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## A Group's a Group, No Matter How Small: An Economic Analysis of Defamation

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# A Group's a Group, No Matter How Small: An Economic Analysis of Defamation<sup>†</sup>

Alan D. Miller<sup>\*</sup>

Ronen Perry<sup>\*\*</sup>

## *Abstract*

*Consider the following: A Jews-for-Jesus bulletin reports, falsely, that a Jewish woman became “a believer in the tenets, the actions, and the philosophy of Jews for Jesus.” Does this publication constitute defamation? Should defamatoriness be determined in accordance with the views of the general non-Jewish community, with those of the Jewish minority, or with a normative ethical commitment? Our Article aims to provide the answers.*

*Part I demonstrates that the definition of defamatoriness in common law jurisdictions is essentially empirical and distinguishes between the two leading tests—the English test and the American test. Part II.A describes the English, or general community test, whereby a statement is defamatory if considered so by the “right thinking members of the public at large.” Part II.B details the American, or sectorial test, whereby a statement is defamatory if considered so by a substantial and respectable minority. A third possible empirical test, whereby the defamatory*

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<sup>†</sup> With apologies to Dr. Seuss: DR. SEUSS, HORTON HEARS A WHO! 6 (1954).

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*potential of a statement may be tested within a small group, has not been adopted in any jurisdiction.*

*Part III, however, demonstrates that the small group test is an economically preferable option to both the English and American tests. Part III conducts two separate economic analyses of the alternative empirical tests for defamation. First, we study the relationship between the view of the community and the views of the individuals who comprise the community. We show that the defamation cases should be decided according to the unanimity rule: A statement may be considered defamatory only when all individuals in the relevant community consider it so. Because this rule is implausible except in the case of the small group test, it suggests that both the English and American tests lack a solid theoretical foundation. Second, we study the costs and benefits associated with the various tests and find that the American sectorial test is no longer optimal. As a result, we argue that it is preferable to adopt the small group test when deciding cases of defamation.*

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### *I. Introduction*

A Jews for Jesus bulletin publishes a report, falsely implying that a Jewish woman became “a believer in the tenets, the actions, and the philosophy of Jews for Jesus.”<sup>1</sup> Does this publication constitute defamation? What makes a statement defamatory? Should a statement be deemed defamatory if it prejudiced the plaintiff in the eyes of a respectable minority, such as the American-Jewish community? Should a statement be held defamatory only if it prejudiced the plaintiff in the eyes of the average non-Jewish American or the “common mind?”<sup>2</sup> Or should a statement be examined regardless of actual perceptions, through the prism of a normative ethical commitment? This Article aims to provide answers to these questions.

The tort of defamation emerged in common law courts in the sixteenth century and quickly gained in popularity<sup>3</sup>—so much so that according to contemporary scholars, “[N]o area of the law excites more interest, or controversy, than the law of defamation.”<sup>4</sup> In the past fifty years, there has been an explosion of interest in this area as the result of a set of Supreme Court decisions that have imposed additional requirements on plaintiffs to comport with the dictates of the First Amendment.<sup>5</sup>

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1. *Jews for Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1101 (Fla. 2008).

2. *Id.* at 1114.

3. See ROBERT E. KEETON ET AL., *TORT AND ACCIDENT LAW: CASES AND MATERIALS* 1145 (3d ed. 1998) (explaining that libel developed separately from slander in the Star Chamber until common law courts assumed jurisdiction over all tort actions when the Star Chamber was abolished).

4. MARK LUNNEY & KEN OLIPHANT, *TORT LAW: TEXT AND MATERIALS* 704 (4th ed. 2010).

5. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974) (refusing to extend the actual malice standard to private individuals seeking to collect damages for defamatory falsehoods); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 156 (1967) (determining that a public figure may recover damages for defamation if the falsehood poses a “substantial danger to reputation” and arises from the defendant’s “extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers”); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964) (requiring public officials

Unfortunately, as the scholarly debate has shifted to address the new constitutional requirements (falsity and fault), the long-standing elements of the common law tort of defamation have been neglected.<sup>6</sup> Although our analysis is not entirely disconnected from the modern changes in defamation law, our focus is on one of the traditional common law requirements.

The first and primary element of this cause of action is that the defendant's statement be defamatory,<sup>7</sup> that is, potentially harmful to the plaintiff's reputation. A statement is defamatory if it is "calculated to injure the reputation of another, by exposing him to hatred, contempt, or ridicule"<sup>8</sup> or, more broadly, if it "tend[s] to lower the plaintiff in the estimation" of others,<sup>9</sup> even if the statement is not actually believed or if it does not disclose previously unpublicized information so that no harm is caused.<sup>10</sup>

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who bring a libel action against critics of their official conduct to prove that the defendant acted with actual malice).

6. See Lyrissa Barnett Lidsky, *Defamation, Reputation, and the Myth of Community*, 71 WASH. L. REV. 1, 3–4 (1996) ("For the past thirty-one years, scholars have largely neglected some of defamation's most basic inquiries, choosing to bask in the 'sunny warmth of the first amendment' . . ." (quoting William W. Van Alstyne, *First Amendment Limitations on Recovery from the Press*, 25 WM. & MARY L. REV. 793, 793 (1984))).

7. See RESTATEMENT (SECOND) OF TORTS § 558 (1977) (listing the elements required to establish a cause of action for defamation).

8. *Parmiter v. Coupland*, (1840) 151 Eng. Rep. 340 (Exch.) 342; 6 M. & W. 105, 108; see also *Thornton v. Tel. Media Grp. Ltd.*, [2010] EWHC (QB) 1414, [28] (Eng.), available at <http://www.bailii.org/ew/cases/EWHC/QB/2010/1414.html> (quoting *Parmiter*, 151 Eng. Rep. at 342 as the "classic definition" of defamatory).

9. *Sim v. Stretch*, [1936] 2 All Eng. Rep. 1237 (H.L.) 1240 (Eng.); see also *Thornton*, [2010] EWHC (QB) 1414 [28] (recognizing that *Sim* broadened the classic definition of defamation to encompass views beyond a specific person or class of persons); RESTATEMENT (SECOND) OF TORTS § 559 (1977) (endorsing the use of community views to determine a statement's defamatory character); Lidsky, *supra* note 6, at 12–13, 44 (recognizing that a defamatory statement must have a "tendency to harm reputation").

10. See RESTATEMENT (SECOND) OF TORTS § 559 cmt. d (1977) (establishing that a statement's defamatory character does not depend on the presence of actual harm, but instead upon the statement's potential to harm reputation). There is a difference between determining whether a statement is defamatory, which does not require harm, and determining whether a cause of action arises, because some types of defamation are actionable only if harm is established. Lidsky, *supra* note 6, at 12–13, 44.

The inquiry involves two cumulative steps.<sup>11</sup> In the interpretive step, the court must determine exactly what the statement attributes to the plaintiff.<sup>12</sup> In the evaluative step, the court must determine whether the statement, as properly interpreted and understood, has the tendency to harm the plaintiff's reputation.<sup>13</sup> This Article focuses on the evaluative component.<sup>14</sup> In particular, we ask a very specific question: should the potential effect on the plaintiff's estimation be tested through the eyes of society at large or through those of a particular segment of the community to which the plaintiff belongs?<sup>15</sup> If the latter, should the law differentiate between segments based on their size and importance?<sup>16</sup> Of course, this type of inquiry assumes that the defamatory character of a statement, or "defamatoriness,"<sup>17</sup> is determined by the actual perceptions of people within a legally relevant group (an empirical test), not through the lens of a judicial ethical commitment (a normative test).<sup>18</sup>

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11. See Lidsky, *supra* note 6, at 11 (distinguishing the two stages); J.M. Burchell, *The Criteria of Defamation*, 91 S. AFR. L.J. 178, 178 (1974) (same).

12. See Lidsky, *supra* note 6, at 11 (describing the main inquiry in the interpretive stage as "whether the words [used by the defendant] will bear the 'spin' that plaintiff is seeking to put on them" (quoting MARC A. FRANKLIN & DAVID A. ANDERSON, *MASS MEDIA LAW* 200 (5th ed. 1995))).

13. See *id.* (explaining that the evaluative step considers the community's attitudes and beliefs to assess the statement's tendency to harm).

14. However, our theoretical analysis may have some bearing on the interpretive step as well because interpretation may raise the question of "meaning in the eyes of whom?"

15. See Michael J. Tommaney, *Community Standards of Defamation*, 34 ALB. L. REV. 634, 641 (1970) ("The problem of determining what segment of the community should be used as the standard for judging whether a communication is defamatory . . . [has] been vexing to the courts.").

16. A related question is whether an empirical test should be subject to external public policy constraints. See Note, *Developments in the Law of Defamation*, 69 HARV. L. REV. 875, 886-87 (1956) (discussing public policy constraints on empirical tests).

17. See Lidsky, *supra* note 6, at 9 (referring to whether a statement is defamatory or not as the "defamatoriness inquiry").

18. See *id.* ("[T]he underlying question is whether the defamatoriness inquiry should focus on actual community values and prejudices or whether, as it currently does, the inquiry should impose normative restrictions on what values it will recognize.").

The Article discusses these matters from a novel theoretical perspective. Yet, the theory is not developed in the abstract. We aspire to settle real and practically significant legal dilemmas. Our starting point must therefore be doctrinal. We will show that in Anglo-American caselaw, two empirical tests, subject to some normative threshold, constitute the dominant competing standards for defamatoriness. The critical appraisal of these tests will lead to a constructive proposal. While our arguments are relevant to all common law jurisdictions and beyond, we focus primarily on the United States and therefore discuss the relevant developments in American constitutional law.

Part II systematically analyzes Anglo-American caselaw.<sup>19</sup> There is no consensus among common law jurisdictions concerning the proper test for determining whether a statement is defamatory.<sup>20</sup> It is prudent to maintain, however, that the American position is somewhat different from the traditional English one.<sup>21</sup> Part II thus distinguishes between the two leading tests for defamation.<sup>22</sup> Subpart A shows that many courts in England and in the British Commonwealth, broadly defined, have embraced the notion that the views of the community as a whole should be considered (hereinafter “the general community test”).<sup>23</sup> Subpart B shows that the leading view in the United States has been that the defamatory potential may be empirically tested within a specific group, namely, a substantial and respectable minority (hereinafter “the sectorial test”).<sup>24</sup> A third

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19. See *infra* Part II (incorporating the approaches taken by Irish and Australian courts into the analysis of American and English case law).

20. Cf. Roy Baker, *Defamation and the Moral Community*, 13 DEAKIN L. REV. 1, 4 (2008) (explaining that Australia’s common law offers various tests for assessing a statement’s defamatory character).

21. See Tommaney, *supra* note 15, at 635 (distinguishing between the English courts’ focus on the general community to assess a statement’s defamatory character from the “important and respectable group in the community” utilized by the U.S. courts).

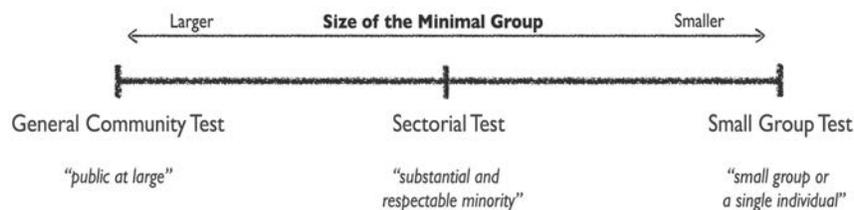
22. See *infra* Part II (recognizing that American courts utilized the traditional English test until the sectorial test arose as the prevailing approach in the early twentieth century).

23. See *infra* Part II.A (explaining that, in addition to empirical data, the general community test utilizes a normative threshold that assesses a statement’s defamatory character according to prevailing public policy).

24. See *infra* Part II.B (stating that American courts generally eschew

possible approach, whereby the defamatory potential of a statement may be tested within a small group (hereinafter “the small group test”), has not been adopted in any jurisdiction, and will not be presented in Part II. We mention it here for two reasons. First, we wish to provide a fuller picture of the available alternatives. Each of the three empirical definitions sets a different size of the minimal group in which the impact of the statement may be tested, and each can be represented as a point or a range on a continuum.<sup>25</sup> Second, the Article ultimately advocates the third approach. The fact that it is a neglected and unexplored alternative highlights this Article’s contribution to legal theory. Lastly, for the sake of completeness, subpart C discusses purely normative (non-empirical) tests for defamation, while recognizing that they are not common.<sup>26</sup>

Figure 1



Part III provides two economic analyses of the competing tests for defamation.<sup>27</sup> It first connects the analysis in Part II with a theoretical argument employed in our earlier papers on the role of community standards in tort and contract law.<sup>28</sup> The

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empirical data to establish the viewpoints of the relevant group and instead favor utilizing common knowledge of the group’s values).

25. *Infra* Figure 1.

26. *See infra* Part II.C (distinguishing the purely normative test’s concentration on subjective ethical principles from the general community and sectorial tests’ concern for potential harm to the plaintiff’s reputation).

27. *See infra* Part III (employing the community standards model and the cost–benefit analysis to demonstrate the theoretical and practical implications of each test).

28. *See generally* Alan D. Miller & Ronen Perry, *Good Faith Performance*, 98 IOWA L. REV. 689 (2013) [hereinafter Miller & Perry, *Good Faith*] (critiquing the use of community standards to assess good faith performance between contracting parties); Alan D. Miller & Ronen Perry, *The Reasonable Person*, 87

theoretical argument can be summarized as follows: First, community standards are derived from individual standards. Second, the derivation method should (a) respect unanimous agreements, (b) change with individual beliefs, (c) treat individuals equally, and (d) not make *ex ante* distinctions between potentially defamatory statements. Third, it should always be possible to make a nondefamatory statement. We then use a theorem from a branch of economics known as social choice theory to show that, as a consequence, the community standard should consider a statement to be defamatory if, and only if, all individuals in the community consider it so.<sup>29</sup> We argue that this theorem poses a serious problem for the application of community standards in general. However, in the case of defamation law, there is an important twist: the problem is much more severe in the case of the English general community standard than in that of the American sectorial standard. In fact, if the sectorial standard is taken to its logical extreme, so that a statement only need be considered defamatory among a very small (and possibly singular) group of people, then the problem posed by this theorem disappears entirely.

Next, Part III offers a cost-benefit analysis of the alternatives.<sup>30</sup> It shows that there are reasons, separate from our theorem, to prefer the American sectorial test to the English general community test, as well as to prefer a small group test to both. A particularly clear example is what we call the strategic action problem.<sup>31</sup> Many individuals value their reputation within a very small group, such as their work colleagues or relatives, or among specific individuals, such as their employer or their

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N.Y.U. L. REV. 323, 324 (2012) [hereinafter Miller & Perry, *Reasonable Person*] (advancing a reasonable person standard in tort law based upon “normative ethical commitment[s]” rather than the “empirically observed practice or profession”).

29. See *infra* Part III.A (addressing the theoretical problems that arise from quantitative constraints encompassed within the general community and sectorial tests).

30. See *infra* Part III.B (analyzing how different sizes of the relevant community under each test pose separate practical costs).

31. See *infra* Part III.B (recognizing that, under the strategic action problem, the harm to the plaintiff arises from the value placed on the relevant community rather than the size of such community).

spouse. A person who wishes to harm one of these individuals may strategically disseminate a false statement that is defamatory only within the relevant small group, without fear of liability under either of the American or English tests. This problem is more severe under the English test; in that case a person may strategically disseminate a false, defamatory statement only within a substantial and respectable minority without fear of legal consequence.

Despite these difficulties, we do not claim that American courts should have adopted the small group test. It too, has its costs: publishers do not always know, and cannot be expected to know, whether a statement is defamatory within every small group that exists in a large and heterogeneous society. Liability in this case could have a chilling effect, leading to a decrease in the quantity and quality of published material.<sup>32</sup> Consequently, we do not criticize the choice of American courts to adopt the sectorial test. Admittedly, the sectorial test suffers from both the possibility of strategic action and the chilling effect. However, the strategic action problem is much less severe than in the case of the general community test, and the chilling effect is much less severe than in the case of the small group test. Within the constraints of common law defamation, this choice may have constituted the optimal tradeoff between these two concerns.

American defamation law has changed substantially since the adoption of the sectorial test. The most important change, for our purposes, is the fault requirement established in *Gertz v. Robert Welch, Inc.*<sup>33</sup> We argue that *Gertz* should be interpreted as allowing liability only if the defendant was aware, or had reason to be aware, that the statement was defamatory.<sup>34</sup> Under this interpretation, the fault requirement counterbalances the chilling

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32. See *infra* Part III.B (establishing that the chilling effect encompasses both the risk of defamation liability and the costs required to assess a statement's potentially defamatory character).

33. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974) ("We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.").

