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LMAO; That Guy Is Such a &*%#!: Redefining Defamation Law's Stagnant Community Standard in a Rapidly Changing World

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"LMAO. . .THAT GUY IS SUCH A &*%#!": REDEFINING DEFAMATION LAW'S STAGNANT COMMUNITY STANDARD IN A RAPIDLY CHANGING WORLD

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"One is a member of a country, a profession, a civilization, a religion. One is not just a man."

~Antoine de Saint-Exupéry[1]

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INTRODUCTION

Nearly forty years ago in the heat of the civil rights movement, the Supreme Court famously considered whether a Montgomery, Alabama Commissioner who supervised the Police Department was damaged by defamatory comments. In determining whether the false statements published in the New York Times article lowered the Commissioner's reputation and impeded his reelection chances, the court wrestled with defining the community in which these comments were

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1. Antoine de Saint-Exupéry, *Wartime Writings 1939-1944*, translated from French by Norah Purcell, http://www.quotegarden.com/community.html (last visited Mar. 7, 2012).

published.[2] Should the Supreme Court consider the allegedly defamatory comments within the scope of a national community, as the New York Times is a national publication, or was the correct community restrained to the registered voters in the Montgomery district upon whose votes the Commissioner would depend? In between these two extremes, the court could have considered a community defined by occupation, such as police officers or government officials, or perhaps even defined the relevant community in which Sullivan's reputation suffered harm as the community of white males in Alabama. This determination was all-important to a case which was to become a lynchpin of defamation case law; defining the community is the crucial initial step in addressing whether the plaintiff suffered harm, and therefore whether the statement is defamatory.

The issue facing the court in Sullivan remains. Despite the speech-based constitutional underpinnings given the tort of defamation by the Supreme Court's holding in *Sullivan*, four decades later a plaintiff seeking to prove a defamation action faces the same evaluation. The plaintiff "must still prove, at a minimum: 1) the existence of a defamatory communication; 2) publication of the communication to a third party; and 3) identification of a plaintiff to a third party."[3] A statement is considered defamatory if it "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."[4] In the decades since the American Law Institute's Restatement (Second) of Torts reiterated the existing common law community standard, the definition of community has become an even more ill-defined and vague standard as the explosion of alternative communities expands.

Before social media allowed us to join forums, create identities with likeminded individuals, tweet, post, or text message statements instantaneously, globally and with little or no filter, the standards of community were often viewed through a geographic lens. We have, for better and worse, entered into an interactive world where the World Wide Web has broken down geographic barriers and communities are comprised of individuals from faraway places, differing beliefs, who

2. New York Times Co. v. Sullivan, 376 U.S. 254, 260 (1964). Sullivan relied on testimony of a former employer, who doubted whether he "would want to be associated with anybody who would be a party to such things that are stated in that ad," and that he would not re-employ respondent if he believed "that he allowed the Police Department to do the things that the paper say he did."

3. Lyrissa Barnett Lidsky, *Defamation, Reputation and the Myth of Community*, 71 WASH L. REV. 1, 7-8 (1996).

4. RESTATEMENT (SECOND) OF TORTS §559 cmt. e (1977).

often remain behind a veil of anonymity.[5] By December 31, 2011, over 2.2 billion users across the globe access and communicate through the Internet.[6] Within a rapidly changing world where communicative mediums evolve in a seemingly constant manner, defining community is an uncertain endeavor, yet a court's definition of community is prerequisite to determining whether or not a statement is defamatory. As new forms of the community emerge, the definition and standards of a community change. Clarity and consensus in defining the community are paramount to effective litigation in the field of defamation.

This note proposes that the current legal system in which judges must speculate and arbitrarily determine a plaintiff's community based on judge's own unconscious beliefs and individualized views, needs to be reformed. The problems of an arbitrary and unclear community definition are exacerbated by the rapidly modernizing modes of communication through which everyday interactions and communications occur. After first tracing the importance and changing definitions of community, this work's second section will analyze the Annenberg Report, the most comprehensive recent work on defamation reform, and other selected reformation concepts brought forth by scholars. While scholars agree that the current defamation structure is poor at best, there is no consensus on what direction to proceed. Part three of this work will weigh and balance the selected reform concepts previously advanced, and offer new recommendations, such as combining the 'plaintiff-centered' approach in which the plaintiffs plead and proves their own community and the 'individualized sub-community' approach in which particularized communal groups are identified, as well as an enlarged "choice of law" approach and liberally borrowing existing obscenity standards. Discussion of these recommendations will be useful in the community standard reformation process.

I. BACKGROUND: THE IMPORTANCE OF COMMUNITY

> *"In many ways, reputation is a quintessential public good. We cannot have a reputation except insofar as it is created in cooperation with others and relative to our relationships with them."*
>
> *~David Ardia*[7]

5. David S. Ardia, *Reputation in a Networked World: Revisiting the Social Foundations of Defamation Law*, 45 HARV. C.R.-C.L. L. REV. 261, 262 (2010).

6. World Internet Usage and Population Statistics, at www.internetworldstats.com/stats.htm (last visited Mar. 15,2012). (citing 2,267,233,742 users on Dec. 31, 2011).

