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DEFAMATORY IN WHOSE EYES?

*Kenneth W. Simons**

Defamation is a moral and legal wrong that is distinct from the wrongs of insulting or offending a person, lying to a person, or unjustifiably causing emotional distress. Defamation essentially involves harm or injury to a person's reputation. And reputation is a social concept: It refers to a person's standing in some relevant audience, i.e., the group or community beyond the speaker and the person.

But from whose perspective must a statement be defamatory? This question has multiple dimensions. Is our only interest whether the person's standing is lowered in the eyes of the community? Or should we also consider the perspective of the person who claims to have been defamed? Must that person subjectively view the statement as injuring his or her own reputation? Are we also interested in the perspective of the speaker?

The perspective of the person's group or community is undoubtedly critical, but this prompts additional questions. If only a minority, or even a very small portion, of the community would lower their opinion of the person, while the majority would not, is that sufficient? Moreover, are these further questions descriptive inquiries into how (most, some, or a few) people *would* react, or instead normative evaluations of how (most, some, or a few) people *should* react? Or is the most defensible analysis a hybrid or combination of descriptive and normative features?

One possible approach to these questions about the defamatory character of a statement asks whether the statement might cause a *reasonable*

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person to lower their esteem of the person. But the reasonable person test is inadequate: It obscures critical questions, including the relative weight we should give to descriptive rather than normative perspectives, to subcommunities as opposed to larger communities, or to the varying perspectives of the plaintiff, the speaker, and the relevant community.

The most plausible approach, I will argue, is a largely *descriptive* perspective that focuses on the actual reactions of both the plaintiff and the subcommunity with which the plaintiff identifies. Defamation law should reject a purely normative perspective that considers only whether members of the community would be justified in lowering their esteem of the plaintiff if the false statement were true. People frequently criticize and even ostracize others for flimsy, irrational, or illegitimate reasons. Yet the resulting reputational injuries are real, and the conduct that causes them is often highly unjustifiable. However, courts should recognize a narrow normative exception and should exclude liability when providing a defamation remedy would contravene a significant public policy, such as the legal principles condemning discrimination on the basis of race or sexual preference.

Introduction.....	763
I. The Relevant Audience (Speaker, Victim, Community).....	765
A. The Victim’s Perspective	765
B. The Speaker’s Perspective.....	767
II. The Perspective of “the Community”	768
A. The Descriptive Perspective	771
B. The Normative Perspective	777
III. Hybrid Approaches: Disjunctive and Conjunctive	785
IV. The Reasonable Person Test.....	788
V. A Suggested Approach.....	792
Conclusion	795

INTRODUCTION

Defamation is a moral and legal wrong. But it differs from the wrongs of insulting or offending a person, the wrong of lying to a person, and the wrong of unjustifiably causing someone emotional distress. Defamation is distinctive because it essentially involves harm or injury to a person's reputation. And reputation is a social concept: It refers to a person's standing in some relevant group or community, beyond the speaker and the person.

To be sure, we might view the wrong of defamation as extending even to false statements that would otherwise be considered defamatory and that are made only to the person who claims to have been defamed. But this scenario reflects a different type of wrong, more in the nature of an insult or an offensive statement. Thus, suppose an actor falsely says to someone, "You stole money from me!" but shares this accusation with no one else. The listener might react with indignation, but she could not plausibly claim that her reputation was harmed—unless she expected that the defamer might share the accusation with others.

With this framework in mind, I will focus on the following question: From *whose perspective* must a statement be defamatory, lowering a person's standing?

This question has three interrelated dimensions: the relevant audience (speaker, victim, community, or some combination of these); which community or subcommunity matters; and the extent to which the perspective is descriptive as opposed to normative—or, put differently, real as opposed to ideal. Parts I and II of the essay explore these topics. The essay then turns, in Part III, to hybrid approaches that combine descriptive and normative perspectives, either disjunctively or conjunctively. Part IV analyzes and critiques a popular alternative approach, which asks whether a reasonable person would lower their esteem of the plaintiff. Part V then discusses a new approach. Under this proposal, whether a statement is defamatory depends on whether, as a descriptive matter, it appreciably lowers the esteem in which the person is held among a substantial portion of the community. However, the proposal also contains a narrow normative exception, precluding a tort remedy if providing that remedy would contravene a significant public policy.

This essay is a legal and philosophical analysis of what makes a false communication defamatory. It is not a thorough review of the intricacies of current legal doctrine, but instead an attempt to provide a useful general framework and to offer some suggestions for reform. Accordingly, the essay will not discuss, or will discuss only in passing, the following issues:

- The scope of constitutional protection for defamatory speech.
- The distinction between fact and opinion.¹
- How defamation law should determine the relevant meaning of an allegedly defamatory statement.

With respect to the last issue, it is important to remember that determining the meaning of a statement is a distinct issue from whether, after that meaning has been determined, the statement has a defamatory content. Unfortunately, courts and commentators sometimes conflate these questions when they ask whether a particular statement is “capable of a defamatory meaning.”² Suppose I post on a social media site a negative review of a concert by Brandi Carlile that I attended,³ and I say “Brandi stole \$100 from me last night; that’s what my ticket cost!” I clearly did not intend to say that she committed the crime of theft, and it would be unreasonable for a reader to think that that was what I meant. But of course a genuine false accusation of criminal theft would be defamatory.

This essay addresses defamation both as a moral wrong and as a legal wrong, with a greater emphasis on the latter. The two types of wrongs share important features but also differ in a number of ways that are discussed below. But it is worth noting at the outset one substantial difference. Making a false statement that the speaker knows or suspects is false and that only modestly demeans or criticizes the plaintiff would plausibly be considered wrongful as a matter of interpersonal morality, but it does not, and should not, suffice for legal liability. The social value of providing a legal remedy for trivial infringements of a person’s reputation is too slight to justify the social costs.

¹ I will assume, in my examples, that the communication falls on the “fact” side of this distinction.

² For a clear statement of the distinction, see RESTATEMENT (THIRD) OF TORTS: DEFAMATION AND PRIVACY §§ 5 cmt. g, 6 cmt. d (Preliminary Draft No. 3, 2023) (not approved by the Am. L. Inst.). The latter comment explains: “The *meaning* of a defendant’s communication is determined by what a recipient of the communication would reasonably understand the defendant intended to express. The distinct question of whether that meaning is defamatory is determined by the standard of the reasonable person in that community, without regard to the defendant’s presumed intent.” *Id.* § 6 cmt. d.

³ This is an extraordinarily unrealistic hypothetical.

For example, procrastination is subject to at least mild moral criticism, but the loss of esteem that a false accusation of procrastination would foreseeably engender is too speculative and modest to justify legal liability.⁴ Courts frequently emphasize that not every false and derogatory statement counts as defamation. This point is captured in the common requirement that the defamatory communication must *appreciably* lower the esteem of the plaintiff.⁵

I. THE RELEVANT AUDIENCE (SPEAKER, VICTIM, COMMUNITY)

Let us turn to the question of which audience is relevant for purposes of determining whether a communication is defamatory.

The paradigm case of defamation, in both the moral and legal realms, is a false statement that harms the victim's reputation as judged by some relevant audience, especially the broader community. But which community? And should we also care about the perspective of the speaker? Of the victim? The perspective of the community is undoubtedly very important, so it will be my main focus. But the other two perspectives are also worth brief discussion.

A. *The Victim's Perspective*

First, consider the victim's perspective. If this is relevant, then we might want to be sure that the victim subjectively views the statement as injuring his or her own reputation. Of course, the simple fact that the victim brings a lawsuit seeking a remedy is powerful proof that the victim so views the statement. But it is not dispositive proof.

One famous example is the landmark case of *New York Times v Sullivan*,⁶ in which a white government official in Alabama who supervised the police sued for defamation based on an advertisement in the *New York Times* that he claimed falsely portrayed him as responding to a peaceful protest by ordering armed police

⁴ See, e.g., *Healey v. Healey*, 529 S.W.3d 124, 131 (Tex. Ct. App. 2017) (“Procrastination may not be seen as a positive attribute, but [a statement asserting that plaintiff procrastinated] is not likely to injure [plaintiff's] reputation or impugn his character.”).

⁵ See RESTATEMENT (THIRD) OF TORTS: DEFAMATION AND PRIVACY § 6 (Preliminary Draft No. 3, 2023) (not approved by Am. L. Inst.). Under England's Defamation Act, enacted in 2013, a “statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant.” WINFIELD AND JOLOWICZ ON TORT § 13-004, at 361 (Edwin Peel & James Goudkamp eds., 19th ed. 2014).

⁶ 376 U.S. 254 (1964).

to ring a college campus and as answering Martin Luther King's peaceful protests with violence. Perhaps the plaintiff did not actually believe that his reputation was harmed by the statement. Perhaps he sued just to recover financial compensation, or to harass and punish a liberal Northern newspaper that was critical of Southern resistance to desegregation. Although readers of the New York Times might have thought less highly of him because of his alleged use of excessive force against Black students,⁷ his reputation among his peers in the local white community might actually have been *enhanced* after the Times printed the derogatory advertisement relating to him. In this type of case, the argument for a tort remedy is weaker; and the measure of damages might also take into account the possibility that the so-called "victim" believed that the statement ultimately enhanced his reputation. (Below, I will discuss more fully the "net enhancement" argument.)

