LGBTQ+ RIGHTS, ANTI-HOMOPHOBIA AND TORT LAW FIVE YEARS AFTER *OBERGEFELL*

Geoffrey Christopher Rapp[*]

Tort law's intersection with the rights of members of minority and historically oppressed groups is complicated, and its status as an instrument for the advancement of rights tenuous. Tort law embraces a "reasonable person" analysis, with liability circumscribed by the attitudes, impressions, beliefs, knowledge, and understanding of the fictional average member of "the community," and reaches for majoritarian sensibilities to regulate human interaction. Tort law is also shaped by the common law process, and can be slow to evolve to changes in social structures, patterns of human relations, and the needs of members of growing minority groups that have not achieved dominant status. On the other hand, because of the evolving content of reasonableness and the common law process, tort law is equipped to change as society changes. This paper considers how tort law responded to a distinctive and powerful exogenous shock—the Supreme Court's landmark 2015 decision prohibiting the restriction of same-sex marriage, Obergefell v. Hodges.

TABLE OF CONTENTS

* Harold A. Anderson Professor of Law and Values, the University of Toledo College of Law.

I. INTRODUCTION

Tort law's intersection with the rights of members of minority and historically oppressed groups is complicated, and its status as an instrument for the advancement of rights is tenuous.

Tort law embraces a "reasonable person" analysis throughout its doctrinal structure—in intentional torts like assault[1] and in torts involving dignitary interests,[2] in the central evaluation of fault in negligence law,[3] as well as in torts relating to informational and reputational interests,[4] privacy,[5] and contractual and business relations.[6] Tort liability is circumscribed by the attitudes, impressions, beliefs, knowledge, and understanding of the fictional average member of "the community."[7] In this way, tort law intentionally and consciously disregards the interests of members of minority groups.[8] Its reaches for

1. *See* RESTATEMENT (SECOND) OF TORTS § 31 (AM. L. INST. 1965) ("Words do not make the actor liable for assault unless together with other acts or circumstances they put the other in reasonable apprehension of an imminent harmful or offensive contact with his person.").

2. *Id.* § 19 ("A bodily contact is offensive if it offends a reasonable sense of personal dignity.").

3. RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 7 (AM. L. INST. 2010) ("An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm.").

4. *Id.*; *id.* § 563 ("The meaning of a communication is that which the recipient correctly, or mistakenly but reasonably, understands that it was intended to express."); *id.* cmt. c ("The question to be determined is whether the communication is reasonably understood in a defamatory sense by the recipient.").

5. *Id.* § 652A ("The right of privacy is invaded by (a) unreasonable intrusion . . . (c) unreasonable publicity given to . . . private life . . . or (d) publicity that unreasonably places the other in a false light . . . .").

6. *Id.* § 766 cmt. b ("[T]here is a general duty not to interfere intentionally with another's reasonable business expectancies of trade with third persons, whether or not they are secured by contract . . . .").

7. "Reasonableness" is presumed to equate to "conformity with statistically prevalent norms of conduct." Heidi M. Hurd & Michael S. Moore, *Negligence in the Air*, 3 THEORETICAL INQUIRIES L. 333, 377 (2002).

8. *See* Paul T. Hayden, *Religiously Motivated "Outrageous" Conduct: Intentional Infliction of Emotional Distress as a Weapon Against "Other People's Faiths,"* 34 WM. & MARY L. REV. 579, 586 (1993) (Tort law "may allow majoritarianism to ride roughshod over unpopular or minority rights and beliefs, the protection of which is an important societal value . . . .").

majoritarian sensibilities[9] to regulate human interaction and neglects the particular interests and history of subjugation of minority group members.[10]

Tort law is also shaped by the common law process, with successive state court decisions establishing the boundaries of causes of action and the rights of parties to seek monetary relief for actionable invasions of their interests.[11] As a result, it can be slow to evolve to changes in social structures, patterns of human relations, and the needs of members of growing minority groups that have not achieved dominant status.[12] The pace of common law change may seem glacial, and may have grown even more sluggish in the last few decades due to a reduction in the number of civil tort trials, an increasingly conservative judiciary, heavy caseloads for state supreme courts, and judicial exhaustion arising from significant tort reforms in the post-World War II era.[13]

On the other hand, because of the evolving content of reasonableness and the common law process, tort law is equipped to change as society changes. When norms of interaction have changed and patterns of behavior evolve, tort law can grow and shift to recognize new rights.[14] As Paul Hayden writes, "no area of law is as flexible and responsive to changing social mores as is torts."[15] Tort law is also distinctive in that the elements of many torts are open-ended, making use of "deliberately flexible words,"[16] the boundaries of tort claims "flexible," their "contours . . . often are filled in by juries rather than by legal elites."[17]

This paper considers how tort law responded to a distinctive and powerful exogenous shock—the Supreme Court's landmark 2015 decision prohibiting the restriction of same-sex marriage, *Obergefell v. Hodges*.[18] The expansion of rights for LGBTQ+[19] Americans is clearly the transcendent civil rights victory of my generation.[20] *Obergefell* represented a perhaps unexpected and dramatic

9. David A. Anderson, *First Amendment Limitations on Tort La*w, 69 BROOK. L. REV. 755, 765 (2004).

10. Katrina Fischer Kuh, *The Legitimacy of Judicial Climate Engagement*, 46 ECOLOGY L.Q. 731, 745–46 n.64 (2019).

11. ANITA BERNSTEIN, THE COMMON LAW INSIDE THE FEMALE BODY 16 (2019) ("Torts has hewed more than any other field in the American law curriculum to what judges fashion.").

12. Ann Bartow, *The Female Legal Realist Inside the Common Law*, 61 B.C. L. REV. ELEC. SUPP. I.-82, I.-82–83 (explaining that the common law process can produce a "slow slog" towards justice for traditionally oppressed groups).

13. Kyle Graham, *The Diffusion of Doctrinal Innovations in Torts Law*, 99 MARQ. L. REV. 75, 130–48 (2015) (discussing possible explanations for a perceived decline in tort law innovations in recent decades).

14. Hayden, *supra* note 8, at 602.

15. *Id.* at 584.

16. *Id.* at 585.

17. *Id.* at 580.

18. 576 U.S. 644, 681 (2015).

19. This Article uses the modern preferred terminology to discuss LGBTQ+ individuals. Many of the cases discussed, however, along with secondary sources commenting on those cases, use more dated phrasing, including terms such as "homosexual" and "homosexuality."

20. The other development of the past quarter-century of note is the widespread recognition of implicit bias and institutional racism, triggered in no small part by the Black Live Matter movement. Arguably, though, credit for that belongs to the Millennial and Z generations. *See* Garrett Chase, *The Early History of the Black Lives Matter Movement, and the Implications Thereof*, 18 NEV. L.J. 1091, 1095–96 (discussing the role of Alicia

rejection of the rights of states to define marriage according to majoritarian standards of "normal" behavior, placing importance instead on the liberty interests of citizens to choose who they love and who they marry.[21] Because it came from the nation's top court but had immediate impact on the laws of the fifty states, the case required abrupt change rather than change through the slower process of common law decision-making.[22]

I evaluate here how tort law has responded to this seismic shift. First, I explore whether tort decisions have faithfully implemented the anti-discrimination mandate in *Obergefell* to embrace the rights of plaintiffs where legally defined marital relationships directly affect the substance of tort law.[23] In areas such as the proper parties for bystander negligent infliction of emotional distress ("NIED"), wrongful death claims, and loss-of-consortium damages, tort jurisprudence has quickly and faithfully responded to *Obergefell's* call, even if courts have been, at times, not imaginative or adaptable enough to address some of the persistent inequities resulting from states' now-defunct bans on same-sex marriage.[24]

Second, I explore whether the exogenous shock of the Court's opinion has affected the less clearly defined rules of tort law to place greater emphasis on the rights of sexual minorities and on the experience of LGBTQ+ Americans by moving away from implicit or explicit homophobia and instead embracing anti-homophobic and anti-transphobic agenda inspired by *Obergefell*.[25] In thinking through these less certain and nonobvious implications, tort law might be affected not just by the formalities of the Supreme Court's decision but also, potentially, by the manner in which the Court articulated its decision.[26] There, we may find that tort law's internal mechanisms for change have proven less adaptable.[27]

While focusing on the experience of LGBTQ+ parties in tort law in the five years following *Obergefell*, the paper's aims are broader—to illuminate the grace and imperfection of the tort system to adapt to sweeping forces of social change. Its lessons can apply with potential equal force to the rights of members of other minority and historically oppressed groups facing obstacles erected by centuries of jurisprudence defined by majoritarian principles.

Garza, born 1981, and Patrice Cullors, born 1983, in starting "what would eventually grow into the BLM movement" in 2013).

21. *See Obergefell*, 576 U.S. 644.

22. *See id.*; *see also* discussion *infra* Part V.

23. *See* discussion *infra* Part V.

24. *See* discussion *infra* Section V.A.

25. *See* discussion *infra* Section V.B.

26. In earlier work, my co-author and I have found no evidence to support the idea that the Supreme Court's articulated reasons for its decision affect the likelihood of a public backlash against Same-Sex Marriage. Even if the Court's reasoning fails to affect the likelihood of a public backlash, it might still impact particular institutions and prompt a reevaluation of rules affecting the rights of parties. *See* Courtney Megan Cahill & Geoffrey Christopher Rapp, *Does the Public Care How the Supreme Court Reasons? Empirical Evidence from a National Experiment and Normative Concerns in the Case of Same-Sex Marriage*, 93 N.C. L. REV. 303, 308–11, 329 (2015).

27. *See* discussion *infra* Part V.

II. TORT LAW AND THE RIGHTS OF MEMBERS OF MINORITY AND HISTORICALLY OPPRESSED GROUPS

Tort law is crafted principally through common law decision-making, which could be described as "the legal rights, duties, powers, prohibitions, and remedies derived exclusively from published caselaw."[28] The common law process involves "incremental, case-specific" adjudication.[29] Common law "resolves issues at the most granular level based on fact-specific cases and controversies."[30]

Applying principles of stare decisis, judges analogize from one case to the next.[31] This results in "innovations" that are "rare," and the law "chang[ing] incrementally."[32]

As a result of the slow, incremental, and conservative nature of tort law, it is widely recognized that the field has proven a relatively ineffective instrument for social change and advancing justice for historically oppressed and minority groups.[33]

A. Gender and Tort Law

Sometimes, tort law fails to advance the interest of minority and oppressed groups through neglect, benign or otherwise.[34] Such has often been the case with tort law's treatment of women.[35] In both the law of torts and in tort scholarship, "gender and women have often been notable…by their absence in analysis and their invisibility in reporting."[36]

Less than a century ago, tort law was expressly inequitable in its treatment of men and women.[37] For example, prior to the middle of the twentieth-century many states adhered to the common law rule that a husband could sue for injuries to his wife, but that "the wife had no action for loss of her husband's society and services."[38] The first torts' *Restatement* produced by the American Law Institute, as late as 1938 updates, reflected this position: "The wife is not, nor has she ever

28. J. Lyn Entrikin, *The Death of Common Law*, 42 HARV. J.L. & PUB. POL'Y 351, 363, 452 (2019).

29. *Id.* at 356.

30. *Id.*

31. *Id.* at 434–45. Writing about another field dominated by an albeit unusual area of common law decision-making, antitrust, Rebecca Haw writes that

> Because stare decisis discourages comprehensive revisions to existing rules, incremental change is the common law's favored mode of rule adjustment. The common law's commitment to incremental change reflects a belief that although legal change is valuable, its optimal process is slow and decentralized; major doctrinal shifts are possible, but they happen slowly and must be achieved through collective judicial action.

Rebecca Haw, *Delay and its Benefits for Judicial Rulemaking Under Scientific Uncertainty*, 55 B.C. L. REV. 331, 356 (2014).

32. Entrikin, *supra* note 28, at 434.

33. *See* Margo Schlanger, *Injured Women Before Common Law Courts, 1860-1930*, 21 HARV. WOMEN'S L.J. 79, 80–82 (1998).

34. *See id.*

35. *See id.*

36. *Id.*

37. *See id.* at 101.

38. RESTATEMENT (SECOND) OF TORTS § 693 cmt. d (AM. L. INST. 1977).

been, entitled to the services of her husband."[39] Another example can be found in the generally now disestablished "heart balm" torts, such as criminal conversation, which allowed a husband to sue a person who had sexual intercourse with his wife but created no such parallel action for a wife.[40]

Courts' treatment of women in tort cases did evolve—albeit slowly.[41] History suggests that as the treatment of female parties in early cases involving automobiles, trains and streetcars evolved, tort cases did not use "exclusionary rhetoric" and indeed engaged in "a good deal of careful line-drawing relating to women's reasonable needs," which produced "quite a lot of law favorable to the actual women claimants."[42] Evolving tort cases "rarely stigmatized or excluded women[,]" and the "exclusion of women" was "perhaps . . . less . . . than has been assumed."[43]

At the same time, tort law continues to fail to recognize injuries, such as those stemming from sexual harassment, which disproportionally affect women.[44] Tort law devalues emotional injury and relationship harm, embracing a hierarchical approach to injury which has prioritized the protection of interests (physical security and property) which has "tend[ed] to have a disproportionately negative impact on women," whose injuries are more likely to be "classified . . . as lower-ranked emotional or relational harms."[45]

B. Race and Tort Law

Tort law is sometimes thought of as "race neutral"—"treating everyone equally, and therefore" making race "irrelevant in the tort system in the United States."[46] Once slavery ended, it is thought, tort law, as "the law of injury . . . [involved] principles applied generally to all."[47]

Scholars have demonstrated that this "unexamined assumption[]" is wrong—even if tort doctrine seems to have evolved towards racial equity or at least neutrality,[48] the "decentralized, informal practices engaged in by individual

39. RESTATEMENT (FIRST) OF TORTS § 695 cmt. a (AM. L. INST. 1938).

40. *See id.* § 685 ("One who, without the husband's consent, has sexual intercourse with a married woman is liable to the husband for the harm thereby caused to any of his legally protected marital interests.").

41. *See* Schlanger, *supra* note 33, at 140; *see also* Victor E. Schwartz, Mark A. Behrens & Mark D. Taylor, 28 LOY. U. CHI. L.J. 745, 747 (1997).

42. Schlanger, *supra* note 33, at 140.

43. *Id.*

44. Marsha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PENN. L. REV. 463, 515 (1998).

45. *Id.* at 510.

46. Jennifer B. Wriggins, *Torts, Race, and the Value of Injury, 1900-1949*, 49 HOW. L.J. 99, 100 (2005).

47. Jennifer B. Wriggins, *Constitution Day Lecture: Constitutional Law and Tort Law: Injury, Race, Gender and Equal Protection*, 63 MAINE L. REV. 263, 268 (2010).

48. Wriggins, *supra* note 46, at 100. Race "should play no part in the resolution of an ordinary tort case. . . . Nevertheless, judges and attorneys involved in the litigation of tort claims realize that race does matter." Frank M. McCellan, *The Dark Side of Tort Reform: Searching for Racial Justice*, 48 RUTGERS L. REV. 761, 761 (1996)

actors within the legal system . . . have resulted in a discriminatory structure and discriminatory outcomes when aggregated."[49]

Throughout the early twentieth-century, awards to Black plaintiffs were significantly lower than to white ones in a host of tort cases, with the tort system both "reflect[ing] and reinforc[ing] racial inequality."[50] These discrepancies appear to have persisted even into the 1990s.[51]

The tort system may be fairly criticized for its failure to treat parties from underrepresented minority groups with full equality.[52] In its doctrinal structure, however, tort law has created some avenues for the advancement of racial justice.[53] The dignitary torts, such as intentional infliction of emotional distress ("IIED"), have potential to "redress racism and ethnoviolence because prejudice is, fundamentally an assault on dignity."[54] During the Civil Rights era, IIED "became prominent as a strategy for plaintiffs of color to seek compensation for racial harassment or violence," and during the 1970s and 1980s there were "several successful [IIED] recoveries for victims of racist incidents."[55]

III. LGBTQ+ PARTIES IN TORT CASES BEFORE *OBERGEFELL*

A. Contexts Involving Formally Recognized Marital Relationships

The first and "obvious place"[56] in which *Obergefell* may have had an impact on the rights of LGBTQ+ parties in torts case relates to aspects of tort law in which marital status was a formal component of a test or a requirement to bring a tort claim. Three such areas come to mind. Even as same-sex couples achieved "some success in other areas of the law," tort law "continue[d] to proclaim, by a 'clanging silence,' the 'erasure of their existence.'"[57]

The first two areas in which LGBTQ+ plaintiffs faced challenges in tort law before *Obergefell* involved the common law of bystander NIED and loss-of-consortium damages.[58] The third involves wrongful death statutes—a legislatively-created vehicle used by surviving family members to recover for the tortious death of their loved ones.[59] John Culhane identified these as three aspects of tort law "deal[ing] specifically with injuries to relationships."[60]

49. Wriggins, *supra* note 46, at 100.

50. *Id.* at 137.

