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Defamation, Reputation, and the Myth of Community

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DEFAMATION, REPUTATION, AND THE MYTH OF COMMUNITY

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Abstract: The complex interaction between defamation, reputation, and community values defines the tort of defamation. A defamatory communication tends to harm a plaintiff's reputation in the eyes of the plaintiff's community. Thus, to determine whether a given statement is defamatory, courts must first identify the plaintiff's community and its norms—an inquiry that presents both theoretical and doctrinal difficulties in a heterogeneous and pluralistic society. Current approaches to identifying the plaintiff's community are particularly inadequate in two common types of cases: (1) cases in which the plaintiff belongs to a subcommunity espousing different values than those prevailing generally, and (2) cases in which social mores are in a state of flux. In these cases, courts often construct by fiat a "substantial and respectable" community that may share little or nothing with the actual community in which the plaintiff's reputation was harmed. This Article critiques the process by which judges construct an idealized community characterized by consensus, cohesion and conformity, and demonstrates the invocation of this idealized community cloaks the imposition of social policy choices. The Article then proposes ways to strengthen both defamation law's instrumental role in redressing actual injuries to reputation and its symbolic role in defining and affirming the myth of community in America.

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The community myth is that there is now, or ever has been, a "community" in the sense of groups of like-minded individuals, living in urban areas, who share a common heritage, have similar values and norms, and share a common perception of social order.

John Crank[1]

I. INTRODUCTION

It is easy to forget that defamation is a tort.[2] After *New York Times Co. v. Sullivan*[3] constitutionalized defamation law, scholars and judges have come to view defamation as a contest between the First Amendment's protection of freedom of speech and the tort's protection of reputation.[4] One contender, however, has garnered more than its share of attention. For the past thirty-one years,[5] scholars have largely neglected some of defamation's most basic inquiries, choosing to bask in the "sunny warmth of the first amendment"[6]

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1. *Watchman and Community: Myth and Institutionalization in Policing*, 28 Law & Soc. Rev. 325, 336 (1994).

2. Actually, defamation is not one tort, but two: *libel* and *slander*. A libel is a written defamation or a defamation published via any media such that the harm is made to endure, persist or be disseminated in the manner of the printed word. Slander is usually published orally or in a manner that is not likely to be preserved in a physical form or broadcast widely. *See generally* W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 112 (5th ed. 1984); Robert D. Sack, *Libel, Slander, and Related Problems* 43–45, 96–98 (1980).

3. 376 U.S. 254 (1964).

4. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974) (describing defamation law as a struggle "to reconcile state law with a competing interest grounded in the constitutional command of the First Amendment"). Judicial descriptions of this clash often take a colorful form. *See, e.g.*, Pullum v. Johnson, 647 So. 2d 254, 255 (1994) (describing a case as involving "a verbal collision at the intersection between the common law's protection of an individual's reputation by the law of defamation and the First Amendment's protection of open public discourse").

5. Prior to 1964, the U.S. Supreme Court refused to impose constitutional limits on private actions for defamation. In 1964, the Court recognized that defamation actions may have a chilling effect on the exercise of free speech and free press rights guaranteed by the First and Fourteenth Amendments. *Sullivan*, 376 U.S. at 279. To safeguard these rights, the Court invaded the traditional province of state tort law, holding that a public official may not recover for defamatory statements about his conduct while in office absent a showing that the defendant published the defamatory statements with knowledge or reckless disregard of their falsity (i.e., "actual malice"). *Id.* at 279–80.

6. William W. Van Alstyne, *First Amendment Limitations on Recovery from the Press*, 25 Wm. & Mary L. Rev. 793, 793 (1984); *See* Bruce W. Sanford, *Some Lessons in Libel: A Primer on the Danger Zones*, Wash. Journalism Rev., March 1986, at 28 (arguing that libel law "came into being" with the *Sullivan* decision); *see also* Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 Cal. L. Rev. 691 (1986); Rodney A. Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. Pa. L. Rev. 1, 49 (1983) (observing that scholars have been preoccupied with the constitutional dimensions of defamation law to the detriment of the development of tort doctrine).

rather than venture into the "far out frozen darkness"[7] of state tort law.[8] Yet this relatively singular focus on defamation's constitutional dimensions has left the tort much as it was in 1964:[9] "perplexed with minute and barren distinctions,"[10] "filled with technicalities and traps for the unwary,"[11] and riddled with "anomalies and absurdities."[12]

Any attempt to unravel these anomalies and absurdities is a worthwhile endeavor. First and foremost, understanding the common law elements of libel is important from a practical standpoint. Although it is impossible to deny or ignore the encroachment of the U.S. Supreme Court's First Amendment doctrine in this area, "the basic underpinning of state defamation law" remains intact,[13] and a plaintiff seeking to establish a libel or slander action must still prove, at a minimum: (1) the

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7. Van Alstyne, *supra* note 6, at 793.

8. Smolla, *supra* note 6, at 48 ("Many articles written about defamation since 1964 have tended to emphasize constitutional theory, either ignoring altogether any serious discussion about the development of common law doctrines or treating the development as secondary.").

9. Professor Smolla describes this as "doctrinal confusion" and attributes it "in large part [to the] pervasive failure to accommodate constitutional and common law values in a coherent set of standards that is responsive to the realities of modern communications." *Id.* at 11 Neglect of the tort aspects of defamation is not altogether unjustified. The Supreme Court's decisions in this area provide much to criticize. In the post-*Sullivan* era, it is impossible even to list the elements of a libel or slander action without adding numerous qualifications regarding "the identity of the plaintiff, the identity of the defendant, the character of the allegedly defamatory statement, and the jurisdiction whose law applies," such that the list becomes practically meaningless. Sack, *supra* note 2, at 39.

In Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), the U.S. Supreme Court held that states may limit the constitutional privilege adopted in *Sullivan* in cases involving defamation of private figure plaintiffs. *Id.* at 351. Private figures involved in matters of public concern may recover damages upon a showing of negligence or gross negligence rather than actual malice, but to do so they must also prove "actual injury," i.e., injury that is "not limited to out-of-pocket loss" but includes "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." *Id.* at 350. However, private figures who wish to recover presumed and punitive damages may still do so upon showing the defendant's "knowledge of falsity or reckless disregard for the truth" in cases involving matters of public concern. *Id.* at 349. The Court has subsequently extended the protection of private figure plaintiffs even further, holding that they may recover presumed and punitive damages even in the absence of actual malice in cases not involving matters of public concern. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761 (1985) (plurality opinion). For a good analysis of the complexities involved as well as an extremely useful chart mapping the possible constellations status of plaintiff, status of speech, status of defendant, burden of proof on the issue of truth, and the minimum constitutional fault standard, see Rodney A. Smolla, Dun & Bradstreet, Hepps, *and* Liberty Lobby: *A New Analytic Primer on the Future Course of Defamation*, 75 Geo. L.J. 1519 (1987).

10. Frederick Pollock, *The Law of Torts* 243 (13th ed. 1929).

11. David Riesman, *Democracy and Defamation: Fair Game and Fair Comment II*, 42 Colum. L. Rev. 1282, 1285 (1942).

12. William Prosser, *Handbook of the Law of Torts* 737 (4th ed. 1971).

13. Marc A. Franklin & David A. Anderson, *Mass Media Law* 196 (5th ed. 1995).

existence of a defamatory communication; (2) publication of the communication to a third party; and (3) identification of the plaintiff to a third party.[14] Often the plaintiff's failure to satisfy the demands of tort law is fatal to a suit at a very early stage, and "[m]any defamation cases are . . . defeated without a mention of federal law or of the Supreme Court of the United States."[15]

That said, this Article solely deals with a single aspect of a single element of the defamation tort, namely whether a given communication is defamatory, or, in other words, whether it is the type of communication that has the tendency to harm reputation.[16] This element, the "defamatoriness inquiry,"[17] is both a logical and necessary point to seek understanding of the tort, for not only is the existence of a defamatory communication the threshold element in every defamation case; it is also the element freighted with the philosophical baggage of the tort.[18]

At first blush the analysis of "what's defamatory"[19] is fairly simple. A defamatory statement is merely a false statement that harms (or, more specifically, tends to harm)[20] an individual's reputation in the eyes of his

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14. *See* Don R. Pember, *Mass Media Law* 147 (2d ed. 1981) (listing common law elements that plaintiff was required to prove prior to 1964). In addition to these elements, the plaintiff must also satisfy constitutional requirements of proving falsity and fault in appropriate cases. At common law, defamatory material was assumed to be false until the defendant proved its truth. Keeton et al., *supra* note 2, §116, at 839. However, the burden of proving falsity has, as a practical matter, generally shifted to the plaintiff in response to changes in the constitutional law. *Restatement (Second) of Torts* § 613 cmt. j (1977).

15. Franklin & Anderson, *supra* note 13, at 196.

16. An understanding of reputation and how it is harmed is particularly important today, as more and more authors and politicians are decrying the lack of civility in modern discourse generally and the lack of protection for individual reputation specifically. *See* Adam Gopnik, *Read All About It*, The New Yorker, Dec. 12, 1994, at 84–102 (criticizing modern journalism's appetite for scandal and its senseless prying into the private lives of public people).

17. Determining whether a statement is defamatory requires several distinct analytical steps. *See infra* part II.A. I use the term "defamatoriness inquiry" to refer to the overall process of determining whether a given statement is defamatory.

18. The defamatoriness inquiry attempts to define the interest protected by the tort: harm to reputation. Reputation, in turn, is a complex sociological construct inextricably and intimately intertwined with the community and its values. *See* Randall P. Bezanson, *The Libel Tort Today*, 45 Wash. & Lee L. Rev. 535, 541–42 (1988) (arguing that reputation is "community-based").

19. Bruce W. Sanford, *Libel and Privacy: The Prevention and Defense of Litigation* § 4.1 (1985) (noting that the defamatoriness inquiry is certainly "no model of clarity or coherence").

20. *Restatement (Second) of Torts* § 559 cmt. d (1977) ("To be defamatory, it is not necessary that the communication actually cause harm to another's reputation or deter third persons from associating or dealing with him. Its character depends on its general tendency to have such an effect.").

or her community. It is defamatory in most cases, for example, to state falsely that an individual is a liar, a crook, or a murderer.[21] These statements are defamatory because they tend to harm the individual's reputation by "lower[ing] him in the estimation of the community or [by] deter[ing] third persons from associating or dealing with him."[22]

Yet as this definition indicates, the interest in reputation is an interest in "the opinion which others in the community may have, or tend to have, of the plaintiff."[23] In other words, harm to reputation is socially constructed: it is defined more by its effect on the "others" who make up the plaintiff's "community" than by its effect on the individual plaintiff.[24] In determining whether a statement is defamatory, therefore, the decision-maker (in most cases, the judge)[25] must first select the

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The abstract nature of this inquiry is a direct result of defamation's anomalous doctrine of presumed harm. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974) (describing "the common law of defamation [as] an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss"); David A. Anderson, *Reputation, Compensation, and Proof*, 25 Wm. & Mary L. Rev. 747, 749–51 (1984) (discussing illogical aspects of doctrine of presumed harm). If the court finds that the statement does have the *tendency* to harm reputation, the plaintiff may recover substantial damages without any proof whatsoever of actual harm. *See id.* If not, the plaintiff recovers nothing, actual harm notwithstanding. *See* Sanford, *supra* note 19, § 4.6; *see generally* Keeton et al., *supra* note 2, § 111, at 774, 780–83; Sack, *supra* note 2, at 72–73. Note that damages will be presumed only in certain types of cases (although these types of cases comprise a large percentage of all defamation actions). The doctrine of presumed harm applies in most libel actions. As a general rule a communication that is libelous per se (i.e., that is defamatory on its face) does not require that the plaintiff prove *special damages*, which are limited to actual pecuniary losses. In contrast, a communication constitutes libel *per quod* when it conveys a defamatory sense only within the context of certain facts known to recipients of the publication. Libel *per quod* does require proof of special damages. Slander, on the other hand, also requires that the plaintiff plead and prove special damages unless the communication falls into any of four established categories of slander *per se*: imputation of a crime, of a *loathsome disease*, of practices or conditions that harm the plaintiff in his trade, profession, business or office, and of serious sexual misconduct. *See* Keeton et al., *supra* note 2, § 112. For further discussion of the doctrine of presumed harm, see *infra* parts II.A and IV.

21. *But see* Burton v. Crowell Publishing Co., 82 F.2d 154, 156 (2d Cir. 1936), in which Judge Learned Hand observed that even murder is not universally condemned:

> We are sensitive to the charge of murder only because our fellows deprecate it in most forms; but a head-hunter . . . or a gangster, would regard such an accusation as a distinction, and during the Great War an "ace," a man who had killed five others, was held in high regard.

22. *Restatement (Second) of Torts* § 559 (1977). Note, however, that the question is not whether the communication actually harmed the plaintiff's reputation but whether it is the type of communication that has *the tendency* to harm the plaintiff. *See* Anderson, *supra* note 20, at 751.

23. Keeton et al., *supra* note 2, § 111, at 771.

24. *See infra* part II.

25. At common law the judge decides whether the published material is susceptible of a defamatory meaning as a matter of law. *See generally* Keeton et al., *supra* note 2, § 111, at 774, 780–83; Sack, *supra* note 2, at 72–73; Jonathan W. Lubell & Mary K. O'Melveny, *The Expert Witness in Libel Trials* (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. G4-3792, 1986); Robert D. Sack, *Common Law Libel and the Press: A Primer* (PLI Patents,

community in whose esteem the plaintiff has been diminished.[26] The choice of community is thus a crucial factor in assessing defamation liability.

American courts have long recognized that an individual might value his reputation in the eyes of a community whose views diverge from the general consensus.[27] To be defamatory, therefore, a statement need only lower the plaintiff's standing in the eyes of either "right-thinking" members of the community[28] or in the eyes of a "substantial and respectable minority" of the community.[29] The substantial and respectable minority standard has a curiously modern ring to it. The standard ostensibly embodies the traditional liberal values of tolerance and respect for diversity necessary in a multi-cultural, multi-ethnic society.

In applying this standard, however, courts must undertake both a quantitative inquiry to determine whether the community segment is "substantial" and a normative inquiry to determine whether it is "respectable." Yet courts rarely resort to polls, surveys or even witness testimony to determine the values held by the community segment but instead rely on their own personal knowledge and intuitive judgments which they subsequently label common knowledge and common sense.[30] Hence, a plaintiff's recovery is contingent on neither actual harm to reputation (due to defamation's anomalous doctrine of presumed harm)[31]

Copyrights, Trademarks, and Literary Property Course Handbook Series No. G4-3912, 1993); Sanford, *supra* note 19, § 4.6 (1985). If the judge decides that the statement is not susceptible of a defamatory meaning, the case will be dismissed. *Id.* If the judge decides that the statement *is* susceptible of a defamatory meaning (even if it can also reasonably be construed to have other meanings), the case goes to the jury. *Id.* The jury then decides whether the defamatory meaning was *in fact* understood by at least some of the recipients. *Id.* However, this formulaic traditional allocation of the roles of judge and jury belies the fact that the *de facto* determination of defamatoriness is often implicitly made as a matter of law by the court through the identification and selection of the community segment in whose eyes the plaintiff has suffered reputational harm. This implicit determination is often made unconsciously, but it is frequently outcome-determinative. Note, *The Community Segment in Defamation Actions, A Dissenting Essay*, 58 Yale L.J. 1387 (1949) [hereinafter Note, *Community Segment*].