7. Ardia, *supra* note 5, at 261.

In David S. Ardia's 2010 work "Reputation in a Networked World," the above quote illustrates an axiomatic truth regarding defamation: our reputation exists as a product and reflection of our interpersonal relationships. Taking this proposition to the logical next step, Ardia points out that when one has his reputation smeared, it lessens the "value and reliability of this information," and as a result devalues an individual's "community identity."[8] In a modern world, the importance of community identity is heightened through the permanence of our communication. The Internet has made changes that were impossible for legislatures to have envisioned when defamation laws were created decades ago. Reputation today is far more permanent than ever before, and information about individuals, both good and bad, not only exists forever but can be easily accessed by others within an individual's community.[9]

Scholar Laura Heymann comments that Ardia's work "is encouraging greater attention to community" in online defamation cases, and postulates that a more complete conception of reputation, therefore, should take such community interests into account.[10] Heymann's theory is that one's reputation is a social concept which springs to life when the community forms a collective judgment, and that this collective judgment in turn guides the community's further interactions towards the individual.[11] This theory implicates the importance community holds in both shaping an individual's reputation and the necessity of taking community interests into account within defamation actions. Defamation actions are crucially important, given that plaintiffs live within communities in which a constructed reputation acts as a medium for all communal interactions. If false and defamatory statements lead to a plaintiff being burdened with inaccurate reputations within the community, the exchange between members of the community rests on a false foundation. For defamation to be a viable method of making an injured plaintiff whole, courts need to take these community interests into account.

The Supreme Court standard established in *Peck v. Tribune Company* held that it is sufficient for defamation claims to have injured the plaintiff "in the estimation of a considerable and respectable

8. *Id.* at 262.

9. John C. Dvorak, *The Permanence of Posting Online*, PC MAGAZINE (July 1, 2011), http://www.pcmag.com/article2/0,2817,2387907,00.asp.

10. Laura A. Heymann, *The Law of Reputation and the Interest of the Audience*, 52 B. C. L. REV. 1341, 1342 (2011).

11. *Id.* at 1341.

class of the community."[12] Important in legally defining community, the court established that a communication need not be defamatory to the general public, but is only required to injure an individual to an "important and respectable" portion of the community.[13] Just over two decades later, the "right-thinking" rule was introduced into the common law. In *Kimmerle v. New York Evening Journal, Inc.*, the court stated that a statement is defamatory only if it would expose an individual to shame "in the minds of right-thinking persons."[14] Ambiguity surrounds exactly what would constitute such a "right-thinking" person, just as no clear delineation has been proffered by the court as to how much, or how little, of the populace constitutes a "substantial and respectable" minority. In a world where new communities arise seemingly overnight, the lack of a defined threshold plagues the tort of defamation. In the "offline" community, geographic proximity, in-person affiliations and face-to-face interactions mesh together to establish rough boundaries which define a community. Where can a line be drawn in an online, networked world, which to a large degree ignores geography and thrives on anonymity?

Post-*Peck* jurisprudence has focused upon the three areas of contention implicated by the fact pattern in *Peck* - size, geography and membership in a particular group.[15] Of these three, the "membership in a particular group approach" utilized in *Remick v. Manfredy* has the most applicability to online mediums.[16] In this case, plaintiff Lloyd Remick, an attorney specializing in sports entertainment law, brought a defamation action against boxer Angel Manfredy, his agents, and his lawyers. The defamation action was premised on a fax sent from Manfredy's Indiana firm to Remick's Pennsylvania offices claiming that Remick was "extorting" money from the boxer. When two of Remick's employees found the letter on top of the fax machine in his Pennsylvania office, the parties argued whether Pennsylvania or Indiana law should apply. In this case, the court eschewed both size and geographic restrictions, deciding to define the relevant community as one

12. Elizabeth Peck v. Tribune Co., 214 U.S. 185, 190 (1909).

13. *Id.*

14. Kimmerle v. New York Evening Journal, Inc., 186 N.E. 217, 218 (N.Y. 1933).

15. Amy Kristin Sanders, *Defining Defamation: Community in the Age of the Internet*, 15 COMM. L. &POL'Y 231, 240-251 (2010). In the decades since *Peck*, the Supreme Court has defined community by focusing on the issue of size in Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990). The court has also focused on geography to determine community - *see* Gertz v. Robert Welch, Inc., 418 U.S. 321 (1974). The Third Circuit recognized community based on membership in an organization rather than boundaries in Remick v. Manfredy, 238 F.3d 248 (3d Cir. 2001).

16. *Id.*

limited to individuals within the boxing community.[17] In so doing, the federal appellate court recognized that false and harmful statements within a professional sub-community can be the basis for a defamation action.

The concept of a small sub-community is being increasingly relied upon, as indicated in the Fourth Circuit Court of Appeals 2008 holding in *Galustian v. Peter* that the "place of the wrong is the place of publication."[18] Here, a resident of the United Arab Emirates ("UAE") brought a defamation claim against a Virginia citizen, who lived and worked in Iraq. The claim alleged that the Virginia citizen sent a defamatory email about him to members of a non-profit organization, costing the UAE resident substantial business.[19] The Virginia court applied the "choice-of law" rule, which applies the law of the place of the wrong on tort claims, holding that the place of publication of allegedly defamatory email is deemed to be the place where the email was received. In the defamation suit in *Galustian*, the place of publication was deemed to be Iraq, the place where the email was received by the non-profit organization, as opposed to the place where the email was composed, since it was to this group that the plaintiff's reputational harm would suffer. An expansion of Virginia's approach to defamatory actions may serve to reform actions and more accurately embrace communities that send and receive information through social mediums.

II. Analysis of Contemporary Reform Efforts

> *"The community myth is that here 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*[20]

17. Remick v. Manfredy, 238 F.3d 248, 249 (3d Cir. 2001). The court did recognize the harm which could have caused by the statements but in this case the plaintiff failed to sufficiently show publication of the defamatory materials (and did not prevail). Nevertheless, the court recognized that a plaintiff's reputation could suffer injury within a community other than one in which either the plaintiff or the publishing entity resides, which supports the concept of non-geographically based community. For a good discussion of this case and the potential effects on the community standards, see Sanders, *Defining Defamation,* 250-251 (2010).