For another example, suppose that a speaker knowingly makes the false accusation that a person *P* has widely disseminated sexually explicit photos that *P* took of his former girlfriend without her consent, yet *P* shrugs off the accusation, because he doesn't care whether other people will think less of him based on that false accusation. Nevertheless, we might conclude that the accuser has acted wrongfully in making the false accusation. And this conclusion arguably holds even if the accuser knows that *P* would not be upset by the false assertion.

On the other hand, perhaps our intuition that this speaker acts wrongfully reflects a judgment that the speaker is highly culpable in making the false and (normally) derogatory statement, but not the judgment that *P* has been wronged.⁸ Accordingly, perhaps any legal liability in this circumstance should take the form of criminal punishment, not tort liability. In substance, the accuser has *attempted* to wrong the victim but has failed to do so. Although criminal law regularly punishes

⁷ It is questionable whether plaintiff suffered even this type of reputational harm, because the advertisement that contained the allegedly false statements did not clearly identify plaintiff's role in the incident. *Id.* at 288.

⁸ It is also possible that *P* in this example has indeed been wronged, even though *P* would not so characterize the situation. Does wrongdoing require that the relevant victim recognize merely the facts that make the offender's conduct wrong, or does it also require that the victim understand that a particular set of facts indeed constitutes the relevant wrong? Or perhaps it requires neither (as in the case of a victim who is a very young child). These are interesting questions that I do not explore in this paper.

for attempts, tort law almost never imposes liability for attempts that do not result in injury or harm.⁹

A final question about the victim's perspective (and about the perspective of the community, discussed below) is whether it is possible to defame someone who already has an extremely bad reputation. Some courts endorse the libel-proof plaintiff doctrine, answering this question in the negative. But courts that adopt the doctrine apply it extremely sparingly.¹⁰ They are unlikely to apply the doctrine just because plaintiff has engaged in minor wrongdoing in the past, but they are more likely to apply it to plaintiffs convicted of very serious crimes or on a particular subject—for example, when a statement falsely accuses plaintiff of adultery but the plaintiff is known to have engaged in another long-term adulterous affair.¹¹ This doctrine supports the basic principle that culpable behavior by a speaker is insufficient for defamation; actual or potential injury to the plaintiff's reputation is required.

B. *The Speaker's Perspective*

Now consider the perspective of a *speaker* concerning the defamatory nature of the speaker's statement. Is this relevant? For example, is it necessary that the speaker injure a person's reputation purposely? Knowingly? Negligently?

Under common law principles of defamation, the speaker does not need to act with any fault whatsoever as to the defamatory nature of the publication. Even if the speaker reasonably believes that the publication is not defamatory, that is no

⁹ See Kenneth W. Simons, *The Crime/Tort Distinction: Legal Doctrine and Normative Perspectives*, 17 WIDENER L.J. 719, 720 (2008).

The tort of assault might seem to be an exception to the statement in the text, that tort law rarely imposes liability for attempts, but it is not, because assault requires that the defendant cause a result—namely, that the plaintiff actually apprehend or anticipate that the defendant might cause a nonconsensual physical contact. See RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 105 (Tentative Draft No. 1, 2015, later renumbered § 5) (approved by Am. L. Inst.).

¹⁰ See Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691, 714 n.124 (1986); *Stern v. Cosby*, 645 F. Supp. 2d 258, 270 (S.D.N.Y. 2009); ROBERT D. SACK, SACK ON DEFAMATION § 2:4.18 (5th ed. 2017).

¹¹ See *Guccione v. Hustler Mag., Inc.*, 800 F.2d 298 (2d Cir. 1986).

defense. Rather, the speaker only needs to intentionally or negligently make a statement to a third person.¹²

Fault as to the defamatory nature of the publication is also not a requirement under the Supreme Court's constitutional rules restricting defamation liability. Although the Court has required varying levels of fault on the part of the speaker, depending on whether the victim was a public official or public figure and whether the topic was a matter of public concern, the Court has required fault on the part of the speaker only with respect to the *falsity* of the statement. It has not required fault with respect to whether the statement will harm the person's reputation.

But as a matter of first principles, arguably the fault of the speaker in this regard should be relevant in several different ways. First, a high degree of fault (such as a purpose to injure plaintiff's reputation) counts in favor of punitive damages and, perhaps, in favor of damages for emotional distress or dignitary harm. Second, perhaps the constitutional protection for First Amendment interests implicated by defamation liability should take into account whether the speaker acts with fault of this kind, especially when the speaker acted with the knowledge or purpose that the plaintiff will suffer harm to their reputation. Suppose a newspaper believes there is a significant chance that the story that it is publishing about plaintiff is false, but its suspicion is not quite sufficient to satisfy the actual malice standard, which requires that "the defendant must have made the false publication with a high degree of awareness of probable falsity or must have entertained serious doubts as to the truth."¹³ And further suppose that the newspaper's predominant reason for publishing the story is a purely malicious desire to destroy plaintiff's reputation. In such a case, a high level of fault with respect to harming reputation arguably should compensate for a less-than-actual-malice level of fault with respect to the truth of the defamatory statement and should satisfy constitutional requirements for lawsuits by public officials and public figures.

II. THE PERSPECTIVE OF "THE COMMUNITY"

Because harm to reputation is a necessary element of both the tort and the moral wrong of defamation, we need to look beyond the speaker and victim to the

¹² See RESTATEMENT (SECOND) OF TORTS § 577 (1977). Similarly, although truth was traditionally a defense, a reasonable (but mistaken) belief that the statement was true was no defense.

¹³ *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 667 (1989) (internal quotation marks and ellipsis omitted).

community in whose eyes the victim's reputation has been sullied. But which community's perspective matters?

This question has two important, and related, dimensions. The first concerns the problem of subcommunities or multiple communities. Suppose only a minority of a community would lower their opinion of the person, while the majority would not. Is that sufficient? What if only a *very small portion* of the group would view the person critically?

The second dimension concerns the type of perspective that matters. Does the judgment that an actor has wrongfully defamed someone depend on a merely *descriptive* inquiry, into how most, some, or a few members of the community would actually react? Or is it instead a *normative* evaluation of how (most, some, or a few) members *should* react or are entitled to react? Or is the most defensible analysis a combination or hybrid of descriptive and normative features?¹⁴

In contemporary American tort law, courts are somewhat divided over these questions. Some courts give more emphasis to the descriptive dimension, and others to the normative dimension, as we will see.

In many, and perhaps most, defamation cases, the choice of perspective will not affect the legal outcome. If the plaintiff is falsely accused of a serious crime, almost everyone in the community who hears of the accusation will have a much lower opinion of the plaintiff. And as a normative matter, community members are justified in having that lower opinion. The same is true if the plaintiff is falsely accused of being incompetent in their profession or business. But in many other cases, the choice of perspective can indeed affect the outcome.

¹⁴ See, e.g., Rodney Smolla, *Ethical Complexities in Defamation and False Light Claims*, 20 GEO. J.L. & PUB. POL'Y 1009 (2022) (endorsing a descriptive perspective); LAWRENCE MCNAMARA, REPUTATION AND DEFAMATION (2007) (endorsing a normative perspective); Adam Slavny, *The Normative Foundations of Defamatory Meaning*, 37 LAW & PHIL. 523 (2018) (endorsing a hybrid). Prominent cases endorsing the descriptive perspective are Justice Oliver Wendell Holmes' opinion in *Peck v. Trib. Co.*, 214 U.S. 185, 190 (1909), and Judge Learned Hand's opinion in *Grant v. Reader's Digest Ass'n*, 151 F.2d 733 (2d Cir. 1945), excerpted below. But a significant number of cases cite the "substantial and respectable minority" standard of RESTATEMENT (SECOND) OF TORTS § 559 cmt. e; and the "respectable" requirement is normative. See, e.g., *Jews for Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1114 (Fla. 2008).

As I discuss below, those who endorse the normative position usually presuppose a minimally hybrid view insofar as they presuppose that some members of the community will actually lower their esteem of the victim.

Here are some concrete illustrations of the problem. In each example, assume that the speaker communicates the statement to people other than the target individual.

- Is it morally wrongful, and should it be tortious, to falsely accuse someone of being sexually promiscuous?¹⁵
- To falsely accuse someone of being sexually inexperienced?
- To falsely assert that someone drinks alcohol (when that person is a member of a religious community that disapproves of this)?
- To falsely assert that someone does *not* drink alcohol (when the person is a member of a college fraternity that disapproves of sobriety)?
- To falsely state that a person has a serious disease?
- To falsely state that a person is an informant and has reported the criminal activity of others, or has cooperated with law enforcement in some other way?
- To falsely identify a Donald Trump supporter (or a Republican) as a Bernie Sanders supporter (or as a Democrat)—or vice versa?
- To falsely label a Cuban-American person as a Communist?¹⁶
- To falsely say that someone belongs to a racist or anti-Semitic organization?
- To falsely identify a heterosexual person as gay (or vice versa)?
- To falsely identify a cisgender person as transgender (or vice versa)?

