Gay Labeling and Defamation Law: Have Attitudes Toward Homosexuality Changed Enough to Modify Reputational Torts?

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I. INTRODUCTION

In the summer of 2009, when Sacha Baron Cohen launched his film character, Bruno—“a flamboyantly gay Austrian fashionista”—the Gay & Lesbian Alliance Against Defamation (“GLAAD”) quickly pounced on the quirky comic’s antics, saying they “hit the gay community pretty hard and reinforce some damaging, hurtful stereotypes.” The movie was released in the midst of an ongoing national, often fiery, debate over whether gays and lesbians ought to have the same rights to marry as heterosexuals. As the Washington Times reported, “[t]he 2008 election was a success for nearly every segment of the Democratic coalition, with one stark exception: gay rights advocates.”

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2 Id.

3 See, e.g., David G. Savage, Gay Marriage Fight Triggers Privacy Battle, BOSTON GLOBE, Oct. 26, 2009, at A6. The article reported that “[t]he fierce fight over same-sex marriage is creating pressure to recognize a new free-speech right that could keep public records secret.” Specifically, gay-rights activists “sought to use public records to expose supporters of antigay measures,” prompting lawsuits to stop them. Id.

4 Valerie Richardson, Gay Rights Abandoned on Sidelines After Election, WASH. TIMES, Nov. 18, 2008, at B1. The article suggested that supporters of Barack Obama and other traditionally liberal causes “suddenly veered from the script when it came to advancing rights for gays.” Id.
“In three states—Arizona, California and Florida—voters approved amendments that defined marriage as between a man and a woman. Two of those states, California and Florida, went Democratic in the presidential vote.” 5 Voters in California overturned a decision by the state’s supreme court that had legalized same-sex marriage earlier in the year, 6 prompting gay activists to stage protest rallies throughout the state. 7

While the embers over same-sex unions continued to smolder, the animus toward homosexuality clearly was not limited to the marriage issue. In Fairfax, California, the student body at a local high school elected a gay male as the prom queen, sparking an organized protest by a Kansas-based church group that “routinely celebrates at soldiers’ funerals, saying that they are killed by God because America tolerates homosexuality.” 8 Although the Fairfax High School students showed their tolerance for gays and lesbians, schools are not always safe havens for supporters of gay rights. In April 2008, the United States Court of Appeals for the Seventh Circuit ruled that a Chicago high school student had a First Amendment right to wear a t-shirt proclaiming “Be Happy, Not Gay.” 9 The student was represented by the Alliance Defense Fund, a Christian litigation group, whose attorney Nate Kellum stated, “[p]ublic school officials cannot censor a message expressing one viewpoint on homosexual behavior and then at the same time allow messages that express another viewpoint.” 10

Anti-gay sentiment also bubbled up in San Antonio and El Paso, Texas as well as Salt Lake City, Utah where gay couples “were arrested, cited for trespassing or harassed by police for publicly kissing.” 11 Likewise, a gay couple in

5 Id. Gay marriage was not the only ballot initiative to affect gay rights. Richardson reported that “[i]n Arkansas, voters approved a ballot measure prohibiting unmarried couples—and thus gay couples—from adopting children. In Hamtramck, Mich., a liberal Detroit suburb that went overwhelmingly Democratic, voters overturned a city ordinance that gave protected civil rights status to gay and transgendered residents.” Id.
7 Kristina Davis, ‘Kiss-in’ Staged in Protest of Gay Marriage Ban, SAN DIEGO UNION-TRIB., Aug. 16, 2009, at B4 (noting the protest took place in front of the Manchester Grand Hyatt “because owner Doug Manchester donated $125,000 to support Proposition 8, the November state ballot initiative that outlawed same-sex marriage”).
8 Seema Mehta, Church Plans Protest Over Male Prom Queen, L.A. TIMES, June 19, 2009, at A15 (noting that counter-protestors planned to “use the church’s presence to raise donations for the school’s Gay-Straight Alliance”).
9 Nuxoll v. Indian Prairie Sch. Dist. No. 204, 523 F.3d 668, 676 (7th Cir. 2008).
11 ‘Kiss-ins’ Staged in Gay Marriage Fight, ST. PETERSBURG TIMES, Aug. 16, 2009, at 14A, available at LEXIS, News & Business Library (“In Utah, the July 9 trespassing incident occurred after a couple were observed by security guards on a downtown parklike plaza owned by the 13 million-member Church of Jesus Christ of Latter-day Saints.”).
New York City found themselves without a ride when a taxicab driver tossed the pair out of his vehicle. News reports indicated that the driver “was apparently appalled by their shows of affection.”

Meanwhile, organized religions have grappled with the recognition of the gay community for decades—sometimes even among their leadership ranks. V. Gene Robinson is the Episcopal Church’s first openly gay bishop. The Los Angeles Times reported in April 2009 that “[s]ome 700 conservative U.S. parishes said last year that they were leaving the Episcopal Church in part because of his consecration, and last summer, Robinson was barred from taking part in leadership meetings at the Lambeth Conference, a once-a-decade global gathering of Anglicans.” The schism that developed in the Anglican communion over objection to homosexuality prompted the Vatican to invite disillusioned Anglicans into its fold, including married clergy, in October 2009.

Even the death of the long-time, much-revered, former CBS anchorman, Walter Cronkite, gave occasion to remember that the heated debate over gay rights in the United States is not merely of recent vintage. Retrospectives heralding the veteran newsman observed that Cronkite had been a target of the nascent gay rights movement in the early 1970s. Gay activist Mark Segal was just nineteen years old when he maneuvered his way into Cronkite’s news studio and, in the middle of the live broadcast, “darted in front of the camera with a sign reading ‘Gays Protest CBS Prejudice.’” Cronkite told his viewers that “[t]he young man was identified as a member of something called Gay Raiders, an organization protesting alleged defamation of homosexuals on entertainment programs.”

Unquestionably, there have been some positive strides in the gay rights movement. Some states—Massachusetts, Connecticut, Vermont, and

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13 Id.
15 Id.
16 Henry Chu, Overture from Pope Has Takers, L.A. TIMES, Oct. 23, 2009, at A28 (noting that homosexuality is “one of the most divisive—perhaps the most divisive—issues in the Anglican communion”).
18 Id.
19 See Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003). The court noted that “[b]ecause civil marriage is central to the lives of individuals and the welfare of the community, our laws assiduously protect the individual’s right to marry against undue government incursion. Laws may not ‘interfere directly and substantially with the right to marry.’” Id. at 957.

Furthermore, many companies routinely offer employment benefits to same-sex domestic partners. In June 2009, President Barack Obama issued a presidential memorandum extending some benefits to same-sex partners of federal employees, but “the Defense of Marriage Act prohibits the federal govern-

Especially in light of the long and undisputed history of invidious discrimination that gay persons have suffered . . . we cannot discount the plaintiffs’ assertion that the legislature, in establishing a statutory scheme consigning same sex couples to civil unions, has relegated them to an inferior status, in essence, declaring them to be unworthy of the institution of marriage.

Id. at 417.