26. *See* Robert D. Sack & Sandra S. Baron, *Libel, Slander and Related Problems* 48–49 (2d ed. 1994).

27. Keeton et al., *supra* note 2, §111, at 777 ("American courts have taken a more realistic view [than English courts have], recognizing that the plaintiff may suffer real damage if he is lowered in the esteem of any substantial and respectable group, even though it may be quite a small minority." (footnotes omitted)).

28. Kimmerle v. New York Evening Journal, 186 N.E. 217, 218 (N.Y. 1930).

29. *Restatement (Second) of Torts* § 559 cmt. e (1977).

30. *See infra* note 131 and accompanying text.

31. *See infra* part II.A.

nor an actual community in whose eyes the plaintiff's reputation has been harmed. And even though the choice of community "is one of the chief determinants of liability,"[32] "it is rare for a court to articulate its reasons for choosing one community segment rather than another."[33] Instead, courts rely on their own intuitive judgments about who constitutes the relevant community, what values that community shares, and whether those values are respectable.

The intuitive nature of this inquiry raises the question of whether and to what extent courts should consider subcommunity values in determining what communications are defamatory. The United States is a pluralistic society; there is no longer, if there ever was, a homogeneous community whose norms provide the benchmark for determining what statements are defamatory.[34] A statement that is defamatory in the eyes of one segment of the community may provoke "approval and increased respect in some quarters; and in others, where only the hit bird flutters, there would be indifference."[35]

For example, consider the statement that Fred "cooperated with the police." Whether this statement harms Fred's reputation depends on what he considers to be his community, which, in turn, depends on his class, race, education, age, geographical location, and a host of other factors.[36] In some subcommunities, Fred would be subjected to derision, contempt, and physical abuse; in others, he would be praised. Which, then, is the relevant community segment for purposes of determining whether a statement is defamatory?

A similar difficulty arises in identifying and selecting community values (or, perhaps more accurately, community prejudices) when they are in a constant state of flux. Community values are a moving target.[37] It is not currently defamatory to state falsely that an individual is Irish, although courts in 1895 might very well have reached a different

32. Note, *Community Segment*, *supra* note 25, at 1387.

33. *Id.*

34. Riesman, *supra* note 11, at 1301.

35. Sweeney v. Schenectady Union Publishing Co., 122 F.2d 288, 290 (2d Cir. 1941), *aff'd*, 316 U.S. 605 (1942). *See also* Layne v. Tribune Co., 146 So. 234, 236 (Fla. 1933) ("[J]udicial decisions of the past are . . . apt to vary with the social and moral views of the different jurisdictions . . . ."); Coburn v. Harwood, Minor 93, 95 (Ala. 1822) (noting that decisions are apt to vary with the mores, social conditions and views of different communities).

36. Although Fred may be allowed to argue about who constitutes the relevant community, most jurisdictions will ignore these arguments if his community is not a "substantial and respectable" one. *See infra* part III.

37. *See infra* part III.

conclusion. But is it defamatory to state falsely that someone is black?[38] A Communist? A homosexual? Currently judges treat as self-evident that being falsely called an African-American is not harmful to reputation.[39] Judges in the first half of this century, however, found it equally self-evident that such a false accusation would harm reputation.[40] Yet can we truthfully say that the battle against racism has been won to such an extent that there are no segments of society in which an individual's reputation would be harmed by such a statement? The resolution of the issue obviously depends on what the court considers to be the relevant community. In essence, the choice of community becomes a policy choice, allowing courts to favor the values the community ought to hold over those it actually does. This idealized community often reflects not the views of a given plaintiff's actual community but the views of the dominant groups in society or, more aptly, what the judge believes to be the dominant groups in society.

Thus, the underlying question is whether the defamatoriness inquiry should focus on actual community values and prejudices or whether, as it currently does, the inquiry should impose normative restrictions on what values it will recognize. Put another way, should a judge, under the rubric of determining defamatoriness, ignore harm to an individual's reputation in order to advance social policy goals?

This Article contends that defamation plays an important role in setting the boundaries of community[41] and choosing between competing values is both inescapable and beneficial.[42] What is troubling about the current state of defamation law, therefore, is not that value choices are made but rather that they are cloaked in the deceptively neutral language of determining defamatoriness. This Article argues that instead of constructing an artificial community through the defamatoriness determination, courts should make explicit what are essentially public policy choices.

Part II.A explores the nature of reputational harm as a socially constructed injury. This unique conception of harm requires judges to determine the community or (as it is often termed) the "community

38. *See infra* part II.D.

39. *See infra* notes 181–200 and accompanying text.

40. *See infra* notes 166–200 and accompanying text. Even the change in terminology from "Negro" to "black" to "African-American" is a hallmark of the changing social attitudes.

41. Post, *supra* note 6, at 710–11.

42. *See* Richard L. Abel, *A Critique of Torts*, in *Perspectives on Tort Law* 322 (Robert L. Rabin ed., 1995).

segment" in whose eyes a given statement is defamatory. Part II.B. then examines the inadequacies of current doctrinal approaches to identifying the community segment, most notably the substantial and respectable minority doctrine discussed above.

Parts II.C and II.D analyze two different types of cases that require judges to select the relevant community segments in which a given statement would be defamatory: (1) cases in which a plaintiff's subcommunity holds values that differ from those prevailing generally (the "subcommunity cases"), and (2) cases in which social mores are in a state of flux (the "social change cases"). Analysis of the cases demonstrates that the determination of community values and community identity allows courts to advance policy goals by constructing by fiat a "respectable" community that shares little in common with the actual community. Courts are able to apply the dominant culture's values either by denying the existence of the community whose values they do not like or by branding that community as too antisocial to deserve recognition. The resulting subterfuge is a natural outgrowth of an inquiry that has little to do with actual harm and even less to do with the actual community segment whose opinion the plaintiff values.

Part III examines the distinctive vision of community life imbedded in the structure of the defamation tort, and shows that this vision is inconsistent with the actual features of modern life. Part IV, in turn, evaluates possible solutions to this dilemma and concludes that none are particularly satisfactory unless one's goal is relatively modest: to make value choices obvious, to make explicit the "intuitive processes"[43] by which judges determine society's rules of civility.[44] Requiring judges to identify and justify the difficult policy choices that underlie many defamation decisions would bring a needed measure of conceptual clarity to this complex area of defamation law.

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43. Note, *Community Segment*, *supra* note 25, at 1389.

44. Very few scholars have systematically addressed the community segment problem. Those who have addressed it have dealt mainly with cases involving a false allegation that the plaintiff was an informant. Daniel More, *Informers Defamation and Public Policy*, 19 Ga. J. Int'l & Comp. L. 503 (1989); Riesman, *supra* note 11; Note, *Community Segment*, *supra* note 25. This Article views the community segment problem from a broader perspective, and it is unique in conceptualizing the subcommunity cases and the social change cases as representing related aspects of an overarching dilemma: the necessity of selecting the relevant community in which the plaintiff's reputation was harmed.

II. DEFAMATION, REPUTATION, AND THE PROBLEMS OF COMMUNITY

A. The Social Construction of Reputational Harm

The threshold inquiry in every defamation action is whether the statement at issue is capable of a defamatory meaning.[45] Although courts often treat this as a single inquiry, it actually involves two distinct steps. First, the judge must make an interpretive judgment about what the words used by the defendant mean. In other words, the judge must decide "whether the words [used by the defendant] will bear the 'spin' that plaintiff is seeking to put on them."[46] This decision is, at least in theory, largely a matter of linguistic analysis, although obviously the interpretation the judge gives to the defendant's statement may reflect his or her own cultural biases.[47]

At the second step of the inquiry, the 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.[48] This step requires the judge to undertake 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.

In simplest terms, a defamatory statement is one that harms an individual in the eyes of the community.[49] The *Restatement (Second) of Torts* § 559, for example, defines a defamatory statement as one that "harm[s] the reputation of another so as to lower him in the estimation of

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45. *See, e.g.*, Romaine v. Kallinger, 537 A.2d 284 (N.J. 1988).

46. Franklin & Anderson, *supra* note 13, at 200.

47. *Id. See also* Marc A. Franklin & Daniel J. Bussel, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 Wm. & Mary L. Rev. 825, 828 (1984). Although this Article primarily argues that the second step of the defamatoriness inquiry allows judges to make policy decisions under the guise of gauging the tendencies of statements to harm reputation, this same critique might be leveled at the interpretive stage of the analysis. *See generally* Stanley Fish, *Is There a Text in This Class? The Authority of Interpretive Communities* (1980); Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 Yale L.J. 997, 1017 (1985) (demonstrating that in traditional contract doctrine "words . . . are inconclusive until they are shaped by a judicial reading of the context in which they are uttered"); Sanford Levinson, *Law as Literature*, 60 Tex. L. Rev. 373 (1982).

48. Franklin & Anderson, *supra* note 13, at 201, 203.

49. Defamation usually involves verbal communications, whether spoken or written. However, photos, drawings and other nonverbal forms of communications may also be defamatory. *See, e.g.*, Burton v. Crowell Publishing Co., 82 F.2d 154 (2d Cir. 1936) (photo created unseemly visual illusion).

the community or . . . deter[s] third persons from associating or dealing with him."[50] Defamation, therefore, is a "recipient-centered concept"[51] whose focus is on the views or opinions of others and their behavior in responding to the defamatory statement made by the defendant.[52] Some definitions even specify the precise sentiments that a defamatory statement must excite in members of the community, describing a defamatory communication as one that "exposes any . . . person . . . to hatred, contempt, ridicule, or obloquy, or which causes . . . any person to be shunned or avoided, or which has a tendency to injure any person . . . in his . . . business or occupation."[53]

At first glance, these definitions make it look as if the defamatoriness inquiry is merely descriptive, a factual determination requiring the judge to find whether the statement actually caused other people to be contemptuous of the plaintiff or to stop dealing with him. Yet these simple definitions soon lead one down the path of abstraction.[54] In determining whether a given statement is defamatory, the question is not, as in other torts, whether the plaintiff actually suffered harm, but is instead a more philosophical inquiry: was the defendant's statement the type of statement that has the tendency to harm reputation.[55] The philosophical nature of this inquiry is a natural outgrowth of defamation's anomalous doctrine of presumed harm.[56] The doctrine assumes that harm to reputation "occurs in ways that are too subtle to

50. *Restatement (Second) of Torts* § 559 (1977).

51. Franklin & Bussel, *supra* note 47, at 828.

52. In his seminal article, *The Social Foundations of Defamation Law*, Professor Robert C. Post has demonstrated that defamation has protected at least three different and potentially conflicting conceptions of reputation: reputation as property, reputation as honor, and reputation as dignity. Post, *supra* note 6, at 693. Reputation may be akin to a property interest because harm to reputation decreases an individual's ability to cash in on her good name. *Id.* at 693–99. Or, harm to reputation may affect honor by impairing the individual's social station or status. *Id.* at 699–707. Finally, reputational harm may lead to loss of dignity by violating social norms defining the rules of deference and demeanor that an individual has come to expect and by disturbing the complex interdependent relationship between the individual and her community. *Id.* at 707–19.

53. Robert H. Phelps & E. Douglas Hamilton, *Libel* 6 (1966). But as Robert Sack and Sandra Baron have observed, "variations among definitions of defamation have little apparent effect on the actual outcome of cases." Sack & Baron, *supra* note 26, at 74. Instead, variations in outcome are "far more likely to reflect different social circumstances than the language" of the definition. *Id.*

54. Anderson, *supra* note 20, at 751.

55. *Restatement (Second) of Torts* § 559 cmt. d (1977). *See also* Anderson, *supra* note 20, at 751.

56. *See* Anderson, *supra* note 20, at 749–51 (discussing illogical aspects of doctrine of presumed harm).

prove,"[57] and consequently concludes that harm must be presumed from the very nature or tendencies of the communication, actual harm to reputation notwithstanding.[58]

But the "tendencies" of particular statements can not be gauged by the language used alone but instead must be measured by the attitudes, beliefs, and prejudices of the relevant community. This abstract inquiry is a response to the "mysterious"[59] nature of reputation itself. As Professor Post has observed, "[r]eputation . . . inheres in the social apprehension that we have of each other."[60] Harm to reputation is thus a socially constructed injury, an injury defined by the response of others[61] to the defendant's communications.[62]

Compare reputational harm with the intangible or dignitary injuries protected by other areas of tort law. All torts seek to embody and enforce social mores (although some more so than others),[63] and they do so through a variety of flexible and open-ended[64] doctrines defining and

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57. David W. Robertson et al., *Cases and Materials on Torts* 714–15 (1989). Harm to reputation may be difficult to show because the plaintiff may be unable to identify those community members who would think less of him as a result of the defamatory statement. Also, witnesses may be reluctant to testify that they think less of the plaintiff on the basis of the defamatory statement. *See* 1 Fowler V. Harper & Fleming James, Jr., *The Law of Torts* § 5.30, at 468 (1956).

58. *See supra* note 21 and accompanying text.

59. Post, *supra* note 6, at 692.

60. *Id.*

61. Defamation is not unique in this respect. Intentional interference with business relations (including the tort of inducing breach of contract and interference with a prospective economic relationship) is another tort based on the reactions of others to the defendant's words or actions. *Restatement (Second) of Torts* §§ 766–74 (1977).

62. Keeton et al., *supra* note 2, § 111, at 771 (noting that at common law, defamation is "not concerned with the plaintiff's own humiliation, wrath or sorrow, except as an element of 'parasitic' damages attached to an independent cause of action.") *But see* Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974) (finding that plaintiffs may prove "actual injury" by proving harm to reputation, embarrassment, or humiliation); Anderson, *supra* note 20, at 756 (arguing that development of constitutional doctrines have allowed plaintiffs to recover for mental anguish and suffering under the guise of defamation law); Bezanson, *supra* note 18, at 539 n.20, 541–42 (stating that although the common law was designed to protect reputation interests, the constitutional privileges have expanded the reputational interest "from that in outward-looking, or extrinsic, community-based reputation to an inward-looking, or intrinsic, freedom from psychic or emotional harm to the individual").

63. Keeton et al., *supra* note 2, § 1, at 6. See, however, discussion *infra* part III (describing the revolution in tort law that has shifted the focus of most torts from wrong to injury—a revolution that came and went and left defamation behind).

