stress, anxiety, depressive symptoms, post-traumatic stress disorder, substance abuse, and suicide”²⁶⁸ among transgender victims.

In fact, multiple studies from the past decade demonstrate that targeted prejudice often leads to post-traumatic stress disorder, higher rates of depression, and anxiety.²⁶⁹ In their 2017 article published in the *Journal of Clinical Nursing*, Edward McCann and Michael Brown conclude that “transgender people continue to experience ongoing and significant challenges in terms of their social inclusion, discrimination, sexual identity, social isolation and the associated impact on their mental health and the development of mental illness.”²⁷⁰

Psychologist Holger Elischberger and his colleagues suggest that “[p]rogress on transgender issues lags farther behind, perhaps owing to the small number of transgendered people, which has translated into less visibility and advocacy, at least up until very recently.”²⁷¹ Political scientist Andrew Flores echoes this sentiment, noting that “[t]he transgender community did not emerge as an organized political movement in the United States until the 1990s.”²⁷² In other words, the gay rights movement has a much longer history in the United States and has, in turn, been able to influence and change public opinion over a greater period of time.

268. Schuster et al., *supra* note 247, at 102.

269. See Walter O. Bockting et al., *Stigma, Mental Health, and Resilience in an Online Sample of the US Transgender Population*, 103 AM. J. PUB. HEALTH 943, 943 (2013) (finding that transgender “[r]espondents had a high prevalence of clinical depression (44.1%), anxiety (33.2%), and somatization (27.5%)” and that “[s]ocial stigma was positively associated with psychological distress”); Stephanie L. Budge & Jill L. Adelson, *Anxiety and Depression in Transgender Individuals: The Roles of Transition Status, Loss, Social Support, and Coping*, 81 J. CONSULTING & CLINICAL PSYCHOL. 545, 545 (2013) (acquiring “[t]he rates of depressive symptoms (51.4% for transgender women; 48.3% for transgender men) and anxiety (40.4% for transgender women; 47.5% for transgender men) within the current study far surpass the rates of those for the general population”); Jillian C. Shipherd et al., *Potentially Traumatic Events in a Transgender Sample: Frequency and Associated Symptoms*, 17 TRAUMATOLOGY 56, 56 (2011) (concluding that “transgender individuals endorsed high prevalence of PTE [potentially traumatic event] exposure along with elevated PTSD [post-traumatic stress disorder] and depressive symptoms, when compared to other traumatized populations”).

270. Edward McCann & Michael Brown, *Discrimination and Resilience and the Needs of People Who Identify as Transgender: A Narrative Review of Quantitative Research Studies*, 26 J. CLINICAL NURSING 4080, 4091 (2017).

271. Elischberger et al., *supra* note 243, at 197.

272. Flores et al., *supra* note 238, at 198.

Recent data from the first national probability sample of heterosexual U.S. adults indicated widespread negative attitudes regarding transgender individuals and attributed its results to Americans' binary conception of gender.²⁷³ These views stem from deep-seated societal standards reinforced by "psychological authoritarianism, political conservatism and anti-egalitarianism, and (for women) religiosity,"²⁷⁴ as well as a general "lack of personal contact with sexual minorities."²⁷⁵

Sociologists Laurel Westbrook and Kristen Schilt coined the term "gender panics" as a result of society's inability to reconcile how transgender men and women fit into gender-divided spaces.²⁷⁶ They define gender panics as "situations where people react to disruptions to biology-based gender ideology by frantically reasserting the naturalness of a male-female binary" such as recent public restroom debates.²⁷⁷

Critically, courts openly acknowledge the discrimination and stigma today that are attached to being transgender. Writing in 2015 in *Adkins v. City of New York*,²⁷⁸ U.S. District Judge Jed Rakoff opined that "transgender people have suffered a history of persecution and discrimination. . . . Moreover, this history of persecution and discrimination is not yet history."²⁷⁹ Rakoff added that "transgender people often face backlash in everyday life when their status is discovered."²⁸⁰

Additionally, the U.S. Court of Appeals for the Ninth Circuit observed the same year that "transgender persons are caught in the crosshairs of both generalized homophobia and transgender-specific violence and discrimination."²⁸¹ Similarly, a federal district court in Wisconsin recognized in 2014 that "[d]espite the strides in acceptance that transgender and intersex persons have made in American society, it is unfortunately true that they have been

273. Aaron T. Norton & Gregory M. Herek, *Heterosexuals' Attitudes Toward Transgender People: Findings from a National Probability Sample of U.S. Adults*, 68 *SEX ROLES* 738, 739 (2013).