¹⁵ See *Mallory v. S & S Publishers*, 260 F. Supp. 3d 453, 462 (E.D. Pa. 2017) (“[C]ourts have found statements implying promiscuity to be reasonably susceptible to defamatory meaning.”).

¹⁶ Lyrissa Barnett Lidsky, *Defamation, Reputation, and the Myth of Community*, 71 WASH. L. REV. 1, 46 (1996) (footnote omitted) (plausibly stating that such a statement “is highly injurious in the Cuban-American community, even though this label may have lost its sting for a large portion of the American populace”); see also Clay Calvert, *Personalizing First Amendment Jurisprudence: Shifting Audiences & Imagined Communities to Determine Message Protection in Obscenity, Fighting Words, and Defamation*, 20 U. FLA. J.L. & PUB. POL’Y 438, 469–70 (2009) (noting that courts were much more willing to treat false accusations of being a Communist as defamatory during World War II or the Cold War than in recent times).

- To falsely accuse a political candidate of eating a salad with a comb?¹⁷ Of eating pudding with the candidate's fingers?¹⁸

In the remainder of this Part, I will examine two potential approaches that might be taken to these questions—a purely descriptive approach or a purely normative approach. I will ultimately conclude that a particular type of hybrid approach is the most justifiable. However, it will prove helpful to begin by analyzing the strengths and weaknesses of each pure approach before examining potential hybrid approaches. In discussing the pure approaches, I will also consider whether the relevant perspective is that of the community as a whole or a subcommunity.

A. *The Descriptive Perspective*

A significant number of defamation cases rely on a descriptive rather than normative perspective. One famous example is *Grant v. Reader's Digest Association*:¹⁹

A man may value his reputation even among those who do not embrace the prevailing moral standards; and it would seem that the jury should be allowed to appraise how far he should be indemnified for the disesteem of such persons. . . . We do not believe, therefore, that we need say whether “right-thinking” people would harbor [negative] feelings toward a lawyer, because he had been an agent for the Communist Party, or was a sympathizer with its aims and means. It is enough if there be some, as there certainly are, who would feel so, even though they would be “wrong-thinking” people if they did.

Let us look more closely at the descriptive view. If this is the sole perspective, or even if it is merely part of a hybrid standard, you might think that courts would demand actual evidence that the audience judged the plaintiff negatively because of the false statement. But courts rarely admit specific evidence to this effect, such as polling data.²⁰

¹⁷ This is a reference to an allegation about the behavior of U.S. Senator Amy Klobuchar, a presidential candidate in 2020.

¹⁸ This is a reference to an allegation about the behavior of Governor Ron DeSantis, a presidential candidate in 2024.

¹⁹ 151 F.2d 733, 734–35 (2d Cir. 1945) (Hand, J.).

²⁰ See Eric P. Robinson, *Libel by the Numbers: The Use of Public Opinion Polls in Defamation Lawsuits*, 51 FIRST AMEND. STUD. 62 (2017); Lidsky, *supra* note 16, at 7. Lidsky would require that plaintiff plead and prove both actual harm and the existence of a segment of the actual community from whose perspective the plaintiff was harmed. *Id.* at 45–48.

Does this judicial practice reveal that courts that purport to apply the descriptive approach do not actually do so? Not necessarily. Sometimes this practice is justified, especially when the relevant community is large and largely unified in its views. Almost everyone would lower their esteem of a person if they believe the person has committed a serious crime or is incompetent in their business or profession. Courts can take judicial notice of widespread and customary attitudes of this sort.

By contrast, if the relevant community is small, there is more reason to require individualized evidence. Suppose someone in the church you attend falsely accuses you of occasionally drinking alcohol, and many members of the church would find this conduct to be highly immoral. Then, under the descriptive approach, you have been wronged, even if *most* members of the church would treat the behavior as a minor lapse or would even be indifferent. But a court could not plausibly take judicial notice of the differences of opinion within the church.

This evidentiary issue underscores a more general point: A descriptive account can readily be tailored to the realities of our pluralistic society, in which multiple subcommunities coexist yet have substantially different standards for the type of behavior that is considered praiseworthy, condemnable, or inconsequential.²¹ Professor (and Restatement Reporter) Lyrisa Lidsky has helpfully emphasized this point: “The United States is a pluralistic society; there is no longer, if there ever was, a homogeneous community whose norms provide the benchmark for determining what statements are defamatory.”²²

²¹ Consider the much-quoted language from *Peck v. Trib. Co.*, 214 U.S. 185, 189 (1909) (Holmes, J.):

If the [statement] obviously would hurt the plaintiff in the estimation of an important and respectable part of the community, liability is not a question of a majority vote. . . . [O]bviously an unprivileged falsehood need not entail universal hatred to constitute a cause of action. No falsehood is thought about or even known by all the world. No conduct is hated by all. That it will be known by a large number, and will lead an appreciable fraction of that number to regard the plaintiff with contempt, is enough to do her practical harm.

²² Lidsky, *supra* note 16, at 8 (footnote omitted). Professor (and Restatement Reporter) Robert Post also acknowledges the value of diversity and tolerance of difference, but he places more emphasis than Lidsky on the role that defamation law should play, in his view, in defining and recognizing community. In his pithy phrase: “Only a thoroughly demoralized community can tolerate everything.” Post, *supra* note 10, at 736.

But this advantage of a descriptive account carries with it a corresponding disadvantage: Sometimes a false statement portrays the plaintiff in a way that prompts both praise and condemnation. What are we then to do?

Consider the important category of informant cases, a category in which courts routinely reject defamation liability.²³ If a prison inmate is falsely accused of being an informant, he might face complete ostracism, not to mention violent retribution, from other inmates. At the same time, most people probably have a high opinion of a person who chooses to provide the government with helpful information for prosecuting criminal behavior. On a purely descriptive account, we would then need to decide whether to adopt a comparative approach such as “the majority rules,” or instead an approach that eschews comparison, such as “a substantial minority would judge the plaintiff negatively.” The latter seems more defensible, especially in the case of a prison informant who might suffer a beating or other significant harm as a result of the false accusation. The fact that prison administrators and individuals outside the prison admire the informer’s conduct hardly seems enough to outweigh this tangible harm. (We will see that the analysis of informant cases would be quite different under the normative approach.)

More generally, there are reasons not to frame the descriptive inquiry too reductively. The question is not simply whether the net effect of a false statement on the plaintiff’s reputation is negative, or, more broadly, whether defamation liability in these cases would increase social welfare. Perhaps a consequentialist account of the wrong of defamation would adopt this framework. But such an approach is too crude. If the plaintiff identifies much more with the community that views the statement as harming plaintiff’s reputation, that seems decisive, even if more people view the statement as increasing than as diminishing plaintiff’s reputation. When the plaintiff identifies with a particular community, that community might inflict or threaten tangible harm on the plaintiff, such as losing a job or a job opportunity, or even suffering physical injury. And apart from such harms, the plaintiff might suffer more subtle types of losses that can be devastating in their own way—losses of friendship, of the opportunity to be included in local activities and social groups, and of a sense of belonging to the community.

In many cases, the diversity of reactions to a false statement does not take the form of starkly opposing characterizations of the reputation or character of the

²³ See MCNAMARA, *supra* note 14, at 128–34.

plaintiff. Informant cases do take this form. But often, some people will hold the plaintiff in much lower esteem while others will have little or no reaction, either negative or positive. For example, a false claim that plaintiff is sexually promiscuous is likely to provoke criticism of the plaintiff from a few people with traditional moral beliefs but to meet indifference from many others. In such a case, the descriptive view does not face the challenge of resolving the tradeoff between strongly negative and strongly positive reactions. Rather, the defamatory quality of the statement is established, so long as the strongly negative views are sufficiently numerous.

Under the descriptive view, if only a portion of the wider community has a negative reaction, how substantial must that portion be? What is the threshold absolute size or proportion of the community that is necessary, even if this subcommunity is a minority? Assuming that the rest of the community is merely indifferent, and does not affirmatively approve of the purported conduct, in principle the answer is: There is no minimum threshold. Even if only a handful of people (other than the speaker and the victim) have a negative reaction and lower their opinion of the victim, perhaps we should characterize their reaction as sufficient to warrant a tort remedy. Moreover, this conclusion is supported by defamation law's usual definition of "publication" as requiring a communication to only a single person other than the person defamed.²⁴

On the other hand, if we really mean to provide a defamation remedy only for reputational injury as opposed to other kinds of wrongs, disseminating a falsehood to only one person or only a handful of individuals is arguably insufficient, because the conduct is closer to an insult. If defamation is a distinctive legal claim or a distinctive moral wrong, doesn't the legal or moral wrong require communication to a wider subcommunity than this? For legal purposes, there is a pragmatic answer. First, it is convenient to invoke a bright-line rule (any number of individuals other than the speaker and the victim) rather than a vague threshold standard such as "significant subcommunity." Second, whenever a false and disparaging statement is communicated beyond the speaker and the person who is disparaged, there is some risk of further dissemination, which could then result in genuine reputational harm. If a speaker tells plaintiff's manager the falsehood that the plaintiff has been

²⁴ See RESTATEMENT (SECOND) OF TORTS § 577(1) (1977).

embezzling funds, it is quite possible that the manager will spread the news to others. Third, even if only a single person hears the defamatory statement, that person might inflict significant harm, as when the defendant defames the plaintiff to a prospective employer who then refuses to hire the plaintiff.

