Defamation in an Age of Political Correctness: Should a False Public Statement that a Person is Gay be Defamatory?

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“Sticks and stones may break my bones, but names will never hurt me.”

INTRODUCTION

The law of defamation recognizes the important public policy that individuals should be free to enjoy their reputations unimpaired by false and derogatory remarks.1 An action for defamation is based upon a viola-

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1. The statement uttered must indeed be a false one, as truth is a defense to defamation. RESTATEMENT (SECOND) OF TORTS § 581A (1977). If the statement that a person is a homosexual proves to be true, then the individual does not have a cause of action for defamation. Instead, since an allegation of homosexuality subjects one’s personal life to heightened scrutiny or may encourage speculation about his or her personal relationships, the plaintiff may have a cause of action for a violation of his or her right to privacy. For a discussion of this issue, see Barbara Moretti, Outing: Justifiable or Unwarranted Invasion of Privacy? The Private Facts Tort as a Remedy for Disclosures of Sexual Orientation, 11 CARDOZO ARTS & ENT. L.J. 857 (1993); Ronald F. Wick, Note, Out of the Closet and Into the Headlines: “Outing” and the Private Facts Tort, 80 GEO. L.J. 413 (1991). Determining the veracity of statements concerning sexual orientation is difficult. Not only is it difficult to determine whether an individual is gay, (see Alfred Kinsey et al., Sexual Behavior in the Human Male, in LESBIANS, GAY MEN, AND THE LAW 1 (William B. Rubenstein ed., 1993); Kathleen Guzman, About Outing: Public Discourse, Private Lives, 73 WASH. U. L.Q. 1531, 1569-73 (1995), but verifying accusations of homosexual acts is also difficult. Nonetheless, for purposes of this Paper, I am assuming that such accusations can be shown to be false.

tion of that right. Although it has been said that no definition exists which has been formulated to cover all the cases, the generally accepted definition is as follows: a communication is defamatory if it tends to harm the reputation of another so as to lower him or her in the opinion of the community or to deter third persons from associating or dealing with him or her. Words alleged to be defamatory are divided into three classes: (1) those that cannot possibly bear a defamatory meaning; (2) those that are reasonably susceptible to a defamatory meaning; and (3) those that are

3. Note that this common law tort differs from the tort of invasion of the right of privacy. The crux of a defamatory action is injury to the plaintiff's reputation. The private facts tort protects public disclosure of private facts about the plaintiff; injury to reputation is not required. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960).


5. RESTATEMENT (SECOND) OF TORTS § 559 (1977). Compare this definition with that given by Prosser and Keeton: Defamation is that which tends to injure the reputation in the popular sense; to diminish the esteem, respect, goodwill or confidence in which the person is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him. W. KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 111, at 773 (5th ed. 1984). For two and a half centuries, the common law has treated the tort of defamation in two different ways on the basis of mere form. Libel consists of the publication of defamatory matter by written or printed words, or by some other physical form such as a sign or picture. Slander consists of the publication of defamatory remarks by spoken words, transitory gestures, or by any form of communication other than those constituting libel. RESTATEMENT (SECOND) OF TORTS § 568 & cmt. b (1977). With the discovery of new methods of communication, many courts have condemned the distinction between the two and treat the tort as that of defamation. *Id.*; Bryson v. News America Publications, Inc., 672 N.E.2d 1207, 1215 (Ill. 1996). Thus, any reference to defamation in this Paper is to encompass both libel and slander.

6. Language that falls within this class may never serve as the basis of an action for libel or slander, for in order to support a cause of action for defamation, the words, in addition to being false and unprivileged, must also be defamatory. This is because expressions of opinion are not actionable. Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974) (stating that under the First Amendment there is "no such thing as a false idea"). Moreover, statements that are merely annoying or embarrassing or no more than rhetorical hyperbole or a vigorous epithet, are not defamatory. Kryeski v. Schott Glass Tech., Inc., 626 A.2d 595, 601 (Pa. 1993). For example, certain name-calling is frequently resorted to by angry people without any real intent to make a defamatory assertion. This is true particularly when it is obvious that the speaker has lost his temper and is merely "venting." MacElree v. Philadelphia Newspaper Inc., 650 A.2d 1068, 1071 (Pa. 1994) (quoting RESTATEMENT (SECOND) OF TORTS, § 566 cmt. (e) (1977)). Thus, if in the course of an argument the defendant loudly and angrily calls the plaintiff a bastard in the presence of others, he is ordinarily not understood as asserting a fact that the plaintiff is of illegitimate birth, but only abusing him to his face.

