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Lawrence Meets Libel: Squaring Constitutional Norms with Sexual-Orientation Defamation

INTRODUCTION

Yonaty v. Mincolla[1] may have been the most anachronistic judicial ruling of 2011. In *Yonaty*, a New York trial court held that false imputations of homosexuality still constituted per se defamation[2] under New York law.[3] The ruling came only a few days before the *New York Times* reported that the New York State Senate was one vote shy of enacting marriage equality.[4] The legislation, which enjoyed wide popular support,[5] was signed into law by Governor Andrew Cuomo on June 24, 2011.[6] Despite the New York State Legislature's efforts to advance full civil equality for LGBT New Yorkers and

1. No. 2009-1003, 2011 WL 2237847 (N.Y. Sup. Ct. June 8, 2011), *aff'd as modified*, 945 N.Y.S.2d 774 (App. Div. 2012). The trial court's disposition, but not the opinion, is reported in a table in *West's New York Supplement*. *See* 932 N.Y.S.2d 764.

2. Unlike ordinary (per quod) defamation suits, which require evidence of harm for success, per se actions involve statements that are "so obviously harmful that no proof of damage ought to be required." 2 RODNEY A. SMOLLA, LAW OF DEFAMATION § 7:9 (2d ed. 2012). See *infra* Part I for a discussion of the elements of defamation.

3. *Yonaty*, 2011 WL 2237847, at *3.

4. Nicholas Confessore & Danny Hakim, *Gay Marriage Bill Is One Vote Shy of Clearing State Senate*, N.Y. TIMES, June 14, 2011, http://www.nytimes.com/2011/06/15/nyregion/2d-gop-senator-backs-gay-marriage-in-new-york.html.

5. In April 2011, one public opinion poll registered fifty-eight percent support for legalizing same-sex marriage in New York. *See* Press Release, Siena Research Inst., Siena College Poll: Cuomo Is Budget Winner Say Voters, as His Ratings Go Higher (Apr. 11, 2011), http://www.siena.edu/uploadedfiles/home/Parents_and_Community/Community_Page/SRI/SNY_Poll/041111SNYPollReleaseFINAL.pdf.

6. Nicholas Confessore & Michael Barbaro, *New York Allows Same-Sex Marriage, Becoming Largest State To Pass Law*, N.Y. TIMES, June 24, 2011, http://www.nytimes.com/2011/06/25/nyregion/gay-marriage-approved-by-new-york-senate.html.

the public's backing of LGBT rights in New York, it was nevertheless deemed defamatory as of 2011 to label a heterosexual person gay.

New York's peculiar treatment of homosexuality in defamation law was not unique. In early 2012, lawmakers in Georgia introduced legislation to codify false imputations of homosexuality as per se defamation,[7] around the same time that they considered enacting LGBT employment-nondiscrimination protections.[8] In numerous jurisdictions, false allegations of nonheterosexuality are still actionable.[9] In those states, there is no shortage of plaintiffs ready and willing to file sexual-orientation defamation claims,[10] including high-profile celebrities.[11]

7. H.B. 680, 151st Gen. Assemb., Reg. Sess. (Ga. 2012).

8. H.B. 630, 151st Gen. Assemb., Reg. Sess. (Ga. 2011); Dyana Bagby, *LGBT Job Bill Languishes in Ga. House Judiciary Subcommittee*, GA. VOICE, Mar. 2, 2012, http://www.thegavoice.com/news/georgia-news/4249-lgbt-job-bill-languishes-in-ga-house-judiciary-subcommittee.

9. *See, e.g.*, Manale v. City of New Orleans Dep't of Police, 673 F.2d 122, 125 (5th Cir. 1982) (applying Louisiana law to find that allegations that plaintiff was "gay" and "a little fruit" were defamatory per se); Robinson v. Radio One, 695 F. Supp. 2d 425, 428 (N.D. Tex. 2010) (acknowledging Texas's precedent that accusations of homosexuality are per se defamation); Thomas v. BET Sound-Stage Rest./BrettCo, Inc., 61 F. Supp. 2d 448 (D. Md. 1999) (finding that false statements regarding plaintiff's sexual preference were defamatory); Schomer v. Smidt, 170 Cal. Rptr. 662, 666 (Ct. App. 1980) ("[A] false imputation of the commission of a homosexual act is slanderous per se."); Hayes v. Smith, 832 P.2d 1022 (Colo. App. 1991) (finding that an accusation of homosexuality was actionable but not libelous per se, and that it required proof of special damages); Veazy v. Blair, 72 S.E.2d 481 (Ga. Ct. App. 1952) (finding that a defendant's statement that the plaintiff was a "queer" was slander per se); Moricoli v. Schwartz, 361 N.E.2d 74, 76 (Ill. App. 1977) (finding that a false accusation of homosexuality was actionable but required proof of special damages); Wetherby v. Retail Credit Co., 201 A.2d 344, 346 (Md. 1964); Bohdan v. Alltool Mfg. Co., 411 N.W.2d 902, 907 (Minn. App. 1987) (finding that a false accusation that a plaintiff was not heterosexual was at least reasonably susceptible to a defamatory interpretation); Nazeri v. Mo. Valley Coll., 860 S.W.2d 303, 311 (Mo. 1993) (finding that an allegation of homosexuality was defamatory per se); Gray v. Press Commc'ns, LLC, 775 A.2d 678, 683-84 (N.J. Super. Ct. App. Div. 2001) ("[A] false accusation of homosexuality is actionable."); Head v. Newton, 596 S.W.2d. 209, 210 (Tex. Civ. App. 1980) (finding that a false accusation of homosexuality was slanderous per se).

