

A Status Theory of Defamation Law

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Defamation law occupies a privileged position in our constitutional order. Despite grave First Amendment concerns, courts around the country routinely muzzle speech to protect good-name interests. Yet, to a growing movement of reformers, this protection is still too weak. With calls reverberating across the political spectrum—emanating from the President, the Supreme Court, scholars, and pundits—there is a growing pressure to reshape defamation law. In all of this, one crucial question remains unanswered: what is the purpose of defamation law?

The most sustained attempts to answer this basic question vacillate between three purposes: protection of honor, dignity, or property. Helpful as they are, these attempts ultimately fail to explain the particular doctrinal architecture of defamation law or to offer a clear vision as to its future design. They leave us bereft of a general understanding in a time of great need. What these accounts lack is what sociologists such as Weber and Veblen have long understood. We care about our good name so much not because it represents our property or even dignity, but because it captures a fundamental human need: *social status*.

This Article demonstrates that a status theory of defamation law offers a more appealing framework—descriptively, functionally, and normatively—than our current menu of explanatory options. Descriptively, status theory is shown to untangle intricate doctrinal knots, rendering them sensible, indeed, necessary. Functionally, status theory reveals the downstream effects of decisions in particular cases: how they promote certain status norms while unraveling others. Normatively, status theory decloaks the judicial role in defamation cases, exposes it to critical scrutiny, and offers concrete guidance in hard cases.

Status theory has immediate practical importance. This is demonstrated in the context of bigoted defamation cases where the prevailing intellectual fog allowed judges to render decisions that either embraced bigoted status hierarchies or whitewashed them. Status theory exposes the faulty logic underlying these decisions. It offers modern judges a sound footing to reach the right decisions in bigoted defamation cases. And most critically, status theory furnishes judges and legislators with a tool to dismantle bigoted racial and ethnic hierarchies.

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INTRODUCTION

The pursuit of social status is a fundamental aspect of human behavior.¹ Within all social communities, individuals strive to occupy elevated positions in the social hierarchy for reasons that cannot be reduced to economic advantage or material gain. A high social status promises the deference and esteem of one's peers, while low status subjects one to indifference and contempt.² These social goods are so important that individuals expend copious amounts of energy, time, and material resources competing in “status games”—social competitions where status is gained and lost.³ Our choice of clothes, accent, books, movies, social milieu, and even our gait and pitch⁴ are all moves played in these eternal status games.⁵ Status games, the name notwithstanding, involve little frivolity—they are played with utmost earnestness. As sociologists Park and Burgess observe, “men work for wages ... [but] they will die to preserve their status.”⁶

¹ John C. Harsanyi, *A Bargaining Model for Social Status in Informal Groups and Formal Organizations*, 11 SYST. RES. 357, 357 (1966) (“Apart from economic payoffs, social status (social rank) seems to be the most important incentive and motivating force of social behavior.”); Cameron Anderson et al., *Who Attains Social Status? Effects of Personality and Physical Attractiveness in Social Groups*, 81 J PERSONALITY & SOC. PSY. 116, 116 (2001) (“Striving for status has been proposed as a primary and universal human motive.”).

Lawyers are familiar with an understanding of status distinct from the sociological one developed here. Henry Maine’s famous thesis—the move from status to contract—invokes status as a legally established social station (e.g., lord, tenant) or a bundle of legally assigned rights and duties (e.g., a minor, naturally born citizen, first born). HENRY MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS 101 (1861). See generally Katharina Isabel Schmidt, *Henry Maine’s “Modern Law”: From Status to Contract and Back Again?*, 65 AM. J. COMP. L. 145 (2017).

² See CECILIA L. RIDGEWAY, STATUS: WHY IS IT EVERYWHERE? WHY DOES IT MATTER? 150 (2019) (defining status as “a social ranking of people, groups, and objects in terms of the social esteem, honor, and respect associated with them.”).

³ See Roger D. Congleton, *Efficient Status Seeking: Externalities, and the Evolution of Status Games*, 11 J. ECON. BEHAV. ORG. 175 (1989); Thomas Quint & Martin Shubik, *Games of Status*, 3 J. PUB. ECON. THEORY 349 (2002). In a recent influential account, Pulitzer-winning journalist Isabel Wilkerson argued for the existence of a caste-like static social hierarchy in the United States, based around race and ethnicity, alongside the merit-based status games. ISABEL WILKERSON, CASTE: THE ORIGINS OF OUR DISCONTENT (2020).