Furthermore, even if the absolute number of individuals who receive the defamatory communication is very small, a requirement of a “significant” or “substantial” subcommunity might be met in another way. Instead of requiring that a significant absolute number (or a significant proportion) of people in the community must actually form a lower opinion of the victim, we could employ a counterfactual test: *If* the communication had been disseminated much more widely, would a significant number or proportion of that larger potential audience have formed a lower opinion of the victim? I believe that courts might be appealing to this counterfactual test implicitly when they decline to require actual proof that a significant number or proportion of a community formed a lower opinion of the victim even in cases when the communication *is* broadly disseminated.

Some of the examples I listed at the beginning of this Part involve people who are falsely accused of conduct inconsistent with their public-facing roles, such as members of a religious community, a social club, a nonprofit group, or a fraternity or sorority. In many of these cases, the relevant community is quite small, and the conduct is not widely disfavored outside that community. For example, the speaker might falsely assert that a member of a religious group that forbids alcohol actually does drink,²⁵ or that a member of a fraternity that strongly encourages alcohol actually does not drink. It might seem that only the descriptive approach can explain defamation liability in such cases.

However, a critic of the descriptive approach might assert an alternative argument for liability: The actor is a hypocrite. He claims to, but does not, follow standards shared with others. On this alternative explanation, he does have a moral defect—of hypocrisy and dishonesty. Perhaps, then, the normative perspective can justify defamation liability even in these cases. As the Winfield and Jolowicz treatise explains:

²⁵ McNamara offers a similar example of a religious group that believes one should read the bible every day; a member might claim to have been defamed by a statement that she had not done so. MCNAMARA, *supra* note 14, at 123.

[I]n many cases where a claimant is charged with offending against the tenets of a group to which he belongs there may be an implication of disloyalty or hypocrisy, which is actionable in its own right, even though ordinary people are indifferent to the direct charge against him. To say of a person that he takes alcohol in moderation is not defamatory; but to say it of a temperance crusader may very well be.²⁶

But I do not think that hypocrisy alone is sufficient to explain the intuition that defamation liability is warranted in this category of cases. If the hypocrisy concerned a relatively trivial matter or a matter about which most people are genuinely indifferent, defamation liability would be unjustified. (Suppose someone is falsely accused of not washing his agreed share of the dishes in an apartment shared with roommates even though he had repeatedly demanded that his roommates wash their agreed share.)

A final and related point about thresholds and subcommunities concerns the relatively new phenomenon of communications distributed on social media. This phenomenon provides another reason why a false statement that provokes no negative reaction from a majority of a community might still be considered defamatory under the descriptive approach. When false and defamatory statements are disseminated on the internet, and especially on social media, the potential impact of those statements dramatically increases.²⁷ And because the internet is so easy to access, any false statement might readily be distributed very widely. Thus, even if only 5% of recipients of a particular statement are likely to view the victim negatively, that is still a potentially enormous number of people if the statement is distributed online. To be concrete, suppose only 5% of the members of the plaintiff's church would appreciably lower their opinion of the plaintiff in light of the false statement that plaintiff occasionally drinks alcohol (behavior that the church's teachings disapprove of). That might ordinarily be too insubstantial a percentage to satisfy a descriptive criterion requiring that at least a substantial minority of the relevant community look negatively upon the plaintiff. But if the statement is distributed on the internet to members of the plaintiff's denomination worldwide, the number of people who react negatively would increase enormously.

²⁶ WINFIELD AND JOLOWICZ ON TORT, *supra* note 5, § 13-009, at 363 (citations omitted).

²⁷ The impact greatly increases as compared to pre-internet interpersonal communications, though perhaps not as compared to pre-internet mass media publication. Still, it was much more difficult, in the pre-internet days, for a private person to reach a huge audience.

Perhaps the greatest drawback to a purely descriptive approach is its implication that defamation liability should exist even in cases where the subgroup that judges the plaintiff negatively is motivated by prejudice, such as racism or prejudice against gay or transgender individuals. I address this issue below.

B. The Normative Perspective

Now suppose that, in lieu of a purely descriptive perspective, the law (and interpersonal morality) employed an exclusively normative perspective, under which the relevant community must be *justified* in lowering their esteem of a person based on the speaker's false statement. On first impression, this approach seems sensible. Let us break it down into two parts:

- (1) A person is defamed if an actor makes a false statement about the person and if an audience that believes the statement to be true would be *justified* in thinking less of the person; but
- (2) A person is not defamed if the audience would *not be justified* in thinking less of the person.

I will suggest that the first proposition, a positive claim, is plausible, but it is subject to an important qualification. The second proposition, a negative claim, is more problematic. Consider these points in turn.

First, when it is normatively justifiable for people to lower their esteem of a person if an actor's false statement about the person were true, that surely counts strongly in favor of granting the person a legal remedy against the actor. The actor has caused others in the community to justifiably react negatively to the false statement in a way that may cause both tangible and intangible harm to the victim, such as loss of a job; loss of, or harm to, relationships with family, friends, and coworkers; and emotional distress. In this respect, the actor's conduct is akin to the conduct of someone who physically touches the immediate victim in a way that is offensive to a reasonable sense of dignity,²⁸ or the conduct of someone who invades the privacy of the immediate victim in a way that would be "highly offensive to a reasonable person."²⁹

²⁸ See RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 3(a) (Tentative Draft No. 4, 2019) (approved by Am. L. Inst.).

²⁹ See RESTATEMENT (SECOND) OF TORTS §§ 652B (intrusion upon seclusion), 652D (publicity given to private life) (1977).

But this point must be qualified. It should not suffice for legal liability that, in the view of a court but not the community, it would be justifiable for the community to think less of a person if the false statement were true. A *purely* normative perspective is highly implausible. If we do not care one whit whether, as a descriptive matter, a community in fact views the victim more negatively as a result of a false statement, then even if the community should take that negative view, it is difficult to defend the imposition of a legal remedy for a reputational harm that the “victim” never actually suffers. Suppose, for example, that *D* falsely states that *P* is a carnivore; and the judge or jury concludes that people should be ashamed of eating meat, in light of the immorality and environmental costs of that behavior. (I would not be surprised if this becomes the dominant opinion by the end of this century.) It would be highly problematic for tort law to award a remedy to *P* by taking a normative position that very few people today share, for the following reason.³⁰ A plaintiff should not obtain a tort remedy unless she is actually wronged by defendant’s behavior. And when the relevant wrong consists in being viewed more negatively or treated adversely because of injury to one’s reputation, yet the plaintiff is not actually viewed more negatively or treated adversely, plaintiff has not actually been wronged.³¹

I do not mean to suggest that every version of the normative position is implausible. I am simply observing that those who endorse the normative position implicitly also endorse the view that a significant number of people must actually believe in that position: They must believe that, if the allegedly defamatory statement were true, the plaintiff *ought* to be regarded negatively. In short, advocates of the normative position are not purists: They presuppose that many people actually share their

³⁰ But a different analysis might well apply to the analogous question whether *D* commits a *moral* wrong against *P* by knowingly making a false statement that, if true, would justify the community in morally criticizing *P*. If moral realism is true, then *D* arguably commits such a wrong even if no one in the community would react negatively to the statement.

³¹ An analogous issue arises with other dignitary torts. Suppose *D* spits in *P*’s face out of malice. *D*’s conduct would ordinarily be considered an offensive battery because it is offensive to a reasonable sense of dignity. But suppose *P* finds *D*’s conduct amusing and is not offended. Does *P* still have a viable offensive battery claim? Arguably not. Although *D* has acted culpably, *P* has arguably not suffered the relevant legal wrong. There are no cases addressing this issue. See RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 3 cmt. a, Rep. Note (Tentative Draft No. 4, 2019).

normative stance, the stance that people are justified in lowering their esteem of a person if the facts asserted in the false statement were true.

The second proposition mentioned above is the following negative claim, also entailed by the pure normative view, that a person is not defamed, even if an actor makes a false statement about the person, if an audience that believes the statement is true would not be justified in thinking less of the person. The motivation behind the claim is admirable: The law should not give effect to, or reinforce, unjustified beliefs about when a person deserves blame, criticism, or ostracism. Informant cases are an example. The normativist will concede that fellow prison inmates or fellow gang members are very likely to judge plaintiff harshly if they believe a false accusation that plaintiff has become an informant. But the normativist will retort that the government has a compelling government interest in obtaining useful information about crime from informants, and that community members who believe otherwise are plainly wrong.³²

The response of the descriptivist is straightforward: The normative view ignores reality. People frequently criticize and even ostracize others for flimsy, irrational, or illegitimate reasons, reasons that are insufficient to justify holding the plaintiff in lower esteem. Even if the reasons are sometimes sufficient to warrant mildly negative reactions by others, they may well be insufficient to warrant the severe reproach that they often engender. Yet the injuries that false and derogatory statements inflict are real, and the conduct that causes them is often completely unjustifiable. On the descriptivist view, the question should be whether *the speaker* who intentionally distributes a false statement, perhaps knowing that this will cause many in the community to harshly judge or even ostracize the plaintiff, acts unjustifiably and thereby wrongs the plaintiff. Whether *members of the community* are actually justified in reacting as they do is at best a secondary consideration.