10. Sexual-orientation defamation suits are not confined to any particular geographic region; they have been filed throughout the country. *See, e.g.*, Garcia v. MAC Equip., Inc., No. H-09-902, 2011 WL 4345205, at *13 (S.D. Tex. Sept. 15, 2011); Murphy v. Millennium Radio Grp. LLC, No. 08-1743 (JAP), 2010 WL 1372408 (D.N.J. Mar. 31, 2010), *rev'd on other grounds*, 650 F.3d 295 (3d Cir. 2011); Van Meter v. Morris, No. 10-11-00083-CV, 2011 WL 6225370, at *6 (Tex. App. Dec. 14, 2011); Habib v. Winther, 146 Wash. App. 1025 (2008).

11. *See, e.g.*, Keyonna Summers, *Hulk Hogan Sues Ex-Wife for Defamation, Says Claims of Abuse Are Lies*, TAMPA BAY TIMES, Dec. 9, 2011, http://www.tampabay.com/news/courts/civil/hulk-hogan-sues-ex-wife-for-defamation-says-claims-of-abuse-are-lies/1205444 (describing Hulk Hogan's sexual-orientation defamation suit); *Cruise Wins 'Gay' Claims Legal Battle*, BBC

Those cases suggest that, social progress for LGBT people notwithstanding, plaintiffs throughout the country will continue to bring sexual-orientation defamation suits unless judges or legislators prohibit them. But in jurisdictions where judges and legislators view LGBT people unfavorably, common law reform may be years away. In these places, public-policy rationales[12] and arguments that allegations of homosexuality are not defamatory will likely fall on deaf ears.[13] Scholars, unfortunately, have overlooked the viable alternative of launching legislative and constitutional challenges.[14]

While defamation law functions as a legitimate governmental mechanism for vindicating harm to one's reputation, it cannot constitutionally do so if it irrationally intertwines state action with class-based animus. As this Essay explains, recent sexual-orientation jurisprudence—*Romer v. Evans*[15] and *Lawrence v. Texas*,[16] taken together—stands for the clear proposition that

NEWS (Jan. 16, 2003, 10:36 AM GMT), http://news.bbc.co.uk/2/hi/entertainment/2664159.stm (describing Tom Cruise's ten-million-dollar judgment for allegations of homosexuality).

12. *See* 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 & ENT. L.J. 581 (2011) (arguing that sexual-orientation suits should be impermissible as a matter of public policy); Haven Ward, *"I'm Not Gay, M'kay?" Should Falsely Calling Someone Homosexual Be Defamatory?*, 44 GA. L. REV. 739 (2010) (same). *See generally* Randy M. Fogle, *Is Calling Someone "Gay" Defamatory? The Meaning of Reputation, Community Mores, Gay Rights, and Free Speech*, 3 LAW & SEXUALITY REV. LESBIAN & GAY LEGAL ISSUES 165, 172 (1993) (discussing how sexual-orientation defamation suits can be contrary to public policy).

13. *Cf.* Letter from Kenneth Cuccinelli, Att'y Gen. of Va., to Presidents, Rectors & Visitors of Va.'s Pub. Colls. and Univs. (Mar. 4, 2010), http://www.washingtonpost.com/wp-srv/metro/Cuccinelli.pdf (stating that sexual-orientation nondiscrimination policies at public colleges and universities are not "in conformance with the law and *public policy* of Virginia" (emphasis added)).

14. Haven Ward's article, arguably the most comprehensive recent treatment of sexual-orientation defamation, does not substantially explore constitutional and legislative means of redress. Ward, *supra* note 12. One additional piece of scholarship has substantively addressed sexual-orientation defamation; however, it was limited to addressing cases of "outing" non-open homosexuals and the evidentiary burdens when outed individuals bring invasion-of-privacy tort suits. John E. Grant, *"Outing" and Freedom of Press: Sexual Orientation's Challenge to the Supreme Court's Categorical Jurisprudence*, 77 CORNELL L. REV. 103 (1991).

15. 517 U.S. 620, 623 (1996) (invalidating a statewide constitutional ban of sexual-orientation-based protections against discrimination).