18. Galustian v. Peter, 561 F.Supp.2d 559, 565 (E.D.Va. 2008). Virginia has codified the "choice-of-law" rule, also called lex loci delicti rule. In short, this means that the law of the place of the wrong applies. An example of this and a good synopsis of the law appears in PBM Products, LLC v Mead Johnson Nutrition Co., 678 F.Supp.2d 390, 398 (E.D.Va. 2009).

19. *Id.* at 561.

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

A. The Annenberg Libel Reform Proposal

While the focus of this work is on the community aspect of defamation, a brief overview of the attempts to reform the tort and the suggestions which have been proffered assist in contextualizing the issue. Defamation law has been the subject of at least one comprehensive review by legal scholars and academics, who railed against the current legal structure of defamation. The most comprehensive contemporary work on reform is the Annenberg Libel Reform Proposal (ALRP), released in 1988.[21] Rodney Smolla, one of the collaborators of the Annenberg proposal, published an article describing what the ALRP entailed and why it represents a necessary starting point for any proposed reformation of defamation law.[22] Beginning with the premise that a "society starting from scratch to design the 'perfect' legal mechanism for handling libel disputes would never arrive at the current system," the writers of the ALRP specifically stressed the need to address the time consuming, inefficient, and costly process to determine, as well as the ineffectiveness of, damages to properly address harms.[23] Shockingly, in a proposed large-scale overhaul of defamation law, no proposed reformation of the community standard or definition was mentioned.

Written in the form of comprehensive model statutes, the ALRP recommends a three-stage approach to resolve defamation disputes which would completely remodel the law of defamation.[24] Stages I and II of the ALRP focus on the problems of cost, inefficiency, and delay inherent in defamation actions. By imposing forceful retraction provisions, streamlined statutes of limitation in which plaintiffs can bring action, endorsing fee-shifting provisions and enlarging the applicability of declaratory judgments, the proposal forcefully attacks key issues

21. Northwestern University Libel Reform Project, Annenberg Washington Program in Communications Policy Studies, Proposal for the Reform of Libel Law: The Report of the Libel Reform Project of the Annenberg Washington Program Annenberg Washington Program [in] COMMUNICATIONS POLICY STUDIES, Northwestern University, 1988).

22. Rodney A. Smolla and Michael J. Gaertner, *The Annenberg Libel Reform Proposal: The Case for Enactment*, 31 WM. & MARY L. REV. 25, 26 (1989).

23. *Id.* at 31.

24. *Id.* at 31 (Smolla's scathing indictment of the current system prefacing the three-stage reform approach the ALRP endorses states: "It is costly, cumbersome, and fails to vindicate either free speech values or the protection of reputation. Enormous defense costs of protracted litigation exert a chilling effect on the press, while plaintiffs are left with no meaningful legal remedy for reputational injury. Libel suits tend to drag on interminably, are enormously costly for both sides, and very rarely end in a clear-cut resolution of what ought to be the heart of the matter: a determination of the truth or falsity of what was published."

which, if adopted, may rectify key issues.[25] Smolla does admit that the reforms outlined in these stages result in the defendant losing the "protection of constitutional fault requirements of negligence or actual malice, as the case may be."[26] It is my contention that a removal of a defendant's constitutional rights renders the proposals outlined by the ALRP committee completely impractical. While the well-written model statutes highlight potential aspects which need improvement and represent a well-reasoned attempt to remedy several of the ailments which plague defamation, there is little to no chance of the Constitution being amended in such a manner as to allow individual protections to be discarded.

Despite the above limitations, the ALRP is not without some promising suggestions. Universally requiring negligence as a floor in all cases, eliminating presumed and punitive damages, and presumptively classifying "certain genres of speech, such as editorials, letters to the editor, editorial cartoons, reviews, parody, satire and fiction" as opinion have inherent benefits in many cases.[27] In attempting a large-scale reformation of the entire tort, however, these solutions seem outweighed by many problems. It forces the plaintiff to be aware of the laws and act swiftly, setting a 30-day statute of limitations in which to bring a complaint lest the suit be barred.[28] This can be especially problematic where the defamatory effects or discovery of the offense is not immediately discovered. It also allows either party, plaintiff or defendant, to opt to file for a declaratory judgment, an act which forecloses monetary recovery for a deserving plaintiff, save the possibility of attorneys' fees.[29] In sum, massive problems emerge when the focus is placed on improving the efficiency, reducing the time and cost and rebuilding ineffective laws that govern defamation. I propose that the ALRP, while necessary to understand the current landscape of defamation reformation, misses the mark by not re-focusing on defining the community and re-defining the tort of defamation within it. Clarifying and reassessing the community standard looms as the most viable method of exacting meaningful reform within a troubled system.

25. *Id.* at 32-34.
26. *Id.* at 33.
27. *Id.* at 34-35.
28. *Id.* at 32-33.
29. *Id.* at 35-36.

B. Focusing on the Community

One contemporary post-ALRP work that has explored the concept of reforming the community is Lyrissa Lidsky's work "*Defamation, Reputation and the Myth of Community*."[30] Lidsky's article focuses on the harm to reputation and the effect of the alleged defamation upon those who "make up the plaintiff's 'community,'" rather than the effect of the harm upon the individual plaintiff.[31] In the nascent stages of a defamation action, therefore, the judge or decision-maker "must first select the community in whose esteem the plaintiff has been diminished."[32] In a modern world where modes of communication are exponentially enlarged, new forums and marketplaces emerge daily. Within this world, the sheer number of sub-communities is growing exponentially. It's simply not plausible to expect a judge to adequately or accurately determine a relevant community in a large number of defamation cases.

