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**GRAY CLOUD OBSCURES THE RAINBOW:
WHY HOMOSEXUALITY AS DEFAMATION
CONTRADICTS NEW JERSEY PUBLIC
POLICY TO COMBAT HOMOPHOBIA
AND PROMOTE EQUAL PROTECTION**

*Rachel M. Wrightson**

Homophobia is far too complex a phenomenon to have a singular explanation. Gay people are stigmatized by several sources, including religion, social mores, and . . . the law. Eliminating one cause of stigmatization among many may not be a panacea but would be a step in the right direction.

— *Christopher R. Leslie*¹

INTRODUCTION

Contemporary defamation law has been characterized as plagued with infirmities and ripe for reform.² Modern attempts at

* Brooklyn Law School Class of 2003; B.A., Northwestern University, 1998. The author would like to thank Professor Nan Hunter and the staff of the *Journal of Law and Policy*. She also acknowledges Eric D. Sherman for his generous contribution of sources cited herein.

¹ Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by 'Unenforced' Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103, 105 (2000).

² See Robert M. Ackerman, *Bringing Coherence to Defamation Law Through Uniform Legislation: The Search for an Elegant Solution*, 72 N.C. L. REV. 291 (1994). According to Ackerman, "one of the most uncertain areas of modern American jurisprudence, the law of defamation remains largely a mystery to commentators and practitioners alike." *Id.* at 291. He further stated, "the law of defamation is in disarray. It is confusing. It is unclear." *Id.*

clarification have unabashedly begun with the assumption that the current framework for the law of defamation and libel “isn’t working well for anyone.”³ In the context of such confusion, it is not surprising that the question of whether calling someone gay is defamatory has not been uniformly analyzed or answered by the courts.⁴ In *Gray v. Press Communications, LLC*,⁵ the Appellate Division of New Jersey determined that an imputation of homosexuality is reasonably susceptible to a defamatory meaning.⁶ This comment combines an analysis of relevant legislation and caselaw to conclude that *Gray* was wrongly decided. New Jersey’s current legislation and prior court rulings do not support the conclusion that reference to an individual as a homosexual lowers the community’s estimation of the individual’s reputation.⁷ Additionally, *Gray* is inconsistent with

at 293. Ackerman’s article reviews the “infirmities that plague contemporary defamation law in the United States” and sets forth an analysis of Uniform Correction or Clarification of Defamation Act as proposed and withdrawn in 1993. *Id.* at 294.

³ Robert J. Hawley, *Libel Litigation: An Overview of the Uniform Defamation Act*, PRAC. LAW INST. G4-3883, at 645 (1992). Hawley’s article reviews a report promulgated by the National Conference of Commissioners on Uniform State Laws regarding the proposed Uniform Defamation Act of 1989. *Id.* The report set forth a comprehensive model Libel Reform Act, designed to “encourage the dissemination of truth in the public realm and facilitate efficient resolution of defamation disputes.” *Id.*

⁴ See Randy M. Fogle, *Is Calling Someone “Gay” Defamatory?: The Meaning of Reputation, Community Mores, Gay Rights, and Free Speech*, 3 LAW & SEX 165, 165 (1993) (noting that “[c]ourts have analyzed the issue differently and have reached different results”).

⁵ 775 A.2d 678 (N.J. Super. Ct. App. Div., 2001), *cert. denied*, 788 A.2d 774 (N.J. 2001). The appellate division reversed the trial court’s dismissal of plaintiff’s defamation suit and found that a radio call-in show host’s characterization of a former host of children’s shows as “the lesbian cowgirl” was reasonably susceptible of a defamatory meaning. *Id.* at 684.

⁶ *Id.*

⁷ New Jersey’s legislature has enacted a number of laws that provide legal protection for the rights of gays and lesbians in the state, and New Jersey courts have broadly construed many of the state laws to provide redress to the lesbian, gay, bi-sexual and transgender individuals. See *infra* Part II (discussing and analyzing a sampling of these enactments and cases).

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the New Jersey court system's progressive approach to protecting the rights of gays and lesbians, and ultimately has deleterious effects upon the state's concerted effort to promote equal protection of gays and lesbians.

This comment focuses on the extent to which defamation law purportedly reflects community standards and on the judge's role in a defamation suit to either condone or condemn societal disapprobation of allegedly defamatory characteristics.⁸ Part I reviews the elements of defamation law, the pleading requirements in New Jersey for a defamation claim, and examines New Jersey legislation and caselaw relevant to issues of sexual orientation. Part II places *Gray* in the context of statutory language and caselaw and concludes that *Gray* was wrongly decided because it is inconsistent with the state's position on sexual orientation and the law. This section also argues that *Gray* has a deleterious effect upon equal protection of gays and lesbians in society and perpetuates homophobia. Part III proposes a model for how the court should have examined the issue in *Gray* to avoid the harmful effects of allowing an imputation of homosexuality to be actionable in a court of law.

I. DEFAMATION LAW AND IMPUTATIONS OF HOMOSEXUALITY AS DEFAMATORY

Defamation has long been viewed as an amorphous, if not elusive, tort.⁹ Throughout history, the legal boundaries of defamation law have changed, and conclusions about whether

⁸ See Lyrissa Barnett Lidksy, *Defamation, Reputation and the Myth of Community*, 71 WASH. L. REV. 1, 17-20 (1996). Lidksy first notes that "the prevailing American rule asks whether the statement was defamatory in the eyes of a substantial and respectable minority [in the community]." *Id.* at 17. She also states that "[i]dentifying what is respectable encourages judges to make normative judgments about the desirability of the beliefs of subgroups within the general community." *Id.* at 20. See also *infra* Part I.D (explaining judicial discretion in defamation actions).

⁹ PROSSER & KEETON, *THE LAW OF TORTS* 771-72 (5th ed. 1984). Dean Prosser began his discussion of the law of defamation by proposing that "there is a great deal of the law of defamation which makes no sense." *Id.* at 771-72.

allegedly defamatory statements are actionable have varied in time and place.¹⁰ In certain instances, statements that may have been actionable as defamatory per se in one generation or context are no longer regarded as defamatory at all.¹¹ For example, statements suggesting that an individual is a fascist,¹² Communist,¹³ or a racist¹⁴ were once actionable but are now properly dismissed as non-defamatory. The notion that religious,¹⁵ racial, or ethnic labels are susceptible of a defamatory

¹⁰ Thomas F. Daly, *Defamation*, 19 AM. JUR. TRIALS § 2 (1972); *see also* Fogle, *supra* note 4, at 172 (noting, “the notion that what is considered defamatory is continuously evolving has been widely recognized”).

¹¹ MICHAEL MAYER, *THE LIBEL REVOLUTION: A NEW LOOK AT DEFAMATION AND PRIVACY* xvi (1987) (noting that “the categories [of defamation] change as yesterday’s derogatory phrase becomes today’s innocuous aside or even compliment”).

¹² *Buckley v. Littell*, 539 F.2d 882 (2d Cir. 1976) (finding a written statement asserting that a periodical and a newspaper column frequently print news items and interpretations picked up from openly fascist journals was not libelous, since issue of what constitutes an “openly fascist” journal is matter of opinion).

¹³ *Grant v. Reader’s Digest Ass’n*, 151 F.2d 733 (2d Cir. 1945) (calling a lawyer a communist sympathizer was defamatory); *Toomey v. Farley*, 156 N.Y.S.2d 840, 845 (1956) (finding that to charge one with being a communist or with having communist affiliations and sympathies is defamatory, justifying an action for libel); *but see* PETER F. CARTER-RUCK & RICHARD WALKER, *CARTER-RUCK ON LIBEL AND SLANDER* 37 (3d ed. 1985) (hereinafter *CARTER-RUCK*) (noting that “it is probable now that such a statement [of communism] would be held to be defamatory. . . . [I]t is essential to consider the attitude of the country, as a whole and at the time, to the particular political party of which it is alleged the plaintiff is a member.”); *see also* MARK A. FRANKLIN ET. AL., *MASS MEDIA LAW* 302 (6th ed. 2000) (stating that “‘Communist’ seems to have gone from being nondefamatory before World War II to being defamatory during the McCarthy era and the Cold War, and perhaps now to being nondefamatory again”).

¹⁴ *See, e.g., Stevens v. Tillman*, 855 F.2d 394, 402 (7th Cir. 1988) (“Accusations of racism no longer are ‘obviously and naturally harmful.’ The word has been watered down by overuse, becoming common coin in political discourse.”). For a general examination of categories, *see* MAYER, *supra* note 11, at 33-38.

¹⁵ *See* *CARTER-RUCK*, *supra* note 13, at 37 (noting that calling someone Roman Catholic during the reign of Charles II was actionable for defamation,

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meaning has also been largely rejected.¹⁶ For example, in the early 1900s false statements that a white person was African-American were regularly deemed defamatory.¹⁷ Although there is no caselaw expressly overruling these cases, such suits have largely ceased.¹⁸ Modern opinions assume that such an allegation is not defamatory at all.¹⁹

One commentator interpreted dismissal of these actions as judicial attempts to avoid sanctioning discriminatory attitudes.²⁰ Another unequivocally stated that the range of statements courts have labeled as defamatory proves that defamation law is founded on social prejudice.²¹ At a minimum, the fact that judges dispose of some defamation claims, rather than submitting questions to a jury, “reflect a belief that what is actionable as defamation is

but was not actionable under the reign of James I, and it would not be actionable today).

¹⁶ See, e.g., *Bradshaw v. Swagerty*, 563 P.2d 511, 514 (Kan. Ct. App. 1977) (“The term ‘nigger’ is one of insult, abuse and belittlement harking back to slavery days. Its use is resented, and rightly so. It nevertheless is not within any category recognized as slanderous per se.”); *Arturi v. Tiebie*, 179 A.2d 539, 543 (N.J. Super. Ct. App. Div. 1962) (Sullivan, J.A.D., concurring) (determining that reference to plaintiff as a “dirty guinea,” a slang expression for an Italian immigrant, though crude and objectionable, was not defamatory).

¹⁷ See, e.g., *Stulz v. Ga. Ry. & Elec. Co.*, 242 F. 794 (6th Cir. 1917); *Morris v. State*, 160 S.W. 387 (Ark. 1913); *Jones v. R.L. Polk & Co.*, 67 So. 577 (Ala. 1915); *May v. Shreveport Traction Co.*, 53 So. 671 (La. 1910); *Mopsikov v. Cook*, 95 S.E. 426 (Va. 1918); *Spencer v. Looney*, 82 S.E. 745 (Va. 1914).

¹⁸ For further discussion of this phenomenon, see *Lidsky*, *supra* note 8, at 29-33.

¹⁹ See *Thomason v. Times-Journal, Inc.*, 379 S.E.2d 551 (Ga. Ct. App. 1989) (refusing to concede that plaintiff may have suffered from social prejudice of others where plaintiff sued over the publication of a false obituary that gave a funeral home listing that catered to a primarily “black clientel [sic]”); see also *Bradshaw*, 563 P.2d at 514 (finding that the term “nigger” was not defamatory per se and dismissing claims where plaintiff had not pled special damages in accordance with state law); *Lidsky*, *supra* note 8, at 9.

²⁰ *Fogle*, *supra* note 4, at 174 (“For example, the law of defamation may ignore racism in our society because to do otherwise would sanction it.”).

²¹ *Lidsky*, *supra* note 8, at 28.

freighted with policy considerations.”²² This evolution in the categories of defamation illustrates that contemporary courts may properly dismiss even those claims that may have been actionable in prior eras.²³ To a certain extent, a modern court sitting in judgment of a defamation suit is entitled to pick and choose which cases to entertain and which to dismiss.²⁴ Courts are not required to accept social prejudices as they find them.²⁵

A. Common Law and Constitutional Components of Defamation

Defamation is founded in the twin torts of libel and slander, both designed to effectuate society’s “pervasive and strong interest in preventing and redressing attacks upon reputation.”²⁶ At common law, “[t]he gravamen or gist of an action for defamation is damage to the plaintiff’s reputation.”²⁷ The law “is not concerned with the plaintiff’s own humiliation, wrath or sorrow,”²⁸ and “the damages sustained by a defamed plaintiff are not to his personal feelings, but rather to those losses which accompany an interference with one’s social, business, religious or familial relations.”²⁹ A cause of action cannot be sustained simply because one feels insulted or angered by an epithet or

²² FRANKLIN, *supra* note 13, at 305.

²³ *See supra* notes 10-18 and accompanying text (detailing the evolution of the categories of defamatory terms).

²⁴ Lidsky, *supra* note 8, at 34.

²⁵ *Id.*

²⁶ *Rosenblatt v. Baer*, 383 U.S. 75, 87-88 (1966) (holding that in order to recover for damages allegedly sustained as a result of a news column allegedly imputing mismanagement on the part of a public official, the plaintiff was required to show that the asserted implication was specifically “of and concerning” him, and jury instructions permitting him to recover upon a finding merely that he was one of a small group, only some of whom were implicated, were erroneous).

²⁷ 50 AM. JUR. 2D *Libel and Slander* § 2 (1995).

²⁸ PROSSER & KEETON, *supra* note 9, at 771.

²⁹ *Id.* at 843.

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statement.³⁰

As a rule, the common law has not attempted to define reputation,³¹ but substantial effort has been expended to articulate the outlines of this elusive concept.³² The harm inflicted upon one's reputation has been characterized as "an impairment of a 'relational' interest, *i.e.*, denigrat[ing] the opinion which others in the community have of the plaintiff and invad[ing] the plaintiff's interest in his . . . good name."³³ Put another way, "[d]efamation 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 about him."³⁴ It is commonly understood that a defamation action affords a remedy for damage to one's general, public image.³⁵

Further, the generally accepted definition is that "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

³⁰ *Id.*

³¹ See generally *Developments in the Law—Defamation*, 69 HARV. L. REV. 875, 877 (1956).