21 VT. STAT. ANN. tit. 15, § 8 (Supp. 2009) (substituting the words “two people” for “one man and one woman” in statutory definition of marriage).
22 Varnum v. Brien, 763 N.W.2d 862, 906–07 (Iowa 2009) (concluding that “the language in Iowa Code section 595.2 limiting civil marriage to a man and a woman must be stricken from the statute, and the remaining statutory language must be interpreted and applied in a manner allowing gay and lesbian people full access to the institution of civil marriage”).
23 See N.H. REV. STAT. ANN. §§ 457:1–457:1-a (Supp. 2009) (“Marriage is the legally recognized union of 2 people. Any person who otherwise meets the eligibility requirements of this chapter may marry any other eligible person regardless of gender.”).
24 Martinez v. County of Monroe, 850 N.Y.S.2d 740, 741–43 (N.Y. App. Div. 2008) (finding that plaintiff’s same-sex marriage did not fall into one of two exceptions to the state’s marriage-recognition rule). See also Robin Shulman, N.Y. to Recognize Other Jurisdictions’ Gay Marriages, WASH. POST, May 30, 2008, at A2 (“In response to a February state court ruling, the governor’s office has directed all state agencies to revise their regulations and policies to ensure respect for same-sex marriages from states and countries where they are legal.”).
25 Associated Press, Calif. to Recognize Some Gay Marriages, BOSTON GLOBE, Oct. 13, 2009, at A2 (reporting that “Governor Arnold Schwarzenegger signed a bill recognizing gay marriages sanctioned in other states during the nearly five months such unions were legal in California”).
28 Defense of Marriage Act, 1 U.S.C. § 7 (2006) (“[T]he word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’
ment from extending health and retirement benefits to same-sex couples, so the benefits are more likely to be marginal—like relocation assistance.”

In the entertainment media, openly gay characters fill the screens of many popular television shows and movies. According to The Hollywood Reporter, the number of gay characters on television reached an all-time high during the fall 2009 season.\textsuperscript{30} Despite this increase, the entertainment industry trade publication reported that, of the 132 series regulars on CBS television, none are gay.\textsuperscript{31} Moreover, “[w]hile broadcast continues to increase its LGBT representation, the number of gay characters on mainstream cable networks is down to 25 from last year’s 32.”

The United States remains sharply divided over acceptance of gays and lesbians in mainstream American life. If a significant portion of society still demonstrates intolerance or antipathy for a particular group, is it correct for our legal system to declare that associating someone with this sexual preference is not sufficient to cause reputational harm? The question is not a rhetorical one.

Against the backdrop of continued hostility toward gay and lesbian individuals in the United States, attorney Howard K. Stern—best known for his romantic relationship with the late model-actress-reality television star Anna Nicole Smith—included an accusation that he engaged in homosexual acts in his defamation lawsuit against Rita Cosby, the author of Blonde Ambition: The Untold Story Behind Anna Nicole Smith’s Death.\textsuperscript{33}

Stern brought the defamation suit immediately after the publication of the book in September 2007 against Cosby and her publisher in the United States District Court for the Southern District of New York.\textsuperscript{34} In the book, Cosby recounted a scene, apparently described to the reporter by “[o]ne of Anna’s closest friends,”\textsuperscript{35} in which the friend happened upon Stern and Smith’s then boy-

\textsuperscript{29} Posting of Ben Smith, Obama to Extend Some Benefits to Same-Sex Partners, to BEN SMITH; A RUNNING CONVERSATION ABOUT POLITICS, http://www.politico.com/blogs/bensmith/0609/Obama_to_extend_benefits_to_samesex_partners.html (June 16, 2009, 21:26 EST).

\textsuperscript{30} James Hibberd, Gay TV Characters at Record High, HOLLYWOOD REPTR., Sept. 30, 2009, http://www.hollywoodreporter.com/hr/content_display/television/news/c3ie41d1967dcb1d0 96a15393d30bd43488. Hibberd quotes GLAAD president Jarrett Barrios as saying, “It is a much deeper and fuller portrayal of this issue than what we’ve seen before.” Id.

\textsuperscript{31} Id.

\textsuperscript{32} Id.


\textsuperscript{34} Id.

\textsuperscript{35} RITA COSBY, BLONDE AMBITION: THE UNTOLD STORY BEHIND ANNA NICOLE SMITH’S DEATH 202 (2007).
friend, Larry Birkhead, and witnessed them engaged in a homosexual act. Specifically, the book recounted:

She says both men had their shirts off and Howard was down on his knees. Larry was sitting in a big oversized loveseat chair and both men had their pants down around their ankles. “Howard’s head was down into Larry’s crotch,” Jackie told me. “Their bodies were intermingled. It was obvious what was happening.” Anna suddenly walked up behind her and laughed out loud when she also saw what the two men were doing.

The book continued to describe the sex act and Smith’s nonchalance toward it. Moreover, Cosby also reported that Smith told her friend, “Howard . . . you know he’s gay, I told you.”

Stern denied that he is gay or had ever engaged in a homosexual act, and in his lawsuit against Cosby and her publisher, he argued that labeling him as such constituted defamation per se. Applying New York law, United States District Judge Denny Chin analyzed Stern’s position on a motion for summary judgment, saying, “[t]he question, then, is whether the New York Court of Appeals, in 2009, would hold that a statement imputing homosexuality connotes the same degree of ‘shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation or disgrace’” as one of four categories of statements deemed by the court to be defamatory per se.

Despite the recent affronts to the gay and lesbian community detailed above, Judge Chin found that “[t]he past few decades have seen a veritable sea change in social attitudes about homosexuality.” As evidence of this change in society’s view, Judge Chin pointed to a poll conducted by Quinnipiac University that showed New Yorkers favored the right for same-sex couples to marry by a margin of 51 to 41 percent, with 8 percent undecided. To that end, Judge Chin observed that “[t]he fact that a majority of New Yorkers supports some sort of government recognition of same-sex relationships belies the notion that these same New Yorkers regard gays and lesbians with ‘public contempt, ridi-

36 Id. at 202–03.
37 Id.
38 Id. at 203.
39 Id.
41 Id. at 273.
42 Id. Those categories of statements were defined as, “(1) those that accuse the plaintiff of a serious crime; (2) those that ‘tend to injure another in his or her trade, business or profession’; (3) those that accuse the plaintiff of having a ‘loathsome disease’; or (4) and those that impute ‘unchastity to a woman.’” Id.
43 Id. Judge Chin suggested that “to the extent that courts previously relied on the criminality of homosexual conduct in holding that a statement imputing homosexuality subjects a person to contempt and ridicule . . . Lawrence [v. Texas] has foreclosed such reliance.” Id. at 274 (citations and parenthetical matter omitted).
This article suggests that Judge Chin’s analysis could easily conclude New Yorkers are fairly evenly split on the question, may be flawed, or is at least premature—particularly in light of the heavy reliance on a poll that carries a significant percentage of undecided respondents, along with a two-point margin of error.\textsuperscript{46} Even the executive director of the Quinnipiac University Polling Institute, Maurice Carroll, labeled the new lead “the slimmest of majorities.”\textsuperscript{47} Moreover, a narrow lead in a poll favoring the right to marriage hardly can be construed as an indication that homosexuals are now viewed in a universally positive fashion. The fact that gay marriage remains such a hot-button issue can be viewed as evidence to the contrary.

More conclusively, Judge Chin’s reliance on how positively New Yorkers view gay marriage may have been misguided. In December 2009, “[t]he New York State Senate decisively rejected” a bill permitting gay marriage which, according to the \textit{New York Times}, “signaled that political momentum, at least right now, had shifted against same-sex marriage, even in heavily Democratic New York.”\textsuperscript{48} One of the key arguments in support of Judge Chin’s finding of a significant change in attitudes toward homosexuality has suffered a clear setback. It bears repeating, however, that the gay marriage issue, as shown above, is only one of many factors that subjects gays and lesbians to contempt, ridicule, and odium.