Beginning again with the Supreme Court's standard from *Peck* articulating an "important and respectable" minority, courts must then consider the Restatement (Second) of Torts' requirement that a statement lower the plaintiff's standing in the eyes of a "substantial and respectable minority" of the community.[33] Overall, the evaluation a court must undertake is arduous. Lidsky points out that in applying this standard, courts are required to first undertake a quantitative inquiry to show a "substantial" portion of the community was affected, and second a normative inquiry is needed to determine whether or not the group is "respectable."[34] An example of the "substantial and respectable minority" standard being applied is found in the Florida Supreme Court's holding in *Rapp v. Jews for Jesus*.[35] Edith Rapp, a woman of traditional Jewish faith, argued that a newsletter and website's comments that she had accepted some Christian teachings would injure her reputation in the eyes of "like-minded" religious practitioners. The Florida Supreme Court held that the statements must be evaluated from the standpoint of a "substantial and respectable minority," the court forestalled Edith Rapp's potential recovery for

30. Lidsky, *supra* note 3, at 7-8.

31. *Id.* at 6.

32. *Id.* at 6-7.

33. Peck v. Tribune, 214 U.S. 185, 190 (1909).; Restatement (Second) of Torts §559 cmt. e (1977).

34. Lidsky, *supra* note 3, at 7.

35. Rapp v. Jews for Jesus, 944 So.2d 460, 465 (Fla. App. 2006).

reputational harm among "like-minded" traditional Jewish practitioners.[36]

Just as the judge must impossibly determine the relevant community in which harm to a plaintiff's reputation must be shown, the judge must somehow undertake the above dual quantitative and normative inquiries to determine whether the group they identify can truly be said to be a community. At least one scholar, Larissa Lidsky, has cast a dubious light on this approach. Lidsky states that the judicial phenomenon and arbitrary determination of community is based on "intuitive judgments" which are never articulated and are labeled as "common knowledge" or "common sense" by the finder of fact.[37] Adding to the complexity facing a tribunal in making the determination of the relevant community is the wide cultural diversity present in modern America.

America is a melting pot which cannot be accurately depicted as a homogenous society with consistent values and norms. Built as a conglomeration of immigrants from different nations throughout American history, many cultural and social norms are transported from abroad. Today, American culture is seemingly so diverse that it may be rare to find many individual values, past perhaps those which govern and restrict the basest and most hideous wrongs, which would permeate equally throughout communities. Communities are not standardized, are not shaped equally, and do not hold the same values from which a "benchmark for determining what statements are defamatory" can be drawn.[38] It is true that what scarcely raises an eyebrow within one community may set another aflame. One contemporary example of this phenomenon occurred when Florida Marlins manager Ozzie Guillen made comments praising Fidel Castro's longevity, comments which registered strong reactions among the particular and small community of Cuban-Americans. The resulting firestorm resulted in Guillen's unpaid suspension as manager.[39]

This wide variance in community norms, coupled with the difficulty of identifying and evaluating communities, creates a situation in which novel approaches to reform are needed. Moreover, what is the impact of ignoring the vantage point of the plaintiff, the individual who may be in the best position to determine accurately and knowingly

36. *Id.* at 465.

37. *See* Lidsky, *supra* note 3, at 7-8.

38. *Id.* at 8.

39. Steven Wine, *Ozzie Guillen Suspended by Marlins for Fidel Castro Comments*, HUFFINGTON POST (April 10, 2012), http://www.huffingtonpost.com/2012/04/10/ozzie-guillen-suspended-fidel-castro-marlins_n_1414666.html.

what the community is, in favor of a judicial determination?[40] Allowing plaintiffs themselves to plead and prove the community in which the harm is apparent may allow for the judicial process to achieve a greater degree of stability. The concept of plaintiffs pleading and proving their own community, or a "plaintiff-centered" approach, is more fully developed by Sanders in her article "Defining Defamation: Community in the Age of the Internet."[41] Allowing a plaintiff to plead and prove his own relevant community allows small sub-communities to achieve recognition, provided they can meet the substantial and respectable minority criteria.[42] This would potentially allow the plaintiff to overcome the "injustice of forcing a plaintiff to accept the community the court chooses" and escape a scenario where "fact-sensitive, ad hoc decisions are the norm."[43]

Support for professional or other subgroups, or at the least rejection of a need for a national community, has already been recognized.[44] The D.C. Circuit utilized this approach in *Afro-American Publishing Co. v Jaffe*, a 1966 case in which a white male was called a "bigot" in a "black newspaper."[45] Here, the court relied on a standard based on the publication's location and the "average reader" within the range of the publication or "target community" as opposed to the national standard. The D.C. Circuit reiterated this approach in *Tavoulareas v. Piro*[46], a 1987 case where an oil company president sued the Washington Post over allegedly defamatory comments. The court in *Tavoulareas* held that the publication must be "read and construed in the sense in which readers to whom it is addressed would ordinarily understand it."[47] This case is another example of the courts, in a media case, determining community in defamation actions based on a "target audience."

While there are appreciable benefits to the plaintiff-centered approach, there is also a substantial downside. A member of the media

40. *Id.* at 22. Lidsky concludes that the "court ignores the views of the community and instead constructs a "general community by fiat."

41. Sanders, *supra* note 15, at 262. Sanders builds on Lidsky's idea, and does especially well to move the concept into a post-internet focus which Lidsky did not contemplate in her 1996 article.

42. Peck v. Tribune, 214 U.S. 185, 190 (1909).

43. Sanders, *supra* note 15, at 245, 251, 257. (*See, e.g.*, Tavoulareas v Piro, 817 F.2d 762 (D.C. Cir. 1987); Afro-American Pub. v Jaffe, 366 F.2d 649 (D.C. Cir. 1966)).

