TORT LAW — DEFAMATION — NEW YORK APPELLATE DIVISION HOLDS THAT THE IMPUTATION OF HOMOSEXUALITY IS NO LONGER DEFAMATION PER SE. — *Yonaty v. Mincolla*, 945 N.Y.S.2d 774 (App. Div. 2012).

Like most American jurisdictions,[1] New York requires plaintiffs to assert pecuniary damages in defamation suits unless the allegedly defamatory statements fall into a narrow category of assertions so patently damaging that they are considered defamation per se.[2] The New York Court of Appeals recognizes four categories of statements as rising to the level of defamation per se: "statements (i) charging plaintiff with a serious crime; (ii) that tend to injure another in his or her trade, business or profession; (iii) that plaintiff has a loathsome disease; or (iv) imputing unchastity to a woman."[3] Until 2012, appellate courts in New York had uniformly held that statements imputing homosexuality also belonged on this list.[4] Recently, in *Yonaty v. Mincolla*,[5] the Appellate Division of the New York Supreme Court, Third Department, overruled this precedent within its jurisdiction, holding that "statements falsely describing a person as lesbian, gay or bisexual . . . are not defamatory per se."[6] In doing so, the Third Department joined courts across the country that have repudiated similar precedents of their own.[7] By simultaneously reflecting and shaping social attitudes about sexual orientation in New York, *Yonaty* exemplifies defamation law's fusion of descriptive and normative dimensions.

Mark Yonaty and Kara Geller were in a dating relationship when Jean Mincolla, an acquaintance of theirs, heard a rumor that Yonaty

---

[1] *See* William L. Prosser, *Libel Per Quod*, 46 VA. L. REV. 839, 844–47 (1960).

[2] *See* Liberman v. Gelstein, 605 N.E.2d 344, 347 (N.Y. 1992).

[3] *Id.* (citations omitted).

[4] *See, e.g.*, Nacinovich v. Tullet & Tokyo Forex, Inc., 685 N.Y.S.2d 17, 19 (App. Div. 1999); Dally v. Orange Cnty. Publ'ns, 497 N.Y.S.2D 947, 948 (App. Div. 1986); Matherson v. Marchello, 473 N.Y.S.2d 998, 1005 (App. Div. 1984); Privitera v. Town of Phelps, 435 N.Y.S.2d 402, 404 (App. Div. 1981) (listing words that "impute . . . homosexual behavior" as one of five recognized categories of defamation per se); *see also* Gallo v. Alitalia–Linee Aeree Italiane–Societa per Azioni, 585 F. Supp. 2d 520, 549 (S.D.N.Y. 2008) (adopting this rule in a federal diversity case).

[5] 945 N.Y.S.2d 774 (App. Div. 2012).

[6] *Id.* at 776.

[7] *See* Haven Ward, *"I'm Not Gay, M'kay?": Should Falsely Calling Someone a Homosexual Be Defamatory?*, 44 GA. L. REV. 739, 752 & n.75 (2010) (citing New York as the "one exception" to "the trend [of] limit[ing] the actionability of such statements to defamation per quod due to the advancement of the societal standing of homosexuals"). For cases in other jurisdictions holding that false allegations of homosexuality are not defamatory per se, see *Albright v. Morton*, 321 F. Supp. 2d 130, 136 (D. Mass. 2004), *aff'd on other grounds*, 410 F.3d 69 (1st Cir. 2005), in which the district court applied Massachusetts law; *Hayes v. Smith*, 832 P.2d 1022, 1025 (Colo. App. 1991); *Boehm v. Am. Bankers Ins. Grp., Inc.*, 557 So. 2d 91, 94 (Fla. Dist. Ct. App. 1990); *Donovan v. Fiumara*, 442 S.E.2d 572, 576–77 (N.C. Ct. App. 1994); and *Lehman v. Wellens*, No. 86-1665, 1987 WL 267191, at *1 (Wis. Ct. App. Apr. 8, 1987) (per curiam).