This article examines the question of whether falsely labeling someone as homosexual today should constitute defamation \textit{per se}. Part I addresses the accepted bases for finding a statement to be defamatory \textit{per se} and argues that such a determination is not limited to the traditional factors at common law.\textsuperscript{49} Even Judge Chin acknowledges this analysis in a subsequent opinion, on re-

\begin{itemize}
\item \textsuperscript{45}Id.
\item \textsuperscript{46}Press Release, Quinnipiac University Polling Institute, New York State Voters Support Same-Sex Marriage Quinnipiac University Poll Finds; Mayor Should Keep School Control, But Share It (June 23, 2009), http://www.quinnipiac.edu/x1318.xml?ReleaseID=1340.
\item \textsuperscript{47}Id.
\item \textsuperscript{48}Jeremy W. Peters, \textit{New York Senate Turns Back Bill on Gay Marriage}, \textit{N.Y. Times}, Dec. 3, 2009, at A1 (noting the Senate vote “followed more than a year of lobbying by gay rights organizations, who steered close to $1 million into New York legislative races to boost support for the measure”).
\item \textsuperscript{49}See Bruce W. Sanford, \textit{Libel & Privacy} §4.5, at 4-21 (2d ed. Supp. 2006). Sanford notes:
\begin{itemize}
\item At common law, slander \textit{per se} meant that the defendant orally accused the plaintiff of (1) a criminal offense punishable by a prison term or widely regarded as a crime of moral turpitude, (2) having a loathsome disease, (3) conduct incompatible with the proper operation of a business, trade, profession or office, or (4) sexual misconduct.
\end{itemize}
\item Id.
\end{itemize}
consideration, in Stern v. Cosby. Part II discusses how courts in New York and elsewhere have addressed the issue, examining their rationale for guidance as to whether the time is ripe for treating accusations of homosexuality differently in defamation law. Finally, Part III concludes by suggesting that, despite some progressive and positive changes in attitudes toward homosexuality—such as increased visibility in entertainment programming—a stigma still attaches to same-sex orientation in a large enough segment of society that falsely labeling someone a homosexual could cause undue injury to one’s reputation.

II. MOVING BEYOND TRADITIONAL COMMON LAW CATEGORIES OF DEFAMATION PER SE

Defamation per se is premised upon the notion that some statements are so inherently malevolent that they, without need for further elaboration, expose the subject to scorn. The definition of defamation per se remains within the province of each state, with expansions and contractions largely a matter of judicial interpretation. The Restatement (Second) of Torts defines words that are “actionable per se” as those in which “the publication is of such a character as to make the publisher liable for defamation although no special harm results from it, unless the defamatory matter is true or the defamer was privileged to publish it.”

Notably, the Restatement also states that libel per se includes—but is not limited to—the traditional categories of slander per se, namely “the publication imputes to the other (a) a criminal offense . . . (b) a loathsome disease . . . (c) matter incompatible with his business, trade, profession, or office . . . [or] (d) serious sexual misconduct . . . .” Specifically, comment f to § 569 of the Restatement discusses sexual activity “irrespective of whether the conduct consti-

50 Stern v. Cosby, 07 Civ. 8536 (DC), 2009 U.S. Dist. LEXIS 90865, at *1, *5 (S.D.N.Y. Sept. 25, 2009) (noting that “the four categories are ‘largely arbitrary,’ and there does not appear to be any logical reason for limiting libel or slander per se to these four categories”) (citation omitted).
51 See supra note 30 and accompanying text.
52 See RESTATEMENT (SECOND) OF TORTS § 559 (1977) (observing 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”).
53 See id. § 569; see also Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974) (“We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.”).
54 RESTATEMENT (SECOND) OF TORTS § 569 cmt. b (noting also that “[s]ome courts have taken the position that a libelous publication is actionable per se only if its defamatory meaning is apparent on its face and without reference to extrinsic facts; otherwise, proof of harm is required”).
55 Id. § 570.
tutes a criminal offense or whether it harms the other in his business, trade or profession.” 56 This section notes that it would be actionable per se to accuse another of “fornication” or “[a]ny abnormal sex conduct or tendency.” 57 As Professor David A. Elder noted in his treatise on defamation law, such depictions “negatively portray plaintiff as involved in immoral and socially objectionable conduct that is deemed, however justifiably or unjustifiably, as tainting one’s reputation among at least a ‘substantial and respectable minority’ of the population even in the modern milieu with its more sexually permissive and open attitudes to sexuality.” 58

Several states have stretched the traditional common law understanding of defamation per se in an effort to enable plaintiffs whose reputations are injured to recover damages without having the additional burden of demonstrating that a particular statement caused a specific harm. 59 Indeed, legal scholars have recognized that “[s]ome authorities have stated that general damages are presumed from a publication of a libel or of slander per se . . . .” 60 Some of the more recent treatments of defamation per se by several states demonstrate that courts are not shy about expanding the definition to aid aggrieved plaintiffs. The rulings in the contemporary cases below and those discussed in Part II are particularly significant given the history of defamation per se, which was once thought to have lived beyond its useful course. As one Florida justice once confidently proclaimed: “Libel per se is dead . . . .” 61

The Florida jurist’s proclamation was not out of line. He was simply reaffirming what the U.S. Supreme Court had done to libel per se in its landmark decision in Gertz v. Robert Welch, Inc. 62 The Court, in 1974, severely limited the imposition of presumed damages arising out of a defamation action involving matters of public concern by requiring a showing of actual malice. 63 In doing so, Justice Powell noted:

The common law of defamation is an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss. Under the traditional

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56 Id. § 569 cmt. f.
57 Id.
58 DAVID A. ELDER, DEFAMATION: A LAWYER’S GUIDE §1:13, 1-67 (2003). Elder notes that “[t]he consensus rule continues to adhere to the view that it is libelous to impute sexual misconduct to either a man or a woman, irrespective of whether it constitutes a crime or injures said person in his or her business, trade, or profession.” Id. § 1:13, 1-64.
59 See infra notes 66–94 and accompanying text.
60 STUART M. SPEISER, ET AL., 8 THE AMERICAN LAW OF TORTS § 29:126, at 815 (1991) (citations omitted) (observing that historically “[t]here was a common law rule that damages were presumed to flow from defamation under a strict liability theory, but that presumption has virtually been destroyed by the constitutional mandates of the Times-Gertz rules”).
61 Mid-Florida Television Corp. v. Boyles, 467 So. 2d 282, 284 (Fla. 1985) (Ehrlich, J., concurring).
63 Id. at 350.
rules pertaining to actions for libel, the existence of injury is presumed from the fact of publication. Juries may award substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred. The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. Additionally, the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact.\footnote{Id. at 349.}

As one commentator recently summed up the status of presumed damages in defamation law, “[u]nder \textit{Gertz}, therefore, a defamation plaintiff complaining about speech on a matter of public concern must prove either actual malice or actual injury.”\footnote{James B. Lake, \textit{Restraining False Light: Constitutional and Common Law Limits on a “Troublesome Tort,”} 61 \textit{Fed. Comm. L.J.} 625, 633–34 (2009) (citations omitted). Lake argues that the myriad “constitutional, statutory, and judge-made limits on the defamation tort” should apply “to alternative torts, such as false light, insofar as they involve defamatory falsehoods.” \textit{Id.} at 627.}

Still, not all defamation involves issues of public concern, and many courts have been flexible with the strictures regarding defamation per se. Some courts have held that associating individuals with groups that are not held in high esteem in particular quarters may indeed constitute defamation per se. In 2003, the Appellate Court of Connecticut ruled that it would be libelous per se to suggest that a social club in Waterbury was connected to the Mafia.\footnote{Lega Siciliana Soc. Club, Inc. v. St. Germaine, 825 A.2d 827, 833–34 (Conn. App. Ct. 2003).} In that case, an ethnic-based social club obtained a liquor license from the state of Connecticut over the objections of several residents.\footnote{\textit{Id.} at 830.}

One opponent to the license wrote a letter to the president of the Waterbury board of aldermen complaining of increased traffic and parking problems.\footnote{\textit{Id.} at 831.} A portion of the letter contained statements that the social club alleged were defamatory; specifically, the letter stated:

The rumors with the elderly go from [members of the club] having political connections in both state and local, to Mafia connections to rubber stamp whatever they want. We wish to live out our lives without fear. They as Italians do have the ethnic [muscle] to influence policy in both state and city [department] on the side of what is in their best interest for their Social Club . . . .