7. The jury must determine whether the language is defamatory. The plaintiff in such instances must plead extrinsic facts that demonstrate that the statement has a defamatory meaning. *See, e.g.*, Morrison v. Ritchie & Co., 4 Fr. 645, 39 Scot. L. Rep. 432 (1902)
defamatory on their face. 8

The actionability of the alleged defamatory words has depended in large part on the temper of the times and the contemporary opinion, so that what may be actionable in one age may not be in another. 9 The decisions are apt to vary with the moral and social conditions and views of different communities. For example, in the age of political correctness, to be called anti-women rights, african-american rights, or homosexual rights is not favorable. 10 Thus, it is not surprising that courts have expressed various opinions over whether a public 11 statement that a person is gay 12 is a defamatory statement if it proves to be false. 13

8. Language is defamatory on its face if the defamatory nature thereof appears without the necessity of pleading and proving explanatory facts. Whether defamation falls within this category is a question of law. Tate v. Bradley, 837 F.2d 206, 208 (5th Cir. 1988). Such words have been called defamatory per se and plaintiff need not plead or prove actual damage to his or her reputation to recover. For examples of such language, see discussion infra notes 16-32 and accompanying text.
9. 50 AM. JUR. 2D § 8, AT 521. For example, accusations of bigotry are not actionable. As Judge Easterbrook stated, "Accusations of 'racism' no longer are 'obviously and naturally harmful.' The word has been watered down by overuse, becoming common coin in political discourse." Stevens v. Tillman, 855 F.2d 394, 402 (7th Cir. 1988), cert. denied, 489 U.S. 1065 (1989) (emphasis added). See also Creekmore v. Runnels, 224 S.W.2d 1007 (Mo. 1949) (heresy is no longer a crime against the state and can no longer be considered defamatory).
10. See, e.g., Vail v. Plain Dealer Publ'g Co., 649 N.E.2d 182 (Ohio 1995) (plaintiff sued paper for being called a "gay-basher," "anti-homosexual," and "homophobic").
11. In order to be actionable defamation, the statement must be public (or published) to a third person. Derogatory words and insults directed to the plaintiff may afford grounds for an action for the intentional infliction of mental suffering, but unless they are communicated to another the action cannot be one for defamation. PROSSER ET AL; supra note 5, § 111, at 771. For example, a statement published through either speech or in a newspaper is considered a public statement. However, a statement made between two individuals that is not overheard by a third person does not constitute actionable defamation.
12. Male homosexuals have been referred to as fags, fairies, fruits, and queers. Women homosexuals have been called lesbians, lesbos, butches, and dykes. Most often, though, members of the homosexual community of both sexes are commonly referred to as gays. Guzman, supra note 1, at 1569. The term gay, however, has increasingly been understood only to apply to men. Critics believe that using such a word as a gender-neutral term is insensitive to the unique experience of homosexual women. Adriene Rich, Compulsory Heterosexuality and Lesbian Experience, in LESBIANS, GAY MEN, AND THE LAW 32 (William B. Rubenstein ed., 1993). However, for brevity reasons, this Paper will use the terms "gay" and "homosexual" interchangeably, unless the context indicates otherwise.
13. The issue of the rights of gays and lesbians has proven to be heavily divided in the United States. Courts are divided over the rights of gays in the military, compare Meinhold v. United States Dep't of Defense, 34 F.3d 1469 (9th Cir. 1993), with Steffan v. Aspin, 8
Some courts have held that such statements are defamatory per se (or as a matter of law).\textsuperscript{14} Other courts have held that, in addition to the statements being made, plaintiffs must prove special damages.\textsuperscript{15} Interestingly enough, no court has held that such statements cannot be defamatory as a matter of law.

This Paper discusses whether a public statement that a person is gay is or should be defamatory if it proves to be false. Part I of this Paper provides an overview of the positions taken by the various courts. Part II of this Paper argues that such statements can never constitute defamation per se. Part III of this Paper discusses whether such a statement can be susceptible to a defamatory meaning and the public policy issues involved in recognizing that a cause of action may exist. Finally, Part IV offers a solution to the division that exists among the courts.

I. BACKGROUND

A. IMPUTATION OF HOMOSEXUALITY AS DEFAMATION PER SE

Words are actionable per se (or actionable on their face) if they are words from which damage flows as a natural consequence, and the court may take judicial notice of that fact.\textsuperscript{16} In such instances, the defamation is such that in its natural and proximate consequences it will necessarily injure the person concerned, in his personal, social, official, or business relations, so that legal injury may be presumed or implied merely from the fact of publication of the statement.\textsuperscript{17} In other words, damages are