was sexually attracted to men and that he was "actively engaging in homosexual conduct."[8] Mincolla "became concerned" on Geller's behalf.[9] Wishing to apprise Geller of the "danger" that Yonaty posed to her, Mincolla passed the information along to Ruthanne Koffman, a friend of the Geller family, with instructions to tell Kara's mother, Marilyn Geller.[10] Koffman, moved by "concern for Kara's physical and emotional health," passed the rumor along to Marilyn Geller, who repeated it to her daughter.[11] After hearing the rumor, Kara Geller ended her relationship with Yonaty.[12]

Yonaty filed a tort suit against Mincolla in the Supreme Court of Broome County, New York, in 2009.[13] He asserted that Mincolla's statements to Koffman constituted defamation, intentional infliction of emotional distress, and prima facie tort[14] under New York law.[15] Mincolla, in turn, filed a third-party action for indemnification against Koffman for repeating the rumor, and moved for summary judgment, asking the court to dismiss all three of Yonaty's tort claims.[16]

In an unpublished trial court opinion, Justice Rumsey granted Mincolla's motion for summary judgment with respect to the actions for prima facie tort and intentional infliction of emotional distress but denied the motion with respect to the defamation action.[17] Justice Rumsey rejected the claim for intentional infliction of emotional distress on the ground that Mincolla's statements to Koffman were not as "outrageous in character or extreme in degree" as that cause of action requires.[18] He rejected the prima facie tort claim on two grounds: first, Yonaty had alleged no special damages, a required element of a prima facie tort claim;[19] second, the prima facie tort claim was a "re-

---

[8] Yonaty v. Mincolla, No. 2009-1003, 2011 WL 2237847, at *1 (N.Y. Sup. Ct. June 8, 2011).

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] Under New York law, "Prima facie tort affords a remedy for 'the infliction of intentional harm, resulting in damage, without excuse or justification, by an act or a series of acts which would otherwise be lawful.'" Freihofer v. Hearst Corp., 480 N.E.2d 349, 354 (N.Y. 1985) (quoting ATI, Inc. v. Ruder & Finn, Inc., 368 N.E.2d 1230, 1232 (N.Y. 1977)).

[15] *Yonaty*, 2011 WL 2237847, at *1.

[16] *Id.*

[17] *Id.* at *2–3. Justice Rumsey also denied a motion filed by Koffman to dismiss the third-party complaint against her. *Id.* at *2. Koffman's motion had been based on the claim that her statements were protected by the "common interest" qualified privilege. *Id.* at *1. Justice Rumsey rejected this argument on the grounds that Koffman was not related to the Gellers, that she had volunteered the information, and that she had not been invited to opine on Yonaty's fitness as a boyfriend. *Id.* at *2.

[18] *Id.* at *3 (citing Howell v. N.Y. Post Co., 612 N.E.2d 699, 702 (N.Y. 1993); *Freihofer*, 480 N.E.2d at 355; Wadsworth v. Beaudet, 701 N.Y.S.2d 145, 148 (App. Div. 1999)).

[19] *Id.* (citing *Freihofer*, 480 N.E.2d at 355; *Wadsworth*, 701 N.Y.S.2d at 148).

cast" version of Yonaty's defamation claim, and a prima facie tort action is available only where a remedy would otherwise be unavailable under traditional tort concepts.[20] Justice Rumsey did not, however, dismiss Yonaty's defamation claim. Although Yonaty alleged no special damages arising from Mincolla's statements about him, and the defamation he alleged did not fall under the four established exceptions to the special damages requirement, Justice Rumsey followed the precedent established in numerous New York Appellate Division decisions and held that statements imputing homosexuality to a heterosexual person constitute defamation per se.[21] Both Yonaty and Mincolla appealed Justice Rumsey's order.[22]

The Appellate Division's Third Department reversed the lower court's ruling on the defamation charge.[23] Writing for a unanimous panel, Acting Presiding Justice Mercure[24] announced that within the Third Department's jurisdiction, falsely describing someone as lesbian, gay, or bisexual no longer constitutes slander per se.[25] Justice Mercure pointed out that a statement's defamatory character largely depends upon the way the statement is received within its cultural milieu; thus, the status of a particular category of statements as slanderous — and indeed, as slanderous per se — is susceptible to change over time.[26] He cited New York's formulation of the standard for defamation: words that "tend[] to expose a person to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation or disgrace, or to induce an evil opinion of [a person] in the minds of right-thinking persons."[27] By this definition, he argued, allegations of

---

[20] *See id.* (citing *Freihofer*, 480 N.E.2d at 355; Morrison v. Woolley, 845 N.Y.S.2d 508 (App. Div. 2007)).