44. *See* Time v. Firestone, 424 U.S. 448, 453-54 (1976). In this case, the court examined Firestone's prominence in the Palm Beach, Florida community.

45. *See Jaffe*, *supra* note 43, at 658.

46. *See* Tavoulareas, *supra* note 43, at 780.

47. *Id.*

or other individual may chill their speech to avoid repercussions of speech in communities never intended to be reached by the speech. Subjecting an author to a potential defamation suit from an unforeseeable plaintiff may outweigh the positive aspects of accurately defining the community and enhancing the certainty of potential punishments.[48] In redefining and reforming the concept of community within the tort of defamation, the plaintiff-centered approach would need to be regulated in order to avoid these potential pitfalls, or perhaps emerge as a piece of a larger community structure.

Lidsky's article attacks the "contemporary" defamation standard, which is to say that she limits her scope to consideration of defamation suits within traditional geographic and communal settings.[49] A look at modern reformation works may prove more apt to generate solutions. Amy Sanders looks exclusively at the post-Internet age of communication, attempting to redefine community by considering more recent and "cutting-edge" Internet cases.[50] Looking at the common factors courts have used in recent Internet jurisprudence to define community provides insight to reforming the definition of community. Acknowledging where the courts have placed weight and what factors they have stressed provides a baseline from which to isolate successes and failures within the current system.

C. The Targeted Community

From 1966 until the 1990's, the geographic approach was "dominant in defining the boundaries of community."[51] Under the geographic approach, the court looks at the reputational harm a plaintiff suffered in the community where the plaintiff lives, or the harm suffered within the publication's target community.[52] With the advent of the Internet, one can see the pitfalls inherent in any approach based on the geographic approach as a sole determinant of community. Perhaps the largest problem with the geographic approach is the fact that

48. Sanders, *supra* note 15, at 263.

49. *See* Lidsky, *supra* note 3, at ? January 1996 work focuses on attacking the "myth" that a community even exists in America, and did not address the nascent internet movement, and it would be asking too much to expect her to have foreseen the great impact the internet has had upon our communication.

50. Sanders, *supra* note 15, at 231.

51. Sanders, *supra* note 15, at 246. *See also* Afro. Am. Pub. Co. v. Jaffe, 366 F.2d 649, 54-55 (D.C. Cir. 1966) (defining community to include either the location of the publication or a professional community based on occupation); Tavoulareas v. Piro, 817 F.2d 762, 780 (D.C. Cir. 1987) (same) (quoting *Jaffe*, 366 F.2d at 654).

52. *See* Sanders, *supra* note 15, at 246.

in a modern world, one's community is less frequently determined by geographic proximity. For instance, online gaming, forums, blogs and more unite those with commonalities from any corner of the globe.

With the flaws of the geographic approach becoming more visible, some courts have instead focused on membership within a particular group, slowly drifting away from the location of the publication or target community as the determinative factors.[53] As Sanders states, "[g]iven the potential for the Internet to unite people across traditional geographic boundaries, it is not surprising that group membership has been used as a proxy for community in several online defamation cases."[54] Even pre-Internet, this idea has surfaced as often the focus has shifted to sub-communities. These sub-communities may focus on occupation, professional affiliation, or language, but the limited discussions of community in online defamation cases have not greatly enlarged the scope of potential communities.[55]

An example of the restriction on the potential scope of online cases can be seen in *Condit v. Dunne*.[56] In 2004, California Congressman Gary Condit filed a defamation claim over comments published by Entertainment Tonight Online, which was based in New York. The court was forced to decide whether to apply California law, the location of Condit and the injury, or New York law, based on the place the allegedly defamatory material was published.[57] Condit claimed that the injury was nationwide, and that the court should enlarge the community to encompass the scope of his reputational harm, but the court eschewed this designation, restricting the judgment to the location of the party's domiciles and the locus of the court. In doing so, the court seems to reason that even where statements are published nationally, and harm occurs nationally, injuries are still redressed within a geo-

53. *See* Sharratt v. Hous. Innovations, Inc., 310 N.E.2d 343, 346 (Mass. 1974) (identifying community and isolating reputational harm to the architecture profession); Reiman v. Pac. Dev. Soc'y 284 P. 575, 578 (Ore. 1930) (identifying the community and isolating the reputational harm to Finnish speaking individuals in Oregon).

54. Sanders, *supra* note 15, at 248. To illustrate her point, Sanders relied on research that "as of 2010, the Southern Poverty Law Center had identified 888 organized hate groups in the U.S." Southern Poverty Law Center, *Stand Strong Against Hate*, www.splcenter.org/center/petitions/standstrong/ (last visited June 14, 2008). She also looked at the online gaming community Second Life, a site that allows users to create virtual identities, reporting "a 'resident population' of nearly fourteen million by 2008. Second Life, *Frequently Asked Questions,* second-life.com/whatis/faq.php (last visited June 14, 2008).

55. *See* McNally v. Yarnell, 764 F.Supp. 838 (S.D.N.Y. 1991) (discussion of sub-community of artists); Remick, *supra* note 12, at 248 (2001 case involving professional affiliation in boxing community); Reiman v. Pac. Dev. Soc. et. al., 284 P. 575 (Ore. 1930) (constructing community based on common language).

56. Condit v. Dunne, 317 F.Supp. 2d 344 (S.D.N.Y. 2004).

57. *Id.*

graphically bound community standard. More to the point, the New York court determined that it was more important to protect the plaintiff's reputation in the locale where it likely suffered the greatest harm, California.[58] Maneuvering to utilize the court located where the alleged injury was suffered does help to protect the plaintiff in their community, if we continue to qualify community geographically. Unfortunately, when considering modern Internet defamation cases, giving flexibility to which community should govern does little where the reputation of the congressman was injured nationally.