34. This position is consistent with the RESTATEMENT (SECOND) OF TORTS § 580B (1977).

effect. As a result of this change, the sectorial test is no longer optimal. We show that it would be preferable to adopt the small group test because it is consistent with the goals of current defamation law, it is easier to apply in difficult cases, and it is economically efficient.

## *II. The Competing Theories*

### *A. The General Community Test*

#### *1. The Principle*

According to the first theory of defamation, which we refer to interchangeably as the general community test or the English position, a statement is defamatory if considered so by the general community.<sup>35</sup> While this definition is a slight oversimplification of contemporary legal reality in England, as we demonstrate below, it captures a significant portion of the traditional English stance. One of the most renowned enunciations of the general community test may be found in *Tolley v. J.S. Fry & Sons, Ltd.*<sup>36</sup> The defendant, a chocolate manufacturer, advertised its products in national newspapers.<sup>37</sup> The ad included a caricature showing the plaintiff, a famous amateur golfer, and his caddie carrying the defendant's chocolate.<sup>38</sup> The plaintiff brought an action for defamation, contending that the ad implied that "he had prostituted his reputation as an amateur golf player for advertising purposes" and "had been guilty of conduct unworthy of his status as an amateur golfer."<sup>39</sup> Witnesses for the plaintiff testified that if an amateur golfer participated in advertising, his reputation as an amateur would be damaged, and his membership in any

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35. See Tommaney, *supra* note 15, at 635 ("The rule in England is that the communication in question must tend to defame the plaintiff in the eyes of the general community, . . . rather than in the eyes of any particular segment of the community.").

36. [1930] 1 K.B. 467 (Eng.), *rev'd*, [1931] A.C. 333 (H.L.).

37. *Id.* at 467.

38. *Id.* at 468.

39. *Id.* at 468, 479, 483.

reputable club would be revoked.<sup>40</sup> The Court of Appeal of England established that a statement is not defamatory even if it affects the plaintiff's reputation in the eyes of a section of the community, such as amateur athletes, unless it amounts to "disparagement of his reputation in the eyes of right thinking men generally" or "in the eyes of the average right thinking man."<sup>41</sup>

The *Tolley* doctrine seems to have two components: an empirical test—focusing on the views of the general community, and some sort of a normative threshold ("right thinking," "reasonable," etc.). The interplay between the two components has generated discussion and some controversy in caselaw and academic literature, but courts still rely, at least de jure, on the judgments of society at large to determine what constitutes a defamatory statement. Accordingly, one of England's leading treatises on the subject deduced from *Tolley* that "[t]he views of the community as a whole must be considered; an imputation of conduct which is merely distasteful or objectionable according to the notions of certain people is not defamatory."<sup>42</sup>

A relatively recent authority to this effect is *Arab News Network v. Al Khazen*,<sup>43</sup> which interestingly corresponds with contemporary events in Syria. The plaintiffs were a television news company based in London and broadcasting in Arabic (ANN), and its owner, the nephew of former Syrian president Hafez al-Assad.<sup>44</sup> The defendants were the former editor in chief and the publisher of a daily newspaper written in Arabic and published in London.<sup>45</sup> An opinion editorial in this newspaper stated, inter alia, that the first plaintiff, run by the second

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40. *Id.* at 469.

41. *Id.* at 479; see also *Sim v. Stretch*, [1936] 2 All Eng. Rep. 1237 (H.L.) 1240 (Eng.) ("[W]ould the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?").

42. PHILIP LEWIS, *GATLEY ON LIBEL AND SLANDER* 23 (8th ed. 1981); see also Lidsky, *supra* note 6, at 16 ("British courts . . . [resort to] the general consensus of society . . .").

43. [2001] EWCA (Civ.) 118 (Eng.), available at <http://www.bailii.org/ew/cases/EWCA/Civ/2001/118.html>.

44. *Id.* at [2].

45. *Id.*

plaintiff, “has taken up a line vis-à-vis peace negotiations [with Israel] different from the official Syrian line, to say the least;” additionally, “[the second plaintiff] has always spoken as an opposition” and “his television station in dealing with Egypt has sought writers and journalists known for being a minority in Egyptian political thinking, who call for truce negotiations with Israel, and make contacts with it” beyond the limits drawn by the Egyptian government.<sup>46</sup> The editorial concluded with the need to protect the Arab cause from “American and Israeli schemes contrived together with weak people.”<sup>47</sup> The plaintiffs brought an action for defamation, arguing that they were portrayed as “willing tools or agents” of Israel and the United States “in their schemes to undermine the pan-Arab cause.”<sup>48</sup> ANN also argued that its political objectivity and neutrality had been challenged.<sup>49</sup>

Alleging that a person or a news network supports peace negotiations between Israel and the Arab world could not be considered defamatory by the average Briton. The question, then, was whether a statement could be considered defamatory if it prejudiced the plaintiff “amongst part of society, such as the Arab or Arab-speaking community [in England], rather than amongst society generally.”<sup>50</sup> Based on *Tolley*, the first instance responded in the negative.<sup>51</sup> The Court of Appeal concluded that the reference to “American and Israeli schemes contrived together with weak people” did not allude to the plaintiffs, but to the second plaintiff’s father and his associates,<sup>52</sup> and that while the editorial disapproved of ANN’s presentation of opposition views, it did not allege lack of impartiality.<sup>53</sup> Thus, it was unnecessary to determine whether the defamatory nature of a statement should “be judged by the reaction of ordinary reasonable people in our society as a whole or by that of such people within a

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46. *Id.* at [6].

47. *Id.*

48. *Id.* at [7].

49. *Id.* at [7], [17].

50. *Id.* at [14].

51. *Id.*

52. *Id.* at [21]–[23].

53. *Id.* at [25]–[27].

particular community within that society.”<sup>54</sup> Nonetheless, the court opined in obiter that there are considerable difficulties in departing from the general community test, which had been endorsed in “a long series of powerful authorities.”<sup>55</sup> Thus, *Tolley* is still in force in England, at least according to some.<sup>56</sup>

The general community test is also manifested in other common law jurisdictions.<sup>57</sup> For example, in the Australian case of *Reader’s Digest Services Proprietary Ltd. v Lamb*,<sup>58</sup> the defendants published a book chapter implying that the plaintiff, the editor of *The Sun*, exploited a personal friend’s tragedy and trust to secure a sensational story in violation of journalistic ethical standards.<sup>59</sup> Witnesses for the plaintiff addressed the possible impact of this incident on the plaintiff’s reputation among journalists.<sup>60</sup> The High Court of Australia explained that in determining whether a statement is defamatory, the court relies on the standards by which hypothetical referees would evaluate the character of the imputation.<sup>61</sup> These hypothetical referees “share a moral or social standard . . . [which is] common to society generally.”<sup>62</sup> The court emphasized that the defamatory nature of a statement “is ascertained by reference to general community standards, not by reference to sectional attitudes.”<sup>63</sup> Moreover, it is for the jury to give effect “to a standard which they consider to accord with the attitude of society generally.”<sup>64</sup> An

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54. *Id.* at [30].

55. *Id.*

56. *See, e.g.,* Thornton v. Tel. Media Grp. Ltd., [2010] EWHC (QB) 1414, [81], [2011] 1 W.L.R. 1985 (Eng.), available at <http://www.bailii.org/ew/cases/EWHC/QB/2010/1414.html> (stating that the *Tolley* definition does not encompass the threshold of seriousness required to assess a statement’s defamatory character).

57. *See* Burchell, *supra* note 11, at 178, 180, 182–83 (contending that the “right thinking people generally” test was adopted in South Africa).

58. (1982) 150 CLR 500 (Austl.), available at <http://www.austlii.edu.au/au/cases/cth/HCA/1982/4.html>.

59. *Id.* at 502–03.

60. *Id.* at 504.

61. *Id.* at 506.

62. *Id.*

63. *Id.* at 507.

64. *Id.* at 506. However, while evidence of the attitude of particular groups

Australian commentator explained that in establishing which standards are “common to society generally,” one must “consider the prevailing values of a geographically determined population, taking that population as a whole”; in particular, one needs to look for a consensus, and if none exists, opt for the majority view or the average viewpoint, both representing the general community.<sup>65</sup> Although this position has not been endorsed by all Australian courts,<sup>66</sup> it is apparently favored by most Australian judges and lawyers.<sup>67</sup>

A nineteenth-century Irish case also supports this position. In *Mawe v. Pigott*,<sup>68</sup> the plaintiff, a parish priest, was attacked in the defendant’s newspaper for denouncing the “Fenian conspirators” (supporters of Irish independence), and was allegedly exposed to hatred and contempt by people who considered him an informer or an accomplice of the British prosecution.<sup>69</sup> The court assumed that the plaintiff could be exposed to hatred among such people, but held that “[t]he very circumstances which will make a person be regarded with disfavour by the criminal classes will raise his character in the estimation of right-thinking men. We can only regard the estimation in which a man is held by society generally.”<sup>70</sup> Seemingly, this was a politically colored, over-inclusive application of the general community test. It is reasonable to assume that opposing the Irish independence movement could be seen in a negative light by the general Irish population at that time.<sup>71</sup>

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of classes is irrelevant and inadmissible for the purpose of determining whether a statement is defamatory, it is relevant for ascertaining harm once a defamatory statement is proven. *Id.* at 507–08.

65. Baker, *supra* note 20, at 7, 8, 10.

66. *Infra* notes 153–60 and accompanying text.

67. See ROY BAKER, DEFAMATION LAW AND SOCIAL ATTITUDES: ORDINARY UNREASONABLE PEOPLE 61 (2011) (explaining that *Lamb* lays down “the more influential” test); Baker, *supra* note 20, at 5, 8 (same).

68. [1869] 4 I.R. (Ir.).

69. *Id.* at 54–55.

70. *Id.* at 62.

71. See PATRICK STEWARD & BRYAN MCGOVERN, THE FENIANS: IRISH REBELLION IN THE NORTH ATLANTIC WORLD, 1858–1876, at xvi (2013) (discussing the reasons why the Fenian movement was unable to garner enough support to

The general community test has been invoked on several occasions in American caselaw, but as we demonstrate below, it has not been the dominant test for at least a century.<sup>72</sup> First, it can be found in relatively old cases. For example, the plaintiffs in *Lyman v. New England Newspaper Publishing Co.*,<sup>73</sup> a husband and wife, brought an action against the defendant-publisher for libel after its newspaper printed a story implying that they were having marital difficulties which would naturally lead to divorce or legal separation.<sup>74</sup> The court opined that the “standing in the community” of a successfully married couple is higher than that of a couple whose marriage had failed; this is the rule that “people in general” apply to the marriages of others.<sup>75</sup> Thus, publishing that a husband and wife ceased to live together in harmony injured their reputation.<sup>76</sup> The relevant position was that of the public at large. We can speculate, however, that given the prevailing views in the 1930s, applying a sectorial test in such a case would have generated the same outcome.

Second, the general community test has been invoked in more recent cases to refute the assertion that a particular statement was defamatory per se without precluding determination that it was defamatory per quod. In *Hayes v. Smith*,<sup>77</sup> the plaintiff, a high school teacher, alleged that the defendants told her supervisor, the superintendent, that she was a homosexual.<sup>78</sup> In refusing to classify this statement as slander per se the court held that “there is no empirical evidence in this record demonstrating that homosexuals are held by society in such poor esteem. Indeed, it appears that the community view toward homosexuals is mixed.”<sup>79</sup> Thus, the “plaintiff must prove

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establish Irish independence).

72. See *infra* text accompanying notes 73–83 (demonstrating that the general community test has been used in a supplemental role by courts, and has not been relied on as the determinative test).

73. 190 N.E. 542 (Mass. 1934).

74. *Id.* at 542.

75. *Id.* at 544.

76. *Id.*

77. 832 P.2d 1022 (Colo. App. 1991).

78. *Id.* at 1023.

79. *Id.* at 1025.

that the statements, in the context in which they were made, were defamatory [slanderous per quod] and that they in turn caused her injury.”<sup>80</sup> In *Stern v. Cosby*,<sup>81</sup> the court similarly held that imputing homosexuality was not defamatory per se.<sup>82</sup> The court concluded that the “current of contemporary public opinion” does not support the notion that New Yorkers view gays and lesbians as shameful or odious,” relying inter alia on opinion polls whereby a clear majority of New York residents supported same-sex marriage, and an even greater majority supported civil unions.<sup>83</sup>

Because the general community test is essentially an empirical one, it is sensitive to time and place. Public opinion may vary from time to time and across jurisdictions, even within a specific legal tradition.<sup>84</sup> Thus, for example, while calling a man “Papist” was not deemed defamatory in England at the time of King James I,<sup>85</sup> it was held defamatory during the reign of King Charles II, following the restoration of the Church of England as an exclusive national church.<sup>86</sup> Likewise, while referring to an American citizen as a Loyalist shortly after the American Revolutionary War could be deemed defamatory in the United States, it was presumably not considered defamatory in England or in Canada.

One criticism that can be leveled at the general community test is that even at a certain time and place, “[n]o conduct is hated by all.”<sup>87</sup> As one commentator noted, “a community could never unanimously agree on the praiseworthiness or the

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80. *Id.* at 1026.

81. 645 F. Supp. 2d 258 (S.D.N.Y. 2009).

82. *Id.* at 275–76.

83. *Id.* at 274.

84. See Burchell, *supra* note 11, at 178 (“[T]he defamatory content of words may vary with the temper of times and in accordance with the prevailing social and moral views.”).

85. See *Ireland v. Smith*, (1611) 123 Eng. Rep. 633 (C.P.) 633 (“[F]or this word Papist no action will lie.”).

86. See *Roe v. Clargis*, (1684) 87 Eng. Rep. 15 (K.B.) 15–17 (stating that calling someone in a public office a Papist is an actionable offense); *Walden v. Mitchell*, (1690) 86 Eng. Rep. 431 (K.B.) 431 (“To call a man a Papist . . . is not actionable unless spoken of a bishop.”).

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

blameworthiness of any description by which a man might be characterized.”<sup>88</sup> A straightforward response might be that in applying a general community test, one need not seek consensus and may be satisfied with a majority or an average person, both representing the general community in some sense.<sup>89</sup> However, this shift is exactly the one that our theoretical framework rejects. We will explain why these versions of the general community test are theoretically unsound in Part III.<sup>90</sup> Moreover, relying on a majority opinion or on the average person to determine whether a statement is defamatory may be practical only in relatively homogenous societies, as England once was.<sup>91</sup> It may take the sting out of defamation law in diverse, multicultural, or immigrant societies—such as that of the United States. Attributing a certain characteristic or conduct may not prejudice a person in the eyes of a majority of the general American population or an average American, but may defame him or her among members of a relevant segment of society.<sup>92</sup>

## 2. *The Qualitative Qualification*

The traditional English test, which relies on empirical observations, at least *de jure*, consists of a normative constraint. A statement is defamatory if considered so by the general

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88. Note, *With How Many People Must a Writing Have a Tendency to Disgrace the Plaintiff to Be Actionable*, 58 U. PA. L. REV. 44, 46 (1909) [hereinafter *Disgracing the Plaintiff*].

89. See *supra* note 65 and accompanying text (describing a majoritarian approach to the general community test in which the average person would be the standard for the community).

90. See *infra* Part III.A.1 (determining the empirical results from the general community test are negative and that this negativity outweighs the unanimity the general community test provides).

91. See David Riesman, *Democracy and Defamation: Fair Game and Fair Comment II*, 42 COLUM. L. REV. 1282, 1300–01 (1942) (discussing homogeneity in England); Burchell, *supra* note 11, at 184 (explaining that the general community test fits England, where the population is relatively homogeneous).

92. See Lidsky, *supra* note 6, at 8, 41, 43, 49 (comparing homogenous and heterogeneous societies, arguing that the homogenous community is a myth); Burchell, *supra* note 11, at 184 (arguing that heterogeneity in South Africa calls for replacing the general community test with a sectorial test).

community, taking into account the views of “right thinking” people. While it is possible to treat “right thinking” as synonymous with “ordinary” or “average,” adding no normative dimension to the empirical test,<sup>93</sup> this is not the dominant interpretation of this term. “Right thinking” is considered the opposite of “wrong thinking,” that is, ethically constrained.<sup>94</sup> Put differently, the fact that a person’s reputation may be injured in the eyes of the general community is important but inconclusive. The court will pay no heed to a community standard if it does not comply with the normative threshold.