16. 539 U.S. 558, 578 (2003) (finding that the "right to liberty under the Due Process Clause" of the Fourteenth Amendment protects "the full right to engage in" same-sex sexual conduct).

government-backed stigmatization of gay and lesbian people is inconsistent with the Due Process Clause of the Fourteenth Amendment.[17]

Part I of this Essay assesses how sexual-orientation defamation claims fit within traditional constructions of defamation law, and it also highlights notable recent judicial dispositions of sexual-orientation defamation claims. Part II undertakes a historical analysis of racial defamation claims to illustrate parallels between these two similar types of class-based defamation suits, and it affirms the appropriateness of constitutional inquiries into defamation law. Part III seeks to synthesize recent decisions involving LGBT rights and precedent concerning government entanglement with private racial bias. Finally, Part IV applies the doctrinal analysis developed in Part III to argue that judicial leave of sexual-orientation defamation claims is incompatible with contemporary constitutional norms and violates the substantive due process guarantees of the Fourteenth Amendment.

I. ASSESSING THE CURRENT STATE OF THE LAW OF SEXUAL-ORIENTATION DEFAMATION

A. Defamation's Common Law Origins and Structure

First, it is necessary to understand how sexual-orientation defamation fits within defamation law more generally. There is, however, no consistent manner in which courts apply the traditional standards of defamation to claims based on sexual orientation.

To bring a successful per quod defamation claim, a plaintiff typically must prove each of the following four elements:

(a) A false and defamatory statement concerning another;
(b) An unprivileged publication to a third party;
(c) Fault amounting at least to negligence on the part of the publisher; and
(d) Either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.[18]

The *Restatement* further defines a defamatory statement as one that "tend[s] to expose another to hatred, ridicule or contempt."[19]

17. U.S. CONST. amend. XIV, § 1.

18. RESTATEMENT (SECOND) OF TORTS § 558 (1977).

19. *Id.* § 559.

A second type of claim, per se defamation, does not require proof of each of these elements for a plaintiff's success. If a statement is determined to be defamatory per se—that is, the statement's defamatory meanings are facially apparent—the plaintiff is not required to prove the existence of special damages.[20] Defamatory per se statements are those that involve statements that are "so obviously harmful that no proof of damage ought to be required."[21] False allegations of criminal conduct, allegations injurious to one's profession or business, imputations of loathsome disease, and imputations of a woman's unchastity all fall within the conventional per se classification.[22]

In applying this traditional common law framework, courts have not treated sexual-orientation defamation claims uniformly. Some courts have repudiated the notion that homosexuality or homosexual conduct is defamatory or have rejected sexual-orientation defamation suits as contrary to public policy.[23] Others have lumped false imputations of homosexuality with allegations of promiscuity, criminality, and disease by classifying sexual-orientation defamation as per se defamation.[24] Still others permit sexual-orientation defamation suits as per quod actions, which require that each element of a defamation claim be proved.[25]

Although there are significant differences between per quod and per se sexual-orientation defamation actions, neither of them constitutes rational governmental action, and neither withstands constitutional scrutiny.[26] The

20. *Id.* § 569.

21. 2 SMOLLA, *supra* note 2, § 7:9.

22. *Id.* It is worth noting that, although some argue that the elements of per se defamation "are arbitrary and archaic, reflecting sensibilities that are no longer completely relevant to contemporary values[,] . . . because of the crazy quilt of confusion that already surrounds the whole slander and libel per se terminology, courts have tended to follow the four categories mechanically." *Id.* § 7:10.

23. *See, e.g.*, Murphy v. Millennium Radio Grp. LLC, No. 08-1743 (JAP), 2010 WL 1372408, at *7 (D.N.J. Mar. 31, 2010) (disposing of the case on other grounds, but speculating that the New Jersey Supreme Court would decline to recognize sexual-orientation defamation suits as inconsistent with New Jersey public policy if that element of plaintiff's claim were being evaluated), *rev'd on other grounds*, 650 F.3d 295 (3d Cir. 2011).

24. *See, e.g.*, Yonaty v. Mincolla, No. 2009-1003, 2011 WL 2237847 (N.Y. Sup. Ct. June 8, 2011), *aff'd as modified*, 945 N.Y.S.2d 774 (App. Div. 2012).

25. *See, e.g.*, Regehr v. Sonopress, Inc., No. 2:99CV69OK, 2000 WL 33710902, at *3 (D. Utah Apr. 14, 2000); Moricoli v. Schwartz, 361 N.E.2d 74, 76 (Ill. App. Ct. 1977); Foley v. Cnty. of Hennepin, No. C1-97-2056, 1998 WL 313546, at *2 (Minn. Ct. App. June 16, 1998); Donovan v. Fiumara, 442 S.E.2d 572, 575-77 (N.C. Ct. App. 1994); Wilson v. Harvey, 842 N.E.2d 83, 89 (Ohio Ct. App. 2005).

26. See *infra* Part IV for a discussion of this matter.

distinction is not completely irrelevant, however. As this Essay emphasizes, per se sexual-orientation defamation claims are especially problematic because they entangle the state with private animus to a greater extent than mere per quod actions do.