[21] *Id.* (citing Gallo v. Alitalia–Linee Aeree Italiane–Societa per Azioni, 585 F. Supp. 2d 520, 549 (S.D.N.Y. 2008); Klepetko v. Reisman, 839 N.Y.S.2d 101 (App. Div. 2007); Tourge v. City of Albany, 727 N.Y.S.2d 753 (App. Div. 2001); Nacinovich v. Tullet & Tokyo Forex, Inc., 685 N.Y.S.2d 17 (App. Div. 1999); Dally v. Orange Cnty. Publ'ns, 497 N.Y.S.2d 947 (App. Div. 1986); DAVID A. ELDER, DEFAMATION § 1:13 (2003)). The court noted that "the law may, at some point, change in response to evolving social attitudes regarding homosexuality," but explained that it was required to follow "the existing law in New York, as expressed by the Appellate Divisions." *Id.*

[22] *Yonaty*, 945 N.Y.S.2d at 776.

[23] *Id.* The court also affirmed the Supreme Court's dismissal of Yonaty's intentional infliction of emotional distress and prima facie tort claims. *Id.* at 779.

[24] Justices Stein, Garry, and Egan concurred.

[25] *Yonaty*, 945 N.Y.S.2d at 776. Slander is a species of defamation "consist[ing] of the publication of defamatory matter by spoken words, transitory gestures" or other ephemeral forms of publication. RESTATEMENT (SECOND) OF TORTS § 568 (1977).

[26] *Yonaty*, 945 N.Y.S.2d at 777 (citing Mencher v. Chesley, 75 N.E.2d 257, 259 (N.Y. 1947) (discussing whether it was libelous to falsely charge that one is a communist or a communist sympathizer and determining that at that time it was)).

[27] *Id.* at 776–77 (second alteration in original) (quoting Kimmerle v. N.Y. Evening Journal, Inc., 186 N.E. 217, 218 (N.Y. 1933)) (internal quotation mark omitted) (noting accord with Golub v. Enquirer/Star Grp., Inc., 681 N.E.2d 1282, 1283 (N.Y. 1997); Bytner v. Capital Newspaper, Div. of Hearst Corp., 492 N.Y.S.2d 107 (App. Div. 1985), *aff'd*, 492 N.E.2d 1228, 1228 (N.Y. 1986)). Justice

homosexuality are not defamatory; such attitudes would be inconsistent with New York's "well-defined public policy of protection and respect for the civil rights of people who are lesbian, gay or bisexual."[28]

To defend his characterization of New York's culture and public policy, Justice Mercure cited New York's 2011 Marriage Equality Act,[29] passed just two weeks after the trial court order was issued, which recognizes marriages between couples of any gender combination.[30] He also cited section 296 of the New York Executive Law,[31] which prohibits discrimination based on sexual orientation, and earlier New York state court decisions[32] that recognized out-of-state same-sex unions for limited practical purposes.[33] He further pointed to case law from other jurisdictions evincing a "tremendous evolution in social attitudes" toward lesbian, gay, and bisexual people across the United States,[34] including the United States Supreme Court's holding in *Lawrence v. Texas*[35] that lesbian, gay, and bisexual people "are entitled to respect for their private lives."[36] Such respect, he claimed, is inconsistent with the "premise that it is shameful and disgraceful to be described as lesbian, gay or bisexual," which undergirded precedents holding that imputation of homosexuality is defamatory per se.[37] Rejecting that premise, Justice Mercure reversed the Third Department's precedents on false allegations of homosexuality, holding that while these allegations might support actions in defamation per quod,[38] they cannot support actions in defamation per se.[39]

Yonaty v. Mincolla follows a string of judicial decisions in other states demoting the imputation of homosexuality from the short list of

---

Mercure also noted that defamation "necessarily . . . involves the idea of disgrace." *Id.* at 777 (quoting *Bytner*, 492 N.Y.S.2d at 108) (internal quotation marks omitted).