³² See generally Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691 (1986). The author sketches three distinct concepts of reputation that the common law of defamation has at various times in its history attempted to protect—reputation as property, as honor, and as dignity—and explores how each weighs in the balance against the constitutional interest in freedom of expression. *Id.*

³³ *Lumberman's Mut. Cas. Co. v. United Serv. Auto Assoc.*, 528 A.2d 64, 67 (N.J. Super. Ct. App. Div. 1987), *construing* HARPER & JAMES & GRAY, *LAW OF TORTS* § 5.1 (2d ed. 1986). The court further noted that "the mere fact that the plaintiff's feelings and sensibilities have been offended is not enough to create a cause of action for defamation." *Id.*

³⁴ PROSSER & KEETON, *supra* note 9, at 773.

³⁵ See *Dairy Stores, Inc. v. Sentinel Pub. Co., Inc.*, 516 A.2d 220, 224 (N.J. 1996) (comparing defamation to an action for product disparagement and noting that "defamation . . . affords a remedy for damage to one's reputation" while the latter was characterized as "an offshoot of the cause of action for interference with contractual relations, such as sales to a prospective buyer") (internal citations omitted). This assertion was confirmed by New Jersey's highest court. *Id.*

with him or her.”³⁶ To be defamatory, therefore, a statement must not only be reasonably calculated to injure the victim’s reputation³⁷ but must tend to lower the plaintiff in the opinion of respectable members of the community.³⁸ Therefore, to establish whether a statement is defamatory, the decision-maker must first examine the community in whose opinion the plaintiff claims to have been diminished.³⁹ The determination of what constitutes the community in which a statement is made is an essential factor in assessing defamation liability.⁴⁰ Although the process of defining the boundaries of a “community” and the distillation of the values held by “respectable members” therein is difficult, it involves crucial public policy decisions that, when not directly addressed by the courts, brings a lack of clarity into defamation law.⁴¹

In the United States, defamation law is governed by a balancing test whereby common law theories of a right to protect one’s reputation are measured against constitutional protection of the First Amendment exercise of free speech.⁴² Because of the strong interest in uninhibited debate on public issues, courts now recognize that the First Amendment protects statements made concerning public officials or public figures, unless those

³⁶ RESTATEMENT (SECOND) OF TORTS § 559 (1977).

³⁷ See Daly, *supra* note 10, at § 2.

³⁸ 50 AM. JUR. 2D *Libel and Slander* § 1.

³⁹ Lidsky, *supra* note 8, at 7.

⁴⁰ *Id.*

⁴¹ *Id.* at 7-9 (suggesting that because defamation plays an important role in setting the boundaries of community and choosing between competing values, “the determination of community values and community identity allows courts to advance policy goals by constructing by fiat a ‘respectable’ community that shares little in common with the actual community”). Lidsky further argues that instead of constructing an artificial community through the defamatoriness determination, courts should make explicit what are essentially public policy choices. *Id.*

⁴² *New York Times v. Sullivan*, 376 U.S. 254 (1964). The Supreme Court first articulated this rule in 1964. *Id.* New Jersey courts have reaffirmed this holding. See, e.g., *Lynch v. N.J. Educ. Ass’n*, 735 A.2d 1129, 1135-37 (N.J. 1999); *Brill v. Guardian Life Ins. Co. of Am.*, 666 A.2d 146, 152-55 (N.J. 1995).

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statements are made with knowledge that they were false or with reckless disregard of whether they were false.⁴³ With respect to public figures, the burden of proof in defamation actions is higher than the “preponderance of the evidence” standard in other civil actions.⁴⁴ To satisfy this higher standard, “a plaintiff must show by clear and convincing evidence that the publisher either knew that the statement was false or published with reckless disregard for the truth.”⁴⁵ This judicially imposed standard requires that courts confronted with defamation suits brought by public figures apply stricter scrutiny than required in other civil actions.⁴⁶ This higher legal bar functions as an additional hurdle for plaintiffs in defamation actions and is an important means of protecting and encouraging free speech.⁴⁷

B. Pleading Defamation in New Jersey: Standards and Requirements

Although the basic elements of defamation remain consistent from state to state, there are many variations of what constitutes sufficient pleading and proof of each element.⁴⁸ In New Jersey,

⁴³ *New York Times*, 376 U.S. at 279-80.

⁴⁴ N.J. STAT. ANN. § 2C:1-13(f) (West 2002) (“In any civil action commenced pursuant to any provision of this code the burden of proof shall be by a preponderance of the evidence.”).

⁴⁵ *Gray v. Press Communications, LLC*, 775 A.2d 678, 684 (N.J. Super. Ct. App. Div. 2001), *citing* *Lynch v. N.J. Educ. Ass’n*, 735 A.2d 1129 (N.J. 1999).

⁴⁶ GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 55 (1996) (“In a typical civil case, a party must prove the elements of his claim by a preponderance of the evidence.”).

⁴⁷ For a thorough analysis of the potential “chilling effect” of defamation law upon First Amendment rights and proposals for reform, *see* David Boies, *The Chilling Effect of Libel Defamation Costs: The Problem and Possible Solution*, 39 ST. LOUIS U. L.J. 1207 (1995).

⁴⁸ *See generally* James R. Pielemeier, *Constitutional Limitations on Choice of Law: The Special Case of Multistate Defamation*, 133 U. PA. L. REV. 381, 384-92 (1985). Pielemeier reviews the variations in state defamation laws and examines the constitutional questions that arise in selecting the applicable law in multi-state publication and litigation. *Id.* His

principles of common law along with Constitution-based decisions of the United States Supreme Court govern libel and slander.⁴⁹ Apart from the statute of limitations, only three statutory provisions deal expressly with the law of defamation in New Jersey.⁵⁰ One provision delineates the nature and extent of the privilege attaching to “the publication of judicial or other proceedings;”⁵¹ a second limits the amount of damages recoverable from print media defendants in the absence of malice;⁵² and a third relieves a broadcaster from liability for statements made by a candidate for public office under specified circumstances.⁵³

In New Jersey, plaintiffs are advised to consider a number of factors when drafting a complaint for defamation.⁵⁴ Among those items are residence of the plaintiff and other jurisdictional facts, the making of the alleged defamatory statement, the publication of the defamatory statement, the inducement, when the statement

article ultimately proposes a model for the choice of law in defamation actions. *Id.* at 434-40.

⁴⁹ Introductory Comments, 3 N.J. PL. & PR. FORMS § 23:1 (1997). The Supreme Court subjected the law of defamation to the regulation of the First Amendment for the first time in 1964. *See New York Times v. Sullivan*, 376 U.S. 254 (1964).

⁵⁰ N.J. STAT. ANN. § 2A:14-3 (West 2002). The statute requires that an action for defamation be commenced within one year of publication. *Id.*

⁵¹ N.J. STAT. ANN. § 2A:43-1 (West 2002). Newspapers may publish official statements by police department heads and county prosecutors on investigations in progress or ones completed by them that are accepted in good faith by the publisher. The privileged character of the statements will be a good defense to any libel action, unless malice in fact is shown. *Id.*

⁵² N.J. STAT. ANN. § 2A:43-2 (West 2002). Only actual damages may be recovered from print media defendants in the absence of malice in fact or failure to retract the libelous charge publicly and within a reasonable time after having been requested to do so by plaintiff. *Id.*

⁵³ N.J. STAT. ANN. § 2A:43-3 (West 2002) A broadcaster is relieved from liability for statements made by a legally qualified candidate for public office when the broadcast is made under provisions of federal law denying the broadcaster the power to censor. *Id.*

⁵⁴ *See* 3 N.J. PL. & PR. FORMS, *Checklist—Matters to Consider When Drafting Complaint for Defamation*, § 23:2 (West 1997).

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complained of is not actionable per se,⁵⁵ and an averment of general damages resulting from the publication complained of or an averment of special damages, when the matter complained of is not defamatory per se.⁵⁶ In short, a plaintiff is required to articulate his or her claim by specifying the statement claimed to be defamatory, the context and communication of the statement, an explanation of how the plaintiff was affected by the statement, and the damage inflicted by the statement.⁵⁷

Like many jurisdictions, New Jersey applies a higher burden of proof when the plaintiff in a defamation suit is a public figure.⁵⁸ In these instances, there must be proof “that the statement was made with actual malice, that is, with knowledge that the statement was false or with reckless disregard of whether or not it was false.”⁵⁹ This strict standard applies because the public has an interest in obtaining knowledge about public figures, and thus such figures should expect information of their lives and activities to be broadly disseminated.⁶⁰

The threshold issue in a defamation case is whether the statement at issue is reasonably susceptible of a defamatory meaning.⁶¹ It is for the court to determine whether a

⁵⁵ In such a case, the actionable character of the defamatory statement and the manner in which it affects the plaintiff should be shown. *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ The Supreme Court decision in *New York Times v. Sullivan* is binding on all lower courts and has been applied by state courts to require that public plaintiffs meet the higher pleading and burden of proof standards established therein. *See, e.g., Gray v. Press Communications, LLC*, 775 A.2d 678, 684 (N.J. Super. Ct App. Div. 2001). *See generally* Francis M. Dougherty, Annotation, *Defamation: Application of New York Times and Related Standards to Nonmedia Defendants*, 38 A.L.R. 4th 1114 (1985); *see also* 3 N.J. PL. & PR. FORMS, *supra* note 54, at § 23:9.

⁵⁹ *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964).

⁶⁰ *Id.* at 272-73, *quoting* *Sweeney v. Patterson*, 128 F.2d 457, 458 (1942) (“The interest of the public [in cases that impose liability for reports of conduct of officials] outweighs the interest of appellant or any other individual. The protection of the public requires not merely discussion, but information.”).

⁶¹ *See Gray*, 775 A.2d at 683, *citing* *Decker v. Princeton Packet*, 561

communication is capable of bearing a particular meaning.⁶² To make this determination, statements are construed together with their context.⁶³ If a published statement has only one meaning and that meaning is defamatory, the statement is libelous as a matter of law.⁶⁴ Conversely, if the statement has only a non-defamatory meaning, it cannot be considered libelous, thereby justifying dismissal of the action.⁶⁵ In cases, however, where the statement is capable of being assigned more than one meaning, one of which is defamatory and another that is not, the question of whether its content is defamatory is resolved by the trier of fact.⁶⁶

These basic rules seem straightforward at first glance, but in fact there are “substantial hurdles” to successfully litigating a defamation suit.⁶⁷ Specifically, litigation is complicated when a defendant moves for summary judgment prior to trial. When a defendant seeks summary judgment on the ground that a statement is not defamatory, the question is presented to the

A.2d 1122, 1125 (1989); *see also* 3 N.J. PL. & PR. FORMS § 23 *supra* note 54.

⁶² *See Gray*, 775 A.2d at 683 (“Initially, the question is one of law to be decided by the court.”). *See also* RESTATEMENT, *supra* note 36, § 616. (“The court determines what items of harm suffered by the plaintiff as the result of the publication of the defamatory matter may be considered by the jury in assessing damages; the jury determines the amount of damages to be awarded for those items.”). Additionally, “the meaning of a communication is that which the recipient correctly, or mistakenly but reasonably, understands that it was intended to express.” *Id.* § 563.

⁶³ *Id.* § 616 cmt. d. Comment d. notes the following:

In determining the meaning of a communication, words, whether written or spoken, are to be construed together with their context. Words which standing alone may be reasonably understood as defamatory may be so explained or qualified by their context as to make such an interpretation unreasonable. So too, words which alone are innocent may in their context clearly be capable of a defamatory meaning and may be so understood.

Id.

⁶⁴ *Id.*

⁶⁵ *Romaine v. Kallinger*, 537 A.2d 284, 290 (N.J. 1988).

⁶⁶ *Id.* at 290-91.

⁶⁷ *Boies*, *supra* note 47, at 1297.

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judge as a preliminary concern.⁶⁸ The judge, therefore, is the initial arbiter to determine if a jury is required to settle a dispute. Practically speaking, this means that a judge will decide whether it is permissible for a jury to attach a defamatory meaning to a given statement.⁶⁹ The discretionary element of a potentially defamatory meaning is not left entirely to the jury under these circumstances, because a judge decides whether a question may be submitted to the jury in the first instance.⁷⁰

C. Imputations of Homosexuality as Defamation

The history of imputations of homosexuality as defamatory has been exhaustively explored elsewhere.⁷¹ For the purposes of this comment, a sampling of cases are used to illustrate the conclusions reached in various jurisdictions.⁷² A number of state courts have held that an imputation of homosexuality is

⁶⁸ See *infra* Part I.B (noting that a threshold issue in any defamation suit is whether the statements can be reasonably construed as defamatory and pointing out the procedural aspects of a motion for summary judgment).

⁶⁹ Judges determine whether an allegedly defamatory statement lowers the plaintiff in the eyes of respectable people. See *supra* Part I.A. This determination has been characterized as “an open invitation to judges to assess which subgroups . . . are or are not worthy of the law’s attention . . . the judge can brand a community as unworthy of respect by either denying its existence or by pronouncing it simply too antisocial for its values to be countenanced.” Lidsky, *supra* note 8, at 20.

⁷⁰ Brill v. Guardian Life Ins. Co. of Am., 666 A.2d 146, 156-7 (N.J. 1995). In deciding whether to grant summary judgment, the motion judge must consider whether the evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party. In a defamation action, the threshold issue is whether the language used is reasonably susceptible of a defamatory meaning. *Id.* See also Decker v. Princeton Packet, 561 A.2d 1122, 1125 (N.J. 1989) (“Initially, the question is one of law to be decided by the court.”).

⁷¹ See generally Janet Boeth James, Annotation, *Imputation of Homosexuality as Defamation*, 3 A.L.R. 4th 752 (1981).