51. *See* Jonathan Cardi, Valerie P. Hans & Gregory Parks, *Do Black Injuries Matter?: Implicit Bias and Jury Decision Making in Tort Cases*, 93 S. CAL. L. REV. 507, 510 (2020).

52. *See id.*

53. *See* Hafsa S. Mansoor, Comment, *Modern Racism but Old-Fashioned IIED: How Incongruous Injury Standards Deny Thick Skin Plaintiffs Redress for Racism and Ethnoviolence*, 50 SETON HALL L. REV. 881, 883 (2020).

54. *Id.* at 886.

55. *Id.* at 887.

56. Courtney G. Joslin & Lawrence C. Levine, *The Restatement of Gay(?)*, 79 BROOK. L. REV. 621, 649 (2014).

57. John G. Culhane, *A "Clanging Silence": Same-Sex Couples and Tort Law*, 89 KY. L.J. 911, 914 (2000).

58. *Id.* at 974.

59. *Id.* at 971.

60. *Id.* at 942.

1. Bystander NIED

Tort law evolved in the twentieth-century to recognize the right of parties suffering emotional harm[61] resulting from negligence to recover,[62] even in the absence of physical "impact."[63] Plaintiffs nearly-missed could bring "direct" NIED actions,[64] the far more widely accepted version of NIED.[65] More controversially in the courts, in some states bystanders who witnessed grave harm to a close family member acquired the ability[66] to bring "indirect" NIED actions as well. The bystander NIED action originated in a California case, *Dillon v. Legg*,[67] and its contours and tortured doctrinal history have been discussed extensively by other scholars.[68]

Where recognized, bystander NIED requires a close family relationship[69], often limited to the nuclear family (parent-child, spousal or sibling).[70] While some courts leave to open to a jury to consider whether other close family relationships than these classic two forms might be a basis for a bystander claim,[71] the general approach prior to *Obergefell* involved rejecting unmarried cohabitants—including LGBTQ+ plaintiffs witnessing harm to their life partners—as eligible plaintiffs.[72]

61. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 45 cmt. a (AM. L. INST. 2012).

62. John J. Kircher, *The Four Faces of Tort Law: Liability for Emotional Harm*, 90 MARQ. L. REV. 789, 806 (2007).

63. David Sampedro, *When Living as Husband and Wife Isn't Enough: Reevaluating* Dillon's *Close Relationship Test in Light of* Dunphy v. Gregor, 25 STETSON L. REV. 1085, 1095 (1996); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 47 (AM. L. INST. 2012).

64. Sampedro, *supra* note 63, at 1097.

65. *Id.* at 1096.

66. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 48 (AM. L. INST. 2012).

67. 441 P.2d 912, 914 (Cal. 1968).

68. *See generally* Virginia E. Nolan & Edmund Ursin, *Negligent Infliction of Emotional Distress: Coherence Emerging from Chaos*, 33 HASTINGS L.J. 583 (1982); Elizabeth Handsley, *Mental Injury Occasioned by Harm to Another: A Feminist Critique*, 14 MINN. J.L. & INEQ. 391 (1996); Kathleen K. Andrews, *The Next Best Thing to Being There?: Foreseeability of Media-Assisted Bystanders*, 17 SW. U. L. REV. 65 (1987); John L. Diamond, Dillon v. Legg *Revisited: Toward a Unified Theory of Compensating Bystanders and Relatives for Intangible Injuries*, 35 HASTINGS L.J. 477 (1984); Robert Rhee, *A Principled Solution for Negligent Infliction of Emotional Distress Claims*, 36 ARIZ. ST. L.J. 805 (2004).

69. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 48 cmt. f (AM. L. INST. 2012).

70. Dale Joseph Gilsinger, *Relationship Between Victim and Plaintiff-Witness as Affecting Right to Recover Under State Law*, 98 A.L. R. 5th 609, §2 (originally published in 2002) ("[P]laintiff-victim relationship is seldom questioned" in cases of immediate family, such as "spouse, child, parent of sibling.").

71. Kircher, *supra* note 62, at 827–28; *see, e.g.*, Dunphy v. Gregor, 136 N.J. 99, 115 (1994).

72. A leading example was the California Supreme Court's decision in *Elden v. Sheldon* in 1988. 758 P.2d 582, 582 (Cal. 1988). Richard Elden and Linda Eberling were involved in an unmarried "cohabitant relationship allegedly akin to a marital relationship." *Id.* The court sought to clear up uncertainty on the extent to which parties other than spouses and parents/children could bring NIED claims. *See id.* at 586. The court identified policy considerations, rather than foreseeability, as the reason to limit recovery for unmarried cohabitants for bystander NIED. *Id.* The court identified two policy reasons. First, because of the state's "strong interest in the marriage relationship," granting unmarried cohabitants the same rights would inhibit that interest. *Id.* at 586. Second, courts would be compelled to inquire into the level of emotional attachment in a relationship, raising ostensibly difficult

The rule has been described as serving a "pragmatic recognition that a line must be drawn and that witnessing physical injury to a close family member will, in general, cause a more serious shock than if the injured party is not related."[73] The drawing of this line prior to *Obergefell* in a way that denied same-sex partners bystander NIED standing was thus defended as a sort of collateral damage associated with pragmatic line-drawing.[74] No serious argument was offered that emotional distress of a same-sex partner witnessing the death of a loved one would not foreseeably cause emotional distress;[75] nor would it be tenable to take the position that same-sex partners in relationships not legally-recognized as marriages could not be distinguished from strangers.[76] Same-sex partners witnessing the death of loved ones simply had to be excluded, or else the law's line drawing would sweep in too many nonmarital opposite sex relationships, including those engaged to be married, that, as a matter of practical line-drawing, had generally been excluded from the scope of bystander NIED.[77]

One of the most striking examples of a case denying a same-sex partner the chance to pursue an NIED claim was *Coon v. Joseph*, a 1987 California appellate court case[78] resolved before the California Supreme Court's 1988 decision in *Elden* clarified that NIED would not be available for unmarried couples (same-sex or opposite-sex).[79] Gary Coon witnessed an assault on his "intimate male friend,"[80] "Ervin," with whom he shared an "intimate, stable, and 'emotionally significant' relationship as 'exclusive life partners.'"[81] John Culhane describes the court's description of the relationship as characterized by "sketchiness,"[82] making it difficult to tell whether the relationship was akin to that of spouses,[83] but that is at least one plausible interpretation of the case.

problems of proof. *Id.* at 587. Tying recovery to whether parties maintained an exclusive sexual fidelity would require courts to inquire into matters of private concern and trying to identify appropriately close relationships without the formality of marital status could lead to indefinite and unpredictable results, interfering with "consistent application from case to case." *Id. Elden* was overruled by statute extending the right to bring bystander actions to parties in civil unions. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 48 rptr. note to cmt. f (AM. L. INST. 2012) ("[T]he California legislature overruled a case, Elden…, that held that one partner in an unmarried cohabiting relationship that was stable, significant, and 'parallel to a marital relationship' could not recover as a bystander for emotional harm.").

73. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 48 cmt. f (AM. L. INST. 2012).

74. *See, e.g.*, *Elden*, 758 P.2d at 587.

75. *Id.* at 586 ("It may well be also that the number of [couples who live together without formal marriage] has increased to the point that emotional trauma suffered by a partner in such an arrangement from injury to his companion cannot be characterized as 'unexpected or remote.'").

76. *See id.* ("[T]he state has a strong interest in the marriage relationship; to the extent unmarried cohabitants are granted the same rights as married persons, the state's interest in promoting marriage is inhibited.")

77. *See, e.g.*, Biercevicz v. Liberty Mutual Ins. Co., 865 A.2d 1267, 1272 (Conn. Super. Ct. 2004).

78. 192 Cal.App.3d 1269, 1271–72 (Cal. Ct. App. 1987).

79. Culhane, *supra* note 57, at 963.

80. *Coon*, 192 Cal. App. 3d at 1272.

81. *Id.*

82. Culhane, *supra* note 57, at 964.

83. Culhane also notes that the court declined to provide "Elden's" full name, resulting in "'de-sexing' of the couple." *Id.* at 965.

A city bus driver, in view of Coon, struck Ervin in the face, causing Coon, who witnessed the homophobic assault, mental and emotional distress.[84]

The court denied the plaintiff's NIED claim, writing that the "inclusion of an intimate homosexual relationship within the 'close relationship' standard would render ambivalent and weaken the necessary limits on a tortfeasor's liability" for NIED.[85] No argument could be made for a "'de facto' marital relationship" because the plaintiff and his partner "are both males and the Legislature has made a determination that a legal marriage is between a man and a woman."[86]

The position that a partner in a same-sex relationship could not bring a NIED claim was awkwardly embraced (or at least accepted) even by the authors of the *Restatement (Third) of Torts* in the last decade.[87] As Courtney Joslin and Lawrence Levine note, "[o]ne of the very few places that the *Restatement (Third) of Torts* expressly mentions LGBT issues is with regard to recovery for bystander emotional distress."[88] The *Restatement* limits bystander-standing to witnesses who are "close family" of the injured or killed.[89]

Because "same-sex . . . partners" were "considered legal strangers, not 'family members'" in most states during the drafting phase of the *Restatement (Third)*, as was the case historically, LGBTQ+ plaintiffs found themselves "unable to recover for this tort."[90] The *Restatement* takes note that "[s]ometimes people live functionally in a nuclear family without formal legal family ties" and urged courts to "take into account changing practices and social norms and employ a functional approach to determine what constitutes a family."[91] Reading this passage post-*Obergefell,* it is striking that the authors of the *Restatement* failed to expressly mention LGTBT+ spouses whose marriages were legal where executed but not recognized in the state of domicile (or one party's death).[92] By contrast, the Comments expressly mention grandparents who may function in a parental role;[93] it seems as if the authors were uncomfortable, in the Comments at least, even mentioning LGBTQ+ couples. In failing to anticipate *Obergefell*, the *Restatement* may have "missed an important opportunity[;]" by "adopt[ing] an explicit position of inclusion" which would allow recovery for some same-sex couples the authors of the *Restatement* "would have gone a long way toward

84. *Id.* at 964.

85. *Coon*, 192 Cal. App. 3d at 1275.

86. *Id.* at 1277.

87. Joslin & Levine, *supra* note 56, at 644.

88. *Id.*

89. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 48 (AM. L. INST. 2012).

90. Joslin & Levine, *supra* note 56, at 644.

91. RESTATEMENT (THIRD) TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 48 cmt. f (AM. L. INST. 2012).

92. The reporter's note refers readers to one book and one *New York Times* article for "account[s] of attitudes about and controversies over the scope of 'family' with regard to same-sex couples and an assessment of future trends in those attitudes by authors sympathetic to an inclusionary approach." *Id.*

93. *See id.* ("For example, a grandparent who lives in the household may have a different status from a cousin who does not.").

influencing legal developments regarding bystander emotional distress claims by gays and lesbians."[94]

Prior to *Obergefell*, therefore, legal claims for bystander NIED "for most LGBT people" were therefore effectively foreclosed.[95] "[O]nly a few courts have permitted non-married cohabitants to recover for bystander negligent infliction of emotional distress."[96]

2. Loss of Consortium

Loss of consortium damages are recoverable by a spouse[97]—and on occasion, other family members[98]—when their relative has been injured, for the loss of "society and services . . . including impairment of capacity for sexual intercourse."[99] As in bystander NIED and wrongful death claims, a legally recognized spousal or parent-child relationship was typically required in order to create eligibility to bring a claim for loss-of-consortium damages.[100] Courts generally "refused to recognize that the intimacy inherent in informal relationships should give partners standing to sue for loss of consortium for . . . when their partners are injured or killed."[101] Through the 2000s, almost without exception,[102] courts denied unmarried partners the right "to sue for common law loss of consortium based on an injury to another partner,"[103] and exceptional cases which suggested the law should change tended not to be followed.[104]

The reasons offered for limiting loss of consortium damages to spouses sometimes echoed those provided for parallel limitations for bystander NIED.[105] Courts took the position that "formal marriage . . . forms the necessary touchstone to determine the strength of commitment between the two individuals which gives rise to the existence of consortium between them in the first instance."[106] Compensation of all who suffer a loss of companionship when a person is injured would mean friends and relatives might also complain,

94. Joslin & Levine, *supra* note 56, at 651–52.

95. *Id.* at 650.

96. *Id.* at 650 n.143.

97. RESTATEMENT (SECOND) OF TORTS § 693 (AM. L. INST. 1977).

98. *See, e.g.*, RESTATEMENT (SECOND) TORTS § 703 (AM. L. INST. 1977) (recognizing parent loss of consortium claim for tort against minor child); Berger v. Weber, 82 Mich. App. 199 (Ct. App. Mich. 1978) (recognizing child cause of action for loss of parental society, companionship, love and affection); *but see* RESTATEMENT (SECOND) OF TORTS § 707A (AM. L. INST. 1977) (rejecting child loss of consortium claim for tort against parent).

99. RESTATEMENT (SECOND) OF TORTS § 693 (AM. L. INST. 1977).

100. There were a few emerging cases in the 2000s and 2010s which took the contrary position. *See, e.g.*, Lozoya v. Sanchez, 66 P.3d 948, 961 (2003).

101. Kaiponanea T. Matsumura, *Beyond Property: The Other Legal Consequences of Informal Relationships*, 51 ARIZ. ST. L.J. 1325, 1351 (2019).

102. Elden v. Sheldon, 46 Cal. 3d 267, 278 (1988).

103. Milberger v. KBHL, LLC, 486 F. Supp. 2d 1156. 1161 (Haw. 2007) (citing cases).

104. Barbara J. Cox, *Alternative Families: Obtaining Traditional Family Benefits Through Litigation, Legislation and Collective Bargaining*, 15 WIS. WOMEN'S L.J. 93, 136 (2000).

105. *See* Joslin & Levine, *supra* note 56, at 652.