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\item F.3d 57 (D.C. Cir. 1994); the rights of gays in employment, compare Gay Law Student Ass'n v. Pacific Tel. & Tel. Co., 595 P.2d 592 (Cal. 1979), with McConnell v. Anderson, 451 F.2d 193 (8th Cir. 1971); the rights of gays to marry, compare Baehr v. Lewin, 852 P.2d 55 (Haw. 1993) (prohibiting same sex marriages violates equal protection on the basis of gender), with Dean v. District of Columbia, 653 A.2d 307 (D.C. 1995) (marriage laws discriminating against gay men and lesbians are lawful); the right of gays to parent, compare Newsome v. Newsome, 256 S.E.2d 849 (N.C. App. 1979), with Bottoms v. Bottoms, 457 S.E.2d 102 (Va. 1995); and the rights of homosexuals to participate in the political process, compare Equality Foundation of Cincinnati v. City of Cincinnati, 54 F.3d 261 (6th Cir. 1995) (lesbians and gays do not constitute an identifiable class for purposes of constitutional review), with 1995 R.I. Pub. Laws 95-32 (banning discrimination on the basis of sexual orientation in credit, housing, employment and public accommodations); to identify just a few. Therefore, it is not surprising that the courts would be divided on the defamation issue as well.
\item 14. See discussion infra notes 16-33 and accompanying text.
\item 15. See discussion infra notes 34-47 and accompanying text. Special damages are those which, although a natural and probable consequence of the statement, are not assumed to be necessary or inevitable, and must be shown by allegation and proof.
\item 16. PROSSER ET AL., supra note 5, § 112, at 788.
\item 17. Id.
\end{itemize}
presumed to result from the statement and need not be pleaded. In most jurisdictions, defamation per se encompasses false statements that the plaintiff was (1) guilty of a crime, 18 (2) afflicted with a loathsome or communicable disease, 19 or (3) unchaste, 20 as well as false statements that (4) concerned the plaintiff’s ability to engage in his or her occupation or business. 21 While no court has found that imputations of homosexuality are defamatory per se because they inflict a person with a loathsome disease, several courts have adopted the other three positions.

Several courts have held that words imputing homosexuality were actionable as defamation per se because they hold one up to infamy and disgrace and impute the commission of the crime of sodomy. 22 In Buck

18. The original basis for the exception as to words imputing crime seems to have been that the plaintiff was thereby placed in danger of criminal prosecution. With the passage of time, the emphasis has shifted to the social ostracism involved. The imputation is actionable without proof of damages only if the crime is one of moral turpitude or involves major social disgrace. PROSSER ET AL., supra note 5, § 112, at 788-89. For example, accusations of assault and battery do not normally involve “moral turpitude.” However, an accusation that an individual beat his mother has been held to involve “moral turpitude.” Id. (citing Sipp v. Coleman, 179 Fed. 997 (D.N.J. 1910).)

19. The “loathsome disease” exception originally was based on the exclusion from society that would result. From the beginning, it was limited to cases of venereal disease, with a few instances of leprosy. Stuart M. Speiser, Charles F. Krause & Alfred W. Gans, THE AMERICAN LAW OF TORTS, § 29:65, at 530 (1991). The rule stated must, however, be limited to diseases that are held in some special repugnance, and that are lingering or chronic, so that they may be expected to last for a considerable period. RESTATEMENT (SECOND) OF TORTS § 572 cmt. c. Modern law has found that accusations that an individual is suffering from AIDS (Acquired Immune Deficiency Syndrome) constitute defamation per se. Snipes v. Mack, 381 S.E.2d 318 (Ga. Ct. App. 1989).

20. An imputation of unchastity to either sex is equivalent to a charge of the crime of adultery or fornication, which involves an infamous punishment or moral turpitude. PROSSER ET AL., supra note 5, § 112, at 793. For example, a speaker at a college convocation who, angered when a college student had forgotten to pick him up at the airport, stated that he had dreamt that the plaintiff was “breeding underneath the sink” with a male student. The court said that the plaintiff did not have to prove damages because the defendant’s statement falsely accused her of unchaste behavior. Wardlaw v. Peck, 318 S.E.2d 270, 275 (S.C. Ct. App. 1984).

21. This exception was limited to defamation that is incompatible with the proper conduct of the business, trade profession or office itself. The statement must be more than a mere general reflection upon the plaintiff’s character or qualities. RESTATEMENT (SECOND) OF TORTS § 573. For example, it would be defamatory per se to say that a school teacher has been guilty of improper conduct as to his pupils, Thompson v. Bridges, 273 S.W. 529 (Ky. 1925), but not to say that a gas company clerk has been consorting with prostitutes, since he might still be a satisfactory clerk.