28 *Id.* at 776.

29 N.Y. DOM. REL. LAW § 10-a (McKinney 2012).

30 *Yonaty*, 945 N.Y.S.2d at 778.

31 N.Y. EXEC. LAW § 296 (McKinney 2010).

32 Godfrey v. Spano, 920 N.E.2d 328, 337 (N.Y. 2009) (Ciparick, J., concurring); Dickerson v. Thompson, 897 N.Y.S.2d 298 (App. Div. 2010).

33 *Yonaty*, 945 N.Y.S.2d at 778.

34 *Id.* at 778–79 (citing Stern v. Cosby, 645 F. Supp. 2d 258, 273–75 (S.D.N.Y. 2009); Albright v. Morton, 321 F. Supp. 2d 130, 136–39 (D. Mass. 2004), *aff'd on other grounds*, 410 F.3d 69 (1st Cir. 2005); Hayes v. Smith, 832 P.2d 1022, 1023–25 (Colo. App. 1991); Boehm v. Am. Bankers Ins. Grp., Inc., 557 So. 2d 91, 94 & n.1 (Fla. Dist. Ct. App. 1990); Donovan v. Fiumara, 442 S.E.2d 572, 575–77 (N.C. Ct. App. 1994).

35 539 U.S. 558 (2003).

36 *Yonaty*, 945 N.Y.S.2d at 778 (emphasis omitted) (quoting *Lawrence*, 539 U.S. at 578) (internal quotation marks omitted).

37 *Id.* at 777.

38 Defamation per quod is the complement of defamation per se, consisting of defamation actions that require proof of special damages. *See generally* Earl L. Kellett, Annotation, *Proof of Injury to Reputation as Prerequisite to Recovery of Damages in Defamation Action — Post-*Gertz *Cases*, 36 A.L.R.4th 807 (1985).

39 *Yonaty*, 945 N.Y.S.2d at 779.

particularly damaging statements constituting defamation per se to the residual category of damaging statements actionable as defamation per quod.[40] Although Justice Mercure's opinion characterized the court's departure from precedent primarily as a recalibration of legal doctrine to independently shifting social mores, it also acknowledged that the reversal constituted a form of participation in the cultural shift, justified by normative considerations. Framed as a rejection of the simultaneously descriptive and normative premise that it is "disgraceful to be described as lesbian, gay or bisexual,"[41] the opinion illuminated the court's dual role as observer and participant in a cultural struggle over the place of sexuality in society, throwing defamation law's distinct descriptive and normative aspects into relief.

The threshold inquiry of a defamation case, determining whether the alleged publication is capable of harming the plaintiff's reputation, has been characterized by some courts as a purely descriptive inquiry[42] — a neutral assessment of the import of the alleged publication in light of the relevant community's values, free of any appraisal of those values. Although the interest protected by defamation actions is acknowledged to be an interest in reputation[43] — which inherently implicates value judgment[44] — the pertinent value judgment is that of the plaintiff's community and not that of the court or the legal system.

However, scholars have cast doubt on the descriptive account's empirical accuracy, documenting various ways in which courts normatively patrol the threshold inquiry of defamation law, excluding some value judgments from the analysis and including others.[45] In the most

---

[40] *See* sources cited *supra* note 7.

[41] *Yonaty*, 945 N.Y.S.2d at 777.