106. Schroeder v. Boeing Comm. Air. Co., 712 F. Supp. 39, 41 (D.N.J. 1989).

involving "costs far beyond those society can afford."[107] It would also, courts argued, undermine the state's strong interest in promoting marriage.[108] Courts found loss of consortium claims were not available to parties unmarried at the time of injury—even if they subsequently may have married.[109]

For example, in 2008 a Florida appellate court rejected a same-sex partner's claim for loss of consortium arising from an automobile accident.[110] The case, *Bashaway v. Cheney Bros., Inc.*, addressed an accident involving Melinda Garrison who was in a "committed, exclusive, and intimate relationship" with Judith Bashaway.[111] The defendant moved to dismiss the loss of consortium claim based on the lack of a legal marriage, and that motion was granted by the trial court.[112] On appeal, Bashaway made two arguments—first that the court should allow loss of consortium claims based on "seriousness of the relationship" rather than simply focus on whether the parties were "technically married."[113] Second, she argued that an exception should be recognized for same-sex partners because they are prohibited in Florida from being legally married.[114] The court rejected these arguments.[115]

The court recognized that the Florida courts had in the past expanded loss of consortium—even in the absence of legislative action—creating a cause of action for loss of consortium for a wife based on injuries to her husband (rather than simply for the husband for injuries to the wife).[116] Similar evolution had occurred regarding parent/child consortium claims.[117] The court drew a distinction between bystander NIED, which involves a direct injury to the bystander, and loss of consortium claims, which are derivative of an injury resulting to the spouse/parent/child.[118] No loss of consortium claims could exist without "a legal relationship between the consortium claimant and the injured party."[119] And, "a legal relationship is simply unattainable for a couple such as Judith and Melinda."[120] Although the court asserted its opinion "express[ed] no disrespect whatsoever concerning that relationship,"[121] one might wonder about that given the unnecessary references to the parties by their first names, and to the court's rather quick analogy of the relationship between same-sex partners and siblings "and perhaps even for close friends who have developed, over time, a living arrangement."[122] The idea that the foreseeable loss of society from a

107. Denil v. Integrity Mut. Ins. Co., 401 N.W.2d 13, 15 (Wis. Ct. App. 1986).
108. Fitzsimmons v. Mini Coach of Boston, Inc., 779 N.E.2d 1256, 1257 (Mass. 2003).
109. Gurliacci v. Mayer, 218 Conn. 590 A.2d 914, 932 (Conn. 1991).
110. Bashaway v. Cheney Bros., 987 So. 2d 93, 93–94 (Fla. Dist. Ct. App. 2008).
111. *Id.* at 94.
112. *Id.* at 93.
113. *Id.* at 94.
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.* at 94–95.
118. *Id.* at 95.
119. *Id.*
120. *Id.* at 96.
121. *Id.*
122. *Id.*

"close friend" with a "living arrangement" is equivalent to that of same-sex partners, strikes a contemporary reader as very much failing to acknowledge the realities of same-sex relationships before *Obergefell*.

Another 2008 case, from Massachusetts, *Charron v. Amaral*,[123] confirmed and applied this limited view of loss of consortium claims to a same-sex couple unmarried at the time of the injury but married, following the state's authorization of same-sex marriage, by the time of the lawsuit.[124] Cynthia Kalish and Michelle Charron began to live together in 1992, two years after beginning their relationship.[125] In 1994, they exchanged rings in a private ceremony.[126] In 1998, Kalish conceived a child and Charron adopted the child.[127]

In 2002, Charron sought treatment for a lump in her breast and eight months later was diagnosed with breast cancer.[128] On May 17, 2004, the first day the state allowed applications for marriage licenses, the couple applied, and they were married three days later.[129]

The court reaffirmed earlier holdings preventing adults from bringing loss of consortium claims other than in connection with a marriage, and denied Kalish's argument that she should be permitted to recover for loss of consortium "because she meets all other criteria for recovery [besides a legally recognized marriage] and would have been married but for the legal prohibition."[130] The court held that its earlier decision finding that a same-sex marriage ban violated the state's constitution did not imply that people in same-sex, committed relationships "would be considered married before they obtained a marriage license" or in any way amend "the laws concerning the benefits available to couples who marry" (including the right to bring loss of consortium claims).[131]

Some progressive state court decisions began to expand the application of loss of consortium to include same-sex couples in the immediate period before *Obergefell*. Perhaps the "most compelling"[132] such example is a 2014 Connecticut case, *Mueller v. Teppler*.[133]

Margaret Mueller was the victim of medical malpractice in 2001—failure to review pathology reports or misinterpretation of their findings, following removal of cancerous tumors from Mueller's body[134]—four years before she and

123. 889 N.E.2d 946 (Mass. 2008).
124. *Id.* at 950–51.
125. *Id.* at 947.
126. *Id.*
127. *Id.* at 948.
128. *Id.*
129. *Id.*
130. *Id.* at 950.
131. *Id.*
132. Lee-ford Tritt, *Moving Forward by Looking Back: The Retroactive Application of* Obergefell, 2016 WIS. L. REV. 873, 940 (2016) ("The recent Supreme Court decision of *Obergefell v. Hodges* has forever altered American jurisprudence."). *Id.* at 873.
133. 95 A.3d 1011, 1014 (Conn. 2014).
134. *Id.* at 1015.

her partner, Charlotte Stacey, were joined in a civil union under Connecticut law.[135]

The trial court dismissed the loss-of-consortium claim because Mueller and Stacey were not "in a legal marriage or in a legal civil union at the time of the wrong."[136] This position was affirmed by the intermediate appellate court on narrower grounds—that the complaint for loss of consortium damages was inadequate because Stacey had failed to plead that the couple "would have married or entered into a civil union before the dates of the defendants' negligent acts" but for the prohibition on civil unions and same-sex marriage in force at the time.[137]

The Connecticut Supreme Court reversed—holding that loss of consortium claims should be "expand[ed]" to "members of couples who were not married when the tortious conduct occurred, but who would have been married if the marriage had not been barred by state law."[138] The court invoked the idea that the common law should be "dynamic," and can "grow" and "tailor itself to meet changing needs" while still respecting *stare decisis*.[139] It was clear that the court "*can* expand the common-law action for loss of consortium as required to address new societal attitudes and situations" and further to the court that it "*should* expand the action" as required to support plaintiff's case.[140] Society now embraces the "view that committed same sex couples who wish to marry are entitled to the same social and legal recognition as committed opposite sex couples who wish to marry."[141]In effect, this meant that the couple's marriage needed to be "backdated" to a time preceding the injury.[142]

Mueller was influential for other courts confronting similar questions,[143] and also potentially set the stage for look-back cases involving loss-of-consortium claims arising from injuries before *Obergefell* to same-sex partners who would have married if not for the legal prohibitions struck down by *Obergefell*.

3. Wrongful Death Statutes

Wrongful death allows family members to pursue claims after the death of their loved ones, something which was prohibited under the common law.[144] Wrongful death statutes primarily provide damages for the economic contributions a deceased person would have made to the surviving family

135. *Id.*; Tritt, *supra* note 132, at 941.
136. *Mueller*, 95 A.3d at 1016.
137. *Id.* at 1014.
138. *Id.* at 1023.
139. *Id.*
140. *Id.*
141. *Id.* at 1024.
142. Peter Nicolas, *Backdating Marriage*, 105 CALIF. L. REV. 395, 419 (2017).
143. *See, e.g.*, Sparks v. Meijer, Inc., No. 15CVC-1413, 2015 WL 11012500, at *1 (Ohio C. P. Nov. 12, 2015).
144. RESTATEMENT (SECOND) OF TORTS § 925 (AM. L. INST. 1979).

member, if not for the tort resulting in their death.[145] Some states' wrongful death statutes expressly provide for or courts impliedly have interpreted wrongful death statutes to allow for recovery of loss-of-consortium damages as well.[146]

Because wrongful death statutes are in derogation of the common law,[147] the starting point for understanding their reach involves a focus on the parties granted standing under the statute to pursue such claims.[148] As a general rule, the actions created by these statutes are limited to spouses and parents/children.[149] Thus, "those in non-marital relationships who suffer the economic and emotional harm of the death of a partner are unable to recover in most jurisdictions."[150] Courts have also "refused to extend standing to sue for wrongful death beyond certain formal relationships, reasoning that the tort protects inheritance rights, not dependency, even though the relevant harm would arise by virtue of an heir's dependency on the decedent."[151]

Same-sex partners, lacking the formal recognition necessary to trigger wrongful death statutes, were unable to pursue remedies, in general, for the tortious death of their loved ones.[152] In *Raum v. Restaurant Associates* in 1998, a New York court rejected a same-sex partner's efforts to avail himself of the state's wrongful death statute.[153] The court opined that "unmarried couples living together, whether heterosexual or homosexual, . . . lack the right to bring a wrongful-death action, and as such, the statute does not discriminate against same-sex partners in spousal-type relationships."[154] The court also rejected the argument that "spouse" should be interpreted to include "same-sex partners."[155]

In a 1999 case, a Texas appellate court shockingly opened its discussion of whether a transgender female could bring a wrongful death case after the death of her spouse with the question, "When is a man a man, and when is a woman a woman?"[156] Christie Lee Littleton sought to recover after her husband Jonathon Mark Littleton died as the result of medical malpractice.[157] Although the couple had married in Kentucky in 1989, the court held that the plaintiff "was a male, both anatomically and genetically," rejected plaintiff's amended birth certificate, and ruled that the couple's marriage "was invalid" and that plaintiff could not bring a cause of action as a surviving spouse.[158]

145. *See, e.g.*, 740 ILL. COMP. STAT. ANN. 180/2 (West 2022).

146. *See, e.g.*, FLA. STAT. §768.18 (2015) ("The surviving spouse may also recover for loss of the decedent's companionship and protection…"); Durham v. Estate of Wade v. U-Haul Intern., 745 N.E.2d 755 (Ind. 2001) ("Although Indiana has no explicit provision in the general wrongful death statute allowing loss of consortium damages, that item of damages has long been recoverable under the wrongful death statute.").

147. *See* RESTATEMENT (SECOND) OF TORTS § 925 (AM. LAW INST. 1979).

148. *See id.*

149. *See id.*

150. Joslin & Levine, *supra* note 56, at 654.

151. Matsumura, *supra* note 101, at 1351–52.

152. *See id.* at 1350.

153. 675 N.Y.S.2d 343, 344 (N.Y. App. Div. 1998).

154. *Id.*

155. *Id.*

156. Littleton v. Prange, 9 S.W.3d 223, 223 (Tex. App. 1999).

157. *Id*. at 224–25.

158. *Id*. at 231.

In the fifteen years preceding *Obergefell*, as states began to experiment with marriage-like institutions including Reciprocal Beneficiaries, Domestic Partnerships and Civil Unions, parties to those relationships were added to the statutory plaintiffs for wrongful death and survivorship.[159] But unless the legislature acted without a rational basis, its choices of how far to extend the right to bring a wrongful death claim (or not to extend it) were dispositive.[160]

Interestingly, though, some courts did reach to adopt interpretations of statutes—even when it required stretching the meaning of statutory terms—to allow same-sex partners to pursue wrongful death claims.[161] For instance, in a case described by John Culhane, *Solomon v. District of Columbia*, a lesbian partner was allowed to proceed on a wrongful death case after being deemed "next of kin" by the court—an interpretation Culhane found "heartening" even though it seemed to involve a strained reading of the statute.[162]

Other successes involved the treatment of marriage-substitute legal relationships in states where wrongful-death laws still used "traditional" phrasing. In *Langan v. St. Vincent's Hospital*,[163] a 2003 case, a New York court confronted whether a person married in a Vermont Civil Union could qualify as a "spouse" under New York's wrongful death statute; the court sided with allowing a same-sex partner to proceed in a wrongful death claim, though its decision was reversed on appeal.[164]

Neal Spicehandler and John Langan were joined in a Vermont Civil Union in 2000; Spicehandler died that year after being struck by an automobile driven by Ronald Popadich, who ran down eighteen people in Manhattan.[165] According to the court, "[t]he evidence offered establishe[d] that John Langan and Neal Conrad Spicehandler lived together as spouses from shortly after they met in 1985 until the year 2000, when they took the first opportunity to secure legal recognition of their union in the State of Vermont, and were joined legally as lawful spouses."[166] The court distinguished *Raum*, which was decided before any option such as the Vermont Civil Union statute was available.[167] Although the court recognized that New York law limited "marriage" to a union of a "man and a woman," the question for the sake of the wrongful death statute was the meaning of "spouse," rather than "marriage."[168] The wrongful death law provided a limited, exclusionary definition of the phrase "spouse"—certain people who were "husband" and "wife" were *not* to be deemed spouses under the statute, for instance, because they had a judgment of separation or had abandoned their spouse.[169] The court viewed the use of the terms "husband and

159. Holguin v. Flores, 18 Cal. Rptr. 3d 749, 750 (Cal. Ct. App. 2004).
160. *See, e.g.*, *id.* at 751.
161. Culhane, *supra* note 57, at 968.
162. *Id.*
163. 765 N.Y.S.2d 411 (N.Y. Sup. Ct. 2003).
164. *Id.* at 44; Langan v. St. Vincent's Hosp. of New York, 802 N.Y.S.2d 476, 480 (N.Y. App. Div. 2005).
165. *Langan*, 765 N.Y.S. 2d at 412.
166. *Id.* at 413.
167. *Id.* at 413–14.
168. *Id.* at 418.
169. *See id.* at 419–20.

wife" as "descriptive rather than exclusionary"—they provided examples of who could be considered a "spouse" but were not required status for being so considered.[170] Finding no difference between Vermont Civil Unions and marriage *other* than the sexual orientation of the parties, the court found no rational basis existed to exclude same-sex partners united in a Vermont Civil Union from New York's wrongful death statute.[171] The court's decision in *Langan* was reversed on appeal,[172] but provided a sign of shifting thinking in the courts on the coverage of wrongful death statutes.

And at least one court used the failure of wrongful death statutes to accommodate same-sex relationships as an opportunity to question the constitutional validity of wrongful death statutes themselves.[173] In a 2001 trial order in a high-profile case that subsequently appears to have settled, a California judge interpreted the term "spouse" in the state's wrongful death statute to include a same-sex partner even though same-sex marriage was not, at the time, legal in the state.[174] The facts underlying the case of *Smith v. Knoller*[175] generated significant interest, in part because of the gruesome nature of the tragedy but also because they raised important questions, at the time, on tort law's treatment of same-sex relationships.[176]

On January 26, 2001, Diane Whipple was "savagely attacked and mauled just outside the door of her San Francisco apartment building by two large dogs."[177] Her partner, Sharon Smith, filed a wrongful death statute that John Culhane predicted was "extremely unlikely to be successful, because the wrongful death statute under which she has brought suit restricts recovery to legal spouses: a status unavailable to same-sex couples."[178]

Plaintiff pointed to the wrongful death statute's phrase, "surviving spouse," and argued it should apply to same-sex couples or at least be "construed in a manner which effectuates the underlying purposes-of [sic] the wrongful death statute."[179] The court rejected that suggestion as "inconsistent with the plain meaning of the word 'spouse.'"[180] The court, however, went on to conclude that the wrongful death statute, by excluding her claim, "denie[d] her equal protection based upon her sexual orientation" in violation of the California Constitution.[181] The court found that to save the statute's constitutionality it would need to

170. *Id.* at 420.

171. *Id.* at 421–22.

172. 802 N.Y.S.2d 476 (N.Y. App. Div. 2005).

173. Smith v. Knoller, No. 319532, slip op. at 2 (Cal. Super. Ct. Aug. 9, 2001).

174. *Id.* at 5.

175. *See* John G. Culhane, *Marriage, Tort, and Private Ordering: Rhetoric and Reality in LGBT Rights*, 84 CHI.-KENT L. REV. 437, 474–75 (2009) (summarizing the facts of *Smith v. Knoller*).

176. *See, e.g.*, Nancy J. Knauer, *The LGBTQ Equality Gap and Federalism*, 70 AM. U. L. REV. 1, 22 (2020) (mentioning *Smith v. Knoller* as an early decision recognizing familial status for same-sex partners in limited circumstances).

177. Culhane, *supra* note 57, at 912.

178. *Id.* at 913.

179. *Smith*, slip op. at 1.

180. *Id.* at 1–2.

181. *Id.* at 2.

interpret the statute to include same-sex couples.[182] The court found that the exclusion of same-sex couples from the wrongful death statute served no rational purpose, since the state already banned same-sex marriage.[183] This was a surprising and striking result[184]—one that, because it occurred in a trial court order rather than an appellate decision, may not have attracted the attention from legal scholars it deserved.

B. The Rights of LGBTQ+ Parties and Issues Surrounding Sexual Orientation in Tort More Generally

In addition to the intersecting with tort law through formal ways relating to the recognition of marital rights, LGBTQ+ issues may arise in less obvious contexts.[185] This includes in connection with establishing the elements of IIED for LGBTQ+ plaintiffs, in connection with defamation claims based on false imputations regarding sexual orientation and, finally, in regard to public disclosure of private facts (an aspect of the four-part invasion of privacy tort).[186]

1. IIED

Regarding intentional infliction of emotional distress, the central concern is whether LGBTQ+ plaintiffs "who experience harm based on real or perceived sexual orientation or gender identity receive equal treatment as compared to people who experience harm based on other identity characteristics."[187] IIED proved a valuable tool during the civil rights movement for combatting extreme racial misconduct;[188] the question arises as to whether it served the same function during the pre-*Obergefell* battle for LGBTQ+ civil rights, and whether *Obergefell* increased the vitality of this claim for same-sex spouses confronting extreme misconduct.