Another example of this flawed approach is illustrated in *Rapp*, where Florida's court employed the "common mind" or "respectable minority" standard under which the appellate court found a reasonable person in the target audience would interpret the statements in a favorable light.[59] By looking at the targeted community, the court undertook an analysis similar to that which would have been undertaken in print cases such as *Jaffe*, a case decided 50 years previously. Much like the injury suffered by Congressman Condit, the injury to the plaintiff's reputation exceeded the scope of the defined community. Rapp was injured in the eyes of her peers, and her injury was given no redress. The basic problem found in *Condit, Rapp,* and *Jaffe* is that the targeted community is not necessarily the community in which the plaintiff suffers his injury. To redress the potential shortcomings which a judicially imposed community standard provides a plaintiff, Sanders puts forth three possible rubrics which could be utilized to reform the definition of community and improve defamation actions effectiveness.[60]

The rubrics Sanders suggests are the plaintiff-centered approach, the mixed methods approach, which utilizes several factors such as plaintiff location and place of publication to redefine the old geographic approach courts have used in the past, as well as the specific community approach which identifies sub-communities within the general population.[61] An idea first introduced in a traditional print context by Lidsky, the plaintiff centered approach was discussed above. One might consider the plight of Edith Rapp, attempting to prove the community her injury was sustained within and being denied as the court considered the overall message was favorable, despite

58. *Id.* at 354; *see* Sanders, *supra* note 15, at 256 for further discussion on *Condit* and the potential applicability to communal reformation, defining community in terms of where the greatest injury occurred.

59. *See* Rapp, *supra* note 35, at 465.

60. Sanders, *supra* note 15, at 15-17.

61. *Id.* at 260.

being quite detrimental from her vantage point and among those she intimately associated with.[62] Sanders' evaluation of the specific community concept of identifying sub-communities within the general population shows this approach has enjoyed a limited success. In *Remick*, the specific community approach was utilized to isolate the professional boxing community, determining that this group was determinative in assessing the plaintiff's harm. As noted by Lidsky, however, courts have been reticent to identify groups that "challenge social norms."[63]

While offering potential enhanced predictability and protection to parties in defamation actions, and possibly creating easily identifiable groups with clear normative structures, there are drawbacks to the specific community approach. The likelihood of a plaintiff being a public figure, and having the court by necessity apply the absolute malice standard to the claim, increases when the community is shrunk. Also, the potential chilling effect of authors closing off communication to ensure it only reaches an audience who will not be offended could result. Lastly, uniformity would be difficult, as courts would need to agree on specific criteria from which to determine small and discrete communities.[64]

D. Reform Within the Homosexual Community

One last approach to redefining the community within defamation claims was postulated by Abigail Rury's work looking at methods of restructuring the community standard within homosexual cases.[65] Rury premised her article on findings that "the community standard, as it is currently used, is not an accurate reflection of society's values when litigating. . .defamation cases," and contends that the courts should be required to identify and articulate the community standard being applied.[66] Articulation would have many benefits, including increased transparency reducing potential judicial biases, enhanced fairness for the plaintiff who will not be judged by some fictional or "idealized" community standard, and a semblance of equity extends to

62. *See* Rapp, *supra* note 35, at 465; *see also* Lidsky, *supra* note 3, at 22; *see* pages 14-15 of this article.

63. Lidsky, supra note 3, at 7-8.

64. Sanders, *supra* note 15, at 261. Sanders concisely discusses these specific pratfalls, but does not endeavor to link her variant approaches together.

65. Abigail Rury, *He's So Gay. . .Not That There's Anything Wrong With That*, 17 CARDOZO J.L. & GENDER 655, 657 (2011).

66. *Id.* at 657. Rury argues that courts can use polls, legislation, case law, or testimony to identify a relevant community standard, and include this analysis within the decision.

all parties where the same standards which determine our individual interactions govern the litigation.[67]

Rury also considers applying the average contemporary person standard used in obscenity law, opining that this would create a more uniform standard for deciding what constitutes defamation.[68] The Supreme Court delineated the "average contemporary person" obscenity standard in *Miller v. California*. The *Miller* standard is a three-part test which asks: (a) whether an "average person, applying contemporary [local] community standards find[s] that the work, taken as a whole, appeals to the prurient interest"; (b)"whether the work depicts or describes, in a patently offensive way, sexual conduct," as defined by the state law; and (c) whether the work in question "lacks serious literary, artistic, political, or scientific value."[69] In contrast to defamation's vague communal standard and wide variance in judicial holdings, when considering obscenity the court in *Miller* stated that there is no national community standard, describing such a standard as "hypothetical and unascertainable."[70]

In analyzing Rury's ideas, she is correct to point out that obscenity and homosexuality may make "strange bedfellows."[71] Certainly those in the homosexual community would not consider their sexuality obscene. There are some binding ties between the two categories however, and Rury aptly links the two concepts:

> Although defamation and obscenity do not seem to have much in common at first blush, the adjudication of whether the false imputation of homosexuality is defamatory and obscenity law are both rooted in sexuality. Homosexuality and obscenity imply certain sexual behaviors. Although vastly different, both defamation and obscenity law share a focus on community standards. Because of the inherent overlap between subject matter and the societal measure of what is deemed prurient or harmful to reputation, obscenity law's community standard should be used in defamation cases.[72]

Part of the rationale of linking homosexuality and obscenity seems to stem from traditional stereotypes regarding homosexuality.[73]

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67. *Id.*

68. *Id.* at 668; Miller v. California, 413 U.S. 15, 24 (1973).