Would Club Members allow another ethnic group to invade their [families’] quality of life as they are doing to us . . . .

Due to rumors of Mafia and political connections my own wife would not sign the petitions for fear of having someone setting our house on fire . . . .\footnote{\textit{Id.}}

On appeal, the question was whether “the [trial] court properly concluded that the publication by the defendant of the subject letter did not constitute libel

\begin{footnotes}
\item[64] \textit{Id.} at 349.
\item[67] \textit{Id.} at 830.
\item[68] \textit{Id.} at 831.
\item[69] \textit{Id.}
\end{footnotes}
Before analyzing the specific statements in question, the court pointed out the importance of determining whether the words at issue amounted to defamation per se:

When the defamatory words are actionable per se, the law conclusively presumes the existence of injury to the plaintiff’s reputation. He is required neither to plead nor to prove it . . . . The individual plaintiff is entitled to recover, as general damages, for the injury to his reputation and for the humiliation and mental suffering which the libel caused him . . . .

The plaintiff alleged that the letter writer “exceeded permissible limits of free speech” with “the allegation that the club was connected with the international criminal organization known as the Mafia.” The court agreed “that the allegedly defamatory statement is of the type that will ‘diminish the esteem, respect, goodwill or confidence in which the plaintiff is held, or to excite adverse, derogatory, or unpleasant feelings or opinions against [it].’”

Certainly, it can be argued that the Mafia is associated with criminal activity and that an association with the organization is tantamount to imputing criminal behavior onto the plaintiff. However, another reasonable interpretation of such an associational statement would not necessarily link specific criminal behavior to the plaintiff but would connect him or her to a group that is not held in high regard in most mainstream circles. Parsed differently, many people that hear the term Mafia will formulate a pejorative view, and will not think highly of someone associated with the group. In such instances, the definition of defamation per se rises above traditional categories—imputation of criminal behavior, primarily—to a more generalized association with a group that does not find widespread acceptance among the general public.

In 2009, Connecticut’s Superior Court further extended the reach of defamation per se in a case involving former police officers who were granted disability pensions over the objection of a fellow officer and Waterbury’s mayor. The mayor said the former officers “appeared to be ‘gaming’ the city’s disability pension system.” Relying heavily on Lega Siciliana Social Club, Inc., the court found that the mayor’s remark was defamatory per se, reasoning that, “[t]his is the type of statement, similar to the statements in Lega Siciliana Social Club, Inc., that diminishes the ‘esteem, goodwill or confidence in which the plaintiff is held, or excite adverse, derogatory, or unpleasant feelings or opinions against [it].’”

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70 Id. at 832.
71 Id.
73 Id.
74 Id. (quoting DeVito v. Schwartz, 784 A.2d 376, 381 (Conn. App. Ct. 2001)).
76 Id.
77 See id. at *6–7.
opinions against him." The court found that “[o]ther courts have reached similar conclusions that statements insinuating dishonest or unethical behavior are indicative of alleging improper conduct or a lack of integrity, and constitute libel per se.”

Associating an individual with a group engaging in improper conduct that a large enough segment of the population finds objectionable can lead to a finding of defamation per se. In 2006, the National Enquirer published an article about actor Mel Gibson’s trip to a Modesto, California bar, where he “engaged in a binge of drinking, cocaine use, and sexual promiscuity.” The article noted that Gibson had “four or five women around the table . . . who were sharing the coke with him.” The tabloid magazine also quoted Fred Yow who “told The ENQUIRER his daughter brought Mel home after a wild night.”

The article further stated that Yow said, “Mel ended up sleeping with her friend. He wanted to sleep with my daughter Angela, but I told him if he tried to I’d break his face!”

Angela Yow sued the tabloid magazine for defamation. She claimed that because the article identified her by name, readers would presume that she was “one of the group of ‘four to five women’ who engaged in illicit activity with Mel Gibson.” Further, since she contends she was not among those who shared drugs with the actor, Yow alleged that associated her with that particular group constituted defamation per se.

In addressing this issue, the district court observed that “[d]efamation per se occurs when a statement, is defamatory on its face, that is untrue.” Noting that per se defamation can take the form of either libel or slander, the court wrote: “A statement is libelous per se if it defames the plaintiff on its face, that is, without the need for extrinsic evidence to explain the statement’s defamatory nature.” It further noted that “[s]tatements which falsely impute the commission of a crime are libelous on their face.” In ruling against the National Enquirer on its motion to dismiss, the court found,

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78 Id. at *6.
79 Id. (citations omitted).
81 Id.
82 Id.
83 Id.
84 Id. at 1182.
85 Id. (noting that although the offending passage in the story did “not literally state ‘ANGELA YOW snorted cocaine with Mel Gibson’ . . . . [i]t would be understood by the ordinary reasonable reader as communicating precisely that”).
86 Id., 550 F. Supp. 2d at 1182–83.
87 Id. at 1183.
88 Id.
89 Id.
Although “the threat of a clearly nonmeritorious defamation action ultimately chills the free exercise of expression,” it cannot be determined as a matter of law that a reasonable reader giving the ordinary meaning to the words of the article, would not clearly identify Plaintiff as one of the women in the back room who used cocaine with Gibson and then was one of the couple of girls escorted out of the bar with Mel Gibson, who took him home with her friend.90 The judge noted that such a semantic connection satisfies Yow’s defamation per se claim.91

While the Yow case arguably was decided on the traditional ground of imputation of criminal behavior, California has expanded the reach of defamation per se in other circumstances. For instance, in Samaan v. Sauer, a juvenile probation officer sued a Sacramento attorney of Egyptian descent over e-mails the attorney sent to the probation officer’s supervisors that claimed the officer made racist comments about him.92 While the case hinged upon whether the e-mails actually identified the probation officer as making the offending comments, the court found that under California law, “[t]he charge of racial discrimination constitutes libel per se.”93

Despite the Gertz prescription and the Supreme Court’s apparent distaste for awarding reputational damages absent specific proof of injury, states continue to safeguard—and indeed, to expand—the common law principles of defamation per se. In North Carolina, the Court of Appeals reiterated in 2008 that state’s understanding of libel per se:

- “Defamatory words to be libelous per se must be susceptible of but one meaning and of such nature that the court can presume as a matter of law that they tend to disgrace and degrade the party or hold him up to public hatred, contempt or ridicule, or cause him to be shunned and avoided.”94

These recent cases demonstrate that today, courts recognize defamation per se as a viable cause of action and are, at times, willing to stretch its reach to include situations not contemplated in the common law understanding of the term.