*B. Post-*Lawrence *Judicial Treatment of Sexual-Orientation Defamation*

Numerous courts have addressed the appropriateness of sexual-orientation defamation claims, but there is no consensus in their dispositions. Although many courts continue to permit sexual-orientation defamation suits, others have prohibited them by invoking public policy or traditional common law rationales. These latter courts' decisions, which reason that sexual-orientation defamation suits stigmatize LGBT people, are particularly important because they lay the foundation for the case against the constitutionality of sexual-orientation defamation suits. Ultimately, the patchwork of varying approaches demonstrates that, in the wake of *Lawrence*, some courts are trending toward disfavoring sexual-orientation defamation claims while others are entrenching archaic common law precedents.

In *Albright v. Morton*, a federal district court rejected a sexual-orientation defamation claim by ruling that homosexuality was not defamatory under Massachusetts law.[27] The court noted that, traditionally, false imputations of homosexuality were actionable because those imputations suggested that the "defamed" party had engaged in the criminal act of sodomy.[28] After the Supreme Court held antisodomy laws unconstitutional in *Lawrence v. Texas*,[29] the district court reasoned, the rationale for deeming homosexuality capable of a defamatory meaning was undermined.[30] The court also emphasized that, despite prevalent religious, moral, and ethical opposition to homosexuality,[31] Massachusetts had broadened nondiscrimination protections and had extended marriage rights to same-sex couples[32] – which further undercut arguments that homosexuality was intrinsically defamatory, because Massachusetts had

27. 321 F. Supp. 2d 130 (D. Mass. 2004), *aff'd sub nom.* Amrak Prods., Inc. v. Morton, 410 F.3d 69 (1st Cir. 2005).

28. *Id.* at 136.

29. 539 U.S. 558 (2003).

30. 321 F. Supp. 2d at 137.

31. *Id.* at 138.

32. In 2003, Massachusetts's Supreme Judicial Court became the first tribunal to mandate same-sex marriage rights under state constitutional law. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

recognized nonheterosexuals as a protected class.[33] Importantly, the court concluded that, if it had permitted a sexual-orientation defamation claim to go forward, it would have been complicit in perpetuating anti-LGBT stigmatization:

> While the [Massachusetts Supreme Judicial] Court's language acknowledges that a segment of the community views homosexuals as immoral, it also concludes that courts should not, directly or indirectly, give effect to these prejudices. If this Court were to agree that calling someone a homosexual is defamatory per se—it would, in effect, validate that sentiment and legitimize relegating homosexuals to second-class status.[34]

In another instance, a federal district court in New Jersey dismissed a sexual-orientation defamation suit in *Murphy v. Millennium Radio Group, LLC*.[35] Employing parallel logic, the court noted that, given greater social acceptance of homosexuality and the New Jersey Supreme Court's decision mandating civil union rights for same-sex couples,[36] it was "unlikely that the New Jersey Supreme Court would legitimize discrimination against gays and lesbians by concluding that referring to someone as homosexual [is defamatory]."[37] Importantly, these two federal court opinions signal a clear understanding that, by permitting sexual-orientation defamation suits, courts give a gloss of government approval to the stigmatization of LGBT people.

These federal court decisions[38] stand in stark contrast to the state of sexual-orientation defamation under New York law as articulated in the 2011 trial

33. 321 F. Supp. 2d at 137.

34. *Id.* at 138.

35. No. 08-1743 (JAP), 2010 WL 1372408, at *6 (D.N.J. Mar. 31, 2010), *rev'd on other grounds*, 650 F.3d 295 (3d Cir. 2011).

36. Lewis v. Harris, 908 A.2d 196 (N.J. 2006) (holding that same-sex couples must be afforded marriage-like rights equal to those of heterosexual couples under the New Jersey Constitution).

37. 2010 WL 1372408, at *7.

38. It is important to note that, even though these cases were heard in federal courts, these decisions applied the relevant state law as they supposed that state courts would, which further complicates the status of sexual-orientation defamation actions. *See In re* Eurospark Indus. Inc., 288 B.R. 177, 182 (Bankr. E.D.N.Y. 2003). If the highest court of the state has not squarely addressed the issue at hand, "then federal authorities must apply what they find to be the state law after giving 'proper regard' to relevant rulings of other courts of the State." Comm'r v. Estate of Bosch, 387 U.S. 456, 465 (1967).

court *Yonaty* decision.[39] However, the trial court ruling in *Yonaty* was appealed. On appeal, the Appellate Division for the Third Judicial Department modified the trial court's ruling and held that false sexual-orientation imputations are not per se defamatory.[40]

The appellate court held that, after *Lawrence*, the idea that being gay, lesbian, or bisexual was "shameful and disgraceful" could not square with *Lawrence*'s proclamation that nonheterosexuals "are entitled to respect for their private lives."[41] The appellate court reasoned that the "respect" the people of New York held for the LGBT community—as evidenced by the 2011 enactment of marriage equality and by prior sexual-orientation nondiscrimination provisions—further undermined the rationale that earlier New York courts used to determine that false homosexual allegations were intrinsically defamatory.[42] This decision rightfully moved New York defamation law away from unequivocally including homosexuality in the per se category, but it created a split within the Appellate Division that only the New York Court of Appeals can authoritatively resolve.[43]