³² See *Michtavi v. N.Y. Daily News*, 587 F.3d 551, 552 (2d Cir. 2009) (quoting *Agnant v. Shakur*, 30 F. Supp. 2d 420, 424 (S.D.N.Y. 1998) (“The population of right-thinking persons unambiguously excludes ‘those who would think ill of one who legitimately cooperates with law enforcement.’”)). Adam Slavny notes another argument in favor of denying a remedy in informant cases: “[T]he non-instrumental value of [an informant’s] reputation is possibly enhanced as we ought to respect her courage.” But Slavny goes on to argue in favor of liability: “[I]t is difficult to believe that the harm she suffers cannot be actionable in tort. This seems to ignore the very real instrumental value of [her] reputation.” Slavny, *supra* note 14, at 535.

Descriptivists can also point to the language that courts and legislatures frequently use when defining “defamatory.” In a widely quoted passage, the Restatement (Second) of Torts states: “Communications are often defamatory because they tend to expose another to hatred, ridicule or contempt.”³³ Consider the term “ridicule.” Is it morally justifiable to ridicule a person? Very often it is not. The dictionary definition of “ridicule” is: “The action or practice of laughing contemptuously at a person or thing.”³⁴ Mocking others through political humor or comedy is often justifiable, but ridiculing a private person who has sought no attention is ordinarily morally offensive. Even if the person has committed a crime or moral wrong, the justifiable response ordinarily is indignation or disapproval, but not ridicule or contempt.³⁵ Of course, it is quite understandable and predictable that, as a descriptive matter, many in the community will often respond with cruelty, ridicule, or other inappropriate or excessive emotional reactions. In short, the inclusion of terms such as “ridicule,” “contempt,” or even “hatred” in standard definitions of what is defamatory is strong evidence that the law does not employ a purely normative definition.

Moreover, some long-recognized doctrines of defamation law underscore the reality that reputations can be harmed by unjustified as well as justified community reactions to false communications. Thus, courts have traditionally said that it is not only defamatory, but defamatory per se, to falsely communicate that a person has a “loathsome disease” such as a venereal disease,³⁶ or to impute unchastity to a

³³ RESTATEMENT (SECOND) OF TORTS § 559 cmt. b (1977). The proposed formulation in the new draft RESTATEMENT (THIRD) OF TORTS: DEFAMATION § 6 is similar. *See supra* note 5.

³⁴ *Ridicule*, OXFORD ENGLISH DICTIONARY, <https://perma.cc/B6DM-YLJA>.

³⁵ Furthermore, retributivists have long debated whether even hatred (as opposed to blame or resentment) is a justifiable emotional response to an offender’s commission of a crime. *See* Neal Tognazzini & D. Justin Coates, *Blame*, STAN. ENCYC. OF PHIL. ARCHIVE (Aug. 17, 2018), <https://perma.cc/MKR8-CAMM>.

³⁶ *See* DAVID A. ELDER, DEFAMATION: A LAWYER’S GUIDE § 1.18, Westlaw (database updated Oct. 2022) (noting that this per se slander category was historically limited to false accusations of present infection with diseases that are permanent, lingering, incurable, and contagious). Thus, the category originally applied only to venereal disease or leprosy, but it has recently been extended to AIDS. A very recent case holds that an advertisement falsely imputing HIV to the plaintiff was defamatory per se because “it can still be said that ostracism is a likely effect of a diagnosis of HIV.”

woman.³⁷ Other cases have considered false statements defamatory when they asserted that plaintiff was insane or mentally ill,³⁸ a crime victim,³⁹ or extremely poor.⁴⁰ But it would be outrageous to suggest that a community is actually justified in holding a person in lower esteem on these bases.

Another example of a context in which courts employ a descriptive view, and that cannot readily be explained under the normative view, is the widespread standard that treats a statement as defamatory if it would cause the victim to be “shunned or avoided.” For example, the New York Court of Appeals has held that a statement

But the court also appropriately criticized the continued use of the term “loathsome” for communicable diseases that courts treat as one category of statements that are defamatory per se. The court explained:

[W]e prefer a formulation that makes clear that an imputation of a particular disease is actionable as defamation per se not because the disease is objectively shameful, but because a significant segment of society has been too slow in understanding that those who have the disease are entitled to equal treatment under the law and the full embrace of society.

Nolan v. State, 69 N.Y.S.3d 277, 285 (N.Y. App. Div. 2018).

³⁷ See *Nolan*, 69 N.Y.S.3d at 284 (explaining that “statements that impute unchastity to a woman” remains one of the four defamation per se categories in New York as of 2018).

³⁸ See ELDER, *supra* note 36, § 1.14 (footnotes omitted):

[I]mputations of insanity and the like are generally held libelous. Thus, the cases held it was libelous to impute to plaintiff that he or she had “some mental problems” in a previous job, or that a veteran had a post-traumatic stress disorder and posed a danger to others, or that a candidate for public office was unbalanced, or that a child was retarded, or that plaintiff had “snapped,” erupting into a “volcano of screaming” and “frothing” at the mouth.

See also DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, *DOBBS’ LAW OF TORTS* § 525 (2d ed. 2022) (“Conditions causing people to shun the plaintiff.”).

³⁹ See Leslie Kim Treiger-Bar-Am, *Defamation Law in a Changing Society: The Case of Yousouppoff v Metro-Goldwyn Mayer*, 20 LEGAL STUD. 291 (2000) (discussing a famous British case, 50 TLR 581 (CA 1934), that has been interpreted as holding that a false statement that a woman was a victim of rape is defamatory per se).

⁴⁰ See RODNEY A. SMOLLA, *LAW OF DEFAMATION* ch. 4, § 4:4 (2d ed. 2022) (discussing *Katapodis v. Brooklyn Spectator, Inc.*, 38 N.E.2d 112 (N.Y. 1941)).

is defamatory “not only if it brings a party into hatred, ridicule or contempt by asserting some moral discredit upon his part, but also if it tends to make him be shunned or avoided, although it imputes no moral turpitude to him.”⁴¹

One potential response to such cases is to bite the bullet and recommend legal reform: The “loathsome disease” and “imputing unchastity” categories should be narrowed or eliminated; attributions of insanity or poverty should be insufficient for liability; and the “shunned or avoided” test is too broad and should be narrowed or rejected.⁴² Advocates of a purely normative approach must indeed take such a position. But notice that normativists must also take the same reformist position with respect to *all* elements of commonly employed tests for what is defamatory. Thus, consider California’s statutory language, which is similar to the common law test employed by many other jurisdictions: “Libel is a false and unprivileged publication by writing . . . or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation.”⁴³ Normativists would have to add the language “justifiably” before “exposes any person to hatred” and “has a tendency,” as well as before “causes him to be shunned or avoided.” Yet that would dramatically restrict the scope of defamation compared to existing law, an implication that normativists have rarely endorsed explicitly.

Another possible response to some of these problematic cases is to broaden our understanding of the wrong that the tort of defamation identifies and remedies. Perhaps defamation is not merely concerned with falsehoods that affect a person’s reputation by “subjecting him or her to the hatred, ridicule, contempt, or obloquy

⁴¹ *Katapodis v. Brooklyn Spectator, Inc.*, 38 N.E.2d 112, 113 (N.Y. 1941) (cited in *G.L. v. Markowitz*, 955 N.Y.S.2d 643, 645 (N.Y. App. Div. 2012)). In *Katapodis*, the court held that a jury could find that a false statement that plaintiff was “steeped in poverty” was defamatory; the court rejected the defense argument that a statement cannot be defamatory “when its only effect is to make a person an object of pity.”

If the “shunned or avoided” test were applied only when people would avoid the plaintiff for a morally acceptable reason such as the plaintiff’s incompetence at business, then the test would not be inconsistent with the normativist view. But the test is applied more broadly than this, as in *Katapodis* itself.

⁴² See McNAMARA, *supra* note 14, at 141–60.

⁴³ CAL. CIV. CODE § 45.

of others, or to other forms of social disapprobation.”⁴⁴ Perhaps defamation also addresses falsehoods that arouse the community’s sympathy or pity towards the person. But this broader understanding would radically reimagine defamation law. Feeling sympathy or pity towards someone is simply not an instance of holding them in lesser “esteem” or of treating the person as having a lower “reputation.” Rather, insofar as the law does or should remedy false statements that engender sympathy or pity, the false light tort is the much more suitable legal vehicle.⁴⁵

Normativists might assert another plausible objection: the concern that a purely descriptive account is unfair to potential defendants. If tort liability can be imposed when only a very small subcommunity views the statement as harmful to the plaintiff’s reputation, the speaker often is reasonably unaware that their statement would be so interpreted. In some of the earlier examples, such as the false statement that the plaintiff drinks alcohol, the speaker might have no idea that the plaintiff belongs to a small subcommunity that condemns such behavior for religious or other reasons. But this objection is easily answered in most cases, simply by requiring proof that the speaker knew or should have known that the plaintiff and others in plaintiff’s small community view the statement as lowering plaintiff’s reputation.