69. *See* Miller, *supra* note 66, at 24.

70. *Id.* at 30-31.

71. Rury, *supra* note 63, at 657.

72. Rury, *supra* note 63, at 675-676.

73. Some courts have held that calling a person gay was defamatory, while other courts have not. Albright v. Morton, a 2004 Federal District Court case in Massachusetts, held that the imputation of homosexuality does not constitute defamation per se. Albright v. Morton, 321 F. Supp. 2d 130, 136 (D. Mass. 2004); In Stern v. Cosby, a 2009 New York Federal

In addition to the sex-based connection, the prejudicial and common "deviancy" inherent with both obscenity and homosexuality are unique to these fields. Current works on allegedly defamatory homosexual imputations argue, alternatively, that a per se defamatory label applied to an accusation of homosexuality either affords protection for the homosexual community or legitimizes and validates a societal stigma applied to a label one is "gay."[74] The latter view, endorsed by Bunker, Shenkman and Tobin in their 2011 article *Not That There's Anything Wrong With That*, adds credence to the common level of "deviancy" some communities within our large society may place on homosexual conduct. A clear link between obscenity and homosexual defamation suits becomes more clearly visible in this light. Nevertheless, while certain logic applies in linking obscenity to homosexuality within a defamatory litigation setting, what about the vast majority of potential group, sub-groups or minorities which are non-sexually based? The link appears more attenuated in a setting with there is no stereotypical negative connotation, and as such may not be a relevant standard for communal groups such as engineers, athletes, or online journalists.

III. CONCLUSIONS AND RECOMMENDATIONS

> *"In effect, to follow, not to force the public inclination; to give a direction, a form, a technical dress, and a specific sanction, to the general sense of the community, is the true end of legislature."*
>
> ~ *Edmund Burke*[75]

The preceding sections have offered widely varying suggestions which endeavor to fix fundamental problems within the tort of defamation. Defining community, or defining in whose eyes a plaintiff's reputation suffers, is a threshold analysis to any defamation jurisprudence, and even in this preliminary analysis, courts fail to find congruence. Compelling reasons for this failure are summed up by Smolla and Gaertner in their article expounding upon the Annenberg Report:

District Court case, the court held that falsely identifying a person as a homosexual does not constitute defamation per se. *Stern v. Cosby*, 645 F. Supp. 2d 258, 276 (S.D.N.Y. 2009).

74. Robert D. Richards, *Gay Labeling and Defamation Law: Have Attitudes Toward Homosexuality Changed Enough to Modify Representational Torts?* 18 COMM. L. CONSPECTUS 349 (2009); Matthew D. Bunker, Drew E. Shenkman, Charles D. Tobin, *Not That There's Anything Wrong With That: Imputations of Homosexuality and the Normative Structure of Defamation Law*, 21 FORDHAM INTELL. PROP. MEDIA. & ENTERTAINMENT. L.J. 581 (2010).

75. Letter from Edmund Burke to the Sheriffs of Bristol (Apr. 4, 1777), http://www.brainyquote.com/quotes/keywords/community.html.

> A society starting from scratch to design the "perfect" legal mechanism for handling libel disputes would never arrive at the current system. It is costly, cumbersome, and fails to vindicate either free speech values or the protection of reputation. Enormous defense costs of protracted litigation exert a chilling effect on the press, while plaintiffs are left with no meaningful legal remedy for reputational injury. Libel suits tend to drag on interminably, are enormously costly for both sides, and very rarely end in a clear cut resolution of what ought to be the heart of the matter: a determination of the truth or falsity of what was published.[76]

Here, Smolla states what I feel is an obvious fact; the system of laws and standards that have risen to govern defamation are irregular, unpredictable, vague and often arbitrary. A system with inherent uncertainties harms both plaintiffs and defendants. Additionally, it is the reason why the reformation ideas discussed above vary so widely. Starting anew would pose significant constitutional problems, as the constitutional protections recognized by the Supreme Court stand as intractable pillars in not only the realm of defamation, but also speech.[77] Like it or not - or more aptly put whether or not the task is achievable - reformers are left to operate within the existing system to bring positive change to defamation actions.

A. Intra-Group Approach

Beginning first with an insular and contained "intra-group" defamation action, or defamation actions by one member of an identifiable community against another member of the same community, we see that a unique opportunity exists. For actions where both parties are members of an identifiable group, such as a particular occupation, as discussed in *Remick* or *McNally*, clearly defining communal standards, and perhaps even communal punishments, becomes possible.[78] With a clear definition, parties know what can and cannot be published and run little risk of defaming another individual. More importantly, should they cross the clear threshold, it would be clearly identified and a punishment may be predicted.

While this is limited to "intra-group" cases, where applicable, it would reduce chilling of speech, as publishers act within their own

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76. Smolla and Gaertner, *supra* note 22, at 32.

77. Sullivan, *supra* note 2, at 270. In New York Times v. Sullivan, the Supreme Court superimposed first amendment protections upon the common law in order to guarantee that the libel system provided sufficient breathing space for the tradition of "'uninhibited, robust, and wide-open" speech.