But how should this threshold be defined? On the one hand, the normative constraint must be a limited one because subjecting the empirical component to an all-pervasive and highly demanding ethical commitment might practically nullify the former. Consequently, it may leave real and substantial harm to one’s reputation without redress.<sup>95</sup> On the other hand, excluding only the judgments of the depraved and the lunatic might take the sting out of the normative constraint. Thus, in practice, courts rarely override the community standard, and when they do so it is usually because the commonly held view seems clearly contrary to public policy.<sup>96</sup>

Overriding an empirical conclusion on the basis of public policy seems more likely under the American sectorial test discussed below because it should be easier for a court to reject the views of eccentric minorities than to reject commonly held views. Yet one can imagine cases in which a court concludes that the general community standard is so morally unacceptable that it should be disregarded. Racial prejudice may serve as a good example. Whereas associating a person with a racial minority

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93. This was apparently the case in South Africa in the 1970s. See Burchell, *supra* note 11, at 180, 182 (discussing the fact that in South Africa during the 1970s, right thinking was synonymous with average, or ordinary).

94. *Id.* at 180–81.

95. See Lidsky, *supra* note 6, at 22–23, 39 (discussing the informant case and explaining that harm exists).

96. See *infra* notes 100–10 and accompanying text (describing cases in which the Georgia Court of Appeals ignored the community standards of racial segregation and white supremacy in favor of public policies supporting desegregation and racial homogeneity).

would not be deemed defamatory by the general community today, the social and political climate was quite different not long ago. In the early twentieth century, referring to a Caucasian individual as a “negro” was held defamatory in several jurisdictions. In *May v. Shreveport Traction Co.*,<sup>97</sup> the plaintiff, a Caucasian woman, was classified as a “negro” by the streetcar conductor and sent to the seats reserved for “negro passengers.”<sup>98</sup> The plaintiff contended that she was humiliated, and the court concluded, relying on prevailing “social habits, customs, and prejudices,” that “to charge a white person, in this part of the world, with being a negro, is an insult, which must, of necessity, humiliate, and may materially injure, the person to whom the charge is applied.”<sup>99</sup>

Later on, courts began to challenge the defamatory nature of statements concerning race. To the extent that this was done while racial segregation was still the social norm, the conceptual tool was reference to public policy.<sup>100</sup> Consider *Watkins v. Augusta Chronicle Publishing Co.*,<sup>101</sup> decided by the Court of Appeals of Georgia in 1934. The defendant’s newspaper published an article stating that the plaintiff, a candidate for the office of

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97. 53 So. 671 (La. 1910).

98. *Id.* at 672, 674.

99. *Id.* at 674; *see also* *Spotorno v. Fourichon*, 4 So. 71, 71 (La. 1888) (“Under the social habits, customs, and prejudices prevailing in Louisiana, it cannot be disputed that charging a white man with being a negro is calculated to inflict injury and damage.”); *Flood v. News & Courier Co.*, 50 S.E. 637, 639 (S.C. 1905) (“To call a white man a negro, affects the social status of the white man so referred to.”); *Bowen v. Indep. Publ’g Co.*, 96 S.E.2d 564, 566 (S.C. 1957) (“[T]o publish in a newspaper of a white woman that she is a Negro . . . in view of the social habits and customs deep-rooted in this State, such publication is calculated to affect her standing in society and to injure her in the estimation of her friends and acquaintances.”); Haven Ward, “*I’m Not Gay, M’Kay?*”: *Should Falsely Calling Someone a Homosexual Be Defamatory?*, 44 GA. L. REV. 739, 749–50 (2010) (“[I]t was defamatory as a matter of law to misidentify a white person as black.”). *But see* *Williams v. Riddle*, 140 S.W. 661, 664–65 (Ky. 1911) (finding that referring to a white person as a negro is not actionable per se, and that in the absence of a special damage caused by the statement there is no cause of action at all).

100. *See* Burchell, *supra* note 11, at 181 (stating that if prevailing views change, the community standard changes, and there is no need to resort to public policy to overcome racial perception).

101. 174 S.E. 199 (Ga. Ct. App. 1934).

sheriff of the municipal court of Augusta, was endorsed by the African-American community in the city.<sup>102</sup> Allegedly, this was a death blow to his candidacy in a society that adhered to “white supremacy.”<sup>103</sup> Still, the court was unwilling to find defamatory the statement that a candidate was endorsed by a particular racial group.<sup>104</sup> It explained that “[n]o man is worthy of holding office in this or any other state who does not purpose in his heart to deal fairly and justly with all men, irrespective of race, color, or creed. All right thinking men covet the good will and esteem of all men.”<sup>105</sup> In *Thomason v. Times-Journal, Inc.*,<sup>106</sup> the plaintiff brought an action for defamation against a newspaper that published an obituary notice erroneously stating that she was deceased.<sup>107</sup> Also, while the plaintiff was white, the obituary listed a funeral home primarily serving black people.<sup>108</sup> The court relied on the Supreme Court’s decision in *Palmore v. Sidoti*,<sup>109</sup> opining that while racial and ethnic prejudices still exist in practice, the law cannot, directly or indirectly, give them effect.<sup>110</sup> We emphasize that as common perceptions about race change, resorting to public policy is no longer necessary to preclude actions for defamation based on false imputation of race.

In a similar manner, a court may decide that homophobes are not right-thinking persons for the purposes of defamation law, even if homophobia is a prevalent social norm, “on the basis that disparagement of homosexuals has no sound moral foundation.”<sup>111</sup> In the past, courts commonly held that false

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102. *Id.* at 200.

103. *Id.*

104. *Id.* at 201.

105. *Id.*

106. 379 S.E.2d 551 (Ga. Ct. App. 1989).

107. *Id.* at 552.

108. *Id.* at 553.

109. 466 U.S. 429 (1984).

110. *Id.* at 433; *see also* *Polygram Records, Inc. v. Superior Court*, 216 Cal. Rptr. 252, 261–62 (Cal. Ct. App. 1985) (relying on *Palmore* to the same effect); *Burchell*, *supra* note 11, at 181 (explaining that while calling a white person “Hottentot” was empirically defaming, the right-thinking person is free from racial prejudice and would not consider it defamatory).

111. *Baker*, *supra* note 20, at 12; *see also* Anthony Michael Kreis, *Lawrence Meets Libel: Squaring Constitutional Norms with Sexual-Orientation*

imputation of homosexuality was defamatory per se. Many now reject this view on the basis of either actual changes in social attitudes or public policy, although they still allow actions for defamation per quod.<sup>112</sup> Consider *Yonaty v. Mincolla*,<sup>113</sup> in which the defendant, through a third-party defendant, told the plaintiff's girlfriend that he was gay, thereby causing "the deterioration and ultimate termination of [their] relationship."<sup>114</sup> While the court found that statements falsely imputing homosexuality were previously held defamatory per se based on community standards,<sup>115</sup> it opined that these decisions were inconsistent with current public policy.<sup>116</sup> The prior cases hinged on the flawed premise that it was shameful and disgraceful to be described as gay.<sup>117</sup> Yet, "[g]iven this state's well-defined public

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*Defamation*, 122 YALE L.J. ONLINE 125, 138–40 (2012), [www.yalelawjournal.org/images/pdfs/1112.pdf](http://www.yalelawjournal.org/images/pdfs/1112.pdf) (arguing that such claims must be denied); Ward, *supra* note 99, at 742 ("Courts should not give effect to homophobia by holding such statements defamatory because it sanctions and endorses homophobic views."); *id.* at 743 ("In the case of misidentification of someone as homosexual, public policy considerations outweigh the potential harm to the plaintiff of not allowing recovery because courts should not sanction or endorse homophobia."); *id.* at 760–65 (positing that allowing claims validates and legitimizes homophobic views and contravenes public policy against discrimination, despite empirical support).

112. See Ward, *supra* note 99, at 752–58 (discussing the fact that courts are split as to whether falsely labeling someone as homosexual is defamatory per se or per quod, but that courts are united in the belief that calling someone homosexual is defamatory); see also Abigail A. Rury, Note, *He's So Gay . . . Not That There's Anything Wrong with That: Using a Community Standard to Homogenize the Measure of Reputational Damage in Homosexual Defamation Cases*, 17 CARDOZO J.L. & GENDER 655, 656–57 (2011) (discussing the fact that courts have shifted from holding that the false identification of someone as homosexual is per se defamation to holding that such identification is at most per quod defamation).

113. 945 N.Y.S.2d 774 (N.Y. App. Div. 2012).

114. *Id.* at 776.

115. See, e.g., *Gallo v. Alitalia-Linee Aeree Italiane-Societa per Azioni*, 585 F. Supp. 2d 520, 549 (S.D.N.Y. 2008) ("[H]omophobia is sufficiently widespread and deeply held that an imputation of homosexuality can—at least when directed to a man married to a woman—be deemed every bit as offensive as imputing unchastity to a woman." (footnote omitted)).

116. See *Yonaty*, 945 N.Y.S.2d at 777 ("[T]hese Appellate Division decisions are inconsistent with current public policy and should no longer be followed.").

117. See *id.* ("[T]he prior cases categorizing statements that falsely impute homosexuality as defamatory per se are based upon the flawed premise that it is

policy of protection and respect for the civil rights of people who are lesbian, gay or bisexual, we now overrule our prior case to the contrary and hold that such statements are not defamatory per se.”<sup>118</sup> In other words, public policy may trump the public perception. The court added, however, that there has been a “tremendous evolution in social attitudes regarding homosexuality”<sup>119</sup> and a corresponding legal change; thus, “it cannot be said that current public opinion supports a rule that would equate statements imputing homosexuality with accusations of serious criminal conduct or insinuations that an individual has a loathsome disease.”<sup>120</sup> Here too, as common perceptions change, resort to public policy is no longer necessary to make attribution of homosexuality nondefamatory.

### *B. Substantial and Respectable Minority*

#### *1. The Principle*

In the early twentieth century, American courts deviated from the traditional English test.<sup>121</sup> In *Peck v. Tribune Co.*,<sup>122</sup> the defendant newspaper published an advertisement in which the plaintiff’s picture was presented as that of Mrs. Schuman, a nurse recommending a certain brand of whiskey for its health-enhancing properties.<sup>123</sup> Alas, the plaintiff was not Mrs.

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shameful and disgraceful to be described as lesbian, gay or bisexual.”).

118. *Id.* at 776.

119. *Id.* at 778.

120. *Id.* at 779.

121. *See supra* Part II.A.1 (describing the traditional English test as a general community test).

122. 214 U.S. 185 (1909).

123. *See id.* at 188

The Chicago Sunday Tribune, and, so far as is material, is as follows: “Nurse and Patients Praise Duffy’s. Mrs. A. Schuman, One of Chicago’s Most Capable and Experienced Nurses, Pays an Eloquent Tribute to the Great Invigorating, Life-Giving, and Curative Properties of Duffy’s Pure Malt Whisky.” Then followed a portrait of the plaintiff, with the words, “Mrs. A. Schuman,” under it. Then, in quotation marks, “After years of constant use of your Pure Malt

Schuman, was not a nurse, and abstained from distilled alcoholic beverages.<sup>124</sup> Assuming that the advertisement could be perceived as attributing the recommendation to the plaintiff, the question was whether such publication was defamatory.<sup>125</sup> The Circuit Court of Appeals held that it was not because there was no “general consensus of opinion” that drinking whiskey was wrong or that being a nurse was discreditable, and because participating in advertising might be ridiculed by only a few.<sup>126</sup> In overruling this decision, Justice Holmes opined that “[i]f the advertisement 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.”<sup>127</sup> A statement can constitute defamation if it is “known by a large number, and . . . lead[s] an appreciable fraction of that number to regard the plaintiff with contempt.”<sup>128</sup> Justice Holmes added that a doctor represented in advertising might have a cause of action if the representation affects his or her reputation among doctors, even if the public at large does not consider it detrimental.<sup>129</sup> In other words, there is no need for a consensus or even a majority opinion to establish defamation. The test is that of a “considerable and respectable

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Whisky, both by myself and as given to patients in my capacity as nurse, I have no hesitation in recommending it as the very best tonic and stimulant for all local and run-down conditions,” etc., etc., with the words, “Mrs. A. Schuman, 1576 Mozart St., Chicago, Ill.,” at the end, not in quotation marks, but conveying the notion of a signature, or at least that the words were hers.

124. *See id.* (“The declaration alleged that the plaintiff was not Mrs. Schuman, was not a nurse, and was a total abstainer from whisky and all spirituous liquors.”).

125. *See id.* at 189 (“The question, then, is whether the publication was a libel.”).

126. *See id.* (“[T]here was no general consensus of opinion that to drink whisky is wrong, or that to be a nurse is discreditable . . . . [A] certificate and the use of one’s portrait in aid of an advertisement would be regarded with irony, or a stronger feeling, only by a few.”).

127. *Id.* at 190.

128. *Id.*

129. *See id.* (“Thus, if a doctor were represented as advertising, the fact that it would affect his standing with other of his profession might make the representation actionable, although advertising is not reputed dishonest, and even seems to be regarded by many with pride.” (citations omitted)).

class in the community.”<sup>130</sup> The Restatement (Second) of Torts endorsed this position, reiterating that there is no need for a consensus or a majority opinion and that a statement is defamatory if it might prejudice the person “in the eyes of a substantial and respectable minority.”<sup>131</sup>

A substantial and respectable minority can be defined in two primary ways—in sociological terms, as a class or a sector, or in numerical terms, as a portion of the general public. Thus, for example, in *Peck v. Tribune Co.*, a sociological definition could have been people of the plaintiff’s congregation, and a numerical definition could have been ten percent of the population of Illinois. We will now demonstrate that the sociological–sectorial test is the dominant one in American caselaw. Religious denominations, professional circles, and distinct cultural communities are often used as reference points.

An example for the application of the sectorial test to a particular religious faith is *Jews for Jesus, Inc. v. Rapp*,<sup>132</sup> which opened this Article.<sup>133</sup> The plaintiff-respondent, a Jewish woman, contended that the defendant-petitioner published a report falsely implying that she became “a believer in the tenets, the actions, and the philosophy of Jews for Jesus.”<sup>134</sup> She argued, inter alia, that the publication constituted defamation.<sup>135</sup> The

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130. *Id.*; see also *Marcoux-Norton v. Kmart Corp.*, 907 F. Supp. 766, 778 (D. Vt. 1993)

A communication is 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” . . . . For the purposes of this definition, the community may be a substantial respectable group, even though only a minority of the total community.

(citations omitted).

131. See 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 or of all of his associates, nor even in the eyes of a majority.”).

132. 997 So. 2d 1098 (Fla. 2008).

133. *Supra* notes 1–2 and accompanying text.

134. *Jews for Jesus*, 997 So. 2d at 1100–01 (citation omitted).

135. See *id.* at 1101 (“Rapp’s complaint alleged: (1) false light invasion of privacy; (2) defamation; and (3) intentional infliction of emotional distress.”).

trial court dismissed her complaint.<sup>136</sup> The District Court of Appeal of Florida affirmed, finding that “the ‘common mind’ reading the newsletter would not have found [the plaintiff] to be an object of ‘hatred, distrust, ridicule, contempt or disgrace.’”<sup>137</sup> The Supreme Court of Florida quashed the District Court of Appeal’s decision, holding that “a communication can be considered defamatory if it ‘prejudices’ the plaintiff in the eyes of a ‘substantial and respectable minority of the community.’”<sup>138</sup> The statement need not be construed as defamatory “by the community at large.”<sup>139</sup> It may be reasonably assumed that the court contemplated the possible impact of attributing a belief in Jesus to a member of the Jewish community, given that such attribution could not prejudice the plaintiff in the eyes of the Christian majority.

An example for the application of the sectorial test to a particular profession is *Sharratt v. Housing Innovations, Inc.*<sup>140</sup> The plaintiff-architect entered into a contract to design a housing project for the defendant-developer.<sup>141</sup> Alas, the defendant named another partnership as the project architects in its promotional brochure, contrary to the plaintiff’s representations to his business associates.<sup>142</sup> The architect and his architecture firm “alleged damage to their professional reputation among the real estate development and architectural community in which they work[ed].”<sup>143</sup> The Supreme Judicial Court of Massachusetts explained that the characterization of a statement as defamatory is a question of fact, not of law.<sup>144</sup> It held that to be actionable, a

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136. *See id.* (“The trial court dismissed [Rapp’s] final complaint in its entirety with prejudice.”).

137. *Rapp v. Jews for Jesus, Inc.*, 944 So. 2d 460, 464 (Fla. Dist. Ct. App. 2006).

138. *Jews for Jesus Inc. v. Rapp*, 997 So. 2d 1098, 1100, 1114–15 (Fla. 2008).

139. *Id.* at 1115.

140. 310 N.E.2d 343 (Mass. 1974).

141. *See id.* at 344 (“In 1972 the corporate plaintiff entered into a contract with a development corporation to design, as the architect, a project known as ‘Madison Park Houses.’”).

142. *Id.* at 344–45.

143. *Id.* at 346.