IIED allows recovery for a person who suffers "severe emotional harm" resulting from intentional or reckless "extreme or outrageous conduct."[189] The tort applies only to a "very small slice of human behavior[,]"[190] which, taking into account "the relationship of the parties, whether the actor abused a position of authority over the other person, whether the other person was especially vulnerable and the actor knew of the vulnerability, the motivation of the actor, and whether the conduct was repeated or prolonged" amounts to conduct going

182. *Id.*

183. *Id.* at 4.

184. Nancy J. Knauer, *Same-Sex Marriage and Federalism*, 17 TEMP. POL. & CIV. RTS. L. REV. 421, 440 n.165 (2008) ("In the face of clear statutory language to the contrary, Smith pursued her wrongful death action against the owners arguing that the exclusion of same-sex partners was invalid under the California state constitution and met with unexpected success at the trial court level.").

185. *See* discussion *infra* Section III.B.

186. *See* discussion *infra* Section III.B.

187. Joslin & Levine, *supra* note 56 at 654–55.

188. *See* Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 151–57 (1982).

189. RESTATEMENT (THIRD) OF TORTS § 46 (AM. L. INST. 2012).

190. *Id.* § 46 cmt. a.

"beyond the bounds of human decency such that it would be regarded as intolerable in a civilized community."[191]

None of the illustrations in the *Restatement (Third)* discussion of IIED utilize same-sex partners, even though many of the illustrations relate to relationships.[192] But the contours of the tort reveal why, at least in theory, it could be a powerful weapon against harassment motivated by homophobia.

Prior to *Obergefell*, LGBTQ+ parties pursued IIED claims relatively rarely,[193] but had notable and modest success.[194]

In the 1991 case of *Collins v. Shell Oil*, a subsidiary of the oil megacorporation terminated an executive after learning of his sexual orientation.[195] The plaintiff had prepared a one-page announcement of "house rules" for a private party he planned to attend, which included statements encouraging safe sex by gay men in attendance at the party.[196] After discovering the plaintiff's sexuality and his seeming involvement in same-sex group sex, the employer adopted shifting justifications for his summary termination.[197] First, the employer pointed to the "house rules" memo and its presence in the office; then, to the "unauthorized use of the computer and printer upon which it was prepared . . . and finally, . . . defendants created out of whole cloth . . . a 'true' re-evaluation of plaintiff's work performance—past, present and future—which contradicted 19 years of positive evaluations."[198] The company violated its own procedures in reevaluating the plaintiff's performance, and attempted to black-ball him with headhunters.[199] To the court, this provided clear and convincing evidence of "outrageous" conduct and "intentional infliction upon plaintiff of emotional distress."[200] The court found the plaintiff "was fired solely because he was a sexually active homosexual" which was a "totally inappropriate over-reaction."[201]

In a 2000 case, *Simpson v. Burrows*,[202] a federal court in Oregon considered whether defendants had engaged in IIED towards plaintiff Jo Anne Simpson. Simpson and her partner, June Swanson, were owners of the Christmas Valley

191. *Id.* § 46 cmt. d.

192. The *Restatement's* collection of cases does identify one case in which a police officer harassed a transgender individual, *id.* § 46 (citing Brandon v. Cnty. of Richardson, 624 N.W.2d 604 (Neb. 2001)), and a second case in which harassment based on sexual orientation rose to the level of outrageous conduct but a claim failed based on lack of severe emotional distress, *id.* § 46 cmt. j (citing Hansson v. Scalise Builders of S.C., 650 S.E.2d 68 (2007)).

193. The number of tort cases involving transgender plaintiffs in particular is low, "due perhaps to the legal system's discriminatory history with trans individuals." Courtney Sirwatka, Comment, *Unlikely Partners: Tort Law as a Tool for Trans Activism*, 20 CARDOZO J.L. & GENDER 111, 118 (2013).

194. *See, e.g.*, Collins v. Shell Oil Co., No. 610983-5, 1991 BL 344, at *1 (Cal. Super. Ct. June 13, 1991).

195. *Id.* at *1.

196. *Id.* at *2–3.

197. *Id.*

198. *Id.*

199. *Id.* at *3.

200. *Id.*

201. *Id.* at *4.

202. 90 F. Supp. 2d 1108, 1113 (D. Or. 2000).

Lodge and Restaurant, located in rural Oregon.[203] After the couple purchased the lodge, defendants circulated a dozen or more letters to members of the community which were inflammatory, insulting, and highly critical of the couple—referring to them as "two Lesbians" and an "immoral abomination" and predicting that Christmas Valley would now become a "mecca for Queers, Lesbians, Perverts & other degenerates."[204] The hateful epithet "fag" was used in another letter, above a swastika.[205] The letters then came to threaten violence.[206] Swanson left town, and another letter arrived, suggesting it was now Simpson's turn to leave town, "HEAD FIRST OR FEET FIRST."[207] To be actionable under Oregon law as IIED, conduct must be "an extraordinary transgression of the bounds of socially tolerable conduct."[208] The court concluded it was—while defendants "have the right to believe that homosexuality or lesbianism is at odds with the teachings of the Bible," they are not immune from actions that "rise beyond rude, boorish, or mean conduct," resemble criminal conduct, and were "repeated at least a dozen times over a period of more than one year, underscoring the outrageousness of the acts."[209]

In a 2001 case included by the *Restatement* authors in its discussion of IIED, *Brandon ex rel. Estate of Brandon v. County of Richardson*, the mother of a transgender male brought a cause of action for IIED and wrongful death against law enforcement officers and the county after her son's 1993 murder.[210] The trial court had found for the plaintiff on wrongful death but denied recovery for IIED.[211] The facts underlying the claim were shocking and tragic and the officer's conduct "brutal"[212]—which made IIED a strong claim for the plaintiff.

Teena Brandon, a transgender male, was involved in a relationship with Lana Tisdel.[213] During a party in December 1993, Brandon was beaten and sexually assaulted by two men.[214] After he reported the rape, he was interviewed by Sheriff Laux, who had, earlier that month, referred to Brandon "as an 'it'" during a conversation with Tisdel.[215] Brandon's rapists were not immediately apprehended, and a few days later, he was murdered.[216] Reviewing the trial court's rejection of the IIED claim, the Nebraska Supreme Court could not determine if the lower court "found the evidence of outrageous conduct to be

203. *Id.* at 1112–13.
204. *Id.* at 1114.
205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.* at 1124 (citation omitted).
209. *Id.*
210. 624 N.W.2d 604, 610 (Neb. 2001); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 46 (AM. L. INST. 2012).
211. *Brandon*, 624 N.W.2d at 611.
212. Joslin & Levine, *supra* note 56, at 655 n.170. The case inspired the Academic Award-winning film, *Boys Don't Cry*. Anne Bloom, *To Be Real: Sexual Identity Politics in Tort Litigation*, 88 N.C. L. REV. 357, 386 (2010).
213. *Brandon*, 624 N.W.2d at 611.
214. *Id.*
215. *Id.*
216. *Id.* at 614.

insufficient as a matter of fact or a matter of law" but concluded that Sheriff Laux's conduct indisputably was "extreme and outrageous as a matter of law."[217] Laux was in a position of power relative to Brandon, a crime victim who sought assistance, and who was in a "vulnerable emotional state" when interviewed by law enforcement due to being a victim of violence and rape.[218] Laux used "crude and dehumanizing language during" his entire interview of the victim, asking questions that "were entirely irrelevant," in a tone that was "demeaning, accusatory and intimidating."[219] The Nebraska Supreme Court concluded that the sheriff's conduct was "atrocious and utterly intolerable in a civilized community" and that the lower court erred in not finding IIED had been established.[220]

In a 2015 case published before *Obergefell's* release, *Armstrong v. Shirvell*, the U.S. Court of Appeals for the Sixth Circuit upheld an IIED verdict in favor of the openly gay former president to the University of Michigan's student council against an attorney who engaged in a campaign of online harassment and stalking.[221] After learning that Christopher Armstrong had been elected president of the student council, Andrew Shirvell, who worked as an Assistant Attorney General, began to post critical comments about Armstrong on Facebook.[222] Shirvell created a blog entitled "Chris Armstrong Watch;" criticized Armstrong in television interviews; and then physically appeared at Armstrong's off-campus residence, making an appearance at a party, marching up and down the street on occasions, and standing outside of Armstrong's residence.[223] Campus police believed that Shirvell's "sole reason for focusing on Armstrong was 'that he was against him being gay;'" police were concerned about Armstrong's safety but the prosecutor's office declined to issue a criminal warrant against Shirvell.[224] The Sixth Circuit found that Shirvell's conduct included "some of the hallmarks of extreme and outrageous conduct"—it "continued over a period of time, despite requests to stop," was "motivated largely by discrimination," included "intrusions into, and false claims about, Armstrong's private sexual conduct."[225]

Still, not all cases in the pre-*Obergefell* era seemed to take seriously LGBTQ+ plaintiff's claims regarding IIED, on occasion giving those claims little attention.[226] In the notable NIED case *Coon v. Joseph*, along with denying the plaintiff bystander NIED standing, the court also rejected plaintiff's attempt to characterize the assault by a bus driver on his partner as IIED—the actions were not "especially calculated to cause" the plaintiff severe distress, as would be needed where the primary target of the conduct was a person other than the

217. *Id.* at 621.
218. *Id.* at 621–22.
219. *Id.* at 622.
220. *Id.*
221. 596 F. App'x 433, 437 (6th Cir. 2015).
222. *Id.* at 437–38.
223. *Id.* at 438–39.
224. *Id.* at 440.
225. *Id*. at 452.
226. *See, e.g.*, Coon v. Joseph, 237 Cal. Rptr. 873, 874 (Cal. Ct. App. 1987).

plaintiff.[227] The court, as in its discussion of the issues raised in NIED, did not engage in much discussion of the basis for its position.[228]

2. Defamation

Defamation law provides a tort claim protecting an individual against statements harmful to her reputation.[229] In both its libel and slander formulations, the tort allows a cause of action where a defendant has made a false communication of or concerning a plaintiff, which is defamatory and harmful to the plaintiff's reputation, and where the communication was made public.[230] Within the law of slander, governing impermanent, oral communications, courts do not require special damages for certain communications which are considered slander *per se*,[231] while special damages (some form of economic loss) are required for communications that have a less patently obvious harmful impact on reputation.[232]

Two issues have arisen relatively frequently[233] in connection to defamation relating to statements about a person's LGBTQ+ status:

- First, is (falsely) labelling someone "gay" defamatory? That is, is being "gay" harmful to reputation?
- Second, if it is defamation to be falsely *called* gay because being gay is harmful to reputation, is the harm so obvious that special damages are not required? That is, would such statements constitute *per se* defamation, actionable without proof of special damages in the case of slander?

Other issues which may arise in the coming years in connection with sexual orientation and gender identity include defamation claims connected to gender identity—for example, whether false statements about a transgender person's gender identity could be actionable.[234] Those issues have yet to be tested extensively in the courts.[235]

The first issue relating to defamation, whether imputations of LGBTQ+ status are harmful to reputation, has confronted courts for nearly 350 years.[236] These cases forced courts to decide whether the (false) statement that a person is "gay" is defamatory.[237] Courts before *Obergefell* regularly concluded that it

227. *Id.* at 875.

228. *Id.* at 876–78.

229. *See* RESTATEMENT (SECOND) OF TORTS § 558 (AM. LAW INST. 1977).

230. *Id.*

231. *Id.* § 570.

232. *Id.* § 575.

233. *See, e.g.*, Ashley Milosevic, *The Tides of Transgressions: An Analysis of Defamation and the Rights of the LGBT Community*, 82 ALA L. REV. 323, 323–39 (2018).

234. *Id.* at 325.

235. *Id.* at 341–48.

236. ROY BAKER, DEFAMATION LAW AND SOCIAL ATTITUDES: ORDINARY UNREASONABLE PEOPLE 89 n.80 and accompanying text (2011) (citing Snell v. Webling (1675) 2 Lev 150 83 ER 493).

237. *Id.* at 89–90.

was.[238] Prior to the 1970s, there were no cases in which "there was any serious challenge to the capacity of an imputation of homosexuality to defame."[239] Cases typically included no "detailed consideration of whether an imputation of homosexuality is, or should be considered to be, something that damages a person's reputation," instead simply "uncritically" accepting the notion.[240] Cases of this nature continued to be successful into the 1990s "with alarming regularity."[241] (Courts have not considered the flip side of these claims—in which a person who identifies as LGBTQ+ is falsely described as straight).

On the second issue, defamation law divides harmful statements, when oral (slander), into two categories—those so obviously harmful to reputation that proof of special damages (economic loss) is not required, and other statements that would require such proof.[242] Historically, the law identified certain categories of behavior—such as imputation of a crime—in the *per se* category.[243] Because same-sex conduct was criminalized in much of the common law era, statements relating to a plaintiff's sexual orientation could easily be found to fall into the *per se* category.[244] After *Lawrence v. Texas*[245] that rationale was no longer available to categorize such statements as slander *per se*, but courts continued to find, on occasion, that these statements were *slander per se* (expanding the traditional category of defamation *per se*, "want of chastity of a woman" to cover statements about sexual orientation).[246]

In addition, some states appear to have imported a "*per se*" concept into libel law.[247] While historically all libel was actionable without proof of special damages, some states now seem to require that libel claims be supported by special damages unless the statements involve the kind of reputational harm traditionally associated the special slander *per se* categories.[248] This point of doctrinal confusion[249] or ambiguity complicates an attempt to understand clearly

238. In 1996, Lyrissa Lidsky found "[n]or do courts today question that an individual will be harmed by being called a homosexual, despite the deep divisions in society of this issue." Lyrissa Barnett Lidsky, *Defamation, Reputation and the Myth of Community*, 71 WASH. L. REV. 1, 38 (1996).

239. BAKER, *supra* note 236, at 90.

240. Theodore Bennett, *Not So Straight-Talking: How Defamation Law Should Treat Imputations of Homosexuality*, 35 U. QUEENSLAND L.J. 313, 315–16 (2016).

241. BAKER, *supra* note 236, at 92.

242. *See* Coulter Boeschen, *Defamation Law: Legal Elements of Libel and Slander*, ALLLAW, https://www.alllaw.com/articles/nolo/civil-litigation/defamation-libel-slander.html (last visited Apr. 3, 2022) [https://perma.cc/8QL7-8AEC].

243. *See* Clay Calvert, Ashton T. Hampton & Austin Vining, *Defamation Per Se and Transgender Status: When Macro-Level Value Judgements About Equality Trump Micro-Level Reputational Injury*, 85 TENN. L. REV. 1029, 1033–34 (2018).

244. *Id.* at 1040.

245. 539 U.S. 558 (2003).

246. *See* Schomer v. Smidt, 170 Cal. Rptr. 662, 666 (Cal. Ct. App. 1980)

247. Matthew D. Bunker, Drew E. Shenkman & Charles D. Tobin, *Not That There's Anything Wrong with That: Imputations of Homosexuality and the Normative Structure of Defamation Law*, 21 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 581, 582 (2011).