⁷² See *infra* notes 73, 74; see also *infra* Part III (analyzing a defamation case from New South Wales, Australia and discussing the relative merits of the approach employed).

slandorous per se, actionable without proof of special damages.⁷³ Alternatively, some courts have found such accusations actionable as defamatory per quod and have required proof of special damages.⁷⁴ Although the United States Supreme Court has not directly addressed this issue, the question of homosexuality as defamation was tangentially addressed in at least two instances.⁷⁵ Additionally, at least one court has found that to be called anti-homosexual is defamatory.⁷⁶ In short, there is no consensus on the issue of whether an imputation of homosexuality is actionable

⁷³ Defamation per se is “a statement that is defamatory in and of itself and is not capable of an innocent meaning.” BLACK’S LAW DICTIONARY 427 (7th ed. 1999). *See, e.g.*, *Nazeri v. Missouri Valley College*, 860 S.W.2d 303 (Mo. 1993); *Nowark v. Maguire*, 255 N.Y.S.2d 318 (2d Dept. 1964); *Buck v. Savage*, 323 S.W.2d 363 (Tex. Ct. App. 1959).

⁷⁴ Defamation per quod is a statement that “either (1) is not apparent but is proved by extrinsic evidence showing its injurious meaning or (2) is apparent but is not a statement that is actionable per se.” BLACK’S LAW DICTIONARY 427 (7th ed. 1999). *See, e.g.*, *Moricoli v. Schwartz*, 361 N.E.2d 74 (Ill. App. Ct. 1977); *Bohdan v. Alltool Mtg. Co.*, 411 N.W.2d 902 (Minn. Ct. App. 1987); *Morrisette v. Beatte*, 17 A.2d 464 (R.I. 1941).

⁷⁵ *Linn v. United Plant Guard Workers*, 383 U.S. 53, 65 n.7 (1966) (declining to limit liability in labor disputes to “‘grave’ defamations—those which accuse the defamed person of having engaged in criminal, homosexual, treasonable or other infamous conduct”); *Paul v. Davis*, 424 U.S. 693 (1976) (Brennan, J., dissenting). Brennan argued that the majority opinion was too broad because it held that no due process security would exist in a statute constituting a commission to conduct ex parte trials of allegedly defamatory statements “so long as the statement was limited to the public condemnation and branding of a person as a Communist, a traitor, an ‘active murderer,’ a homosexual, or any other mark that ‘merely’ carries social opprobrium.” *Id.* at 721.

⁷⁶ *Vail v. Plain Dealer Publ’g Co.*, 649 N.E.2d 182 (Ohio 1995). The Ohio Court of Appeals found that the plaintiff, a candidate for state senator, stated actionable claims for defamation and intentional infliction of emotional distress based on a newspaper columnist’s description of her as “dislik[ing] homosexuals,” of “engag[ing] in an ‘anti-homosexual diatribe,’” and of “foster[ing] homophobia” in an attempt to be elected. *Id.* at 184. The Ohio Supreme Court reversed, finding that the columnist’s statements were protected under the Ohio Constitution because they represented a point of view that was “obviously subjective” and that “the ordinary reader would accept [the] column as opinion and not as fact.” *Id.* at 184, 186.

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as defamatory.

D. Judicial Discretion in Defamation Actions

In 1986, the Supreme Court ruled again that public figures bringing suit for libel must provide clear and convincing evidence of actual malice to avoid defendant's summary judgment.⁷⁷ Thus, the "clear and convincing" evidentiary standard must be applied at the appellate as well as the trial level. In light of the necessary balance between society's interest in protecting individuals and the interest in promoting free speech under the First Amendment, the bar for a defamation claim is necessarily high and "because non-meritorious defamation claims have a tendency to compromise or chill the exercise of First Amendment values . . . a court should not be reluctant to grant summary judgment if the defamation claim lacks merit."⁷⁸ The extent to which defamation law has a chilling effect upon the First Amendment cannot be determined with any mathematical certainty. However, at least one leading commentator was willing to declare that the effect is "significant."⁷⁹ The First Amendment balancing test, therefore, is rightfully considered alive and well in the courts.⁸⁰

Considering the impact upon the media, allowing homosexuality to remain on the list of legally offensive terms may have the practical effect of deterring press coverage of the

⁷⁷ *Anderson v. Liberty Lobby*, 477 U.S. 242, 257 (1986).

⁷⁸ *Gray v. Press Communications, LLC*, 775 A.2d 678, 684-85 (N.J. Super. Ct. App. Div. 2001).

⁷⁹ Boies, *supra* note 47, at 1208.

⁸⁰ *Liberty Lobby*, 477 U.S. at 255-56.

[W]hether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case. This is true at both the directed verdict and summary judgment stages . . . where the factual dispute concerns actual malice . . . [T]he appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not.

Id.

gay rights movement.⁸¹ In communities that have passed legislation indicating an acceptance of homosexuality, the media could justifiably conclude that threat of defamation suits arising out of media coverage of gay events is lessened.⁸² Burdening such media outlets with the “chill” of potential litigation would therefore be unwarranted. Decisions in defamation suits that take local and state legislation into account can facilitate the exercise of free speech by sending a clear, consistent message from the courtroom to the press room.

E. Gray in Context

The fact that defamation law exists to protect one’s reputation, taken together with the contention that individual plaintiffs in defamation suits are not primarily motivated by economic recovery, supports a common understanding that defamation suits generally arise when someone is hurt or angry.⁸³ One can justifiably wonder, then, why a plaintiff who has personally appeared in a number of gay pride events, and who lives in a community with legislation that strives to eliminate discrimination based on sexual orientation should be sufficiently hurt and angry to pursue potentially costly litigation based on a single statement that she is gay.⁸⁴ It is also a mystery that a court

⁸¹ See Fogle, *supra* note 4, at 175 (noting that “the threat of defamation claims has a similar ‘chilling effect’ on the naming of homosexuals”). As a practical matter, it can be assumed that media outlets and resources would be unwilling to provide news coverage of an event if that coverage carried with it a probable risk of liability in subsequent defamation suits. The mainstream press has consistently avoided naming individuals who have been “outed” by the gay community, claiming a fear of libel litigation. *Id.* at 175. Fogle further argues that “[t]he chilling effect that defamation suits have on the media coverage of outing has dramatic societal implications including using defamation suits (1) in the political arena and (2) to support attitudes that are contrary to public policy.” *Id.* at 175.

⁸² *Id.* at 195.

⁸³ See Boies, *supra* note 47, at 1209.

⁸⁴ See discussion *infra* Part I.E.1. New Jersey legislation and caselaw are remarkably protective of the rights of gays and lesbians under the law. For discussion of Sally Starr’s participation in Gay Pride events, see *infra* Part II.

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that once stated that “[i]t is unquestionably a compelling interest of this State to eliminate the destructive consequences of discrimination from our society” and that evinced a desire to “eradicate the cancer of unlawful discrimination of all types” would decline to further this goal when presented with the opportunity to do so.⁸⁵ This context of apparent inconsistencies generated a judicial decree that now has the dubious distinction of further confusing defamation law as well as detracting from an effective, concerted effort to further equal protection for gays and lesbians.⁸⁶

1. New Jersey Legislation

The legislative history and framework in New Jersey reflects a long-standing effort to broaden the scope of the equal protection doctrine. The New Jersey Legislature codified its commitment to equality by enacting the Law Against Discrimination (“LAD”) in 1945, “some twenty years before the effective date of [federal anti-discrimination law] Title VII.”⁸⁷ The LAD was amended in 1991 to include sexual orientation.⁸⁸ New Jersey’s sodomy statute was repealed in 1979.⁸⁹ The state’s

⁸⁵ Dale v. Boy Scouts of Am., 734 A.2d 1196, 1227, citing Peper v. Princeton Univ. Bd. of Trs., 389 A.2d 465 (N.J. 1978).

⁸⁶ For further discussion of the residual effects of *Gray* on the clarity of defamation law and gay rights, see *infra* Part II.B.3.

⁸⁷ Peper, 389 A.2d at 478. See also 42 U.S.C.A. §§ 2000a-2000h-6 (West 2002).

⁸⁸ NJ STAT. ANN. § 10:5-4 (West 2002). The statute includes “affectional or sexual orientation.” *Id.* It reads as follows:

All persons shall have the opportunity to obtain employment, and to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation, publicly assisted housing accommodation, and other real property without discrimination because of race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, or sex, subject only to conditions and limitations applicable alike to all persons.

Id.

⁸⁹ N.J. STAT. ANN. §§ 2A:143-1, 2A:143-2 (repealed 1979). This is relevant because some courts have relied on sodomy laws to conclude that an

Unlawful Discrimination statute provides legal redress for discrimination based on sexual orientation.⁹⁰ The Prevention of Domestic Violence Act affords the same protection to victims in a same-sex relationship as in other relationships covered by the act.⁹¹ New Jersey's Hate Crimes Law includes sexual orientation.⁹² At a minimum, New Jersey's current legislative framework clearly indicates a desire to protect the legal rights and interests of lesbians and gays in the state.

Furthermore, the mission statement of the New Jersey Human Relations Council includes "developing proposals for the State to combat crime based on race, color, religion, sexual orientation, ethnicity, gender, or physical, mental or cognitive disability."⁹³ The council assists other legislative bodies "in [their] efforts to foster better community relations throughout the State."⁹⁴ The executive committee of the council "shall include ten public members who shall be representative of the various ethnic; religious; national origin; racial; sexual orientation; gender; and disabilities organizations [of the] state."⁹⁵ By establishing this commission, the legislature not only codified the state's desire to "promote prejudice reduction,"⁹⁶ but also explicitly welcomed—indeed required—the inclusion of homosexuals in the state's representative government. The commission was charged with the mission to eliminate "all types of discrimination" by fostering

imputation of homosexuality is defamatory per se because it infers the commission of a crime. *See* *Head v. Newton*, 596 S.W.2d 209, 210 (Tex. 1980); *Buck v. Savage*, 323 S.W.2d 363, 369 (Tex. Ct. App. 1959). At least one member of the current New Jersey Supreme Court acknowledged that "the 1979 repudiation of New Jersey's sodomy statutes . . . is further evidence of the evolution in social thinking about homosexuality." *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1244 (N.J. 1999) (Handler, J., concurring).

⁹⁰ N.J. STAT. ANN. § 10:5-1 (West 2002).

⁹¹ N.J. STAT. ANN. § 2C:25-17 (West 2002).

⁹² N.J. STAT. ANN. § 2C:43-7 (West 2002).

⁹³ *See* N.J. STAT. ANN. § 52:9DD-8 (West 2002). The committee was established by statute in 1997 to perform planning and coordinating functions in conjunction with other legislative organizations. *Id.*

⁹⁴ *Id.*

⁹⁵ N.J. STAT. ANN. § 52:9DD-8(b) (West 2002).

⁹⁶ N.J. STAT. ANN. § 52:9DD-8(a) (West 2002).

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“good will, cooperation and conciliation among the groups and elements of the inhabitants of the community.”⁹⁷

2. Sexual Orientation in New Jersey Courts

New Jersey caselaw reveals a similar desire to promote equal protection of gay and lesbians in the state. New Jersey courts have “recognized the arbitrariness of discriminating against individuals solely because of their sexual orientation.”⁹⁸ The high court recently reiterated that “New Jersey has always been in the vanguard in the fight to eradicate the cancer of unlawful discrimination of all types from our society.”⁹⁹ This same opinion declared that New Jersey has “long been a leader” in combating the problems faced by gays and lesbians in society.¹⁰⁰ Although the following list is by no means exhaustive, there are a number of landmark cases that illustrate the New Jersey courts’ commitment to preventing discrimination based on sexual orientation and promoting equal protection for gays and lesbians under the law.¹⁰¹

As early as 1974, the Supreme Court of New Jersey noted that the “[f]undamental rights of parents may not be denied,

⁹⁷ N.J. STAT. ANN. § 10:5-10 (West 2002).

⁹⁸ *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1228, *citing* *One Eleven Wines & Liquors, Inc. v. Div. of Alcoholic Beverage Control*, 235 A.2d 12, 18-19 (1967). In *One Eleven Wines & Liquors*, the New Jersey Supreme Court reversed the suspension and revocation of liquor licenses to three establishments patronized by “apparent homosexuals.” *One Eleven Wines & Liquors*, 235 A.2d at 19. The opinion is not entirely a beacon of flattery for gays and lesbians, considering the inclusion of a statement that “in our culture homosexuals are indeed unfortunates,” but the court did find unpersuasive the Division of Alcoholic Beverage Control’s argument that permitting “apparent homosexuals” to congregate at a bar threatened public welfare. *Id.* at 18.

⁹⁹ *Dale*, 734 A.2d at 1227, *citing* *Peper*, 389 A.2d at 478.

¹⁰⁰ *Dale*, 734 A.2d at 1227.

¹⁰¹ *See, e.g., Dale*, 734 A.2d at 1196; *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000); *In re Change of Name by: Jill Iris Bacharach*, 780 A.2d 579 (N.J. Super. Ct. App. Div. 2001.); *Enriquez v. West Jersey Health Sys.*, 777 A.2d 365 (N.J. Super. Ct. App. Div. 2001).

limited or restricted on the basis of sexual orientation, per se.”¹⁰² New Jersey was the first state in the nation to specify that gay and unmarried couples will be measured by the same adoption standards as married couples, and that no couple will be barred from adopting because of their sexual orientation or marital status.¹⁰³ Recently, the Supreme Court of New Jersey applied the “psychological parent” doctrine to allow a biological mother’s same-sex former domestic partner to qualify as a statutory “parent” so that the former partner was entitled to visitation

¹⁰² *In re J.S. & C.*, 324 A.2d 90, 92 (N.J. Ch. Div. 1974), *aff’d*, 362 A.2d 54 (N.J. Sup. Ct. App. Div. 1976). In a dispute between mother and father over the extent of divorced father’s visitation rights, the court held that granting visitation rights to homosexual father would serve the best interests of the children. *Id.* It should be noted, however, that the court imposed a limitation on the father’s visitation rights based on a finding that “the lack of understanding and controversy which surrounds homosexuality, together with the immutable effects which are engendered by the parent-child relationship, demands that the court be most hesitant in allowing any unnecessary exposure of a child to an environment which may be deleterious.” *Id.* at 97.