274. *Id.* at 749.

275. *Id.* at 738.

276. Laurel Westbrook & Kristen Schilt, *Transgender People, Gender Panics, and the Maintenance of the Sex/Gender/Sexuality System*, 28 *GENDER & SOC'Y* 32, 34 (2014).

277. *Id.*

278. 143 F. Supp. 3d 134 (S.D.N.Y. 2015).

279. *Id.* at 139.

280. *Id.* at 140.

281. *Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1081 (9th Cir. 2015).

unfairly stigmatized, and that someone publically [sic] labeled a hermaphrodite could, however unjustly, face a loss of reputation.”²⁸²

Viewed collectively, all of these data points, surveys, observations, and other pieces of evidence readily help to answer the question posed in the opening paragraph of this Part: unlike recent shifts in opinions about homosexuals, there has been neither a “tremendous evolution”²⁸³ nor a “veritable sea change”²⁸⁴ in societal attitudes toward transgender individuals that is sufficient—at least, standing alone—to jettison false allegations of transgender status from the province of defamatory per se statements.

With this review of the persistent negative attitudes and actions that transgender individuals confront today in mind, the Article next turns to the Conclusion. It proposes variables for judicial consideration in cases such as *Simmons* where the legal system’s desire not to endorse or ratify prejudice and discrimination conflicts with an individual’s need to recover damages stemming from harm wrought by that same prejudice and discrimination.

CONCLUSION

This Article examined the 2017 decision in *Simmons v. American Media, Inc.* regarding defamation per se and transgender status. The Article situated Judge Gregory Keosian’s ruling against fitness aficionado Richard Simmons within a broad framework. That context included both case law and legal scholarship on the imperfect, ill-fitting analogy to false allegations of homosexuality,²⁸⁵ given that gender identity and sexual orientation simply are not the same.²⁸⁶ Additionally, the Article offered social science data, government reports, and scholarly articles describing attitudes and actions towards transgender individuals in the United States.²⁸⁷

As Part III evidenced, transphobia remains a stubborn, troubling problem. Transgender adults and minors²⁸⁸ routinely confront

282. *Mitchell v. Price*, No. 11-cv-260-wmc, 2014 U.S. Dist. LEXIS 171561, at *39 (W.D. Wis. Dec. 10, 2014).

283. *Yonaty v. Mincolla*, 945 N.Y.S.2d 774, 778 (N.Y. App. Div. 2012).

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

285. *Supra* Part II.B.

286. *Supra* notes 85–91 and accompanying text.

287. *Supra* Part III.

288. Battles over bathroom access in public schools in 2018 bring home the point about the seemingly bigoted attitudes and actions of many Americans toward transgender minors. See Moriah Balingit, *Education Dept. Isn’t Investigating Bathroom Cases*, WASH. POST, Feb. 14, 2018, at A4 (“The Education Department confirmed this week that it is no longer investigating civil rights complaints from

stigma and discrimination. Data described in Part III clearly indicate that a false allegation of transgender status today harms a person's reputation in the eyes of a considerable and respectable minority of the population—the gold standard for defamatory meaning in American libel law.²⁸⁹

There simply has not been the same type of positive change in attitudes and actions toward transgender individuals that there has been in recent decades toward gays and lesbians. As a 2017 article in *Political Research Quarterly* reported, “the public is less likely to support discrimination protections for transgender people in comparison with gay men and lesbians,”²⁹⁰ and people “on average, expressed warmer feelings toward gays and lesbians compared with transgender people.”²⁹¹ The researchers added that “[w]hile attitudes toward gays and lesbians have become increasingly positive in recent years, feelings toward transgender people remain cooler.”²⁹² Judges in defamation cases who nonchalantly gloss over the differences between attitudes toward gays and lesbians, on the one hand, and transgender individuals, on the other, are mistaken.

