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Not That There's Anything Wrong with That: Imputations of Homosexuality and the Normative Structure of Defamation Law

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Cover Page Footnote

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Not That There's Anything Wrong with That: Imputations of Homosexuality and the Normative Structure of Defamation Law

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INTRODUCTION

Should it be defamatory to falsely call someone a lawyer? Plenty of people hate lawyers (in the abstract, at least). Hurling the false epithet “lawyer” could cause people to back away, to shun the individual, to walk in the other direction. Real damage may be done by that single, erroneous characterization.

Or consider for a moment what a member of Tony Soprano’s crew might lose if someone falsely accuses him of being a government informant. Certainly, for the falsely accused here, a damaged reputation would be the least of his worries. But as with the stigmatized “lawyer,” would the besmirched mafioso actually succeed in a defamation claim?

Not likely. While lawyers are loathed by some and stool pigeons reviled by others, in mainstream society neither draws general disapprobation. Lawyer and tattletale jokes aside, the acts of lawyering and cooperating with police are not, to a reasonable person, shun-worthy.

Why, then, do some courts continue to hold that a false statement that an individual is gay is defamatory?¹ Even more, why do other courts still view this characterization as defamatory per se (i.e., the statement is defamatory on its face and damages are simply *presumed*)?² What are the policy implications of these decisions on the direction of our society? Is it fair to simply write off these rulings as homophobic?

This Article will attempt to shed some light on the tangled combination of the descriptive and the normative bases on which courts find defamatory meaning. It will first explore some of the intricacies of identifying defamatory statements in libel law, including the slander per se categories that have been imported into libel in many jurisdictions. Next, this Article examines a range of cases in which the central question was whether a false statement

¹ See *Q-Tone Broad., Co. v. Musicradio of Md.*, No. 93C-09-021, 1994 Del. Super. LEXIS 453, at *14 (Del. Super. Ct. Aug. 22, 1994) (citing *Schomer v. Smidt*, 170 Cal. Rptr. 662, 664 (Cal. Ct. App. 1980)).

² See *Mangle v. City of New Orleans Dep’t of Police*, 673 F.2d 122 (5th Cir. 1982) (affirming lower court’s decision and holding that falsely calling someone gay was per se defamatory).

that the plaintiff was gay was defamatory. These decisions present a wide range of opinions, with some recent cases questioning whether an allegation of homosexuality should ever be construed as defamatory.³ Finally, the Article analyzes the current state of the law and suggests an alternate approach to this important area of defamation doctrine. We offer a proposal that suggests courts decline to find defamatory meaning not only in statements involving imputations of homosexuality, but in other statements concerning an immutable characteristic or involuntary state where a finding of defamation would tend to stigmatize or promote discrimination against that class of persons.

I. IDENTIFYING DEFAMATORY STATEMENTS

Proving defamation in United States courts has become an increasingly complicated undertaking. Along with a substratum of common law requirements, the U.S. Supreme Court has imposed a number of additional layers of First Amendment firmament, beginning with the landmark case *New York Times Co. v. Sullivan*.⁴ Additional requirements flowing from state constitutional free speech and press protections have also made their way into the defamation laws of individual states.

Although the basic elements of libel vary somewhat from state to state, a number of consistent patterns emerge. The Restatement (Second) of Torts offers the following summary of the elements of

³ See *Hayes v. Smith*, 832 P.2d 1022, 1025 (Colo. App. 1991).

⁴ 376 U.S. 254 (1964). In *Sullivan*, the Court considered “the extent to which the constitutional protections for speech and press limit a State’s power to award damages in a libel action brought by a public official against critics of his official conduct.” *Id.* at 256. At issue was a paid editorial advertisement, published by *The New York Times*, which contained several misstatements of fact regarding a civil rights protest in Montgomery, Alabama. *Id.* Respondent, Sullivan, one of three elected commissioners of Montgomery, sued the *Times*, alleging that he had been libeled by the advertisement. *Id.* Reasoning that “erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the breathing space that they need . . . to survive,” *id.* at 271 (internal quotation marks omitted) the Court held that the First Amendment requires “a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.” *Id.* at 279.

libel: “(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm, or the existence of special harm caused by the publication.”⁵

The last element—the issue of special damages—deserves a brief discussion since it connects with an ongoing conflict in the law in cases involving imputations of homosexuality. Most U.S. jurisdictions follow a rule that makes libel without special damages actionable only if its defamatory meaning is clear on the face of the statement—that is, “libel *per se*.”⁶ For statements without such patent defamatory meaning (“libel *per quod*”), the claim requires proof of special damages—actual economic or pecuniary loss.⁷ These damages can be difficult to prove, and their absence creates a barrier to recovery. A *per se* finding may also mean that “the plaintiff need not prove the statements were defamatory within the context in which they were made.”⁸ A further wrinkle is that a number of jurisdictions have now imported into libel law four categories of statements from the law of slander that also are actionable without special damages (drawn from the concept of slander *per se*, not to be confused with libel *per se*)⁹: (1) accusations of crimes; (2) imputation of a loathsome disease; (3) imputations affecting the plaintiff in his or her business or profession; and (4) imputations of unchastity.¹⁰ A number of cases involving sexual orientation have applied both the first and fourth categories to allegations that the plaintiff is gay.

⁵ RESTATEMENT (SECOND) OF TORTS § 558 (1977).

⁶ ROBERT D. SACK, SACK ON DEFAMATION § 2.8.3 (1999).

⁷ See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1973).

⁸ *Smith*, 832 P.2d at 1024.

⁹ The *per se/per quod* damage distinction stems from the difference in the lasting effects of libel, which generally only requires proof of actual damages, versus the more fleeting nature of slander, treated as *per quod* and for which some jurisdictions require a showing of special damages. See Charles T. McCormick, *The Measure of Damages for Defamation*, 12 N.C. L. REV. 120, 121–22 (1934). Some states have eliminated the distinction entirely, requiring all plaintiffs meeting the basic defamation elements to prove damages of some kind. Moreover, these slander *per se* categories may be applied both in slander cases and in libel cases. Courts sometimes confuse this issue by using the term “defamation *per se*,” but this does little to clarify which concept is being applied.

¹⁰ RESTATEMENT (SECOND) OF TORTS §§ 570, 571–73 (1977).

Determining whether a statement is capable of defamatory meaning is generally the province of a judge in the first instance rather than that of a jury. The standard by which this generally is done incorporates both descriptive and normative elements. The Restatement (Second) of Torts states the majority rule that a “communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.”¹¹ In a comment to that section, the Restatement notes that the determination of the “community” in question is not based on the notion of a simple majority vote, but is instead determined by whether the communication would prejudice the person in the eyes of “a substantial and respectable minority” of the community.¹² If only a small group of persons would view the statement as defamatory, the Restatement notes, that would be legally insufficient. Moreover, “[t]he fact that a communication tends to prejudice another in the eyes of even a substantial group is not enough if the group is one whose standards are so anti-social that it is not proper for the courts to recognize them.”¹³

Thus, the judge in a defamation case is required to determine how a “substantial and respectable minority” of the community would react to the statement in question, and whether that reaction would tend to harm the plaintiff. As Professor Lyrissa Lidsky astutely noted, the nature of

[t]he determination of who constitutes a substantial and respectable minority often hinges on what the judge presumes the community’s values are. In effect, liability is often based on the judge’s own knowledge and experience rather than on the

¹¹ *Id.* § 559.