Although ultimately rejected on appeal, the reasoning of the trial court in *Yonaty* is by no means an aberration in modern American defamation law. Federal courts in California and Texas have taken similar postures toward sexual-orientation defamation suits. In 2008, a federal court in California acknowledged the *Morton* stigmatization argument,[44] but nevertheless suggested that sexual-orientation defamation claims might still be actionable as per quod actions.[45] That court noted that, after *Lawrence* decriminalized sodomy, homosexuality presumably fell outside the traditional criminal category of per se defamation. But the court intimated that it might entertain a sexual-orientation defamation claim upon a showing of actual damages, the fourth factor of the traditional test for defamation.[46] In *Robinson v. Radio One,*

39. No. 2009-1003, 2011 WL 2237847 (N.Y. Sup. Ct. June 8, 2011), *aff'd as modified*, 945 N.Y.S.2d 774 (App. Div. 2012).

40. Yonaty v. Mincolla, 945 N.Y.S.2d 774, 776 (App. Div. 2012).

41. *Id.* at 778 (quoting Lawrence v. Texas, 539 U.S. 558, 578 (2003)).

42. *Id.*

43. *Compare id.* (Third Department of the Appellate Division), *with* Matherson v. Marchello, 473 N.Y.S.2d 998, 1005 (App. Div. 1984) (Second Department of the Appellate Division) (holding that imputations of homosexuality are per se defamatory).

44. Albright v. Morton, 321 F. Supp. 2d 130, 137 (D. Mass. 2004), *aff'd sub nom.* Amrak Prods., Inc. v. Morton, 410 F.3d 69 (1st Cir. 2005).

45. Greenly v. Sara Lee Corp., No. S-06-1775 WBS EFB, 2008 WL 1925230, at *6 n.15 (E.D. Cal. Apr. 30, 2008).

46. *Id.* at *6.

Inc., a federal judge in Texas declined to reexamine whether false accusations of homosexuality were still per se defamation under Texas law.[47] The judge ruled that *Lawrence* notwithstanding, it may still be per se defamation to falsely impute homosexuality and that "judicial caution requires the Court to acknowledge that the imputation of homosexuality might as a matter of fact expose a person to public hatred, contempt or ridicule," the third relevant factor in a defamation analysis.[48]

The *Robinson* judge's caution was seemingly well founded. In December 2011, a Texas appellate court reaffirmed Texas's per se rule for false imputations of minority sexual orientation.[49] In that case, the appellate court held that the false imputations of homosexuality in question were per se defamatory, "especially considering . . . the trial court's findings that [the allegedly defamed party's] business sustained losses" and his reputation diminished as a result of the false allegations of homosexuality.[50]

These cases demonstrate that there is no clear judicial consensus on the permissibility of sexual-orientation defamation claims. *Yonaty*, *Murphy*, *Greenly*, and *Morton*, together, poignantly illustrate that, even in jurisdictions where LGBT rights are generally viewed with favor, there is staggering inconsistency in courts' treatment of sexual-orientation defamation claims. Although states' common law approaches to similar issues routinely differ, this lack of consensus is troubling and calls for constitutionalization because many of these decisions undermine efforts to disentangle government actors from private stigmas that have substantial public-welfare consequences for the LGBT community.

II. RACIAL ANIMUS AND THE COMMON LAW

Sexual orientation's treatment in American defamation law is not historically an anomaly. Indeed, like sexual orientation, false imputations of racial classifications were actionable in American defamation law for hundreds of years. However, the evolution of constitutional principles in Fourteenth Amendment jurisprudence rendered these racial defamation claims constitutionally suspect.

47. 695 F. Supp. 2d 425 (N.D. Tex. 2010).

48. *Id.* at 428.

49. Van Meter v. Morris, No. 10-11-00083-CV, 2011 WL 6225370, at *6 (Tex. App. Dec. 14, 2011).

50. *Id.*

The use of defamation law to reinforce privately held class-based animus traces back at least to the eighteenth century. In 1791, South Carolina's court of last resort held that falsely describing an individual as a mulatto was actionable "because, if true, the [plaintiff] would be deprived of all civil rights."[51] False imputations that white persons were nonwhite or otherwise racially "impure" remained actionable in parts of the United States well into the twentieth century, particularly across the South.[52] In 1957, South Carolina, for example, reaffirmed the precedent set in 1791. In *Bowen v. Independent Publishing Co.*, the South Carolina Supreme Court held that allegations of racial impurity remained per se defamatory because, in light of the "social habits and customs deep-rooted in this State, such publication [alleging nonwhite lineage] is calculated to affect [one's] standing in society and to injure [one] in the estimation of [one's] friends and acquaintances."[53] *Bowen* and other decisions like it used the judicial arm of the state to reinforce Jim Crow under the guise of "neutrally applied" common law. By sanctioning these causes of action, the state reinforced notions of white supremacy and "affirmed the honor of whites by authoritatively denying status to blacks."[54]

Although no court has squarely addressed the issue, given precedent concerning the impermissibility of state action being used to sanction private racial animus, racial defamation suits are likely constitutionally deficient. The fact that courts have viewed racial defamation as a constitutional issue in these cases illustrates the appropriateness of bringing constitutional challenges to rulings that disfavor LGBT people.