64. Paul T. Hayden, *Religiously Motivated "Outrageous" Conduct: Intentional Infliction of Emotional Distress as a Weapon Against "Other People's Faiths"*, 34 Wm. & Mary L. Rev. 579, 584 (1993) (noting that tort law's flexibility is reflected in "the development of new causes of action . . . to accommodate majoritarian notions of right and wrong; in the open-endedness of the

proscribing "socially unreasonable" conduct.[65] The law of battery, for example, defines as socially unreasonable intentional contacts that would be harmful or offensive to a (hypothetical) reasonable person.[66] Likewise, intentional infliction of emotional distress involves conduct that is "outrageous" and beyond the bounds of decency. Defamation law is no exception to this pattern.

The goal of defamation law is to define a realm of "socially unreasonable" communication and, at least in theory, to compensate individuals for a particular type of harm resulting from such communications—harm to reputation.[67] Whereas most other torts directly condemn the defendant's antisocial behavior as "offensive" or "outrageous,"[68] defamation law takes a more circuitous route.[69] It pronounces the defendant's communication as uncivil not because it caused direct and immediate harm to the plaintiff's psyche[70] or property but because it diminishes her in the eyes of others. Doctrinal orthodoxy dictates that "defamation does not provide compensation for emotional disturbance, but rather remedies a wrongful disruption in the 'relational interest' that an individual has in maintaining personal esteem in the eyes of others."[71]

Take, for example, the false statement that John Brown is a murderer. In theory the statement does not affect Brown's "character," his self-concept.[72] Yet the statement may very well deter others from dealing with him, and he may suffer severe emotional distress as a result. However, his distress stems not from the statement itself, but from

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elements that comprise a number of tort causes of action . . . and in the recoverability of substantial damages for intangible affronts to dignity").

65. Keeton et al., *supra* note 2, § 1, at 6.

66. *See, e.g.*, Ghassemieh v. Schafer, 447 A.2d 84 (Md. Ct. Spec. App. 1982); Garratt v. Dailey, 46 Wash. 2d 197, 279 P.2d 1091 (1955); *Restatement (Second) of Torts* § 19 (1977).

67. Sack, *supra* note 2, at 1.

68. Defamation is not the only tort defined by an indirect relational harm, however. *Restatement (Second) of Torts* §§ 766–74 (1977) (explaining intentional interference with business relations).

69. Peter M. Tiersma, *The Language of Defamation*, 66 Tex. L. Rev. 303, 307 (1987) ("[D]efamation is traditionally defined primarily by the effect that it has on the victim, with relatively little emphasis on the act of the tortfeasor.").

70. *But see* Anderson, *supra* note 20, at 756–57 (describing how the constitutionalization of the tort, in particular the actual injury rule, has resulted in compensating plaintiffs for emotional injury).

71. Smolla, *supra* note 6, at 18 (citing Leon Green, *Cases on Injuries to Relations* 193–276 (1940)).

72. Von Vechten Veeder, *The History and Theory of the Law of Defamation II*, 4 Colum. L. Rev. 33, 33 (1904) ("It is to be observed that it is reputation, not character, which the law aims to protect. Character is what a person really is; reputation is what he seems to be.").

others' reaction to it; any emotional distress he suffers is merely parasitic to the reputational injury.[73]

Obviously this view is somewhat simplistic. "[A] plaintiff does not sue simply because his reputation has been hurt . . . ."[74] Defamatory communications also inflict a host of psychic injuries, ranging from mere "hurt feelings" to "anxieties worthy of psychiatric concern."[75] For many defamation plaintiffs, the need to vindicate a damaged reputation takes a back seat to the desire to salve hurt feelings and express outrage at the misbehavior of defendants who publish false statements.[76] Juries, too, are sensitive to complaints of psychic or emotional harm. As a practical matter, "the bulk of the money paid out in damage awards in defamation suits is to compensate for psychic injury, rather than to compensate for any objectively verifiable damage to one's community standing."[77]

Moreover, modern trends in both constitutional and common law lend sanction to this increased sensitivity to the psychic damage caused by defamatory communications.[78] Tort law generally has extended protection to a variety of psychic interests. And in defamation law specifically, the U.S. Supreme Court has required plaintiffs who cannot prove actual malice to prove "actual injury," which includes not only impairment of reputation but "personal humiliation, and mental anguish and suffering."[79] Indeed, a plaintiff may establish "actual injury" by showing emotional distress alone, thereby allowing states to predicate defamation actions on "elements other than injury to reputation."[80] Hence, it is no longer entirely accurate to characterize defamation as

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73. Keeton et al., *supra* note 2, § 111, at 771.

74. Walter Probert, *Defamation, A Camouflage of Psychic Interests: The Beginning of a Behavioral Analysis*, 15 Vand. L. Rev. 1173, 1177 (1962) (arguing that the common law's concept of reputation fails to adequately comprehend and protect the psychic injuries that result from defamatory communications). *Cf.* Anderson, *supra* note 20 (criticizing the broadening of the defamation action to protect interests other than pure reputation); Tiersma, *supra* note 69, at 309 ("The focus of defamation, however, should remain on reputation, not on the unpleasant but usually temporary effects that communication has on the victim himself; these effects are better addressed by the tort of infliction of emotional distress.").

75. Probert, *supra* note 74, at 1174.

76. *See generally* Rodney A. Smolla, *Suing the Press* (1986).

77. Smolla, *supra* note 6, at 19.

78. *See, e.g.*, Time, Inc. v. Firestone, 424 U.S. 448, 460–61 (1977). *See also* Anderson, *supra* note 20, at 756–58; Hayden, *supra* note 64, at 587–88.

79. Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974).

80. *Time*, 424 U.S. at 460. Arguably, however, the fact that a plaintiff may recover damages for emotional injury does not mean that defamation law no longer protects reputation but merely that it provides for additional remedies.

solely existing to safeguard reputation, or to describe reputation as solely defined by what others think of the plaintiff.

B. *Defining the Other: The Illusory Promise of the Substantial and Respectable Minority Doctrine*

Despite this growing emphasis on an inner-directed conception of reputational harm, the traditional "other-directed" conception remains largely responsible for defamation's doctrinal shape. The necessary corollary to this "other-directed" conception of reputational harm is that the decision-maker (most often the judge)[81] must determine who the "others" are who would think less of the plaintiff on the basis of the defendant's statement. A second and often unacknowledged question frequently follows: Are these others worthy of the law's attention and respect?

Tort law has posed various doctrinal solutions to the problem of identifying the relevant "community segment" for purposes of ascertaining whether a given statement is defamatory. British courts took the position that a statement must be defamatory according to the general consensus of society in order to be actionable, thereby sanctioning overt application of the dominant culture's values in determining whether a statement is defamatory.[82] American courts plotted a different course. Allegedly due to a more pluralist orientation, American courts recognized that "defamation is not a question of majority opinion";[83] not all (mis)behavior is universally condemned, and a plaintiff may suffer harm to reputation within one social group but not another.[84] To deal with this problem, courts resorted to yet another abstract inquiry to discern the relevant community in whose eyes the plaintiff was injured.[85] Although some courts originally phrased the inquiry as whether the statement should be defamatory in the eyes of "right-thinking people,"[86]

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81. Bezanson, *supra* note 18, at 541 ("Issues of reputational harm and defamatory interpretation, if addressed, increasingly are considered matters of law for the judge . . . .").

82. This standard originated in Parmiter v. Coupland and Another, 151 Eng. Rep. 340, 342 (1840). *See* Sir Robert McEwen & Philip Lewis, *Gately On Libel And Slander* § 41 (7th ed. 1974). For a good discussion of the approaches taken by other countries (particularly Israel) to the community segment problem, see More, *supra* note 44.

83. *Restatement (Second) of Torts* § 559 cmt. e (1977).

84. *E.g.*, Peck v. Tribune Co., 214 U.S. 185, 190 (1909). *See infra* text accompanying note 92.

85. Anderson, *supra* note 20, at 751.

86. *See, e.g.*, Kimmerle v. New York Evening Journal, 186 N.E. 217, 218 (N.Y. 1930). A few courts have recognized that a plaintiff may value his reputation even amongst those who are "wrong-thinking." *See* Grant v. Reader's Digest Ass'n, 151 F.2d 733, 734 (2d Cir. 1945), *cert. denied*, 326

the prevailing American rule asks whether the statement was defamatory in the eyes of a substantial and respectable minority.[87] Despite its lofty rhetoric, however, the substantial and respectable minority doctrine remains a largely illusory promise of toleration and respect for the diversity of values amongst American communities.

The dominance of the substantial and respectable minority doctrine originated with the U.S. Supreme Court's decision in *Peck v. Tribune Co.*[88] *Peck* aptly demonstrates the abstract and conclusory nature of the community segment inquiry. *Peck* involved an advertisement for Duffy's Pure Malt Whisky [sic].[89] The advertisement pictured the plaintiff, a nurse, along with her alleged "Eloquent Tribute to the Great Invigorating, Life-Giving, and Curative Properties" of the defendant's whiskey.[90] Nurse Peck sued for libel, alleging that association with defendant's product demeaned her in the eyes of her community.[91] Although the circuit court had rejected her claim, at least partially based on the lack of "general consensus of opinion that to drink whisky is wrong,"[92] the Court characterized this reasoning as "beside the point."[93]

Writing for the majority, Justice Holmes branded the "general consensus" of opinion irrelevant: "liability is not a question of a majority vote. . . . No falsehood is thought about or even known by all the world. No conduct is hated by all."[94] What matters is whether the "obvious

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U.S. 797 (1946) ("A man may value his reputation even among those who do not embrace the prevailing moral standards; and it would seem that the jury should be allowed to appraise how far he should be indemnified for the disesteem of such persons."); Van Wiginton v. Pulitzer Publishing Co., 218 F. 795, 796–97 (8th Cir. 1914) ("In determining whether the false imputation tends to impair the social standing of a person, or to affect injuriously his opportunities of social intercourse, the customs and standards of society are to be regarded. In other words, *society is to be taken as it is*, with its recognized prejudices, without determining whether they are well founded in reason or justice."); Herrmann v. Newark Morning Ledger Co., 140 A.2d 529, 531–32 (N.J. Super. Ct. App. Div. 1958) (ostensibly collapsing the "respectable" prong of the inquiry in favor of a standard based on "society taken as it is"). Even taking society as it is, however, requires the decision-maker to identify precisely what the values of the community are.

87. *Restatement (Second) of Torts* § 559 (1977).

88. 214 U.S. 185, 190 (1909).

89. *Id.* at 188.

90. The alleged endorsement read as follows: "'After years of constant use of your Pure Malt Whisky, both by myself and as given to patients in my capacity as nurse, I have no hesitation in recommending it as the very best tonic and stimulant of all local and run-down conditions.'" *Id.*

91. *Id.* at 188–89. The plaintiff appears to have been concerned not only that her picture was used for a whiskey advertisement, but that it was used in an advertisement at all.

92. *Id.* at 189.

93. *Id.*

94. *Id.* at 190.

tendency" of the advertisement was to hurt Nurse Peck's "standing with a considerable and respectable class in the community."[95] The Court's opinion appeared to be sensitive to the Nurse Pecks of the world who might hold themselves to a higher, or at least a different, standard than the general public. Indeed, the Court appeared to take a neutral position towards the "respectability" of those who would condemn either alcohol use or allowing one's picture to be used for advertising purposes; the Court emphasized instead that the plaintiff would suffer "practical harm" if the statement were "known by a large number," an "appreciable fraction" of whom would regard her with contempt.[96] Therefore, the Court seemed to view its role as gauging the opinions of this "appreciable fraction,"[97] whether respectable or not.

Despite this talk of practical harm, it is important to note that courts rarely resort to polls or surveys to ascertain the attitudes of the "respectable part" of the community.[98] Even witness testimony is rare.[99] Notice that in *Peck* the Court did not seek any factual guidance nor look to any actual community before concluding that the "obvious tendency" of the advertisement was to injure Nurse Peck's reputation.[100] Thus, the community segment determination often involves a largely "intuitive"[101] judgment about the beliefs and attitudes of society at large and of particular groups within it, a judgment largely based on the judge's own "common knowledge" and common sense.[102]

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95. *Id.*

96. *Id.*

97. *Id.*

98. *See* Riesman, *supra* note 11, at 1304–08 (contending that courts should consider public opinion data in order to determine what types of statements are defamatory).

99. *But see* Jackson v. Record Publishing Co., 178 S.E. 833 (S.C. 1935).

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

101. Note, *Community Segment*, *supra* note 25, at 1389.

102. The court in Herrmann v. Newark Morning Ledger Co., 140 A.2d 529 (N.J. Super. Ct. App. Div. 1958) was explicit in its reliance on common knowledge as the basis for assessing public opinion. *Herrmann* involved a newspaper story insinuating that the plaintiff had communist leanings. *Id.* at 529. The court found that this insinuation would harm the plaintiff in the eyes of a substantial portion of the community, explicitly grounding this decision on "aspects of current public opinion so commonly held by some segments of the general public as to be a matter of common knowledge to the well informed." *Id.* at 530. The court refused to cede the community segment determination to a jury because jurors would be swayed by the "currents and eddies" of public opinion, "their own private predilections," or "the sparse evidence of . . . a bare sprinkling of the public as witnesses." *Id.* at 531. Perhaps because of judges' presumed superiority in gauging matters of "common knowledge," the court found it unnecessary to even hear evidence on the community segment issue. *Id.* at 530. Why, the court asked, should it submit to the jury "for a possible contrary conclusion" what it "knows to be a fact"? *Id.* at 531–32. This case presents a telling example of the decision-making process undergirding the community segment determination.

The determination of who constitutes a substantial and respectable minority often hinges on what the judge presumes the community's values are. In effect, liability is often based on the judge's own knowledge and experience rather than on the community's actual beliefs.[103] The "substantial and respectable minority" standard thus exemplifies what Professor Richard Hiers has termed a "crypto-normative" expression, that is, one that camouflages normative judgments beneath its "seemingly descriptive form."[104] The judge's unstated assumptions about the values of the dominant culture, the existence and legitimacy of subcommunities within that culture, and the nature of community life as a whole often play a key role in the defamatoriness inquiry.

Although commentators have seized primarily on the "respectableness" prong of the community segment determination, even the requirement that the community segment be substantial has not escaped criticism.[105] On one hand, this requirement is a rational response to defamation law's refusal to demand proof of actual harm to the plaintiff's reputation. If defamation were like negligence, for example, the small size of the community might merely affect the amount of damages a plaintiff could recover. But defamation, with its doctrine of presumed harm, is not like negligence. Thus, the quantitative requirement of a "substantial" minority appears to be an attempt to ensure that the injury to reputation is not *de minimis*.[106] In other words, it attempts to ensure that the defamatoriness inquiry does not devolve into a search for the few idiosyncratic individuals who would think less of the plaintiff for conduct that the overwhelming majority would find laudatory. However, this quantitative limitation means that if the single individual who finds the statement defamatory is the plaintiff's spouse or boss, the plaintiff will receive no recovery despite the very real and substantial nature of his injury.[107] What matters to the plaintiff is not the

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103. More, *supra* note 44, at 513 (arguing that judges' failure to apply "actual community norms" results in imposition of "their own value judgments" in determining the relevant community segment).