¹² Under defamation law, the “community” can be geographic, social, or even topical. *See, e.g.,* *Jews for Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1100 (Fla. 2008) (holding that a communication is defamatory if it prejudices the plaintiff in the eyes of a “substantial and respectable minority of the community”); *see also* Matthew D. Bunker & Charles D. Tobin, *Pervasive Public Figure Status and Local or Topical Fame in Light of Evolving Media Audiences*, 75 *JOURNALISM & MASS COMM. Q.* 112 (1998) (arguing that the shift in media and audience fragmentation making it easier to reach more discrete communities warrants an expansion in the public figure doctrine).

¹³ RESTATEMENT (SECOND) OF TORTS § 559 (1977).

community's actual beliefs. The "substantial and respectable minority" standard thus exemplifies what Professor Richard Hiers has termed a "cryptonormative" expression, that is, one that camouflages normative judgments beneath its "seemingly descriptive form."¹⁴

This normative grounding of defamation law suggests, of course, that as social norms evolve, formerly defamatory meanings may cease to be recognized as such. Consider, for example, defamation by racial misidentification. As Professor John C. Watson has described these cases, it was not uncommon for nineteenth and early twentieth century U.S. courts, particularly in the South, to find that falsely identifying a white plaintiff as African-American was defamatory.¹⁵ The earliest cases, Watson suggests, seem to have relied on either injury to the plaintiff in his business, or on "the loss of rights and the imposition of criminal penalties that black people were subject to solely because of their race."¹⁶ This latter rationale tied the injury to the English common law's *per se* category based on imputing a serious crime to the defamation plaintiff—in these cases, the crime simply was being black. Later courts, Watson suggests, began to apply a community standards approach to defamatory meaning equivalent to the Restatement approach mentioned above, which resulted in an analysis of racial misidentification based on the expected reaction of whites to the individual misidentified.¹⁷

Ultimately, courts began to reject defamation claims based on racial misidentification, acknowledging that while prejudices persisted among segments of the population, the community in general was now more enlightened. In a 1989 case, *Thomason v. Times-Journal, Inc.*,¹⁸ a Georgia appellate court affirmed summary

¹⁴ Lyrissa Barnett Lidsky, *Defamation, Reputation, and the Myth of Community*, 71 WASH. L. REV. 1, 19 (1996) (quoting Richard H. Hiers, *Normative Analysis in Judicial Determination of Public Policy*, 3 J.L. & RELIGION 77, 80 (1985)).

¹⁵ John C. Watson, *Defamation by Racial Misidentification: A Study of the Social Tort*, 4 RUTGERS RACE & L. REV. 77, 77–78 (2002); see also Jonathan D. Kahn, *Controlling Identity: Plessy, Privacy, and Racial Defamation*, 54 DEPAUL L. REV. 755, 759 (2005).

¹⁶ Watson, *supra* note 15, at 87.

¹⁷ *Id.* at 82, 84–85.

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

judgment for the publisher of a false obituary.¹⁹ Not only was the white subject of the obituary still alive, but the obituary stated that the memorial service had been held at a funeral home serving primarily African-American clients.²⁰ The appellate court ruled that the law could not give its imprimatur to such a claim: “Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”²¹ Moreover, the court wrote, “mere ‘peculiarities of taste found in eccentric groups cannot form the basis for a finding of libelous inferences.’”²²

A. *False Imputation of Homosexuality Under State Defamation Law*

As previously noted, under current libel doctrine, state law resolves the question of whether the false imputation of homosexuality possesses a defamatory meaning. The decisions generally fall into three groups, and while the growing trend is toward the acceptance of homosexuality in American society, defamation case law remains mixed. Courts generally hold that: (1) such statements are defamatory *per se*, and damages are presumed, either because they imply a serious crime, unchastity, or simply expose a plaintiff to public hatred, contempt or ridicule;²³ (2) such statements are capable of defamatory meaning, but require proof of damages, a subset of which require proof of “special damages;”²⁴ or (3) such statements are not capable of defamatory

¹⁹ *Id.* at 554.

²⁰ *Id.* at 552–53.

²¹ *Id.* at 553 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)).

²² *Id.* (quoting *Fairley v. Peekskill Star Corp.*, 445 N.Y.S.2d 156, 158 (App. Div. 1981)).

²³ *See, e.g., Burns v. Meyer*, 175 F. Supp. 2d 1259, 1270 (D. Nev. 2001) (“If the defamation tends to injure the plaintiff in his or her business or profession, it is deemed defamation *per se*, and damages will be presumed.”); *Murphy v. Pizarrio*, No. 94 Civ. 0471(JFK), 1995 WL 565990, at *3 (S.D.N.Y. Sept. 22, 1995) (“Under New York law . . . a published statement imputing homosexuality to another is still defamatory *per se* and proof of special damages is not required.”).

²⁴ *See, e.g., Smith v. Mission Assocs. Ltd. P’ship*, 225 F. Supp. 2d 1293, 1303 (D. Kan. 2002) (“In Kansas, damages to reputation are not presumed and must be proved regardless of the type of libel or slander.”); *Donovan v. Fiumara*, 442 S.E.2d 572, 575 (N.C. Ct. App. 1994) (“Our courts have long recognized two actionable classes of oral defamation: slander *per se* and slander *per quod*: That is, the false remarks in themselves (*per se*) may form the basis of an action for damages, in which case both malice and

meaning at all due to the U.S. Supreme Court's decision in *Lawrence v. Texas*,²⁵ as well as the increasing acceptance of homosexuality in contemporary society.²⁶

B. Defamation Per Se—Imputing (Former) Crime of Sodomy

Under the traditional common law view, slander per se was limited to defamatory statements that impute to another person: (1) a criminal offense; (2) a loathsome disease; (3) conduct, characteristics or a condition that is incompatible with his business, trade or office; or (4) serious sexual misconduct.²⁷ A number of cases, particularly those decided twenty or more years ago, have held that a statement that the plaintiff was gay fell within the “serious crime” category of slander per se.²⁸ As noted earlier, in slander or libel cases in many jurisdictions, such a finding means that the claim is actionable without proof of special damages.

For example, in *Buck v. Savage*,²⁹ a 1959 Texas appellate court affirmed a libel and slander judgment on the per se ground of criminal conduct.³⁰ The plaintiff, Eldon Savage, had been employed as a pharmaceutical salesman for Lincoln Laboratories and its president, Wallace A. Buck. In the course of an employment dispute, Buck asserted that Savage was “‘queer’ on Hickam, meaning an unnatural relationship between two men.”³¹ Other statements by Buck attacked Savage's character and honesty. The court held “words used in the case in issue were

damage are, as a matter of law, presumed; or the false utterance may be such as to sustain an action only when causing some special damage (*per quod*), in which case both the malice and the special damage must be alleged and proved.” (quoting *Beane v. Weiman Co.*, 168 S.E.2d 236, 237 (N.C. Ct. App. 1969)).

²⁵ 539 U.S. 558 (2003); *see id.* at 584 (O'Connor, J., concurring) (“A State can of course assign certain consequences to a violation of its criminal law. But the State cannot single out one identifiable class of citizens for punishment that does not apply to everyone else, with moral disapproval as the only asserted state interest for the law.”).

²⁶ Lydia Saad, *Americans' Acceptance of Gay Relations Crosses 50% Threshold*, GALLUP (May 25, 2010), <http://www.gallup.com/poll/135764/americans-acceptance-gay-relations-crosses-threshold.aspx>.

²⁷ RESTATEMENT (SECOND) OF TORTS §§ 570–74 (1977).

²⁸ *See, e.g.*, *Buck v. Savage*, 323 S.W.2d 363 (Tex. App. 1959).

²⁹ 323 S.W.2d 363 (Tex. App. 1959).

³⁰ *Id.* at 376–77.