22. See PROSSER ET AL., supra note 5, § 111, at 775 (“it is defamatory upon its face to say that the plaintiff . . . is . . . queer”).
v. Savage,\textsuperscript{23} for example, the court held that the statement to another man that the plaintiff was "queer" was slanderous per se because it imputed to plaintiff commission of the crime of sodomy, which was a penal offense under Texas law.\textsuperscript{24} This is still the law in Texas, although under its new Penal Code the offense of sodomy is no longer punishable by imprisonment.\textsuperscript{25} Similarly, in Mazart v. State,\textsuperscript{26} the court held that the plaintiffs were libeled per se by a university newspaper's publication of a letter that falsely suggested the plaintiffs were "members of the gay community," because society would naturally assume that the plaintiffs engaged in homosexual acts based on such an identification.\textsuperscript{27}

Other courts hold that such statements are defamatory per se because they imply unchastity or abnormal sexual behavior. Most of the reported cases deal with women who were called either a lesbian or a hermaphrodite. According to one court:

To state that one [a woman] carries on sexual conduct be it alone, with members of the opposite or similar sex

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\item \textsuperscript{23} 323 S.W.2d 363 (Tex. Civ. App. 1959).
\item \textsuperscript{24} Id. at 369 (citing TEX. CODE CRIM. PROC. ANN. art. 524; 33 AM. JUR. § 44, at 65; 27 TEX. JUR. §§ 5, 6, at 596).
\item \textsuperscript{25} Head v. Newton, 596 S.W.2d 209, 210 (Tex. Civ. App. 1980) (citing TEX. PENAL CODE ANN. § 21.06 (West 1974)).
\item \textsuperscript{26} 441 N.Y.S.2d 600 (N.Y. Ct. Cl. 1981).
\item \textsuperscript{27} Id. at 604. Deviant sexual intercourse and sodomy were crimes in the State of New York at the time the letter was published. See also Nowark v. Maguire, 255 N.Y.S.2d 318, 319 (N.Y. App. Div. 1964) (holding the statements "You are both queers. Even your wife said you were odd and she stuck with you," slanderous per se); Dally v. Orange County Publications, 497 N.Y.S.2d 947, 948 (N.Y. App. Div. 1986) ("the advertisement at issue imputes homosexual behavior to the plaintiff [and] ... constitutes libel per se"). Even though sodomy is no longer a crime in New York, a federal district court still found false imputations of homosexuality to constitute defamation per se. Murphy v. Pizarrio, 1995 WL 565990 *4 (S.D.N.Y. Sept. 22, 1995) ("Under New York Laws, ... a published statement imputing homosexuality to another is still defamatory per se and proof of special damages is not required.").
\item Another New York court apparently makes the distinction between status and conduct. In Stein v. Trager, 232 N.Y.S.2d 362 (N.Y. App. Div. 1962), the court recognized that a statute existed that punished "Crimes Against Nature." However, the court found no law that punished being a "homosexual." Thus, the court would not find the use of such a term slanderous per se. Id. at 364. The New York Court of Appeals has yet to resolve this apparent "split" in reasoning.
\item Other courts that did not recognize a per se rule did so because sodomy was not punishable in their states. See, e.g., Lehman v. Wellens, 1987 WL 267191, at *1 (Wisc. Ct. App. Apr. 8, 1987) ("[P]rivate homosexual conduct between consenting adults is not illegal in Wisconsin. In fact, Wisconsin prohibits discrimination on the basis of sexual orientation in the areas of housing and employment. Thus, ... calling a person a word which implies homosexual preference does not constitute slander per se.").
\end{itemize}
imputes to them a "want of chastity," which in the eyes and minds of their peers might and could subject them to disgrace, ridicule, damage to reputation, lacking virtue or reliability.  

The "unchastity" prong of defamation per se has traditionally applied only to the imputation of unchastity of a woman. This rule, however, has also been extended to apply to imputation of homosexual conduct on the part of a man. In Reject v. Liberation Publications, Inc., the court held that the plaintiff had stated a valid cause of action for defamation when the defendant had used and published an unauthorized photograph of the plaintiff picturing him in a sexually provocative position because it carried the false implication that he was lustful and promiscuous. The court noted that libelous words imputing sexual misconduct to a man have also been made defamatory per se.

Still, another court has held that such statements are defamatory per se when uttered in a situation that maligns the plaintiff in his business. While recognizing that not all statements of homosexuality constitute actionable defamation, the court in Qtone Broadcasting, Co. v. Musicradio of Maryland, Inc., held that an individual's statement to the plaintiff's business associates that the plaintiff was a homosexual and propositioned his male clients amounted to actionable defamation. The court explained that it was reasonable to conclude that the associates might believe the individual had specific facts to support his accusations and, thus, be deterred from associating with the plaintiff.


29. Written words charging a woman with unchastity are actionable per se, for the reason that they tended to injure her reputation and expose her to public ridicule, scorn, and contempt. Such an imputation, it was believed, excluded her from social interaction and all hopes of marriage. See Malone, 15 Ohio 319.


33. Id. at *21-22. According to the court, the business associates could infer from the comments that the plaintiff was a homosexual who had designs on him. Such comments went further than mere name calling. Id. at *21. See also Manale v. New Orleans Dep't of Police, 673 F.2d 122, 125 (5th Cir. 1982) (fellow police officer's sexual preference epithets to another officer in front of the unit constituted defamation per se).
B. IMPUTATION OF HOMOSEXUALITY MAY CONSTITUTE DEFAMATION: PROOF OF DAMAGES REQUIRED

Those courts that do not recognize that such statements are defamatory per se do, however, recognize that a cause of action may, under certain circumstances, exist. These courts require the plaintiff to prove special or actual damages.