¹⁰³ See David L. Chambers & Nancy D. Polikoff, *Family Law and Gay and Lesbian Family Issues in the Twentieth Century*, 33 FAM. L.Q. 523, 540 (1999) (“In a 1997 settlement of a class action law suit, New Jersey became the first state in the country with a written agency policy requiring that gay, lesbian, and unmarried heterosexual couples be evaluated for joint adoption of children using the same criteria used for married couples.”). See also Press Release, ACLU, New Jersey Becomes First State to Allow Joint Adoption by Lesbian and Gay Couples (Dec. 17, 1997), available at <http://www.aclu.org/news/n121797a.html> (last visited Apr. 13, 2002); Press Release, Gay and Lesbian Alliance Against Defamation (GLAAD), New Jersey Press Does Justice to Gay Marriage (June 25, 1998), available at <http://www.glaad.org/org/publications/alerts/index.html?record=954> (last visited Apr. 13, 2002). In a 1997 judgment, attorneys for the American Civil Liberties Union reached an agreement with New Jersey to allow lesbian and gay couples to adopt children on equal footing with married couples. *Id.* For additional same-sex adoption cases, see, e.g., *In re Adoption of Two Children by H.N.R.*, 666 A.2d 535 (N.J. Super. Ct. App. Div. 1995) (permitting “any person” to institute action for adoption allows unmarried person, heterosexual or homosexual, to adopt (*construing* N.J.S.A. 9:3-43(a)); *In re Adoption of Child by J.M.G.*, 632 A.2d 550 (N.J. Super. Ct. Ch. Div. 1993) (granting lesbian’s petition to adopt biological child of her partner with a conclusion that the adoption would be in child’s best interest).

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rights with the children the couple had raised during their partnership.¹⁰⁴ By acknowledging the parental and familial rights of gays and lesbians, New Jersey courts have expressed an interest in protecting homosexual relationships.¹⁰⁵

In *Enriquez v. West Jersey Health Systems*¹⁰⁶ a unanimous three-judge panel of the New Jersey Appellate Division ruled that an individual who encounters employment discrimination because she is transgendered may have a claim under the state's LAD.¹⁰⁷

¹⁰⁴ *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000); see also Press Release, ACLU, Recognizing Lesbian and Gay Family Relationships, N.J. Appeals Court Grants Visitation Rights to Woman's Former Partner (Mar. 8, 1999), available at <http://www.aclu.org/news/1999/n030899d.html> (last visited Apr. 13, 2002).

¹⁰⁵ See generally Paula L. Ettelbrick, *Wedlock Alert: A Comment on Lesbian and Gay Family Recognition*, 5 J.L. & POL'Y 107, 110-12 (1996). Ettelbrick noted the following:

The struggle of lesbian and gay parents to hold on to custody of and visitation with their children has moved many courts to reject outlandish stereotypes and to acknowledge that one's sexual orientation is not a predictor of parental ability. A growing number of courts and employers have begun to acknowledge the integrity of lesbian and gay family relationships by embracing concepts such as 'second parent adoption' and 'domestic partnership.' Furthermore, courts have extended the definition of 'family' to include lesbian and gay couples, and the relationships between non-biological lesbian parents and the children they raise with their partners have increasingly gained recognition in the contexts of adoption, guardianship and custody.

Id.

¹⁰⁶ 777 A.2d 365 (N.J. Super. Ct. App. Div. 2001).

¹⁰⁷ *Id.* The trial court rejected plaintiff's claim on the ground that gender dysphoria could not be a handicap under the LAD. The appellate court first detailed what the record disclosed concerning the plaintiff's gender dysphoria or transsexualism, and stated the following:

Essentially, plaintiff claimed that she felt like a woman trapped in a man's body from a very early age, and that she was called upon to act manly even though she did not feel masculine. This is consistent with general clinical findings regarding other transsexuals. Transsexuals do not alternate between gender roles; rather, they assume a fixed role of attitudes, feelings, fantasies, and choices consonant with those of the opposite sex, all of which clearly date back to early

This case is especially relevant because although the LAD bars discrimination on the basis of “sex,” the “definitions” section of the statute does not include transgendered individuals.¹⁰⁸ Additionally, the plaintiff’s claim of gender discrimination was distinct from sex discrimination claims covered by the LAD.¹⁰⁹ The court found other state courts’ decisions excluding transsexuals’ gender discrimination claims “too constricted”¹¹⁰ and adopted a reading that “sex discrimination under the LAD includes gender discrimination so as to protect the plaintiff from gender stereotyping and discrimination for transforming herself from a man to a woman.”¹¹¹ It is interesting to note that the court revived language used in a 1976 case, stating that “a person’s sex or sexuality embraces an individual’s gender, that is, one’s self-image, the deep psychological or emotional sense of sexual identity and character.”¹¹² This explicit recognition of sexuality as a component of one’s psychological makeup and identity indicates that New Jersey courts view sexual orientation as encompassing more than behavior or sexual activity. This analysis is more comprehensive than some courts have been willing to recognize.¹¹³

development.

Id. at 370 (internal citations omitted).

The case was remanded for trial both on plaintiff’s gender discrimination claim as well as for further determination on whether or not plaintiff had gender dysphoria and whether her condition was medically diagnosed to qualify as a handicap. *Id.* at 377.

¹⁰⁸ See 10 N.J. PL. & PR. FORMS § 85A:3 (1996), *Employment Relations Chapter 85A. Discrimination*. “‘Affectional or sexual orientation’ means male or female heterosexuality, homosexuality or bisexuality by inclination, practice, identity or expression, having a history thereof or being perceived, presumed or identified by others as having such an orientation.” *Id.*; see also N.J. STAT. ANN. § 10:5-5(hh), *Law Against Discrimination Definitions* (West 2002).

¹⁰⁹ *Enriquez*, 777 A.2d at 377.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 378.

¹¹² *Id.*, citing *M.T. v. J.T.*, 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976).

¹¹³ See generally *Fogle*, *supra* note 4, at 181-82. Some courts have

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The plaintiff in *Enriquez* also brought an action under the portion of the LAD that provides relief for those who suffer unlawful discrimination because of a handicap.¹¹⁴ The court began by noting that the state's LAD should be liberally construed,¹¹⁵ containing fewer restrictions than the correlating federal statute.¹¹⁶ Accordingly, the court determined that New Jersey's legislature did not preclude protection to those with gender dysphoria.¹¹⁷ Turning again to other jurisdictions, the

distinguished between sexual orientation and the acts, whether sexual or otherwise, that are associated with that orientation, thus declining to state explicitly that sexual orientation is an intrinsic part of one's identity and psychological constitution. *Id.* at 182. (characterizing this as a means of side-stepping the "difficult issue" in defamation cases and citing, for illustration, *Buck v. Savage*, 323 S.W.2d 363 (Tex. Ct. App. 1959), and *Mazart v. State*, 441 N.Y.S.2d 600 (N.Y. Ct. Cl. 1981)).

Federal cases construing Title VII of the Civil Rights Act of 1964 in light of sexual harassment claims based on gender stereotypes are also highly illustrative on this point. Readers interested in this topic are encouraged to examine *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and its progeny. See generally Toni Lester, *Protecting the Gender Nonconformist from the Gender Police—Why the Harassment of Gays and Other Gender Nonconformists Is a Form of Sex Discrimination in Light of the Supreme Court's Decision in Oncale v. Sundowner*, 29 N.M. L. REV. 89 (1999).

¹¹⁴ *Enriquez v. West Jersey Health Sys.*, 777 A.2d 365, 379 (N.J. Super. Ct. App. Div. 2001). The relevant statute in *Enriquez* was N.J. STAT. ANN. § 10:5-5(q). Specifically, the court interpreted and applied the portion that provides a person can be handicapped if he or she suffers from "mental, psychological, physiological or neurological conditions which prevents the normal exercise of any bodily or mental functions or is demonstrable, medically or psychologically, by accepted clinical or laboratory diagnostic techniques." *Id.* at 379.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 380, comparing 42 U.S.C.A. § 12211(b)(1). The Americans with Disabilities Act expressly excludes "transvestitism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, and other sexual behavior disorders." *Id.* at 380.

¹¹⁷ *Enriquez*, 777 A.2d at 376 ("Thus, gender dysphoria is a recognized mental or psychological disability that can be demonstrated psychologically by accepted clinical diagnostic techniques and qualifies as a handicap under the LAD."). For the definition of gender dysphoria set forth by the court, see *supra* note 107.

court noted a “split on this issue” in other states,¹¹⁸ and reiterated that New Jersey’s statute should be construed to “eradicate the evil of discrimination in New Jersey.”¹¹⁹ The court also referred to current understanding and approaches to gender dysphoria by psychiatrists and medical practitioners.¹²⁰ This willingness to acknowledge new trends in other professional fields aided the court’s conclusion that gender dysphoria qualifies as a handicap under the LAD.¹²¹ This illustrates the merits of judicial decisions that incorporate contemporary, evolving research on, and acceptance of, issues pertaining to sexual orientation.

In 2001, the New Jersey appeals court overturned a lower court ruling and allowed a lesbian to hyphenate her name to include that of her same-sex partner.¹²² In *Bacharach*, the court remarked that although public policy judgments are essentially irrelevant to application for change of name, “to the extent that public policy may be gleaned from the actions of our legislature and the decisions of our Supreme Court, [there is] no basis for declining a name change which would enable an applicant to adopt a hyphenated surname to include the name of her same-sex partner.”¹²³ Moreover, the court explicitly stated that, in light of current legislation and judicial decrees, the legitimacy of same-sex relationships is “well established by both statutory and decisional law.”¹²⁴ Thus, analysts of the New Jersey Court of Appeals can conclude that judges are likely to look toward legislation to ensure that their decisions comply with the state’s public policy, even when those decisions are admittedly not founded in policy considerations.

Perhaps the most notable example of the New Jersey court’s progressive approach towards homosexuality is the Supreme

¹¹⁸ *Enriquez*, 777 A.2d at 380.

¹¹⁹ *Id.* at 10.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *In re Change of Name by: Jill Iris Bacharach*, 780 A.2d 579 (N.J. Super. Ct. App. Div. 2001).

¹²³ *Id.* at 584.

¹²⁴ *Id.*

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Court's decision in *Dale v. Boy Scouts of America*.¹²⁵ Although the critical question in deciding whether the Boy Scouts violated the LAD by terminating Dale's membership was whether the Boy Scouts may be deemed a "place of public accommodation,"¹²⁶ the state supreme court gave substantial consideration to legislative history and intent as it pertained to furthering fundamental equality and protection of the rights of gays and lesbians in the state.¹²⁷ The court noted that, "at a most fundamental level, adherence to the principle of equality demands that our legal system protect the victims of invidious discrimination New Jersey has long been a leader in this effort."¹²⁸ Construing the state's LAD to cover sexual orientation, they found that "the scope of the statute is reflective of the breadth of the underlying problems we face as a society."¹²⁹ The language and spirit of *Dale* can be reasonably interpreted as indicating the court's interest in placing the state at the forefront of gay rights. That the New Jersey Supreme Court's decision was ultimately reversed by the United States Supreme Court further illustrates that the state's courts and legislature seek to provide more protection to gays and lesbians than other jurisdictions.¹³⁰

II. *GRAY CLOUD OVER THE RAINBOW*

Sally Starr Gray, also known as "Our Gal Sal," has been in

¹²⁵ *Dale v. Boy Scouts of Am.*, 734 A.2d 1196 (N.J. 1999). *Dale* has been the subject of a substantial amount of scholarly writing entirely beyond the scope of this comment. This reference to the case highlights the New Jersey Supreme Court's analysis as illustrative of the Court's position on gays and lesbians in the state.

¹²⁶ *Id.* at 1208.

¹²⁷ *Id.* at 1207-30. Chief Justice Poritz's majority opinion in *Dale* provides a comprehensive, thorough analysis of the state's LAD as it intersects with the State and Federal Constitution, as well as how the LAD had been construed in prior decisions to effectuate legislative intent. *Id.*

¹²⁸ *Id.* at 1227.

¹²⁹ *Id.* at 1227 n.15.

¹³⁰ *Id.*

show business since the early 1940s.¹³¹ In recent years, she has complemented her career as an entertainer with personal appearances at numerous public events, including events hosted by gay and lesbian rights groups and AIDS organizations.¹³² The incident that gave rise to *Gray v. Press Communications* involved a call-in radio show broadcast on a New Jersey radio station.¹³³ On July 24, 1998, the show focused on children's television shows and callers were asked to discuss their favorite childhood program.¹³⁴ One caller identified the Sally Starr show as one of her two favorite shows, and co-host Jeff Diminski commented, "That was the lesbian cowgirl I think."¹³⁵ When she learned of the comment, Starr immediately contacted the program director and complained.¹³⁶ Diminski then retracted the statement.¹³⁷ Despite this apology, Starr filed suit claiming that the broadcast defamed her.

¹³¹ For a colorful and flattering synopsis of Ms. Starr's illustrious career, see "Sally Starr—Biographical Profile," available at <http://www.sallystarrshow.com/biography.htm> (last visited Apr. 25, 2002) (hereinafter *Biographical Profile*).

¹³² See Brief and Appendix of Defendant-Respondents at Da2-5, *Gray v. Press Communications, LLC.*, 775 A.2d 678 (Sup. Ct. N.J. App. Div. 2001) (No. A-004797-99T5) (hereinafter *Respondent's Brief*).

¹³³ The show was co-hosted by Jeff Diminski, who was also named as a defendant in the action, and broadcast on FM 101.5, which was licensed by Press Communications, LLC. *Gray v. Press Communications, LLC.*, 775 A.2d 678, 681 (N.J. Super. Ct. App. Div. 2001).

¹³⁴ *Id.* at 681.