90 Id. at 1190 (citations omitted).
91 Id.
93 Id. at *3.
94 Nucor Corp. v. Prudential Equity Group, LLC, 659 S.E.2d 483, 486 (N.C. Ct. App. 2008) (emphasis in the original) (citation omitted). The court noted:

In North Carolina, the term defamation applied to the two distinct torts of libel and slander. Libel per se is a publication which, when considered alone without explanatory circumstances: (1) charges that a person has committed an infamous crime; (2) charges a person with having an infectious disease; (3) tends to impeach a person in that person’s trade or profession; or (4) otherwise tends to subject one to ridicule, contempt or disgrace.

Id. (emphasis in the original) (citation omitted).
III. VIEWING ACCUSATIONS OF HOMOSEXUALITY THROUGH THE LENS OF DEFAMATION LAW

In *Stern v. Cosby*, U.S. District Judge Chin, quoting a 1947 New York Court of Appeals decision, said the calculation of whether a statement is defamation per se, """"depends, among other factors, upon the temper of the times, the current of contemporary public opinion, with the result that words, harmless in one age, in one community, may be highly damaging to reputation at another time or in a different place."""" Judge Chin noted that the question of whether falsely imputing homosexuality constitutes defamation per se had not been decided by New York’s highest court, and therefore, he had to decide """"whether the New York Court of Appeals, in 2009, would hold that a statement imputing homosexuality connotes the same degree of ‘shame, obliquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation or disgrace.’"""

During oral arguments, Judge Chin indicated a clear preference to avoid this issue, if possible. In an exchange with L. Lin Wood, counsel for Howard K. Stern, Judge Chin asked, """"Do I need to decide this issue of whether it is defamatory per se, or can I duck it?"""

Wood responded, """"I’m afraid you have to decide it."""

Judge Chin held that it is not defamation per se to falsely impute homosexuality to someone. In his analysis, Judge Chin looked first to the United States Supreme Court’s decision in *Lawrence v. Texas*, which he labeled """"a sweeping decision"""" that """"invalidated laws criminalizing intimate homosexual conduct."""

Judge Chin correctly reasoned that """"to the extent that courts previously relied on the *criminality* of homosexual conduct in holding that a statement imputing homosexuality subjects a person to contempt and ridicule . . . *Lawrence* has foreclosed such reliance."""

Indeed, imputing criminal conduct to another is a hornbook example of defamation per se. *Lawrence* clearly

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96 *Id.* at 273.
98 *Id.* at 42.
99 *Stern*, 645 F. Supp. 2d at 271.
100 *Lawrence v. Texas*, 539 U.S. 558 (2003). *Lawrence* struck down a Texas statute that made intimate homosexual conduct a crime, overturning the Court’s decision in *Bowers v. Hardwick*. *Id.* at 577.
102 *Id.* at 274 (emphasis added).
103 See, e.g., 2 Rodney A. Smolla, *Law of Defamation* § 7:11 (2d ed. 2009) (""""The imputation to another of conduct that constitutes a criminal offense is slanderous per se and is traditionally actionable without proof of special damages if the imputed conduct would be punishable by imprisonment, or is generally regarded by public opinion as involving moral"""")
removes homosexual acts from the realm of criminal activity, and thus such a statement could not be considered defamatory per se on that basis.

Judge Chin’s second basis—New Yorkers’ attitude towards the gay community—for determining that the statement is not defamatory on its face suffers from several flaws. Judge Chin ruled 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.” Judge Chin relied on polls showing that a narrow majority of New Yorkers appears to favor the rights of same-sex couples to marry. But it is an illogical stretch to find that, because a slim majority of the state’s residents favor same-sex marriage, gays and lesbians are no longer subjected to scorn and odium. Moreover, such a rationale flies in the face of established precedent from Judge Chin’s own federal district, as well other state courts.

In 2008, in the case *Gallo v. Alitalia-Linee Aeree Italiane-Societa Per Azioni*, Judge McMahon observed that, “because certain people view homosexuality as particularly reprehensible and immoral conduct, several New York courts have concluded that imputations of homosexuality are slanderous per se.” Judge McMahon noted that gays and lesbians have made strides both in the field of civil rights and in the court of public opinion, but found “homophobia is sufficiently widespread and deeply held that an imputation of homosexuality can—at least when directed to a man married to a woman—be deemed every bit as offensive as imputing unchastity to a woman.” In agreeing with other courts that imputations of homosexuality are defamatory per se, Judge McMahon made clear that her decision “should not be interpreted as endorsing prejudicial views against gays and lesbians . . . . [r]ather this decision is based on the fact that the prejudice gays and lesbians experience is real and sufficiently widespread so that it would be premature to declare victory.” Judge McMahon hastened to add that “[i]f the degree of this widespread prejudice disappears, this Court welcomes the red flag that will attach to this decision.”

No monumental societal shift occurred in the intervening nine months between Judge McMahon’s ruling and Judge Chin’s decision that would precipi-
tate the “veritable sea change in social attitudes about homosexuality”\textsuperscript{111} that Judge Chin recognized. Indeed, the spirited public debate over equal rights for gays and lesbians fits squarely with Judge McMahon’s view that prejudice against homosexuals remains widespread. By extension, labeling someone a homosexual continues to carry a degree of public scorn in a significant portion of the public.

Moreover, Judge McMahon’s opinion was handed down five years after the Supreme Court’s decision in \textit{Lawrence} in 2003. Even cases decided prior to \textit{Lawrence} do not focus solely on the criminality of homosexual conduct in determining the applicability of a defamatory inference. Parsed differently, falsely labeling someone a homosexual was defamatory not merely because the underlying conduct was criminal in some states. In a 1993 decision that found “a false allegation of homosexuality is defamatory,” Missouri’s Supreme Court observed:

> The harm inflicted by defamation is particularly sensitive to the characteristics and situation of the injured party and of the society that surrounds him or her. Attitudes change slowly and unevenly among different groups. Despite the efforts of many homosexual groups to foster greater tolerance and acceptance, homosexuality is still viewed with disfavor, if not outright contempt, by a sizeable proportion of our population.\textsuperscript{112}

Similarly, in \textit{Matherson v. Marchell}, a group of musicians intimated during a radio interview that they had sexual relations with the wife of the owner of a venue where the band used to play.\textsuperscript{113} Discussing how angry the owner might have been, a band member observed, “I don’t think it was his wife that he got upset about, I think it was when somebody started messing around with his boyfriend that he really freaked out.”\textsuperscript{114} The club owner brought a defamation action over this imputation of homosexuality.\textsuperscript{115} In analyzing whether this imputation should be considered defamatory, the court found, “[i]t cannot be said that social opprobrium of homosexuality does not remain with us today. Rightly or wrongly, many individuals still view homosexuality as immoral.”\textsuperscript{116}

While the \textit{Matherson} case was decided more than a quarter century ago, it is instructive to look at the rationale behind the court’s finding. The court cited the fact that homosexuals face “[l]egal sanctions” if they are involved in “military service.”\textsuperscript{117} While decades have passed since the court considered that factor, it is still the law of the United States that “[t]he prohibition against homosexual conduct is a longstanding element of military law that continues to be

\begin{itemize}
    \item \textsuperscript{111} Stern v. Cosby, 645 F. Supp. 2d 258, 273 (S.D.N.Y. 2009).
    \item \textsuperscript{112} Nazeri v. Mo. Valley Coll., 860 S.W.2d 303, 312 (Mo. 1993).
    \item \textsuperscript{113} Matherson v. Marchell, 100 A.D.2d 233, 234 (N.Y. App. Div. 1984).
    \item \textsuperscript{114} \textit{Id.}
    \item \textsuperscript{115} \textit{Id.} at 241.
    \item \textsuperscript{116} \textit{Id.}
    \item \textsuperscript{117} \textit{Id.}
\end{itemize}
necessary in the unique circumstances of military service.” Even President Barack Obama, who campaigned on a pledge to end this policy, has been characterized as “dragging his feet” on this issue. The President has ordered the Pentagon to study the issue, looking toward an eventual repeal of the “Don’t Ask, Don’t Tell” policy, but even that move has stirred controversy. To participate in the study, “gay service members would have to break the law, which prohibits them from discussing their sexual orientation.” Courts considering the issue pre-Lawrence focused on societal factors in reaching their decisions, rather than the fact that homosexual activity, at the time, often constituted criminal behavior.