104. Richard H. Hiers, *Normative Analysis in Judicial Determination of Public Policy*, 3 J.L. & Religion 77, 80 (1985). *See also* More, *supra* note 44, at 510 (arguing that the "right-thinking" persons standard "appears to relate to the world of objective or factual reality, . . . but, in fact, serves to mask a subjective, normative evaluation").

105. More, *supra* note 44, at 516 (noting that the substantial and respectable minority standard involves both quantitative and normative considerations).

106. *Id.* at 517.

107. *Id.* ("If the statement lowers the plaintiff in the eyes of a relatively few recipients, but if their opinion is highly important to him his defamation action should not be denied on the basis of the

number of individuals who would think less of him, but rather their importance to him.[108] Conversely, of course, those closest to the individual might also be the least likely to believe ill of him. Nevertheless, the quantitative limitation on defamatoriness seems a justifiable prophylactic measure to deter frivolous suits and to avoid devolution of the standard into chaotic individualism.

C. *Respectability and the Problem of Subcommunities*

The respectableness prong of the community segment inquiry is considerably more problematic than the substantialness prong. Identifying what is respectable encourages judges to make normative judgments about the desirability of the beliefs of subgroups within the general community.[109] The requirement that the community segment be a "respectable" one is subject to at least three strong objections. First, the standard fails to specify whether and to what extent subcommunity values that diverge from dominant social mores should be taken into account in determining whether a statement is defamatory. The second objection is closely related to the first: the standard fails to specify how courts decide which community segment defines public opinion when mores are in a period of flux. Finally, the standard fails to acknowledge either dilemma or to set forth criteria to ensure informed public policy choices by the judiciary.

The necessity of determining whether the community segment is respectable is an open invitation to judges to assess which subgroups within society are or are not worthy of the law's attention and respect. The judge can brand a community as unworthy of respect by either denying its existence or by pronouncing it simply too antisocial for its values to be countenanced. Although this process goes on in every defamation case, it is most visible in the so-called informant cases.

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small size of this index group."). *See also* Michael J. Tommaney, Comment, *Community Standards of Defamation*, 34 Alb. L. Rev. 634, 641 (1970) (arguing that recovery should be allowed where the plaintiff is "defamed in the eyes of a group that is important or substantial quantitatively").

108. *See, e.g.*, Ben-Oliel v. Press Publishing Co., 167 N.E. 432 (N.Y. Ct. App. 1929) (finding statement defamatory even though plaintiff's reputation would only be harmed amongst experts on Palestinian history and customs).

109. *See* Riesman, *supra* note 11, at 1300 ("[T]he courts have introduced into the factual question of what is defamatory both their notions as to what ought to be defamatory and their judgments as to what ought to be done in the entire situation before them.").

Saunders v. Board of Directors, WHYY-TV[110] dealt with a particularly identifiable subcommunity—a community of inmates. The plaintiff, also an inmate, sued a local television station for referring to him as "an alleged FBI informant"[111] during a report on a search of a Delaware prison. The plaintiff contended that the statement was defamatory because being branded an informant put him in fear for his life and caused him to suffer "physical and mental damage."[112]

The *Saunders* court nonetheless found that the statement was not defamatory.[113] The court defined a defamatory statement as one that "expose[s] the plaintiff to public contempt or ridicule in the minds of 'right thinking persons' or among 'a considerable and respectable class of people.'"[114] The plaintiff's fellow inmates, though a "substantial group," held views that were simply so anti-social as to make it improper "for courts to recognize them."[115]

Note, however, that the basis for the decision was *not* that the plaintiff would suffer no reputational harm. Indeed, the court conceded that the allegation that the plaintiff was an FBI informant might harm his reputation and "bring opprobrium from [his] fellow inmates in the prison community."[116] The court simply refused to credit the opinions of those who would think less of the plaintiff if he were an informant, thereby allowing plaintiff's harm to go unredressed because the views of his community were not respectable.

The court's analysis suffers from two severe flaws. First, it ignores the actual views of plaintiff's community in favor of the views it wishes the entire community to have. In fact, the court appears to be engaging in willful blindness about the views "prevailing generally." It is not merely

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110. 382 A.2d 257 (Del. Super. Ct. 1978).

111. *Id.* at 258.

112. *Id.*

113. *Id.* at 259.

114. *Id.* (quoting Lawlor v. Gallagher Presidents' Report, Inc., 394 F. Supp. 721 (S.D.N.Y. 1975)).

115. *Id.* (quoting Connelly v. McKay, 28 N.Y.S.2d 327, 329 (Sup. Ct. 1941)).

116. *Id.* Initially the Court noted that a statement alleging that an individual is an informant "does not label [him] with unlawful or improper conduct." *Id.* While this may be true, it is not entirely relevant for defamation purposes. For example, the allegations that one is an anarchist or a Communist do not allege unlawful conduct, but all have at one time or another been denoted as defamatory statements. *See, e.g.*, Spanel v. Pegler, 70 F. Supp. 926 (D. Conn. 1946) (holding allegation of being Communist or Communist-sympathizer was libelous); Cahill v. Hawaiian Paradise Park Club, 543 P.2d 1356 (Haw. 1975) (holding accusation that family favored anarchist objectives was libelous). *See also* Kenneth L. Karst, *Paths To Belonging: The Constitution And Cultural Identity*, 64 N.C. L. Rev. 303, 305 n.7 (1986).

the anti-social community of prisoners who find informers worthy of "opprobrium." Substantial evidence indicates that a large portion of the general population feels the same way.[117] In effect, the court ignores the views of the community and instead constructs a "general community" by fiat.[118]

The second problem with the court's analysis is that it leaves unredressed a real and very substantial harm to the plaintiff. The court tried to minimize the significance of its holding by characterizing it as merely a case about prison inmates.[119] Even though the plaintiff's "fellow inmates in the prison community" might think less of him, the court characterized his community as a "limited" one whose attitudes and social values "depart substantially from those prevailing generally."[120] In effect the court attempted to marginalize the plaintiff and his community by portraying them as deviant and by defining their views as being outside the bounds of what is tolerable in a civilized community.

Even if the court were correct in finding that it is only fellow prisoners who would think less of plaintiff for being an informant, the fact is that for the plaintiff, his fellow prisoners are the only community (at least for the time being) that matters![121] Unlike other plaintiffs who might be able to recreate their reputation by moving into a new community, the plaintiff is in a very real sense trapped. Moreover, the potential harm he faces—ranging from ostracism to death—is more severe than the harms faced by the typical plaintiff. In effect, the court has chosen to sacrifice the individual plaintiff in order to advance social policy goals. The harm to the plaintiff must go unredressed in order that the court may avoid lending sanction to "antisocial" views.

Of course, whether one finds this decision justifiable depends on how important one considers the symbolic effect of judicial pronouncements.

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117. *See, e.g.*, John Irwin & Donald R. Cressey, *Thieves, Convicts and the Inmate Culture*, in *The Sociology of Subcultures*, 64, 67 (David O. Arnold ed., 1970) (arguing that although informants are condemned in the criminal subculture, such values are not even peculiarly criminal, "for policemen, prison guards, college professors, students, and almost any other category of persons evaluate behavior in terms of in-group loyalties").

118. In the words of Michael Kinsley, the court appears uncertain whether its task is "to bring reality into line with appearances [or] to bring appearances into line with reality." *See* Gopnik, *supra* note 16, at 102 (attributing this phrase to Kinsley).

119. *Id.*

120. *Id.* Whether one sees this as a problem depends on what one sees as the purpose of defamation law. As this Article argues in part III, defamation plays both an instrumental role in redressing harm to reputation and a symbolic role in defining the boundary of community.

121. *See generally* Irwin & Cressey, *supra* note 117, at 65 (examining the dynamics of prison culture); *see also* Karst, *supra* note 116, at 309 (explaining the importance of cultural groups).

The *Saunders* court obviously considered itself to be speaking for the community at large in condemning those who would think less of an individual who cooperated with the police. The court apparently assumed that if it allowed the plaintiff to recover, it would be throwing its weight behind an antisocial view, and that this judicial approval might deter other citizens from becoming informants. Yet the actual effect of the court's symbolic pronouncements is somewhat perverse. Not only does the decision leave the plaintiff without redress; in doing so, it rewards the defamer by giving him license to defame again.[122] While this result may not be problematic where, as here, the defendant was relatively blameless in publishing the harmful statement, it is extremely troublesome in cases where the defendant intentionally caused the plaintiff harm.

Such was the case in *Connelly v. McKay*.[123] *Connelly* dealt not with a community of prisoners but a community of interstate truckers. The plaintiff owned a service station and roominghouse catering to truckers.[124] The plaintiff sued the defendant for defamation for spreading a rumor that plaintiff had reported truckers for violating the Interstate Commerce Commission's hours restrictions.[125]

The court held that not only was this accusation not libelous per se; it could not "under any circumstances be held defamatory."[126] Although the court acknowledged that informants "are not always held in too high esteem,"[127] the court downplayed the significance of possible harm to the plaintiff's reputation by labeling those who might show or hold plaintiff in contempt as "violators of the law."[128] In other words, the court seems to be suggesting if some people would shun the plaintiff on the basis of such an allegation, their opinions are so wrong-headed as to be unimportant anyway.[129]

Indeed, the opinion makes clear that the judges are substituting their own judgments for that of the community of truckers. The court asks rhetorically: "Are such acts reprehensible? Is such language defamatory?

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122. *See* Note, *Community Segment*, *supra* note 25, at 1391 ("So dangerous would be the impact that the factually injured plaintiff must be sent away without redress, and the spreader of the injurious false rumor be dismissed scot-free.").

123. 28 N.Y.S.2d 327 (Sup. Ct. 1941).

124. *Id.* at 328.

125. *Id.*

126. *Id.* at 329.

127. *Id.*

128. *Id.*

129. *See id.*

This Court thinks not."[130] The court thus ignores the actual community in favor of an idealized community created by its own decision.

Cognizant of this objection, however, the court shored its reasoning by holding that even if some would think less of the plaintiff due to the defendant's statement, they would be unreasonable if they did.[131] To allow a defamation action based on such anti-social views would be "contrary to the public interest."[132] Not only would it "penalize the law-abiding citizen and give comfort to the law violator[,] [i]t would impede law enforcement for the benefit of the anti-social."[133]

Again, the court is very conscious of its symbolic role as spokesperson for the community, and its decision ostensibly seeks to encourage socially desirable behavior.[134] Yet commentators have roundly criticized

130. *Id.*

131. *See id.*

132. *Id.*

133. *Id.*

134. Compare this approach to the one employed by the court in Herrmann v. Newark Morning Ledger Co., 138 A.2d 61, *opinion adhered to on reh'g*, 140 A.2d 529 (N.J. Super. Ct. App. Div. 1958), which is perhaps better reasoned, if still problematic. In *Herrmann*, the plaintiff alleged that he had been defamed by a newspaper story accusing him of opposing a city policy of discharging "teachers and other city employees who pleaded the Fifth Amendment to investigations of Communism." *Id.* at 66. The jury awarded plaintiff $3000, and defendants appealed. *Id.* at 64. The appellate court reversed. *Id.* at 77.

On rehearing, the appellate court reiterated its prior holding that the article published by defendants imputed Communist sympathies to the plaintiff and was therefore defamatory *per se*. *Herrmann*, 140 A.2d at 530. The court applied what it called the "prevailing American rule" that a statement need only defame the plaintiff in the eyes of a "substantial number of respectable people" in order to be actionable. *Id.* at 530–31. According to the court, no factual evidence was necessary to determine that a "substantial number of people would infer from the article . . . that the plaintiff had Communistic leanings." *Id.* at 530. Rather, basing its finding on "aspects of current public opinion so commonly held by some segments of the general public as to be a matter of common knowledge to the well-informed," the court determined that the statement that plaintiff opposed the City's anti-communism policy would brand him as "sympathetic with Communists," and therefore cause members of the community to hold him "in disrepute." *Id.*

The court refused to find that the community segment that would think less of plaintiff was "disrespectable or negligible." *Id.* at 530–34. Distinguishing the "substantial and respectable minority" standard from the "right-thinking persons" standard applied by some jurisdictions, the court attempted to free the "respectableness" prong of the standard from its normative underpinnings, at least for purposes of the instant case. *Id.* Instead, the court explicitly realized that whether a statement is defamatory is "dependent upon the mental habits or political or social views or biases of the public or some of its members." *Id.* at 530. In other words, defamation is a function of societal prejudices. Therefore, the court should abjure the task of determining the rightness of these prejudices because "the false writing, realistically, is as hurtful to plaintiff as though the harmful imputation were drawn only by paragons of fair, unbiased and logical judgment." *Id.* at 531. Thus, what matters is whether the plaintiff was harmed in the eyes of "people whose good opinion was important to him," regardless of the fact that these people held irrational or unreasonable views. *Id.* at 532.

the *Connelly* decision for its undue faith in the power of judicial pronouncements to shape social behavior,[135] and perhaps rightly so. Certainly the *Connelly* court's refusal to grant the plaintiff's defamation action here did not "swell the ranks" of informers,[136] unless one presumes that large numbers of Americans routinely read judicial opinions and take them as models of appropriate social behavior.

Nonetheless, the fact that such a pronouncement is likely to be ineffectual does not necessarily mean that *Saunders*, *Connelly*, and similar "informant cases"[137] were wrongly decided. As Oliver Wendell Holmes long ago noted,[138] judicial decisions represent the application of public force to the individual, even where such decisions affect only private causes of action such as torts or contracts.[139] Thus, it is sometimes appropriate for the courts to deny an individual redress in order to advance social policy goals. Indeed, *New York Times Co. v. Sullivan*[140] was precisely such a case, holding that public officials must forego recovery in most instances in order to advance the public's interest in freedom of speech and of the press.[141] Hence, the problem with *Saunders* and *Connelly* is not that they make public policy choices, but rather that they make these choices under the guise of determining defamatoriness. It is not unreasonable for a society to set aspirational goals or even to

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Consistent with this notion, the court refused to pass judgment on the views held by the community segment. According to the court's view, the determination of defamatoriness is an exercise of realpolitik:

> The determination of a point of libel law is not an exercise in social or political philosophy or in pure logic .... We must take public opinion and mental reactions as we find them in living society, not as one might visualize them in a Utopia. For this purpose "society is to be taken as it is, with its recognized prejudices, without determining whether they are well founded in reason or justice."

Id. (quoting Van Wiginton v. Pulitzer Publishing Co., 218 F. 795, 796 (8th Cir. 1914)). Hence, the court's own views on the matter are simply irrelevant.

135. Note, *Community Segment*, *supra* note 25, at 1391–94. *See also* More, *supra* note 44, at 517–18 (criticizing courts for basing judgments of defamatoriness on public policy).