144. *See id.* at 345 (“It is now well settled that the character of a publication as being [libelous] or otherwise is not to be judged by what we ourselves would

statement “need not hold a plaintiff up to ridicule or damage his reputation in the community at large, or among all reasonable men. It is enough that they do so among ‘a considerable and respectable class’ of people.”<sup>145</sup> In particular, a statement clearly deemed defamatory among the professional community to which the plaintiff belongs should not fail to be actionable merely because it is not considered so by “the general public.”<sup>146</sup>

An interesting example for the application of the sectorial test to a distinct cultural community is *Reiman v. Pacific Development Society*.<sup>147</sup> A local newspaper in the Finnish language published an article accusing the plaintiff, a member of the Finnish community in Oregon, of trying to disrupt labor organizations to the advantage of capitalists.<sup>148</sup> The court found for the plaintiff,<sup>149</sup> even though this publication could affect his reputation only within the Finnish community.<sup>150</sup> This decision is used by the Restatement (Second) of Torts as an illustration for an application of the sectorial test.<sup>151</sup>

The sectorial test has been endorsed by jurists in other common law jurisdictions. For example, both *Peck* and the Restatement are cited with approval in a well-known Canadian tort law treatise,<sup>152</sup> admittedly without any independent Canadian support. The sectorial test was also adopted by the New South Wales Court of Appeal in *Hepburn v. TCN Channel Nine Pty. Ltd.*<sup>153</sup> The question arose in regard to whether it was defamatory to accuse a medical practitioner of conducting lawful abortions.<sup>154</sup> Justice Glass held, first, that the test must be of an

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understand it to mean, but that commonly the question is one of fact . . .” (quoting *King v. Ne. Publ’g Co.*, 2 N.E. 486, 486–87 (Mass. 1936)).

145. *Id.* at 346 (citations omitted).

146. *Id.*

147. 284 P. 575 (Or. 1930).

148. *Id.* at 578.

149. *Id.* at 579.

150. *Id.* at 576.

151. See RESTATEMENT (SECOND) OF TORTS § 559 cmt. e (1977) (discussing cases that illustrate comment e and listing *Reiman* as an illustrative case).

152. ALLEN M. LINDEN, CANADIAN TORT LAW 688 nn.49–50 (7th ed. 2001).

153. [1983] 2 NSWLR 682 (Austl.).

154. See *id.* at 693 (“Much of the argument on appeal was devoted to

empirical nature.<sup>155</sup> After contrasting the English and American positions,<sup>156</sup> he opined that “a man can justly complain that words, which lower him in the estimation of an appreciable and reputable section of the community, were published to members of it, even though those same words might exalt him to the level of a hero in other quarters.”<sup>157</sup> Thus, Justice Glass adopted the American approach.<sup>158</sup> Interestingly, this seems like a numerical version of the sectorial test, as the judge does not refer to the views of a specific sector, but rather refers to those of a certain portion of the general population that does not constitute a majority. It is unclear whether the Australian High Court’s decision in *Reader’s Digest* overrides the New South Wales Court of Appeal’s decision in *Hepburn*.<sup>159</sup> Some commentators prefer

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imputation (c) viz that the plaintiff was an abortionist.”).

155. See *id.* at 693–94 (“[R]egard should be paid to actual community standards, right or wrong.”).

156. See *id.* at 693

There is a body of English authority which suggests that the standard of opinion is that of “right thinking people generally” . . . In the United States, on the other hand, an imputation can be defamatory if it injures a man in the eyes of a “considerable and respectable class in the community” though it be only a minority.

(citations omitted).

157. *Id.* at 694.

158. See BAKER, *supra* note 67, at 60 (“[A]ccording to *Hepburn* the test is whether it might lead to damage to reputation among an ‘appreciable’ or, according to Hutley JA, ‘substantial’ section of the community, which presumably can include a minority. Clearly *Hepburn* is presenting a sectionalist test.”); LAWRENCE MCNAMARA, REPUTATION AND DEFAMATION 121 (2007) (“The court effectively adopted the American approach.”); Baker, *supra* note 20, at 7–8 (“Now the question is not what most people think, but what do *some* people think? . . . [U]nder *Hepburn* the community of ‘ordinary reasonable people’ is less homogenous in its responses to the imputation, with large proportions of its members holding diametrically opposed views.”).

159. See BAKER, *supra* note 67, at 60–61

In terms of hierarchy of precedent, *Reader’s Digest* was a decision of the High Court of Australia, while *Hepburn* was determined by the Court of Appeal of New South Wales. A decision of a higher court should override a contrary dictum from a lower. On the other hand, the dictum quoted from *Reader’s Digest* could be regarded as obiter on this issue . . . . On that basis, *Reader’s Digest* would, as an authority, be persuasive at best, and would not bind future courts.

*Hepburn*, explaining that it better fits the cultural diversity in Australia.<sup>160</sup>

We should note here that despite the empirical pretense, American courts rarely use or seek empirical data concerning actual views and perceptions.<sup>161</sup> They sometimes do,<sup>162</sup> but in practice, many decisions hinge on an intuitive judgment, that is, “common knowledge” and common sense regarding the relevant community’s values.<sup>163</sup> Some scholars encourage greater reliance on concrete evidence of actual perceptions of the relevant sector, such as polls and surveys.<sup>164</sup>

## 2. The Quantitative Qualification

Although the Restatement (Second) of Torts provides that a statement can be defamatory if it prejudices a person in the

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(footnote omitted).

160. See MCNAMARA, *supra* note 158, at 122 (“The decision in *Hepburn* was appropriate . . . . The general standard of *Readers’ Digest v. Lamb* should be reconsidered by Australian courts, especially given the cultural diversity that characterizes Australian society and many local communities.”).

161. See Lidsky, *supra* note 6, at 18 (“[I]t is important to note that courts rarely resort to polls or surveys to ascertain the attitudes of the ‘respectable part’ of the community.” (footnote omitted)).

162. See, e.g., *Stern v. Cosby*, 645 F. Supp. 2d 258, 274 (S.D.N.Y. 2009) (“[A]ccording to a recent opinion poll from Quinnipiac University—New York State residents support gay marriage 51 to 41 percent, with 8 percent undecided.” (citation omitted)).

163. See Lidsky, *supra* note 6, at 18–19 (“The determination of who constitutes a substantial and respectable minority often hinges on what the judge presumes the community’s values are.”).

164. See *id.* at 47 (“[R]equiring . . . poll and survey results would add another layer of complexity to the already tangled web of defamation law. Nonetheless, the benefits of such a proposal in making defamation an effective instrument for redressing harm to reputation probably justify imposing this additional burden.” (footnote omitted)); Riesman, *supra* note 91, at 1307–08 (“The use of these public opinion techniques would tend to avoid the subjective factors in the experience of the actual plaintiff, or of the court and jury.”); Rury, *supra* note 112, at 680 (“[T]he courts should articulate their findings by citing trends in legislation, public polls, or rely on expert testimony. Requiring the courts to identify the relevant community removes any implicit or explicit biases, and provides an articulable basis on which future courts may rely.”).

eyes of a minority,<sup>165</sup> that minority must be substantial.<sup>166</sup> According to the Restatement, a single individual or a very small group of persons with peculiar views will not suffice.<sup>167</sup> The courts' thorny task, therefore, is to ascertain a very elusive border line.<sup>168</sup> We are told that a single individual cannot constitute a substantial minority, but it is unclear when a group becomes sufficiently large for purposes of the sectorial test, a problem reminiscent of the *sorites paradox*.<sup>169</sup> If a group of  $n$  members is sufficiently large, then a group of  $n-1$  members cannot be insufficiently large because a single person does not make a real difference. But if this holds, then a group of  $n-2$  members should also be sufficiently large, and so should a group of  $n-3$  members, and so on and so forth. Ultimately, we get to the conclusion that a group of one member is also sufficiently large, contradicting our initial assumption. Setting the boundary is inherently arbitrary, but legally inevitable.

For example, we have seen that jeopardizing a person's reputation among American Jews might be deemed defamatory.<sup>170</sup> The Jewish population is a sufficiently large

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165. See 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 or of all of his associates, not even in the eyes of a majority of them.").

166. See *id.* ("It is enough that the communication would tend to prejudice him in the eyes of a substantial and respectable minority of them . . .").

167. See *id.* ("On the other hand, it is not enough that the communication would be derogatory in the view of a single individual or a very small group of persons, if the group is not large enough to constitute a substantial minority."); accord WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 577 (2d ed. 1955) ("But if the group who will think the worse of the plaintiff is so small as to be negligible, or one whose standards are so clearly anti-social that the court may not properly consider them, no defamation will be found." (footnotes omitted)).

168. See *supra* note 15 and accompanying text (noting that courts have struggled to decide what part of the community is the standard for determining defamation).

169. See Dominic Hyde, *Sorites Paradox*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY 1, 1 (Edward Nalta ed., 2011), available at <http://plato.stanford.edu/entries/sorites-paradox/> ("The sorites paradox is the name given to a class of paradoxical arguments, also known as little-by-little arguments, which arise as a result of the indeterminacy surrounding limits of application of the predicates involved.").

170. See *supra* notes 134–39 and accompanying text (describing the facts,

minority for purposes of the sectorial test.<sup>171</sup> Yet, within the Jewish population one might observe highly varied nuances.<sup>172</sup> Although a statement may in fact defame a person within a small fragment of a given minority, it will not be deemed defamatory from a legal standpoint.<sup>173</sup> The case of *Weiner v. Time & Life Inc.*<sup>174</sup> is illustrative, even if one may contest the outcome. A *Time* magazine article on anti-Semitic incidents near Yeshiva University in upper Manhattan ascribed the following quotation to the plaintiff, an orthodox Jewish rabbi: “I no longer wear my yarmulke [skullcap] when I’m out driving. Now I look over my shoulder to see who’s following me.”<sup>175</sup> The plaintiff argued that he had never made this statement, and that its publication damaged his reputation as an observant Jew in his highly orthodox Jewish community.<sup>176</sup>

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procedural history, and holding in the *Jews for Jesus* case).

171. See U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES tbl. 77 (2012), <http://www.census.gov/compendia/statab/2012/tables/12s0077.pdf> (showing that over 6.5 million Jews made up 2.1% of the U.S. population in 2010).

172. See Jonathon Ament, *American Jewish Religious Denominations*, UNITED JEWISH COMMUNITIES REPORT ON THE NATIONAL JEWISH POPULATION SURVEY 2000–01, Feb. 2005, at 8, [http://www.jewishfederations.org/local\\_includes/downloads/7579.pdf](http://www.jewishfederations.org/local_includes/downloads/7579.pdf)

[T]he denominational choices of American Jews reveal an extremely diverse population. While most Jews still identify with a particular denomination, an increasing proportion of Jews appear to be opting out of a denominational framework, choosing instead to call themselves “just Jewish” or some variant of secular. No single category, denominational or not, garners the support of even 40% of all Jews.

173. See *supra* note 167 and accompanying text (identifying an individual or a very small group of individuals as insufficient according to the Restatement).

174. 507 N.Y.S.2d 784 (N.Y. Sup. Ct. 1986).

175. *Id.* at 784.

176. See *id.* at 784–85

Plaintiff’s complaint alleges the extrinsic facts that he is an Orthodox Jew and a Rabbi and that he never told the *Time* reporter that he removed his yarmulke, since to do so totally conflicts with plaintiff’s religious beliefs and observances and that the statement attributed to him that he removed his yarmulke when driving damaged his reputation by causing his neighbors, friends, religious associates and acquaintances to suspect and believe that he is a person of immoral and reprehensible character guilty of violating Orthodox Jewish Law.

The court opined that a publication is actionable if it “tends to expose a person to hatred, contempt or aversion . . . in the minds of a substantial number of the community”<sup>177</sup> or “tends to make him be shunned or avoided, or deprived of the friendly association of a considerable number of respectable members of the community although it imputes no moral turpitude to him.”<sup>178</sup> The court then held that considering the small highly orthodox Jewish community in upper Manhattan to be the relevant community would be an overly restrictive view.<sup>179</sup> In the court’s opinion, it would be unfair and unworkable to expect a national magazine with a heterogeneous audience to consider “each small enclave within various communities whenever it writes about a person.”<sup>180</sup> A statement is not defamatory if deemed so only by those with “eccentric perceptions or preconceptions.”<sup>181</sup> The court further explained that “[a] publication designed to reach a national audience cannot be judged by the standards of a unique and fractional segment of its total readership . . . . [T]he impact of an alleged libel cannot fairly be judged if we attempt to slice the community pie too thin.”<sup>182</sup> Presumably, if the views of a larger and less eccentric segment were at stake, as in the case of *Rapp*, the court could find them relevant. Critics may argue that the highly orthodox Jewish population in New York is sufficiently large for purposes of the sectorial test,<sup>183</sup> but this position only challenges the specific outcome and not the quantitative qualification.

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177. *Id.* at 785 (quoting *Mencher v. Chesley*, 297 N.Y. 94, 100 (1947)).

178. *Id.* (quoting *Brown v. Du Frey*, 1 N.Y.2d 190, 196 (1956)).

179. *See id.* (“Plaintiff seeks to equate the word ‘community’ as tantamount to the small, highly Orthodox Jewish community in upper Manhattan with which he associates. This is too restrictive . . . .”).

180. *Id.*

181. *Id.*

182. *Id.*

183. *See* Joseph Berger, *Aided by Orthodox, City’s Jewish Population Is Growing Again*, N.Y. TIMES (June 11, 2012), [http://www.nytimes.com/2012/06/12/nyregion/new-yorks-jewish-population-is-growing-again.html?\\_r=0](http://www.nytimes.com/2012/06/12/nyregion/new-yorks-jewish-population-is-growing-again.html?_r=0) (last visited Oct. 22, 2013) (stating that “the Jewish population of New York City is growing again, increasing to nearly 1.1 million”) (on file with the Washington and Lee Law Review).

A somewhat more esoteric example is *Fairley v. Peekskill Star Corp.*,<sup>184</sup> in which an article published in the defendant's newspaper stated that the plaintiff, a self-proclaimed social theoretician, planner, and developer, described himself as a social scientist.<sup>185</sup> Although we are still uncertain as to which people might consider this inaccuracy defamatory, the group is presumably small and eccentric.<sup>186</sup> Thus, the court held that "[a]mong certain segments of the population a social scientist designation might be considered unflattering. [But] the peculiarities of taste found in eccentric groups cannot form a basis for a finding of libelous inferences."<sup>187</sup>

The quantitative qualification has three intuitive explanations. First, as the court in *Weiner* observed, reputational harm among members of a very small group may not be reasonably foreseeable by the publisher.<sup>188</sup> Avoiding such harm might impose an excessive burden, mostly in the form of high information costs, on publishers.<sup>189</sup> Second, the size requirement ensures that "the injury to reputation is not *de minimis*."<sup>190</sup> A *de minimis* qualification generally aims to prevent a legal process where the administrative costs outweigh the benefits (in terms of deterrence or even justice).<sup>191</sup> The problem with this explanation

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184. 445 N.Y.S.2d 156 (N.Y. App. Div. 1981).

185. *Id.* at 157–58.

186. *See id.* at 158 (noting that while certain segments of the population may consider the term to be defamatory, the opinion of these "eccentric" groups cannot form a basis for defamation). *But see* Lidsky, *supra* note 6, at 22 (recognizing that a large percentage of the population feels contempt for informers, as indicated by substantial evidence) (citing John Irwin & Donald R. Cressey, *Thieves, Convicts and the Inmate Culture*, in *THE SOCIOLOGY OF SUBCULTURES* 64, 67 (David O. Arnold ed., 1970)).

187. *Fairley*, 445 N.Y.S.2d at 158.

188. *See* *Weiner v. Time & Life, Inc.*, 507 N.Y.S.2d 784, 785 (N.Y. Sup. Ct. 1986) (noting that it would be "manifestly unfair and unworkable" for every publisher to consider every possible community when writing an article).

189. *Id.*

190. *See* Lidsky, *supra* note 6, at 19 ("[T]he quantitative requirement of a 'substantial' minority appears to be an attempt to ensure that the injury to reputation is not *de minimis*." (citing Daniel More, *Informers Defamation and Public Policy*, 19 GA. J. INT'L & COMP. L. 503, 517 (1989))).

191. *See id.* (explaining that the "substantial minority" size requirement attempts to "ensure that the defamatoriness inquiry does not devolve into a

is that if a single individual or a very small group of people who find the statement defamatory are the plaintiff's close relatives or employer, the plaintiff will receive no recovery despite the substantial nature of his injury. What matters to the plaintiff is not the number of people who may think less of him, but rather the magnitude of the statement's effect on each of them.<sup>192</sup> Third, the quantitative qualification may prevent a proliferation of actions, many of which are frivolous.<sup>193</sup> This is exceptionally important in the context of defamation because many lawsuits mean a greater encroachment on freedom of expression.<sup>194</sup>

### 3. *The Qualitative Qualification*

As explained above, both the English and the American empirical tests consist of a normative constraint.<sup>195</sup> In England, a statement is defamatory if considered so by the general community, taking into account the views of "right-thinking" people.<sup>196</sup> In the United States, a statement may be defamatory if considered so by a mere minority, provided that it is a "respectable" one.<sup>197</sup> While the two concepts—"right-thinking"

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search for the few idiosyncratic individuals who would think less of the plaintiff for conduct that the overwhelming majority would find laudatory").