Two years before Lawrence, a radio talk show commentator in New Jersey who called a 1950’s children’s television host a “lesbian cowgirl” did not find a sympathetic court when he was sued for defamation. An issue of first impression in the state, the appellate division of the Superior Court, like other tribunals had previously done, examined how gays and lesbians are viewed by society and found 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. Accordingly, we conclude that at the very least, a false accusation of homosexuality is reasonably susceptible to a defamation meaning.

Nonetheless, not every court that has addressed the issue is in accord. In Albright v. Morton, the court ruled that to find statements implying homosexuality as defamatory “requires this Court to legitimize the prejudice and bigotry that for too long have plagued the homosexual community.” Judge Gertner clearly took offense to the “plaintiff’s argument that, even without the implicit

119 Sheryl Gay Stolberg, Obama Pledges Again to End ‘Don’t Ask, Don’t Tell’ But Offers No Timetable, N.Y. TIMES, Oct. 10, 2009, at A24. See also Abby Goodnough, Gay Rights Rebuke May Result in a Change in Tactics, N.Y. TIMES, Nov. 5, 2009, at A25 (“[G]ay rights activists believe that President Obama is not treating their agenda as a high priority . . . . At stake, they say, is not only same-sex marriage, but the military’s ban on openly gay service members.”); Daniel Bajger, For Young Obama Voters, Thrill is Gone, BALTIMORE SUN, Nov. 6, 2009, at 17A (noting “the ‘don’t ask, don’t tell’ policy in the military remains”).
120 Anne Flaherty, Army: Gays Still Can Be Discharged If They Speak Up, VIRGINIAN-PILOT, Apr. 2, 2010, at A7 (quoting Army Secretary John McHugh who issued a statement saying, “Until Congress repeals ‘don’t ask, don’t tell,’ it remains the law of the land and the Department of the Army and I will fulfill our obligation to uphold it”).
121 Id.
123 Id. at 683–84.
124 Albright v. Morton, 321 F. Supp. 2d 130, 133 (D. Mass. 2004) (observing that “[i]n this day and age, recent rulings by the Supreme Court and the Supreme Judicial Court of Massachusetts, undermine any suggestion that a statement implying that an individual is a homosexual is defamatory”).
accusation of a crime, portions of the community ‘feel [homosexuals] are less reputable than heterosexuals.’” 125 As she reasoned in the opinion, “[i]f this Court were to agree that calling someone a homosexual is defamatory per se—it would, in effect, validate that sentiment and legitimize relegating homosexuals to second-class status.” 126 On appeal, however, the United States Court of Appeals for the First Circuit chose specifically to avoid the question of whether labeling someone a homosexual was defamatory per se. 127 Instead, the court relied upon the convoluted facts of the case to find that the photograph in question was not subject to a defamatory meaning. 128

The plaintiff in the case was a former bodyguard for the pop star Madonna who had a romantic relationship with the singer for several years. 129 After the pair broke up, he entered into a contract with a publishing company and supplied information about his relationship for a Madonna biography being written by Andrew Morton. 130 When the book was published, it contained “forty-eight pages of photographs, including one in which Madonna is accompanied by two men. The man to the left is wearing black pants, a black and white shirt, a black leather jacket, tinted sunglasses, a string necklace, and an earring.” 131 A caption accompanying the photograph read: “Madonna attends ex-lover Prince’s concert with her secret lover and one-time bodyguard Jimmy Albright (left). Albright, who bears an uncanny resemblance to Carlos Leon, the father of Madonna’s daughter, enjoyed a stormy three-year relationship with the star. They planned to marry, and had even chosen names for their children.” 132

As the court explained, “[t]his photograph allegedly defamed Albright because the man pictured was, in fact, José Guittierez, an ‘outspoken homosexual’ who ‘often dressed as a woman,’ and engaged in what appellants describe as ‘homosexual, sexually graphic, lewd, lascivious, offensive, and possibly illegal’ conduct. Guittierez was employed as one of Madonna’s dancers.” 133 The court found that too many leaps in reasoning would have to take place for any reader to draw a defamatory inference from the miscaptioned photograph. 134 As the court observed, “[n]othing in Guittierez’s appearance, particularly given the accompanying caption stressing Albright’s heterosexuality (e.g., Madonna’s “secret lover”), gives any indication that Albright is homosexual.” 135 The court

125 Id. at 137.
126 Id. at 138.
127 Amrak Prods., Inc. v. Morton, 410 F.3d 69, 73 (1st Cir. 2005).
128 Id.
129 Id. at 71.
130 Id.
131 Id.
132 Id.
133 Amrak Prods., Inc. v. Morton, 410 F.3d 69, 71 (1st Cir. 2005).
134 See id. at 73.
135 Id. The court noted that,
concluded that, because “the photograph and its caption make no imputation of homosexuality, we need not decide whether such an imputation constitutes defamation *per se* in Massachusetts.”\(^{136}\)

In Colorado, however, the Court of Appeals addressed that particular question directly in *Hayes v. Smith*.\(^{137}\) Kathleen Hayes was a high school teacher in a “conservative Christian community,” who formed a corporation with Samantha Smith, one of the defendants in the case, “to further business ideas related to their common religious outlook.”\(^{138}\) The relationship eventually “deteriorated resulting in harassment and verbal accusations.”\(^{139}\) Subsequently, Smith and her husband met with Hayes’ school superintendent and asserted that Hayes “had tried to establish a homosexual relationship with Samantha Smith” and “had ‘proposed marriage’ to Samantha Smith.”\(^{140}\) On the basis of those statements, Hayes filed a defamation suit, claiming the accusations of homosexuality were slanderous *per se*, which resulted in a jury verdict in her favor.\(^{141}\)

On appeal, the Colorado Court of Appeals reversed the judgment,\(^{142}\) finding that allegations of homosexuality do not constitute slander *per se*, relying primarily on “the fact that sexual activities between consenting adults of the same sex are no longer illegal in Colorado tends to indicate that an accusation of being a homosexual is not of such a character as to be slanderous *per se*.\(^{143}\) Second, the court believed that defamation *per se* attaches when a person is “falsely accused of belonging in a category of persons considered deserving of social approbation, *i.e.*, thief, murderer, prostitute, etc. . . .”\(^{144}\) Based on those findings, the court concluded they “should not classify homosexuals with those miscreants who have engaged in actions that deserve the reprobation and scorn which is implicitly a part of the slander/libel *per se* classifications.”\(^{145}\) The court also found that “there is no empirical evidence in this record demonstrating that homosexuals are held by society in such poor esteem. Indeed, it ap-

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\(^{136}\) Id. (citation omitted).


\(^{138}\) Id. at 1023.

\(^{139}\) Id.

\(^{140}\) Id.

\(^{141}\) Id.

\(^{142}\) Id. at 1023, 1026.


\(^{144}\) Id.