[42] *See, e.g.*, Van Wiginton v. Pulitzer Publ'g Co., 218 F. 795, 796–97 (8th Cir. 1914) ("In determining whether the false imputation tends to impair the social standing of a person, or to affect injuriously his opportunities of social intercourse, the customs and standards of society are to be regarded. In other words, society is to be taken as it is, with its recognized prejudices, without determining whether they are well founded in reason or justice."); Spotorno v. Fourichon, 4 So. 71, 71 (La. 1888) ("We are concerned with these social conditions simply as facts. They exist and, for that reason, we deal with them."); *see also* Grant v. Reader's Digest Ass'n, 151 F.2d 733, 734 (2d Cir. 1945) ("A man may value his reputation even among those who do not embrace the prevailing moral standards . . . .").

[43] Rosenblatt v. Baer, 383 U.S. 75, 86 (1966); *see also* Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CALIF. L. REV. 691, 691–92 (1986); *Developments in the Law — Defamation*, 69 HARV. L. REV. 875, 877 (1956).

[44] *See* WEBSTER'S NEW WORLD COLLEGE DICTIONARY 1218 (4th ed. 2000) (defining "reputation" as the "estimation in which a person or thing is commonly held, whether favorable or not").

[45] *See, e.g.*, David Riesman, *Democracy and Defamation: Fair Game and Fair Comment II*, 42 COLUM. L. REV. 1282, 1300 (1942) ("It is apparent that the courts have introduced into the factual question of what is defamatory both their notions as to what ought to be defamatory and their judgments as to what ought to be done in the entire situation before them."). *See generally* Lyrissa Barnett Lidsky, *Defamation, Reputation, and the Myth of Community*, 71 WASH. L. REV. 1 (1996); Post, *supra* note 43.

conspicuous cases of normative patrolling, courts refuse to permit defamation actions simply because they regard the quality attributed to the plaintiff as morally good.[46] More subtly, courts implicitly exercise discretion in identifying the relevant community and characterizing its values.[47] Finally, courts filter community values by rejecting those that are deemed inconsistent with public policy.[48] By means of these devices, courts fuse a descriptive examination of the community's values with a normative assessment of those values, generating a hybrid descriptive and normative defamation inquiry.[49] To prevail in the resulting hybrid inquiry, a plaintiff must convince the court not only that she suffered a reduction in her social status, but also that this reduction in status is one that normatively merits legal redress.[50]

This normative dimension was highly salient in Yonaty's defamation action — so much so that lesbian, gay, and bisexual advocacy organiza-

---

[46] *See, e.g.*, Hallock v. Miller, 2 Barb. 630, 633 (N.Y. Gen. Term. 1848) ("It cannot be maintained that an action of slander will lie for speaking words, which charge an act both legal and praiseworthy, although a loss or injury may be the consequence of the words."); Connelly v. McKay, 28 N.Y.S.2d 327, 329 (Sup. Ct. 1941) (accord); Rose v. Borenstein, 119 N.Y.S.2d 288, 289–90 (City Ct. 1953) (accord).

[47] *See, e.g.*, Saunders v. Bd. of Dirs., WHYY-TV, 382 A.2d 257, 259 (Del. Super. Ct. 1978) (holding that the defendant was not liable in defamation for publishing that the plaintiff, a prisoner, was an informant, since "the statement by defendants was made for general consumption by the public"); *see also* RESTATEMENT (SECOND) OF TORTS § 559 cmt. e (1977) ("The fact that a communication tends to prejudice another in the eyes of even a substantial group is not enough if the group is one whose standards are so anti-social that it is not proper for the courts to recognize them."); Lidsky, *supra* note 45, at 19–20 ("The determination of who constitutes a substantial and respectable minority often hinges on what the judge presumes the community's values are. . . . The necessity of determining whether the community segment is respectable is an open invitation to judges to assess which subgroups within society are or are not worthy of the law's attention and respect. The judge can brand a community as unworthy of respect by either denying its existence or by pronouncing it simply too antisocial for its values to be countenanced."); Post, *supra* note 43, at 737 n.242; John C. Watson, *Defamation by Racial Misidentification: A Study of the Social Tort*, 4 RUTGERS RACE & L. REV. 77, 104–05 (2002); Comment, *Community Standards of Defamation*, 34 ALB. L. REV. 634, 637 (1970).