248. Stern v. Cosby, 645 F. Supp. 2d 258, 289–90 (S.D.N.Y. 2009).

249. For one example, consider *Wilson v. Harvey*, 842 N.E.2d 83 (Ct. App. Ohio 2005). The court there considers whether flyers posted at Case Western as a joke on student Jeffrey Wilson, which showed his face

what courts have held regarding whether statements relating to sexual orientation are actionable as defamation *per se*, actionable as defamation only with proof of special damages, or not defamatory and therefore not actionable at all.[250] It is clear what defamation *per se* requires—proof of special damages; what is less clear in some court decisions is whether all libels are defamation *per se*, or only those which involve statements likely to cause the kind of damage involved in the traditional slander *per se* categories.[251]

Courts confronting these two issues were not considering the claims of plaintiffs who self-identified as part of the LGBTQ+ community but instead claims from straight plaintiffs who felt being described falsely as gay or a lesbian was damaging to their reputation.[252] Courts were thus forced to confront whether the (false) statement that a person was gay or a lesbian would damage a straight person's reputation.[253] This required exploration of whether the "community" would think less of a person subject to that characterization.[254]

Thus, in considering sexual orientation in the context of defamation, courts aren't directly exploring the rights of sexual minorities.[255] But, they are identifying "majority" attitudes about sexual orientation, and may in so doing be implicitly accepting or validating homophobia.[256]

Considering statements about sexual orientation defamatory has been described as a "ridiculous and offensive" concept.[257] Critics argue that when courts allow defamation claims based on calling a person "gay," "they send out the message that 'gay' is a derogatory term, and that to be gay is an undesirable trait."[258] Where "courts hold homosexual imputations capable of being

under the caption, "in search of male companion," were defamatory. *Id.* at 86. After describing Ohio's distinction between libel *per se* and libel *per quod*, the court first rules that a false imputation of that a person is gay "is not libel per se," because it does not fit into the crime/disease/etc. categories traditionally associated with slander *per se*. *Id.* at 89. "[H]omosexuality is not a crime, nor is it a disease," opined the court. *Id.* "Additionally, being a homosexual would not tend to injure a person in his trade or occupation." *Id.* The court, however, then suggested that the posters could constitute libel *per quod*: "Although this flyer may be facially innocent, it might become defamatory through interpretation or innuendo if used to imply that someone is a homosexual, when in fact he is not." *Id.* The flyer, if clear in its factual assertion, cannot be both "facially innocent" and harmful to reputation. *See id.* The court's confusion over the difference between slander *per se* and libel *per se* seems to be the result of successive precedents—the *Wilson* course cites *Williams v. Gannett Satellite Info. Network*, 834 N.E.2d 397, 400 (Ct. App. Ohio 2005), which explains the difference between libel *per quod* and libel *per se* correctly but then garbles the issue by citing a slander *per se* case, *Schoedler v. Motometer Gauge & Equip. Corp.*, 15 N.E.2d 958, 961 (Ohio 1938), regarding the "special categories" piece of defamation law. 834 N.E.2d. at 399.

250. Bunker et al., *supra* note 247, at 584.

251. This question is separate from whether some libelous statements require proof of special damages because they are "*libel per quod*," statements which do not defame on their face but only by reference to extrinsic information.

252. *See, e.g.*, Bunker et al. *supra* note 247, at 594–96.

253. *See id.* at 594.

254. *Id.*

255. *See id.* at 594, 596.

256. Of course, as Lyrissa Barnett Lidsky has written, "all defamation is based on social prejudices." Lidsky, *supra* note 238, at 28.

257. BRUCE MACDOUGALL, QUEER JUDGMENTS: HOMOSEXUALITY, EXPRESSION AND THE COURTS IN CANADA 226 (2000).

258. Gary Lo, *Queer Lies in the Law's Eye: Is it Still Defamatory to Call Someone Gay?*, 13 POLEMIC 1, 1 (2004).

defamatory, they effectively issue an authoritative message that homosexuality is undesirable, giving homophobic views validity."[259] A judicial decision allowing a defamation claim to go forward based on statements regarding the plaintiff's sexual orientation "carries the necessary–and homophobic–implication that being gay is somehow inferior to being straight."[260] It requires grouping LGBTQ+ individuals "with criminals, fraudsters, untruthful people, and the like."[261] Labelling "a certain characteristic as defamatory is to relegate it to exclusion, to otherness, to inferiority."[262]

Defining the "relevant community validates certain moral standards, and as such, defamation laws play a role in defining the community with (largely implicit) assumptions about who is included in and who is excluded from the community of ordinary, decent folk that are the hypothetical judges of our moral worth."[263] In this way, "defamation law practises and authorises moral exclusion."[264] Among the pernicious features of this moral exclusion is its one-sided nature. If a straight person is falsely labelled gay, precedent suggests they will have a claim for defamation.[265] On the other hand, if a gay person is falsely labelled straight, there is no parallel cause of action—in effect, because the lesbian, gay or bisexual plaintiff falsely described as heterosexual "is not a part of the community.[266]

At a minimum, if courts find that being called "gay" or a "lesbian" is defamatory because of community attitudes, they are presented with an opportunity (which they have traditionally been reluctant to embrace) to describe those attitudes as inconsistent with antidiscrimination principles of a state's public policy goals of equality for the members of the LGBTQ+ community.

Prior to *Obergefell*, courts continued to consider false imputations regarding sexual orientation defamatory.[267] A mix began to emerge on whether such statements were defamatory *per se*.[268] Reviewing cases in 1997, one commentator found that some courts had found statements that a "person is gay" defamatory *per se*, while others had required special damages, but that "no court has held that such statements cannot be defamatory as a matter of law."[269]

For example, in a 2001 case, *Gray v. Press Communications LLC*,[270] a New Jersey court considered a claim by a former children's television show host that

259. *Id.* at 4.

260. Dean R. Knight, *"I'm Not Gay–Not that There's Anything Wrong with That! Are Unwanted Imputations of Gayness Defamatory*, 37 VICTORIA U. WELLINGTON L. REV. 249, 268 (2006).

261. *Id*.

262. MACDOUGALL, *supra* note 257, at 226.

263. Lawrence McNamara, *Bigotry, Community and the (In)visibility of Moral Exclusion: Homosexuality and the Capacity to Defame*, MEDIA & ARTS L. REV. 271, 274 (2001).

264. *Id.*

265. *Id.* at 276.

266. *Id.*

267. Patrice S. Arend, *Defamation in an Age of Political Correctness: Should a False Public Statement that a Person is Gay Be Defamatory*, 18 N. ILL. U. L. REV. 99, 101 (1997).

268. *Id.* at 102.

269. *Id.* at 101–02.

270. 775 A.2d 678 (N.J. Super. Ct. App. Div. 2001).

a radio broadcaster's description of her as "[t]he lesbian cowgirl, Sally Starr," could be considered defamatory.[271] The court found that "the majority of jurisdictions . . . that have considered the issue have concluded that a false accusation of homosexuality is actionable."[272] The court adhered to this position, stating that "[a]lthough society has come a long way in recognizing a persons' right to freely exercise his or her sexual preferences, unfortunately, the fact remains that a number of citizens still look upon homosexuality with disfavor."[273] As a result, the court concluded that "a false accusation of homosexuality is reasonably susceptible to a defamation (sic) meaning."[274] The court, according to one commentator, "treat[ed] as self-evident that being falsely called a lesbian may be harmful to one's reputation," and thus "implicitly condone[d] homophobia."[275]

In the decade before *Obergefell*, progress was only achieved through court decisions that found an imputation of homosexuality was not defamation *per se*.[276] As policy and social attitudes began to become more inclusive of LGBTQ+ citizens in the 2003–2012 timeframe, courts "across the country" began to reevaluate wither "false imputations of homosexuality should remain *per se defamatory*."[277]

In a 2004 case, *Albright v. Morton*, a Massachusetts court confronted a defamation claim in which plaintiff claimed that a book falsely portrayed him as gay by miscaptioning a photograph of a gay man with his name.[278] Plaintiff was Madonna's bodyguard and also had a relationship with the singer.[279] The court opined that "recent rulings by the Supreme Court" (such as *Lawrence*) "undermine any suggestion that a statement implying that an individual is a homosexual is defamatory."[280] To allow imputations relating to sexuality to be a basis for a defamation claim would require a court to "legitimize the prejudice and bigotry that for too long have plagued the homosexual community."[281] The court opined that agreeing "that calling someone a homosexual is defamatory per se" would "validate" sentiment that "views homosexuals as immoral" and "legitimize relegating homosexuals to second-class status."[282] While the language in *Albright* was empowering, it was unfortunately delivered in dicta.[283] Because the court found that mis-captioning a photo with plaintiff's name did

271. *Id.* at 681, 683.

272. *Id.* at 683.

273. *Id.* at 684.

274. *Id.*

275. Rachel M. Wrightson, *Gray Cloud Obscures the Rainbow: Why Homosexuality as Defamation Contradicts New Jersey Public Policy to Combat Homophobia and Promote Equal Protection*, 10 J.L. & POL'Y 635, 673 (2002).

276. *See* Holly Miller, *Homosexuality as Defamation: A Proposal for the Use of the "Right-Thinking Minds" Approach in the Development of Modern Jurisprudence*, 18 COMM. L. & POL'Y 349, 350–52 (2013).

277. *Id.*

278. 321 F. Supp. 2d 130, 136 (D. Mass. 2004).

279. *Id.* at 132.

280. *Id.* at 133.

281. *Id.*

282. *Id.* at 138.

283. *See id.*

not in fact mischaracterize plaintiff as gay, the discussion of whether such statements could be defamatory *per se* was not necessary.[284] This may explain why the court seems to have made a mistake common to law students—conflating defamation *per se* under Massachusetts law (which seemingly included all libel, as well as slander *per se*) with slander *per se*. Still, *Albright* inspired several other courts to embrace the position that imputations regarding sexual orientation could not be actionable as slander *per se*.[285]

One such example came in *Stern v. Cosby*, a 2009 decision from a Southern District of New York judge.[286] Attorney Howard K. Stern, who represented model Anna Nicole Smith, sued a publisher after an unauthorized biography of the model "falsely stat[ed] or suggest[ed], among other things, that he had engaged in sex with the father of Smith's child…."[287] Defendant argued that the statements "are not defamatory," in part because "in this day and age, statements suggesting that someone is homosexual are no longer libelous . . . as they now longer connote shame, contempt or ridicule."[288] The court held that the statements were defamatory but were not defamatory *per se* and thus required proof of special damages.[289] As the court interpreted New York law, a libel would constitute defamation *per se* if it involves the "same degree of 'shame . . . or disgrace'" as the kind of statements traditionally considered slander *per se* (relating to criminal misconduct, injurious to trade or profession, "loathsome" disease, and the like).[290]

Recognizing the "sea change in social attitudes about homosexuality," the court opined that the "'current of contemporary public opinion' does not support the notion that New Yorkers view gays and lesbians as shameful or odious."[291] Although the court held that allegations of homosexuality, in and of themselves, would not be defamatory *per se*, it further held that the specific statements included in the book could be found "susceptible to a defamatory meaning."[292] A jury could find that the statement that the plaintiff engaged "in oral sex at a party is shameful or contemptable."[293] The court does not explain why oral sex at a party is shameful or contemptible, other than to speculate that if the plaintiff was dating model Smith at the time, the statement would provide a suggestion that he was "unfaithful" to Smith (although why *that* would be defamatory is not obvious either).[294] A second statement in the book suggested that the plaintiff

284. On appeal, the 1st Circuit upheld the district court's decision that the erroneous captioning did not make a statement concerning the plaintiff's sexuality, but that it was not necessary to decide "whether such an imputation constitutes defamation *per se* in Massachusetts." Amrak Productions Inc. v. Morton, 410 F.3d 69, 73 (1st Cir. 2005).

285. *See, e.g.*, Greenly v. Sara Lee Corporation, 2008 WL 1925230, at *8 n.15 (E.D. Cal. 2008); Yonaty v. Mincolla, 945 N.Y.S.2d 774, 779 (N.Y. App. Div. 2012).

286. 645 F. Supp. 2d 258, 275 (S.D.N.Y. 2009).

287. *Id.* at 263.

288. *Id.* at 264.

289. *Id.* at 276.

290. *Id.* at 273.

291. *Id.* at 273–74.

292. *Id.* at 275.

293. *Id.*

294. *See id.* at 275–76.

made a sex tape with the father of Smith's child (Birkhead)—an allegation the court found "would expose [plaintiff] to contempt among most people."[295] The court "reject[ed], as absurd"[296] the defense argument that a statement suggesting a person made a sex tape is not defamatory—without explanation, however, as to why making a sex tape is shameful or what makes the argument advanced by the defendant absurd.

The decision in *Stern* was a narrow one—during oral arguments, the judge "indicated a clear preference to avoid this issue, if possible."[297] On remand, the judge allowed the defamation *per se* claim to proceed on narrower grounds than simply the allegation of homosexuality.[298] In addition, because *Stern* was a federal case predicting New York law, "many New York courts have ignored this ruling and continue to follow the precedent" set in state court decisions.[299]

In *Yonaty v. Mincolla*, a 2012 case, a New York Appellate Division court considered the issues raised in *Albright* in a bit more depth, taking the opportunity to "overrule [a] prior case" and hold that "statements falsely describing a person as lesbian, gay or bisexual" are "not defamatory *per se*."[300] A person heard that the plaintiff was gay or bisexual, and relayed that information to another, hoping that it would reach the plaintiff's girlfriend.[301] Plaintiff had no economic losses, so unless false statements that a person is gay or bisexual are defamation *per se*, the case would fail.[302] The court explained that defamation "involves the idea of disgrace."[303] Prior case law finding that statements falsely imputing homosexuality were defamatory *per se* are "based upon the flawed premise that it is shameful and disgraceful to be described as lesbian, gay or bisexual."[304] With that premise no longer supportable, a plaintiff could not maintain a defamation claim based on imputations about sexual orientation in the absence of special damages.

A 2013 commentator anticipated courts would soon "go a step further and hold that [imputations that a person was gay] hold no defamatory meaning."[305]

3. Public Disclosure of Embarrassing Private Facts

The public disclosure tort[306] allows a plaintiff to bring a cause of action for the public disclosure of private facts regarding matters which would be "highly

295. *Id.* at 276.
296. *Id.* at 276 n.11.
297. *See* Robert D. Richards, *Gay Labeling and Defamation Law: Have Attitudes Toward Homosexuality Changed Enough to Modify Reputational Torts?*, 18 COMMLAW CONSPECTUS 349, 362 (2010).
298. *See* Ashley Milosevic, *The Tides of Transgressions: An Analysis of Defamation and the Rights of the LGBT Community*, 82 ALB. L. REV. 323, 327–28 (2019).
299. *Id.* at 328.
300. 945 N.Y.S.2d 774, 776 (N.Y. App. Div. 2012).
301. *Id.*
302. *Id.* at 777.
303. *Id.* at 777 (internal quotation marks omitted).
304. *Id.*
305. Miller, *supra* note 276, at 352–53.
306. RESTATEMENT (SECOND) OF TORTS § 652D (AM. L. INST. 1977).

offensive to a reasonable person" and are not a matter of public concern.[307] A plaintiff must establish that a defendant "(1) gave 'publicity' to (*e.g.*, widely disseminated), (2) completely private/secret information, (3) that was 'highly offensive,' and (4) not of legitimate public concern."[308] In this last element, the tort "internalizes free speech concerns in the form of the common law 'newsworthiness' test, which is coextensive with First Amendment protections."[309]

Courts confronted two issues relating to sexual orientation in connection with this tort. First, is revealing that a person is gay or a lesbian "highly offensive to a reasonable person"?[310] Second, in what cases are such disclosures "newsworthy"?[311] While "[o]n its face, a doctrine of civil liability for disclosures of private facts could deter and redress unwanted revelations and 'outings,'" LGBTQ+ plaintiffs had "mixed luck with the publication of private tort."[312]

The public disclosure tort might at first blush seem to be one that would be utilized in cases of involuntary "outing" of celebrities and powerful figures. Among LGBTQ+ activists, involuntary outing of public figures who have chosen to keep hidden their LGBTQ+ status has some history of controversy.[313] In the United States, because of the "newsworthiness" defense to the tort, perhaps, such cases are relatively rare.[314] Instead, the cases that have been brought tend to relate to individuals who have limited public presence.[315]

A 1992 commenter found two cases relating to disclosure of sexual orientation or gender identity—*Sipple v. Chronicle Publishing Co.*,[316] and *Diaz v. Oakland Tribune, Inc.*[317] While *Sipple* was resolved based on the already-public nature of the disclosure and newsworthiness, the court suggested in dicta that because of its widely known nature, the plaintiff's sexual orientation "was not so offensive . . . as to shock the community notions of decency," [318]

307. *Id.*

308. Scott Skinner-Thompson, *Privacy's Double Standards*, 93 WASH. L. REV. 2051, 2060 (2018).

309. John P. Elwood, Note, *Outing, Privacy, and the First Amendment*, 102 YALE L.J. 747, 754 (1992).

310. Here, the question isn't whether the *fact* of LGBTQ+ status is offensive but whether its disclosure is offensive (this is to be distinguished from false imputations of LGBTQ+ status in defamation, where the issue is whether the imputation is harmful to reputation). The *Restatement's* describes the requirement as "highly offensive publicity." RESTATEMENT (SECOND) OF TORTS § 652D (AM. L. INST. 1977).