Special damages, to be recoverable, must be of a material, or generally of a pecuniary, nature. They must result from the conduct of a person other than the defamer or the defamed, and such conduct must be directly caused by the defamation. Consequently, plaintiff must allege that he was specifically injured and must also prove the relationship between his injury and the slander alleged.

The loss of customers or business, or a particular contract or employment, or of an advantageous marriage is sufficient to make the slander actionable. The loss of friends and associates, however, is not enough to prove damages, unless their assistance was such that it could be considered a pecuniary benefit. Moreover, that the plaintiff may have suffered acute mental distress and serious physical illness as a result of the defamation, or has been put to expense to refute the defamatory statement is not enough to constitute actionable defamation. Although scathing and unwarranted characterizations can be hurtful, the law of defamation does not provide redress whenever feelings and sensibilities are offended. A "plaintiff must necessarily be expected and required to be hardened to a

34. For example, in Hayes v. Smith, 832 P.2d 1022 (Colo. Ct. App. 1991), the court noted that "there is no empirical evidence ... demonstrating that homosexuals are held by society in such poor esteem. Indeed, it appears that the community view toward homosexuals is mixed." Id. at 1025.

35. See Moricoli v. Schwartz, 361 N.E.2d 74 (Ill. 1977) ("in view of the changing temper of the times such presumed damage to one's reputation, from the type of utterances complained of in this record is insufficient to mandate creation of such a category"); accord Donovan v. Fiumara, 442 S.E.2d 572 (N.C. Ct. App. 1994).

36. PROSSER ET AL., supra note 5, § 92 at 806.

37. PROSSER ET AL., supra note 5, § 92 at 807 (describing proximate cause requirement).

38. Id. at 807.

39. PROSSER ET AL., supra note 5, § 112, at 794.

40. Id.

41. However, once the cause of action is established either through the nature of the defamation or by the proof of pecuniary loss, the plaintiff may recover for the injury to the plaintiff's reputation, his or her wounded feelings and humiliation, and his or her resulting physical illness or pain. In other words, such damages are insufficient in themselves to make the slander actionable, but once the cause of action is made out without them, they may be "tacked on" to it. PROSSER ET AL., supra note 5, § 112, at 794-95.

amount of rough language, and to acts that are definitely inconsiderate and unkind. 43

Most cases dealing with the issue of whether a plaintiff may recover damages for defamation when falsely called a homosexual do not go into detail to establish what constitutes proper damages. 44 The only case addressing the sufficiency of special damages is Key v. Ohio Department of Rehabilitation and Correction. 45 The court, however, defined special damages as those injuries that are the provable natural consequences of a defendant’s slander. 46 Thus, the plaintiff, who alleged that he was subjected to harassment and thereafter had difficulty interacting with others as a result of an allegation of homosexuality, had validly demonstrated that he had suffered an injury resulting from the defendant’s statements. 47

II. AN IMPUTATION OF HOMOSEXUALITY IS NOT DEFAMATORY PER SE

The actionability of words alleged to be defamatory per se depends on the specificity of the language used. To impute someone with the commission of a crime, the language should bear some reasonably close relationship to the legislative definition of a crime. 48 As a result, it seems as though the law of defamation makes some distinction between words that allege status and words that allege conduct.

For example, the words “crook” or “crooked” do not in and of themselves impute the commission of a crime sufficient to constitute slander per se. 49 In Cinquanta v. Burdett, the court held that the “words must impute conduct constituting a criminal offense chargeable by indictment or by information either at common law or by statute and of such a kind as to involve infamous punishment or moral turpitude conveying the idea of major social disgrace.” 50 Thus, the court reasoned, the word “crook,”

43. Logan v. Sears, Roebuck, & Co., 466 So. 2d 121, 124 (Ala. 1985) (“plaintiff cannot recover merely because he had his feelings hurt”).
44. These courts state the rule that proof of special damages is required to prevail in a suit for defamation. However, the courts do not establish what is sufficient to prove special damages. They merely remand the cases for the lower courts to determine whether special damages exist.
45. 598 N.E.2d 207 (Ohio Ct. Cl. 1990).
46. Id. at 209.
47. Id. The plaintiff, however, failed to prove any pecuniary damages. The Ohio court still, however, found sufficient special damages. Perhaps the court deviated from the majority rule regarding special damages because the plaintiff, a prison inmate, could not suffer economic harm while in jail.
50. Id. at 780 (emphasis added).
although derogatory, does not in and of itself impute the commission of a crime.\textsuperscript{51}

Using similar reasoning, the simple statement that an individual is "gay" or "bisexual" or a "lesbian" does not impute that individual with the commission of a crime. Sodomy statutes state, for example, that

[a] person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another.\textsuperscript{52}

Such statutes, however, neither by their terms nor by judicial gloss proscribe sexual preference or the status of being homosexual.\textsuperscript{53} In order to violate such statutes, the individual must actually \textit{commit} one of the specific acts coming within the purview of the statutes.\textsuperscript{54} Merely stating that an individual is a homosexual does not assert that the individual has engaged in any act.