[48] *See, e.g.*, Polygram Records, Inc. v. Superior Court, 216 Cal. Rptr. 252, 261–62 (Ct. App. 1985); *Connelly*, 28 N.Y.S.2d at 329. Note that public policy considerations impose normative restrictions on the defamation inquiry even though the values espoused in public policy may not be shared by judges who appeal to these values.

[49] *See* Matthew D. Bunker et al., *Not that There's Anything Wrong with that: Imputations of Homosexuality and the Normative Structure of Defamation Law*, 21 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 581, 585 (2011) ("The standard by which [a judge determines a statement's capacity to defame] incorporates both descriptive and normative elements."). *See generally* Lidsky, *supra* note 45; Post, *supra* note 43.

[50] *See* Post, *supra* note 43, at 712–13 ("A defamation trial can . . . be viewed as an arena in which the parties are free to present 'competing interpretations of behavior': the plaintiff contending that the defamation should be explained by the social incompetence and inappropriate behavior of the defendant; the defendant urging that the lack of respect implied by the defamation should be understood as justified by the plaintiff's conduct. The plaintiff's dignity is rehabilitated if the court authoritatively . . . designates the plaintiff as worthy of respect, thereby confirming his membership within the community." (footnote omitted) (quoting Philip Lewis, *Defamation: Repudiation and Encounter*, JAHRBUCH FUR RECHTSSOZIOLGIE UND RECHTSTHEORIE 271, 278 (1976))).

tions filed an amicus brief in support of the defendant, even though her conduct was ostensibly hostile to their mission.[51] And the importance of defamation's normative dimension was not lost on the court. Indeed, the *Yonaty* opinion crystallized the hybrid defamation inquiry by framing its reversal of precedent as a rejection of "the flawed premise that it is shameful and disgraceful to be described as lesbian, gay or bisexual."[52] This premise itself is ambiguous, teetering between descriptive and normative meanings: descriptively, it means that homophobic attitudes are *prevalent*; normatively, it means that they are *proper*. Corroborating the hybrid view of defamation, the court asserted that "prior cases categorizing statements that falsely impute homosexuality as defamatory per se are based upon [this] flawed premise."[53] The court then challenged the premise both on normative and descriptive grounds. Descriptively, the court denied that homophobic attitudes are sufficiently prevalent to support a defamation claim, drawing on statutes and judicial decisions as evidence "of the respect that the people of this state currently extend to lesbians, gays and bisexuals."[54] Normatively, the court denied that homophobic attitudes constitute appropriate grounds for a defamation claim, characterizing these same legal developments and others as "expressing a policy of acceptance" of lesbian, gay, and bisexual people.[55]

The court also emphasized the stigmatic harm that lesbian, gay, and bisexual people suffer when the imputation of homosexuality or bisexuality is characterized as defamation per se, arguing that "such a rule necessarily equates individuals who are lesbian, gay or bisexual with those who have committed a 'serious crime' — one of the four established per se categories."[56] The court found this comparison so disrespectful of les-

---

[51] *Yonaty*, 945 N.Y.S.2d at 777 n.1. Mincolla's "concern" about the "danger" that Yonaty posed to Geller, much like Koffman's "concern for Kara's physical . . . health," Yonaty v. Mincolla, No. 2009-1003, 2011 WL 2237847, at *1 (N.Y. Sup. Ct. June 8, 2011), bespeaks a prejudiced conception of gay and bisexual men as disease vectors. *See* Paula C. Rodríguez Rust, *Bisexuality: The State of the Union*, 13 ANN. REV. SEX RES. 180, 186–87, 190–91 (2002) (tracing the ideological origins of a widespread fear that men who have sex with both men and women "threat[en] public health," *id.* at 190, and serve as a "vector" for transmitting HIV to heterosexual women, *id.* at 191); Christian Klesse, *Shady Characters, Untrustworthy Partners, and Promiscuous Sluts: Creating Bisexual Intimacies in the Face of Heteronormativity and Biphobia*, 11 J. BISEXUALITY 227, 232 (2011) (similar); Miguel A. Muñoz-Laboy & Brian Dodge, *Bisexual Practices: Patterns, Meanings, and Implications for HIV/STI Prevention Among Bisexually Active Latino Men and Their Partners*, 5 J. BISEXUALITY 79, 82 (2005) (reporting that extensive research on the hypothesis that bisexually active men function "as an epidemiological 'bridge'" transmitting AIDS from gay men to straight women has failed to substantiate that hypothesis).