Judicial action that either advances or gives credence to private racial discrimination or biases consistently fails to meet constitutional muster. *Shelley*

51. Eden v. Legare, 1 S.C.L. (1 Bay) 171, 171 (Ct. Com. Pl. Gen. Sess. 1791).

52. *See, e.g.*, Morris v. State, 160 S.W. 387, 388 (Ark. 1913) ("Under our social conditions . . . it cannot be disputed that charging a white man with being a negro is calculated to bring into disrepute his good name or character."); Upton v. Times-Democrat Publ'g Co., 28 So. 970, 971 (La. 1900) (ruling that a publication describing a white man as a "negro" was actionable); Natchez Times Publ'g Co. v. Dunigan, 72 So.2d 681, 684 (Miss. 1954) ("The general rule seems to be that to write of a white person that he or she is a Negro is libelous per se."); O'Connor v. Dall. Cotton Exch., 153 S.W.2d 266, 268 (Tex. Civ. App. 1941) ("[T]o falsely charge a white person with being a negro . . . in view of the social habits, customs, traditions and prejudices prevalent in this state, in regard to the status of whites and blacks, we think such a charge would be slanderous."); Spencer v. Looney, 82 S.E. 745, 746-47 (Va. 1914) (reasoning that, notwithstanding the Civil War Amendments, it was "scandalous" to speak of white persons as being nonwhite).

53. 96 S.E.2d 564, 566 (S.C. 1957).

54. Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CALIF. L. REV. 691, 726 (1986).

v. Kraemer is the earliest example of this concept.[55] In holding that, under the Fourteenth Amendment, a judge could not enforce racially restrictive private covenants,[56] the Supreme Court took its earliest steps toward articulating that the powers of the state cannot be used to perpetuate private social biases under the guise of supposedly neutrally applied common law.[57]

Similarly, in 1984, the Supreme Court in *Palmore v. Sidoti* addressed the issue of racial stigma in a family court's child-custody decision.[58] In *Palmore*, two divorced white parents, one of whom remarried a black man, contested custody of their daughter.[59] The family court determined that the social stigma the child would endure from living in an interracial household was not in the child's best interests and weighed against placing the child with the remarried parent.[60] The Supreme Court held that, notwithstanding the state's "duty of the highest order to protect the interests of minor children" and the "reality of private biases and the possible injury they might inflict,"[61] the family court's consideration was impermissible under the Fourteenth Amendment.[62] Writing for the Court, Chief Justice Burger explained:

> The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but *the law cannot, directly or indirectly, give them effect.* Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice that they assume to be both widely and deeply held.[63]

These precedents are only applicable to defamation law, however, if judicial entanglement in defamation suits is considered state action, thus triggering constitutional limitations. The Supreme Court applied the underlying rationale of *Shelley* within a First Amendment context in *New York Times Co. v. Sullivan*.[64] In *Sullivan*, the Court held that entering a judgment in a common law defamation suit constitutes state action, even without a supporting

55. 334 U.S. 1 (1948).

56. *Id.* at 20-21.

57. *Id.* at 19.

58. 466 U.S. 429 (1984).

59. *Id.* at 430.

60. *Id.* at 431.

61. *Id.* at 433.

62. *Id.*

63. *Id.* (emphasis added).

64. 376 U.S. 254, 265 (1964).

legislative statutory scheme.[65] Although *Sullivan* only answered questions about First Amendment limitations on defamation law, the decision nevertheless confirms that defamation law is cabined by constitutional constraints imposed by the Fourteenth Amendment.

Shelley, *Sullivan*, and *Palmore* make clear that the exercise of judicial power in common law suits is state action and subject to constitutional norms. Thus, they validate that a constitutional inquiry of common law sexual-orientation defamation actions is appropriate and not unprecedented. Together, *Shelley* and *Palmore* foreclosed any possibility that judges could even entertain racial defamation suits. Even when the state has a compelling interest, as it did in *Palmore*, the Supreme Court clearly articulated that judicial decisions that endorse and embolden private racial biases, whether in their intent or effect, are categorically improper.

Given the difference in rigor between the constitutional scrutiny applied to racial discrimination and that applied to sexual-orientation discrimination, these cases on their own are more instructive than dispositive of the constitutionality of sexual-orientation defamation.[66] Racial and sexual-orientation defamation suits both raise, however, a broader question of general applicability: can the false imputation of a class-based characteristic be actionable without irrationally entangling state actors with class-based animus, in violation of substantive due process guarantees? In a fashion similar to judicial decisions in the racial-prejudice context, recent LGBT-rights jurisprudence suggests the answer is an unequivocal "no."

65. *Id*.