¹³⁵ Diminski reiterated, "The lesbian cowgirl, Sally Starr." For a full transcript of the relevant exchange, see *id.*

¹³⁶ *Id.* at 682.

¹³⁷ Specifically, Diminski stated, "It has been very informative today. We have learned about sex offenders' rights. We learned about diamonds. We learned that Sally Starr is not a lesbian." *Id.* This retraction is relevant because New Jersey state law requires that a plaintiff prove either "malice in fact or that defendant, after having been requested by plaintiff in writing to retract the libelous charge in as public a manner as that in which it was made, failed to do so within a reasonable time, shall recover only his actual damage proved and specially alleged." N.J. STAT. ANN. § 2A:43-2 (West 2002).

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A. Gray Road to the Courthouse

Sally Starr was born in Kansas City, Missouri on January 25, 1923.¹³⁸ She made her show business debut when she was twelve years old and sang and performed, primarily for live audiences, until the late 1940s when she began a career in broadcast radio.¹³⁹ Starr's television career began in 1950 when she began hosting the daily children's show "Popeye Theater."¹⁴⁰ In the mid-1960s Starr expanded her career to include appearances in feature films, audio recordings, and a series of children's stories published in conjunction with her television program.¹⁴¹ "Popeye Theater" was cancelled in 1971.¹⁴² Starr's career currently consists of making personal appearances and hosting a three-hour country classic radio show.¹⁴³ Starr has also made public appearances at various gay pride events.¹⁴⁴

¹³⁸ See *Biographical Profile*, *supra* note 131. Her parents were Charles and Bertha Beller. She changed her name legally to Sally Starr in 1941. *Id.*

¹³⁹ In addition to recording commercials for the Pepsi-Cola Company, Starr and her husband performed on radio programs such as "Hayloft Hoe-Down," which was broadcast from the old Town Hall in Center City Philadelphia. *Id.*

¹⁴⁰ The show was broadcast out of Philadelphia. The format consisted of cartoons, comedy acts, and live appearances by such entertainers as Roy Rogers and Dale Evans, Chuck Connors, Dick Clark, Jerry Lewis, Tim Conway, Jimmy Durante, Nick Adams, and The Three Stooges. *Id.*

¹⁴¹ Starr appeared in "The Outlaws are Coming," the last feature film to be made by The Three Stooges at Columbia Pictures, and had roles in such movies as "The In Crowd," "Mannequin On the Move," and "Holiday Journey." She also performed with Bill Haley and the Comets and recorded country and western music on the Haley's label, Clymax. *Id.*

¹⁴² *Id.*

¹⁴³ See *Gray v. Press Communications, LLC*, 775 A.2d 678, 680-81 (N.J. Super. Ct. App. Div. 2001). Starr regularly appears at Folk and Family music festivals and parades in the New Jersey, Delaware, and Pennsylvania area. For an updated list of appearances, or to secure a personal appearance of Ms. Starr at your business location or event, see <http://www.sallystarrshow.com/appearances.htm> (last visited Apr. 29, 2002). Ms. Starr's radio show is broadcast from Vineland, N.J. on 92.1 FM WVLTV. See <http://www.sallystarrshow.com/whatsnew.htm> (last visited Apr. 25, 2002).

¹⁴⁴ *Gray*, 775 A.2d at 681. The opinion noted as follows:

Prior to trial, a preliminary hearing was conducted to address defendant's motion for summary judgment.¹⁴⁵ Starr's attorney conceded that she is a public figure and the judge determined that she could not prevail without meeting the higher standard of "demonstrat[ing] by clear and convincing evidence, that defendant's statement was accompanied by actual malice."¹⁴⁶ The trial judge did not address the question of whether or not an imputation of homosexuality is defamatory.¹⁴⁷ Rather, the judge was convinced by defense counsel's construction of the actual malice standard as requiring "reckless disregard" and a "high degree of awareness of probable falsity of the statement."¹⁴⁸ Plaintiff's counsel attempted to discredit Diminski's basis for belief that Starr was a lesbian,¹⁴⁹ while defense counsel posited that the high burden of proof did not allow for a flexible standard and was not met.¹⁵⁰ Because the record did not establish malice

[Starr] also did personal appearances for the AIDS Foundation She also stated that she appeared in the Philadelphia Gay Pride Parade, where her participation was limited to riding on the back of a convertible and waving to people. Additionally, she made several paid appearances at an outdoor festival in Philadelphia, held in connection with the Gay Pride festivities.

Id. The irony of this was not lost on all commentators. *See, e.g.,* Arthur S. Leonard, 'Lesbian' Still Defames in New Jersey, LGNY, NEWSPAPER FOR LESBIAN & GAY N.Y., July 9-19, 2001.

¹⁴⁵ *Gray*, 775 A.2d at 682. In this context, malice requires that the statement was made "with knowledge of the probable falsity of the statement." *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *See Respondent's Brief, supra* note 132, at 4-6. It should be noted here that both respondent's brief and respondent's petition record the spelling of defendant's name as "Jeff Deminki," while the spelling used in the court's opinion is "Diminski." For purposes of clarity and consistency, this comment uses the spelling employed by the court.

¹⁴⁸ *Respondent's Brief, supra* note 132, at Da4.

¹⁴⁹ Plaintiff's counsel stated that Diminski "found out at a cocktail party. He was washing his car, someone made a comment to him. He was at a comedy club and he thought he heard something. These were the basis [sic] of his belief, if it was actually worthy of belief." *Id.* at Da3.

¹⁵⁰ Defense counsel stated, "My colleague says that the reckless disregard standard is a mutable standard, is a flexible standard, but it is not, Your

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“by anything close to clear and convincing evidence,” summary judgment was granted.¹⁵¹

On appeal, Starr argued both that the term “lesbian cowgirl” was reasonably susceptible of a defamatory meaning, and that a reasonable fact-finder could conclude that Diminski knew his statement was false.¹⁵² Despite the fact that plaintiff’s first contention was not ruled upon by the trial court, the appellate division examined Starr’s claim and agreed that an accusation of homosexuality is actionable as defamatory.¹⁵³ The case was remanded on the determination that a reasonable fact-finder could conclude that Diminski’s actions constituted actual malice.¹⁵⁴ This decision, however, precludes future defendants from arguing that an accusation of homosexuality is not defamatory because further proceedings cannot be inconsistent with the appellate division’s opinion.¹⁵⁵ Moreover, the defendant’s petition for certification of the decision was denied.¹⁵⁶

Honor.” *Id.*

¹⁵¹ *Id.* at Da4-5.

¹⁵² See *Gray v. Press Communications, LLC*, 775 A.2d 678, 681 (N.J. Super. Ct. App. Div. 2001). At his deposition, Diminski mentioned three occasions in which he had heard plaintiff was a self-identified lesbian, though he was unable to identify the individuals who made these statements. *Id.*

¹⁵³ This is significant because it is a well-settled practice that appellate courts may decline to address an issue if it was not ruled upon in the first instance by the motion judge. *Gray*, 775 A.2d at 685, citing *Subcarrier Comm’n, Inc. v. Day*, 691 A.2d 876, 882-83 (N.J. Super. Ct. App. Div. 1997).

¹⁵⁴ *Gray*, 775 A.2d at 686, cert. denied, 788 A.2d 774 (N.J. 2001).

¹⁵⁵ *Id.* It should also be noted that, by virtue of *stare decisis*, the court’s statements on this question are binding upon lower courts throughout the state. As such, any discussion or further analysis of this matter in New Jersey’s court systems is effectively shut down by the court’s minimal treatment of the matter. For further discussion, see *infra* Part II.3.

¹⁵⁶ *Gray*, 775 A.2d 678, cert. denied, 788 A.2d 774 (N.J. 2001). Defendant’s Petition for Certification of and Appeal from Final Judgment with the Supreme Court of New Jersey was denied without opinion. *Id.*

B. Gray, Not Black and White

Gray addressed whether an imputation of homosexuality could be defamatory as a matter of first impression for New Jersey courts.¹⁵⁷ As such, there was no controlling precedent, and the court was entitled to arrive at whatever conclusion it deemed appropriate. Confronted with the same question, many courts have assessed contemporary social mores by way of local and state legislation.¹⁵⁸ The *Gray* court did not mention New Jersey's legislative framework, and instead looked to six other jurisdictions' opinions on this issue for guidance.¹⁵⁹ The court's reliance upon these decisions, however, was inherently flawed. Of those decisions, three were issued in states that either still have sodomy laws or had sodomy laws at the time of the decision.¹⁶⁰ Furthermore, opinions that it found persuasive rested

¹⁵⁷ *Gray*, 775 A.2d at 683-84 ("Our research has failed to disclose a case in New Jersey considering whether an accusation of homosexuality is defamatory.").

¹⁵⁸ *See, e.g.*, *Hayes v. Smith*, 832 P.2d 1022 (Colo. Ct. App. 1991) (reversing trial court decision that imputation of homosexuality was slander per se and finding "no empirical evidence in [the] record demonstrating that homosexuals are held by society in such poor esteem"). To support this contention, the court referred to the repeal of the state's sodomy law, an executive order prohibiting anti-gay discrimination in public employment, as well as nondiscrimination ordinances in Denver and Boulder, Colorado. *Id.* at 1025. The case was remanded to determine whether, in the context that it was made, the statement was defamatory at all. *Id.* at 1026.

¹⁵⁹ Without indicating why it selected these cases, the court cited *Thomas v. Bet Sound Stage Restaurant/Brett Co., Inc.*, 61 F. Supp. 2d 448 (D. Md. 1999); *Hayes v. Smith*, 832 P.2d 1022 (Colo. Ct. App. 1991); *Moricoli v. Schwartz*, 361 N.E.2d 74 (Ill. App. Ct. 1977); *Bohdan v. Alltool Mtg. Co.*, 411 N.W.2d 902 (Minn. Ct. App. 1987); *Nazeri v. Missouri Valley College*, 860 S.W.2d 303 (Mo. 1993); *Head v. Newton*, 596 S.W.2d 209 (Tex. App. 1980). *See also* *Gray v. Press Communications, LLC*, 775 A.2d 678, 684 (N.J. Super. Ct. App. Div. 2001).

¹⁶⁰ This inconsistency was brought to the attention of the supreme court in defendant's petition for certification. *See* Brief in Support of Appeal and Petition for Certification of Defendants-Petitioners/Appellant at 17-18, *Gray v. Press Communications, LLC*, 775 A.2d 678 (N.J. Super. Ct. App. Div., 2001) (No. 51,813) (hereinafter *Petition*).

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upon archaic reasoning that New Jersey's state law rejected years ago.¹⁶¹

As explained above, the community in which a statement is uttered uniquely governs the boundaries of defamation law.¹⁶² It has long been noted that changes in social sensibilities as well as varying judicial attitudes in the fifty plus jurisdictions—federal and state—account for sharp contradictions and controversy in the determination of what is or is not defamatory.¹⁶³ Therefore, while it is conceivable that decisions from other courts correctly reflect the public policy of those jurisdictions, opinions of homosexuality vary depending on the region of the country.¹⁶⁴ For example, one could, at the very least, expect that the opinion commonly held about homosexuality in Texas in 1980 would differ drastically from that in New Jersey in 2001.¹⁶⁵ So illustrated, the potential for substantial variation in public policy between states and across decades surely renders the persuasive value of certain defamation decisions questionable at best. The *Gray* court's decision neither explored what motivated the out-of-state decisions nor indicated why they would be persuasive.¹⁶⁶ Because defamation suits purport to provide an opportunity to

For a complete, current list of State sodomy laws, see American Civil Liberties Union, *State by State Breakdown of Sodomy Laws*, available at <http://www.aclu.org/issues/gay/sodomy.html> (last visited Apr. 13, 2002).

¹⁶¹ New Jersey's sodomy law was repealed in 1979. See *supra* note 89.

¹⁶² Fogle, *supra* note 4, at 172.

Therefore, finding that a statement is defamatory at a particular place and time should not govern the determination of whether a similar statement is defamatory at a different place and time. Instead, the impact a particular statement is likely to have on a plaintiff's reputation should be considered in the context in which it is published.

Id.

¹⁶³ MAYER, *supra* note 11, at 34.

¹⁶⁴ Fogle, *supra* note 4, at 179.

¹⁶⁵ This analogy is not arbitrarily drawn. Of the six cases referenced, the *Gray* court cited to a 1980 case from the Texas Court of Appeals. See *supra* note 159; see also *Gray*, 775 A.2d at 684.

¹⁶⁶ As noted, the court cited to the cases without explaining why they were selected. *Gray*, 775 A.2d at 684.

vindicate one's harmed reputation, it is essential that courts identify the plaintiff's community and its norms to gauge the interaction between the statement uttered and values of the audience.¹⁶⁷ This does not necessarily render extra-jurisdictional opinions entirely irrelevant, but it does indicate that sound judicial opinions cannot be furnished in utter absence of contextual analysis.

It is equally well established that the existence of a judicial remedy for injury to reputation is entirely a matter of state law.¹⁶⁸ In 1976, the United States Supreme Court held that a plaintiff's "interest in reputation is simply one of a number which the State may protect against injury by virtue of its tort law, providing a forum for vindication of those interests by means of damages actions."¹⁶⁹ The Supreme Court of New Jersey has also explicitly rejected the proposition that the state constitution creates a right to maintain a defamation action.¹⁷⁰ Therefore, to the extent that a New Jersey court chooses to authorize a cause of action for defamation, it may also limit a plaintiff's ability to prove his or her claim in order to promote other social purposes without regard to other states' conclusions.¹⁷¹

1. New Jersey Legislation Regarding Sexual Orientation

Judicial opinions often refer to state and local legislation to determine whether public statements are actionable as defamatory.¹⁷² There is substantial reason to give great weight to

¹⁶⁷ Lidksy, *supra* note 8, at 1.

¹⁶⁸ *Maressa v. N.J. Monthly*, 445 A.2d 376, 384 (N.J. 1982).