136. Note, *Community Segment*, *supra* note 25, at 1391–94.

137. *See, e.g.*, Burrascano v. Levi, 452 F. Supp. 1066 (D. Md. 1978), *aff'd*, 612 F.2d 1306 (4th Cir. 1979); Westby v. Madison Newspapers, Inc., 259 N.W.2d 691 (Wis. 1977).

138. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457 (1897).

139. *Id.* at 457–58. *See also* Post, *supra* note 6, at 703 (defamation law "speaks with the full force of public power").

140. 376 U.S. 254 (1964).

141. *Id.* at 268–92. *Sullivan*, however, rested on a public policy choice arguably dictated by the First Amendment. *See id.* at 268–70 ("[W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open ....").

prefer aspirational goals over its actual beliefs and behavior.[142] But if choices must be made amongst such aspirational goals, these choices should be made as an explicit public policy matter, with full explanation and consideration of competing concerns.

It would be a mistake to assume that courts make value choices only in rare defamation cases, or indeed, only in cases explicitly applying the substantial and respectable minority standard. Although value choices are perhaps most obvious in the informant cases, every defamation case involving a statement about which there is a division of opinion in society requires the judge to decide which community to assist in the maintenance of its cultural norms and which values to reject as deviant.[143]

Consider, for example, *Moore v. P.W. Publishing Co.*[144] The plaintiff in *Moore* was a 60-year-old license plate registrar and Democratic party activist in Ohio.[145] She sued a Cleveland newspaper for defamation for reporting that the Governor of Ohio had described her as an "Uncle Tom."[146] The jury found that this statement harmed her reputation and awarded her damages of $32,000 ($25,000 of which represented punitive damages).[147] The Court of Appeals affirmed the trial court verdict, but the Supreme Court of Ohio reversed.[148] The court determined that an attribution of "Uncle Tomism" did not constitute libel per se because these words were not "of such a nature that courts can presume as a matter of law that they tend to degrade or disgrace the person of whom they are written or spoken, or hold him up to a public hatred, contempt or scorn."[149]

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142. *But see* Stanley Ingber, *Rethinking Intangible Injuries*, 73 Cal. L. Rev. 772, 823 (1985). Ingber observed that the burden that results from limiting suits for defamation to advance first amendment values is not "shared generally by the populace" but "falls directly and immediately upon the injured individual." *Id.* at 823. "When this occurs, the value of free speech is subsidized by the injured individuals rather than by the populace that benefits from a system of free expression." *Id.*

143. Paul J. Magnarella, *Justice in a Culturally Pluralistic Society: The Cultural Defense on Trial*, 19 J. Ethnic Stud. 65, 66 (1991) (observing that "politically dominant" groups may "delegitimize conflicting subcultural practices" by "imposing a single moral code on all societal members"); Post, *supra* note 6, at 715.

144. 209 N.E.2d 412 (Ohio 1965), *cert. denied*, 382 U.S. 978 (1966).

145. *Id.* at 412–13.

146. *Id.* at 413. According to the newspaper accounts, the Governor suggested that Moore was an "Uncle Tom" who was "detrimental to the progress of [her minority] group" because her job as license plate registrar was a political sinecure awarded for her role in the Democratic party. *Id.*

147. *Id.* at 414.

148. *Id.* at 414, 416.

149. *Id.* at 415.

In finding that the statement could not be libelous per se, the court substituted its interpretation of the phrase "Uncle Tom" for that of the jury. According to the court, "Uncle Tom" was merely an admirable character in Harriet Beecher Stowe's novel, a character who was "loyal, patient, humble and long suffering."[150] Citing *Webster's International Dictionary*, the court concluded that the term could not be "commonly understood" to have an opprobrious meaning outside "the language of the comparatively recent militant civil rights movement."[151] This attempt to define the term according to its allegedly "common usage" is, of course, the last refuge of a formalist court[152] seeking to avoid giving weight to the values of a community it considers disrespectable. Again, the court is simply engaging in willful blindness, relying on what it considers to be common knowledge in the face of compelling evidence to the contrary.[153]

Here, as in the informant cases, the court intimates that the defamatory meaning is limited to small and, by implication, inconsequential or irrational segments of the community. Note that the court insists that the phrase is defamatory only in the eyes of "militant[s]."[154] Again, the court resorts to portraying the group whose values it is seeking to discredit as those of a marginal and deviant group.[155] Indeed, the court pursued this strategy even in the face of testimony by three witnesses that an Uncle Tom is a person who sells out his race for his own selfish ends.[156] In describing the testimony, the court revealed its own prejudices by stressing that the witnesses were "highly regarded member[s] of the Negro race."[157] Highly regarded, but apparently not by the court, which insisted that the phrase could only be defamatory "in the Negro community."[158]

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150. *Id.*

151. *Id.*

152. *See* James Boyle, *Anatomy of a Torts Class*, 34 Am. U. L. Rev. 1003, 1052 (1985) ("To make a formalist argument, explain the meaning of the word by taking it out of context and without considering the purpose behind the rule. Having defined the word in question in the same way that a dictionary might, apply it to the fact situation.").

153. Indeed, the *Oxford English Dictionary* appears to refute the interpretation given to the *Webster* definition by the court. *Oxford Eng. Dictionary* 910–11 (2d ed. 1989). The Oxford dictionary defines "Uncle Tom" as "used allusively for a Black man who is submissively loyal or servile to White men." *Id.* at 910.

154. *Moore*, 209 N.E.2d at 415.

155. *See id.* at 415–16.

156. *Id.*

157. *Id.* at 416.

158. *Id.*

The question, of course, is why the court refused to give weight to this subcommunity's values when this community was precisely the one with which the plaintiff was concerned. The practical effect of the decision was to deny Moore recovery in order that the court could sustain an image of a cohesive community characterized by shared norms; it stigmatized as simply insignificant and deviant those holding different norms.[159]

D. Respectability and Social Change

What these cases demonstrate is that determining whether a given communication is defamatory requires the decision-maker to be sensitive to the fact that the choice of community is often a policy choice. The cases also adumbrate a second major problem that results from the "other-directed" focus of the defamatoriness inquiry: courts must decide which community's values will receive its imprimatur, even though such values are in constant flux.

It should be obvious from the above that all defamation is based on social prejudices.[160] One has only to look at the range of statements that courts have labeled defamatory to confirm this observation. For example, various courts have held that it is defamatory to say of the plaintiff that she is unchaste,[161] an adulterer,[162] a homosexual,[163] a racist,[164] a communist,[165] or a fascist.[166] The question then becomes whether (and

159. *See id.*

160. *See* Van Wiginton v. Pulitzer Publishing Co., 218 F. 795, 796 (8th Cir. 1914) (observing that the defamatoriness determination hinges on the prejudices of society, whether "well founded in reason or justice" or not).

161. *See, e.g.*, Wardlaw v. Peck, 318 S.E.2d 270, 272 (S.C. Ct. App. 1984) (involving a professor who stated during a speech that plaintiff and another male student were "breeding under his sink").

162. *See, e.g.*, Nazeri v. Missouri Valley College, 860 S.W.2d 303, 311 (Mo. 1993) (en banc) (finding false accusation of adultery is libelous).

163. *See, e.g., id.* at 312 (holding that false imputation of homosexuality is defamatory).

164. *See, e.g.*, City of Brownsville v. Pena, 716 S.W.2d 677 (Tex. Ct. App. 1986) (finding statement accusing employee of racism is libelous).

165. *See, e.g.*, Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951) (finding publication of unfounded designations of organizations as Communist was damaging to reputation and sufficient for defamation action).

166. *See, e.g.*, Luotto v. Field, 49 N.Y.S.2d 785, 789 (Sup. Ct. 1944), *aff'd*, 63 N.E.2d 58 (N.Y. 1945) (holding that accusation of being supporter of fascism or nazism would be libelous per se). There are many more types of characterizations involving anything from religiosity, sexuality, political orientation, and morality that have been found defamatory by the courts. *See generally* Gregory G. Sarno, Annotation, *Imputation of Allegedly Objectionable Political or Social Beliefs, or Principles as Defamation*, 62 A.L.R. 4th 314 (1988).

how) courts should validate all such prejudices or whether and how they should distinguish amongst them.

Again, the chief determinant of liability is the choice of community. If the decision-maker favors a progressive (and hence "respectable") community, the outcome is likely to be different than if she chooses an "old-fashioned" (hence "disrespectable") community. Conversely, if she chooses a traditional ("respectable") community, the outcome will be different than if she had chosen a "militant" or "radical" (hence "disrespectable") community. But rarely does the issue even rise to this level of consciousness. Instead, courts tend blithely to assume that all communities have jumped on the bandwagon of so-called right thinkers, whether this assumption is rooted in objective fact or not.

The cases dealing with false allegations that a white person is black provide support for this theory.[167] *Bowen v. Independent Publishing Co.*[168] was roughly contemporaneous with the U.S. Supreme Court's landmark decision in *Brown v. Board of Education.*[169] While the Court was busy deciding whether "separate but equal" could ever really be equal,[170] *Bowen* presented the Supreme Court of South Carolina with the question whether it is libelous per se to include a white person's name in connection with a news item under the heading "Negro News."[171] Citing cases stretching back to 1791, the court found that it was.[172]

The court explicitly premised its decision on the existence of social prejudice against African-Americans. Neither the abolition of slavery nor changes in the "legal and political status of the colored race" warranted departure from South Carolina precedent, according to the court.[173] Despite these changes, the court found that an allegation that a white person is black might affect the plaintiff's "social status" due to the "social distinction existing between the races."[174] Hence the court held:

> Although to publish in a newspaper of a white woman that she is a Negro imputes no mental, moral or physical fault for which she

167. There are numerous cases holding that it is defamatory to state that a white person is black. *See, e.g.*, May v. Shreveport Traction Co., 53 So. 671 (La. 1910). Interestingly there is no case law expressly overruling these past cases.

168. 96 S.E.2d 564 (S.C. 1957).

169. 347 U.S. 483 (1954).

170. *Id.* at 495.

171. *Bowen*, 96 S.E.2d at 564.

172. *Id.* at 564–66.

173. *Id.* at 565.

174. *Id.*

> may justly be held accountable to public opinion, yet in view of the social habits and customs deep-rooted in this State, such publication is calculated to affect her standing in society and to injure her in the estimation of her friends and acquaintances.[175]

Here, the *Bowen* court automatically assumed that the values of the dominant (read: white and racist) culture would brand a black person as being of inferior "social status" and that plaintiff, her friends and acquaintances shared the values of this culture.[176] Indeed, the court considered the issue hardly worth discussing, which is perhaps understandable since presumably the members of the court were themselves members of this dominant culture. But perhaps more significant was the court's unconscious prioritization of the dominant culture's values by assuming without question that the plaintiff's community was a "considerable and respectable" one whose values are worthy of the law's attention, respect, and support.[177] In doing so, the court ignored the views of other communities, particularly the black community, and made a value choice cloaked in the guise of simply following a long line of established precedent.[178] In essence, therefore, the defamatoriness determination enables the dominant community to validate the status quo and thereby to validate racist views.

Although a great many cases where plaintiffs sued over a false statement that they were African-American appeared in the reporters prior to 1950,[179] after that date they began to disappear.[180] Whereas the earlier cases take the attitude that it obviously is defamatory to call

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175. *Id.* at 566.

176. Professor Post has described the cases holding that it is defamatory to say that a white person is black as a means by which "defamation law enforced the values of the dominant white culture." Robert C. Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 Cal. L. Rev. 297, 300 n.18 (1988). These cases thus exemplify an insidious form of "assimilationist law" because they place "the force of the state behind the cultural perspective of a particular, dominant group." *Id.* at 299.

177. Magnarella, *supra* note 141, at 67.

178. *Cf.* Wolfe v. Georgia Ry. & Elec. Co., 58 S.E. 899, 901–02 (Ga. App. Ct. 1907) (holding defamatory a statement that a white person was black because "from a social standpoint, the negro race is in mind and morals inferior to the Caucasian").

179. *See, e.g.*, Stulz v. Cousins, 242 F. 794 (6th Cir. 1917); Jones v. R.L. Polk & Co., 67 So. 577 (Ala. 1915); Morris v. State, 160 S.W. 387 (Ark. 1913); *Wolfe*, 58 S.E. 899; May v. Shreveport Traction Co., 53 So. 671 (La. 1910); Upton v. Times-Democrat Pub. Co., 28 So. 970 (La. 1900); Spotorno v. Fourichon, 4 So. 71 (La. 1888); Hargrove v. Oklahoma Press Publishing Co., 265 P. 635 (Okla. 1928); Flood v. News & Courier Co., 50 S.E. 637 (S.C. 1905); Mopsikov v. Cook, 95 S.E. 426 (Va. 1918); Spencer v. Looney, 82 S.E. 745 (Va. 1914).

180. *See generally* J.H. Crabb, Annotation, *Libel and Slander: Statements Respecting Race, Color, or Nationality as Actionable*, 46 A.L.R.2d 1287–1308 (1956); *supra* note 167.

someone a Negro, the more modern cases (to the extent they exist) tend to assume it is equally obvious that such an allegation is not defamatory.[181]

A possible exception to this generalization is *Polygram Records, Inc. v. Superior Court.*[182] *Polygram* provides a thoughtful analysis of the race and defamation issue based on unusual facts. *Polygram* involved an ad hoc comedy routine by Robin Williams.[183] The routine allegedly went as follows:

> Whoa—White Wine. This is a little wine here. If it's not wine it's been through somebody already. Oh.—There are White wines, there are Red wines, but why are there no Black wines like: REGE, a MOTHERFUCKER. It goes with fish, meat, any damn thing it wants to. . . .[184]

Williams evidently was unaware of the existence of "Rege" wines;[185] nonetheless, plaintiff Donald H. Rege took great umbrage at Williams's monologue. Rege was the proprietor of a San Francisco store specializing in the sale and distribution of an assorted variety of "Rege"

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181. Thomason v. Times-Journal, Inc., 379 S.E.2d 551 (Ga. Ct. App. 1989), is a modern case dealing tangentially with the issue of whether it is defamatory to suggest that a white person is black. There, the plaintiff sued over the publication of a false obituary. *Id.* at 552. In seeking to establish the "special circumstances" necessary to establish her libel claim, the plaintiff alleged that the funeral home listed in the obituary catered to a primarily "black clientel [sic]." *Id.* at 553. Because she is white, she contended, this statement caused her to suffer ridicule and humiliation. *Id.*

The court swiftly rejected this claim by simply noting that the alleged conduct—selecting a funeral home—was lawful and could not therefore be considered libelous. *Id.* In any event, the court declared, "[p]eculiarities of taste found in eccentric groups cannot form [a] basis for a finding of libelous inferences." *Id.* The court refused to concede that the plaintiff might have suffered from the social prejudice of others, and there is no discussion in the decision of any public policy implications. Rather, the court merely rejected plaintiff's claim out of hand as absurd.