66. Racial classifications are reviewed under the most extracting level of scrutiny: strict scrutiny. *See* Grutter v. Bollinger, 539 U.S. 306, 327 (2003) ("When race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied."). Sexual-orientation discrimination is reviewed under a less stringent analysis than race. Courts apply a slightly more exacting form of scrutiny than rational basis, sometimes called rational basis "with bite." *See* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 760-61, 777-78 (2011) (describing the heightened level of rational basis review applied to LGBT classifications after Romer v. Evans, 517 U.S. 620 (1996)). Thus, sexual-orientation defamation could theoretically pass constitutional muster under the heightened rational basis standard even though it would otherwise fail under strict scrutiny, the level of analysis that would apply to constitutional challenges of racial defamation suits.

III. SEXUAL-ORIENTATION DEFAMATION AND CONTEMPORARY CONSTITUTIONAL NORMS

Since the United States Supreme Court first addressed the constitutional boundaries of sexual-orientation discrimination in *Bowers v. Hardwick*, where the Court found no constitutionally protected right to engage in homosexual sodomy,[67] the Court's subsequent jurisprudence has dramatically undermined the government's power to discriminate on the basis of sexual orientation.

Romer v. Evans was the Supreme Court's first authoritative statement that the entanglement of state action with anti-LGBT animus is constitutionally impermissible.[68] The Court, applying rational basis review, invalidated a state constitutional amendment that repealed and prohibited all local policies that recognized homosexuals as a protected class.[69] Thus, the amendment prohibited any legislative, executive, or judicial action aimed at expanding protections based on sexual orientation.[70] The Court determined that "the amendment seems inexplicable by anything but animus toward the class it affects"[71] and concluded that animus did not constitute a rational basis for Colorado's state action.[72] Without any animus-free justification for the constitutional amendment, the Court struck down Colorado's amendment for want of any rationale that could satisfy even the most minimal test of validity under the Equal Protection Clause of the Fourteenth Amendment.[73]

In 2003, the Supreme Court in *Lawrence v. Texas* overturned antisodomy laws as violative of the Fourteenth Amendment's Due Process Clause.[74] As in *Romer*, the Court found no rational basis to support animus-motivated sodomy prohibitions.[75] The Court in *Lawrence* described the relationship between sodomy bans, stigma, and the Constitution:

> [S]tigma might remain even if [antisodomy laws] were not enforceable as drawn for equal protection reasons. When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is

67. 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

68. 517 U.S. 620 (1996).

69. COLO. CONST. art. II, § 30b (1992), *abrogated by Romer*, 517 U.S. 620.

70. *See Romer*, 517 U.S. at 624.

71. *Id.* at 632.

72. *Id.* at 634-35.

73. *Id.*

74. 539 U.S. 558 (2003).

75. *Id.* at 582-85.

> an invitation to subject homosexual persons to discrimination both in the public and in the private spheres. . . . Its continuance as precedent demeans the lives of homosexual persons.[76]

The *Lawrence* Court, like Chief Justice Burger in *Palmore* before, recognized that government might be powerless to eradicate private stigmas. However, government-backed perpetuations of stigma that demean a class of people are irreconcilable with the Constitution. In essence, *Lawrence* effectively recast the underpinnings of *Palmore* within the framework of LGBT rights and rational basis review: the state cannot rationally form public policy grounded in class-based stigma or use the law to perpetuate stigma.

IV. THE CONSTITUTIONAL LIMITATIONS OF SEXUAL-ORIENTATION DEFAMATION

Taken together, *Romer* and *Lawrence* make clear that moral disapproval of gay and lesbian people cannot sustain a law relegating them to second-class citizenship against a constitutional challenge under the Fourteenth Amendment. In the case of defamation actions arising from allegations of homosexual conduct, neither awarding a judgment for sexual-orientation defamation nor ruling that such an allegation is per se defamatory can withstand constitutional scrutiny under the Fourteenth Amendment's Due Process Clause.

What animus-free government interest might allow sexual-orientation defamation claims to survive constitutional scrutiny? At first blush, the answer might be simply to "restore" a plaintiff's reputation. However, this justification is no more neutral in its effect than the ones rejected in *Shelley* and *Palmore*.[77] But for the existence of anti-LGBT prejudice, there would be little basis for any person to bring and maintain a sexual-orientation defamation suit. Thus, any purportedly animus-free justification for sexual-orientation defamation claims is disingenuous pretext. As at least two courts have already recognized, any judicial sanction of sexual-orientation defamation claims makes courts complicit in perpetuating the idea that nonheterosexuality is a mark deserving of moral opprobrium and invites additional discrimination against LGBT people.[78] As such, whenever courts permit sexual-orientation defamation suits,

76. *Id.* at 575.

77. *See supra* Part II.

78. *See* Murphy v. Millennium Radio Grp. LLC, No. 08-1743 (JAP), 2010 WL 1372408 (D.N.J. Mar. 31, 2010), *rev'd on other grounds*, 650 F.3d 295 (3d Cir. 2011); Albright v. Morton, 321 F. Supp. 2d 130 (D. Mass. 2004), *aff'd sub nom.* Amrak Prods., Inc. v. Morton, 410 F.3d 69 (1st

they entangle themselves with anti-LGBT animus in precisely the way that the Supreme Court has tried to prohibit.