³¹ *Id.* at 367.

slanderous per se because they did impute to [Savage] the commission of the crime of sodomy which was then a penal offense in Texas.”³²

Of course, in 2003, the U.S. Supreme Court dramatically altered the legal landscape of this “criminality” approach to slander per se with its decision in *Lawrence v. Texas*.³³ In *Lawrence*, the Court struck down a Texas statute criminalizing homosexual activity and thereby overruled *Bowers v. Hardwick*,³⁴ a 1986 case in which the court had upheld the constitutionality of laws criminalizing sodomy.³⁵ Justice Kennedy, writing for the *Lawrence* majority, explained that the Georgia anti-sodomy statute violated the right to privacy under the Due Process clause of the Fourteenth Amendment, declaring a fundamental right for consenting adults to engage in private sexual activity.³⁶ Justice Kennedy championed the “liberty” interest in the Due Process clause, writing that the Court

began its substantive discussion in *Bowers* as follows: “The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still

³² *Id.* at 369. Other courts have applied defamation per se. *See, e.g.*, *Plumley v. Landmark Chevrolet, Inc.*, 122 F.3d 308 (5th Cir. 1997); *Murphy v. Pizarrio*, No. 94 Civ. 0471(JFK), 1995 WL 565990 (S.D.N.Y. Sept. 22, 1995); *Wetherby v. Retail Credit Co.*, 201 A.2d 344 (Md. 1964); *Veazy v. Blair*, 72 S.E.2d 481 (Ga. Ct. App. 1952); *see also* *Thomas v. Bynum*, No. 04-02-00036-CV, 2003 WL 553277 (Tex. App. Feb. 28, 2003); *Nacinovich v. Tullet & Tokyo Forex, Inc.*, 685 N.Y.S.2d 17 (App. Div. 1999); *Leyendecker & Assocs., Inc. v. Wechter*, 683 S.W.2d 369 (Tex. 1984); *Head v. Newton*, 596 S.W.2d 209 (Tex. App. 1980); *Mazart v. State*, 441 N.Y.S.2d 600 (N.Y. Ct. Cl. 1981); *Nowark v. Maguire*, 255 N.Y.S.2d 318 (App. Div. 1964); *Christy v. Stauffer Publ'ns, Inc.*, 437 S.W.2d 814 (Tex. 1969).

³³ *Lawrence v. Texas*, 539 U.S. 558 (2003). In 1962, a New York trial court somewhat presaged *Lawrence* when it suggested that a plaintiff’s allegation that he was labeled a “homosexual” did not constitute slander per se. *Stein v. Trager*, 232 N.Y.S.2d 362, 364 (N.Y. Sup. Ct.). The court reasoned that because the New York criminal code failed to disclose any specific crime in the phrase “homosexual,” the use of the phrase did not constitute words charging a punishable crime and were therefore not slanderous per se. *Id.*

³⁴ 478 U.S. 186 (1986).

³⁵ *See id.* at 196.

³⁶ *See Lawrence*, 539 U.S. at 578 (citation omitted).

make such conduct illegal and have done so for a very long time.” That statement, we now conclude, discloses the Court’s own failure to appreciate the extent of the liberty at stake. To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse.³⁷

He further stated: “When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.”³⁸

Lawrence, which constitutional scholar Laurence Tribe has claimed “may well be remembered as the *Brown v. Board* of gay and lesbian America,”³⁹ thus may be the death knell of the *Buck* approach.⁴⁰ Indeed, as Justice O’Connor suggested in her *Lawrence* concurring opinion, the application of the Texas anti-sodomy law as slander per se also improperly singles out homosexuals as a class “for disfavored legal status” in violation of the Equal Protection Clause, which “neither knows nor tolerates classes among citizens.”⁴¹

Yet, some post-*Lawrence* courts have still applied pre-*Lawrence* precedent without relying on a criminal foundation. In February 2010, a Texas federal court denied a radio station’s motion to dismiss allegations that it falsely branded the plaintiff as “Henry the gay security guard.”⁴² The court held that under Texas law, the “imputation of homosexuality might as a matter of fact

³⁷ *Id.* at 566–67.

³⁸ *Id.*

³⁹ Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” that Dare Not Speak Its Name*, 117 HARV. L. REV. 1894, 1895 (2004).

⁴⁰ See *Buck v. Savage*, 323 S.W.2d 363, 376–77 (Tex. App. 1959).

⁴¹ *Lawrence*, 539 U.S. at 584 (O’Connor, J., concurring) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

⁴² See *Robinson v. Radio One, Inc.*, 695 F. Supp. 2d 425, 426 (N.D. Tex. 2010).

expose a person to public hatred, contempt, or ridicule.”⁴³ Although the court recognized that *Lawrence* limited prior Texas defamation law, which, relying on the illegality of sodomy at the time had held allegations of homosexuality were defamatory per se, it avoided resolving the conflict. Instead, the Texas court suggested that defamatory meaning was a question of fact and “a complex [issue], ripe for the clarification that comes from allowing litigation to proceed rather than the imposition of a single judge’s view.”⁴⁴

C. Defamation Per Se—Implying Unchastity or Exposing Plaintiff to Public Hatred, Contempt, or Ridicule

While the continuing viability of the sodomy line of cases is questionable post-*Lawrence*, other courts continue to find the false imputation of homosexuality to be defamatory per se solely on the grounds that it either implies unchastity, or has the tendency to expose a person to public hatred, contempt, or ridicule.

Typically, implied unchastity claims concerned suggestions of women having pre- or extra-marital sexual encounters with men.⁴⁵ However, courts have expanded the category to include allegations of female homosexual acts,⁴⁶ and even suggested the theory could apply to male homosexual acts.⁴⁷ For example, in *Schomer v. Smidt*,⁴⁸ a 1980 California court upheld jury instructions charging that “lesbianism implies unchastity and abnormal sexual behavior.”⁴⁹ In this case, the plaintiff, a flight attendant, alleged

⁴³ See *id.* at 428.

⁴⁴ *Id.* at 428 n.4.

⁴⁵ See *Bryson v. News Am. Publ’ns, Inc.*, 672 N.E.2d 1207 (Ill. 1996); *Tonsmeire v. Tonsmeire*, 199 So. 2d 645, 648 (Ala. 1967); *Webb v. Isensee*, 166 P. 544 (Or. 1917).

⁴⁶ See, e.g., *Gallo v. Alitalia-Linee Aeree Italiane-Societa per Azioni*, 585 F. Supp. 2d 520, 549 (S.D.N.Y. 2008); *Wetherby v. Retail Credit Co.*, 201 A.2d 344 (Md. 1964); see also *Rejent v. Liberation Publ’ns*, 611 N.Y.S.2d 866, 867 (App. Div. 1994); *Palmisano v. Modernismo Publ’ns, Ltd.*, 470 N.Y.S.2d 196 (App. Div. 1993); *Guccione v. Hustler Magazine, Inc.*, No. 80AP-375, 1981 WL 3516 (Ohio Ct. App. Oct. 8, 1981).

⁴⁷ *Gallo*, 585 F. Supp. 2d 549 (“[I]mputation of homosexuality can—at least when directed to a man married to a woman—be deemed every bit as offensive as imputing unchastity to a woman.”).

⁴⁸ 170 Cal. Rptr. 662 (Ct. App. 1980), *disapproved on other grounds* by *Miller v. Nestande*, 237 Cal. Rptr. 359 (Ct. App. 1987).