\(^{145}\) Id.
pears that the community view toward homosexuals is mixed.”

In Ohio, the Court of Appeals reached a similar result in a case involving a group of students and a college prank at Case Western Reserve University. Jeffrey Wilson sued other students in his dormitory after they had “created computer-generated flyers depicting Wilson as homosexual.” Specifically, the flyers contained a photograph of Wilson, along with a title that said, “[I]n Search of Male Companion.” The flyer also provided Wilson’s name and contact information, along with the following statement: “Looking for non-smoking GWM who enjoys dominating,’ and ‘Interests include: Biology, kissing, crying at movies, picking flowers and dreaming of that special some guy . . .” Approximately twenty to twenty-five flyers were displayed on campus. At trial, “Wilson testified that he was not a homosexual and that he received numerous phone calls and e-mails inquiring about the flyers. He also testified that he was embarrassed, humiliated, and ridiculed because of the creation and publication of the flyers.”

The court of appeals upheld the trial court’s ruling that the flyers were not libelous per se. The court found that, “[i]n the instant case, publicizing that someone is a homosexual is not libel per se because being a homosexual is not a crime, nor is it a disease. Additionally, being a homosexual would not tend to injure a person in his trade or occupation.” The court’s rationale in this instance adhered to the common law definition of defamation per se.

Courts remain divided on this issue of whether allegations of homosexuality constitute libel per se, and on how far society has come with respect to treatment of homosexuals. As Judge McMahon pointed out in her opinion in Gallo, any celebration of victory on the issue would be premature. Consequently, the law must reflect cultural realities and avoid creating legal fictions of society having reached some aspiration level of tolerance. The “day and age” that Judge Gertner references in Morton regrettably still includes individuals being physically attacked merely because they are perceived to be homosexual.

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146 Id.
148 Id.
149 Id.
150 Id.
151 Id.
152 Id.
154 Id.
155 Id.
157 Jenna Johnson, 2nd GU Student Hurt in Anti-Gay Attacks, WASH. POST, Nov. 3, 2009, at B4. The paper reported that “[a] female student was walking on Canal Road near the entrance to Georgetown’s campus about 9 p.m. last Tuesday when she was confronted by two
organizations whose sole purpose is to defeat the rights of same-sex couples to marry,\textsuperscript{158} public schools where gay and lesbians can sense the scorn of their fellow students by reading messages on t-shirts,\textsuperscript{159} and religions whose members would rather defect than accept homosexual congregants.\textsuperscript{160} Even the Supreme Court in \textit{Lawrence}, striking down the Texas sodomy statute, recognized that many people have deeply-held beliefs on this subject:

It must be acknowledged, of course, that the Court in \textit{Bowers} was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives.\textsuperscript{161}

Finally, there is another, perhaps more pragmatic reason, why the imputation of homosexuality should still be considered defamatory per se. A finding that falsely labeling someone as gay is not defamatory per se necessarily requires the plaintiff to plead and prove special damages in a defamation suit.\textsuperscript{162} From a procedural standpoint, that means the defendant who made the false accusation—most likely in a pejorative and judgmental fashion—will have an easier time prevailing in the lawsuit. Thus, there is no disincentive for falsely alleging gay imputations because the law protects that type of invective on the foundation—ironically—that society no longer attaches a stigma to homosexuality. As Eric K.M. Yatar wrote, “accepting that an imputation of homosexuality is defamatory or that its publicity is highly offensive should not be viewed as an endorsement of homophobia, but rather as a recognition of the actual reality that homosexuals face on a daily basis and a punishment for homophobic speech acts/conduct.”\textsuperscript{163}

Refusing to recognize that sizable pockets of society still hold gays and lesbians to the obloquy, ridicule, and contempt that define defamation per se does not eradicate that prejudice from reality. Perhaps one day, societal attitudes

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\textsuperscript{158} Monica Hesse, \textit{Opposing Gay Unions With Sanity & a Smile}, \textit{WASH. POST}, Aug. 28, 2009, at C1.

\textsuperscript{159} See supra notes 9–10 and accompanying text.

\textsuperscript{160} See supra note 16 and accompanying text.

\textsuperscript{161} \textit{Lawrence v. Texas}, 539 U.S. 558, 571 (2003).

\textsuperscript{162} See supra notes 52–65 and accompanying text.

\textsuperscript{163} Eric K.M. Yatar, \textit{Defamation, Privacy, and the Changing Social Status of Homosexuality: Re-Thinking Supreme Court Gay Rights Jurisprudence}, 12 \textit{TUL. J.L. & SEXUALITY} 119, 156 (2003). Yatar suggests that “when understood in the context of the socio-political marginalization of homosexuals and the undeniable reality of homophobic violence, these tort causes of action come to reveal a viable course of redress that is in line with the prevailing judicial treatment of homosexuality in general and homosexual parties in particular.” Id. at 158.
will have changed to the point that cases finding the imputation of homosexuality to be defamation per se will appear anachronistic. However, that day and society as a whole, have not yet reached that point.

IV. CONCLUSION

When the *Washington Blade*, a newspaper serving the gay community in the nation’s capital, recently shuttered its doors after declaring bankruptcy, a former staff reporter received an e-mail from a prominent religious leader in the District of Columbia stating, “The shutdown of the Blade is a sign from God.” Unfortunately, that proved to be one of the more innocuous recent incidents of anti-gay sentiment in Washington, D.C. At the same time, the city witnessed a rash of physical assaults on college students who were perceived to be gay or sympathetic to homosexual causes. Near Georgetown University, in a span of a week, two students “reported being attacked and called an anti-gay slur while walking near campus.” The campus has had problems with attacks on homosexuals in the past. The *Washington Post* reported:

Last fall, a Georgetown medical student was assaulted with a glass bottle by two men shouting homophobic slurs. In September 2007, a sophomore was arrested for allegedly assaulting a fellow student in what police investigated as a possible hate crime. Prosecutors later dropped the case, citing a lack of evidence, but the incident contributed to the establishment last year of a campus resource center for gay, lesbian, bisexual and transgender students.

At The Catholic University of America, a campus gay rights group unsuccessfully attempted to get official student-club status for a support organization. The *Washington Post* reported in December 2009 that “[e]very Wednesday night, more than three dozen students gather to discuss what the university can do to welcome, affirm and protect its gay students, staff members and others. . . . [b]ut so far, the administration has not been receptive to the group’s Wednesday efforts.” In the summer of 2009, “school officials rejected an application from the group CUAllies to be an official club,” explaining that “[d]oing so would have given support to a group that advocates positions contrary to church teachings.”