The statutes do not, and cannot, punish the status of being homosexual.\textsuperscript{55} Moreover, a person's status alone is not enough to impute misconduct. "Undoubtedly, there are individuals with a homosexual identity as there are individuals with a heterosexual identity, who are not sexually active."\textsuperscript{56} Status is nothing more than a state of mind. Thus, accusing someone of being homosexual is nothing more than an accusation of being someone, not doing something.

Several courts have adopted similar reasoning in this context. In \textit{Moricoli v. Schwartz},\textsuperscript{57} the court found that while the defendant's reference to plaintiff as a "fag" could reasonably be interpreted to assert plaintiff was a homosexual, "[t]he statements complained of . . . do not, of themselves, import commission of a crime."\textsuperscript{58} Similarly, the Supreme Court of Rhode Island stated that

the mere use of the term in question [meaning coition by one man with another \textit{per os}] . . . unaccompanied by language or other circumstances which, fairly considered, would be understood as charging the plaintiff with having

\textsuperscript{51} \textit{Id.}
\textsuperscript{52} \textit{GA. CODE ANN. § 16-6-2} (1992).
\textsuperscript{54} \textit{Id.}
\textsuperscript{55} Cf. \textit{Robinson v. California}, 370 U.S. 660 (1962) (cannot punish or convict a defendant due to his "status" as a narcotics addict).
\textsuperscript{57} 361 N.E.2d 74 (Ill. App. Ct. 1977).
\textsuperscript{58} \textit{Id.} at 76.
actually committed an act of unnatural coition, is insufficient to support an action for slander.\textsuperscript{59}

While these courts did allow for the possibility that a cause of action may lie if the plaintiff proved actual and special damages, the one thing they had in common was that they refused to recognize a cause of action based on defamation per se. Courts should follow their reasoning.

Even if individuals assume that the plaintiff will engage in sodomy because he or she is a homosexual, the language at issue will still not constitute defamation. Words that impute merely a criminal design or intention are not actionable per se, since they do not impute a violation of law.\textsuperscript{60} For example, it has been stated that a complaint in slander setting forth words clearly charging a desire to commit a crime, such as adultery, but not charging the act itself, does not state facts sufficient to constitute a cause of action.\textsuperscript{61} The statement must actually impute a crime, in other words, it must accuse someone of having actually committed a crime.\textsuperscript{62} Thus, even if calling someone "gay" means that he desires to engage in or will engage in acts of sodomy at some future time, the courts should refuse to recognize an action for defamation per se.

At least one court has rejected the defamation per se category because sodomy was not a crime "deserving of social approbation" (or sometimes referred to as moral turpitude,\textsuperscript{63} a requirement for defamation per se).\textsuperscript{64} According to the court, other courts should use caution in applying a per se rule to imputations of homosexuality, since homosexuals do not belong in a category of persons deserving of social approbation, such as thieves, murderers, and prostitutes. When no empirical evidence exists in the record to demonstrate that homosexuals are held by society in such poor esteem as unequivocally to expose them to public hatred or contempt, the court was unwilling to apply a slander per se rule.\textsuperscript{65} Colorado no longer punishes the

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\item 60. 50 AM. JUR. 2D § 3, at 457.
\item 61. Simon v. Shearson Lehman Bros, Inc., 895 F.2d 1304 (11th Cir. 1990) (holding that a statement insinuating that the plaintiff had the intent to steal or embezzle funds was not slanderous per se).
\item 62. Id.
\item 64. See supra note 16.
\item 65. Hayes, 832 P.2d at 1025.
\end{itemize}
crime of sodomy. However, this argument cannot generally be made in jurisdictions that still punish the act of sodomy, because such statutes define sodomy as a crime of moral turpitude.66

Along the same line of reasoning as defamation based on alleged criminal conduct, a statement that an individual is gay does not imply unchaste behavior. Like words charging criminal behavior, the language used to impute someone with unchaste behavior must also be relatively specific. Calling a woman a “bitch” or a “slut” does not ordinarily and necessarily amount to a charge of adultery, fornication, or want of chastity.67 It has been held actionable per se to make a written charge of adultery,68 or a statement that a woman has forced another to commit fornication.69 In these cases, the actual statement is charging a woman with “unchaste conduct.” A statement that an individual is a “lesbian” or “gay” does not involve conduct at all; it merely imputes a state of mind.70