⁴⁹ *Schomer*, 170 Cal. Rptr. at 664.

that a pilot had told others he saw her engaging in sexual relations with another woman.⁵⁰ The court, while noting that sexual conduct between consenting adults was legal in California, nonetheless stated that “despite the sexual revolution and the freedom of action and expression now extant, there is a distinction which must be drawn between proper, moral and legal conduct,” such that “a homosexual or heterosexual act could be proper, legal, and questionably ‘moral.’”⁵¹ Thus, an imputation of “want of chastity” the court found, could cause others to think less of the plaintiff and subject the plaintiff to serious reputational harm.⁵² As a result, the court concluded that the statement was slanderous per se.⁵³ However, noting the changing perceptions toward chastity in contemporary society, a commentator in a leading defamation treatise added that: “Many adult American women might well consider it more harmful to be called ‘unchased’ than ‘unchaste,’ the common law to the contrary notwithstanding.”⁵⁴

Meanwhile, other courts hold that a false imputation of homosexuality as defamatory per se tends to expose a person to public hatred, contempt, or ridicule.⁵⁵ Indeed, many New York

⁵⁰ *Id.* at 663.

⁵¹ *Id.* at 666.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ SACK, *supra* note 6, § 2.4.4.

⁵⁵ *Manale v. City of New Orleans, Dep't of Police*, 673 F.2d 122 (5th Cir. 1982); *Thomas v. BET Sound-Stage Restaurant/Brettco, Inc.*, 61 F. Supp. 2d 448, 457 (D. Md. 1999) (holding that all elements of defamation under Maryland law met when falsely calling woman a lesbian); *Switzer v. Rivera*, 174 F. Supp. 2d 1097, 1110 (D. Nev. 2001) (holding that the statements at issue were defamatory per se to the extent that they were made in the workplace, but granting summary judgment to defendants for plaintiff's failure to prove defamation occurred); *see also Klepetko v. Reisman*, 839 N.Y.S.2d 101, 102–03 (App. Div. 2d Dep't 2007); *Niconovich v. Tullet & Tokyo Forex*, 685 N.Y.S.2d 17 (App. Div. 1st Dep't 1999); *Bohdan v. Alltool Mfg., Co.*, 411 N.W.2d 902 (Minn. Ct. App. 1987) (holding that employees of defendant company defamed plaintiff by falsely stating or implying he was a homosexual); *Q-Tone Broad., Co. v. Musicradio of Md.*, No. 93C-09-021, 1994 Del. Super. LEXIS 453, at *23 (Del. Super. Ct. Aug. 22, 1994) (holding that while the imputation of homosexuality alone is insufficient to support an action for slander per se, comments which suggested that the plaintiff was a homosexual who propositioned his male clients maligned the plaintiff's professional conduct and were therefore sufficient to support the plaintiff's prima facie case of slander per se).

courts have traditionally followed this theory.⁵⁶ For example, a New York appellate court ruled in 1984 that statements by a singing group about a husband and wife were libelous on their face. In *Matherson v. Marchello*,⁵⁷ a singing group, in a broadcast interview, suggested that both the husband and wife engaged in same-sex relationships outside of their marriage. As to a comment by the singing group about the husband's "boyfriend," the court rejected the defendant's argument that no social stigma should attach.⁵⁸ "It cannot be said that social opprobrium of homosexuality does not remain with us today," the court wrote.⁵⁹ "Rightly or wrongly, many individuals still view homosexuality as immoral In short, despite the fact that an increasing number of homosexuals are publicly expressing satisfaction and even pride in their status, the potential and probable harm of a false charge of homosexuality, in terms of social and economic impact, cannot be ignored."⁶⁰

More recently, in the 2008 case of *Gallo v. Alitalia-Linee Aeree Italiane-Societa per Azioni*,⁶¹ a New York federal court found slander per se where the defendant told the plaintiff's wife that the plaintiff was a homosexual and had had an affair with another male employee.⁶² The court reasoned that, under New York law, slander per se applied "because certain people view homosexuality as particularly reprehensible and immoral

⁵⁶ While New York's highest court has never weighed in on the issue, numerous trial and intermediate appellate courts have found the imputation of homosexuality to be defamatory or slanderous per se under New York law. *See, e.g.,* *Moye v. Gary*, 595 F. Supp. 738, 740 (S.D.N.Y. 1984) ("Some New York courts have held that words constitute slander *per se* if they impute homosexual behavior."); *Tourge v. City of Albany*, 727 N.Y.S.2d 753 (N.Y. App. Div. 2001); *Privitera v. Town of Phelps*, 435 N.Y.S.2d 402 (N.Y. App. Div. 1981), *abrogated on other grounds by* *Lieberman v. Gelstein*, 605 N.E.2d 344 (N.Y. 1992); *Nowark v. Maguire*, 255 N.Y.S.2d 318 (N.Y. App. Div. 1964). *But see* *Stein v. Trager*, 232 N.Y.S.2d 362 (N.Y. App. Div. 1962) (holding that an alleged statement by the defendant that the plaintiff was a homosexual was not slanderous per se, since it did not charge the plaintiff with a punishable crime).

⁵⁷ 473 N.Y.S.2d 998 (App. Div. 1984).

⁵⁸ *Id.* at 1005.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ 585 F. Supp. 2d 520 (S.D.N.Y. 2008).

⁶² *Id.* at 551.

conduct.”⁶³ While the court recognized that “many in our society no longer hold such beliefs, and that gay and lesbian persons have achieved many civil rights that were once denied them due to their status,” the decision was “based on the fact that the prejudice gays and lesbians experience is real and sufficiently widespread so that it would be premature to declare victory.”⁶⁴ Yet, in reaching its decision, the court noted that “if the degree of this widespread prejudice disappears, this Court welcomes the red flag that will attach to this decision.”⁶⁵

D. Capable of Defamatory Meaning, Requiring Proof of Damages

The vast majority of recent decisions have found that the imputation of homosexuality is not per se defamatory, yet that it does meet the basic defamatory threshold—a tendency to lower the plaintiff in the eyes of his or her community—thereby requiring the plaintiff to prove that the false statement caused damage.⁶⁶ The degree to which a plaintiff must prove damage varies, with some courts requiring him or her to show as little as loss of social standing or reputation, and others requiring proof of economic damages.⁶⁷ For example, one court allowed a plaintiff to cite as

⁶³ *Id.* at 549.

⁶⁴ *Id.* at 549–50.

⁶⁵ *Id.* at 550.

⁶⁶ *See, e.g.,* Greenly v. Sara Lee Corp., No. CIV. S-06-1775(WBS)(EFB), 2008 WL 1925230, at *8 n.15 (E.D. Cal. Apr. 30, 2008); Doe I v. Individuals, 561 F. Supp. 2d 249 (D. Conn. 2008); Smith v. Mission Assocs. Ltd. P’ship, 225 F. Supp. 2d 1293 (D. Kan. 2002); Regehr v. Sonopress, Inc., No. 2:99CV690K, 2000 WL 33710902, at *4 (D. Utah Apr. 14, 2000); Thomas v. Bet Sound-Stage Restaurant/BrettCo, Inc., 61 F. Supp. 2d 448 (D. Md. 1999); *see also* Gray v. Press Commc’n, LLC, 775 A.2d 678 (N.J. App. Div. 2001); Stokes v. Meimaris, 675 N.E.2d 1289 (Ohio Ct. App. 1996); Donovan v. Fiumara, 442 S.E.2d 524 (N.C. Ct. App. 1994); Hayes v. Smith, 832 P.2d 1022, 1023–25 (Colo. App. 1991); Bohdan v. Alltool Mfg. Co., 411 N.W.2d 902 (Minn. App. 1987); Moricoli v. Schwartz, 361 N.E.2d 74 (Ill. App. Ct. 1977); Anson v. Paxson Commc’n Corp., 736 So. 2d 1209 (Fla. 4th Dist. Ct. App. 1999); Boehm v. Am. Bankers Ins. Grp., Inc., 557 So. 2d 91, 94 n.1 (Fla. 3d Dist. Ct. App. 1990); Nazeri v. Missouri Valley College, 860 S.W.2d 303 (Mo. 1993) (en banc); Miskovsky v. Tulsa Tribune Co., 678 P.2d 242 (Okla. 1983); Key v. Ohio Dep’t of Rehab. & Corr., 598 N.E.2d 207 (Ohio Ct. Cl. 1990); Trice v. Burress, 137 P.3d 1253, 1257 n.7 (Okla. Civ. App. 2006); Morrissette v. Beatte, 17 A.2d 464 (R.I. 1941).