311. *See* Elwood, *supra* note 309, at 754.

312. Anita L. Allen, *Privacy Torts: Unreliable Remedies for LGBT Plaintiffs*, 98 CALIF. L. REV. 1711, 1733 (2010).

313. *See, e.g.*, Irene Lacher, *Public Good—or Private Matters?: Advocates of 'Outing' Gay Celebrities and Powerbrokers Say the Process Is Just a Part of Gaining Equality. But Critics Say It's Crossing the Line Between Gossip and News*, L.A. TIMES (Apr. 13, 1995, 12:00 AM), https://www.latimes.com/archives/la-xpm-1995-04-13-ls-54443-story.html [https://perma.cc/43ET-EYET]; Aisha Schafer, Comment, *Quiet Sabotage of the Queer Child: Why the Law Must be Reframed to Appreciate the Dangers of Outing Gay Youth*, 58 HOW. L.J. 597, 603 (2015) ("Some within the gay community advocate outing anti-gay public figures in order to expose the hypocrisy of their homophobia. Many question this line of thinking, because even when outing is used as a tool to undermine adversaries of the gay community, it still is an act that intrudes upon an individual's interest in privacy.").

314. *See* Elwood, *supra* note 309, at 755.

315. *See id.* at 756.

316. 201 Cal. Rptr. 665 (Ca. Ct. App. 1984).

317. 188 Cal. Rptr. 762 (Cal. Ct. App. 1983).

318. *Sipple*, 201 Cal. Rptr. at 670.

particularly since it painted the plaintiff in a positive, "heroic"[319] light as a former United States Marine who had saved President Gerald Ford from an assassination attempt by grabbing or striking a gunman's arm.[320] In *Diaz*, a newspaper column revealed that the student body president of a California college was transgender.[321] The Court found that the matter was not newsworthy as a matter of law but was not asked to review the jury's determination that the disclosure of facts relating plaintiff's gender assignment at birth was "highly offensive to a reasonable person of ordinary sensibilities."[322] The Court did opine that "[c]ontrary to defendants' claim, we find little if any connection between the information disclosed and [plaintiff's] fitness for office. The fact that she is a transsexual does not adversely reflect on her honesty or judgment."[323]

In 1995, a Colorado Court affirmed a jury verdict for publication of private facts for a law firm associate based in part on revelations of his sexual orientation and that his male partner was HIV positive.[324] That may have been an "easy" case since *both* the plaintiff's sexual orientation and his partner's HIV positive status were disclosed—though the court found that disclosure of this information "would be highly objectionable to a reasonable person because a strong stigma still attaches to both homosexuality and AIDS."[325] On appeal, the state Supreme Court reversed based on whether the information had been made "public" but did not reverse the finding that the information disclosed could meet the threshold necessary for the public disclosure tort.[326]

In another 1995 case, *Greenwood v. Hollister*,[327] a court overruled the dismissal of an attorney's public disclosure claim based on law firm staff sharing information that he'd amended his employee benefits forms to list his male partner as beneficiary "with persons who had no responsibility for the administration of the programs and no need to know the information."[328]

One 2000 case to suggested a pathway to a more expansive approach to the disclosure tort—finding a disclosure objectionable even without a finding that the disclosure of the information itself was something that would be highly offensive.[329] In *Simpson v. Burrows*, the Christmas Valley Lodge harassment case discussed above in relation to its IIED claim, plaintiffs also alleged an imprecisely identified "invasion of privacy" claim the court interpreted as public disclosure.[330] Plaintiff's sexual orientation "is a private fact," according to the court, and it was disclosed in a "highly objectionable" way through inclusion in

319. *Id.* at 670 n.2.
320. *Id.* at 666.
321. *Diaz*, 188 Cal. Rptr. at 766.
322. *Id.*
323. *Id.* at 773.
324. Borquez v. Ozer, 923 P.2d 166, 169–71 (Colo. App. 1996).
325. *Id.* at 173.
326. Ozer v. Borquez, 940 P.2d 371, 373 (Colo. 1997).
327. 663 N.E.2d 1030 (Ohio Ct. App. 1995).
328. *Id.* at 1034.
329. Simpson v. Burrows, 90 F. Supp. 2d 1108, 1125 (D. Or. 2000).
330. *Id.* at 1131.

the letters.[331] While the court was certainly dealing with an unsympathetic defendant, it did not clearly address whether it found disclosure of fact of sexual orientation objectionable.[332] Or, perhaps, the court confused the disclosure of information that a person would find "objectionable," to disclosure of information in a *way* a person would find objectionable, allowing the claim to proceed based on the objectionable manner of disclosure (threatening letters mailed to numerous members of the community) rather than the objectionable nature of the facts disclosed.

Simpson may provide a path forward to LGBTQ+ plaintiffs reluctant to argue that the disclosure of their sexual orientation or gender identity is itself "highly offensive," by allowing them to argue that the malicious and/or irresponsible manner of the disclosure turns what should otherwise be viewed as "inoffensive" private information into an actionable wrong.[333]

The public disclosure tort requires that the information disclosed be embarrassing and its revelation "highly offensive."[334] The question is whether, after *Obergefell*, courts will begin to question the idea that disclosure of information relating to sexual orientation is embarrassing or "highly offensive," given changing social understanding about sexual orientation.[335] Certainly, there were matters of a private nature, the disclosure of which would have been offensive in the past, that, due to changing social standards, have been normalized and would no longer be actionable.[336]

IV. ENTER *OBERGEFELL*

The Supreme Court published its decision in *Obergefell v. Hodges*[337] on June 26, 2015.[338] Justice Kennedy, who wrote the opinion for a 5-to-4 majority, announced the opinion from the bench that Friday—as "several lawyers seated in the bar section of the court's gallery wiped away tears" and crowds outside the Supreme Court chanted, "[l]ove has won."[339]

Petitioners were fourteen same-sex couples and two men whose same-sex partners had died.[340] The court recounted the circumstances of three of the cases

331. *Id*. at 1125.

332. *See id.*

333. In essence, the court adopts the view that the public disclosure tort can be predicated not upon a showing that "being labeled as 'gay' is in-and-of-itself offensive, but rather whether *the act of outing* is itself offensive." Adam J. Kretz, *The Right to Sexual Orientation Privacy: Strengthening Protections for Minors Who Are "Outed" in Schools,* 42 J.L. & EDUC. 381, 388 (2013).

334. RESTATEMENT (SECOND) OF TORTS § 254D (AM. L. INST. 1977).

335. *See* Bunker et al., *supra* note 247, at 604.

336. *See id.* at 604–05.

337. 576 U.S. 644 (2015).

338. Kaitlin E.L. Gates, Comment, *Catching the Gold at the End of the Rainbow: The Impacts of Retroactive Recognition of Same-Sex Marriage on Community Property Division*, 9 EST. PLAN. & CMTY. PROP. L.J. 263, 270 (2017).

339. Adam Liptak, *Supreme Court Ruling Makes Same-Sex Marriage a Right Nationwide*, N.Y. TIMES (June 26, 2015), https://www.nytimes.com/2015/06/27/us/supreme-court-same-sex-marriage.html [https://perma.cc/S6F4-S9CW].

340. *Obergefell*, 576 U.S. at 654–55.

consolidated in *Obergefell*.[341] James Obergefell had married John Arthur in Maryland in 2013 and sought to be listed on Arthur's death certificate as his surviving spouse after his husband passed away three months after their marriage;[342] Ohio had denied that request.[343] April DeBoer and Jayne Rowse, who had celebrated a commitment ceremony in 2007, sought to jointly adopt a baby girl with special needs but were denied under Michigan law, which permits each child to "have only one woman as his or her legal parent."[344] Ijpe Dekoe, an Army Reserve Sergeant First Class, and his partner, married in New York the week before Dekoe deployed to Afghanistan in 2011, and sought recognition of their marriage in Tennessee, where they lived.[345]

> Justice Kennedy identified four principles motivating the holding—individual autonomy, the support for an important two-person union for committed couples seeking companionship and mutual caring, the fact that marriage would help protect the children being raised by same-sex couples, and that denying same-sex couples the state sanctioned benefits of marriage inflicted both material and stigmatic harm on gay Americans.[346]

As one commentator put it, "[i]t is difficult to overstate the impact of the *Obergefell* decision on the lives of LGBT people."[347] The case "brought a sense of dignity and pride to gay couples and their families, and a feeling of justice and equality to the hearts of many Americans."[348]

Obergefell also represented the culmination of a ten-year wave of increased public acceptance of LGBTQ+ Americans, though the rhetoric and policy positions taken by the federal government in the years following triggered a decline in that support.[349]

The case also had a profound impact of jurisprudence.[350] As of this writing, it had been cited in 708 cases and more than 600 trial documents available on Westlaw.[351]

341. *Id.* at 658.

342. James Obergefell later recalled, "This piece of paper, the death certificate made . . . the Defense of Marriage Act into something real and harmful and hurtful." D. Benjamin Barros et al., *Law Review Lecture on Finding Friendship in a Contentious Place: A Conversation with Obergefell and Hodges from the Landmark U.S. Supreme Court Case on Same-Sex Marriage*, 51 U. TOL. L. REV. 443, 448–51 (2020).

343. 576 U.S. at 658.

344. *Id.* at 658–59.

345. *Id*. at 659.

346. Christopher R. Leslie, *Dissenting from History: The False Narratives of the* Obergefell *Dissents*, 92 IND. L.J. 1007, 1008 (2017).

347. Courtney G. Joslin, *The Gay Rights Canon and the Right to Nonmarriage*, 97 B.U. L. REV. 425, 438 (2017).

348. Andrea B. Carroll & Christopher K. Odinet, *Gay Marriage and the Problem of Property*, 93 WASH U. L. REV. 847, 847–48 (2016).

349. EZRA CUKOR & SHIRLEY LIN, 3 EMPLOYMENT DISCRIMINATION LAW & LITIGATION § 27:1 (2021).

350. Tritt, *supra* note 132, at 873 ("The recent Supreme Court decision of *Obergefell v. Hodges* has forever altered American jurisprudence.").

351. Obergefell v. Hodges*: Citing References*, WESTLAW, https://1.next.westlaw.com/RelatedInformation/I5509aeda1beb11e5a807ad48145ed9f1/kcCitingReferences.html?docSource=e5c9cf2d32a54835b80efb8cedab1a25&rank=1&pageNumber=1&facetGuid=h562dbc1f9a5f4b0c9e54031a19076b9c&ppcid=b94

V. THE IMPACT OF *OBERGEFELL* ON TORT LAW

A. Contexts Involving Formally Recognized Marital Relationships

1. Negligent Infliction of Emotional Distress

The predicted impact of *Obergefell* would be to overturn the line of tort cases rejecting the rights of partners in same-sex marriages legal where executed.[352]

The courts seem to have faithfully embraced the antidiscrimination principles in *Obergefell* in this context.[353] For example, in a 2018 case, *Moreland v. Parks*, the New Jersey courts considered a case involving a fatal accident that occurred in 2009.[354] Valerie Benning and l'Asia Moreland were a same-sex couple who lived together with two of Moreland's biological children.[355] While Benning and one of the children were crossing the street to attend the "Disney on Ice" show, a traffic accident occurred and one of the vehicles struck the child, propelling her two-year-old body sixty-five feet and causing her death.[356] The trial court dismissing Benning's NIED claim based on the lack of an "'intimate, familial relationship'" to the child.[357]

Benning and Moreland had met around two years before the accident and been living together for at least a year.[358] After the accident, they were engaged (in 2011) and eventually married (in 2014).[359] The deceased child had been thirteen months old when the couple's relationship began and Moreland's other children referred to Benning as "mom or mommy."[360] After the family was transported to the hospital, Benning became hysterical, was placed into restraints and administered a sedative.[361] The trial record reflected significant "emotional and psychological trauma Benning suffered as an aftershock" of the accident and "the emotional pain she continues to suffer."[362]

The lower court had characterized the relationship between Benning and Moreland as "lovers," finding that a bystander NIED claim "is reserved to those who are actually closer related . . . ." Further, "[t]here is a requirement that they have to be family."[363] To the trial court, "[t]he evidence is that she was a girlfriend and she might have been part of the child's household, but by any

ab905041f422ba65c50ad129c3aee&transitionType=ListViewType&contextData=(sc.Search) (last visited Mar. 31, 2022) [https://perma.cc/2L2M-VKBW].

352. *See* Leslie, *supra* note 346; *see also* Tritt, *supra* note 132, at 873.

353. *See* Michael J. Higdon, *While They Waited: Pre-*Obergefell *Lives and the Law of Nonmarriage*, 129 YALE J.L.F. 1, 3 (2019).

354. 191 A.3d 729, 731 (N.J. Super. Ct. App. Div. 2018).

355. *Id.*

356. *Id.*

357. *Id.* at 731–32 (referencing Portee v. Jaffee, 417 A.2d 521, 526 (N.J. Sup. Ct. 1980)).

358. *Id.* at 732.

359. *Id.*

360. *Id.*

361. *Id.* at 733.

362. *Id.* at 734.

363. *Id.*

definition that I can find about the law of family, Ms. Benning doesn't meet it."[364] The court dismissed indications of the children's treatment of plaintiff Benning—"using the word mom doesn't count for much . . . ."[365]

The appellate court looked back to the state's defining precedent on NIED, which had been issued in 1980.[366] At that time, "gay, lesbian and transgender people were socially shunned and legally unprotected . . . . The notion of same-sex couples and their children constituting a 'familiar relationship' worthy of legal recognition was considered by a significant number of our fellow citizens as socially and morally repugnant and legally absurd."[367] But times had changed—the state and its citizens "now unequivocally reject this shameful, morally untenable bigotry . . . ."[368]

The court ruled that the jury could decide the issue of whether Benning's relation to the child was sufficiently close to establish NIED standing.[369] A jury "can find that Benning was a de facto mother to this child, and felt her loss as deeply as any parent facing that horrific event."[370]

2. Loss of Consortium

The predicted impact of *Obergefell* is that same-sex spouses would now be successful in loss of consortium claims.[371] To date, only one published appellate court decision or trial court order available in online databases has taken up the issue.[372]

That case was published shortly after *Obergefell* in 2015: *Sparks v. Meijer*.[373] Kristin Sparks was injured in a fall in a Meijer store parking lot in 2013.[374] Two months after *Obergefell*, on August 26, 2015, she amended her claim to add a loss of consortium claim for her partner Priscilla George, with whom she had shared a relationship since 2002.[375] The couple had conducted a "private commitment ceremony" in 2010 and filed that year for a recognized Domestic Partnership; they were legally married in Maryland in 2013 but their marriage had not been recognized in Ohio until *Obergefell*.[376] The defendant moved for summary judgment on the loss-of-consortium claim, "asserting that George's claim fails because she was not legally married to Sparks at the time of

364. *Id.*
365. *Id.*
366. *Id.*; Portee v. Jaffee, 417 A.2d 521, 528 (N.J. 1980).
367. *Moreland*, 191 A.3d at 737.
368. *Id.*
369. *Id.* at 738.
370. *Id.*
371. Aaron M. House, Obergefell*'s Impact on Wrongful Death in Missouri and Kansas*, 84 UMKC L. REV. 733, 734 (2016).
372. *See* Sparks v. Meijer, Inc., No. 15CVC-1413, 2015 WL 11012500, at *1 (Ohio Ct. C.P. Nov. 12, 2015).
373. *Id.*
374. *Id.*
375. *Id.*
376. *See id.*

Sparks' alleged injury," and plaintiff responded that they would have married had the right been available.[377]

The court rejected a 2002 precedent which denied same-sex partners the right to bring loss of consortium claims.[378] Relying on *Mueller*,[379] the court found that recognizing common law marriages for same-sex partners ineligible to wed prior to *Obergefell* was "sound judicial policy" and denied the motion for summary judgment, allowing the loss of consortium claim to proceed.[380]

One interpretation of the absence additional of published decisions on the issue is that the right of same-sex spouses to pursue loss of consortium claims is now so obvious that defendants have not sought to invoke pre-*Obergefell* precedent to the contrary in motions for judgment.