Simmons v. American Media, Inc., thus, sits at a dangerous intersection. Consider it a crossroads where a noble judicial desire to reject prejudicial stereotypes and to embrace equality collides head-on with an ignoble reality in which a significant minority of the population finds a false allegation (in *Simmons*, transgender status) to be defamatory. The wreckage, in turn, is reputational injury.

What should a judge do in this situation? Sacrifice the reputation of an individual plaintiff like Richard Simmons at the altar of a larger societal good of equality? Or allow a plaintiff to recover today and postpone until later—after public opinion and attitudes have meaningfully and measurably shifted and solidified in a positive direction—before sending an egalitarian signal? In other words, when should a judge, faced with the discomfiting fact that a substantial minority of the population still views a particular characteristic with disdain and disgust, nonetheless jettison that characteristic from defamatory per se status?

transgender students barred from school bathrooms that match their gender identity, a development those students say leaves them vulnerable to bullying and violence.” (emphasis added).

289. *Supra* Part II.A.

290. Daniel C. Lewis et al., *Degrees of Acceptance: Variation in Public Attitudes Toward Segments of the LGBT Community*, 70 POL. RES. Q. 861, 871 (2017).

291. *Id.*

292. *Id.* at 872.

There is no easy answer. A central problem here is that “norms do not change overnight nor are they susceptible to easy quantification.”²⁹³ Judges like Gregory Keosian rightfully do not want to endorse bigotry and hatred. The natural temptation for judges, therefore, is to take large leaps forward, changing defamation law overnight to promote the greater good of equality.

Are there factors a judge might weigh in deciding whether it is too early or too soon to declare that a particular false label does not merit defamatory per se status? A logical starting point is for a judge to consider methodologically sound survey data, government reports, and peer-reviewed scholarly articles regarding attitudes and actions toward individuals who possess the allegedly defamatory characteristic or trait. For example, Part III of this Article set forth multiple data points reflecting public sentiment about and discrimination against individuals who are transgender.

When reviewing such data, judges should examine several items. First and foremost, they should search for evidence of how a false allegation of possessing the characteristic in question detrimentally affects individuals in their occupations and professions. That is imperative because many states such as California—the venue for *Simmons*—define a defamatory statement in terms of one with “a tendency to injure him in his occupation.”²⁹⁴ In other words, a false allegation that harms a person in his job is a core facet of libel law. More specifically, it is a key feature of statements traditionally deemed defamatory per se.²⁹⁵ Sacrificing a person’s ability to earn a

293. Ardia, *supra* note 221, at 298.

294. CAL. CIV. CODE § 45 (West 2017); *see, e.g.*, MONT. CODE ANN. § 27-1-802 (2017) (“Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation that exposes any person to hatred, contempt, ridicule, or obloquy or causes a person to be shunned or avoided or that has a *tendency to injure a person in the person’s occupation.*”) (emphasis added); OKLA. STAT. tit. 12, § 1441 (2017) (defining libel, in pertinent part, as a statement that tends to “to injure him in his occupation”); S.D. CODIFIED LAWS § 20-11-3 (2017) (“Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a *tendency to injure him in his occupation.*”) (emphasis added).

295. *See, e.g.*, *Harriss v. Metropolis Co.*, 160 So. 205, 207 (Fla. 1935) (holding that a statement is libelous per se if it “naturally and necessarily tend[s] to degrade or to expose a person to distrust, hatred, contempt, ridicule, or obloquy, or to cause him to be avoided or tend to *injure him in his occupation, business, or employment*”) (emphasis added); *Scott v. Harrison*, 2 S.E.2d 1, 3 (N.C. 1939) (“Had she been presently so employed, there is no question but that the words complained of, in the connection used, would be actionable per se as words tending to bring her into disrepute and *injure her in her occupation.*”) (emphasis added); *Spangler v. Glover*,

living in the name of promoting equality is somewhat troubling. Occupational harm is far greater than just not having as many friends or pals due to a false allegation. It severely affects the ability to fiscally survive.