⁶⁷ Compare with *Hayes*, 832 P.2d at 1024–25 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (suggesting that injury is not limited to monetary loss, but can be

damage the fact that a same-sex co-worker propositioned him in response to false statements about his sexuality.⁶⁸ In another case, a plaintiff met her burden of proving damages by testifying that she experienced embarrassment and humiliation when her ex-husband falsely told her colleagues that she was having a lesbian relationship.⁶⁹

A much-cited 1991 Colorado appellate case declined to hold that statements regarding homosexuality were within the *per se* categories.⁷⁰ In *Hayes v. Smith*,⁷¹ two individuals told a teacher's supervisor that she was homosexual.⁷² In concluding that the statement should not be classified as slander *per se*, the court noted several important factors, including the fact that proof of economic and reputational damage was less daunting than in earlier times due to the availability of expert testimony from economists, psychologists, and other experts.

The court also distinguished between statements about homosexuality and statements about other standard *per se* activities, noting that:

if a person is falsely accused of belonging to a category of persons considered deserving of social [condemnation], i.e., thief, murderer, prostitute, etc., it is generally the court's determination as to whether such accusation is considered slander *per se* so that damages are presumed. A court should not classify homosexuals with those miscreants who have engaged in actions that deserve the reprobation or scorn which is implicitly a part of the slander/libel *per se* classifications.⁷³

shown by emotional and reputational damage as well)) *with* Glazer v. Lamkin, 506 N.W.2d 570, 572–73 (Mich. Ct. App. 1996).

⁶⁸ Smith v. Mission Assocs. Ltd. P'ship, 225 F. Supp. 2d 1293, 1304 (D. Kan. 2002).

⁶⁹ Stokes v. Meimaris, 675 N.E.2d 1289, 1295 (Ohio Ct. App. 1996).

⁷⁰ Hayes v. Smith, 832 P.2d 1022, 1024 (Colo. App. 1991).

⁷¹ 832 P.2d 1022 (Colo. App. 1991).

⁷² *Id.* at 1023.

⁷³ *Id.* at 1025 (citation omitted).

The court further noted that social attitudes toward gays were mixed and that no evidence in the case suggested “homosexuals are held by society in such poor esteem.”⁷⁴

Still other courts considering imputations of homosexuality require a heightened showing of damages, such that a plaintiff must prove “special damages,” i.e., proof of economic harm separate from emotional distress.⁷⁵ In 1994, the North Carolina Court of Appeals, in *Donovan v. Fiumara*,⁷⁶ held that referring to two women as “gay and bisexual” was not slander absent proof of special damages.⁷⁷ The court reasoned that being homosexual itself was not a crime, and therefore was not per se slanderous because the conduct proscribed by state law making “a crime against nature, with mankind or beast” a felony was not necessarily implicated by the terms “gay” or “lesbian.”⁷⁸ Indeed, the court added, homosexuality or bisexuality does not necessarily connote sexual activity at all, but rather an “inclination” or “preference.”⁷⁹

II. CHANGING PERCEPTIONS IN THE FEDERAL COURTS

After the Supreme Court’s groundbreaking decision in *Lawrence*, and in light of the changing attitudes in society towards homosexuality, a growing number of federal courts have adopted the rationale that the false imputation of homosexuality can be defamatory is no longer sustainable.⁸⁰ To a certain extent, the

⁷⁴ *Id. But see Romer v. Evans*, 517 U.S. 620, 623–24 (1996) (striking down Amendment 2 of the Colorado State Constitution, which “prohibit[ed] all legislative, executive or judicial action at any level of state or local government designed to protect . . . homosexual persons” as violative of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution).

⁷⁵ *See, e.g., Miskovsky v. Tulsa Tribune Co.*, 678 P.2d 242 (Okla. 1983); *Trice v. Burress*, 137 P.3d 1253, 1257 n.7 (Okla. Civ. App. 2006); *Wilson v. Harvey*, 842 N.E.2d 83 (Ohio Ct. App. 2005); *Donovan v. Fiumara*, 442 S.E.2d 572 (N.C. Ct. App. 1994); *Hayes* 832 P.2d at 1022; *Moricoli v. Schwartz*, 361 N.E.2d 74, 76 (Ill. App. Ct. 1977).

⁷⁶ 442 S.E.2d 572 (N.C. Ct. App. 1994).

⁷⁷ *Id.* at 576.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Albright v. Morton*, 321 F. Supp. 2d 130 (D. Mass. 2004), *aff’d sub nom. Amrak Prods., Inc. v. Morton*, 410 F.3d 69 (1st Cir. 2005); *see also* *Murphy v. Millennium Radio Grp., LLC*, Civil Action No. 08-1743(JAP), 2010 WL 1372408, at *7 (D.N.J. Mar. 31, 2010); *Stern v. Cosby*, 645 F. Supp. 2d 258, 273–76 (S.D.N.Y. 2009).

Lawrence decision was presaged by some defamation courts. In a pre-*Lawrence* decision out of the Southern District of New York, in a case without an allegation of homosexuality, the court discussed the common law per se categories and suggested, *sua sponte*, that under New York law, the defamatory implication of homosexuality “in twenty-first century Manhattan amounts to little more than an historical oddity.”⁸¹ Indeed, a few years later, the same court noted in dicta that the “welcome shifts in social perceptions of homosexuality” call into question the entire line of New York precedent holding the imputation of homosexuality is per se defamatory.⁸²

Taking a more direct approach, in 2004, a Massachusetts federal district court, applying Massachusetts law, questioned whether a false statement that an individual is gay is capable of a defamatory meaning, although the discussion is arguably dicta. In *Albright v. Morton*,⁸³ the plaintiff complained that his miscaptioned photograph in a book about the singer Madonna created the erroneous impression that he was gay. Although it ruled that the photograph and accompanying text did not actually suggest that the plaintiff was gay—and thus was not defamatory—the court nevertheless chose to address the question of whether an actual false statement that an individual is gay could be defamatory, at least using the per se approach.

“Looking at any ‘considerable and respectable class of the community’ in this day and age,” the court wrote, “I cannot conclude that identifying someone as a homosexual discredits him, that the statement fits within the category of defamation per se.”⁸⁴ The *Albright* court reasoned that per se allegations of homosexuality, like the sodomy statutes overturned in *Lawrence*, “demean[] the lives of homosexual persons” and so too, the court

⁸¹ *Dellefave v. Access Temporaries, Inc.*, No. 99 CIV. 6098(RWS), 2001 WL 25745 at *4, n.1 (S.D.N.Y. Jan 10, 2001).

⁸² *Lewittes v. Cohen*, No. 03 Civ. 189(CSH), 2004 WL 1171261, at *3 n.5 (S.D.N.Y. May 26, 2004) (disposing case on statute of limitations issue).

⁸³ 321 F. Supp. 2d 130 (D. Mass. 2004).