¹⁶⁹ *Paul v. Davis*, 424 U.S. 693, 712 (1976). Since *Paul v. Davis*, federal courts have noted that "the State has created the [defamation] cause of action and hence . . . it can limit, modify or perhaps take it away through the operation of testimonial privileges, absent any claim of constitutional deprivation." *Mazzella v. Phila. Newspapers*, 479 F. Supp. 523, 528 (E.D.N.Y. 1979).

¹⁷⁰ *Maressa*, 445 A.2d at 384-385.

¹⁷¹ *Id.*

¹⁷² *See, e.g., Hayes v. Smith*, 832 P.2d 1022, 1025 (Colo. Ct. App. 1991) (examining state and local human rights codes and concluding that "the

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gay rights legislation to determine community acceptance of homosexuality. At least one author has argued that gay rights laws indicate both the community's desires to fully incorporate gays and lesbians into the community, as well as a condemnation of homophobic behavior.¹⁷³ It is not unrealistic to conclude that legislation passed by popularly elected representatives reflects those legislators' desire to further the governmental interest that the law serves.¹⁷⁴ The long-standing existence of gay rights laws may illustrate a community's commitment to such issues and indicate the community's acceptance of homosexuality.¹⁷⁵ Thus, in communities with comprehensive gay rights protection, any harm to one's reputation suffered by an imputation of homosexuality would not be inflicted by a majority of citizens and could be disregarded as negligible by courts.¹⁷⁶

community view toward homosexuals is mixed"); *Nazeri*, 860 S.W.2d at 312 (pointing to same-sex sodomy statute to conclude that "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"); *Donovan v. Fiumara*, 442 S.E.2d 572, 575 (N.C. Ct. App. 1994) (noting that state sodomy statute applies equally to heterosexuals and homosexuals and concluding that referring to a person as gay is not tantamount to imputing the commission of a crime).

¹⁷³ See Fogle, *supra* note 4, at 188.

¹⁷⁴ See, e.g., *Gay Rights Coalition of Georgetown Univ. Law Center v. Georgetown Univ.*, 536 A.2d 1, 38 (D.C. 1987) (finding that the Council of the District of Columbia "acted on the most pressing of needs when incorporating into the Human Rights Act its view that discrimination based on sexual orientation is a grave evil that damages society as well as its immediate victims. The eradication of sexual orientation discrimination is a compelling governmental interest."). In *Gay Rights Coalition*, the court reversed the trial court's ruling that relieved Georgetown University of its statutory obligation to provide tangible benefits without regard to sexual orientation. *Id.* at 39; see also Fogle, *supra* note 4, at 185 ("The relevance of state and city laws to determine the defamatory nature of the imputation of homosexuality is predicated upon the concept that the laws of a given jurisdiction reflect the moral values of that jurisdiction.").

¹⁷⁵ Fogle, *supra* note 4, at 189.

¹⁷⁶ See *Ben-Oliel v. Press Publ'g Co.*, 167 N.E. 432 (N.Y. 1929) (concerning the publication of a newspaper article that contained errors about Palestinian customs, which only people knowledgeable about such customs

The *Gray* court did not refer to New Jersey legislation to determine community standards on sexual orientation,¹⁷⁷ although the decision noted society's increasing acceptance of freely exercising one's sexual preferences.¹⁷⁸ Neither did the court examine whether the statement actually injured the plaintiff.¹⁷⁹ Yet, the decision now includes homosexuality in the category of defamatory statements, regardless of legislative intent. Indeed, the entire issue was disposed of in a single paragraph.¹⁸⁰ Because defamation law is designed to protect a person's reputation, the defamatory nature of a comment must be properly evaluated in terms of the person's reputation in the community.¹⁸¹ Courts do a disservice to the clarity of defamation law when the question of how homosexuality harms one's reputation is not given full treatment.¹⁸²

If the *Gray* court had examined the state laws, it would not

would likely recognize and thus conclude that plaintiff was a "fraudulent ignoramus"). See also Fogle, *supra* note 4, at 188.

¹⁷⁷ *Gray v. Press Communications, LLC*, 775 A.2d 678, 684 (N.J. Super. Ct. App. Div. 2001). After examining how accusations of homosexuality have been treated by other jurisdictions, the court conclusively stated that "[a]lthough society has come a long way in recognizing a person's right to freely exercise his or her sexual preferences, unfortunately, the fact remains that a number of citizens still look upon homosexuality with disfavor." *Id.* at 684.

¹⁷⁸ *Id.*

¹⁷⁹ Interestingly, if the court had examined this issue, it would have found that although Ms. Starr's complaint sought five million dollars in damages, she claimed to have lost no more than \$8,000 in cancelled personal appearance contracts. See *Respondent's Brief*, *supra* note 132, at 9.

¹⁸⁰ See *Respondent's Brief*, *supra* note 132, at 9.

¹⁸¹ A similar argument has been made to critique judicial analysis holding that because homosexual activity may indicate a lack of chastity in a woman, imputation of homosexuality was slanderous without proof of damages. Fogle, *supra* note 4, at 183, citing *Schomer v. Smidt*, 170 Cal. Rptr. 662, 666 (Cal. Ct. App. 1980).

¹⁸² Fogle, *supra* note 4, at 180-84. Fogle further argues that some courts have side-stepped the question of how homosexuality damages one's reputation and have disposed of the question by other mechanisms, such as misapplying sodomy laws to equate homosexuality to criminal or other distasteful behavior. *Id.*

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have found support for their conclusion “that a number of citizens still look upon homosexuality with disfavor.”¹⁸³ As noted above, New Jersey adopted anti-discrimination laws well before the federal government,¹⁸⁴ and the legislature has drafted statutes that explicitly protect the rights of gays and lesbians in the state in myriad areas.¹⁸⁵ Americans commonly assume that legislation passed by popularly elected representatives embodies the will of the majority, if not the populace at large.¹⁸⁶

Specifically, laws prohibiting bias reflect a community’s unwillingness to tolerate such behavior. This begs the question whether is it truly harmful to reputation to charge variance from heterosexual practices, while at the same time society establishes laws forbidding discrimination for such orientation.¹⁸⁷ At the very least, the legal status of gays and lesbians in New Jersey is relevant in determining whether the community has accepted homosexuals as a group.¹⁸⁸ Moreover, if New Jersey’s Law

¹⁸³ *Gray*, 775 A.2d at 684.

¹⁸⁴ *See supra* Part I.E.1 (contrasting New Jersey’s LAD with Federal Anti-Discrimination Law Title VII).

¹⁸⁵ *See supra* Part I.E.1. *See also* Chris Bull, *New Jersey Enacts Nation’s Fifth State Bias Ban*, *ADVOCATE*, Feb. 25, 1992, at 15 (reporting that New Jersey passed a gay rights bill in housing, employment, public accommodations, credit and public contracts).

¹⁸⁶ *See generally* Nan D. Hunter, *Sexual and Civil Rights: Re-Imagining Anti-Discrimination Laws*, 17 *N.Y.L. SCH. J. HUM. RTS.* 565, 567 (2000). Hunter suggests that progress in equality rights is a product of movements and campaigns that in turn establish the cultural dynamics of equality statutes. *Id.* She further states that “[w]hen legislatures extend the civil rights model to a new group, a powerful sense of social legitimacy is conferred. This sense of legitimacy develops, in part, because legislation can be enacted only after the group has reached a certain level of social acceptance.” *Id.* at 567. *See also* Fogle, *supra* note 4, at 185-92 (discussing the relevance of gay rights legislation as a reflection of popular attitudes towards homosexuality).

¹⁸⁷ Fogle, *supra* note 4, at 186-87. Fogle argues that, “although the law cannot prohibit individual prejudice, it can prohibit discriminatory behavior Eradicating discrimination on the basis of sexual orientation indicates a compelling interest on the part of the jurisdiction adopting such a statute to protect the status of gays and lesbians.” *Id.*

¹⁸⁸ *Id.* at 192. Fogle notes that “using the legal status of a group of people to determine whether a statement is defamatory has been applied in other

Against Unlawful Discrimination is meant to have any teeth, its very existence must be read to indicate that residents have decided to treat gays, lesbians and heterosexuals equally.¹⁸⁹ In short, the legislative intent is to dismiss precisely the type of opinions that *Gray* tacitly permits, if not rewards.¹⁹⁰ Judicial declaration that homosexuality harms one's reputation is therefore entirely antithetical to the will of the majority as expressed in legislation.

2. *Progressive Judicial Decisions in New Jersey Caselaw*

New Jersey caselaw simply does not support the court's decision in *Gray*. The cases explored in this comment provide a brief look at the current supreme and appellate courts' apparent effort to provide progressive solutions to the problems gays, lesbians, and transgendered people face in contemporary society. Taken together, they indicate the cumulative effort expended by New Jersey courts to combat homophobia and insure equal protection in the state.¹⁹¹ Such an effort is frustrated by the oversimplified analysis in *Gray* that unnecessarily concluded that homosexuality is reasonably susceptible to a defamatory meaning because "a number of citizens still look upon homosexuality with

subgroups within the general population." *Id.*, citing *Ledsinger v. Burmeister*, 318 N.W.2d 558 (Mich. Ct. App. 1982) (holding that calling someone a "nigger" was not defamatory at all).

¹⁸⁹ See *Petition*, *supra* note 160, at i. This contention was one of the two main propositions advanced by the defendant in its petition for certification. The other main argument was that the appellate division misapplied the constitutionally imperative actual malice standard developed by the United States and New Jersey Supreme Courts. See *id.* Defendants specifically stated that "[i]gnoring New Jersey's efforts to end discrimination on the basis of sexual orientation, the appellate division erred in holding that an imputation of homosexuality could be defamatory." *Id.* at 16.

¹⁹⁰ Allowing a defamation plaintiff to prevail has been considered the equivalent of legally sanctioning the position asserted in his or her claim. See *infra* Part I (discussing dismissal of certain claims to avoid condoning discriminatory attitudes).

¹⁹¹ See generally *Fogle*, *supra* note 4, at 186-87.

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disfavor.”¹⁹² These cases also bolster the legislative and statutory analysis set forth in this comment. Taken together, they illustrate that the state courts acknowledge legislation as a manifestation of “public policy” in New Jersey, and that the highest court in the state takes pride in maverick decisions affording broad protection to gays and lesbians.¹⁹³

A common justification for exercising judicial restraint on policy issues is that proper redress should be achieved through political venues and lobbying.¹⁹⁴ This approach may be effective when, for example, an individual seeks legislative change.¹⁹⁵ When, as in *Gray*, however, the applicable legal standard is a uniquely judicial determination,¹⁹⁶ there is perhaps no alternate means to affect the desired change.¹⁹⁷ Thus, even lesbians and gays who are active in legislative lobbying and advocacy groups must presumptively stand idly by while courts sanction an individual’s estimation of homosexuality as a negative characteristic.¹⁹⁸

¹⁹² *Gray v. Press Communications, LLC*, 775 A.2d 678, 682 (N.J. Super. Ct. App. Div. 2001).

¹⁹³ See *supra* Part II (discussing New Jersey cases and legislation that further equal protection for gays and lesbians in the state).

¹⁹⁴ One argument is that substantive changes in the law should be achieved through the political process rather than by judicial fiat. See, e.g., Patrice S. Arend, *Defamation in an Age of Political Correctness: Should a False Public Statement That a Person Is Gay Be Defamatory?*, 18 N. ILL. U. L. REV. 99, 114 (1997) (arguing that “[a]s society ‘evolves’ and recognizes that homosexuality is not offensive, fewer cases will be brought to the courts 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.”).

¹⁹⁵ This approach may be effective in cases where the desired remedy is repealing, altering or amending an act of legislation. However, as noted, New Jersey’s defamation law is not codified in statute and is therefore governed by common law ideals and decisional law. See *supra* Part I.B.

¹⁹⁶ See *supra* Part I.B (noting that it is for the court to determine whether a communication is reasonably susceptible of a defamatory meaning).

¹⁹⁷ Whether or not a plaintiff is allowed to proceed with a defamation claim is discretionary by the court. See *supra* Part I.B.

¹⁹⁸ As previously discussed, the court determines whether a statement is defamatory as a threshold issue. See *supra* Part I.B. Because this decision will

The New Jersey defamation law is not codified in a statute, and is therefore uniquely amenable to judicial revisions.¹⁹⁹ This places an additional burden on courts to be more careful when determining whether a statement is defamatory. The appellate court in *Gray* had a real opportunity to inject an element of badly needed intellectual rigor into caselaw on defamation. In an area of the law containing “such anomalies and absurdities for which no legal writer has had a kind word,”²⁰⁰ this would have been a service not only to the state of New Jersey, but also to other jurisdictions that may eventually have to decide the same issue.²⁰¹ The decisions of other state courts that have casually interpreted homosexuality in defamation cases could, therefore, mean essentially nothing.

To be sure, some courts have not been eager to validate progressive points of view in cases dealing with homosexuality.²⁰² However, as noted above, New Jersey courts have certainly not been adverse to rejecting out-of-state decisions construing identical questions pertaining to sexual orientation.²⁰³ There is,

be made based on the judgment of the court, it is distinctly unlike legislative initiatives and enactments, which may be affected by political lobbying and voting constituent groups.

¹⁹⁹ See *supra* Part I.B (explaining that New Jersey’s defamation law is governed by common law ideals and judicial decree).

²⁰⁰ PROSSER & KEETON, *supra* note 9, at 771-72.

²⁰¹ As noted, courts and commentators agree that defamation standards change from one generation to the next. Some commentators have projected that the time will arrive when stating that someone is gay or lesbian does not reflect negatively upon their reputation. See, e.g., MAYER, *supra* note 11, at 35; Arend, *supra* note 194, at 114 (stating that “as the gay community becomes even more visible and achieves greater political power, the stigma attached to homosexuality will undoubtedly disappear”).