It also is important to note that the phrasing of California's statute simply involves a mere *tendency* to harm a person in his occupation.²⁹⁶ By comparison, this is not as high of a threshold such as *substantially likely* to harm or *directly* harm. In other words, the legal bar is set low for a statement to be considered defamatory in terms of it detrimentally affecting one's occupation or business. This, in turn, should make a judge proceed cautiously before stripping a particular allegation of defamatory per se status. If the bar for harming one's occupation is set low by statute (and thus legislative fiat), then a judge risks encroaching on the province of the legislative branch by removing from defamatory per se status an allegation that, in fact, tends to harm a person in his occupation. As addressed in Part III, a 2017 report by the U.S. Commission on Civil Rights clearly reveals how transgender status tends to harm individuals in their occupations.²⁹⁷ This suggests Keosian erred by rejecting the notion that false allegations of transgender status are defamatory per se.

Second, judges should scrutinize the data for clear and decisive evidence that societal attitudes have shifted positively toward the particular trait or characteristic. Such an evidentiary standard is akin to the "clear and convincing evidence"²⁹⁸ test for proving actual malice²⁹⁹ in defamation law. Relying on only one or two studies simply may not be sufficient to prove such an evolution or movement

313 P.2d 354, 357 (Wash. 1957) (holding that "[e]very publication by writing which tends to expose any living person to hatred, contempt, ridicule or obloquy, or to deprive him of the benefit of public confidence or social intercourse or to *injure him in his business or occupation*, is libelous per se," and adding that "[d]efamatory words spoken of a person, which in themselves *prejudice him in his profession, trade, vocation, or office*, are slanderous and actionable *per se* unless they are either true or privileged") (emphasis added).

296. CAL. CIV. CODE § 45 (West 2017).

297. *Supra* notes 257–58 and accompanying text.

298. *See* *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 773 (1986) (noting that the "clear and convincing" standard is a reformulation of "convincing clarity"); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 30 (1971) (asserting that "*New York Times* held that in a civil libel action by a public official against a newspaper those guarantees required *clear and convincing proof* that a defamatory falsehood alleged as libel was" published with actual malice) (emphasis added).

299. *See* *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964) (defining actual malice as a statement published "with knowledge that it was false or with reckless disregard of whether it was false or not").

is clear and decisive. Obviously, the greater the number of studies, the more justified a judge's decision would be to remove an allegation from defamatory per se status.

Third, the pattern of positive progress should be sustained over a significant amount of time—perhaps five years or even a decade—to ensure the change in opinion is neither anomalous nor fleeting. Stripping a particular allegation of defamatory per se status should not be based, in other words, on an aberration.

In addition to examining data on public opinion and discrimination, judges should look beyond the confines of defamation law to analyze what other courts are saying about the particular characteristic or trait in non-defamation cases. It will be recalled, for instance, that several courts in disputes other than libel cases have described the hostility and stigma that transgender individuals face today.³⁰⁰

Finally, judges should be cautious about making and using analogies to other types of assertions that once were—but no longer are—defamatory per se. Keosian seemingly gave short shrift to the differences between homosexuality and transgender status. He reconciled the distinction in a single, brief sentence: “Although there is no connection between homosexuality and being transgender, both characteristics relate to sex and gender.”³⁰¹ As this Article made clear, societal views about sexual orientation and gender identity are not equivalent.³⁰²

The suggestions proffered here, of course, will not end the predicament judges face when considering whether to eliminate—in the name of endorsing principles of equality—defamatory per se status for allegations a significant minority of the population find defamatory. They might, however, add rigor and a more systematic approach to the process. And if that proves to be the case, then Richard Simmons' lawsuit against the *National Enquirer* will have been about far more than either just an individual battle to recover for reputational injury or a larger fight for LGBTQ rights. It will have helped judges in similar future cases to determine if and when it is appropriate to deny defamatory per se status to a false label or assertion.

300. *Supra* notes 278–82 and accompanying text.

301. Simmons Order, *supra* note 5, at 8.

302. *Supra* notes 85–91 and accompanying text.