⁸⁴ *Id.* at 136.

reasoned, did application of the *per se* rule to allegations of homosexuality.⁸⁵

The court acknowledged that bias against gay individuals persists, sometimes driven by religious or ethical convictions, but wrote that “[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”⁸⁶ The court noted that if it “were to agree that calling someone a homosexual is defamatory *per se*—it would, in effect, validate that sentiment and legitimize relegating homosexuals to second-class status.”⁸⁷ The court’s opinion also referred to the racial misidentification cases and drew an analogy between those cases and *Albright*.⁸⁸ In 2005, the First Circuit affirmed the opinion in *Albright* on the grounds that the photograph failed to impute homosexuality, and declined further opinion as to whether such imputation constitutes defamation in Massachusetts.⁸⁹

Following the logic of *Albright*, in a 2009 case, *Stern v. Cosby*,⁹⁰ the United States District Court for the Southern District of New York rejected plaintiff Howard K. Stern’s claim, and a long line of New York precedent, that being called gay was defamatory *per se* under New York law.⁹¹ Stern, a former companion of the late celebrity-socialite Anna Nicole Smith, claimed that he was defamed by passages in a book written by television host Rita Cosby. The book suggested that Stern had oral sex with a man at a party, and also that he and others watched pornographic videos of himself having sex with other men.⁹² Stern argued that the statements were defamatory *per se* under New York law because they exposed him to public hatred and ridicule.⁹³

⁸⁵ *Id.* at 137 (citing *Lawrence v. Texas*, 539 U.S. 558, 575 (2003)); *see also* *Greenly v. Sara Lee Corp.*, No. CIV. S-06-1775(WBS)(EFB), 2008 WL 1925230, at *8 (E.D. Cal. Apr. 30, 2008) (holding that characterizing the imputation of homosexuality as slander *per se* demeans the lives of homosexual persons).

⁸⁶ *Albright*, 321 F. Supp. 2d at 138 (quoting *Palmore v. Sidoti*, 446 U.S. 429, 433 (1984)).

⁸⁷ *Id.*

⁸⁸ *Id.* at 138–39.

⁸⁹ *Amrak Prods., Inc. v. Morton*, 410 F.3d 69, 73 (1st Cir. 2005).

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

⁹¹ *Id.* at 273, 276.

⁹² *Id.* at 267, 281 (alleging other defamatory statements unrelated to Stern’s sexuality).

⁹³ *Id.* at 273.

Rejecting Stern's arguments, Judge Denny Chin noted that "the past few decades have seen a veritable sea change in social attitudes about homosexuality."⁹⁴ The court echoed the growing sentiment that the Supreme Court's decision in *Lawrence* had "foreclosed such reliance" on older, per se precedent.⁹⁵ The court added that "in 2009, the 'current of contemporary public opinion' does not support the notion that New Yorkers view gays and lesbians as shameful or odious."⁹⁶ As evidence, the court pointed to the movement in the state to legalize gay marriage and to a 2009 New York public opinion poll in which the majority overwhelmingly supported some form of government recognition of same-sex relationships.⁹⁷ Moreover, the court relied on the New York Court of Appeals' recent ruling holding that the right of gay marriage was not implicitly found in the state constitution, but that the legislature was not foreclosed to establish it.⁹⁸ The *Stern* court pointed to the plurality opinion of New York's highest court finding that social attitudes towards gay and lesbian New Yorkers had changed dramatically over the years.⁹⁹ Finally, the *Stern* court reasoned that because the New York Court of Appeals had never ruled on the issue, it was not bound by the older line of cases that conclusively held that imputation of homosexuality was defamation per se; yet the court declined to either discuss the issue in depth or contemplate the "evolving social attitudes regarding homosexuality."¹⁰⁰ Judge Chin concluded that "[w]hile I certainly agree that gays and lesbians continue to face prejudice, I respectfully disagree that the existence of this continued prejudice leads to the conclusion that there is a widespread view of gays and lesbians as contemptible and disgraceful. Moreover, the fact of such prejudice on the part of some does not warrant a judicial

⁹⁴ *Id.*

⁹⁵ *Id.* at 274.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* (citing *Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y. 2006) ("[T]he idea that same-sex marriage is even possible is a relatively new one.")).

⁹⁹ *Id.* at 273–74.

¹⁰⁰ *Id.* at 275.

holding that gays and lesbians, merely because of their sexual orientation, belong in the same class as criminals.”¹⁰¹

Recently, in the 2010 case of *Murphy v. Millennium Radio Group LLC*,¹⁰² a New Jersey federal court also found that “the assertion that someone is homosexual is not defamatory.”¹⁰³ Murphy was hired to take photographs of two male radio shock-jocks for the cover of a magazine that depicted the men posing nude behind their radio station’s logo.¹⁰⁴ The station encouraged listeners to submit digitally manipulated versions of the photo, and Murphy in turn accused the station of encouraging copyright infringement. In response, the radio hosts made on-air statements about Murphy’s business practices, as well as allegations that they “inferred [he] was a homosexual.”¹⁰⁵

While the court found the statements were rhetorical hyperbole and did not convey a defamatory meaning, the court also held that to the extent the statements implied that Murphy was homosexual, they were not reasonably susceptible to defamatory meaning.¹⁰⁶ In support, the court cited a 2006 New Jersey Supreme Court case finding an equal protection violation by the state’s denial of rights and benefits to committed same-sex couples that were given to their heterosexual counterparts.¹⁰⁷ Following that decision’s reasoning, the *Murphy* court embraced the notion that “[t]imes and attitudes have changed, and there has been a developing understanding that discrimination against gays and lesbians is no longer acceptable in this State,” and noted that New Jersey had recently legally recognized same-sex domestic partnerships.¹⁰⁸

¹⁰¹ *Id.* While holding that the statements were not defamatory per se, the court nonetheless held that they were susceptible of defamatory meaning—but not because the statement alleged that Stern was gay. Rather, the court reasoned that a “reasonable jury could find that engaging in oral sex at a party is shameful or contemptible,” regardless of the sex of the other individual, and that making a sex tape with *any* individual “would expose Stern to contempt among most people—even if, arguably, not among the social circles in which he . . . traveled.” *Id.*

¹⁰² Civil Action No. 08-1743(JAP), 2010 WL 1372408 (D.N.J. Mar. 31, 2010).

¹⁰³ *Id.* at *7.

¹⁰⁴ *Id.* at *1.

¹⁰⁵ *Id.* at *2.

¹⁰⁶ *Id.* at *7.

¹⁰⁷ *Id.* (citing *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006)).

¹⁰⁸ *Id.* (quoting *Harris*, 908 A.2d at 209).

Thus, given the evolution of the societal landscape, the *Murphy* court found that it “appears unlikely that the New Jersey Supreme Court would legitimize discrimination against gays and lesbians by concluding that referring to someone as homosexual ‘tends so to harm the reputation of that person as to lower him in the estimation of the community as to deter third persons from associating or dealing with him.’”¹⁰⁹ Consequently, the court denied Murphy’s defamation claim as a matter of law, holding that statements implying he was homosexual were not defamatory at all.¹¹⁰

III. NORMATIVITY AND DEFAMATORY MEANING

The future viability of defamation suits based on imputations of homosexuality is still uncertain. Although there appear to be fewer recent decisions willing to place an allegation of homosexuality within the “criminal” or “unchastity” categories of per se defamation, plaintiffs are not barred from trying to establish claims with a showing of special damages. More courts seem to be taking judicial notice of changing social attitudes toward alternative sexualities, although only a handful have entirely repudiated the notion that calling someone gay defames that individual.¹¹¹

Social attitudes are of course changing. A number of polls have documented the increasing public acceptance of gay lifestyles and gay rights. For example, a 2007 Gallup poll found “public tolerance for gay rights at the high-water mark of attitudes recorded over the past three decades.”¹¹² Although the poll still found considerable opposition to gay marriage, on the issue of whether homosexuality was an acceptable lifestyle, 57% of respondents said they believed it was, which Gallup described as

¹⁰⁹ *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 559 (1977) (“A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.”)).

¹¹⁰ *Id.* at *7–8.

¹¹¹ *See* Part II.