⁴ See, e.g., Juan David Leongómez et al., *Perceived Differences in Social Status Between Speaker and Listener Affect the Speaker’s Vocal Characteristics*, PLOS ONE, 12(6) (2017).

⁵ For an effective introduction to the allocation of status in the modern United States, see Scott Alexander, *Staying Classy*, SLATESTARCODEX (Jan. 30, 2016), <https://perma.cc/J55D-Q3A2>. See also PAUL FUSSELL, CLASS: A GUIDE THROUGH THE AMERICAN STATUS SYSTEM (1983); Scott Alexander, *Right is the New Left*, SLATESTARCODEX (Apr. 22, 2014), <https://perma.cc/P6WP-W7FV>.

⁶ ROBERT PARK & ERNEST W. BURGESS, INTRODUCTION TO THE SCIENCE OF SOCIOLOGY, 30 (1921). An earlier statement of this idea is found in Proverbs 22:1: “A good name is more desirable than great riches.” The importance of status is consistent with the findings of Bezanson, who found that only twenty percent of plaintiffs in defamation lawsuits reported being motivated by compensation. Randall P. Bezanson, *Libel Law and the Realities of Libel Litigation: Setting the Record Straight*, 71 IOWA L. REV. 226 (1985). Note, however, that these numbers should be weighed against the unknown rates in other types of lawsuits. See Randall P. Bezanson, *The Libel Suit in Retrospect: What Plaintiffs Want and What Plaintiffs Get*, 74 CAL. L. REV. 789 (1986).

Status pursuits account for a large degree of human behavior; but unlike their economic counterpart—wealth maximization—they have been largely neglected in legal scholarship. There is even a certain sense of taboo around explicit discussions of status and class.⁷ But neglecting social status has serious implications, given the role status plays in human motivation, welfare, and prosperity. Nowhere is the omission of status considerations more pressing than in the context of defamation law, where loss of status captures the very essence of the harm resulting from defamatory statements—or so this Article will argue.

This Article advances a status theory of defamation law.⁸ Defamation law is a branch of tort law that sanctions published false communications of fact that harm their target's good name.⁹ Beyond this basic understanding, confusion abounds. The doctrine is oft described as being full of “anomalies and absurdities for which no legal writer ever has had a kind word.”¹⁰ Commentators commonly decry our understanding of this tort, its function, and logic, decrying the “unsatisfying present morass.”¹¹

Partly an interpretative project, this Article argues that a large part of the morass can be cleared up if defamation law is read through the prism of status theory.¹² Thinking of defamation law as the law of status illuminates the doctrine in a favorable, logical, and coherent light. Indeed, status proves so potent at explaining the doctrinal architecture of this tort that this Article can claim little in the way of novelty. It seems that an unarticulated notion of social status was present in this tort throughout its long history—and that the morass is simply the result of jurists looking at the doctrine through the wrong prism.¹³

Beyond the doctrinal and analytical clarity offered by status theory, the theory also packs a normative punch. Under the conventional view, stated lucidly in *Gertz v. Welch*, “The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory

⁷ Joan C. Williams, Marina Multhaupt, & Sky Mihyalo, *Why Companies Should Add Class to Their Diversity Discussions*, HARV. BUS. REV. (Sept 5, 2018) (“[I]n the United States, talking about class is taboo.”).

⁸ In following with the modern trend, this Article uses defamation law to capture both libel and slander. See ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS § 2:3, at XX (3d ed. 2009) [hereinafter SACK ON DEFAMATION].

⁹ DAN B. DOBBS ET AL., HORNBOOK ON TORTS § 37.1, at 936 (2d ed. 2015); RESTATEMENT (SECOND) OF TORTS § 558 (AM. L. INST. 1977) [hereinafter RESTATEMENT OF TORTS].

¹⁰ WILLIAM PROSSER, HANDBOOK OF THE LAW OF TORTS, 737 (4th ed. 1971).