A further and very important objection that normativists will register has two parts. The first concern is that a descriptivist approach places courts in the very uncomfortable position of placing the law’s imprimatur on the prejudiced reactions of some members of the community, including prejudice against racial minorities, gay individuals, and transgender individuals. Moreover, if defamation law awards a remedy because of the continuing reality of prejudice against such groups, this might encourage such prejudice or at least slow progress towards reducing it.

These are powerful objections. Our legal system (in contrast to our moral blaming practices) sometimes has reason to take a normative perspective in determining which injuries to reputation to recognize and remedy. Legal norms have a distinc-

⁴⁴ RESTATEMENT (THIRD) OF TORTS: DEFAMATION AND PRIVACY § 6 cmt. a (Preliminary Draft No. 3). Similar language can be found in the RESTATEMENT (SECOND) OF TORTS § 559 cmt. b.

⁴⁵ See JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, *THE OXFORD INTRODUCTIONS TO U.S. LAW: TORTS* 334 (2010) (“To defame someone . . . is to publish a statement about him that tends to harm reputation. To expose someone by means of false light is to attribute to him, inaccurately, a quality or act that one would be embarrassed or offended to have attributed to oneself.”).

tive and important expressive dimension, a dimension that courts would undermine if they always employed a highly descriptive understanding of what counts as defamatory. This is the most persuasive reason why courts increasingly refuse to permit a heterosexual person to obtain a tort remedy if he is falsely described as being gay, and why courts do not grant a defamation remedy to a white person if she is falsely described as being Black.

In the domain of interpersonal morality, this expressive argument has much less force. If *D* falsely states to a group of people that *P* is gay, *P* might be entitled to demand a retraction and apology, because the statement mischaracterizes *P*'s sexuality and might result in *P* having difficulty initiating or maintaining heterosexual relationships. Arguably *P* has no duty to refrain from making such a demand even if the demand might be viewed as reinforcing prejudice against gay individuals; or if he does have such a duty, it seems much less stringent than the state's analogous duty when judges and other legal actors consider the proper scope of defamation law.

But even in the legal context, one might question whether courts have gone too far in the normative direction. Perhaps courts should forthrightly declare that in permitting a defamation remedy, they are not endorsing the view that the speaker's false statement about a person really *justifies* a community, or even a subcommunity, in lowering their opinion of the person. On the other hand, perhaps it is not realistic to think that a disclaimer placed in a judicial opinion will reach the general public. Perhaps the public is much more likely to believe that the legal system is endorsing prejudice, than to grasp the very different message that the court intends to send: that plaintiff deserves a legal remedy even though the community is unjustified in lowering their esteem of the plaintiff.

The other argument for withholding a defamation remedy in this context is consequentialist: Judicial recognition of a remedy might have the very undesirable effect of increasing, or at least not reducing, the prevalence of unjustifiable prejudice. But I find it doubtful that narrowing or broadening the scope of defamation remedies will actually have a significant impact on the incidence of discriminatory behavior against a vulnerable group. Courts have been divided for decades on the question whether a false accusation that plaintiff is gay is defamatory. It is hard to believe that jurisdictions in which defamation remedies are denied are, for that reason, becoming more tolerant and less prejudiced.

A final question about a normative perspective is how it would address the existence of multiple subcommunities. A religious group might condemn drinking alcohol; others in the community will tolerate or even encourage such behavior. Fellow criminals might condemn plaintiff for acting as an informant; most members of the community might applaud him for helping to solve crimes. We have seen that a descriptive perspective must confront this problem, and we have explored possible solutions. However, the problem is more acute for advocates of a normative perspective. The point of that perspective is that the community must have been *justified* in judging plaintiff negatively (if the accusation against the plaintiff were true). But the fact of pluralism means that different subcommunities claim to be justified in viewing plaintiff negatively, positively, or with indifference. Or different subcommunities might all claim to be justified in viewing plaintiff negatively, but for different reasons. How does the judge or jury determine which subcommunity is truly justified, or which subcommunity is justified for the right reason? Or, if one is a relativist and believes that different subcommunity views about justification are equally valid, how does the judge or jury resolve disagreement among these views? I see no obvious answers to these questions.⁴⁶

III. HYBRID APPROACHES: DISJUNCTIVE AND CONJUNCTIVE

It is common for courts to combine descriptive and normative approaches in characterizing what constitutes a defamatory statement. Consider the much-cited test of the Restatement (Second) of Torts § 559, comment e (emphasis added):

A communication to be defamatory need not tend to prejudice the other in the eyes of everyone in the community or of all of his associates, nor even in the eyes of a majority of them. It is enough that the communication would tend to prejudice him *in the eyes of a substantial and respectable minority of them*.

On this view, the statement must lower the esteem in which the plaintiff is held in a subcommunity that is *both* substantial (in the descriptive sense) *and* respectable (in the normative sense). This is a conjunctive test, requiring that the statement satisfy both descriptive and normative criteria.

⁴⁶ McNamara does propose an answer. He endorses what he calls a “sectional standards” approach that is normative but sensitive to pluralism. His test would include several inclusive liberal presumptions, especially the presumption that all people are of equal moral worth, in applying the traditional English test of “the right-thinking person.” MCNAMARA, *supra* note 14, at 191–232. This approach, while promising, offers uncertain guidance in many of the cases discussed in this paper.

Many different combinations of descriptive and normative approaches are possible, especially if we include variations in the size or nature of the community. In the following analysis, I will only address some of these hybrids.

One possible hybrid is a disjunctive test. Imagine the following disjunctive version of the Restatement (Second) test: The communication must lower plaintiff's esteem in the eyes of *either* a substantial minority *or* a respectable minority of the community. This version initially seems attractively inclusive, insofar as it recognizes the value of both the descriptive and the normative perspectives.

In a recent article, Adam Slavny thoughtfully explores the possibility of a disjunctive test.⁴⁷ Slavny considers two hybrid views that combine what he calls the “moralised” (or normative) and “non-moralised” (or descriptive) views in two different ways. The first version treats a statement as defamatory if and only if it satisfies either the normative or the descriptive view, but this version does not require the judge or jury to identify which prong is the basis of the finding of defamatoriness. Slavny finds this version unsatisfactory because “it compromises the expressive value of judgments about defamatory meaning.” As he explains:

Consider the contrast between a statement that a person has committed a rape and a statement that a person is the victim of a rape. On the DV1 [the first hybrid view], both might be defamatory: the former satisfies the moralised element and the latter, in certain circumstances, satisfies the non-moralised element. But unless an explicit decision is made about which element of the definition is satisfied—and on the DV1 this decision need not be made if it is clear that at least one element is satisfied—the expressive value of the judgement is ambiguous. This is a serious problem given the radical difference in the expressive content of the respective judgements. If an imputation of victimhood is seen to satisfy the moralised element, the law endorses victim-blaming, and if an imputation of rape is seen to satisfy only the non-moralised element, the law fails to express the appropriate condemnation for a serious wrong.⁴⁸

This is a persuasive objection. If it is proper for the law to rely (at least in part) on a normative conception because of the expressive value of the judgment that

⁴⁷ Slavny, *supra* note 14.

⁴⁸ *Id.* at 539. One might object that Slavny invokes a weak precedent when he discusses defamation for the false accusation that plaintiff was a rape victim. In American law, there are few recent cases treating as defamatory the false accusation that plaintiff is a crime victim. But Slavny's general argument is still worth addressing.

people are justified in lowering their esteem of plaintiff, it is imperative that that judgment be conveyed clearly.⁴⁹

To be sure, a disjunctive test is unlikely to satisfy all advocates of the two camps. Normativists will object that this test permits the views of a mere substantial minority to support a legal remedy and undermines the expressive message of the law. And descriptivists will object that a purely normative approach entails that a respectable view that is actually held by no one in the community would still warrant a legal remedy, a problem that was noted above.

The version of a disjunctive test that is most likely to satisfy both camps is one that ratchets up the proportion of the community that must, as a descriptive matter, negatively view the plaintiff. For example, perhaps plaintiff would have to show that a *strong majority* of the community would lower their esteem of the plaintiff, in cases where, as a normative matter, it is unjustifiable to view the plaintiff in that way.

In the end, I do not believe it is possible to adopt either a disjunctive or a conjunctive test that will fully satisfy the concerns of both normativists and descriptivists.⁵⁰ In Part V below, I will defend a hybrid test that I believe is the most promising: a largely descriptivist test with a narrow normativist exception.

⁴⁹ Slavny's second version of a hybrid test attempts to remedy this defect of the first by requiring the drawing of "a strict symbolic and substantive distinction" between statements that satisfy the descriptive test and those that satisfy the normative test. Indeed, Slavny argues that "statements meeting the moralised and non-moralised definitions should be considered fundamentally different forms of personal defamation and should have different remedies, defences and conditions of liability attached to them." *Id.* at 526. For example, he contemplates recognizing a truth defense for statements satisfying the normative criterion but not statements satisfying the descriptive criterion. I am not persuaded by this specific argument, but Slavny is right that significant differences exist between the two criteria.