¹¹² Lydia Saad, *Tolerance for Gay Rights at High-Water Mark*, GALLUP (May 29, 2007), <http://www.gallup.com/poll/27694/tolerance-gay-rights-highwater-mark.aspx>.

“the highest on record for this measure.”¹¹³ A 2006 poll by the Pew Research Center for the People & the Press similarly found declines in the number of Americans opposing gay marriage, gay adoption, and open military service by gays.¹¹⁴ A 2009 Gallup poll also found a shift, even among conservatives, toward favoring openly gay service members: “The findings show that majorities of weekly churchgoers (60%), conservatives (58%), and Republicans (58%),” favored the end of the “Don’t Ask, Don’t Tell” law,¹¹⁵ which was repealed by Congress and signed by President Obama in December 2010.¹¹⁶ All of this empirical evidence strongly suggests that public attitudes are evolving.

Given the data and the recent caselaw, one might surmise that defamation doctrine is in the gradual process of responding appropriately to social changes. Defamation is, after all, the “social tort,” and the proper scope of defamatory meaning must move with changes in social attitudes. But is the doctrinal change, slow though it may be, truly sufficient?

This Article proposes a different and more comprehensive solution. Regardless of the shifting winds of public sentiment, this Article suggests that courts should reject the conclusion that imputations of homosexuality are defamatory. They should do so on the same grounds as the racial misidentification cases: public policy should not permit the law to symbolically endorse discriminatory attitudes or conduct, even if such attitudes are common.

Our proposal suggests that common-law defamation doctrine should be fundamentally rethought to reflect the more egalitarian age of today and the courts’ more enlightened views on homosexuality in other legal contexts. Indeed, this proposal would

¹¹³ *Id.*

¹¹⁴ *Less Opposition to Gay Marriage, Adoption and Military Service*, PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS (May 22, 2006), <http://people-press.org/report/273/less-opposition-to-gay-marriage-adoption-and-military-service>.

¹¹⁵ Lymari Morales, *Conservatives Shift in Favor of Openly Gay Service Members*, GALLUP (June 5, 2009), <http://www.gallup.com/poll/120764/conservatives-shift-favor-openly-gay-service-members.aspx>.

¹¹⁶ Don’t Ask, Don’t Tell Repeal Act of 2010, Pub. L. No. 111-321 (2010) (repealing 10 U.S.C. § 654 (2006)).

affect cases involving imputations of homosexuality, but it would also have implications for other defamation cases where unjustly discriminatory views are at issue. This Article proposes that courts draw a sharp distinction between defamatory statements that refer to some *immutable characteristic* or involuntary status of an individual versus those statements that refer to some voluntary misconduct or malfeasance. Courts should hold that statements or inferences about immutable characteristic references are non-defamatory as a matter of law, regardless of a judge's or a jury's sense of how the Restatement's "substantial and respectable" group of so-called right-thinking citizens would view a statement. Thus, a statement that reflected discriminatory attitudes toward someone's racial or ethnic background, sexual orientation, mental¹¹⁷ or physical illness or disability, or other immutable characteristic should not be treated as carrying defamatory meaning, even if, in fact, a significant segment of society would endorse such discriminatory views.

The justification for this restructuring of doctrine starts with the recognition that the Anglo-American common law of defamation carries with it vestiges of a very different, less egalitarian society than we find ourselves in today.¹¹⁸ Small

¹¹⁷ For an interesting analysis of defamation and mental illness, see Karen M. Markin, *Still Crazy After All These Years: The Enduring Defamatory Power of Mental Disorder*, 29 LAW & PSYCHOL. REV. 155 (2005).

¹¹⁸ See, e.g., LAWRENCE McNAMARA, REPUTATION AND DEFAMATION 73–74 (2007). McNamara notes that in ecclesiastical courts in England, defamation was intertwined with social control:

The control dimension of the law is reflected first in the benchmark standard of "good and serious men." It was by definition acceptable under the law to speak ill of a person who was not of good fame "among good and serious men." The meaning of the phrase "good and serious men" is never discussed in the literature or cases, but there is never any doubt expressed about what it might mean. Those who were thought of as "of no account" or "not of good fame" included the "underclass [of the poor and lawbreakers] who would rendezvous in taverns and other gathering places." Exclusion served to maintain the social order. Hanawalt notes that the processes of marginalization in medieval England "were as important in establishing boundaries as were those that elevated and enclosed the space around the elite." Social control and exclusion are based on the equating of social standing and moral goodness; that is, power defines virtue.

wonder, then, that the mechanisms for determining harm to reputation are deficient—they evolved without a nuanced grasp of social discrimination and its harms. Defamation doctrine’s origin precedes our current, more sophisticated understanding of how we should make social evaluations of persons. The fact that the common law has perpetuated these atavistic understandings is not sound reason to follow those rules, *stare decisis* notwithstanding. As Justice Holmes put it,

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.¹¹⁹

The common law of defamation has assumed social inequality built into its very DNA—the assumption that certain people, by their very essence, are either superior or inferior. People’s inherent characteristics were, in the not-so-distant past, a marker for their place in the social hierarchy—the prejudices of the “culturally superior” class are inevitably reflected in legal doctrine touching upon personal reputation.¹²⁰ Only through a fundamental restructuring of how we think about defamatory meaning can we expunge this atavistic worldview from our legal doctrine. The groundwork of such a restructuring was laid in *Hayes v. Smith*,¹²¹ discussed earlier,¹²² which recognized the unfairness of placing imputations of homosexuality into the same (*per se*) category as “a person falsely accused of belonging to a category of persons considered deserving of social [condemnation], i.e., thief, murderer, prostitute, etc. . . . A Court should not classify homosexuals with those miscreants who have engaged in actions

Id. (citations omitted).

¹¹⁹ Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

¹²⁰ See, e.g., *Wolfe v. Georgia R. & E. Co.*, 58 S.E. 899, 901 (Ga. App. 1907) (“It is a matter of common knowledge, that, viewed from a social standpoint, the negro race is in mind and moral inferior to the Caucasian. The record of each from the dawn of historic time denies equality.”).

¹²¹ *Hayes v. Smith*, 832 P.2d 1022 (Colo. App. 1991).

¹²² See *supra* Part I.D.

that deserve . . . reprobation or scorn”¹²³ *Hayes*, of course, only addressed whether imputations of homosexuality should be categorized as defamatory per se—our suggestion is that imputations involving immutable characteristics or involuntary status should not be recognized as carrying *any* defamatory meaning whatsoever.¹²⁴

Commentators have long recognized this fundamental flaw in the law’s evaluation of defamatory meaning, although most appear to have simply accepted the status quo. Consider, for example, Dean Prosser’s statement that “[a] defamatory communication usually has been defined as one which tends to hold the plaintiff up to hatred, contempt or ridicule, or to cause him to be shunned or avoided. This definition is certainly too narrow, since an imputation of insanity, or poverty, or an assertion that a woman has been raped, which would be likely to arouse only pity or sympathy in the minds of all decent people, have been held to be defamatory.”¹²⁵ Our contention is that, regardless of how decent people would react, these are exactly the kinds of statements that the law, as a matter of policy, should not recognize as carrying any defamatory meaning. They are statements that refer not to some voluntary wrong-doing or illegal course of conduct, but to an individual’s unavoidable—and sometimes unfortunate—status. The problem is not simply that, as Prosser put it, the standard definition of a defamatory communication is “too narrow.”¹²⁶ The problem is that the standard definition recognizes as defamatory statements that stigmatize innocent classes of persons and thus perpetuate and approve that stigma.

Within certain narrow domains, such as racial misidentification, courts have recognized the problem as well. Consider *Polygram Records, Inc. v. Superior Court*,¹²⁷ a 1985 California appellate decision. In *Polygram*, comedian Robin Williams and several media companies were sued for defamation by a wine maker after Williams recorded a joke which, the maker

¹²³ *Hayes*, 832 P.2d at 1025.