Ledsinger v. Burmeister, 318 N.W.2d 558 (Mich. Ct. App. 1982) is also suggestive of the change in courts' attitudes. In that case the plaintiff, who was black, sued a retail merchant for slander after the merchant called him a "nigger" and told him to get his "black ass" out of the store. *Id.* at 560. Although the appellate court allowed the plaintiff to proceed with his actions for intentional infliction of emotional distress and violations of his civil rights, the court refused to find that the epithet "nigger" was defamatory. *Id.* at 562–63. While the term "may be offensive, its natural and ordinary import is as a slang term referring to members of the Negro race, a meaning that is not defamatory." *Id.* at 563. Thus, the trial court properly granted summary judgment on the slander action because there was no "actual defamation." *Id.* at 563. There is no other reasoning or explanation in the case. Presumably the court considered it so obvious that to call someone a "nigger" is not defamatory that it needed no further explanation.

182. 216 Cal. Rptr. 252 (Ct. App. 1985).

183. *Id.* at 253.

184. *Id.* (quoting plaintiff's complaint).

185. *Id.*

wines.[186] Rege brought suit individually and on behalf of his business, claiming that Robin Williams's monologue, which was published via record albums, audio tapes, video tapes, and HBO cable television,[187] had caused Rege "embarrassment, humiliation, ridicule and anxiety"[188] and had caused people to view Rege wines as inferior. More specifically, Rege argued, Williams's joke "associate[d] 'Rege' brand wines with Blacks,"[189] "a socio-economic group of persons commonly considered to be the antithesis of wine connoisseurs."[190] Thus, Rege relied on stereotypes rooted in prejudice to bolster his libel action.

In the modern era, Rege's argument seems, if not patently absurd, at least politically unpalatable. Indeed the court treated it as such, finding plaintiff's claim to be "utterly untenable."[191] The court explicitly refused to find the statement defamatory as a matter of constitutional public policy.[192] The court refused to even discuss the issue of whether a white producer's product might be harmed by association with a particular racial group as a result of racist stereotypes. Instead, the court declared that courts must not "condone theories of recovery which promote or effectuate discriminatory conduct" and summarily disposed of plaintiff's argument that his wines had been disparaged by association with black consumers.[193]

Despite the paucity of its discussion, the court was probably correct in assuming that granting a libel action based on racial prejudice would constitute a form of state action and would therefore violate the equal protection clause of the Fourteenth Amendment.[194] This result seems to

186. *Id.*

187. *Id.*

188. *Id.* at 256.

189. *Id.* at 261.

190. *Id.* (plaintiff further alleged that African-Americans "harbor obviously unsophisticated tastes in wines").

191. *Id.*

192. *Id.* at 262.

193. *Id.* (citing Palmore v. Sidoti, 466 U.S. 429 (1984) (holding that state may not deny custody to white mother who married black man because child would be stigmatized by private racial biases) and Shelley v. Kraemer, 334 U.S. 1 (1948) (holding that state may not lend enforcement to restrictive covenants based on race)).

194. The issue of what constitutes state action has been dealt with extensively elsewhere. *See, e.g.*, Georgia v. McCollum, 509 U.S. 42 (1992) (holding that use of peremptory challenges amounted to state action); West v. Atkins, 487 U.S. 42 (1988) (finding that doctor contracting with state to provide medical services to inmates was acting under color of state law); *Palmore*, 466 U.S. 429 (holding that use of state courts and judicial officers in their official capacity is state action); *Shelley*, 334 U.S. 1 (holding that actions of state courts and officers in their official capacity is state action);

be dictated by *Palmore v. Sidoti*,[195] which was cited by the *Polygram* court. There, the U.S. Supreme Court dealt with the closely analogous issue of whether a parent may be divested of custody of her child because she has remarried a person of a different race.[196] Courts customarily make custody determinations based on the "best interests of the child."[197] The U.S. Supreme Court conceded that a child might suffer "pressures and stresses" that would not be present if his parents were of the same race or ethnic origin.[198] Nonetheless, the Court found the "reality of private biases and the possible injury they might inflict" to be impermissible bases on which to deny a parent custody.[199] Although the law may not be able to control "private biases," neither may it "directly or indirectly . . . give them effect."[200]

Both *Palmore* and *Polygram* demonstrate that courts are sometimes willing to engage in symbolic gestures to avoid lending sanction to invidious prejudices, even if the symbolic gesture comes at the expense of a harmed individual.[201] Even in *Polygram* it is clear that the court has chosen to support a particular community's values—the community of presumably more enlightened non-racists—over another community's values—the community of racists. Yet the court never acknowledges that it has done so; never acknowledges that racism is still a prevalent and vitriolic force in our own society. Instead, the court deflects this painful issue by deferring to constitutional public policy.

Ex parte Virginia, 100 U.S. 339 (1880) (finding that racial discrimination in jury selection amounted to state action).

195. 466 U.S. 429 (1984).

196. *Id.* at 430.

197. *Id.* at 431–32.

198. *Id.* at 433. (observing that "[i]t would ignore reality to suggest that racial and ethnic prejudices do not exist or that all manifestations of those prejudices have been eliminated").

199. *Id.*

200. *Id.*

201. Richard Epstein has criticized employment discrimination laws for enforcing a regime of "forced association" in order to pursue the largely symbolic gain of eliminating racism and sexism in society. Richard A. Epstein, *Forbidden Grounds* 505, 497 (1992). Epstein contends that the legal system should abjure pursuit of symbolic goals because there is no equation to trade off symbolic gains with economic losses and that it is a violation of individual liberty to impose "whatever conduct is thought to be wise or enlightened . . . on society by the public speaking with one voice." *Id.* at 505. Epstein, however, presumes at the outset of his analysis that the status quo serves as a neutral baseline for judicial analysis and that deviations from the status quo constitute illegitimate policy-making. Thus, from Epstein's point of view, alteration's from the status quo are justified only to achieve economic goals. Yet Epstein fails to see that his proposal, too, involves the pursuit of symbolic goals.

This is not to criticize the outcome of the court's decision. Indeed, the court is laudably candid in discussing the defamatoriness issue as a public policy matter rather than trying to camouflage this difficult decision in the guise of mechanical application of the substantial and respectable minority doctrine. All in all, the *Polygram* approach is a more lucid, more well-considered, and more attractive approach to making public policy decisions than the more traditional approach taken by the *Bowen* court.

Query, however, whether courts will (or should) only make such public policy decisions on the basis of specific constitutional mandates. Courts have not been so eager to validate a progressive point of view in cases dealing with homosexuality.[202] Many (presumably heterosexual) plaintiffs have sued for defamation based on statements by defendants accusing them of being homosexuals. Obviously in these cases a plaintiff's reputation can only be injured in the eyes of homophobic individuals. Yet these cases present both the subcommunity and the social change problem in bold relief. First, one might argue that only certain subcommunities are homophobic and thus would think less of an individual for being homosexual. On the other hand, one might also characterize this as a social change problem. Mores are in transition on the issue of homosexuality. Progressive thinkers within the community arguably are not homophobic.

Why, then, should courts treat a false statement that a plaintiff is homosexual any differently than a false statement that he is an African-American? Courts have been slow to embrace a progressive view by declaring that an allegation of homosexuality cannot be libelous.[203] The courts act as if they are not in a position to pick and choose but must accept social prejudices as they find them. Thus, for example, even courts that are sensitive to the fact that social mores are changing are loath to hold that such a statement is not defamatory—even on public policy grounds.[204] Indeed, the overwhelming majority of courts that have

202. *See, e.g.*, Schomer v. Smidt, 170 Cal. Rptr. 662 (Ct. App. 1980); Moricoli v. Schwartz, 361 N.E.2d 74 (Ill. Ct. App. 1977); Nazeri v. Missouri Valley College, 860 S.W.2d 303 (Mo. 1993) (en banc); Rejent v. Liberation Publishing, Inc., 611 N.Y.S.2d 866 (App. Div. 1994); Head v. Newton, 596 S.W.2d 209 (Tex. Ct. App. 1980); Buck v. Savage, 323 S.W.2d 363 (Tex. Ct. App. 1959).

203. *See* cases cited in *supra* note 202.

204. *Compare* Matherson v. Marcello, 473 N.Y.S.2d 998, 1005 (App. Div. 1984) (rejecting defendant's argument that allegation of homosexuality results in no "social stigma" despite changing mores and finding courts to be "constrained" to find such an allegation defamatory) *with* Hayes v. Smith, 832 P.2d 1022 (Colo. Ct. App. 1991) (holding that allegation of homosexuality is not slander per se and questioning in dicta whether such allegation should even be defamatory at all).

addressed the issue have held that a false allegation of homosexuality is defamatory,[205] and many of these courts apply reasoning strikingly similar to that used by the courts in the pre-1960s race cases such as *Bowen*. Perhaps these cases demonstrate that courts are unwilling to pursue symbolic goals through the defamatoriness determination unless they can be sure that they are backed by a high degree of social consensus. On the other hand, perhaps this argument is too facile.[206] An allegation of homosexuality has legal as well as social consequences. Many jurisdictions still have laws making homosexual behavior criminal.[207] Homosexuality also makes an individual ineligible for military service[208] or for security clearance in certain governmental

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205. *See* cases cited in *supra* note 202.

206. I am indebted to Professor Diane Mazur for this insight.

207. For laws criminalizing sodomy between same sex partners, see Ark. Code Ann. § 5-14-122 (Michie 1993); Kan. Crim. Code Ann. § 21-3505 (Vernon 1988); Mo. Rev. Stat. § 566.090 (1986); Mont. Code Ann. § 45-5-505 (1995); Nev. Rev. Stat. § 201.190 (1991); Tenn. Code Ann. § 39-13-510 (1991); Tex. Penal Code Ann. § 21.06 (West 1994). For laws criminalizing both heterosexual and homosexual sodomy, see Ala. Code § 13A-6-64 (1994); Ga. Code Ann. § 16-6-2 (1992); Idaho Code § 18-6605 (1987); Miss. Code Ann. § 97-29-59 (1994); N.M. Stat. Ann. § 20-12-57 (Michie 1978); N.C. Gen. Stat. § 14-177 (1993); N.D. Cent. Code § 12.1-20-12 (1985); Ohio Rev. Code Ann. § 5924.125 (Anderson 1994); R.I. Gen. Laws § 11-10-1 (1994); S.C. Code Ann. § 16-15-120 (Law. Co-op. 1985); Va. Code Ann. § 18.2-361 (Michie 1988). Oklahoma's sodomy statute, Okla. Stat. Ann. tit. 21, § 886 (West 1993), ostensibly applies to heterosexual partners but is enforced only against homosexuals. *See* Post v. Oklahoma, 715 P.2d 1105 (Okla. Crim. App.), *cert. denied*, 479 U.S. 890 (1986).

For a more extended discussion of these issues, see generally Kenneth Williams, *Gays in the Military: The Legal Issues*, 28 U.S.F. L. Rev. 919, n.167 (1994); Evan Wolfson & Robert S. Mower, *When the Police Are in Our Bedrooms, Shouldn't Courts Go in After Them?: An Update on the Fight Against "Sodomy" Laws*, 21 Fordham Urb. L.J. 997, 997 (1994) (stating that "[s]o-called 'sodomy' laws—criminal sanctions on consensual oral or anal sex even in private—remain in force in nearly half the states.")

208. Section 571(a)(1) of the National Defense Authorization Act provides:

> (b) Policy—A member of the armed forces shall be separated from the armed forces under regulations prescribed by the Secretary of Defense if one or more of the following findings is made and approved in accordance with procedures set forth in such regulations: (1) That the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts . . . .

National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, 10 U.S.C. § 654(b)(1) (1994). *See also* Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989) (holding that the Army's refusal to reenlist a lesbian does not violate equal protection), *cert. denied*, 494 U.S. 1004 (1990); Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989) (holding that Navy's refusal to induct a gay man does not violate equal protection), *cert. denied*, 494 U.S. 1003 (1990); Padula v. Webster, 822 F.2d 97 (D.C. Cir. 1987) (holding that FBI's decision not to hire a lesbian does not violate equal protection).

For extended discussion, *see generally* Diane Mazur, *The Unknown Soldier: A Critique of "Gays in the Military" Scholarship and Litigation*, 29 U.C. Davis L. Rev. 229 (1996).

positions.[209] Moreover, the law extends few protections to an individual falsely accused of being homosexual if she is fired or is subjected to other types of discriminatory conduct.[210] Despite these obstacles, one can only hope that one day the modern homosexuality cases will seem as anachronistic as the pre-1960s race cases.

III. EXPOSING THE MYTH OF COMMUNITY

As the previous section suggests, the socially constructed nature of reputational harm has important implications for defamation law. Deciding whether statements have defamatory "tendencies" requires judges (and sometimes juries) to envision the community in which the plaintiff's reputation was harmed. The term "envision" is appropriate, since the community segment determination is rarely based on objective evidence but is instead based on (often) unconscious decisions and beliefs about communities and their values.[211]

Yet as the cases discussed in part II indicate, courts often envision the community as they wish it to be rather than the community as it is. This wishful thinking is understandable. It is much nicer to envision a community in which racism is unthinkable, in which neither informants nor those with differing political or religious beliefs are shunned—in

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209. *See* High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2c 563 (9th Cir. 1990) (holding that the refusal to allow homosexuals security clearance does not violate equal protection standards). *See generally* Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation"*, in *Euro-American Law and Society*, 83 Cal. L. Rev. 1, 22 n.54 (1995).

Indeed, federal agencies that dismiss gay or lesbian employees often cite "the existence of state sodomy statutes . . . as a justification for the denial of employment or special security clearances for gay men and lesbians." Wolfson & Mower, *supra* note 207, at 1035–36.

210. "There is no federal law prohibiting discrimination on the basis of sexual orientation . . . . Lesbian and gay plaintiffs have attempted to seek protection from the existing federal employment laws, without success." James D. Wilets, *International Human Rights Law and Sexual Orientation*, 18 Hastings Int'l & Comp. L. Rev. 1, 114 n.568 (1994) (quoting William B. Rubenstein, *Lesbians and Gay Men in the Workplace*, in *Lesbians, Gay Men, and the Law* 262 (William B. Rubenstein, ed., 1993). *See also* Gay Law Students Ass'n v. Pacific Tel. and Tel. Co., 595 P.2d 592 (Cal. 1979) (finding that neither state nor federal anti-discrimination laws forbid discrimination against homosexuals).

211. As Professor Stanton Krauss has observed, the social science literature indicates that individuals "tend to project [their] own views onto others," and laymen, in particular "'tend . . . to see their own behavioral choices and judgments as relatively common and appropriate to existing circumstances while viewing alternative responses as uncommon, deviant, or inappropriate.'" Stanton D. Krauss, *Representing the Community: A Look at the Selection Process in Obscenity Cases and Capital Sentencing*, 64 Ind. L.J. 617, 637 (quoting Lee Ross et al., *The "False Consensus Effect": An Egocentric Bias in Social Perception and Attribution Processes*, 13 J. Experimental Soc. Psychol. 279, 280 (1977)).

short, in which people do not hold irrational and sometimes invidious prejudices.[212] More fundamentally, it is much easier to simply deny the existence of communities whose values one does not like or to brand such communities as simply too antisocial to be acknowledged than it is to face the difficult policy choices defamation cases often present.