192. *Id.* at 19–20 (discussing the significance of an individual's reputation among small groups in society); *see also id.* at 42 (same).

193. *See* Burchell, *supra* note 11, at 186 (arguing that requiring the injury to reputation to be noticed among a "substantial and respectable" portion of the community prevents "a proliferation of defamation actions" in certain situations, such as when the feelings of a single family unit have been offended).

194. *See* *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (concluding that attacking publishers restricts the freedoms of speech and press and leads to intolerable levels of self-censorship); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (opining that forcing critics of official conduct to guarantee the accuracy of their factual assertions leads to self-censorship).

195. *See supra* Part II.A.2 (describing the normative constraint of the English test); *supra* notes 161–63 and accompanying text (noting that American judges rarely use empirical data and often use intuition and common sense to determine the values of the community).

196. *See* Burchell, *supra* note 11, at 180 (discussing the creation of the "right-thinking" test); *supra* Part II.A (explaining the general community test in detail).

197. *See, e.g.,* *Peck v. Tribune Co.*, 214 U.S. 185, 190 (1909) (finding that the

and “respectable”—do not necessarily have an identical meaning,<sup>198</sup> they serve a similar purpose: normative screening. The fact that a person’s reputation may be injured in the eyes of a substantial minority is inconclusive.<sup>199</sup> The court will reject the sectorial standard if it does not comply with the normative threshold.<sup>200</sup> An American commentator summarized the applicable principle as follows: “Where the group under consideration approves of illegal or antisocial acts, or the nonfeasance of judicially approved acts, the courts have refused to recognize as legally damaging the factual injury caused by the false utterance.”<sup>201</sup> In rejecting the sectorial test for public policy reasons, the court practically reverts to general community standards, and sets the limits of variance, diversity, and tolerance within the community.<sup>202</sup> Critics say that this qualification leaves real reputational harm without redress, and without changing the deviant minority’s perceptions.<sup>203</sup>

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publication was defamatory because it hurt the plaintiff’s reputation within an important and respectable section of the community); Lidsky, *supra* note 6, at 29 (discussing the value of a community’s reputation when an individual within the community attempts to proceed on libel charges). *But see* *Kimmerle v. N.Y. Evening Journal, Inc.*, 186 N.E. 217, 218 (N.Y. 1933) (explaining that “widespread notoriety” is insufficient and that the statement must tend to affect the plaintiff’s reputation “in the minds of right-thinking persons”).

198. *See* *Herrmann v. Newark Morning Ledger Co.*, 140 A.2d 529, 531 (N.J. 1958) (“[U]nder the prevailing American rule, the court is not concerned . . . with whether the segment of the public which thinks odiously of plaintiff because of the facts stated in the publication is ‘right-thinking’ . . . . It is sufficient that it be ‘substantial’ and ‘respectable.’”).

199. A similar discussion has surrounded the English test. *See supra* Part II.A.2 (“[T]he fact that a person’s reputation may be injured in the eyes of the general community is important, but inconclusive. The court will pay no heed to a community standard if it does not comply with the normative threshold.”).

200. *Supra* Part II.A.2.

201. Note, *The Community Segment in Defamation Actions: A Dissenting Essay*, 58 *YALE L.J.* 1387, 1391 (1949).

202. *See* Lidsky, *supra* note 6, at 40 (“[B]y defining the values of a particular group within the community as too antisocial to be recognized, [courts] are ‘declaring how much variability and diversity can be tolerated within the group.’” (quoting KAI T. ERIKSON, *WAYWARD PURITANS: A STUDY IN THE SOCIOLOGY OF DEVIANCE* 11 (1966))).

203. *See id.* at 39 (discussing the role of the court to provide redress for the victim’s injury and to redefine the values and prejudices of the community).

A recurring example is the informant case, which may be generalized as the assistance-to-law-enforcement case. In *Connelly v. McKay*,<sup>204</sup> a truck service station owner was accused by the defendant of informing the Interstate Commerce Commission (ICC) about truck drivers who had violated ICC rules and regulations.<sup>205</sup> He argued that this had affected his reputation among truck drivers and had harmed his business.<sup>206</sup> The court concluded that while accusing a person of being an informer might affect a person's reputation among law violators, it cannot be deemed defamatory.<sup>207</sup> The court cited the Restatement (Second) of Torts, whereby "[t]he 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 antisocial that it is not proper for the courts to recognize them."<sup>208</sup> The legal system cannot consider cooperation with law enforcement agencies as negative conduct, even if people in some circles evidently consider it so.<sup>209</sup> Thus, attributing such conduct to a person cannot underlie an action for defamation.<sup>210</sup>

*Connelly* was followed in many subsequent cases.<sup>211</sup> For instance, in *Saunders v. Board of Directors, WHYY-TV (Channel 12)*,<sup>212</sup> the plaintiff-inmate was falsely presented in the defendant's broadcast as an FBI informant.<sup>213</sup> Relying on

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204. 28 N.Y.S.2d 327 (N.Y. Sup. Ct. 1941).

205. *Id.* at 328.

206. *Id.* at 328–29.

207. *See id.* at 329 (finding that informers may not be held in "high esteem" but the label does not constitute defamation).

208. *Id.* at 329 (quoting RESTATEMENT (SECOND) OF TORTS § 559 cmt. e (1977)).

209. *See id.* (noting that to hold in favor of an antisocial group would "penalize the law-abiding citizen and give comfort to the law violator").

210. *See id.* at 329–30 (concluding that words not creating a generally unflattering or immoral image fail to satisfy a defamation claim (citing *Hallock v. Miller*, 2 Barb. 630, 632 (N.Y. Gen. Term 1848))).

211. *See, e.g., Rose v. Borenstein*, 119 N.Y.S.2d 288, 289–90 (N.Y. City Ct. 1953) (finding *Connelly* to be "a case precisely in point" and supportive of the decision that accusations of informing on others fails to qualify as defamation).

212. 382 A.2d 257 (Del. Super. Ct. 1978).

213. *Id.* at 258.

*Connelly*, the court found that the statement was not defamatory.<sup>214</sup> It emphasized that while the allegation that an inmate is an informer might impair his reputation among fellow inmates, the tort of defamation is not designed to protect one's reputation among members of a limited community whose views "depart substantially from those prevailing generally."<sup>215</sup> This formulation is somewhat different from that of *Connelly*, insofar as it does not focus on the antisocial nature of the standard, but instead on the magnitude of the deviation from the views of the general public. Theoretically, very eccentric but harmless views might be disregarded under *Saunders*, but not under *Connelly*.

Although the public policy constraint is needed to exclude liability in the informer's case under the American test, given the attitude toward informers among offenders, it may be redundant under the English test for an almost obvious reason: helping law enforcement agencies might be seen in a negative light in some circles, but not by the law-abiding public at large.<sup>216</sup> Therefore, attributing such help may be considered defamatory under an empirical sectorial test, but not under a general community test. Indeed, English courts have treated cases of this kind somewhat differently. In *Byrne v. Deane*,<sup>217</sup> the plaintiff was publicly identified as the person who informed the police of the presence of illegal gambling machines at a golf club, thereby denying fellow members the ability to gamble.<sup>218</sup> The Court of Appeal denied his claim for defamation.<sup>219</sup> Lord Justice Slesser opined that "to allege of a man . . . that he has reported certain acts, wrongful in law, to the police, cannot possibly be said to be defamatory of him in the minds of the general public."<sup>220</sup> The test is that of the

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214. *Id.* at 259.

215. *See id.* (noting that the tort of defamation will not protect the reputations of those individuals whose attitudes and social values depart substantially from the values of the greater community).

216. *But see* Lidsky, *supra* note 6, at 22 (recognizing that a large portion of the general population feels contempt for informers (citing John Irwin & Donald R. Cressy, *Thieves, Convicts and the Inmate Culture*, in *THE SOCIOLOGY OF SUBCULTURES* 64, 67 (David O. Arnold ed., 1970))).

217. [1937] 1 K.B. 818 (C.A.) (Eng.).

218. *Id.* at 818.

219. *Id.*

220. *Id.* at 832–33.

“ordinary good and worthy subject of the King,” and such a subject would not consider the allegation that a certain person helped law enforcement against wrongdoers to be defamatory.<sup>221</sup> We nonetheless need to qualify this analysis, as some empirical evidence shows that a significant portion of the general population also despises informers.<sup>222</sup> Thus, even the general community test may be ultimately imbued with normative content when applied to informant cases.

### C. *The Purely Normative Test*

The defamatory nature of a particular statement is generally determined by an empirical test, be it a general community standard or a sectorial standard.<sup>223</sup> While the two are qualified to some extent by a normative constraint, the essence of the inquiry remains mostly empirical. However, the defamatory nature of statements can also be tested from a purely normative perspective. Put differently, courts can determine that a particular statement is defamatory because it violates a normative ethical principle applicable to human interaction, regardless of the potential impact of the statement on the subject’s reputation.<sup>224</sup> In so doing, courts will aim to prevent morally unacceptable publications, thereby imposing their own moral preferences on human communications.<sup>225</sup> Again, purely

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221. *Id.* The same conclusion was reached in South Africa. See Burchell, *supra* note 11, at 182, 195 (discussing a case where in which a student was allegedly helping the police to obtain evidence against fellow students at the university).

222. See Lidsky, *supra* note 6, at 22 (discussing how the court in *Saunders* ignored the views of the larger community, which evidence suggests disfavor the informer (citing John Irwin & Donald R. Cressey, *Thieves, Convicts and the Inmate Culture*, in *THE SOCIOLOGY OF SUBCULTURES* 64, 67 (David O. Arnold ed., 1970))).

223. See *supra* Part II.B (discussing the “substantial and respectable minority,” or sectorial, test).

224. See Lidsky, *supra* note 6, at 22 (explaining that a court may sacrifice the individual plaintiff in an attempt to advance certain social policy goals).

225. See *supra* Part II.A.2 (discussing ways in which public policy and morality may overrule a morally repugnant community opinion); see also Baker, *supra* note 20, at 12 (noting that “moralist courts” may subjectively decide who

normative tests are not common in Anglo-American jurisdictions.<sup>226</sup> Still, the alternative must be mentioned not only for the sake of analytical completeness, but also because our previous studies indicate that applying a normative test may sometimes be inevitable given the theoretical unsoundness of empirical community standards.<sup>227</sup>

Applying a normative test raises at least three concerns. First, on the conceptual level, defamation law protects a relational interest, namely a person's reputation.<sup>228</sup> Reputation may be defined as the estimation of a person by other members of the relevant community.<sup>229</sup> Thus, defamation law does not protect a person's good name in the abstract, but the positive opinion that others have of the individual: "It is the actual community attitudes and opinions . . . which must serve as the standard, regardless of whether the court itself considers the particular group to be 'right-thinking.'"<sup>230</sup> Second, defamation law encroaches upon the freedom of speech.<sup>231</sup> Imposing a limit

falls within the category of "ordinary reasonable people").

226. See *supra* Part II.A–B (explaining the normative and empirical constraints within the English and American tests).

227. *Infra* Part III.A.

228. See Burchell, *supra* note 11, at 183 ("Reputation is a relational interest . . . ." (citing G.L. Fricke, *The Criterion of Defamation*, 32 AUSTRALIAN L.J. 7, 8 (1958))); Rodney A. Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1, 18 (1983) (explaining that defamation "remedies a wrongful disruption in the 'relational interest.'" (citing L. GREEN, *CASES ON INJURIES TO RELATIONS* 193–276 (1940)); Arthur L. Berney, *Libel and the First Amendment—A New Constitutional Privilege*, 51 VA. L. REV. 1, 40–41 (1965); Leon Green, *Relational Interests*, 31 ILL. L. REV. 35, 36 (1936)).

229. See Lidsky, *supra* note 6, at 12–13 ("Defamation, therefore, is a 'recipient-centered concept' whose focus is on the views or opinions of others and their behavior in responding to the defamatory statement . . . Harm to reputation is thus a socially constructed injury, an injury defined by the response of others . . . ." (citing Marc A. Franklin & Daniel J. Bussel, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 WM. & MARY L. REV. 825, 828 (1984); Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691, 693 (1986))).

230. Tommaney, *supra* note 15, at 641 (citing G.L. Fricke, *The Criterion of Defamation*, 32 AUSTRALIAN L.J. 7, 10 (1958)).

231. See Lidsky, *supra* note 6, at 3 ("[S]cholars and judges have come to view defamation as a contest between the First Amendment's protection of freedom of speech and the tort's protection of reputation.") (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974)).

derived from actual perceptions of the community may be deemed more legitimate than imposing a limit based on the judge's subjective views.<sup>232</sup> Third, once the court opts for a normative test, it must determine the content of this test, which is not an easy task.<sup>233</sup> A theory of permissible and impermissible expression is markedly different from a theory of permissible and impermissible conduct, so one cannot simply import the familiar tests for reasonableness in negligence law and plug them into the defamation law.<sup>234</sup> One commentator suggested that an allusion to reasonableness may denote that a defendant is liable only if he or she can foresee that the statement will prejudice the plaintiff.<sup>235</sup> However, we doubt that foreseeability alone can make a statement wrongful and provide a sufficient ground for liability. To be employed, a purely normative test must be justified, and the more esoteric or elitist the test, the greater the departure from prevailing views.<sup>236</sup>

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232. See generally *id.* at 18–19 (noting that the “community segment determination” is often based on the judge’s own knowledge, beliefs, and experiences, rather than on the community’s beliefs (citing Daniel More, *Informers Defamation and Public Policy*, 19 GA. J. INT’L & COMP. L. 503, 513 (1989))).

233. Cf. Rudolf Alexander Mikus, *The Reasonable Person in Substantive Canadian Criminal Law* (Aug. 1995) (unpublished L.L.M. thesis, The University of British Columbia), [https://circle.ubc.ca/bitstream/handle/2429/3900/ubc\\_1995-0450.pdf](https://circle.ubc.ca/bitstream/handle/2429/3900/ubc_1995-0450.pdf)? (“Even if most people in a given society would agree that certain conduct was done ‘wickedly,’ the criteria for wickedness are not transparent . . . . Therefore, a purely normative test does not work without restricting criteria, but the very criteria are not visible.”) (on file with the Washington and Lee Law Review).

234. See Miller & Perry, *Reasonable Person*, *supra* note 28, at 328, 348, 361–63 (defining the various normative tests for reasonableness).

235. Baker, *supra* note 20, at 5 (explaining the view that the defendant should only be liable for interpretations of his or her publication by the reasonable person, as those are the interpretations that the defendant should have anticipated).

236. Cf. *supra* Part II.B.3 (noting that the decision in *Byrne v. Deane* was contrary to empirical data regarding the community’s view and therefore may need more analytical qualification).

### III. Redefining Defamation

#### A. Social Choice Theory

##### 1. The Model of Community Standards

In this Part, we analyze the leading empirical tests for defamation—the general community test and the sectorial test—with the aid of an economic model of community standards.<sup>237</sup> In the model, which we have previously introduced in the contexts of negligence<sup>238</sup> and good faith performance,<sup>239</sup> community standards are methodically derived from the views of the individuals.<sup>240</sup> We use the model to determine which derivation methods are plausible and to understand the relevant implications for the law of defamation.

The model of community standards is drawn from the field of social choice theory, a branch of economics that arose in the 1950s out of the pioneering work of Kenneth J. Arrow.<sup>241</sup> Arrow sought to understand the origins of the economic concept of social welfare—the good of the society—and asked the following question: with which methods can we plausibly derive the social welfare from the welfare of the individuals who comprise the

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237. For the formal presentation of the model, see Alan D. Miller, *Community Standards*, 148 J. ECON. THEORY 2696, 2697 (2013); Alan D. Miller, *Essays on Law and Economics* 38 (Apr. 6, 2009) (unpublished Ph.D. dissertation, California Institute of Technology), [http://thesis.library.caltech.edu/2283/1/Miller\\_Dissertation.pdf](http://thesis.library.caltech.edu/2283/1/Miller_Dissertation.pdf) [hereinafter Miller, *Essays*] (on file with the Washington and Lee Law Review). The model was originally applied to community standards in the context of obscenity law. *Id.*

238. See Miller & Perry, *Reasonable Person*, *supra* note 28, at 376–84 (detailing a formal model of the reasonable person).

239. Miller & Perry, *Good Faith*, *supra* note 28, at 730–32 (explaining a formal community standards model used to apply the duty of good faith performance).

240. See Miller & Perry, *Reasonable Person*, *supra* note 28, at 377 (“Contemporary community standards . . . are often said to be an aggregate of the standards of individuals.” (citing *United States v. Danley*, 523 F.2d 369, 370 (9th Cir. 1975))).