¹²⁴ See *supra* Part I.D.

¹²⁵ WILLIAM L. PROSSER, *THE LAW OF TORTS* 739 (4th ed. 1971) (citations omitted).

¹²⁶ *Id.*

¹²⁷ 216 Cal. Rptr. 252 (Cal. Ct. App. 1985).

contended, associated its wine with African-Americans.¹²⁸ Williams' routine focused on a "Black" wine, "Rege" (or "Reggie") that unlike red or white wine, "goes with fish, meat, any damn thing it wants to."¹²⁹ Apparently unbeknownst to Williams, there was an actual "Rege" wine company, which filed suit.¹³⁰ As part of its defamation claim, Rege argued that the comedy routine associated its wine with African-Americans, "allegedly 'a socio-economic group of persons commonly considered to be the antithesis of wine connoisseurs,' who 'harbor obviously unsophisticated tastes in wines.'"¹³¹

The California court rejected this argument as "utterly untenable."¹³² Even assuming the joke conveyed that sentiment, the court wrote, "he could not recover damages based upon a theory that his wine had been disparaged by association with a particular racial or ethnic group, or a segment thereof. Courts will not condone theories of recovery which promote or effectuate discriminatory conduct."¹³³ The California court cited *Palmore v. Sidoti*,¹³⁴ in which the U.S. Supreme Court overturned a Florida decision denying custody of a three-year-old to her mother because the mother had remarried an African-American man and the mixed-race marriage would cause social stigma to be visited upon the child.¹³⁵ The Court, noting that a denial of custody was clearly state action subject to the Equal Protection Clause, ruled that judges could not, under the Constitution, consider such alleged stigma in a custody case.¹³⁶ "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect," the Court wrote¹³⁷ in a sentence later quoted in the

¹²⁸ *Id.* at 254.

¹²⁹ *Id.*

¹³⁰ *Id.* at 253.

¹³¹ *Id.* at 261.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ 466 U.S. 429 (1984).

¹³⁵ *Id.* at 433.

¹³⁶ *Id.* at 433–34.

¹³⁷ *Id.* at 433.

Albright case, which itself found that defamation per se “demeans the lives of homosexual persons.”¹³⁸

Although *Polygram Records* does not explicitly anticipate the breadth of our proposal, the California court’s reasoning is certainly consistent with the direction in which we would like to see the law go. Whether or not a determination of defamatory meaning is state action implicating the Equal Protection Clause,¹³⁹ as the *Polygram* case seemed to suggest, defamation doctrine would benefit from a deeper consideration of the equality effects of its rules. The issue of defamatory meaning is in most jurisdictions based in the common law, which regularly consults public policy implications in shaping doctrine. The Restatement’s reference to anti-social groups, whose views courts should reject,¹⁴⁰ implicitly endorses this role of public policy in shaping the normative boundaries of defamatory meaning, although the law has yet to come to grips with the full implications of the problem.¹⁴¹

The argument that important social goals should at times outweigh legitimate reputational harm is consistent, of course, with numerous public policy-based defenses already recognized in libel doctrine. Various privileges, for example, allow defamation to take place in light of important reasons supporting the privilege. Absolute privileges against defamation liability granted to judges, legislators, and executive officials,¹⁴² for example, protect the important social interest of these officials carrying out their official duties without fear of ruinous defamation suits.¹⁴³ Various qualified privileges for speaking in the public interest—including a

¹³⁸ *Albright v. Morton*, 321 F. Supp. 2d 130, 137 (D. Mass. 2004) (quoting *Lawrence v. Texas*, 539 U.S. 558, 575 (2003)). Justice Scalia, however, appears to disagree. In his vigorous dissent to *Romer v. Evans*, 517 U.S. 620 (1996), a case in which the Supreme Court overturned a Colorado referendum denying equal protection to homosexuals, he cited pre-*Lawrence* precedent and argued that “[i]f it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely *disfavoring* homosexual conduct.” *Id.* at 641.

¹³⁹ U.S. CONST. amend. XIV, § 1.

¹⁴⁰ RESTATEMENT (SECOND) OF TORTS § 559 cmt. e (1977).

¹⁴¹ See Lidsky, *supra* note 14, at 9 (arguing that public policy choices obscured by defamation doctrine should be addressed explicitly by courts).

¹⁴² RESTATEMENT (SECOND) OF TORTS §§ 585, 590–91 (1977).

¹⁴³ SACK, *supra* note 6, § 2.8.2.

privilege granted to the press¹⁴⁴—similarly recognize the principle that compensating defamatory harms must sometimes give way to important policy considerations.

Our proposal is also consistent with the constitutional revolution in libel law begun by *New York Times Co. v. Sullivan*.¹⁴⁵ Prior to *Sullivan*, most courts had essentially ignored the harm to First Amendment interests that state-driven libel doctrine had created.¹⁴⁶ *Sullivan* and its progeny recognized that free speech interests sometimes must be vindicated even in the face of real reputational harms. The “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open”¹⁴⁷ simply trumps the reputational interests of certain classes of libel plaintiffs. In the same way, our proposal suggests that equality interests must at times trump even genuine defamatory harms when the statements giving rise to liability compel the law to give its approval to discriminatory and unjustly stigmatizing social views.

There are of course interests that counsel against this shift in doctrine. Particularly in more socially conservative areas of the country, individuals may in fact suffer reputational harm because of imputations of homosexuality or other immutable characteristics. Social relationships may be damaged; careers may be affected. Not only that, but, as Professor Lidsky points out, “it rewards the defamer by giving him license to defame again.”¹⁴⁸ There are no easy answers, yet there are powerful reasons to consider change in the legal status quo.

The imprimatur of the law is a powerful symbolic force that normalizes certain social understandings.¹⁴⁹ Basing legal decisions on discriminatory beliefs and behaviors, whether in libel law or child custody cases, validates those beliefs and behaviors. There

¹⁴⁴ RESTATEMENT (SECOND) OF TORTS § 594 (1977).

¹⁴⁵ *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

¹⁴⁶ See, e.g., Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1, 26–27 (2002).

¹⁴⁷ *N.Y. Times*, 376 U.S. at 270.

¹⁴⁸ Lidsky, *supra* note 14, at 23.

¹⁴⁹ See *id.* at 40 (arguing that “defamation’s symbolic functions often take precedence over its instrumental ones”).

must come a time when the law no longer recognizes atavistic and discriminatory social views as indispensable ingredients in legal doctrine.¹⁵⁰ That time, we believe, is now.

CONCLUSION

Imputation of homosexuality cases present an interesting challenge for courts as social understandings of gay individuals evolve. A status that was once regarded as criminal in nature has come to mean something quite different to many citizens in the early part of the twenty-first century. The process by which courts account for such changes in social attitudes is an important aspect of the study of defamation law. Although the law appears to be in a state of flux, this Article has suggested that courts should seriously consider whether to give legal effect to discriminatory views in a way that legitimizes and validates them.

Our proposal suggests that courts decline to recognize as defamatory statements that stigmatize a class of persons based on some immutable characteristic or involuntary status. As one court put it, courts should not “condone theories of recovery which promote or effectuate discriminatory conduct.”¹⁵¹ Although this proposal has definite costs, it has the decided advantage of removing the imprimatur of the law from regressive and stigmatizing social attitudes.

¹⁵⁰ See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (overturning *Plessy v. Ferguson*, 163 U.S. 537 (1896) which had upheld racial segregation as constitutional).

¹⁵¹ *Polygram Records, Inc. v. Superior Court*, 216 Cal. Rptr. 252, 261 (Cal. Ct. App. 1985).