¹¹ Sheldon W. Halpern, *Of Libel, Language, and Law: New York Times v. Sullivan at Twenty-Five*, 68 N.C. L. Rev. 273, 313 (1990)

¹² As developed *infra* Part I.3, status theory rationalizes requirements of publicity, measure of harm, and the very definition of defamation as a “communication” that “tends to ... lower [a person] in the estimation of the community or to deter third persons from associating ... with him.” RESTATEMENT OF TORTS, *supra* note 9, at § 559.

¹³ This statement must be qualified because the reason why status is worth protecting implicates concerns with dignity and property-like claims. The difference being that in status theory, these values explain elements of the theory rather than exhausting it.

falsehood.”¹⁴ The compensatory view casts defamation law in a passive, reactive role where it only reacts to transgressions. In so doing, it completely misses the things that defamation law *does and can do*. Just as trademark protection encourages investments in research, quality assurance, and innovation, so does the protection of our personal ‘brands’ through defamation law affect the choices we make about our own brands.¹⁵ Defamation law affects the extent to which people devote themselves to specific status pursuits as well as the choice of which status games they play. This neglected behavioral effect is of key social importance and opens a door to social reformers—not only those interested in defamation or freedom of speech—to attain social policies through defamation law.¹⁶

There is little exaggeration in the observation that the fate of societies is determined by the type of status competitions its members play.¹⁷ The Renaissance, the great rebirth, owes as much to the genius of Da Vinci and Michelangelo as it does to the status ambitions of wool traders like the de’ Medici.¹⁸ Societies flourish when its members compete for status through patronage of the arts, scholarship, philanthropy, and political reform, they enrich and nurture society. But societies can also wither and flag when its members pursue status through duels, foot binding, big-game hunting, street racing, birthright privileges, and ethnic hierarchies.¹⁹ Herein lies the normative punch of defamation law: it helps us realize the ways our legal norms affect the status games that individuals play. Judges do more than redress harms, they create norms of behavior. Misunderstanding the effects of defamation law can entrench deeply problematic status games.

The growing dissatisfaction with defamation law reveals the need for a deeper understanding of defamation law. Recently, Justices Thomas and Gorsuch have each called to retreat from modern federal balances and return to state regulation of defamation law.²⁰ Both Presidents Biden and Trump voiced unhappiness with the degree of accountability for speech communicated in social and traditional media.²¹ Scholars of opposing ideological persuasions believe that

¹⁴ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342(1974).

¹⁵ Davidson Heath & Christopher Mace, *The Strategic Effects of Trademark Protection*, 33 REV. FINANC. STUD. 1848 (2020).

¹⁶ See *infra* notes 246-251 and accompanying text.

¹⁷ The first murder in the bible is the product of status envy among two brothers, *Genesis* 4. Matters went downhill from there. William C. Wohlforth, *Unipolarity, Status Competition, and Great Power War*, 61 WORLD POL. 28 (2008) (developing a status theory of war).

¹⁸ See generally FRANS JOHANSSON, *THE MEDICI EFFECT* (2006).

¹⁹ Liam Stack, *Big Game Hunting Is Also Big Business for Wealthy Few*, N.Y. TIMES (Aug. 10, 2015), <https://perma.cc/NDC2-4WLQ>.

²⁰ *Berisha v. Lawson*, cert denied, 594 U. S. ____ (2021) (Thomas, Gorsuch JJ., dissenting); *McKee v. Cosby*, cert denied, 139 S. Ct. 675, 682 (2019) (Thomas, J., concurring).

²¹ Rachel Lerman, *Social Media Liability Law is Likely to Be Reviewed under Biden*, WASH. POST (Jan. 18, 2021); Michael M. Grynbaum, *Trump Renews Pledge to ‘Take a Strong Look’ at*

reform is necessary.²² Pundits across the political spectrum call for reform.²³ In the midst of all this debate, a new Restatement project is underway.²⁴ Yet, for all their zeal, reformers fail to articulate a clear purpose for defamation law, placing them on the horns of the Cheshire Cat dilemma: “If you don't know where you want to go, then it doesn't matter which path you take.”²⁵

The value of status theory to reformers can be concretely demonstrated by tackling one of the most intricate challenges in defamation law: bigoted defamation. These are thorny cases where a statement is only derogatory in the eyes of members of a bigoted community—to which the plaintiff belongs. Prototypical historical cases are white people claiming defamation because they were alleged to be black; a Christian, a Jew; straight men, gay; or “chaste” women, promiscuous.²⁶ To be sure, none of these statements *should* be defamatory, but the conventional approach has led courts to deeply problematic decisions in these cases.