Still, one can hardly expect to free defamation law from its normative moorings. Defamation originated as a tort action,[213] and like other torts it seeks to define and proscribe antisocial conduct.[214] Indeed, Professor Robert Post convincingly has demonstrated that one of defamation law's primary functions is to police violations of a society's "rules of civility."[215] On this account, defamation law implicitly recognizes the reflexive relationship between individuals and their communities.[216] Individual identity is constituted by identification with the community and internalization of its rules and values; the community, in turn, is constituted by the shared values of individuals, and the community depends for its continued existence on the "reciprocal observance" of the "rules of civility" that it has prescribed.[217] Consequently, defamation law, which proscribes antisocial communications that harm reputation, helps preserve the community's identity, for it is the existence of shared values and shared beliefs that defines community life.[218]

This account of defamation law partially explains the often unconscious policy-making that goes on under the guise of determining

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212. As Guido Calabresi has explained, we often resort to "subterfuges and wishful thinking" to avoid facing the fact that "some groups in our flawed society may have attributes which are *undesirable and even dangerous*"—attributes for which "*we* are in a deep sense responsible." Guido Calabresi, *Ideals, Beliefs, Attitudes, and the Law* 42–43 (1985).

213. This attempt to enforce community values and make pronouncements on "wrongs" is inherent in defamation's structure as a tort. Libel was originally a crime, an offense against the state. Keeton et al., *supra* note 2, § 112, at 785. Once defamation became a private cause action, it retained as one of its central functions deterring wrongful behavior. Anderson, *supra* note 20, at 748. As tort law's focus shifted primarily to compensation, however, defamation law was left behind. *Id.* Despite constitutional constraints, defamation law's refusal to focus on actual harm to reputation (which would in turn, shift its focus to compensation) has left it with a stronger moral vision than other torts. Post, *supra* note 6, at 699–707.

214. *See* Keeton et al., *supra* note 2, § 1, at 6.

215. Post, *supra* note 6, at 710–11.

216. *See* Tiersma, *supra* note 69, at 304 (describing defamation law as regulating the relationship between the individual and the community).

217. Post, *supra* note 6, at 716.

218. *Id.* ("Th[e] image of 'society as a whole' is made possible by general diffusion of rules of civility."). *See also* Emile Durkheim, *The Division of Labor in Society* 96–103 (Free Press of Glencoe, Ill 1964) (George Simpson trans., 1933) (stressing the importance of enforcing rules and norms to preservation of community identity).

what communications are defamatory, for in enforcing defamation law's rules of civility, judges must rely on an implicit vision of community life.[219] Yet defamation doctrine presupposes that identification of a community's rules of civility is a relatively straight-forward task and that the "community" whose "rules" the law is assigned to police is an organized, cohesive unit.[220]

That this idealized community is relatively homogeneous, characterized by a high degree of consensus and conformity is apparent in the cases discussed above. Judges often seem to assume that in run-of-the-mill defamation cases, the existence of a general consensus of opinion in the community is so obvious that it merely takes common sense to discover it. Take the case of chastity as a simple example. Courts still routinely pronounce it defamatory to suggest that someone is unchaste,[221] the so-called "sexual revolution" notwithstanding, and rarely do they inquire into the beliefs and attitudes of the plaintiff's actual community.[222] Similarly, the Supreme Court of South Carolina in 1957 never stopped to question that the existence of racism was so pervasive that any white plaintiff would be harmed by a statement that she was black.[223] Nor do courts today question that an individual will be harmed by being called a homosexual, despite the deep divisions in society over this issue. In essence, therefore, defamation law depends on and seeks to perpetuate what John Crank has labeled the "myth of community"—the myth that there is such a thing as a "community" characterized by "groups of like-minded individuals . . . who share a common heritage, have similar values and norms, and share a common perception of social order."[224]

A necessary corollary to this vision of community life is that the determination of whether a statement is defamatory becomes a mechanism for defining which groups and which values are worthy of

219. Post, *supra* note 6, at 693 ("[D]efamation law presupposes an image of how people are tied together, or should be tied together, in a social setting.").

220. In the words of Joseph Gusfield, this conceptualization of the community requires "a great leap beyond the complex of divergent and conflicting groups which make up modern communities." Joseph R. Gusfield, *On Legislating Morals: The Symbolic Process of Designating Deviance*, 56 Cal. L. Rev. 54, 55 (1968).

221. *See supra* notes 161–62.

222. *See supra* notes 109–18 and accompanying text.

223. Bowen v. Independent Publishing Co., 96 S.E.2d 564, 566 (S.C. 1957).

224. Crank, *supra* note 1, at 325.

inclusion within the community.[225] In essence, the process denotes those who do not share the community's rules of civility as somehow marginal or deviant and, therefore, as unworthy of inclusion within the community. Consider the approach courts take in the informant cases.[226] It is clear that being falsely labeled an informant may harm an individual's reputation. Yet irrespective of the empirical evidence to the contrary, courts refuse to concede that those who would think less of an "informant" are true members of the community. Instead, courts must take great pains to portray those who would think less of an informant as insignificant (for example, just prisoners), disrespectable and deviant (antisocial). The process of validating society's rules of civility therefore becomes a process for designating the boundaries of community.

This theory also helps explain why courts take their symbolic role so seriously in defamation cases. As Joseph Gusfield has shown, governmental acts may have both instrumental and symbolic functions.[227] Refusing to recognize that a plaintiff's reputation will be harmed by being labeled an informant is simply pointless from an instrumental perspective. Not only does such a decision fail to punish the wrongdoer or to compensate the victim; it also fails to "swell the ranks" of informants.[228] Likewise, the argument goes, ignoring the reality of prejudice against homosexuals will not make homophobia go away but will leave the plaintiff who has been falsely labeled a homosexual without compensation for his very real injury. Indeed, the failure of the courts' symbolic pronouncements to shape the values and prejudices of the community is a powerful argument against allowing defamation decisions to be dictated by public policy concerns.

However, defamation's symbolic function is even more vital than its instrumental one. A "symbolic act 'invites consideration rather than overt action.'"[229] Declaring one group's values as too antisocial to be recognized is a means by which courts publicly affirm the society's rules of civility,[230] which comprise its social aspirations and norms.[231] Thus, in

225. *See generally* Kai T. Erikson, *Wayward Puritans: A Study in the Sociology of Deviance* 8–19 (1966) (describing the defining of deviance as a way in which communities maintain their boundaries and their identity).

226. *See supra* notes 109–42 and accompanying text.

227. Gusfield, *supra* note 220, at 57.

228. *See* More, *supra* note 44; Note, *Community Segment*, *supra* note 25.

229. Gusfield, *supra* note 220, at 57 (quoting P. Wheelwright, *The Burning Fountain* 23 (1954)).

230. Post describes society's rules of civility as a "means by which the society distinguishes members from nonmembers." Post, *supra* note 6, at 711. Civility rules therefore play an important

a sense, defamation law helps secure the order and cohesion that is essential for community life. In determining whether a communication is defamatory, judges or juries are setting the boundaries of the community;[232] by defining the values of a particular group within the community as too antisocial to be recognized, they are "declaring how much variability and diversity can be tolerated within the group."[233] Moreover, defamation's symbolic functions often take precedence over its instrumental ones. Courts frequently ignore actual reputational harm to a plaintiff in order to avoid lending credence to antisocial values. By the same token, plaintiffs frequently recover damages for defamation without proof of any tangible injury to reputation.[234] Even so, this ritual of affirmation often disguises the fact that the decision-maker is conferring legitimacy on one subculture's values while pronouncing others as deviant.[235]

Of course, the substantial and respectable minority doctrine ostensibly reflects sensitivity to the problems of subcultures and is tailor-made to deal with situations in which no general consensus of opinion exists. While the doctrine holds out the promise of recognition and respect for subcommunity values, the doctrine imports a normative vision of the community into the process of identifying defamatory communications through the loaded words "substantial and respectable." Thus, the doctrine gives judges license to ignore certain communities merely by labeling them insubstantial or disrespectable. Moreover, the doctrine makes it appear as if it applies only in special cases, those relatively rare cases where no general consensus can be found. The very existence of this special standard in effect papers over ideological conflict within the

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role in preserving "'the stability of social life'" and "maintaining the contours of [the] social constitution." *Id.* (quoting Erikson, *supra* note 225, at 116).

231. *See* Post, *supra* note 6.

232. *See* Erikson, *supra* note 225, at 11.

233. *Id.*

234. Anderson, *supra* note 20, at 748. ("Today, defamation is the only tort that allows substantial recovery without proof of injury.").

235. Gusfield, *supra* note 220, at 58–59. The modern defamation action might be likened to the institution of the duel in the antebellum South. Kenneth Greenberg has described the duel as a "ritual drama"—a "theatrical display that attempt[s] to resolve conflict and reaffirm the political values of the dominant group in the society." Kenneth S. Greenberg, *Masters and Statesmen: The Political Culture of American Slavery* 23–41 (1985) (footnote omitted). The duel was a "structured, formal context" for conflict that served important functions for both participants and observers by confirming the boundaries of the community of "gentlemen" and affirming its vision of social order. *Id.* The same might be said of the defamation action's symbolic attempt to define the boundaries of the community, to symbolically pronounce the values of one or both of the litigants as worthy of the law's attention and respect.

society[236] and obscures the extent to which mores are in a state of flux. The doctrine creates the appearance of sensitivity and toleration without necessarily making those values a reality.

The vision of a cohesive community imbedded in the determination of what is defamatory is subject to various criticisms. First, this vision fails to comport with the complex reality of modern community life. The vision of community underpinning defamation law is based on a very simple, traditional model of social life—a model that is contrary to the prevailing forms of social interaction in American society. It is possible to speak of widespread consensus only in small, closely knit, and relatively homogeneous communities (if they exist).[237] In contrast, American society might be described as a community of subcommunities, undergoing a constant process of formation and reformation. Indeed, one commentator has deftly described American society as one in which "no individual participates in the total cultural complex;"[238] instead, Americans are separated and defined by deep divisions based on "sex, age, class, occupation, region, religion, and ethnic group—all with somewhat differing norms and expectations of conduct."[239]

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236. Gusfield, *supra* note 220, at 55 ("To assume a common culture or normative consensus in American society, as in most modern societies, is to ignore the deep and divisive role of class, ethnic, religious, status, and regional culture conflicts which often produce widely opposing definitions of goodness, truth, and moral virtue.")

237. *See* Crank, *supra* note 1, at 336.

238. Arnold W. Green, *Sociological Analysis of Horney and Fromm*, Amer. J. of Sociology 533, 534 (May 1946).

239. *Id. See* Karst, *supra* note 116, at 303–04 ("Throughout the nation's history, differences in race, language, religion, and ethnicity have produced waves of nativist hostility to the members of cultural minorities."). The recent spate of articles calling for a return to the Golden Era of "family values" and "civility in public discourse" are token to perceived cracks in the facade of social order and to the increasing fragmentation of the American polity. *See, e.g.*, David S. Broder, *Civic Life and Civility*, Wash. Post, Jan. 1, 1995, at C7 ("Nothing would make 1995 a better year in America than a strengthening of civic life and the return of civility in our public discourse."); Meg Greenfield, *It's Time for Some Civility*, Wash. Post, May 29, 1995, at A15 (describing the decline of public debate as "a result of our political, social and ethnic fragmentation, the abandonment by so many of the idea of a common purpose and our voluntary self-recreation as a collection of mutually resentful groups").

These rhetorical paeans to civility have a certain attraction. After all, most people at one time or another have wondered why we can't just all get along. However, attempts to enforce civility may mask a desire to suppress dialogue that seems threatening to the established social order. Thus, the call for civility may simply be an attempt to silence one's critics. *See* Amy R. Mashburn, *Professionalism As Class Ideology: Civility Codes and Bar Hierarchy*. 29 Val. U. L. Rev. 657, 663 (1994) (demonstrating that lawyer civility codes often codify the "skewed perceptions of a privileged few" and that such codes "may express flawed values, promote a false community and constitute potentially dangerous exercises of hierarchical power" by imposing the norms of one powerful segment on the whole).

Yet even this description understates the complexity of modern society. Individuals define themselves not only by reference to fixed categories such as sex and race. They also define themselves as members of population segments grouped along more fluid lines such as political orientation or activity, or membership in charitable or social organizations.[240] Moreover, it is amongst these very limited spheres, these relatively small segments of society that individuals tend to value reputation. Hence, very few individuals can lay claim to a truly national reputation. A law professor, for example, will value her reputation within her own law school community, consisting of her students and colleagues. She will also value her reputation within the national legal academic community. Aside from these small communities, unless she is particularly well-known, she will probably value her reputation only amongst her assorted family members and friends.

This presents something of a dilemma for her, however, because each of these groups may have different norms of behavior that it seeks to uphold, different roles it expects her to play. Her reputation among her colleagues might not be harmed by an allegation that she is a lesbian; whereas, depending on her family's values, this allegation might seriously diminish her in their regard.[241] On the other hand, an allegation of plagiarism is the kiss of death in the academic community, but may be relatively inconsequential outside of it. Although Senator Joseph Biden had to drop out of the presidential race over allegations of plagiarism, he remains a Senator in the U.S. Congress, one of the most respected elected positions in this nation.[242]

This is not to say that there is no national community, however. Even in this fragmented environment, certain norms continue to command widespread consensus. The vast majority of Americans would condemn child molestation, cold-blooded murder, or treachery to friends, family or country.[243] Despite the existence of community consensus as to certain

240. *See generally* Robert H. Wiebe, *The Segmented Society: An Introduction to the Meaning of America* (1975).

241. Consider the case of Oliver Sipple, who deflected Sara Jane Moore's attempted assassination of President Gerald Ford. Sipple v. Chronicle Publishing Co., 201 Cal. Rptr. 665 (Ct. App. 1984). Media reports of the event included the fact that Sipple was gay. *Id.* at 667. Sipple was very open about his sexuality in his primary community in San Francisco, even marching in gay pride parades. *Id.* at 669. This did not mean, however, that he wanted his family and his relatives throughout the country to know this information about him. *Id.* at 667.

242. George J. Church, *And Then There Were Six*, Time, Oct. 5, 1987, at 24; Paul Taylor, *Biden Admits Plagiarizing in Law School*, Wash. Post, Sept. 1, 1987, at A1.

243. I am indebted to Professor David A. Anderson for his insights about the degree to which a national community does still exist.

core values, it is clear that the segmented, highly complex, and heterogeneous nature of American society has made the task of identifying community values increasingly complicated. Moreover, the more segmented the society becomes, the less valid judgments about the values of its members are likely to be.[244] Regardless, community in modern life bears little resemblance to the "myth of community" constructed by defamation law.