3. Wrongful Death Statutes

Since *Obergefell*, several courts have considered the standing of same-sex partners to bring claims for death of a partner, which were foreclosed under the dominant prior limitation for such standing to parties in legally recognized marriages.[381] The predicted impact of *Obergefell* would be that same-sex spouses could bring claims for wrongful death; children of same-sex spouses "should also now be able to bring wrongful death claims for the death of either parent, as should both same-sex parents for the death of a child."[382]

In *Hard v. Attorney General*,[383] a court found that plaintiff was a surviving spouse even though the state had not recognized same-sex marriages at the time of his partner's death.[384] David Fancher was killed when his vehicle collided with a UPS tractor trailer.[385] Fancher and Paul Hard had married in Massachusetts in May, 2011, and returned home to Alabama, which had refused to recognize same-sex marriage prior to *Obergefell*.[386] Hard sought disbursement of the proceeds from a wrongful death lawsuit, and his husband's mother sought to intervene to stop the payment of funds after *Obergefell* led the state to amend the decedent's death certificate to recognize Hard as decedent's spouse.[387] The court sided with decedent's husband: "We conclude there was no abuse of discretion because the district court properly applied Alabama law of intestate succession pertaining to surviving spouses. Simply put, once the state of Alabama recognized Hard as the surviving spouse . . . the court committed no abuse of discretion by disbursing the funds accordingly."[388]

377. *Id.*
378. *Id.* at *2–*3.
379. See *supra* notes 132–43 and accompanying text.
380. *Sparks*, 2015 WL 11012500, at *3 (quoting Mueller v. Tepler, 95 A.3d 1011, 1018 (Conn. 2014)).
381. *See, e.g.*, Hard v. Attorney General, 648 F. App'x 853, 853 (11th Cir. 2016).
382. House, *supra* note 371, at 734–35.
383. *Hard*, 648 F. App'x at 853–56.
384. *See id.* at 856.
385. *Id.* at 854.
386. *Id.*
387. *Id.*
388. *Id.* at 856.

In a 2016 case, *Rannolls v. Dewling*, a federal court in Texas found that *Obergefell* prevented the assertion that a same-sex common law spouse did not have standing to pursue a wrongful death claim in an accident case.[389] In *Rannolls*, the decedent and her surviving partner were not legally married, but the surviving partner asserted indications of common law marriage—that she and her partner lived together, wore wedding rings, raised a son, and presented themselves as spouses at public and family events.[390]

Rannolls provides protection for plaintiffs relating to a limited historical window in which same-sex marriages were not recognized under state law.[391] Its reach does not extend to parties who chose not to be married even after *Obergefell*, or in the particular state law.[392] Courts are likely to continue to "deny unmarried cohabitants rights under the premise that they could have secured their rights by getting married."[393]

Other courts, however, have been less willing to embrace a retroactive view of tort cases informed by *Obergefell*.[394] In a 2017 decision in *Ferry v. De Longhi*, a federal court in California held that the surviving member of a same-sex couple was not a lawful spouse of the decedent and could not bring a wrongful death case.[395] Patrick Ferry and Randy Sapp met in 1984 and began living together in 1985.[396] They married in a Unitarian service in 1993 but were prohibited by law, at the time, from obtaining a marriage license.[397] They held themselves out as a married couple, though they never registered as domestic partners, because they believed that they were married.[398] In 2013, Sapp was killed in a fire caused by an allegedly defective heater manufactured by defendant De Longhi America, Inc.[399] Mr. Ferry filed a lawsuit including claims for wrongful death in 2015.[400] The defendant argued that Mr. Ferry "did not qualify" as the decedent's "spouse, domestic partner, or putative spouse," and thus could not bring a claim for wrongful death under the governing provision of California law, Code of Civil Procedures section 377.60.[401]

Plaintiff acknowledged that his marriage to the decedent "was not viewed under the law as 'legal,'" but argued that the extension of the constitutional right to marry to same-sex couples should be applied retroactively to "render [the] marriage valid."[402]

389. 223 F. Supp. 3d 613, 623 (E.D. Tex. 2016).

390. *Id.* at 624.

391. The case, and others like it, explores how states "are . . . to treat the pre-equality years when same-sex couples had no option but to form nonmarital relationships[.]" Higdon, *supra* note 353, at 5.

392. London S. Ballard, *Unmarried Cohabitants: How the United States Is Still Not Protecting Same-Sex Couples*, 20 OR. REV. INT'L L. 275, 280 (2018).

393. *Id.*

394. *Id.* at 279.

395. 276 F. Supp. 3d 940, 952 (N.D. Cal. 2017).

396. *Id.* at 942–43.

397. *Id.* at 943.

398. *Id.*

399. *Id.*

400. *Id.* at 943–44.

401. *Id.* at 944–45 (citing CAL. CIV. PROC. CODE § 377.60 (West 2020)).

402. *Id.* at 945.

The court rejected plaintiff's claims, distinguishing loss-of-consortium claims, which are common law in nature, and wrongful death claims, which are "statutory in nature and may not be judicially expanded."[403] The court further opined that nothing had prevented the couple from marrying after 2013, up to the point of Mr. Sapp's death.[404] The court concluded by expressing that it did "not doubt the depth of Mr. Ferry and Mr. Sapp's commitment to each other" and did "not seek to diminish Mr. Ferry's loss."[405] It took note of the "vestiges of inequity that remain even after the rights of same-sex couples have been declared" but found that it's "hands are tied" even if "the equities might favor a different result."[406] Critics have argued that the court's decision meant that even though "the two men had lived as a married couple for over thirty years" they "were punished for not obtaining a marriage license in the six months between finally gaining the right to do so and Sapp's death."[407]

B. The Rights of LGBTQ+ Parties and Issues Surrounding Sexual Orientation in Tort More Generally

1. IIED

In the era before *Obergefell*, LGBTQ+ plaintiffs had modest success in utilizing IIED to combat harassment on the basis of sexual orientation and gender identity, in spite of the challenge sexual minorities might have been thought to face in establishing the necessary "outrage" element which relies upon majoritarian sensibilities.[408] Such cases were relatively rare, however.[409] In the aftermath of *Obergefell*, one might expect that LGBTQ+ parties would more regularly bring IIED claims in the face of extreme behavior and be more successful when such claims are brought. Although it may be too soon to tell, that prediction appears to be on the way to being realized.[410]

Success, post-*Obergefell*, has not been universal. For example, in a 2018 case, *Chandler v. Pye Automotive*,[411] the plaintiff included an IIED claim in a wrongful termination case.[412] For several years before her termination, plaintiff alleged she was the target of sexual harassment, including multiple cases involving physical contact, by male employees.[413] In the summer of 2015, the

403. *Id.* at 947.
404. *Id.* at 949–50.
405. *Id.* at 952.
406. *Id.* at 950 (citations omitted).
407. Higdon, *supra* note 353, at 7.
408. See discussion *supra* Section III.B.1.
409. See discussion *supra* Section III.B.1.
410. Some cases address the issue in relatively short treatment. For example, in *Minor v. Dilks*, No. 19-18261, 2020 WL 133278 (D.N.J. Jan. 13, 2020), a *pro se* plaintiff who was a transgender, gay inmate was permitted to proceed against prison officials for IIED based on allegations they "told inmates and prison employees of Plaintiff's sexual orientation for the purpose of causing his harassment in a hostile environment." No. 19-18251, 2020 WL 133278, at *9 (D.N.J. Jan. 13, 2020).
411. No. 4:17-CV-00086-HLM-WEJ, 2018 WL 3954768 (N.D. Ga. July 9, 2018).
412. *Id.* at *1.
413. *Id.* at *3.

owner of the car dealership where she worked "smacked her buttocks," and another manager made comments about her sexual orientation and intimate behavior.[414] During the last week of her work, the dealer's owner told her that "her relationships with women were disgusting," and that she needed to "straighten up."[415] The court rejected her IIED claim—according to the court, she "failed to submit probative evidence that [defendant]'s alleged touching of her buttocks on one occasion, inappropriate comments on a few occasions, and laying her off from a job were outrageous under Georgia law."[416] Further, the court found that she had failed to allege sufficiently severe emotional distress.[417]

A second case of note is *Herrick v. Grindr, LLC*[418]—in part because plaintiff also sought (ultimately unsuccessfully) to test the boundaries of Section 230[419] immunity for Internet Service Providers (ISPs).[420] Plaintiff Matthew Herrick was the victim of a "malicious catfishing" campaign at the hands of his former boyfriend,[421] who used the web site to create a fake profile of Herrick that encouraged web site users to "go to Herrick's home and workplace for sex."[422] Herrick reported the fake profile to the web site approximately 100 times, but the defendant did not respond other than to "send an automated, form response."[423]

Reading *Herrick*, one wonders a bit about the tone selected by the district court. The court is graphic in its description of the fake profile—graphic content is certainly not foreign to IIED cases.[424] But the court is also vague about some details of the plaintiff's allegations—describing first "hundreds of . . . users" who had responded to the fake profile[425] before later clarifying that Herrick had alleged that "'approximately 1100' users" had responded to the fake profile over a six-month period.[426]

Notably, the *Herrick* court did not need to weigh in on the substance of plaintiff's IIED allegation since it had concluded that the claim was barred by the CDA.[427] Still, in dicta, it went on to criticize the IIED claim—which, to the court, plaintiff had not "plausibly" alleged.[428] Herrick failed to meet the "high bar"[429] of establishing that the defendant's conduct was sufficiently extreme and outrageous to be a proper basis for an IIED claim. The court explained, by

414. *Id.*
415. *Id.* at *4–*5.
416. *Id.* at *18.
417. *Id.* at *19.
418. 306 F. Supp. 3d 579, 584 (S.D.N.Y. 2018).
419. 47 U.S.C. § 230.
420. *Herrick*, 306 F. Supp. 3d at 584; *see also* Herrick v. Grindr, LLC, 765 Fed. App'x 586, 591 (2d Cir. 2019), *cert denied*, 140 S.Ct. 221 (2019).
421. *Herrick*, 306 F. Supp. 3d at 584.
422. *Id.*
423. *Id.* at 585.
424. *Id.*; *see also supra* Section III.B.1.
425. *Herrick*, 308 F. Supp. 3d at 584.
426. *Id.* at 585.
427. *Id.* at 593.
428. *Id.*
429. *Id.* at 594.

reference to past cases, that "the failure to respond appropriately to complaints of harassment, on its own, will not be sufficiently egregious—'outrageous'—to amount to" conduct actionable as IIED.[430]

The court makes no mention of Herrick's ability to present evidence on IIED's requirements of intent or recklessness, or severe emotional distress,[431] something that has the effect of dehumanizing the plaintiff. Its holding on outrageousness, similarly, is relatively short—so short, in fact, that other courts seem to have misread it to represent a finding that the conduct *was* in fact outrageous (the opposite of what the court actually said).[432] In rejecting a plaintiff's IIED claim over an internet impersonation, a Missouri court opined that the impersonation at issue in its case "bears no resemblance to the impersonation in *Herrick*."[433]

The *Herrick* court's rejection in *dicta* of the plaintiff's IIED claim stands in contrast to other recent decisions in IIED cases which suggest more openness to considering expanding the range of behavior that might be considered outrageous.[434] The court also appears to have omitted in its discussion some of the more troubling aspects of plaintiff's account—for instance, that some of the users responding to the fake profile "physically attacked or verbally harassed Herrick's roommates and coworkers."[435]

Other cases, however, suggest a more hospitable environment.

In a 2020 case, *Grimes v. County of Cook*,[436] a transgender man who had kept his transgender status private and lived as "unambiguously male" since 2008 brought an intentional infliction of emotional distress claim, among other causes of action, after his immediate supervisor at the Cook County Jail (where he worked as a medical technician) revealed his transgender status to plaintiff's coworkers.[437] This disclosure occurred in a workplace with a "culture of

430. *Id.* (quoting Turley v. ISG Lackawanna, Inc. 774 F.3d 140, 161 (2d Cir. 2014)).

431. *See id.* at 593–94. One commenter argued that "[t]he harms posed by [malicious catfishing] accounts are uniquely pervasive." Camile Bachrach, *The Case for a Safe Harbor Provision of CDA 230 that Allows for Injunctive Relief for Victims of Fake Profiles*, 72 FED. COM. L.J. 147, 165–66 (2020).

432. *Herrick*, 308 F. Supp. 3d at 594; *see, e.g.*, Hoffman Brothers Heating v. Air Conditioning, Inc. v Hoffmann, No. 4:19-cv-00200-SEP, 2020 WL 5569989, at *4 (E.D. Mo. Sept. 17, 2020).

433. *Hoffman*, 2020 WL 5569989, at *4.

434. For example, in *Baldonado v. El Paso Natural Gas Company*, 176 P.3d 286 (N.M. Ct. App. 2006), plaintiff first responders encountered a truly horrific scene after a pipeline exploded, causing the death of a family group that had been camped in the vicinity of the explosion. *Id.* at 289. Although the scene was horrific, the underlying conduct which the court must have found "outrageous" involved a corporation conducting a cost-benefit analysis in the form of a "Pinto memo," concluding that it would be cheaper defend personal injury and wrongful death claims than to upgrade the pipeline to avoid potential explosions. *Id.* at 296. The court founds this "prolonged, systemic indifference" was sufficient to allow for a claim for IIED. *Id.* at 297. The court pushed back against the early, "tentative, conservative formulation of the tort of IIED", suggesting that experience with the tort allowed for a more robust view. *Id.* at 296. Grindr's conduct in *Herrick* certainly amounted to sustained and systematic indifference – one wonders if the plaintiff's sexual orientation may have made the court less likely to express openness to the substance of his claim (even if it would still have concluded the claim was barred by Section 230 of the CDA).

435. Andrew Gilden, *Sex, Death and Intellectual Property*, 32 HARV. J.L. & TECH. 67, 86 (2018) (citing allegations in complaint not mentioned in court's decision).

436. 455 F. Supp. 3d 630 (N.D. Ill. 2020).

437. *Id.* at 637, 640.

transphobia among . . . employees," and plaintiff had witnessed multiple acts of verbal harassment and degradation and become aware of incidents of physical violence against transgender detainees by correctional officers and medical staff.[438] The court found that the plaintiff sufficiently alleged an IIED claim under Illinois law.[439]

In other cases, the issue of outrageousness has surfaced with respect to how non-LGBTQ+ parties *treated* LGBTQ+ individuals. For example, in a 2020 case, *Kluge v. Brownsburg Community School Corp.*,[440] a music teacher sought to recover for IIED after he was forced to resign because he refused to comply with the school district's policy to address transgender students by their preferred names and pronouns.[441] The teacher informed the district superintendent that the requirement that he use preferred names "conflicted with his religious beliefs against affirming gender dysphoria," and was told that he could either use preferred names, say he was forced to resign, or be terminated.[442] The teacher requested a religious accommodation or using student last names only and that another staff member be assigned to distribute "gender-specific uniforms" so the teacher would not have to do so, which was granted.[443] The district subsequently informed the teacher that the last-names-only arrangement had created "tension," however, and asked him to resign.[444] The teacher's lawsuit asserted federal and state constitutional claims, wrongful termination, and also IIED.[445] The court rejected the IIED claim because "his allegations do not demonstrate" that the district's "conduct was extreme or outrageous."[446] The court found that the school simply attempted to enforce a policy the teacher did not agree with but that no "school official acted in an outrageous, harassing, or threatening way."[447] The teacher also failed to allege the necessary severity of emotional distress.[448]

2. Defamation

As tort law responds to social change, communications that may have been actionable at one point no longer are.[449] For instance, "statements suggesting that an individual is a fascist [or a] Communist . . . were once actionable but are now properly dismissed as non-defamatory."[450] If the law has evolved to "indicate a public acceptance of homosexuality," that should "negate[] a finding that one is injured when publicly labeled as homosexual."[451]

438. *Id.* at 637.
439. *Id.* at 641.
440. 432 F. Supp. 3d 823 (S.D. Ind. 2020).
441. *Id.* at 823, 826.
442. *Id.* at 834.
443. *Id.*
444. *Id.*
445. *Id.* at 836.
446. *Id.* at 852.
447. *Id.*
448. *Id.* at 852–53.
449. Wrightson, *supra* note 275, at 638.
450. *Id.*
451. *Id.* at 674.