241. See *id.* at 373 (“[Arrow’s theorem] launched a new field of research in economics, social choice theory.”). See generally KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed. 1963) (providing a more detailed explanation of Arrow’s pioneering theory).

society?<sup>242</sup> Arrow sought to define “plausible” by requiring that the derivation method satisfy several axioms or properties.<sup>243</sup> One axiom required that the society should strictly prefer one alternative to another when every individual strictly preferred the former to the latter.<sup>244</sup> Another required that opinions about “irrelevant” alternatives should not affect society’s ranking of the relevant alternatives.<sup>245</sup> A third required that society should not consider the opinion of one person—a dictator—to the exclusion of all others.<sup>246</sup> Arrow showed through the use of an innovative mathematical theorem that no derivation method could possibly satisfy his axioms.<sup>247</sup> There is no good way to define social welfare.

Arrow’s result shocked the world of economics. The entire field of welfare economics, necessary for making policy recommendations, depended on the existence of a means of calculating social welfare.<sup>248</sup> While all of the major methods were known to have problems, economists had assumed that these problems were not insurmountable and that a reasonable definition could be discovered over time.<sup>249</sup> Arrow showed that

242. See ARROW, *supra* note 241, at 2 (considering the possibility of creating a “procedure for passing a set of known individual tastes to a pattern of social decision-making”); see also Miller & Perry, *Reasonable Person*, *supra* note 28, at 327 (“Arrow studied social welfare as a positive concept, in which the well-being of society derives from individual preferences.”).

243. See Miller & Perry, *Reasonable Person*, *supra* note 28, at 373 (providing a description of these axioms).

244. See ARROW, *supra* note 241, at 25–26 (describing the positive correlation between social values and individual values).

245. See *id.* at 26–28 (describing the condition of the independence of irrelevant alternatives).

246. See *id.* at 30–31 (describing the condition of non-dictatorship).

247. See *id.* at 12–13 (describing the mathematical theorem); see also Miller & Perry, *Reasonable Person*, *supra* note 28, at 373 (discussing the results and impact of Arrow’s research).

248. See Patrick Suppes, *The Pre-History of Kenneth Arrow’s Social Choice and Individual Values*, 25 SOC. CHOICE WELFARE 319, 319 (2005) (“To most early writers . . . utility had been a quantity theoretically measurable; that is to say, a quantity which would be measurable if we had enough facts.”).

249. See *id.* (noting that most early writers believed utility could be measured if enough information was provided); see also Miller & Perry, *Reasonable Person*, *supra* note 28, at 373 (“[Arrow’s theorem] cast doubt on the fundamental assumptions of welfare economics . . .”).

there was a reason for the problems encountered by welfare economists: finding a defensible method is not merely difficult, it is impossible. For this discovery, Arrow was awarded the Nobel Prize in 1972.<sup>250</sup>

The common law elements of the tort of defamation have something in common with the economic concept of social welfare.<sup>251</sup> First, the empirical question of whether the statement has a tendency to lower the estimation of the plaintiff in the eyes of the community or a segment of it, which underlies the dominant standards for the determination of defamation,<sup>252</sup> is analogous to the concept of social welfare in the sense that both depend on the beliefs, broadly understood, of a group of people—the society.<sup>253</sup> Second, both the economic definition of social welfare and the legal definition of defamation have been controversial. Still, the problems are by no means identical. Defamation is distinct from welfare. For this reason, our model of defamation, which is based on judgments, is very different from Arrow's model of welfare, which was based on preferences. That there is no good way to combine preferences does not mean that it is impossible to define the standard for defamation.

We apply a different argument from social choice—one constructed with legal standards in mind—to the problem of defamation. We begin by describing the model of community standards as applied to the general community test. The

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250. See Press Release, The Royal Swedish Academy of Sciences, (Oct. 25, 1972), available at [http://www.nobelprize.org/nobel\\_prizes/economics/laureates/1972/press.html](http://www.nobelprize.org/nobel_prizes/economics/laureates/1972/press.html) (“As perhaps the most important of Arrow's many contributions to welfare theory appears his ‘possibility theorem,’ according to which it is impossible to construct a social welfare function out of individual preference functions.”) (on file with the Washington and Lee Law Review).

251. See, e.g., *Talbert v. United States*, 932 F.2d 1064, 1066 (1991) (noting that the elements of the tort of defamation include a false and defamatory statement, an unprivileged publication, fault on the part of the publisher, and “either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication” (citing RESTATEMENT (SECOND) OF TORTS § 558 (1977))).

252. See *supra* Part II.A–B (discussing the two dominant standards for the determination of defamation).

253. See Miller & Perry, *Reasonable Person*, *supra* note 28, at 377 (noting that social welfare is an aggregate of individual welfare, based on informal observations of the individuals' behaviors).

application of the model to the sectorial test will be illustrated after presentation of the main results. The model can be described as follows.

First, there is a group of individuals. In the case of the general community test, this is a “geographically determined population.”<sup>254</sup> Next, let us ask the question of whether the statement tends to lower the estimation of the plaintiff in the eyes of an individual. The answer to this question depends on the individual: a statement may lower the estimation of the plaintiff in the eyes of some individuals, but not others.<sup>255</sup> In order to consider this problem, it will help if we begin by labeling an individual’s beliefs on this subject. We will simply call these “the individual’s beliefs about reputation.”

Of course, whether a specific statement concerning one individual is defamatory in the eyes of another may depend on the context.<sup>256</sup> Consider, for example, a false statement that the plaintiff aided the British during the Battle of the Brandywine in 1777. Would this statement tend to harm the plaintiff’s reputation in the eyes of a particular individual in Philadelphia during that time? In general, the answer might be yes, but if the plaintiff was known to be a supporter of George III, the answer may be no. The effect that a statement may have on the plaintiff’s reputation depends on what is already known about the plaintiff.<sup>257</sup> Thus, an individual’s beliefs about reputation can be described as the collection of statements that would tend to lower the plaintiff in the eyes of that individual given the context. We allow all possible beliefs, with but one restriction: regardless of the context, it must always be possible to make a nondefamatory statement about the plaintiff. That is, it should not be the case that every statement that one could possibly make about the

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254. Baker, *supra* note 20, at 7.

255. *See id.* at 16–20 (describing the results of a study about reactions to defamatory speech among Australian adults).

256. *See Hayes v. Smith*, 832 P.2d 1022, 1026 (Colo. App. 1991) (discussing the role that context plays in the court’s analysis of defamatory statements).

257. *See Jews for Jesus v. Rapp*, 997 So. 2d 1098, 1101 (2008) (concerning the allegedly defamatory statement that the plaintiff had joined “Jews for Jesus”—a statement that could injure the plaintiff’s reputation only if a substantial and respectable minority knew that she was Jewish).

plaintiff would tend to harm his or her reputation. Of course, individuals do not tend to think about reputation in this way. Some people may rely on “gut instincts” or upon a particular normative philosophy. However, this distinction is largely immaterial. Because we consider all possible statements and all relevant contexts, our model provides a complete description of an individual’s beliefs about reputation.<sup>258</sup>

Having formulated a model of individual beliefs about reputation, we then complete the model by describing the community’s belief about reputation. As with individual beliefs, the community belief is the collection of statements that tend to lower the plaintiff in the eyes of the community given the context, with the sole restriction being that it must always be possible to make a nondefamatory statement about the plaintiff. The community belief is methodically derived from individual beliefs; that is, it is completely determined by individual beliefs and the derivation method.<sup>259</sup>

Having described a complete model of the general community test, we now study derivation methods. These are the essence of the definition of defamation—they specify how the community belief is defined with respect to the individuals’ beliefs.<sup>260</sup> In particular, we look for natural axioms or properties that we would expect a derivation method to satisfy.<sup>261</sup> We impose four such axioms.

To understand the first axiom, consider a society with no disagreement—a world in which every individual agrees with every other individual about every possible statement in every relevant context.<sup>262</sup> This society might be an incredibly boring

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258. We make an implicit assumption that two beliefs are identical if they would always agree about whether a statement is defamatory.

259. See Miller, *Essays*, *supra* note 237, at 6 (“These individual standards are then aggregated to form a community standard.”).

260. See Miller & Perry, *Good Faith*, *supra* note 28, at 732 (describing the application of derivation methods in determining community).

261. See Miller, *Essays*, *supra* note 237, at 9 (“Social rules are studied through an axiomatic approach . . .”).

262. See *id.* at 41 (“The first axiom, *homogeneity*, requires that if there is a single standard shared by every member of the community, then that standard is also the community standard.”).

place in which to live, but it would be easy to determine whether a statement is defamatory in this community. Our first axiom, “homogeneity,” requires that in this special case, the community belief must be identical to the commonly held individual belief.

*Axiom 1: Homogeneity.* If all individuals have identical beliefs about reputation, then the community belief is identical to the commonly held belief.<sup>263</sup>

To explain the second axiom, we must first describe a natural way of comparing individual beliefs. We say that Amy is more “judgmental” than Bill if whenever a statement tends to harm the plaintiff’s reputation in Bill’s eyes, that statement also tends to harm the plaintiff’s reputation in Amy’s eyes. Along these lines, Amy can become more judgmental if she changes her mind and decides that, in some context, a statement that previously did not affect her view of the plaintiff now does in fact lower the plaintiff in her estimation. According to our second axiom, “responsiveness,” the community belief should respond to changes in individual beliefs: if all individuals become more judgmental, or do not change, then the community standard should also become more judgmental, or remain static.<sup>264</sup> This can be thought of as a direction requirement: the community belief should change in the same direction as individual beliefs.

*Axiom 2: Responsiveness.* If all individuals’ beliefs either (a) become more judgmental or (b) do not change, then the community belief either becomes more judgmental or does not change.<sup>265</sup>

The next axiom stems from the notion that the law should treat all individuals equally.<sup>266</sup> Amy’s belief is accorded neither more nor less respect than Bill’s belief. There are different ways of implementing this ideal in practice. We use the idea of a swap

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263. *Id.*

264. *See id.* (“The second axiom, *responsiveness*, requires the community standard to ‘respond’ in the same direction (more permissive or less) as the community.”).

265. *See id.* (“If every individual standard becomes more permissive, then the community standard should become more permissive as well.”).

266. *See id.* (“[T]he law requires equal treatment of individuals.”).

of beliefs. Amy and Bill swap their beliefs if Amy's new belief is identical to Bill's old belief, and Bill's new belief is identical to Amy's old belief. In this case, the names attached to the beliefs have changed, but the collection of beliefs found within the society has not.<sup>267</sup> Our third axiom, "anonymity," requires the community belief to be invariant to a swap of beliefs.

*Axiom 3: Anonymity.* A swap of individual beliefs does not affect the community belief.<sup>268</sup>

The last axiom is based on the idea that the community belief should be based entirely on individual beliefs rather than on some preconceived notion of what is defamatory.<sup>269</sup> If it is defamatory to label someone a "communist" but not defamatory to label that person a "fascist," this must be because of a distinction made by the individuals and not because the distinction is built into the derivation method itself. Our fourth axiom, "neutrality," requires that the derivation method must not favor some beliefs over others.<sup>270</sup>

*Axiom 4: Neutrality.* The derivation method should be neutral between beliefs.<sup>271</sup>

Homogeneity, responsiveness, anonymity, and neutrality are basic properties that any reasonable method of deriving the community belief should satisfy.<sup>272</sup> Which derivation method satisfies these four basic properties? One such method is what we call the unanimity rule. Under this method, a statement made in a particular context is defamatory if, and only if, it would tend to lower the reputation of the plaintiff in the eyes of every single

267. *See id.* ("The third axiom, *anonymity*, requires that the aggregation rule not discriminate between individuals.").

268. *See id.* at 10 ("An *anonymity* axiom requires that the qualification of individuals does not depend on their names.").

269. *See id.* at 41 ("This axiom assumes that all judgments are subjective and is relevant when there is no method by which works can be objectively compared.").

270. *See id.* ("The fourth axiom, *neutrality*, requires that the aggregation rule not discriminate, ex ante, between works.").

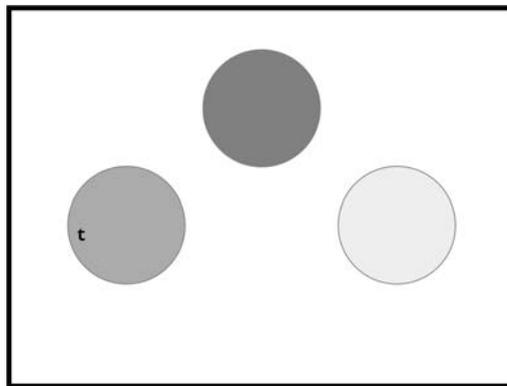
271. *Id.*

272. *See id.* ("Each [axiom] is, in some way, a desirable property for any objective aggregation rule.").

individual in the community.<sup>273</sup> We do not claim that the unanimity rule is a good way to determine whether a statement is defamatory. Instead, we claim something else—not only does the unanimity rule satisfy the four axioms, but the unanimity rule is the *only* method to do so. Every other method of deriving a community belief fails in at least one of these four respects.<sup>274</sup>

The theorem states that only the unanimity rule satisfies the four axioms. Why are all other rules flawed? A few methods, such as the majority rule, are invalid rules in our framework.<sup>275</sup> It is possible that, for some context, every possible statement that could be made about a plaintiff would be found defamatory; this contradicts our assumption that it be possible to make a nondefamatory statement regardless of the context. This problem is illustrated in Figure 2. In the figure, each circle illustrates the set of statements that a particular person considers nondefamatory in a particular context. One can readily see that no statement is considered nondefamatory by a majority.

Figure 2



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273. See *id.* at 45 (“Under the ‘unanimity rule’, a work is considered obscene if it is considered obscene by every individual.”).

274. For the formal proof of this claim, see Miller, *Essays*, *supra* note 237, at 45. Informal explanations of the proof are provided in Miller & Perry, *Reasonable Person*, *supra* note 28, at 384, and in Miller & Perry, *Good Faith*, *supra* note 28, at 740–44.

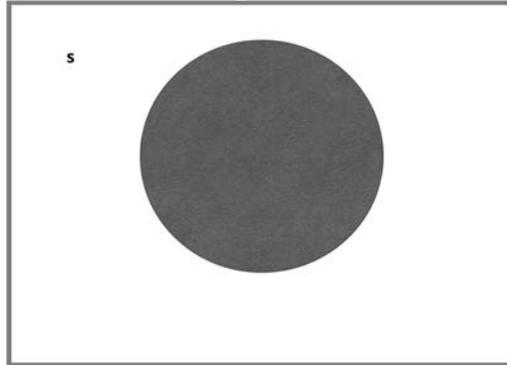
275. See Miller & Perry, *Reasonable Person*, *supra* note 28, at 388 (discussing the flaws of the majority rule and why the unanimity rule is better for determining community beliefs).

There are variants of the majority rule that do not suffer from this problem. However, they violate one or more of the four axioms. For example, consider the majority–unanimity rule, under which a statement is deemed defamatory in a given context if the majority considers it so—unless every statement is considered defamatory in that context by some majority. In the case where every statement is considered defamatory by some majority, the majority–unanimity rule deems a statement defamatory only when everyone agrees that it is defamatory. Unlike the majority rule, the majority–unanimity rule is a valid rule; it cannot lead to the outcome in which all statements are defamatory. Still, it violates the responsiveness axiom: it is possible that every individual in the community will become less judgmental and that the community will become more judgmental as a consequence.

We will now demonstrate that every valid rule other than the unanimity rule violates one or more of the four axioms. While the proof applies for any number of individuals and any number of contexts, to simplify the exposition, we will focus on the case of three people and a single context. At the outset, we consider two special cases. While each of these scenarios may be unlikely to occur in practice, they are helpful because they are very simple and can be used as reference points.

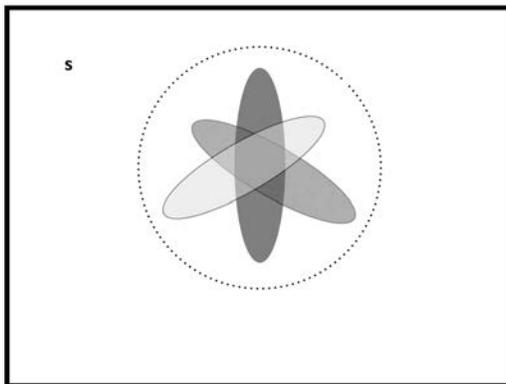
The first such special case is that of complete agreement: every person in the society shares an identical belief about every statement in every context. This case is represented in Figure 3, in which the shaded circle represents the set of statements considered nondefamatory in the context. Because the three circles are identical, they overlap, so only one circle is shown. In this case, because of the homogeneity axiom, it is clear that the community will consider a statement nondefamatory if and only if it is within the circle.