Finally, a statement imputing homosexuality does not affect an individual’s ability to perform any profession. Neither an individual’s sexual orientation nor his or her activities in the privacy of the bedroom

70. See discussion supra notes 37-39 and accompanying text. Using this line of reasoning, then, it would appear that a statement that another was engaging in homosexual activities may be actionable defamation in states that still criminalize sodomy. See, e.g., Morissette v. Beatte, 17 A.2d 464, 464 (R.I. 1941) (“the use of this vile term alone is not sufficient to subject this defendant to liability for slander unless it is clear that the term was used actually to impute the offense connoted thereby”). None of the reported cases, however, involve such an accusation; they merely involve a cause of action based on status alone. A false statement that a person has actually engaged in sodomy should be actionable per se in jurisdictions that make sodomy a crime. If an individual does charge another with the act of sodomy, and the state makes such acts criminal, then under the first category of defamation per se the allegation would be actionable. Whether this should be the result, however, goes not to the issue of defamation, but to the issue of whether sodomy laws should exist. That issue is an entirely different debate that goes beyond the scope of this paper. Sodomy laws should be eradicated altogether. For a discussion of this issue, see, e.g., Juli A. Morris, Challenging Sodomy Statutes: State Constitutional Protections for Sexual Privacy, 66 IND. L.J. 609 (1991).
influences the mental or physical ability to perform a job. In fact some of the nation's most successful people are homosexuals. Homosexuals, although successful employees in education, the military, and politics, have been discharged for their homosexuality.

III. A CAUSE OF ACTION FOR DEFAMATION MAY EXIST

Once a court has determined that a public statement that an individual is gay does not constitute defamation per se, the court will decide whether to recognize a cause of action contingent on the plaintiff proving actual and special damages. The arguments on both sides are quite compelling.

Some argue that if courts recognize that calling an individual a homosexual damages an individual's reputation, it is the same thing as saying that homosexuality is offensive or somehow shameful. Those who argue against taking such a position believe that language and ideas heavily influence culture, opinion and self-image. How people perceive homosexuals may be tied directly to how homosexuals are treated by the media and other social institutions. The argument is that as long as the law continues to reinforce the notion that being homosexual is "bad" or "offensive," then gay people will continue to suffer institutional and psychological oppression.

71. In fact, most homosexuals are given adequate performance ratings. It is usually not until after their sexual orientation has been discovered that their performance is questioned. See, e.g., supra notes 72-74.
73. For example, before Perry Watkins' dismissal from the military for being homosexual, he was evaluated by a superior officer as possessing an "outstanding professional attitude, integrity, and suitability for [military] assignment" and was "one of the most respected and trusted soldiers, both by his superiors and his subordinates." Watkins v. United States Army, 837 F.2d 1428 (9th Cir.), amended, 847 F.2d 1329 (9th Cir. 1988), aff'd on different grounds, 875 F.2d 699 (9th Cir. 1989) (en banc), cert. denied, 111 S. Ct. 384 (1990).
74. There are three openly gay people in the United States House of Representatives, one openly gay federal judge, and 133 openly gay elected officials in federal, state and municipal offices. GAY AND LESBIAN STATS: A POCKET GUIDE OF FACTS AND FIGURES 16 (Bennett L. Singer & David Deschampes eds., 1994).
75. Moretti, supra note 1, at 872 n.68.
76. Similar arguments have been made by leaders of the African-American community and other minority groups. David H. Pollack, Comment, Forced Out of the Closet: Sexual Orientation and the Legal Dilemma of "Outing", 46 U. MIAMI L. REV. 711, 732 (1992) (citing D. Marvin Jones, Rioters Come to Give Verdict of Their Own, MIAMI HERALD, May 3, 1992, at 6C). See also Moretti, supra note 1, at 872 n.68. These groups also argue that even if the courts do not affect social change per se, court action attracts media attention and makes the issues salient to the general public. See Gerald N. Rosenberg, THE HOLLOW HOPE 125-27 (1991).
Relying on statements by our courts and media to cure the problem, however, denies the extent to which homophobia exists in society and the rate at which social change occurs. To a large segment of society, calling an individual a homosexual injures reputation and generates disassociation. The time has not yet arrived where falsely stating that someone is gay or lesbian leaves his or her reputation intact. Removing homosexuality from the legal system’s list of “offensive” language may send a message to gays that the legal system is on their side, but it does not protect an individual, living in a bigoted community, whose livelihood is ruined by someone’s name calling.

For example, an individual may live in a small town where the citizens are biased against homosexuals. This individual owns a store and has been running it successfully. This all comes to an end one day when a neighbor falsely accuses the owner of being gay. Most individuals in the town stop coming to the store and the owner loses her livelihood. Removing homosexuality from the list of defamatory language does not protect this individual. She has no legal recourse to recover any of the damages she has suffered.