In addition to impacting the doctrine when the issue arises in published court decisions, changing social acceptance of LGBTQ+ parties would also be expected to reduce the frequency of litigation, and the number of opinions that engage the issue.[452] As attitudes evolve and the law changes, fewer cases would be brought because "fewer people will suffer pecuniary losses,"[453] whether required for the particular defamation claim or not.

If *Obergefell* represented the final word on whether society views discrimination on the basis of sexual orientation as impermissible (or something close to it), one would expect that tort cases would shift away from allowing claims of defamation based on false assertions of a LGBTQ+ identity.[454] The "normative grounding of defamation law suggests . . . that as social norms evolve, formerly defamatory meanings may cease to be recognized as such."[455]

Certainly, the evident pre-*Obergefell* trend towards no longer considering imputations regarding sexual orientation to be defamation *per se* appears to have gained force in the years following the decision.[456] In a 2019 case, *Jamiel v. MaisonKayser@USA.COM*, a New York court cited *Yonaty* for the proposition that "[u]nder current New York law, statements about homosexuality are not slanderous *per se*."[457] In a 2020 case, *Laguerre v. Maurice*, a New York Appellate Division court took up the issue again to discuss in more detail.[458] Pastor Maurice stated before 300 members of the church that the plaintiff, a former elder in the church, "was a homosexual" and had "disrespected the church by viewing gay pornography on the church's computer."[459] The court agreed with *Yonaty* that "earlier cases . . . which held that the false imputation of homosexuality constitutes a category of defamation *per se*, are inconsistent with current public policy."[460] The court specifically noted the impact of *Obergefell*: even though New York had allowed same-sex marriage since 2011, *Obergefell* provided stark indication of a "profound and notable transformation of cultural attitudes and governmental protective laws."[461] This change influences how the court would apply *stare decisis*, when considering earlier precedent before the change in attitude culminating in and reflected by *Obergefell*.[462] Concluding that "the false imputation of homosexuality does not constitute defamation per se,"

452. *See* Arend, *supra* note 267, at 114.

453. *Id.*

454. *Cf.* Bunker et al., *supra* note 247, at 585–86.

455. *Id.* at 586.

456. *See, e.g.*, Jamiel v. Maison Kayser@USA.com, No. 19-cv-01389, 2019 WL 9362541, at *6 (S.D.N.Y. Dec. 19, 2019) (citing Yonaty v. Mincolla, 945 N.Y.S.2d 774, 777 (App. Div. 2012)); Laguerre v. Maurice, 138 N.Y.S.3d 123, 130 (App. Div. 2020) (quoting *Yonaty*, 945 N.Y.S.2d at 777).

457. *Jamiel*, 2019 WL 9362451, at *6 (citing *Yonaty*, 945 N.Y.S.2d at 777).

458. 138 N.Y.S.3d at 126.

459. *Id.*

460. *Id.* at 130.

461. *Id.* at 130–31.

462. *Id.*

the court ruled that special damages, which had not been alleged, would be required.[463]

As yet, however, it is not clear that the courts have been ready to move to the position that such statements are not defamatory at all.[464] Such a shift has been observed in other common law jurisdictions.[465] Commonwealth jurisdictions have defined the "harmful to reputation" element a bit differently than the dominant American approach—while both focus on "community standards," the Commonwealth approach, following a House of Lords precedent, asks whether conduct will "lower the reputation of the plaintiff in the estimation of *right-thinking* members of society generally."[466] Commonwealth courts also confront such claims in a more pro-plaintiff environment, unburdened by the significant Constitutional overlay for defamation claims applicable to public figures in the United States (which may explain why there seem to be more cases in Commonwealth jurisdictions involving false statements regarding plaintiffs' sexual orientation—such cases are simply easier to win and therefore more likely to be filed).[467]

But the tenor of the limited case law rejecting defamation claims based on false allegations relating to sexual preference appears equally applicable to the American approach.[468] The first judicial decision in this direction came in 1999 from a Scottish court, though in dicta.[469] A prison inmate alleged in a letter that a prison official was gay and a defamation suit followed.[470] To the court, "merely to refer to a person as being a homosexual would not now generally at least be regarded–if it ever was–as defamatory per se."[471]

In Australia, a 2001 case, *Rivkin v. Amalgamated Television Services*[472] took the "monumental" position that "changes in community attitudes meant that imputations of homosexuality alone could no longer be defamatory."[473]

In *Rivkin*, the New South Wales Supreme Court considered a case brought by a plaintiff concerning a broadcast relating to the death of a young model, Caroline Byrne.[474] The broadcast raised the suggestion that Byrne's partner, Gordon Wood, had murdered her, and in the course of the broadcast, the presenter suggested that Wood had murdered Byrne after she became suspicious of Wood's same-sex relationship with plaintiff, his driver and personal

463. *Id.* at 131. The court went further by holding that the additional allegation that the plaintiff viewed gay pornography on the church's computer "likewise does not fit within any of the categories of defamation per se." *Id.*

464. *See* Bunker et al., *supra* note 247, at 587–91; Wrightson, *supra* note 275, at 682.

465. Wrightson, *supra* note 275, at 682 n.246 (citing Rivkin v Amalgamated Television Servs. Pty Ltd, [2001] NSWSC 432 (Austl.)).

466. Sim v. Stretch [1936] 2 All ER 1237 (UK).

467. *Cf.* Wrightson, *supra* note 275, at 642–43.

468. *Cf.* BAKER, *supra* note 236, at 95.

469. *Id.* (citing Quilty v. Windsor (1999) SLT 346 (OH)).

470. *Quilty*, SLT at 346.

471. *Id.* at 355.

472. *Rivkin v Amalgamated Television Servs Pty Ltd*, [2001] NSWSC 432 (Austl.)

473. Lo, *supra* note 258, at 1, *discussing Rivkin*, 432 NSWSC at *1.

474. Rivkin, 432 NSWSC at *3.

assistant.[475] The broadcaster questioned Mr. Wood on whether Byrne had discovered him having "homosexual intercourse with the plaintiff."[476] Plaintiff's defamation claims included a claim that the broadcast contained an "imputation[]" that plaintiff "had engaged in homosexual intercourse with [] Wood."[477]

Responding to the claim, defendant's counsel argued that imputations of homosexuality could not rise to the level required for defamation because they did not "tend to lower the plaintiff in the estimate of 'right thinking members of society generally.'"[478] The court opined that it took counsel to argue that "until relatively recent times the charge that a man had homosexual intercourse with another would, without more, have been capable of being defamatory of him."[479] But, with "a change in the social and moral standards of the community…as a matter of law, it could not be said that right thinking members of the society generally would hold that the mere fact of homosexual intercourse lowered a man in their estimate."[480] The court paid "[p]articular weight … on the framework of legislation, both at a state and federal level in Australia, which reflected a change in community attitudes."[481]

Even if a particular religious belief may lead a person to "think the less of a man who engages in homosexual intercourse," *Rivkin* held that is no longer the case that "the shared social and moral standards with which the ordinary reasonable member of the community is imbued" would lead to a person holding the plaintiff "in lesser regard" on the basis of an asserted fact relating to sexual orientation "alone."[482] In accepting the "submission" that false statements about sexual orientation, without more, cannot be defamatory, the court noted that assertions about sexual orientation may separately "give rise to a defamatory imputation such as hypocrisy, the abuse of a position of power or trust, infidelity, or the like in the context of the publication or by way of true innuendo."[483]

As of 2006, it wasn't clear that the *Rivkin* approach had been "universally accepted in Australia," and it had not "yet been considered in other jurisdictions."[484] A 2010 review found no Australian cases on the issue after 2004.[485] In a 2015 case, an Australian judge considered a claim that a man married to a woman was gay, and found that this suggestion could be defamatory, but emphasized that the context of the suggestion mattered (since it implied not

475. *Id.*
476. *Id.* at *6.
477. *Id.* at *2.
478. *Id* at *17.
479. *Id.* at *18.
480. *Id.*
481. Knight, *supra* note 260, at 264.
482. *Rivkin*, NSWSC 432 at *8.
483. *Id.* One commentator described it as "somewhat unfortunate that the concluding statement of law is not expressed a little more carefully and precisely." McNamara, *supra* note 263, at 287.
484. Knight, *supra* note 260, at 268.
485. BAKER, *supra* note 236, at 99.

just something about plaintiff's sexual orientation, but also about infidelity).[486] Read together, the cases suggest that the law in Australia has evolved from the historical position that "a bare assertion of homosexuality is actually defamatory," with more recent decisions "engag[ing] more critically with this issue" and a focus on the context of the case—something like "aggravating factors" being required to make a statement about sexual orientation actionable in defamation.[487]

In the United States post-*Obergefell*, one notable case addressed whether imputation that a person was transgender could constitute defamation.[488] Fitness icon Richard Simmons sued the publisher of the *National Enquirer* relating to an article concerning his gender identity.[489] The *Enquirer* published an article in 2016 speculating that Simmons had retreated from public life because he was transitioning from male to female.[490] The court dismissed Simmons's case, holding in part that under California law, misidentifying someone as transgender is not defamatory on its face.[491] Even if transgender individuals are "held in contempt by a portion of the population," treating false imputations regarding gender identity as defamation would mean courts were "valid[ating] those prejudices by legally recognizing them."[492]

3. Public disclosure of embarrassing private facts

The predicted impact of *Obergefell* on LGBTQ+ parties in public disclosure cases would be to reduce the likelihood a court would hold that public revelations of facts relating to sexual orientation, gender identity or gender expression were "embarrassing" such that their disclosure would be "highly offensive."[493] To date, no published appellate court decisions or trial court orders appear in online databases taking that position.[494]

In *Grimes v. County of Cook*, discussed above in connection with plaintiff's IIED claim based on his supervisor's disclosure of his transgender status to coworkers at a municipal jail, plaintiff also successfully withstood a motion to dismiss on his public disclosure of private facts claim.[495] The defendants did not

486. Bennett, *supra* note 240, at nn.56–57 and accompanying text, *discussing* Gluyas v. Canby [2015] VSC 11 (N.Z.).

487. *Id.* at 320.

488. *See* Brief for Respondents at *17, Simmons v. Am. Media (No. B285988), 2018 WL 2648481 (Cal. App. 2018).

489. *Id.*

490. *Id.* at *21–*22.

491. *Id.* at *25–*26.

492. *Id.* at *26.

493. *See* sources cited *supra* notes 313–31 and accompanying text.

494. It is possible that transgender plaintiffs may be reluctant to pursue claims for public disclosure because such claims would need to be "premised on the assertion that disclosing their transgender status is offensive." Ezra Cukor, *Eschewing Title VII, Embracing Privacy, Transgender Plaintiff Survives Motion to Dismiss*, 2020 LGBT L. NOTES 11, 12 (2020). In addition, for many such plaintiffs, they lack the option to keep their transgender status private because they "transitioned on the job or are visibly transgender," which would defeat a publication of private facts claim. *Id.*

495. 455 F. Supp. 3d 630, 640 (N.D. Ill. 2020).

argue that disclosure of plaintiff's transgender status would not be "'highly offensive to a reasonable person,' thereby forfeiting the point for the purposes of [the] motion [to dismiss]."[496] The court did find that some coworkers had suspected that the plaintiff was a transgender man did not constitute prior publicity of that information so as to defeat a claim of disclosure, and allowed the plaintiff to proceed on the public disclosure theory.[497]

VI. CONCLUSION

While *Obergefell* directly addressed the constitutionality of state laws prohibiting same-sex marriage, its impact extended well beyond that issue and the field of constitutional law, clearly influencing the law of torts.[498] While LGBTQ+ parties enjoyed some success in tort cases in the decades preceding *Obergefell*, and while courts began to distance themselves in other cases from positions that may have implicitly endorsed homophobic viewpoints, *Obergefell* provided a discrete, and momentous, impetus for change.[499]

In the five years since, tort law has adapted quickly in many contexts and embraced same-sex marriages as providing the same basis for recovery afforded marriage before *Obergefell* in contexts like bystander NIED, loss of consortium, and wrongful death.[500] Perhaps this is unsurprising given the Supreme Court's focus in *Obergefell* on marriage—rather than a case focused on equality for LGBTQ+ individuals,[501] *Obergefell* can be read as a case about marriage[502] and in tort cases since, its impact most obviously felt in context where key issues related to marriage. How the Court chose to express its decision may have directed, if not constrained, its impact on the development of law in areas beyond the Constitutional principles the Court discussed.[503]

State courts have been creative in applying retroactive, look-back approaches, at times, to validate the rights of recovery of parties even for injuries that pre-dated the *Obergefell* decision.[504] In some other contexts, however, courts have yet to fully embrace the anti-discrimination principle embodied in

496. *Id.* (citing Karraker v. Rent-A-Center, 411 F.3d 831, 838 (7th Cir. 2005).

497. *Id.* at 640–41.

498. *See supra* Section V.A.

499. *See supra* Parts II, IV.

500. *See supra* Section V.A.

501. Donald H.J. Hermann, *Extending the Fundamental Right of Marriage to Same-Sex Couples: The United States Supreme Court Decision in Obergefell v. Hodges*, 49 IND. L. REV. 367, 396 (2016) ("[T]he opinion in Obergefell provides no explicit authority for further claims to rights by homosexuals (gays and lesbians). There was little attention to establishing a class subject of discrimination thus eligible to make claims for other rights or protections . . . [T]he opinion in Obergefell does not provide significant legal authority for further development of gay and lesbian rights . . . ."). *Id.*

502. Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmartial Family*, 5 CALIF. L. REV 1277, 1283 (2015) ("[W]hether this spectacular constitutional victory is the harbinger of greater social and material equality for diverse family forms remains to be seen. . . . In a world in which marriage is both a privileged status and a status of the privileged, marriage equality . . . risks reinforcing the many other status inequalities that taint the legacy of marital supremacy.").

503. *See supra* Part V.

504. *Supra* Part III; *see, e.g.*, Mueller v. Teppler, 95 A.3d 1011, 1014 (Conn. 2014).

Obergefell and condemn legal positions that appear to tacitly endorse anti-LGBTQ+ viewpoints.[505]

Studying the case law relating to LGBTQ+ parties and issues does make clear that tort law provides a powerful opportunity for wrestling with hard questions, which courts are beginning, thankfully, to be willing to address rather than simply avoid or ignore.[506] Should the law recognize a tort claim for publicly disclosing an otherwise private sexual orientation or gender identity, or does recognizing such a claim require accepting a view that the facts disclosed are ones that should be considered embarrassing? Does it reinforce homophobic positions to hold that imputations of gay or lesbian sexual orientation are defamatory? Or does failing to so rule gloss over the fact that significant portions of American society may continue to harbor discriminatory views towards LGBTQ+ Americans? In cases often tragic in their brutality, this history reminds us that the struggle for LGBTQ+ rights is not over and the path forward one that will require continued imagination and adaptation from the law of torts.

505. *See supra* Section V.B.1.

506. *See* Simpson v. Burrows, 90 F. Supp. 2d 1108, 1125 (D. Or. 2000).