Figure 3



From this special case, we can show that if a statement is considered defamatory by everyone, then the community must also consider it defamatory. To see that this is the case, consider the set of views represented in Figure 4, and focus on a particular statement, *S*, considered defamatory by everyone. Next, suppose that everyone becomes less judgmental, so that everyone considers a statement nondefamatory if it is within the dotted line. We are now in the special case described in Figure 3. Because the opinions depicted in Figure 4 are more judgmental than those depicted in Figure 3, every statement deemed defamatory in the latter case must also have been deemed defamatory in the former. Statement *S* was defamatory in the case of Figure 3—because it is outside the circle—and consequently must be defamatory in the case of Figure 4. This proves that the community must consider a statement defamatory if an individual within the community considers it defamatory.

Figure 4

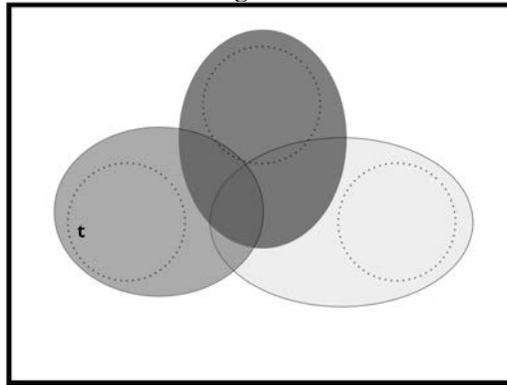


The second special case is that of complete disagreement: every person considers some statements to be nondefamatory in the context, but no two people agree that any particular statement is nondefamatory. Furthermore, each person believes that the same proportion of statements is nondefamatory. This case is depicted in Figure 2, in which each of the circles—each depicting the set of statements that a particular individual considers nondefamatory—is of the same size, and no two circles overlap. Because this case is completely symmetric, the anonymity and neutrality axioms imply that every statement considered nondefamatory by someone must be treated in the same manner—either none may be defamatory or all must be. However, if all statements in the circles are defamatory, then every statement would be defamatory in this context, and this violates the assumption that some statements must be nondefamatory. Thus, in this special case, a statement is nondefamatory if, and only if, one individual considers it nondefamatory.

It remains to be shown that, in general, a statement must be deemed nondefamatory whenever one or more people consider it nondefamatory. We begin with the general case, depicted in Figure 5. To prove this claim, we must show that statement  $T$ —considered nondefamatory by one person—must be considered nondefamatory by the community. We make the following two observations about Figure 5. First, each individual is less judgmental in Figure 5 than that individual was in Figure 2. As a

consequence, the responsiveness axiom implies that any statement that is nondefamatory in Figure 2 must also be nondefamatory in Figure 5. Second, statement *T* is considered nondefamatory by the same individual in both cases. Because statement *T* is within one of the circles in Figure 2, we can conclude that it must have been deemed nondefamatory by the community in that case. By the responsiveness axiom, then, statement *T* must also have been nondefamatory in the case of Figure 5.

Figure 5



We have shown that any statement that is considered defamatory by all individuals must be deemed defamatory by the community, and that every statement considered nondefamatory by at least one individual must be deemed nondefamatory. This is precisely the unanimity rule.<sup>276</sup> Thus, we have concluded our proof.

## 2. A Critical Appraisal of the Empirical Tests

The implication of the result in subpart A for the general community test is clearly negative. If it is true, as some commentators have claimed, that “no conduct is hated by all,”<sup>277</sup>

276. See Miller & Perry, *Reasonable Person*, *supra* note 28, at 388 (discussing and defining the unanimity rule).

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

or that “a community could never unanimously agree on the praiseworthiness or the blameworthiness of any description by which a man might be characterized,”<sup>278</sup> then the unanimity rule would completely eviscerate the law of defamation. For any context, it would be practically impossible to find a statement that tended “to lower the plaintiff in the estimation” of every single individual in a particular jurisdiction.<sup>279</sup> Communities are simply too diverse to meet this exacting standard. Proponents of the general community test, of course, have never defended the unanimity rule. Rather, they look to majoritarian norms or to the average person standard.<sup>280</sup> However, our framework rejects both of these approaches.

To apply the model to the sectorial test, we simply need to make one change—specifically to the first element of the model, the “group of people” from whose beliefs we derive the community belief. In the case of the general community test, this was determined to be the set of people living in a particular jurisdiction.<sup>281</sup> In the case of a sectorial test, it will be a smaller group of people; it may be the community of amateur athletes,<sup>282</sup> doctors,<sup>283</sup> Jews,<sup>284</sup> Arabic speakers,<sup>285</sup> truck drivers,<sup>286</sup> or any

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278. Note, *Disgracing the Plaintiff*, *supra* note 88, at 46.

279. *White v. Fraternal Order of Police*, 285 F.2d 512, 518 (D.C. Cir. 1990) (citing *Afro-Am. Publ'g Co. v. Jaffe*, 366 F.2d 649, 654 n.10 (D.C. Cir. 1966)).

280. See *Tolley v. J.S. Fry & Sons, Ltd.*, [1930] 1 K.B. 467, 479 (C.A.) (Eng.) (“Words . . . must tend to disparage him in the eyes of the average sensible citizen.”), *rev'd* [1931] A.C. 333 (H.L.).

281. See *Baker*, *supra* note 20, at 23 (discussing how juries are made up of the general community of the jurisdiction).

282. See, e.g., *Tolley*, [1930] 1 K.B. at 472–74 (discussing the plaintiff's status as an amateur golfer and the role it played in determining defamation).

283. See, e.g., *Peck v. Tribune Co.*, 214 U.S. 185, 190 (1909) (discussing doctors).

284. See, e.g., *Jews for Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1114–15 (Fla. 2008) (discussing the applicable community standard can be a minority view and in this case, the Jewish community).

285. See, e.g., *Arab News Network v. Al Khazen*, [2001] EWCA (Civ) 118, [14] (Eng.) (“[W]hether one can have regard to a lowering of reputation amongst part of society, such as the Arab or Arab-speaking community, rather than amongst society generally.”).

286. See, e.g., *Connelly v. McKay*, 28 N.Y.S.2d 327, 328–29 (N.Y. Sup. Ct. 1941) (discussing the plaintiff's allegation that the defendant's words affected the plaintiff's business from truck drivers).

other group that might be considered a substantial and respectable minority. The precise rule used to determine the membership of this group need not concern us at this point.

Having made this simple change, the rest of the model applies in a straightforward way. The unanimity rule is still the unique rule that satisfies the axioms; however, it must be applied to the sector and not to the community as a whole. Thus we must ask, for example, whether a statement in a specific context would tend to lower the estimation of the plaintiff in the eyes of truck drivers. The sectorial test is likely to produce many of the same problems as the general community test. For example, while the majority of amateur athletes in 1930 might have considered it wrong to commercially exploit their fame,<sup>287</sup> surely one or two might have seen nothing wrong with the practice. Similarly, while many Arabic speakers may have supported the Syrian government's official policy toward Israel,<sup>288</sup> it is quite clear that some Arabic speakers support negotiation toward an eventual peace settlement.

While the sectorial test is likely to lead to many of the same problems as the general community test, it is clear that the main problem is attenuated, at least in a theoretical sense: the smaller the group, the larger the likelihood that all members of the group will consider a particular statement to have been defamatory. The extent of the attenuation of this problem depends on the minimal allowable size of the sector whose views the courts will consider relevant. For a substantial and respectable minority, this difference may not matter much. It will still be difficult to find many statements about which all members of the minority agree. However, as the size of the sector is allowed to become smaller, the probability of unanimous agreement increases. Smaller groups may be more cohesive, and unanimous opinions may be more likely to appear. In the extreme case, where each individual is a separate sector, this problem disappears entirely.

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287. See *Tolley v. J.S. Fry & Sons, Ltd.*, [1930] 1 K.B. 467, 467 (C.A.) (Eng.) (“[H]e had prostituted his reputation as an amateur golf-player for advertising purposes.”), *rev'd* [1931] A.C. 333 (H.L.).

288. See *Arab News Network*, [2001] EWCA at [4–7] (discussing the News Network's publication, which described the reasons for the Vice President's dismissal).

*B. Cost–Benefit Analysis*

*The Impact of Group Size.* In this subpart, we analyze and compare three different rules: (1) the English general community test, under which a statement is defamatory if considered so by the general community;<sup>289</sup> (2) the American sectorial test, under which a statement is defamatory if considered so by a substantial and respectable minority;<sup>290</sup> and (3) the small group test, under which a statement is defamatory if considered so by a small group or a single individual.<sup>291</sup>

Because it is unclear which method courts use to determine the community belief—or even whether an empirical test is in fact used as is claimed—we need to make an assumption about how a change in the allowable size of a group affects courts’ behavior. We assume that the scope of liability for defamation widens as the minimal size of the allowable group becomes smaller. This is so because in allowing claims of defamation based on smaller groups, we add to and do not preclude claims for defamation within larger groups. For example, in jurisdictions using the sectorial test, one may make a claim of defamation based on the views of the general community, and need not focus on the case of a specific “substantial and respectable minority.”<sup>292</sup>

*The Strategic Action Problem.* There are reasons, separate from the theoretical problem outlined in subpart A, to prefer the American sectorial test to the English general community test and to prefer a small group test to both. The sectorial test does not allow claims that would be permitted under the small group test, and the general community test bars claims allowed by

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289. See Lidsky, *supra* note 6, at 16 (“British courts took the position that a statement must be defamatory according to the general consensus of society . . .”).

290. See *id.* (“American courts . . . discern the relevant community in whose eyes the plaintiff was injured.” (citation omitted)).

291. See Tommaney, *supra* note 15, at 641 (“[M]ore harm can be done to a person’s reputation when he is defamed in the eyes of an extremely small group . . .”).

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

both.<sup>293</sup> The cost of not allowing these claims can be significant.<sup>294</sup>

First, it is important to recognize that the harm to the plaintiff may be largely independent of the size of the relevant group. Individuals who are not public figures usually care about their reputations among relatively small groups.<sup>295</sup> On a personal level, they care most about their reputation among friends, family, neighbors, and people who attend the same church or whose children attend the same schools.<sup>296</sup> On a professional level, they may care about their reputation among colleagues, and their ability to retain their job, find a new one, or attract clients. A statement that is defamatory among a small group may be just as harmful as one that is defamatory among the general population.

Second, if the statement in question is not found to be defamatory because either the sectorial test or the general community test is used, then the defendant has no incentive to take the proper amount of care to prevent real and serious harm to the plaintiff's reputation. This is especially clear when the publisher of the statement knows, or could discover at a low cost, that the statement tends to harm the plaintiff's reputation in the relevant group. In this case, a publisher will not exert a reasonable level of effort to ensure that the defamatory statement

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293. See *supra* Part II.A–B (discussing the differences between successful claims under the sectorial test and the general community test).

294. See *supra* Part I (discussing the possibility of strategic action and the chilling effect of the sectorial test and the general community test); see also Tommaney, *supra* note 15, at 641 (“[M]ore harm can be done to a person’s reputation when he is defamed in the eyes of an extremely small group, or even in the eyes of only one person . . .”).

295. See *Weiner v. Time & Life Inc.*, 507 N.Y.S.2d 784, 785 (N.Y. Sup. Ct. 1986) (“[I]t is obvious that a person can only be injured in his community, i.e. with those who know him personally or by reputation . . .”); Tommaney, *supra* note 15, at 641 (“[M]ore harm can be done to a person’s reputation when he is defamed in the eyes of an extremely small group, or even in the eyes of only one person . . . For example, if a man is defamed in the eyes of his employer, his relatives, or his close friends, considerable damage may be done . . .”).

296. See Tommaney, *supra* note 15, at 641 (explaining how people value the opinions of certain people more than others depending on the relationship).

is truthful or to check, when reasonable, whether the statement might be harmful to the plaintiff's reputation.<sup>297</sup>

Third, this problem becomes more extreme when considering the case of intentional defamation. Individuals may strategically make a false statement with the goal of inflicting injury to the reputation of another, having an economic or a psychological motivation. The harm from this malicious behavior can be significant. A carefully calculated statement may only harm the plaintiff's reputation within a small group of individuals, yet might destroy the plaintiff's marriage or career. The problem is not simply that the plaintiff may not recover, but rather that the defendant has a blank check to harm the reputation of a perceived rival, so long as the defendant can find a statement that is only harmful within a subset of the plaintiff's immediate circle of family, friends, colleagues, and acquaintances. Put differently, individuals have no incentive to take precautions when they know that a statement tends to harm the potential plaintiff's reputation within a group that is smaller than the minimum recognized by the applicable test. In this case, a strategic defamer can act with impunity.

While the problems of negligent and intentional defamation are distinct, in general it is clear that they exist in close proximity to each other. That is, neither is a serious problem under the small group test, but both are very significant problems under the sectorial test, and both are even more severe under the general community test. To simplify the discussion, we will give a common name to both: the strategic action problem.

*The Chilling Effect.* While the small group test would eliminate the theoretical problem outlined in subpart A and the problem of strategic action, Anglo-American courts do not allow actions for defamation based upon reputational harm in very small segments of society.<sup>298</sup> Under American law, the sector

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297. Cf. *Weiner*, 507 N.Y.S.2d at 785 (“[I]t would be manifestly unfair and unworkable to require *Time*, a magazine of nationwide scope with a heterogeneous audience, to consider each small enclave within various communities whenever it writes about a person.”).

298. See, e.g., *Peck v. Tribune Co.*, 214 U.S. 185, 190 (1909) (applying the substantial and respectable minority test); *Marcoux-Norton v. Kmart Corp.*, 907 F. Supp. 766, 778 (D. Vt. 1993) (“[T]he community may be a substantial

must be “a substantial and respectable minority,”<sup>299</sup> and may not be a “single individual or a very small group of persons.”<sup>300</sup>

A possible explanation for this discrepancy can be found in the aforementioned case of *Weiner v. Time & Life, Inc.* In this case, the court refused to hold the defendant liable for an allegedly defamatory article in *Time* magazine, which described the plaintiff as violating the rules of his religious community.<sup>301</sup> The court reasoned that it would be unfair and unworkable to expect a national magazine with a heterogeneous audience to consider “each small enclave within various communities whenever it writes about a person.”<sup>302</sup> In economic terms, imposing liability in this case would create high publication costs, which would require the publisher to devote a significant amount of resources to ensuring that its reporting would not be considered offensive in any small community.<sup>303</sup> In addition, these increased costs would likely lead to a chilling effect by reducing and decreasing the quantity and quality of published material.<sup>304</sup> The cost of precaution—the resources devoted to

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respectable group, even though only a minority of the total community.”); *Tolley v. J.S. Fry & Sons, Ltd.*, [1930] 1 K.B. 467, 479 (C.A.) (Eng.) (applying the general community test), *rev'd*, [1931] A.C. 333 (H.L.); RESTATEMENT (SECOND) OF TORTS § 559 cmt. e (1977) (“It is enough that the communication would tend to prejudice him in the eyes of a substantial and respectable minority . . .”).

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

300. *Id.*

301. *Weiner v. Time & Life Inc.*, 507 N.Y.S.2d 784, 784–85 (N.Y. Sup. Ct. 1986).

302. *Id.* at 785.

303. *Cf.* *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (“[A] rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship.”); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964) (“A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions . . . leads to a comparable ‘self-censorship.’”); *Weiner v. Time & Life Inc.*, 507 N.Y.S.2d 784, 785 (Sup. Ct. 1986) (“[I]t would be manifestly unfair and unworkable to require *Time*, a magazine of nationwide scope with a heterogeneous audience, to consider each small enclave within various communities whenever it writes about a person.”).

304. *See Gertz*, 418 U.S. at 340 (“[P]unishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press. . . . [A] rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship.”); *Sullivan*, 376 at 279 (“A rule compelling

determining whether a statement is defamatory—and the chilling effect are interrelated, but distinct. Nevertheless, because they exist within close proximity—one is a problem when the other is a problem—we will simplify the discussion by referring to them collectively as the “chilling effect.” We believe that any loss in accuracy will be made up for by an increase in clarity.

Generally, as the minimal size of the allowable group becomes smaller, the chilling effect is exacerbated.<sup>305</sup> The cost of determining whether a statement is defamatory in the eyes of the general community is relatively low; individuals can be presumed to be familiar with the community as a whole.<sup>306</sup> We may expect that it is somewhat more costly to determine whether a statement is defamatory in the eyes of a substantial and reasonable minority. Individuals often have some degree of familiarity with the larger subgroups in the population, but less than they do with the community as a whole. It is much more costly to determine whether a statement is defamatory in the eyes of a small group. An individual will be familiar with the prevailing perceptions in small groups only if he or she has learned about them from personal interaction with members of these groups or with the potential plaintiff, or through coincidental exposure to relevant information.