⁵⁰ An alternative solution is to rely on a different tort, the privacy tort of false light. See RESTATEMENT (SECOND) OF TORTS § 652E (1977). One advantage of this tort is its breadth: It does not require harm to reputation, but only that the plaintiff was placed in a false light that "would be highly offensive to a reasonable person." However, this supposed advantage might be viewed as a bug, not a feature, because the breadth of the tort raises significant First Amendment concerns. Furthermore, the "reasonable person" criterion obscures but does not solve the problems that this paper has noted with the descriptive/normative distinction, as the following Part explains.

IV. THE REASONABLE PERSON TEST

An especially tempting alternative to the approaches considered thus far is to evaluate the defamatory character of a statement according to whether it might cause a *reasonable person* to lower their esteem of the victim. This is the current position of many courts and of the Reporters for the Restatement (Third) of Torts: Defamation and Privacy.⁵¹

But this approach is not an adequate solution, for several reasons. First, using the reasonable person test in this context is problematic. Notice the role that it plays here—to identify when an audience’s negative reactions to a false communication suffice to render that communication defamatory. Contrast this with the role of the reasonable person when this construct serves as a standard of liability for negligently causing physical harm. In the latter context, “reasonable” care is a standard of ideal behavior, behavior that subjects the actor to liability for failing to live up to that standard. But in defamation, if the audience reacts “unreasonably” to a false statement, the reasonable person standard operates to *preclude* liability, and it has this preclusive effect even if, in fact, members of the community disrespect and shun the victim because of the speaker’s false statement.

Judges understandably employ reasonableness standards widely as criteria for legal liability, especially tort liability, and they are often justified in doing so, because it is often fair to hold members of a community to that standard when they harm or endanger others. But it hardly follows that it is equally desirable to apply reasonableness criteria to the judgments of community members about whether a person deserves to be criticized or ostracized.⁵² Consider the analogous problems

⁵¹ See RESTATEMENT (THIRD) OF TORTS: DEFAMATION AND PRIVACY § 6 (Preliminary Draft No. 3, 2023) (not approved by the Am. L. Inst.):

A communication is defamatory if it tends to harm the reputation of another by appreciably lowering the esteem in which he or she is held among reasonable persons.

⁵² In prior writing, I have suggested that courts should hesitate before applying reasonable person standards to the conduct of actors other than the defendant. See Kenneth W. Simons, *The Hegemony of the Reasonable Person in Anglo-American Tort Law*, in OXFORD STUDIES IN PRIVATE LAW THEORY: VOLUME 1, 45, 57–64 (Paul B. Miller & John Oberdiek eds., 2020).

Courts also routinely employ a reasonable person standard in defamation law in order to assess the meaning of a statement. See *supra* note 2 and accompanying text. Invoking the reasonable person in this context is ordinarily much less troublesome than invoking it to determine whether a

of defining what constitutes an “offensive” contact for purposes of battery and what constitutes a violation of privacy. In both contexts, courts frequently use a reasonable person test—a “reasonable sense of dignity” for purposes of offensive battery,⁵³ and “highly offensive to a reasonable person” for purposes of the privacy torts of intrusion upon seclusion, public disclosure of private facts, and false light.⁵⁴ These reasonableness criteria do serve a valuable purpose in protecting potential defendants from unpredictable liability. But the criteria are a crude and imperfect means to that end. If the defendant actually knows that the plaintiff would be offended by the defendant’s conduct, arguably the defendant should still be liable, even if the factfinder would find the plaintiff’s reaction to be “unreasonable.”⁵⁵

Second, it is troubling that the reasonable person standard precludes liability if the audience’s reaction is determined to be unreasonable under that standard, even if the conduct of the actor making the false statement is highly culpable. Suppose, for example, that the actor preys on a plaintiff, knowing that the plaintiff is unusually susceptible to what the plaintiff perceives to be a serious reputational harm, yet that perception would not be shared by a “reasonable person” in the community. Imagine that *D1* knows that *P1* believes that failing to tuck in his shirt in the office is a serious breach of etiquette, equivalent to wearing pajamas or a swimsuit at the office. For the purpose of humiliating *P1*, *D1* spreads the false rumor that *P1* never tucks in his shirt. Or suppose the actor knows that the plaintiff belongs to a community with an unusual sense of honor. Imagine that *P2* lives in a community in which swearing is viewed as extremely wrongful, a breach of norms as serious as

statement is defamatory, but problems can arise here, too. For example, if most readers would understand “My political opponent is a crook” as asserting an opinion, not a fact, but a substantial minority would understand it as factual, some of the problems addressed in this paper arise in choosing which interpretation to adopt.

⁵³ See RESTATEMENT (SECOND) OF TORTS § 18 (1965); see also RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 3(a) (Tentative Draft No. 4, 2019) (approved by Am. L. Inst.).

⁵⁴ See RESTATEMENT (SECOND) OF TORTS §§ 652B, 652D, 652E (1977).

⁵⁵ See Simons, *Hegemony*, *supra* note 52, at 57–64. In RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 3(b) (Tentative Draft No. 4, 2019), liability for an offensive battery is modestly extended beyond cases in which the contact is offensive to a reasonable sense of dignity, embracing cases in which “the actor knows that the contact is highly offensive to the other’s sense of personal dignity, and the actor contacts the other with the primary purpose that the contact will be highly offensive.”

punching a person. *D2* falsely accuses *P2* of swearing, for the very purpose of harming *P2*'s reputation. *D2*'s conduct is even more blameworthy than the conduct of more typical defamation defendants who act for less culpable reasons (such as the desire to quickly publish a breaking story) and who are nevertheless liable in tort.

In both cases, *D*'s conduct is reprehensible and highly unjustifiable. As a moral matter, his conduct is a serious wrong. As a legal matter, I grant that there are pragmatic and principled reasons for caution before imposing liability in such cases. A speaker will often be (reasonably!) unaware of the unusually damaging effect of his communication on an unusually susceptible subject of the communication or on a community with unusual sensitivities. However, these reasons seem insufficient to preclude liability, at least if the legal standard requires, as it should, an especially culpable state of mind.⁵⁶

There are parallels to these examples elsewhere in tort law. Thus, the tort of intentional infliction of emotional distress ordinarily employs an objective test, of whether the actor's conduct was extreme and outrageous. But it also treats the following more subjective factors (among others) as relevant to whether the conduct was extreme and outrageous: "the relationship of the parties, whether the actor abused a position of authority over the other person, whether the other person was especially vulnerable and the actor knew of the vulnerability, [and] the motivation of the actor."⁵⁷ Similarly, the tort of offensive battery ordinarily employs a test of reasonableness: The contact must be offensive to a "reasonable sense of dignity."⁵⁸ But if the actor knows that the contact is highly offensive to the plaintiff's unusually sensitive sense of dignity and touches the plaintiff with the purpose that the contact will be highly offensive, a court might impose offensive battery liability.⁵⁹

⁵⁶ An alternative basis of liability in some cases of this sort is the catch-all tort of intentional infliction of emotional distress. But this tort will not be available in all such cases, because it requires behavior that is extreme and outrageous and that causes severe emotional harm. And even when this tort might apply, the tort of defamation is often a better fit when harm to reputation is central to the case.

⁵⁷ RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 46 cmt. d (2012).

⁵⁸ RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 3(a) (Tentative Draft No. 4, 2019).

⁵⁹ *Id.* § 3(b). See Simons, *Hegemony*, *supra* note 52, at 61–64, for further discussion.

Third, the standard of the reasonable audience member or the reasonable person in the community is more opaque and less helpful than other reasonableness standards. This standard does not resolve, or even offer much guidance about, the most intractable questions. Which of the varying perspectives should a court take, as between the speaker, the audience, and the victim? Should the focus be on sub-communities as opposed to larger communities? If so, which ones? What relative weight should be given to descriptive as opposed to normative features?

To be sure, a reasonable person standard can be applied flexibly, incorporating certain of the relevant actor's characteristics. In negligence law, the standard of reasonable care considers whether the actor is physically disabled (in which case the actor must conform to the standard of a reasonable person with that disability) or is a child engaging in a non-adult activity. And the standard of "offensive to a reasonable sense of dignity" is flexible enough to accommodate religious beliefs. Thus, a person who informs a caterer of a religious objection to eating pork suffers a legally cognizable "offense" if the caterer nevertheless serves that food.⁶⁰ This flexibility does make the standard more tractable.⁶¹ For example, a court might apply the standard of "a reasonable person with the plaintiff's religious beliefs." Nevertheless, this approach can only be taken so far. "Reasonableness" itself is a vague

⁶⁰ See RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 3 cmt. a, illus. 5 (Tentative Draft No. 4, 2019).

⁶¹ I have not found defamation cases that explicitly employ a flexible standard along the lines of "the reasonable child" or "the reasonable disabled person." And one case seems to reject this type of standard. In *Weiner v. Time & Life Inc.*, 507 N.Y.S.2d 784 (Sup. Ct. 1986), an Orthodox Jew sued a magazine for libel, alleging that the story falsely reported that he no longer wears a yarmulke or skullcap while driving because of violence in his neighborhood. Plaintiff claimed that the report caused his neighbors, friends, and religious associated to believe that he is immoral for removing his yarmulke while driving and thus violating Jewish law. The court firmly rejected a flexible understanding of the relevant community:

Plaintiff seeks to equate the word "community" as tantamount to the small, highly Orthodox Jewish community in upper Manhattan with which he associates. This is too restrictive a view since it would be manifestly unfair and unworkable to require Time, a magazine of nationwide scope with a heterogeneous audience, to consider each small enclave within various communities whenever it writes about a person.