Depriving individuals of a tort remedy for defamation is an inappropriate and inefficient method for changing public attitudes about homosexuality. The role of tort law is to make the injured whole, not to change social mores. Relying on the courts to send the appropriate signal denies how difficult it is to change positive morality. Even after thirty years of civil
rights legislation, racism persists in our society.\textsuperscript{81} Attitudes are best changed in other ways, such as the enactment of antidiscriminatory legislation or through speech.\textsuperscript{82} Ruling otherwise would only offer a “quick fix” that would draw attention to the cause of homosexuals for a few days or weeks, but would not likely have a lasting impact.\textsuperscript{83} One court has recognized the precarious position of the legal system regarding whether to recognize a cause of action for defamation in such situations. In \textit{Donovan v. Fiumara},\textsuperscript{84} the court stated that as North Carolina progresses through the mid-1990’s, we are unable to rule the bare allegation that an individual is “gay” or “bisexual” constitutes today an accusation which, as a matter of law and absent any “extrinsic, explanatory facts,” \textit{per se} holds that individual up to “disgrace, ridicule or contempt.” Nonetheless, individuals such as plaintiffs who feel themselves falsely impugned as homosexual are not without remedy in today’s society. It remains for them to pursue an action based upon pleading and proof of special damages.\textsuperscript{85}

\section*{IV. Solution}

A middle ground is needed that serves a dual purpose. Holding that such statements are not defamatory \textit{per se} sends a signal from the legal community that homosexuality is neither “bad” or shameful. Requiring the proof of damages protects an individual’s right to a good reputation and the benefits that flow from them while simultaneously allowing a flexible

\begin{itemize}
  \item \textsuperscript{81} \textit{Id.} at 767.
  \item \textsuperscript{82} “As a society we have made a determination that the best way to combat bias and prejudice is through the exchange of ideas and speech . . . .” \textit{Ward v. Zelikovsky}, 643 A.2d 972, 985 (N.J. 1994). According to Rosenberg, courts are ineffective at producing social change. They must depend on actions of others for their decisions to be implemented. Accordingly, where there is local hostility to change, court orders will be ignored.
  \item American courts are not all-powerful institutions. They were designed with severe limitations and placed in a political system of divided powers. To ask them to produce significant social reform is to forget their history and ignore their constraints. It is to cloud our vision with a naive and romantic belief in the triumph of rights over politics.
  \item \textit{Rosenberg}, \textit{supra} note 76, at 336-43.
  \item \textsuperscript{83} In fact, according to Gerald Rosenberg, the majority of Americans do not even perceive court activity. Thus, the signal, if any, that is sent would not be seen by the majority of the populace. \textit{See Rosenberg}, \textit{supra} note 76, at 125-27.
  \item \textsuperscript{84} 442 S.E.2d 571 (N.C. Ct. App. 1994).
  \item \textsuperscript{85} \textit{Id.} at 580 (internal citations omitted).
\end{itemize}
standard of application. In other words, if such statements are uttered in a
community that does not find such statements offensive, the individual will
suffer no damages and, thus, have no cause of action. If such statements are
uttered in a community that does find such statements offensive, the
individual will receive the compensation afforded to her under law.

Courts are already beginning to recognize the societal change regarding
views toward homosexuality. In *Lehman v. Wellens,* 86 for example, the
court refused to recognize a cause of action for defamation when the
defendant called the plaintiff a "fag" or "faggot" in the course of an
argument. According to the court, "the incident would have remained what
it really was: a private name-calling incident between individuals" and the
public would not understand it to be anything else. 87

To argue that the court should never find defamation in such cases is
to deny the extent to which homophobia exists. "To deny the existence of
prejudice because acknowledging it seems politically incorrect does a
disservice to society . . . ." 88 As society "evolves" and recognizes that
homosexuality is not offensive, fewer cases will be brought to the courts
because fewer people will suffer pecuniary losses. This allows the law to
change gradually to serve the role of stimulating social change, while at the
same time doing what it is intended to do—protect people.

V. CONCLUSION

Though there is a split among the various jurisdictions over whether
false allegations of homosexuality constitute defamation, recognizing the
imputation of homosexuality as defamation per se and require some proof
of damages. 89 As the gay community becomes even more visible and
achieves greater political power, the stigma attached to homosexuality will
undoubtedly diminish considerably. However, until the time when accusa-
tions of homosexuality are no longer obviously or naturally harmful, courts
should refrain from taking the politically correct position and should
recognize that a cause of action for defamation may exist. Eventually, such
terms will become so "watered down by overuse" 90 that listeners will
understand them to be nothing more than mere "name-calling." 91

87. *Id.* at *1.
90. Stevens v. Tillman, 855 F.2d 389, 402 (7th Cir. 1988), *cert. denied*, 489 U.S. 1065
91. See *supra* note 6.