Traditional constructions of common law also undermine any animus-free defense of sexual-orientation defamation claims. As a result, jurisdictions where false imputations of nonheterosexuality are still per se defamatory are particularly susceptible to constitutional challenges. Traditionally, per se defamation included allegations of criminal conduct, of a nature injurious to one's professional standing, of a loathsome disease, and of a woman's unchastity.[79] However, *Lawrence* ended the criminalization of homosexual conduct,[80] homosexuality does not universally detract from one's professional reputation,[81] the medical community expressly rejects the idea that homosexuality is a disease,[82] and sexual orientation is unrelated to female chastity. Thus, there is no bias-free justification for bringing homosexuality into the per se category.

Indeed, states such as Texas have actually created a special category of per se defamation reserved for LGBT people—which, post-*Lawrence*, is undeniably impermissible. Creating a special class of per se defamation actions for sexual-

Cir. 2005); *see also supra* note 38 (noting that these federal courts applied the relevant state law).

79. *See* RESTATEMENT (SECOND) OF TORTS §§ 571-574 (1977).

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

81. Such a bright-line rule is rebutted by state laws barring sexual-orientation discrimination in employment practices, for they reinforce the idea that sexual orientation is not a relevant factor for employability. *See, e.g.*, CAL. GOV'T CODE § 12920 (West 2012); 775 ILL. COMP. STAT. 5/1-102 (2012); N.Y. EXEC. LAW § 296 (McKinney 2012). In all, thirty-one states forbid to some extent employment discrimination on the basis of sexual orientation. Twenty-one states proscribe discrimination based on sexual orientation in private and public employment; twelve provide protections for public employees through executive order, administrative regulation, or personnel regulation. *See Statewide Employment Laws & Policies*, HUMAN RIGHTS CAMPAIGN (2012), http://www.hrc.org/files/assets/resources/Employment_Laws_and_Policies.pdf. Polls showing that most Americans believe nonheterosexuals should be employed as salespersons, military personnel, doctors, government officials, and teachers also weigh against the notion that a minority sexual orientation *necessarily* undermines one's employability. *See Gay and Lesbian Rights*, GALLUP, http://www.gallup.com/poll/1651/gay-lesbian-rights.aspx (last visited Oct. 25, 2012).

82. The American Psychiatric Association, the American Psychological Association, and the National Association of Social Workers all reject the premise that homosexuality is an abnormal form of sexual expression. *See* Am. Psychiatric Ass'n, *Position Statement on Homosexuality and Civil Rights* (1973), *reprinted in* 131 AM. J. PSYCHIATRY 497 (1974); Am. Psychological Ass'n, *Minutes of the Annual Meeting of the Council of Representatives*, 30 AM. PSYCHOLOGIST 620, 633 (1975); Nat'l Ass'n of Soc. Workers, *Policy Statement on Lesbian and Gay Issues* (1993) (updating the original 1977 policy), *reprinted in* NAT'L ASS'N OF SOC. WORKERS, SOCIAL WORK SPEAKS: NASW POLICY STATEMENTS 224 (6th ed. 2003).

orientation claims is a particularly egregious act of state-sponsored invidious discrimination. The reasons for this are twofold. First, although both per se rules and judgments for per quod suits perpetuate anti-LGBT stigma, the state is particularly hard-pressed to provide animus-free justifications in the per se context. Secondly, per se rules are especially abhorrent to constitutional principles because they directly entangle state actors with private animus when courts rule as a matter of black-letter law that false allegations of homosexuality are defamatory.

However, the per se rules' ultimate effect is no different from courts entering judgments on regular per quod actions – they are both improper government validations of privately held anti-LGBT animus. Thus, both per se rules and the entering of judgments on per quod sexual-orientation defamation suits violate the substantive due process guarantees of the Fourteenth Amendment because they ultimately do what *Lawrence* suggested state actors cannot do: create policies rooted in antigay animus that "demean [gay and lesbian people's] existence."[83]

CONCLUSION

Given the contours and trajectory of recent LGBT-rights jurisprudence, the environment is ripe for litigants to challenge the constitutionality of sexual-orientation defamation judgments, especially per se rules. Constitutional challenges will be particularly necessary in jurisdictions where judges and legislators balk at correcting deficiencies in the common law because doing so would advance LGBT rights.[84] However, given the damaging effects of stigma on some of the most vulnerable members of society, state legislatures would be wise to preemptively foreclose class-based defamation suits. Indeed, it makes little sense for legislatures to take up such salient issues as marriage equality and nondiscrimination, only to punt the elimination of other government-backed relics of inferiority to courts. In an age when civil equality for LGBT people is rapidly accelerating, it is inconceivable that the antiquated standards of the common law are still applied to demean their very existence.

83. *Lawrence*, 539 U.S. at 578.

84. *See, e.g.*, William Yardley, *Idaho Senator To Push Gay Rights Bill from the Outside*, N.Y. TIMES, Mar. 2, 2012, http://www.nytimes.com/2012/03/03/us/idaho-senator-to-push-gay-rights-bill-from-outside.html (describing Idaho legislators' refusal to consider an LGBT nondiscrimination bill for fear that it might lead to same-sex marriage).

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