78. *See* Remick, *supra* note 17, at 249; *see* McNally, *supra* note 53, at 838.

community and the limits are clearly identified and known. It would also heighten efficiency, expedite claims, and provide more equity. Could the court effectively isolate small, insular sub-communities and define limits and clarify punishments? Could these sub-communities grow to include online gaming and social media forums? These are the questions facing modern defamation jurisprudence. By starting with redefining the community, much progress towards necessary reform can be made by the courts. The trick will be how to best expand a workable approach such as outlined in this section to the much larger communal scope of defamation

B. Combining the "Specific Community" and "Plaintiff-Centered" approaches

Standing alone, the idea put forth by Sanders, reforming defamation's community standard via a "specific community" approach potentially creates easily identifiable groups with clear normative structures. This approach offers certain advantages, such as offering potentially enhanced predictability and protection to parties in defamation actions. However, these are outweighed by the two largest drawbacks to this approach. First, there is the potential chilling effect on communication.[79] Creating numerous and particularized groups which apply a uniquely tailored scope of community to defamatory communication, leaves an author in a perilous position. Unsure of which groups will receive the message, an author is tempted to shield himself by closing off communication to all except a "target" audience, thereby ensuring no offending result. Lastly, uniformity would be difficult, as courts would need to agree on specific criteria from which to determine small and discrete communities.

The second potential drawback to the specific community approach is the lack of uniformity among courts and jurisdictions in their creation of sub-groups.[80] To fully effectuate this concept alone, courts would need to agree on specific criteria from which to determine small and discrete communities in order to deter forum shopping and increase equity. Legal uniformity is improved when the specific community approach is merged with the plaintiff centered approach. In the plaintiff centered approach outlined by Lidsky, the plaintiff is allowed to plead and prove his or her own community.[81] By identifying clearly the boundaries of the plaintiff's community and allowing courts

79. Sanders, *supra* note 15, at 261.

80. *Id.*

81. Lidsky, *supra* note 3, at 22.

to affirm the standards by which defamatory communication within the particular group is measured, authors can clearly adjudge whether their speech is likely to be defamatory.

By way of example, consider the homosexual community Rury used in her article, where she postulated that a courts' clear articulation of the plaintiff's community heightens both transparency and equity.[82] Identifying a specific community has legitimate benefits and the courts' articulation of their analysis does provide a more realistic semblance of community. Using familiar standards to determine individual interactions gives larger certainty. But homosexuality is a large group with many variants, and no two communities can realistically be believed to operate in exactly the same way, with common social mores and standards of conduct. What of a homosexual male in Nebraska compared to a lesbian in New York City? Consider a gay individual working in a public school, or perhaps a prominent politician. It is common sense to believe that the communities in which these individuals live and operate are drastically different. The concept of clear articulation can be taken further and operate more effectively when combined with a plaintiff-centered approach which allows the plaintiff to plead and prove her own community. The judge can then determine empirically what the standards within the proffered community are by using polls, legislation, testimony, or any other relevant information.

Critics of this approach may point to the prohibitive costs, both in time and money. They argue that requesting the trier-of-fact clearly articulate the boundaries of the relevant community would impose upon the legal system. However, where the judge is already issuing a written verdict, it would not require an excessive amount of time to merely include the boundaries that the judge considered. It is necessary for the judge to formulate a communal boundary within a defamation action, and then assess whether or not reputational harm occurred within this community. Simply asking a judge to "show their work" imposes a minimal burden. Moreover, improving the transparency within an amorphous tort and potentially reducing ancillary chilling effects on author's who are unclear of defamatory boundaries amply offsets this minimal increase in time and cost. It is hard to envision a more practical method of increasing clarity than a judicial explanation of the community in which reputational harm was alleged.

82. Rury, *supra* note 63, at 657.

C. Borrowing the Obscenity Standard

Perhaps the plaintiff-centered approach to redefining the community within defamation actions can borrow from obscenity case law. The standard the court stated in *Miller*, the average contemporary person, has relevance.[83] By allowing a plaintiff to plead and prove his own community, and evaluating the allegations of injury to the plaintiff's reputation under a reasonable person standard as stated in *Miller*, it seems more likely a court may more accurately evaluate the injury with more precision under a "contemporary community standard". Of course, obscenity carries with it a certain stigma among many communities, and as such a reasonable person standard is perhaps more applicable where there is a negative connotation attached, and less relevant when considering communities where there is no preconceived biases or attachments. Nevertheless, defamation law as currently codified would be greatly improved should it choose to apply a "contemporary community standard" approach that measures the community through the eyes of the "reasonable person."

Taking for example *Peck v. Tribune Company*, where the court held that it is sufficient for defamation claims to have injured the plaintiff "in the estimation of a substantial and respectable class of the community."[84] In applying this standard, a trier-of-fact must first deduce a quantifiable percentage or fraction which makes the community a "substantial" minority. After this evaluation, the court must then identify and determine whether or not this community is "respectable." By being required to show injury to an individual to a "substantial and respectable" portion of the community, the judge must undergo two evaluations, both of which are vague and ambiguous.[85] Applying instead the contemporary community standard, which looks at the defamation through the eyes of the "reasonable person," the judge need undertake only one evaluation. Moreover, the determination which the judge must make is more flexible. Harder and more ambiguous determinations of whether or not enough of the population agree as to make the portion "substantial" are left by the wayside. All that the judge, and for that matter the parties involved, need to be focused on is whether or not a reasonable person at the time and place the alleged defamation took place would find this conduct acceptable.

Defamation law needs an evolution. Changing the way we think about defamatory conduct is essential in a modern world. Indi-

83. *See* Miller, *supra* note 66, at 24.

84. Elizabeth Peck v. Tribune Co., 214 U.S. 185, 190 (1909).

85. *Id.*

viduals from different cultures, separated by oceans and reared in vastly different cultural communities, are interacting instantaneously through public forums. When assessing whether or not the communications between the parties are defamatory, the law must begin to reflect this massive evolution in communication. By identifying and focusing on a "contemporary community standard" based on reasonableness, the courts can go a long way towards providing injured plaintiffs equity in the eyes of the law.