The problem with the conventional approach is that by focusing on redressing harm to good name interests, it created the mirage that courts only react to harm rather than define and enforce norms of behavior. This has led to deeply problematic decisions. In 1888, a white person in Louisiana was alleged to be black. The court held that allegations of this nature are defamatory (although never the reverse). Instead of assuming responsibility for their racially-charged holding, the judges used the conventional approach as cover. The judges portrayed themselves as disinterested social scientists who are “concerned with [the] social conditions simply as facts,” thus “under the social habits, customs and prejudices prevailing in Louisiana, it cannot be disputed that charging a

Libel Laws, N.Y. TIMES (Jan. 10, 2018), <https://perma.cc/M2XJ-JW8M>; Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 5, 2018, 6:33 AM).

²² For a few examples, see Cass R. Sunstein, *Falsehoods and the First Amendment*, 33 HARV. J.L. & TECH. 387, 389 (2020) (arguing that “New York Times Co. v. Sullivan ... looks increasingly anachronistic”); Cristina Tilley, *(Re)categorizing Defamation*, 94 TUL. L. REV. 435 (2020); Glenn Reynolds, *Rethinking Libel for the Twenty-First Century*, 87 TENN. L. REV. 465, 465 (2020) (calling for reform and noting that even left-leaning academics recognize the existence of a problem); JUSTIN HENDERSON, THE TORTS PROCESS, 856 (9th ed. 2020) (“Recent years have seen growing dissatisfaction with ... the law of defamation.”); David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487, 550 (1991) (“The present law of libel is a failure.”).

²³ See, e.g., Bruce Fein, *End the First Amendment Sanctuary for Fake News*, THE AMERICAN CONSERVATIVE (Feb. 27, 2019, 1:00 PM), <https://perma.cc/CUL8-LC34>; Paul Schindler, *Hoylman Said Stronger Law Would Protect Lincoln Project's Ivanka-Jared Billboards*, GAY CITY NEWS (Oct. 29, 2020), <https://perma.cc/KUD9-L9QN>.

²⁴ RESTATEMENT (THIRD) OF TORTS: DEFAMATION AND PRIVACY (AM. L. INST. 2019).

²⁵ LEWIS CARROLL, ALICE IN WONDERLAND (1865).

²⁶ For the era in American law when such statements were considered per se defamatory see, e.g., *Eden v. Legare* 1 S.C.L. 171 (1791).

white man with being a [black person] is calculated to inflict injury and damage.”²⁷

Belatedly and inconsistently, judges sought to reverse their historical positions, but the focus on harm only stunted and perverted progress. To hold that bigoted statements are not defamatory required denying the existence of the kind of harm the courts have traditionally ‘found.’ Courts thus began engaging in the pretense that bigotry spontaneously combusted. The dissonance this position creates verges on the absurd, as illustrated by a 1977 case where a court pronounced that calling the plaintiff by a three-letter word used against gay men was not harmful due to “the changing temper of the times.” A determination that was seemingly unperturbed by pervasive discriminatory social attitudes that were even *legally* formalized in most states.²⁸

This patchwork around harm, and the pretense that bigotry was vanquished, does society no favor. Until we have eradicated homophobia, anti-Semitism, racism, misogyny, and other social ills, bigoted defamation may well inflict harm to the plaintiff’s status privilege within their own *bigoted* community.²⁹ Denying this harsh fact does little to remedy the problem and may even perpetuate it.³⁰

Status theory allows courts to reach the right outcomes without engaging in artifice. Bigoted defamation lawsuits should be rejected not because there was no harm to a status privilege; they should be rejected because the privilege itself was attained in a deeply illegitimate status game.³¹ Under status theory, it is appropriate and necessary for courts to deny lawsuits that build on status attained in racist status games, for the simple reason that finding for the plaintiff would entrench these games.³²

²⁷ *Spotorno v. Fourichon*, 4 So. 71, 71 (La. 1888). For an overview of how defamation law supported racial hierarchies in the South, see John C. Watson, *Defamation by a Racial Misidentification: A Study of the Social Tort*, 4 RUTGERS RACE & L. REV. 77 (2002). See also Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1713-18 (1993) (discussing racial “passing” and racial status privileges). For further discussion, see *infra* Part II.