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166 Emma Brown, *GU Rally Decrees Anti-Gay Violence*, WASH. POST, Oct. 31, 2009, at B6 (observing that “[a]bout 50 Georgetown University students rallied on campus at noon Friday to show solidarity with a student who was allegedly attacked this week because of her perceived sexual orientation”).
168 *Id.*
169 *Id.*
Meanwhile, the same-sex marriage issue continues to roil throughout the country. Voters in Maine decided in November 2009 to undo what state lawmakers had done, rejecting the notion that same-sex couples had a right to marry in that state even before that state’s law took effect.\(^\text{170}\) In what the New York Times labeled a “crushing loss,”\(^\text{171}\) it turned out that “voters decided to repeal Maine’s new law . . . setting back a movement that had made remarkable progress nationally this year.”\(^\text{172}\) The Maine vote prompted this commentary:

> Until the past 10 or 20 years, no society had ever sanctioned marriage between same-sex partners. It was unthinkable outside of a small radical fringe. Now, in the twinkling of an eye, it’s coming to pass in a few countries, though the vast majority of humankind still finds it unthinkable.\(^\text{173}\)

In New Jersey, “[s]upport for gay marriage in Trenton is draining away like water from a tub as nervous legislators scurry toward safer political ground,” according to an editorial in the Star-Ledger.\(^\text{174}\) In January 2010, the New Jersey State Senate defeated a bill that would have legalized gay marriage.\(^\text{175}\) As the newspaper noted,

> Marriage equality was supposed to be the big prize, the final measure of respect, a sign that gay families were indeed equal under the law. Instead, gay couples and their children are getting another ugly reminder that their families are regarded as second-class, as something less than the families next door.\(^\text{176}\)

Opposing gay marriage has been an economic boon for some companies that have capitalized on creating campaigns to defeat legislation. A cottage industry has cropped up as “several California companies have emerged as the go-to players for opponents of the marriages.”\(^\text{177}\) These companies reaped a significant financial benefit from the Maine legislation: “Of the $2.7 million spent to pass the Maine measure, about 75 percent flowed to compa-

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\(^\text{171}\) Id.

\(^\text{172}\) Id.

\(^\text{173}\) Rod Dreher, Empathy Works Both Ways, DALLAS MORNING NEWS, Nov. 6, 2009, at 4P available at LEXIS, News & Business Library (suggesting that “[l]eaving aside that there is undoubtedly a significant number of people who vote against gay marriage because they flat-out don’t like gay people, there are serious and important reasons to vote against same-sex marriage—and these deserve to be taken seriously”).


\(^\text{176}\) Moran, supra note 174.

\(^\text{177}\) Jesse McKinley, In California Companies, a Cottage Industry for Fighting Same-Sex Marriage, N.Y. TIMES, Dec. 13, 2009, at A29 (reporting that “[o]ne of the companies, Mar/Com. Services, Inc., lists its business address here in San Francisco, a city well known for its large and politically active gay population”).
nies in California, according to campaign disclosure documents.”  Although some of these companies kept quiet about their out-of-state involvement in the issue, gay-marriage advocates in Maine characterized the effect of the California campaign assistance as being “profound.”

Activists in New Hampshire, a state in which a new law allowing same-sex marriage went into effect on January 1, 2010, are now ratcheting up efforts to repeal the measure. As one newspaper in that state reported, “[t]he LetNHVote effort to give voters a say on gay marriage wants to use resolutions at town hall meetings this year to urge a popular vote on a constitutional amendment defining marriage as a one-man, one-woman institution.”

In December 2009, the New York State Senate defeated a measure that would have allowed homosexuals to marry. Writing in support of gay marriage, just prior to the New York Senate vote, Washington Post columnist Richard Cohen made a poignant statement about our times. He examined the national angst over the issue—the “irrationality comes at [him] on an almost daily basis”—and made this sad conclusion:

The truth is that if Maj. Nidal Hasan, the accused killer of 13 people at Fort Hood, had entered the officers club there with a nice handbag on his arm, perhaps a Gucci tote, he would have been out of the Army by the end of the week. Since he was merely antisocial, a misfit, an incompetent psychiatrist and a likely Islamic fanatic, he was retained and promoted. This says something about America. On the subject of gays, we are a tad nuts ourselves.

The American Idol runner-up, Adam Lambert, lost a guest shot on ABC-TV’s “Good Morning America” after he passionately kissed his male band member during a telecast of the American Music Awards. Lambert was scheduled to perform during the popular morning show but, after kissing the keyboard player, ABC said, “[g]iven his controversial live performance on the AMAs, we were concerned about airing a similar concert so early in the morn-

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178 Id. (noting that “California companies billed hundreds of thousands of dollars for consulting work, phone lists, printing and other services”).
179 Id.
180 See supra note 23 and accompanying text.
184 Verne Gay, ‘GMA’ Gives Lambert Kiss-off, NEWSDAY (N.Y.), Nov. 25, 2009, at A10, available at LEXIS, News & Business Library (“He was dropped from a ‘Good Morning America’ performance scheduled for this morning—pretty much the first time in memory any network morning show yanked a performer because of what he might do.”).
ing.”185 Apparently, two males kissing does not pass the “breakfast test”186 in the eyes of ABC executives. Lambert later appeared on CBS-TV’s “The Early Show” and said “that his performance would not have caused as much controversy if he weren’t openly gay.”187 He might be right. During his appearance on CBS, the video of his kiss was blurred out.188

The incidents described above and in the Introduction, which range from pathetic to tragic, and myriad others like them across the nation serve as a stark reminder that homosexuals still face intolerance, discrimination, and ridicule from numerous pockets of society. Sadly, these are not isolated instances. While gays and lesbians have made strides in securing for themselves certain basic rights under the law, it is unquestionable that at least a “substantial and respectable minority” of society still views them in a negative light.189

There is little support, given “the temper of the times,”190 for Judge Chin’s finding that there has been some sort of recent “sea change in social attitudes about homosexuality.”191 Without question, the federal district judge himself had wanted to “duck” the issue of whether labeling someone a homosexual is defamatory per se.192 Subsequently, he appeared to go to great lengths to rescue Howard K. Stern’s defamation lawsuit. When pressed on reconsideration of the summary judgment motion—filed by Cosby because Stern had not plead special damages now required because of Judge Chin’s earlier ruling—the New York jurist kept the case alive by finding that it was defamation per se to accuse Stern of (1) having sex with Smith’s boyfriend; (2) making a video of himself having sex with Smith’s boyfriend; (3) promiscuity; and (4) infidelity—so clearly expose Stern to “hatred, contempt or aversion, or [so clearly] induce an evil or unsavory opinion of him in the minds of a substantial number of the community” that serious injury to Stern’s reputation can be presumed. Accordingly, he need not prove special damages . . . .193

185 Id.
186 See Daniel D. Perlmutter & Lesa Hatley Major, Nieman Foundation, Images of Horror from Fallujah (Summer 2004), available at http://www.nieman.harvard.edu/reportsitem.aspx?id=100834. The authors quoted Bill Keller, the executive editor of the New York Times, as describing the so-called “breakfast test” for determining what photographs or video should be run by news organizations this way: “At the same time you have to be mindful of the pain these pictures would cause to families and the potential revulsion of readers, and children, who are exposed to this over their breakfast table.” Id.
188 See David Itzkoff, CBS Is Criticized For Blurring of Video, N.Y. TIMES, Nov. 28, 2009, at C2.
189 Cf. ELDER, supra note 58 and accompanying text.
191 Id.
193 Stern v. Cosby, 07 Civ. 8536 (DC), 2009 U.S. Dist. LEXIS 90865, at *7 (S.D.N.Y.
Alternatively, Judge Chin found it was defamatory per se, under the traditional category of injuring one in his or her profession, to “portray Stern as a lawyer who would have sex with his client’s boyfriend—on video. Potential clients would, presumably, not want to have a lawyer who slept with his client’s significant other.”

While Howard K. Stern undoubtedly appreciated Judge Chin’s legal leaps, it would have been a better fit—and a more intellectually honest approach—to simply have applied Judge McMahon’s ruling that labeling someone a homosexual today remains defamation per se. Her well-reasoned decision, grounded in New York State law, 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.” For now, this is the correct approach because, “[o]n the subject of gays, we are a tad nuts ourselves.”

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194 Id. (adding that “serious questions as to an attorney’s duty of loyalty to his client surely are raised when the attorney has a sexual relationship with his client’s significant other”).


196 Cohen, supra note 183.