*England versus the United States.* Having elucidated the economic factors relevant when choosing between the various rules, we seek to understand this central question: how can we account for the divergence among the common law countries? Why did England adopt the general community test?<sup>307</sup> Why is the sectorial test popular in the United States? In both countries,

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the critic of official conduct to guarantee the truth of all his factual assertions . . . leads to . . . ‘self-censorship.’ Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred.”)

305. Cf. *Weiner*, 507 N.Y.S.2d at 785 (“[I]t would be manifestly unfair and unworkable to require *Time*, a magazine of nationwide scope with a heterogeneous audience, to consider each small enclave within various communities whenever it writes about a person.”).

306. See *Baker*, *supra* note 20, at 8 (suggesting that the general community test relies upon standards that are common to society generally).

307. See *supra* Part II.A (discussing the English adoption of the general community test).

common law judges faced a tradeoff between the problem of strategic action, on the one hand, and the chilling effect, on the other. The English general community test suffers from a severe strategic action problem, but a very mild chilling effect, while under the American sectorial test, both the chilling effect and the strategic action problem are moderate.<sup>308</sup> What explains this difference? Were English courts more concerned with the chilling effect than American courts? Were American courts more concerned with the strategic action problem than English courts? Or was it a combination of these two factors?

We suspect that the first explanation is more likely. The extent of the chilling effect depends on how likely individuals are to know about smaller groups. Because England once had a very homogeneous population,<sup>309</sup> it is possible that the chilling effect which would come from the adoption of the sectorial test would have been quite severe. On the other hand, the United States population had already become relatively diverse by the time that American courts adopted the sectorial test.<sup>310</sup> We do not have any reason to believe that the strategic action problem would have been more significant in the United States than in England. There is no evidence that Americans are more likely to want to harm their rivals or are more likely to have the skills necessary to do so through defamatory speech.

As a result, while it would have been costly—in terms of the chilling effect—to adopt the sectorial test, this cost would have been much smaller in the United States than in England. The benefits—in terms of the strategic action problem—of adopting the sectorial test would have been similar in both countries. As a consequence, the sectorial test was *relatively* more desirable in the United States, and it seems reasonable that American courts made this choice.

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308. *Supra* Part III.B.1–2.

309. *See* Riesman, *supra* note 91, at 1301 (discussing homogeneity in England); Burchell, *supra* note 11, at 183 (explaining that the general community test fits England, where the population is relatively homogeneous).

310. *See* BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, PART 1, at 22 (1975) (providing census information delineated by sex, race, residence, age, and nativity by region between 1790 and 1970).

*Caveats.* While our analysis shows that both sets of choices—that of the English courts to adopt the general community test, and that of the American courts to adopt the sectorial test—may have been justifiable at the time in terms of the cost–benefit tradeoff described, several notes of caution are in order.

First, the theoretical model of community standards suggests that if the element of defamatoriness is empirically founded—that is, if the tendency to harm one’s reputation is based on an actual tendency and is not a legal fiction—then only the unanimity rule satisfies the basic axioms that we have identified.<sup>311</sup> The unanimity rule is not a practically feasible rule under either the general community test or the sectorial test, although it is slightly less feasible under the former.<sup>312</sup> Because it seems clear that the unanimity rule is not used in practice, we must draw the conclusion that courts are not using a coherent or consistent method to determine the views of the community. That there is a flaw in the method used does not mean that it should necessarily be discarded, as it is possible that whatever courts do in practice under a particular rule may be preferable from the perspective of a normative goal such as welfare maximization. However, it should be understood that both the general community test and the sectorial test are based on a legal fiction and cannot represent the community belief in *any* meaningful sense.

Second, while we argue that the courts in both countries may have made the best choice, we are assuming that the courts were limited to the three possible rules discussed here. In a broader sense, neither the English general community test nor the American sectorial test is fully optimal. Both suffer from the problem of strategic action. However, it is plausible that the chilling effect which would be created by adopting the small group test would be worse. In addition, it is important to note that none of these tests removes the chilling effect entirely.

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311. See *supra* Part III.A.2 (explaining that the model of community standards’ four axioms are only satisfied when “a statement made in a particular context is defamatory if, and only if, it would tend to lower the reputation of the plaintiff in the eyes of every single individual in the community”).

312. *Supra* Part III.A.2.

*C. Constitutionalized Defamation*

In the past fifty years, American defamation law has dramatically changed following a set of Supreme Court decisions that interpreted the U.S. Constitution to require plaintiffs to prove additional elements as part of a defamation claim.<sup>313</sup> The most relevant of these cases is *Gertz v. Robert Welch, Inc.*, in which the Supreme Court held that states may not hold defendants liable for defamation without a showing of fault.<sup>314</sup> We argue that *Gertz* should be interpreted as allowing liability only if the defendant was aware, or had reason to be aware, that the statement was defamatory. Our argument can be broken into two parts. First, we argue that the Constitution requires fault with respect to both the accuracy of the statement and its defamatory nature.<sup>315</sup> Second, we maintain that fault with respect to the defamatory nature of a statement is primarily a question of knowledge.<sup>316</sup>

In general, there are two main interpretations of the fault requirement that we have found in caselaw and legal literature. First, the Constitution may require fault with respect only to the accuracy of the statement.<sup>317</sup> In this setting, one must prove that

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313. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974) (holding that liability for defamation requires fault); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 155 (1967) (“We . . . hold that a ‘public figure’ who is not a public official may also recover damages for a defamatory falsehood . . . , on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.”); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (concluding that an action for defamation cannot be brought by a public official if the false statements were made without the plaintiff’s knowledge of the falsity or the plaintiff’s reckless disregard for their truth).

314. *Gertz*, 418 U.S. at 347 (“We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.”).

315. See RESTATEMENT (SECOND) OF TORTS § 580B (1970) (indicating that liability for defamation requires that the defendant “knows that the statement is false and that it defames” the plaintiff).

316. See *id.* (requiring the defendant to know that the statement is both false and defamatory).

317. See, e.g., *Jews for Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1106 (Fla. 2008) (requiring fault only as to the falsity of the statement).

the defendant failed to act reasonably in determining whether the statement was true.<sup>318</sup> Second, the Constitution may require fault with respect to both the accuracy of the statement and its defamatory nature.<sup>319</sup> In this case, one must prove that the defendant failed to act reasonably in determining whether the statement was both false and harmful.<sup>320</sup> A defendant who reasonably believed that the statement was not defamatory may be liable under the former interpretation, but not under the latter.

A third potential interpretation, that the Constitution might require fault with respect only to the defamatory nature of the statement, has not taken root. Part of the reason for this is that the defendant's knowledge of the statement's falsity or lack thereof has been deemed central to the case.<sup>321</sup> The defendant in *Gertz* claimed to have not known that the statements were false,<sup>322</sup> while it seems to have been uncontroverted that they were understood to be defamatory. In addition, while there may be value in the publication of statements which are defamatory but true,<sup>323</sup> Justice Powell, writing for the majority, emphasized

318. *See, e.g., id.* ("Defamation has . . . five elements: (1) publication; (2) falsity; (3) actor must act with knowledge or reckless disregard as to the falsity on a matter concerning a public official, or at least negligently on a matter concerning a private person; (4) actual damages; and (5) statement must be defamatory.").

319. *See, e.g.,* RESTATEMENT (SECOND) OF TORTS § 580B (1977) ("One . . . is subject to liability, if, but only if, he (a) knows that the statement is false and that it defames the other, (b) acts in reckless disregard of these matters, or (c) acts negligently in failing to ascertain them.").

320. *See id.* (requiring that the defendant know that the statements are false and defamatory, that the defendant acted in reckless disregard, or that the defendant acted negligently in failing to realize the statements' falsity and defamatory nature).

321. *See, e.g.,* *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (requiring knowledge of falsity or reckless disregard for falsity for defamation of a public figure).

322. *See Gertz v. Robert Welch Inc.*, 418 U.S. 323, 328 ("The editor denied any knowledge of the falsity of the statements concerning petitioner and stated that he had relied on the author's reputation and on his prior experience with the accuracy and authenticity of the author's contributions to *American Opinion*.").

323. *Cf. Note, Developments in the Law of Defamation, supra* note 16, at 932 [T]here is no civil liability for the publication of a true statement even

that “there is no constitutional value in false statements of fact,”<sup>324</sup> even if these facts are not defamatory.

The Restatement (Second) of Torts has endorsed the second position, namely that the fault requirement should be understood with respect to both the falsity and the defamatory nature of the statement.<sup>325</sup> However, this issue is far from settled, as many jurisdictions seem to follow the first approach.<sup>326</sup> We argue that the Restatement’s position is more tenable for several reasons. First, Justice Powell, writing for the majority in *Gertz*, held that States may not impose liability without fault with respect to the publication of a “defamatory falsehood injurious to a private individual,”<sup>327</sup> implying that the defamatory nature of the statement is part of the analysis.

Second, the two questions of whether there is fault with respect to the falsity and defamatoriness of a statement are not separable. On the one hand, we expect someone with an inkling that a statement might harm an individual’s reputation if false to very carefully check the veracity of the claim. On the other hand, if a person does not know that a statement, if false, could hurt an individual’s reputation, then we do not expect that person to exert nearly as much effort in verifying that the statement is true.

Third, while the first two interpretations are conceptually distinct, the practical implications are limited by the fact that American courts only allow for liability when the statement is defamatory in the eyes of the general community or a substantial and respectable minority.<sup>328</sup> The larger the size of this group, the

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though it is uttered maliciously and injures a person’s reputation. . . .  
[A] person has no right to a better reputation than he would have if all the facts about him were known, and . . . members of the public have an interest in knowing the truth about others with whom they may associate.”

(footnote omitted).

324. *Gertz*, 418 U.S. at 340.

325. RESTATEMENT (SECOND) OF TORTS § 580B (1977).

326. See, e.g., *Jews for Jesus, Inc. v. Rapp* 997 So. 2d 1098, 1106 (Fla. 2008) (requiring fault with respect to the accuracy of the statement).

327. *Gertz*, 418 U.S. at 347.

328. See RESTATEMENT (SECOND) OF TORTS § 559 cmt. e (1970) (explaining the substantial and respectable minority standard).

less likely it is that an individual could reasonably, but incorrectly, come to the conclusion that a defamatory statement is nondefamatory. Differences between the interpretations would only be relevant when dealing with smaller groups that barely fit into the category of “substantial and respectable.” It is possible that courts have varied these boundaries to avoid holding defendants liable when they are perceived to have acted reasonably. For example, in *Weiner v. Time & Life, Inc.*, the court discussed whether the defendant could be expected to know that the statement in question was defamatory among highly orthodox Jews in upper Manhattan in determining whether highly orthodox Jews in this area comprised a substantial and respectable minority.<sup>329</sup>

Furthermore, we maintain that fault with respect to the defamatory nature of a statement is primarily a question of knowledge. To show that this must be the case, we return to our argument that the questions of fault with respect to falsity and defamatoriness are inseparable. While we expect reasonable persons to exert some effort in determining whether a statement is accurate, we do not generally expect reasonable persons to inquire as to whether a statement is defamatory. There is not necessarily anything wrong with making a defamatory statement if that statement is factually true.<sup>330</sup> However, the level of effort that a person should exert to verify the accuracy of a statement depends on what the person knows about the amount of harm which could result from a false statement, that is, on whether the person knows the statement is defamatory.

The fault requirement is important because it largely counteracts most of the chilling effect. We noted in Part II.B that the chilling effect has two components.<sup>331</sup> First, publishers may expend too much effort in determining whether a statement is

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329. *Weiner v. Time & Life, Inc.*, 507 N.Y.S.2d 784, 784–85 (N.Y. Sup. Ct. 1986).

330. *See* *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (“[There is] a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”).

331. *Supra* Part II.B.

false and defamatory.<sup>332</sup> Second, publishers may publish less as a result of these increased costs and the damages that may be imposed for honest mistakes.<sup>333</sup> The fault requirement substantially changes the analysis. Publishers will be liable only if at fault; thus, they only need to expend reasonable effort in verifying statements.<sup>334</sup> Moreover, under the fault requirement, publishers that act reasonably will not be required to pay damages when an honest mistake is made—that is, when a false defamatory statement is published in spite of their reasonable efforts.<sup>335</sup> This effect of the fault requirement on the chilling effect is not a mere coincidence, but was the primary intention of the Supreme Court. Both *New York Times v. Sullivan* and *Gertz v. Robert Welch, Inc.* are justified in terms of their effect on self-censorship.<sup>336</sup>

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332. Cf. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (“[A] rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship.”); *Sullivan*, 376 U.S. at 279 (“A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions . . . leads to a comparable ‘self-censorship.’”); *Weiner*, 507 N.Y.S.2d at 785 (“[I]t would be manifestly unfair and unworkable to require Time, a magazine of nationwide scope with a heterogeneous audience, to consider each small enclave within various communities whenever it writes about a person.”).

333. See *Gertz*, 418 U.S. at 340 (“[P]unishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press. . . . [A] rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship.”); *Sullivan*, 376 U.S. at 279 (“A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions . . . leads to . . . ‘self-censorship.’ Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred.”).

334. See *Jews for Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1106 (Fla. 2008) (requiring knowledge or reckless disregard as to falsity for matters concerning a public official, or at least negligence for matters concerning a private person).

335. See *id.* (requiring knowledge or reckless disregard as to falsity for matters concerning a public official, or at least negligence for matters concerning a private person).

336. See *Gertz*, 418 U.S. at 340 (“[P]unishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press . . . . [A] rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship.”); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964) (“A rule compelling the critic of official conduct to guarantee the

Thus, as a result of the fault requirement introduced in *Gertz*, the analysis of the three rules changes. The small group test is now preferable to both the sectorial test and the general community test. First, because the chilling effect has been negated by the fault requirement, the small group test allows us to eliminate the problem of strategic action without creating a significant chilling effect. The American sectorial test and the English general community test, on the other hand, suffer from a serious strategic action problem. Second, the small group test is not subject to the theoretical problem described in Part II.A. In the present legal reality, the adoption of the small group test—allowing claims of defamation for statements that would be considered defamatory in the eyes of small groups or individuals—could improve both the economic efficiency and the internal consistency of the law.

#### *IV. Conclusion*

This Article provides an answer to the most fundamental question in defamation law: what should make a particular statement defamatory? The inquiry involves two steps. In the interpretive step, the court determines whether the allegedly defamatory statement was true, and in the evaluative step, the court determines whether the statement, properly interpreted, had the tendency to harm the plaintiff's reputation. This Article focuses on the latter. Part III explains that the definition of defamatoriness in common law jurisdictions is essentially empirical, and distinguishes between the two leading tests—the English test and the American test.

Part II.A discusses how English courts have embraced the general community test, whereby a statement is defamatory if considered so by the public at large. The traditional English test, which relies on empirical observations, at least *de jure*, consists of a normative constraint. A statement is defamatory if considered so by the general community, taking into account only the views

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truth of all his factual assertions . . . leads to a comparable 'self-censorship.' Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred.").

of “right thinking” people. Thus, an English court will pay no heed to a community standard if it does not comply with the normative threshold.

Part II.B illustrates that American courts have generally endorsed the sectorial test, whereby a statement is defamatory if considered so by a substantial and respectable minority. This test integrates two constraints. On the quantitative level, although a statement can be defamatory if it prejudices a person in the eyes of a minority, that minority must be substantial. A single individual or a very small group of persons with peculiar views will not suffice. This qualification precludes *ex definitio* the small group test. On the qualitative level, a statement may be defamatory if considered so by a mere minority, provided that it is a respectable one. Accordingly, the fact that a person’s reputation may be injured in the eyes of a substantial minority is insufficient. The court will reject the sectorial standard if it does not comply with the normative threshold. Part II.C discusses purely normative tests for defamation for the sake of completeness, although they are uncommonly used.

Part III conducts two separate economic analyses of the tests for defamation. In the first analysis, we use a theorem from the economic field of social choice to study the relationship between the view of the community and the views of the individuals who comprise the community. We explain that if the former is derived from the latter, and the derivation satisfies several normatively desirable properties, then the derivation must be done according to the unanimity rule. A statement may be considered defamatory only when all individuals in the relevant community consider it so. Because this rule is implausible except in the case of the small group test, it suggests that both the English general community test and the American sectorial test lack a solid theoretical foundation.

In the second analysis, we study the costs and benefits associated with the various tests. We demonstrate that the important costs involved are the chilling effect and the problem of strategic action, and that the American sectorial test may have constituted a reasonable tradeoff between these concerns. We then argue that the fault requirement introduced in *Gertz* should apply to both the falsity and the defamatory nature of the statement. Under this interpretation, the fault requirement

ameliorates the chilling effect. As a result, the American sectorial test is no longer optimal, and it would be preferable from the standpoint of economic efficiency to adopt the small group test in its place.