Id. at 785. The court also held that the story does not clearly imply that plaintiff was ready to abandon his religious beliefs under external pressure. *Id.* at 786.

standard that sits in an uncertain space between the descriptive and normative, between average and ideal behavior.⁶² It is best to seek a more precise and tailored standard.

V. A SUGGESTED APPROACH

In defining what counts as defamatory for purposes of tort law,⁶³ I believe that the law should take a largely *descriptive* perspective, focusing on the actual reactions of both the victim and the audience. Further, it should not be a requirement that *most* audience or group members would judge the victim more negatively because of the statement.

In lieu of a “reasonable person” test or a test of the “respectable” or “right-thinking” person, I suggest a test along the following lines:

- (1) A communication is defamatory if it tends to harm the reputation of another by appreciably lowering the esteem in which the person is held among a substantial portion of the community, and if providing legal relief would not contravene a significant public policy.
- (2) A communication is also defamatory if
 - (a) it actually harms the reputation of another by lowering the esteem in which the person is held among a substantial portion of the community, and
 - (b) the speaker, in making the communication, intends to harm the reputation of the person.

Section (1) establishes an underlying descriptive test (by referring to the esteem in which the person “is held”) and couples it with a normative exception (when legal relief would “contravene a significant public policy”). The descriptive portion of the test adopts much of the proposed language of Restatement (Third) of Torts:

⁶² A recent empirical study of how ordinary people understand “reasonableness” finds, not surprisingly, that they judge it as intermediate between “the relevant average” and the ideal across many different legal domains. See Kevin P. Tobia, *How People Judge What Is Reasonable*, 70 ALA. L. REV. 293, 316–29 (2018).

⁶³ A similar test might be employed to define the wrong of defamation as a matter of interpersonal morality, but it would need some modifications, such as eliminating the term “appreciably” in section (1). The moral version of the test might also eliminate the public policy exception, as discussed earlier.

Defamation and Privacy § 6,⁶⁴ but replaces the “reasonable person” language of the latter.

The exception is just that—a provision excluding liability only in exceptional circumstances. The significant public policies⁶⁵ that satisfy the exception would include compelling and distinctive state interests such as ensuring that the expressive message of a successful defamation claim is consistent with evolving antidiscrimination norms contained in legislation and constitutional law. Thus, the proposal would preclude a tort remedy when the speaker falsely states that the plaintiff is a member of a particular group, such as gay individuals, or Catholics, or Asians, or Blacks, and the relevant community holds the plaintiff in lower esteem only because of unjustifiable prejudice against that group. The public policy override would also extend to the government’s interest in obtaining useful information from informants about ongoing serious criminal activity.⁶⁶ The public policy exception might also apply to statements that misidentify a Republican as a Democrat, or a Democrat as a Republican. As a descriptive matter, such false statements can indeed harm, and in some cases seriously harm, the reputation of the falsely accused plaintiff. But a court could plausibly conclude that granting defamation remedies in this type of case might contribute to the contemporary polarization of politics or undermine efforts to reduce it.

However, the exception would not apply simply because a judge concludes that, although a substantial number of people held the plaintiff in appreciably lower esteem based on the speaker’s false accusation, they were not justified in reaching that negative judgment. For example, under Section (1), it is defamatory to falsely accuse someone of drinking alcohol if the person belongs to a religious group that strongly disapproves of this conduct. Even if a judge reaches the conclusion that it

⁶⁴ RESTATEMENT (THIRD) OF TORTS: DEFAMATION AND PRIVACY § 6 (Preliminary Draft No. 3, 2023).

⁶⁵ This language bears some similarity to Lidsky’s argument: “[I]nstead of constructing an artificial community through the defamatoriness determination, courts should make explicit what are essentially public policy choices.” Lidsky, *supra* note 16, at 9.

⁶⁶ McNamara argues that government informants should not be able to recover for false and otherwise defamatory statements if the crime about which they are providing information is especially serious (such as the crime of rape or terrorism) but is more supportive of recovery if the crime is not serious. MCNAMARA, *supra* note 14, at 222. My proposal could also reach this differential result via the requirement that the exception applies only when the public policy (here, aiding the prosecution of serious crimes) is significant.

is unjustifiable for people to attach such weight to alcohol consumption, that conclusion does not satisfy the more demanding standard contained in the exception—that a defamation remedy would contravene a significant public policy.

This proposal also has the flexibility to account for changing social attitudes and legislative policies relating to defamation. Courts have sometimes moved from a position of permitting defamation liability to the position of precluding it, based on the evolution of social attitudes and on legislative changes, such as anti-discrimination laws that expand the scope of groups that are protected.⁶⁷ What counts as a significant public policy that overrides a plaintiff's right to obtain a remedy for harm to reputation will change over time. One can clearly see this development in the cases where plaintiffs have claimed that they were defamed when defendant made a statement that misidentified the plaintiff's race, sexual preference, or cis-gender/transgender identity.

Section (2) of the proposal is an alternative basis for defamation liability. It employs a thoroughly descriptive criterion that would support liability if two special requirements are satisfied:

- (a) the communication actually harms the plaintiff's reputation (though it need not lower the plaintiff's reputation "appreciably"), and
- (b) the speaker acts with an especially culpable intent to harm the plaintiff's reputation.

The rationale behind section (2) is that the pronounced culpability of the actor warrants a tort remedy even if other criteria that usually apply (such as an appreciable lowering of esteem) are not met.⁶⁸

Consider how this proposed test would analyze an example provided in the most recent preliminary draft of the Restatement (Third) of Torts: Defamation and

⁶⁷ Lidsky appropriately emphasizes that the "respectable" minority standard "fails to specify how courts decide which community segment defines public opinion when mores are in a period of flux." Lidsky, *supra* note 16, at 20.

⁶⁸ As written, Section (2) does not follow Section (1) in recognizing a public policy override. Whether the override should be included in Section (2) is a close question. Perhaps maliciously and falsely identifying a gay person as straight should permit a tort remedy, while maliciously and falsely identifying a straight person as gay should not. But arguably a tort remedy is appropriate in both cases, because the actor's conduct is highly culpable and, for that reason, allowing a remedy is less likely to convey the unintended message that discrimination on the basis of sexual preference is acceptable.

Privacy. In the example,⁶⁹ *A* falsely states that *B* had an abortion, an accusation that will cause many in the community to lose esteem for *B*. The Reporters suggest that it is a question for the factfinder whether this communication appreciably lowers the esteem in which a reasonable person would hold *B*. They also indicate that it is relevant whether abortion is legal in *B*'s jurisdiction, thus implying that if it is legal, that counts against finding the communication defamatory. They presumably believe that a reasonable person would think there is no shame in exercising a legal option.

Under my proposal, the communication could readily be found defamatory, depending on the facts. If *B* is an active member of a group that is strongly opposed to abortion, the communication might appreciably lower her standing in that group. And this is so even if abortion is legal in the jurisdiction, and even if the judge or jury would conclude that the members of the group are not justified in losing esteem for *B*.

But might the legality of abortion demonstrate that providing a tort remedy in such a case contravenes a significant public policy? The more persuasive answer is no. It is doubtful that the existence of a tort remedy in the special circumstances of the plaintiff's membership in a group that disapproves of abortion would undermine the general message that abortion is legal and is, in that sense, a choice left to the pregnant woman.

Conversely, even if abortion is illegal in the jurisdiction, falsely stating that someone had an abortion might not be defamatory, again depending on the facts. If the falsely accused person lives in a liberal community within the state that strongly and almost universally supports the right to choose an abortion whether or not abortion is illegal, then the descriptive component of the proposed test would not be satisfied, and the communication would not be deemed defamatory. Under these circumstances, the false accusation is analogous to a false statement that a person consumes marijuana in a community whose laws forbid this conduct but whose members do not disapprove of such consumption.

CONCLUSION

This article has canvassed a range of important questions that arise when we judge whether a false statement is defamatory. A critical question is whether to adopt a descriptive perspective that focuses on whether people would actually react

⁶⁹ RESTATEMENT (THIRD) OF TORTS: DEFAMATION AND PRIVACY § 6 cmt. d, illus. 7.

to the statement by lowering their esteem of the plaintiff, or instead a normative perspective that considers whether people are justified in reacting that way. I conclude that the descriptive perspective should ordinarily govern. People frequently criticize and even ostracize others for inadequate reasons. Yet the speaker's conduct in publishing a false statement can cause genuine and serious harm to the plaintiff's reputation, and that conduct is often highly unjustifiable. Defamation law should focus on the justifiability of the speaker's conduct and its effect on the plaintiff. Whether members of the community are truly justified in reacting to the statement as they do should ordinarily not be a decisive consideration.

However, the law should also recognize a narrow normative exception and preclude a defamation remedy when providing that remedy would contravene a significant public policy, such as the value to the government of obtaining useful information from informants about serious crimes, or the expressive value of not undermining the legal principles condemning discrimination on the basis of race or sexual preference.