[52] *Yonaty*, 945 N.Y.S.2d at 777.

[53] *Id.*

[54] *Id.* at 778.

[55] *Id.*

[56] *Id.* at 777. Note that two other per se categories — statements that a plaintiff has a "loathsome disease" or that a female plaintiff is "unchast[e]," Liberman v. Gelstein, 605 N.E.2d 344, 347

bian, gay, and bisexual people that it "[could not] be reconciled" with *Lawrence v. Texas*.[57]

Significantly, while the court's descriptive repudiation of that premise was qualified, its normative repudiation was not. The court acknowledged that homophobia still persists among some New Yorkers.[58] Many courts have held that an attitude can support a defamation claim without being held by a majority of the community,[59] which suggests that the court's recognition of homophobia's persistence could have sufficed, descriptively, to support Yonaty's defamation action. Indeed, just four years before *Yonaty*, a federal court applying New York law reached the opposite holding on similar facts. Emphasizing the descriptive aspect of defamation law, that court remarked:

> This Court's decision to include homosexuality in the slander per se category should not be interpreted as endorsing prejudicial views against gays and lesbians. Rather, this decision is based on the fact that the prejudice gays and lesbians experience is real and sufficiently widespread so that it would be premature to declare victory.[60]

Though descriptively, Yonaty likely faced prejudicial views similar to the ones that the plaintiff in this federal case experienced four years earlier, the *Yonaty* court did not allow the persistence of homophobic attitudes to determine the outcome of the case. Emphasizing the normative at the expense of the descriptive, it asserted that "the fact of such prejudice on the part of some does not warrant a judicial holding that gays and lesbians [and bisexuals], merely because of their sexual orientation, belong in the same class as criminals."[61] In its willingness to reach this holding despite continuing prejudice, the *Yonaty* court embraced a hybrid descriptive and normative conception of defamation law.

(N.Y. 1992) — could also be regarded as comparable to being gay, lesbian, or bisexual. After all, these sexual orientations were designated mental illnesses until 1973, *see* Jack Drescher, *Queer Diagnoses: Parallels and Contrasts in the History of Homosexuality, Gender Variance, and the* Diagnostic and Statistical Manual, 39 ARCHIVES SEXUAL BEHAV. 427, 434–35 (2010), and like "unchastity," they transgress traditional sexual norms.

[57] *See Yonaty*, 945 N.Y.S.2d at 777–78.

[58] *See id.* at 779 (acknowledging that "discrimination" against lesbian, gay, and bisexual people still "has not been completely eradicated").

[59] *See, e.g.*, Peck v. Tribune Co., 214 U.S. 185, 190 (1909) ("If [a libelous publication] obviously would hurt the plaintiff in the estimation of an important and respectable part of the community, liability is not a question of a majority vote."); RESTATEMENT (SECOND) OF TORTS § 559 cmt. e (1977) ("A communication to be defamatory need not tend to prejudice the other in the eyes of everyone in the community . . . . It is enough that the communication would tend to prejudice him in the eyes of a substantial and respectable minority . . . .").

[60] Gallo v. Alitalia–Linee Aeree Italiane–Societa per Azioni, 585 F. Supp. 2d 520, 549–50 (S.D.N.Y. 2008) (citation omitted).

[61] *Yonaty*, 945 N.Y.S.2d at 779 (alteration in original) (quoting Stern v. Cosby, 645 F. Supp. 2d 258, 275 (S.D.N.Y. 2009)) (internal quotation marks omitted).