²⁰² See, e.g., *supra* notes 71-72 (citing cases which have found imputation of homosexuality to be defamatory).

²⁰³ By the time *Dale* was litigated, other jurisdictions had applied narrow definitions to public accommodation laws and found that the Boy Scouts did not constitute a “place of public accommodation.” See *Welsh v. Boy Scouts of Am.*, 993 F.2d 1267 (7th Cir. 1993), *aff’g* 787 F. Supp. 1511 (N.D. Ill. 1992), *cert. denied*, 510 U.S. 1012 (1993); *Randall v. Orange County Council, Boy Scouts of Am.*, 952 P.2d 261 (Cal. 1998); *Curran v. Mount Diablo Council of the Boy Scouts of Am.*, 952 P.2d 218 (Cal. 1998);

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therefore, no reason why the New Jersey court should act as though it is not in a position to be selective and judgmental when it comes to accepting social prejudices. By treating as self-evident that being falsely called a lesbian may be harmful to one's reputation, the *Gray* court implicitly condones homophobia.²⁰⁴ Sound judicial discretion should be applied to ensure that defamation decisions comply with the state's public policy. Given that the current trend of the New Jersey courts is to liberally construe state laws to provide legal redress to those who suffer discrimination based on sexual orientation, *Gray* was inconsistent and should have been reversed.

3. The Many Shades of Gray

To the extent that implications can be drawn from *Gray*, one must consider the standards required to sustain a defamation action as set forth above in conjunction with the role of judicial

Quinnipiac Council, Boy Scouts of Am., Inc. v. Comm'n on Human Rights and Opportunities, 528 A.2d 352 (Conn. 1987); Seabourn v. Coronado Area Council, Boy Scouts of Am., 891 P.2d 385 (Kan. 1995); Schwenk v. Boy Scouts of Am., 551 P.2d 465 (Or. 1976). See also Erica L. Stringer, *Has the Supreme Court Created a Constitutional Shield for Private Discrimination Against Homosexuals? A Look at the Future Ramifications of Boy Scouts of Am. v. Dale*, 104 W. VA. L. REV. 181, 183-84 (2001). In an analysis of the future impacts of *Dale* on American constitutional litigations, the author noted the following:

The Boy Scouts of America ["BSA"] has faced numerous court challenges to its exclusionary membership policies under state public accommodations laws. Through these challenges, brought on behalf of girls, atheists, and homosexuals, four state supreme courts and the U.S. Court of Appeals for the Seventh Circuit have held that BSA is not a place of public accommodation. In a groundbreaking decision, however, the Supreme Court of New Jersey departed from these decisions in unanimously holding that BSA does fall within the scope of New Jersey's LAD.

Id.

²⁰⁴ In the same manner that upholding a defamation claim that a white person is African-American would sanction racist beliefs, judicial recognition of defamation suits based on an imputation of homosexuality sanctions homophobia. See generally Fogle, *supra* note 4, at 176.

discretion.²⁰⁵ The thrust of this analysis concludes that allowing defamation suits of this nature is tantamount to declaring homosexuality offensive; it permits juries to award damages on a necessary presumption that one is damaged by such imputations.²⁰⁶ This position has been suggested elsewhere,²⁰⁷ though this comment takes a moderate view concluding that “depriving individuals of a tort remedy for defamation is an inappropriate and inefficient method for changing public attitudes about homosexuality.”²⁰⁸ It should be noted, however, that caselaw and legislation within a specific jurisdiction may indicate a public acceptance of homosexuality that negates a finding that one is injured when publicly labeled as homosexual.²⁰⁹ Therefore, in jurisdictions where the conditions of the latter proposition are met, pro-active judicial decisions in defamation suits are neither unwarranted nor unprecedented.²¹⁰

²⁰⁵ See *supra* Parts II.A, II.B, II.D for the applicable legal standards in defamation actions, New Jersey’s statutory and common law requirements, and judicial discretion in determining whether a defamation claim is cognizable.

²⁰⁶ See *supra* Part II.A (explaining that defamatory statements are those that harm one’s reputation).

²⁰⁷ See Arend, *supra* note 194, at 111.

²⁰⁸ *Id.* at 113-14.

²⁰⁹ Fogle, *supra* note 4, at 176. Fogle utilized a comparison between statements that a white person is African-American and those labeling a heterosexual as homosexual. He noted the following:

[T]he two examples differ in the degree to which society has determined to treat people of color and gays equally. In the first instance, equal protection laws have been established throughout the nation to protect employment, housing, and other rights. Such laws concerning gays and lesbians are largely absent at the federal level and local protection varies greatly in different regions of the country. Therefore, it would not be logical to treat allegations that someone is white the same way as allegations that someone is not heterosexual, except where the jurisdiction has adopted a similar attitude regarding the two populations.

Id. (internal citations omitted).

²¹⁰ Additionally, because decisions in defamation suits inherently reflect the competing policy tensions between one’s desire to protect his or her reputation and society’s interest in protecting First Amendment rights, the fact

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At least one commentator has argued that courts should never deny economic recovery to those who consider themselves harmed by an accusation of homosexuality.²¹¹ Such a bright-line rule, however, unnecessarily overlooks affirmative steps taken by a particular jurisdiction's legislative and judicial systems to expunge the legal system of discriminatory treatment of gays and lesbians.²¹² Further, such a rule neglects the fact that merely allowing homosexuality to remain on the list of legally "offensive" terms may have a deleterious effect upon how the community at large views gays and lesbians.²¹³ Finally, because plaintiffs who bring defamation suits are not necessarily motivated by financial factors, a court that dismisses a defamation suit does not always risk leaving a person financially damaged.²¹⁴

The court's conclusion in *Gray* has far-reaching effects upon

that plaintiffs in defamation suits tend to have non-economic motives should be carefully considered. *See* Boies, *supra* note 47, at 1298.

²¹¹ Arend, *supra* note 194, at 114.

²¹² *See supra* Parts I and II for analysis of relevant New Jersey legislation and caselaw.

²¹³ *See generally* Ryan Goodman, *Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics*, 89 CAL. L. REV. 643 (2001). Similar arguments have been made about the impact of "unenforced" sodomy laws upon a community's treatment of homosexuals. Goodman borrowed from sociological studies of law founded in constitutive theories and analyzed the ways in which sodomy laws "operate in daily life by shaping interpersonal relations, influencing daily habits and helping define civic identity." *Id.* at 666.

²¹⁴ Boies, *supra* note 47, at 1298-99.

Defamation actions, particularly those that involve individuals, usually have strong noneconomic motives. Defamation litigation usually arises when someone is hurt. They are hurt and they are angry. They may or may not have suffered a calculable economic loss, but they are often going to be less motivated by that loss, and less constrained by the economic costs of litigation, than most potential plaintiffs.

Id. *But see* Post, *supra* note 32, at 694. In expounding upon the "reputation as property" theory of defamation law, Post points out that perhaps "the value of reputation is determined by the marketplace in exactly the same manner that the marketplace determines the cash value of any property loss." *Id.*

all individuals who attribute to themselves the status of being a homosexual.²¹⁵ While the defendant in *Gray* referred to Starr as “the lesbian cowgirl,” he did not claim that she engaged in homosexual acts, frequented gay bars or even affiliated herself with openly gay individuals.²¹⁶ This is a decidedly status-based imputation, distinct from a public statement that one engages in specific, possibly reprehensible, or even criminal acts.²¹⁷ Further, New Jersey’s high court has recognized that homosexuality is a trait inseparable from personal identity.²¹⁸ Therefore, regardless of how lawfully or respectfully an individual may conduct him or herself, *Gray* has the practical effect of hanging a label of opprobrium upon the entire class of individuals who identify themselves as homosexual.²¹⁹ Put another way, *Gray* provides

²¹⁵ See generally *Jantz v. Muci*, 759 F. Supp. 1543, 1548 (D. Kan. 1991) (stating that discrimination against immutable characteristics such as homosexuality will cause “significant damage to the individual’s sense of self”).

²¹⁶ Interestingly, if the defendant had stated that Ms. Starr was affiliated with gay individuals or organizations, this would have been true and therefore not actionable as defamatory because, as noted, Ms. Starr admitted that she appeared in Philadelphia Gay Pride Parade and in the accompanying outdoor festival. See *supra* note 132.

²¹⁷ Some courts have noted this status-act distinction. See, e.g., *Donovan v. Fiumara*, 442 S.E.2d 572 (N.C. 1994) (claiming falsely that plaintiffs were gay or bisexual did not carry with it an automatic reference to any particular activity and therefore was not tantamount to charging that individual with the commission of a crime under state sodomy law sufficient for classification as defamatory per se); *Moricoli v. Schwartz*, 361 N.E.2d 74 (Ill. App. Ct. 1977) (stating that defendant’s reference to plaintiff as a “fag” could reasonably only be interpreted to assert plaintiff was homosexual and statement therefore did not import commission of homosexual acts). See also *MAYER*, *supra* note 10, at 35 (“A charge of child abuse, molestation or rape involves distinguishable criminal conduct or a decidedly loathsome character and must remain a proper subject for relief.”).

²¹⁸ See *In re J.S. & C.*, 324 A.2d 90 (N.J. Super. Ct. App. Div. 1976) As early as 1976, New Jersey’s high court recognized that a person’s sex or sexuality embraces an individual’s gender, one’s self-image, and his or her deep psychological or emotional sense of sexual identity and character. *Id.*

²¹⁹ See *Peck v. Tribune*, 214 U.S. 185 (1909) (holding that words that impute conduct calculated to injure a plaintiff in the eyes of a considerable and

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legal permission to condemn any individual who identifies herself as homosexual on the basis of her status alone.

To better understand the impact of *Gray*, one should engage in an intellectual exercise. First, note that statements are only actionable as defamatory if they are false.²²⁰ It is self evident, then, that an individual who has openly acknowledged him or herself as gay or lesbian could not maintain a defamation action for public statements referring to him or her as such, regardless of any real or actual harm to their reputation.²²¹ At first glance, this seems a simple conclusion. In light of *Gray*, however, openly gay individuals in New Jersey must now live not only without legal recourse to redeem their potentially damaged reputation, but must also accept the fact that society can, with the blessing of the court, view their status as gay as less than desirable. In fact, no matter how much pride a gay or lesbian person takes in his or her identity, judicial decree now tells all homosexuals in New Jersey that revealing their sexual orientation may lower their reputation in the minds of respectable members of the community.²²² *Gray* effectively relegates gays and lesbians

respectable class of the community, though not in the eyes of the whole community, are libelous).

²²⁰ Truth is an affirmative defense to defamation. LAURENCE ELDREDEGE, *THE LAW OF DEFAMATION* 323 (1977). *See also* 22 AM. JUR. 3D *Proof of Facts* § 305 (1993) (noting that a publication must contain a false statement of fact to give rise to liability for defamation).

²²¹ An individual who has previously stated or admitted his or her homosexuality would have disclosed it as fact, thus precluding him or her from bringing a cause of action against one who would publish an imputation of his or her homosexuality, because only false statements are defamatory. *See id.*; *see also* *Hein v. Lacy*, 616 P.2d 277 (Kan. 1980) (finding statements that the plaintiff favored the legalization of homosexuality and the decriminalization of marijuana not defamatory because they were substantially true inasmuch as they reflected plaintiff's voting record as a state senator).

²²² *See* Fogle, *supra* note 4, at 173. One of the limitations on the law of defamation is that a statement is only deemed defamatory "if it prejudices a person in the eyes of a substantial number of 'right-minded' people." *Id.* Fogle uses the analogy of racial or ethnic remarks to illustrate that by dismissing certain defamation claims courts may "implicitly [label] racists as 'wrong-thinking.'" *Id.*

in a position of political and legal second-class citizenship.

Cast in this light, the practical effects and future impact of *Gray* can be fully examined. First, to the extent that *Gray* offers protection to anyone, it is only to those members of society who consider themselves defamed by a label of homosexuality.²²³ Obviously, however, a plaintiff's reputation "could only be injured in the eyes of homophobic individuals."²²⁴ In the event that a heterosexual in New Jersey wishes to redeem his or her reputation by removing the stigma of homosexuality, he or she may do so. This may be considered a rare event, given that in the history of New Jersey's courts such an action has been before the court only once.²²⁵ Homosexuals, however, may live their entire adult lives identifying themselves as gay, lesbian, bi-sexual or transgendered.²²⁶ The damage done to the psyche of those who have already "come out" in a community is far more enduring than to those who are subject to a single, false statement that they are gay or lesbian.²²⁷ Similarly, finding that homosexuality as a status is defamatory may deter people from privately, let alone publicly, acknowledging their homosexuality.²²⁸

²²³ This logically comports with the analysis laid out above, that plaintiffs in defamation suits are not primarily motivated by financial desires, but rather are seeking to clear their reputation of an allegedly defamatory implication. An individual would necessarily have to consider his or her reputation harmed to be motivated to sue in the first instance. *See supra* note 214 and accompanying text. *See also*, Fogle, *supra* note 4, at 176.

²²⁴ Fogle, *supra* note 4, at 176; *see also*, Lidsky, *supra* note 8, at 34.

²²⁵ This is true at least with respect to New Jersey appellate courts with reported decisions, inasmuch as this was a question of first impression before the *Gray* court. *See supra* note 157.

²²⁶ The mutability of sexual orientation has been the subject of numerous legal, medical and academic studies. This comments restricts analysis to those who have publicly acknowledged their sexual orientation as other than heterosexual.

²²⁷ *See, e.g.*, Janet Halley, *The Politics of the Closet: Toward Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915 (1989); *see also* Leslie, *supra* note 1, at 105.

²²⁸ Halley, *supra* note 227, at 945-46 ("The legal and social burdens imposed on homosexual identity deter individuals whose desires and behavior are entirely or partially homosexual from acknowledging that fact.").