A final objection to the normative vision of community life imbedded in defamation doctrine stems from the power of the myth of community to shape positive outcomes in defamatory cases. The myth of community imbedded in the doctrine would not be so troubling were it not for its power to shape outcomes. The myth makes judges and juries confident in assuming that their own norms are the norms of the entire community, thereby blinding them to the fact that they are not so much reflecting existing community values as creating them. As the cases demonstrate, decision-makers are often blind—sometimes willfully, often not—to the fact that while invalidating certain subcommunities and their prejudices, they are constructing the community as they would have it be.[245] What this means, at a minimum, is that public policy choices are made in a relatively unexamined fashion.

IV. ACCOMMODATING THE MYTH: TOWARD A SOLUTION

A. The Pervasiveness of the Community Myth

One obvious response to this artificial construction of community is to attempt to eradicate the myth. From this perspective, judges should merely accept "society . . . taken as it is"[246] rather than attempt to identify a "substantial and respectable" community. Although some courts have ostensibly adopted the standard of "society . . . taken as it is,"[247] this

244. Krauss, *supra* note 211, at 638.

245. The third objection to this vision is that it is potentially inconsistent with first amendment values. *See* Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 Harv. L. Rev. 601, 604 (1990). Professor Post has shown how the common law torts of defamation and intentional infliction of emotional distress regulate the realm of civil discourse by reference to community norms. *Id.* Conversely, first amendment theory attempts to create a realm of discourse that is neutral with respect to community norms. *Id.* Hence, the tort law and first amendment law rest on conflicting paradigms of community life. *Id.*

246. *See, e.g.*, Van Wiginton v. Pulitzer Publishing Co., 218 F. 795 (8th Cir. 1914) ("society is to be taken as it is"); Herrmann v. Newark Morning Ledger Co., 140 A.2d 529, 532 (N.J. Super. Ct. App. Div. 1958) ("society is to be taken as it is").

247. *Herrmann*, 140 A.2d at 532.

solution is effective only to the extent that one assumes that decision-makers consciously and explicitly reject certain communities on public policy grounds. As previously discussed, however, part of the power of the community myth is its ability to operate below the level of conscious reflection and analysis. Adopting a broader verbal standard hardly cures this problem. Moreover, even under a broader verbal test for identifying community, courts undoubtedly would find it unpalatable to truly accept society taken as it is in all its manifestations.

B. Some Partial Solutions

1. Abolition of the Doctrine of Presumed Harm

A more effective means of making defamation law more instrumental in compensating reputational harm is to abolish the doctrine of presumed harm. Indeed, this solution has been forcefully advocated by Professor David Anderson.[248] As Professor Anderson has pointed out, defamation is an evolutionary throw-back in tort law.[249] Tort law originated as a mechanism to right wrongs[250] but has since evolved into a system for compensating injuries.[251] However, this "redirection of tort law from wrong to injury has bypassed defamation."[252] Defamation still compensates based on the tendency of statements to harm reputation rather than the actual harm caused. Hence, the natural solution to making defamation law more instrumental in compensating reputational harm is to shift defamation's focus from the *tendency* of a given statement to harm reputation to *actual harm* to reputation.

Rather than presuming harm based on the nature of the defendant's statement, the courts should force the plaintiff to prove actual harm to reputation through his own testimony and through the testimony of witnesses. Actual harm need not be pecuniary.[253] Instead, a plaintiff

248. *See* Anderson, *supra* note 20.

249. Perhaps the evolution of the tort aspects of defamation has been stunted due to the preoccupation (previously mentioned) of scholars and judges with the constitutional aspects of defamation law. *See supra* notes 3–9.

250. Courts originally granted tort damages only as an adjunct to a criminal proceeding. Pollock, *supra* note 14, at 150.

251. *See* Anderson, *supra* note 20, at 747.

252. *Id.* at 748.

253. Actual harm as defined here is to be distinguished from the constitutional standard of "actual injury," which includes damages for emotional suffering. *See* Time, Inc. v. Firestone, 424 U.S. 448, 460 (1976) (allowing plaintiff to establish actual injury by demonstrating emotional distress). It is

might prove reputational harm by proving that "his family ostracizes him, his friends shun him, his acquaintances ridicule him, his employer fires him, or his customers desert him."[254] This reform would have the salutary effect of bringing defamation law in line with the general trend in tort law by shifting its focus to actual harm. In addition, it would help ensure that defamation primarily protects reputational rather than emotional interests.[255] Finally, forcing the plaintiff to plead and prove actual harm would have the additional virtue of making the defamatoriness determination less abstract, less subject to the unconscious mediation of judges in determining what statements are defamatory. It would set the defamation law on a more objective footing and would, at the very least, focus "attention on the facts of the case."[256] Hence, the determination would become more reliant on witness testimony and other data and less reliant on judicial common knowledge about the beliefs of the community.

2. *The Search for a Realistic Community*

If one's desire is only to compensate actual harm to reputation, abolishing the doctrine of presumed harm would be a dramatic improvement over current defamation law. However, this proposal for reform does not directly address the community segment problem—the problem of determining which is the relevant community for purposes of gauging a plaintiff's reputational harm. Forcing a plaintiff to provide a sprinkling of witnesses to testify that they would think less of the plaintiff due to the defendant's communication about him helps ensures that the plaintiff's reputation was actually harmed. Yet such testimony would do little to ensure that the plaintiff's witnesses are representative members of the community whose opinions he values.

To deal with this problem, therefore, courts could require plaintiffs to plead and prove the relevant community in whose eyes they claim to have been harmed. If the plaintiff's friends or family or social group

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also to be distinguished from special damages. *See* Pember, *supra* note 14, at 200 (defining special damages as "specific items of pecuniary loss caused by published defamatory statements.").

254. *See* Anderson, *supra* note 20, at 765. Anderson also suggests that a plaintiff might establish actual reputational harm by showing interference with "future business and social relationships," destruction of a "favorable public image" or creation of a "negative public image for a person who previously had no public image at all." *Id.* at 765–66. Obviously, it would be impossible to hold the plaintiff to a rigid standard of proof in establishing these types of injuries.

255. *See supra* notes 73–79 and accompanying text.

256. *See* Anderson, *supra* note 20, at 752.

holds values antithetical to those of the judge, the jury, or the dominant culture generally, the plaintiff should be allowed to prove that the defendant's communication was defamatory within the "relevant community" (that is, the community relevant to him) even if not defamatory in American society generally. This pleading requirement would be loosely analogous to a "cultural defense" in criminal law.[257] It would allow a plaintiff to recover as long as he could prove that the community segment to which he belonged would think less of him as a result of the defendant's communications. Hence, for example, a Cuban-American plaintiff might show that being labeled a Communist is highly injurious in the Cuban-American community,[258] even though this label may have lost its sting for a large portion of the American populace. Allowing such a plaintiff to establish the values of his own community would serve two purposes: it would accommodate the values of the various subcommunities in American society, and it would help to fulfill the hollow promise of toleration for diversity implicit in defamation law's "substantial and respectable minority" standard.

This proposal raises several objections, however. Requiring a defamation plaintiff to plead and prove both actual harm to reputation as well as the existence of an actual community segment in whose eyes the plaintiff was harmed would clearly make it harder for defamation plaintiffs to establish their causes of action. In an era in which courts have loaded the dice against plaintiffs' recovery in defamation actions anyway,[259] imposing further obstacles to recovery at the outset is a

257. This type of defense was employed by the defendant in People v. Helen Wu, 286 Cal. Rptr. 868 (Ct. App. 1992). The defendant was a Chinese woman who, upon learning of her husband's infidelity, strangled her son and unsuccessfully attempted to kill herself. *Id.* The California Court of Appeal reversed the defendant's conviction for murder, holding that the trial court erred in denying an instruction to the jury regarding the defendant's cultural background and its impact on her state of mind at the time of the murder. *Id. See generally* Taryn F. Goldstein, *Cultural Conflicts in Court: Should the American Criminal Justice System Formally Recognize a "Cultural Defense"*, 99 Dick. L. Rev. 141 (1994) (discussing the history of and debate surrounding the cultural defense and concluding that it is both "impractical and inherently unfair to the very groups it purports to protect"); Note, *The Cultural Defense in the Criminal Law*, 99 Harv. L. Rev. 1293 (1986) (discussing the current debate regarding the cultural defense, its implications for the criminal justice system, and factors defining the scope of the defense).

258. Alan McConagha, *Nation, Inside Politics*, Wash. Times, Oct. 29, 1993, at A8 (describing the accusation that a Cuban-born City Commissioner was a communist as "the ultimate insult among Miami's Cuban exiles").

259. *See* Marc A. Franklin, *Winners and Losers and Why: A Study of Defamation Litigation*, 1980 Am. B. Found. Res. J., 455 (discussing the results of an empirical study of defamation actions and concluding that plaintiffs prevail only in a tiny fraction of defamation actions); David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. Pa. L. Rev. 487 (1991) (describing the layer of constitutional complexity that stands in the way of plaintiffs' recoveries in defamation actions).

dubious proposition. Moreover, assuming that the plaintiff can surmount the summary judgment hurdle,[260] requiring additional testimony from witnesses and perhaps poll and survey results would add another layer of complexity to the already tangled web of defamation law.[261] Nonetheless, the benefits of such a proposal in making defamation an effective instrument for redressing harm to reputation probably justify imposing this additional burden.

3. *Accommodating the Myth*

The chief focus of this Article has been the complex interaction between defamation, reputation, and community values and ideals. Defamation exists to protect reputation, but reputation is a curious concept, hinging as it does on a plaintiff's standing in his or her community. Due to the unique nature of reputational harm, defamation's primary role may be symbolic rather than instrumental. A community is in a very real sense defined, created, affirmed and enforced by the process of identification, of inclusion and exclusion. The law is a powerfully constitutive force in this process.[262] Because the community and its values are not merely neutral, objective and observable phenomena waiting to be discovered by the perceptive judge or jury, applying community values can never be a strictly descriptive enterprise. Hence, requiring the plaintiff to plead and prove both actual harm and the actual beliefs within the relevant community may help curtail the discretion of judges in determining defamatoriness, but such discretion cannot and indeed should not be completely eliminated. Nor can focusing the defamatoriness inquiry on more objective factors rid defamation of its normative vision of community, for this vision inheres in its underlying structure as a tort. Thus, perhaps the most fruitful

260. *See supra* note 14 and accompanying text. It is unclear whether requiring additional testimony to establish reputational harm would make it more or less likely that a case would go to a jury. On one hand, juries are more likely to be necessary to make credibility determinations. On the other hand, judges may more readily weed out cases at a preliminary stage due to plaintiff's failure to plead sufficient evidence of actual harm. Certainly judges in defamation actions have shown no hesitation in wielding the potent weapons in their summary judgment arsenal. *See* Anderson, *supra* note 259, at 498–99 (explaining judges' tendency to use summary judgment to resolve defamation cases in favor of media defendants at an early stage).

261. *Cf.* Riesman, *supra* note 11, at 1306–07 (advocating the use of opinion research to identify the community segment).

262. Post, *supra* note 6, at 711 ("Rules of civility are the means by which society defines and maintains this dignity. Conversely, rules of civility are also the means by which society distinguishes members from nonmembers.").

avenue for reform lies in simply making the public policy choices implicit in defamation law more explicit.

The problem is not that judges make value choices in identifying community values; such choices are inevitable. What is troubling is that these value choices are often made in an unreflective manner, based on assumptions about community life presumed to be so common they need not be stated. Raising these assumptions to the level of consciousness will help make overt the covert public policy decisions that go on in the guise of determining defamatoriness.

Precisely because defamation symbolically imposes order on modern society by defining the boundaries of community, courts occasionally should refuse to lend weight to the invidious prejudices of certain subgroups within society. Judges must inevitably select whether to apply older values or newer values during periods when mores are in transition. However, they should face this choice directly, rather than camouflaging it beneath the cloak of identifying the community's values. Furthermore, it is a mistake to assume such choices need only be made in rare cases, or in cases that directly implicate specific constitutional provisions.

In many ways, this is a modest proposal.[263] It is not unreasonable to demand that if courts are to deny redress to a harmed individual to advance social policy goals, these goals should at least be elaborated and explained. As it currently stands, the doctrine forecloses such discussion. Decisions based on unstated assumptions deflect rather than promote debate. Thus, the first step is becoming aware of these unstated assumptions, and the second is making them explicit. While a modest step, this proposal has several distinct advantages. First, this would lead to enhanced doctrinal clarity. In turn, this would allow the doctrine to be evaluated and perhaps reformed and would allow the policy choices made by judges to be debated and discussed. Finally, it would force us to come to grips with the lack of consensus in society over difficult moral

263. Despite the seemingly modest nature of this proposal, forcing judges to analyze and articulate unstated assumptions about the nature of community constructed by defamation law would be no mean feat. A primary function of law is "to create the image of order even if this image masks the truth." Jeffrey L. Harrison & Amy R. Mashburn, *Jean-Luc Godard and Critical Legal Studies (Because We Need the Eggs)*, 87 Mich. L. Rev. 1924, 1943 (1989) (arguing that without a "sense of order and principle we simply could not function"). In a sense, therefore, law plays a role in suppressing discussions that would tear the community apart. *See* Walter O. Weyrauch, *Law as Mask—Legal Ritual and Relevance*, 66 Cal. L. Rev. 699, 718 (1978) (arguing that the "masks of objectivity, neutrality, and fairness give the legal process an independent power so that it is not [perceived to be] merely the tool of dominant social forces"). Although law's role in transforming the disparate elements in American life into an ordered and cohesive community may represent the triumph of hope over experience, it may nonetheless be important to continue to hope.

issues and the failure to eradicate invidious prejudices in all groups within society.

V. CONCLUSION

Some fictions are useful fictions; some myths are useful myths. At the heart of the defamation tort lies a myth of a cohesive, homogeneous community whose norms lend shape and order to modern life. However, this idealized vision of community life does not comport well with the fragmented nature of life in a complex, heterogeneous, multicultural, multiethnic society. Nonetheless, the myth has the power to shape outcomes in defamation cases. The myth encourages unreflective decisions, and these decisions sometimes cloak the imposition of the dominant culture's values on conflicting subcultures. Moreover, the myth obscures the choice of conflicting values in a deeply divided society.

The doctrinal structure of defamation law does little to inhibit this process. The threshold inquiry in every defamation case is whether a defendant's communication had the tendency to harm reputation, not whether it actually harmed reputation. The corollary to this threshold inquiry is the question whether the community in which the plaintiff's reputation was harmed was a substantial and respectable one. The abstract nature of these questions encourage judges to speculate about and invent the plaintiff's community and its values. Requiring plaintiffs to bring evidence that their reputations were *actually* harmed in the eyes of *actual* communities will give the defamatoriness inquiry a more objective grounding. Nonetheless, it highly unlikely that defamation can be liberated from its normative moorings. Because the myth of community is embedded in the defamation tort, the introduction of objective data cannot eliminate the need to select the plaintiff's community and, hence, to make sensitive public policy choices. Requiring judges to make such choices explicit is a modest but desirable step toward reinforcing defamation's symbolic role in the definition, affirmation and enforcement of community values in America.