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In a legal context, because a statement that one is homosexual is actionable as defamatory when false, defamation law provides harbor only for those willing to publicly denounce and litigate against such a statement.²²⁹ While this legal consequence may be correct in suggesting that those who disclose their homosexuality do not regard it as harming their reputation, practically speaking, it leaves only two options for self-identified homosexuals: they must either (1) acknowledge and subjectively regard their homosexuality as degrading or (2) hide it.²³⁰ This not only places a premium on heterosexuality, but simultaneously functions as legal deterrant for those who wish to be openly gay. It is easy to see, then, that while other groups are free to promulgate hatred through spreading lies that a heterosexual is gay, gays and lesbians have very little opportunity to expunge their own identities of this judicially-imposed pejorative meaning.²³¹ It has been noted that, because of harsh societal penalties, many homosexual persons conceal their sexual orientation.²³² Accordingly, the *Gray* rule may have the practical effect of politically silencing gays and lesbians, as it results in the removal of homosexuals from open political activity.²³³ This would only diminish any perspective or sensitivity by the heterosexual majority for concerns of the homosexual community.²³⁴ Given that the New Jersey legislature has explicitly encouraged gays and lesbians to participate in the state's political forum, it is hard

²²⁹ As noted in *supra* note 220, truth is an affirmative defense to defamation. Furthermore, although anyone may consider his or her reputation to have been harmed by a statement, it is self-evident that no one is required to litigate.

²³⁰ This sort of "rock and a hard place" analysis has been noted by at least one commentator with regard to government policy of firing all homosexuals. See Halley, *supra* note 227, at 957, *construing* *Doe v. Casey*, 796 F.2d 1508 (D.C. Cir. 1986), *aff'd in part, rev'd in part on other grounds, sub nom.*, *Webster v. Doe*, 486 U.S. 592 (1988).

²³¹ See *Jantz v. Muci*, 759 F. Supp. 1543, 1550 (D. Kan. 1991) (stating that homosexuals face severe limitations on their ability to protect their interests by means of the political process).

²³² Halley, *supra* note 227, at 957.

²³³ *Id.*

²³⁴ *Id.*

to imagine that this effect is desired.²³⁵

Additionally, inasmuch as *Gray* legally sanctions negative perceptions of gays and lesbians, it also implicitly tolerates, and may well foster, homophobia in New Jersey.²³⁶ Though defamation is a civil wrong and does not carry the impact of attributing criminal status to a class of individuals, the fact remains that judicial determinations in defamation suits unequivocally label certain acts or classes of people as undesirable.²³⁷ Allowing homosexuality to remain on the list of “legally offensive” terms may prevent gays and lesbians from reporting bias or hate crimes against them.²³⁸ In a jurisdiction that has articulated an interest in protecting homosexuals from this very type of isolation, it is antithetical for a court to declare that one person’s legally protected, public acknowledgement of homosexuality is another’s cause for a lawsuit.

Further, the harmful seeds sowed by judicial decree in defamation suits have especially subversive results because, unlike anti-gay legislation or active discrimination by specific organizations, a judicial declaration that attaches stigma to a particular class cannot be redacted by political lobbying or advocacy.²³⁹ Gay rights organizations have successfully affected

²³⁵ See N.J. STAT. ANN. § 52:9DD-8 (West 2002) (stating that the Human Relations Council “shall consist of an executive committee which shall include ten public members who shall be representative of the various ethnic; religious; national origin; racial; sexual orientation; gender; and disabilities organizations in the State”).

²³⁶ In the same manner that finding racial comments actionable as defamatory has been considered as sanctioning racism, homophobia is implicitly tolerated, if not affirmed, by finding an imputation of homosexuality defamatory. See Fogle, *supra* note 4, at 174.

²³⁷ See Arend, *supra* note 194, at 112. Inasmuch as criminal statutes have the immediate effect of denoting certain acts as “criminal,” civil laws and tort claims function to make the injured party whole. *Id.* Arend argued that tort law is not properly employed as a mechanism to change social attitudes. See *id.* (“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.”).

²³⁸ See Halley, *supra* note 227, at 957.

²³⁹ See *supra* Part I.B (noting that the only statutes governing the law of

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legislative approaches to numerous causes in New Jersey.²⁴⁰ As noted, the legislative and judicial branches of the state government have been receptive to passing and interpreting laws so as not to advance discriminatory attitudes or initiatives.²⁴¹ Defamation law, however, is unique because there is not, and perhaps cannot be, a mechanism to attack the discrimination that it undoubtedly fosters.²⁴² In a single decision, *Gray* now effectively provides the legal legs upon which individuals who wish to advance anti-gay and homophobic agendas may stand. Because control over the boundaries of defamatory categories is placed in the hands of judges, only a decree from the bench can eradicate the myriad, pervasive effects of *Gray*.²⁴³

defamation in New Jersey pertain to retraction and pleading requirements).

²⁴⁰ Numerous groups are active in lobbying for gay rights and electing officials supportive of gay and lesbian initiatives in New Jersey. For examples of state and local organizations and their political efforts, *see e.g.*, New Jersey Stonewall Democrats, at <http://www.geocities.com/njstoned/WTC.html> (outlining mission statement of coalition of lesbian, gay, bisexual and transgendered individuals effecting change within the state Democratic Party) (last visited Mar. 24, 2002); New Jersey Lesbian and Gay Coalition, at <http://www.njlgc.org> (detailing efforts of non-profit organization committed to sexual orientation-based discrimination through public advocacy, education, political action and legal reform) (last visited Mar. 24, 2002); Gay and Lesbian Political Action and Support Groups, at <http://www.gaypasg.org/Projects/STOP%20HARASSMENT%20AND%20BULLYING.htm> (outlining work done to pass bills in the New Jersey Senate and Assembly that would implement sexual orientation provisions of the state's LAD to further safe schools and community violence prevention by requiring school districts to adopt harassment and bullying prevention) (last visited Mar. 24, 2002).

²⁴¹ *See supra* Parts I.E.1, I.E.2 (examining New Jersey legislation and caselaw relevant to sexual orientation).

²⁴² Courts do not recognize a cause of action where the allegedly defamatory statement is directed at a group. *See, e.g.*, *Neiman Marcus v. Lait*, 13 F.R.D. 311, 316 (S.D.N.Y. 1952) ("Where the group or class disparaged is a large one, absent circumstances pointing to a particular plaintiff as the person defamed, no individual member of the group or class has a cause of action.") (quoting RESTATEMENT OF TORTS § 564(c)).

²⁴³ As noted in *supra* Part I.B., it is for the court to determine whether a statement is defamatory in the first instance.

III. A MORE COMPREHENSIVE PROPOSAL: SHEDDING LIGHT IN A GRAY AREA

Although courts in the United States are divided as to whether a false imputation of homosexuality is defamatory per se or defamatory per quod,²⁴⁴ no court has concluded that an accusation of homosexuality is not actionable under any circumstance.²⁴⁵ A recent case from New South Wales, Australia, *Rivkin v. Amalgamated Television Services*, however, concluded that a jury is no longer allowed to decide on the defamatory character of imputations that a person may be homosexual.²⁴⁶ While this opinion is from an international jurisdiction, the mechanisms applied by the court are enlightening. *Rivkin* referred to the framework of state and federal legislative provisions to determine the community's view on homosexuality.²⁴⁷ Significantly, the legislation presently in place in New Jersey nearly mirrors that of the jurisdiction in *Rivkin*.²⁴⁸ Unlike the *Gray* court, the *Rivkin*

²⁴⁴ Defamation per se is "a statement that is defamatory in and of itself and is not capable of an innocent meaning." BLACK'S LAW DICTIONARY 427 (7th ed. 1999). Defamation per quod is a statement that "either (1) is not apparent but is proved by extrinsic evidence showing its injurious meaning or (2) is apparent but is not a statement that is actionable per se." BLACK'S LAW DICTIONARY 427 (7th ed. 1999).

²⁴⁵ See *supra* Part I.C (reviewing caselaw finding imputations of homosexuality to be either defamatory per se or per quod).

²⁴⁶ *Rivkin v. Amalgamated Television Servs. Pty. Ltd.*, 2001 NSW LEXIS 432 (N.S. W. S. Ct. 2001).

²⁴⁷ *Id.* at *5. Specifically, the court noted that the former proscription of homosexual conduct between consenting males adults was abolished by amendment in 1984. The Anti-Discrimination Act includes unlawful discrimination on the grounds of homosexuality in a wide range of contexts and includes a provision making it unlawful to incite hatred towards, serious contempt for, or severe ridicule of a person on the grounds of homosexuality. The Property (Relationships) Legislation Amendment Act broadened the definition of "de facto relationship" to include homosexual relationships, thus providing for court orders adjusting property rights between homosexual couples upon the termination of a domestic relationship. *Id.*

²⁴⁸ See *supra* Parts I, II. For a comprehensive overview and state-by-state comparative analysis of New Jersey's laws on sexuality-related topics, readers are encouraged to examine *Overview of State Sexuality Laws* generated by the

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court found that “it is no longer open to contend that the shared social and moral standards with which the ordinary reasonable member of the community is imbued include that of holding homosexual men . . . in lesser regard *on account of that fact alone*.”²⁴⁹ The facts underlying *Rivkin* are distinguishable, but the court’s conclusion and analysis are instructive.²⁵⁰

The Supreme Court of New Jersey recently stated, “the human price of this bigotry has been enormous. At a most fundamental level, adherence to the principle of equality demands that our legal system protect the victims of invidious discrimination.”²⁵¹ It would seem reasonable to conclude, therefore, that the court is amenable to progressive solutions like those employed in *Rivkin* to cure social ills. At a minimum, the state courts have acknowledged the legal impact upon the political and social reality of what it means to be an openly gay individual. The court should have utilized existing legislation and

Sexuality Information and Education Council of the United States (SIECUS), available at <http://www.siecus.org/policy/states> (last visited Mar. 11, 2002).

²⁴⁹ *Rivkin*, 2001 NSW LEXIS at *7 (emphasis added). The court allowed plaintiff to re-plead his case, and submitted to the jury an amended contention that defendant had abused his position of power in an employee-employer relation by engaging in a homosexual affair with a third party. *Id.*

²⁵⁰ *Id.* at *1-2. The defendant in *Rivkin* was responsible for airing a television broadcast that suggested the plaintiff was criminally liable for the death of a woman who was the partner of a man the program alleged to be engaged in a homosexual relationship with the plaintiff. *Id.* Based on the broadcast, Mr. Rivkin sued the television station. In addition to the imputation of homosexuality, he pled that three additional imputations in the program were defamatory. *Id.* The court acknowledged defendant’s challenge to the charges involving homosexuality as the following:

[U]ntil relatively recent times the charge that a man had had homosexual intercourse with another would, without more, have been capable of being defamatory of him. However, [defendant] submitted that there had been a change in the social and moral standards of the community such that, as a matter of law, it could not be said that right thinking members of the society generally would hold that the mere fact of homosexual intercourse lowered a man in their estimate.

Id. at *5. The plaintiff successfully pled that various other imputations within the television broadcast should be submitted to the jury. *Id.*

²⁵¹ *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1227 (N.J. 1999).

recent caselaw as a reflection of community and legal values to determine that an imputation of homosexuality is actionable as defamatory.

CONCLUSION

It is widely accepted that defamation law is an odd and confusing conglomeration of varying standards and procedures.²⁵² Rather than lending reason and clarity to the realm of defamation law, *Gray* has the dubious distinction of further muddying the “intellectual wasteland” of inconsistent rulings and unenlightened decisions.²⁵³ While commentators urge for closer judicial scrutiny to prevent abuse of defamation law, *Gray* clearly overlooked the need for legal reform.²⁵⁴ The Supreme Court of New Jersey should have re-examined *Gray* to insure that judicial decisions are consistent with the broader efforts of the legal system.

Similarly, the social phenomenon of homophobia cannot feasibly be attributed to a single source.²⁵⁵ A reconsideration of *Gray* would have effectuated the court’s articulated goal of expunging society of sexual orientation-based discrimination. Some commentators have expressed expectation, and even hope, that homosexuality will one day go the path of other categories into the annals of defamatory anachronisms.²⁵⁶ No court in the United States has risen to the challenge.²⁵⁷ The Supreme Court of

²⁵² See generally PROSSER & KEETON, *supra* note 9, at 771-72.

²⁵³ See Post, *supra* note 32, at 691.

²⁵⁴ MAYER, *supra* note 11, at 214 (stating that “courts must be tough in defining defamatory language to prevent abuse of the law Short of false and malicious statements clearly causing actual damages many defamation cases could well be summarily dismissed.”).

²⁵⁵ See generally Leslie, *supra* note 1, at 105.

²⁵⁶ See, e.g., MAYER, *supra* note 11, at 35; Arend, *supra* note 194, at 114; Fogle, *supra* note 4, at 166; Lidsky, *supra* note 8, at 36.

²⁵⁷ See, e.g., Hayes v. Smith, 832 P.2d 1022, 1025 (Colo. Ct. App. 1991) (holding that allegation of homosexuality is not slander per se and questioning, in dicta, whether such allegation should even be defamatory at all); see generally, 50 AM. JUR. 2D *Libel and Slander* § 199 (1995) (articulating the various positions taken by state and federal courts, all of which held that imputations of homosexuality are either defamatory per se or

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New Jersey stood in the unique position to provide substantial and effective analysis to this question.²⁵⁸ This comment does not suggest that a reversal of *Gray* would have erased homophobia from the fabric of society, or even from the state of New Jersey. A more enlightened analysis of the policy issues at stake in *Gray*, however, may have provided grounds for a reversal, which would have been a step in the direction of removing the scourge of sexual orientation based discrimination.²⁵⁹ In light of current legislation and the strongly worded decisions previously rendered by New Jersey courts, it is lamentable that the archaic conclusion of *Gray* was allowed to stand.

per quod).

²⁵⁸ The petition for certification of the appellate court's decision was denied. *See supra* note 156.

²⁵⁹ Leslie, *supra* note 1, at 105.