²⁸ *Moricoli v. Schwartz*, 361 N.E.2d 74 (Ill. App. Ct. 1977). It was not until 2003 that the Supreme Court ruled sodomy laws unconstitutional. *Lawrence v. Texas*, 539 U.S. 558 (2003).

²⁹ See, e.g., *Thomason v. Time-Journal, Inc.*, 379 S.E.2d 551, 553 (Ga. Ct. App. 1989) (denying a libel lawsuit by a woman alleged to be black because “peculiarities of taste found in eccentric groups cannot form the basis for a finding of libelous inferences.”). The same year, twenty-nine percent of white respondents answered that they support laws against interracial marriage and twenty-one percent said they would not vote for a black candidate. See Maria Krysan & Sarah Patton Moberg, *Trends in Racial Attitudes*, UNIV. ILL. SYS.: INST. GOV’T & PUB. AFFS. (Aug. 25, 2016), <https://igpa.uillinois.edu/programs/racial-attitudes>.

³⁰ *Palmore v. Sidoti*, 466 US 429 (1984) (recognizing the existence of prejudice but also the dangers of a narrow harm-based approach).

³¹ As Wilkerson argues, Jim Crow era hierarchies had given status privileges to poor whites at the expense of African Americans, and the dismantling of these laws upset these privileges. WILKERSON, *supra* note 3, at 178-90.

³² See *Norwood v. Harrison*, 413 U.S. 455, 470 (1973) (“Invidious private discrimination . . . has never been accorded affirmative constitutional protections.”). Notably, Courts are not compelled to deny harm in other areas of tort law. See *Mitchell v. Cent. Vt. Ry. Co.*, 158 N.E.

Status theory emphasizes the first order relevance of status games to judicial determinations. But it does not expand the judicial role so much as expose it. Courts already pick and choose among status games when they decide cases, although their decisions are cloaked in a rhetoric of “objective” determinations of harm to social standing.³³ This fiction produces a welter of confused jurisprudence, unprincipled decision-making, and obfuscation of the judicial role in regulating status. By explicitly considering the relevance of status games to defamation law, we can start to develop a vocabulary that allows us to recognize the role of the courts, evaluate their institutional capacity to make such determinations, and guide future decision-making. Perhaps most fundamentally, understanding the importance of regulating status games justifies the privileged position defamation occupies in our constitutional order, which allows it to defeat First Amendment rights.

The argument follows four arcs, with the second one being its crux. The first articulates the theory of status and its relevance to defamation law.³⁴ A central point is that much of defamation doctrine can be understood as responding to implicit social status concerns. Despite that, we—members of the legal community—have been struggling to understand the doctrine, because we were trying to fit the square peg of status in the round holes of dignity, property, or honor. These concepts guided our thinking for too long and have limited our ability to see the tort for what it is.

The second arc draws attention to the way status is produced: status games.³⁵ It starts by exploring status games, their ubiquity, and social effects. Status games are directly tied to human flourishing and withering, and the key point developed here is that defamation law affects the selection of status games.³⁶ This point was well understood by the gentry of England, who used defamation law to punish untoward behavior against the nobility as a means of upholding the existing social order.³⁷ What changed since then was not the function of defamation law but the ethos of allocation, moving from pedigree and social station to a democratic, merit-based allocation. Even without understanding their effects, legal determinations in defamation cases inevitably regulate status

336 (Mass. 1927) (authorizing the operation of trains despite the noise of train whistles because of the broader, positive social effects of the activity).

³³ While the rhetoric is couched in objective determinations, the decisions themselves are highly normative. See Lyrrisa B. Lidsky, *Defamation, Reputation, and the Myth of Community*, 71 WASH. L. REV. 1, 9 (1996) (criticizing the use of objective language). Commentators debate the use of a more empirical or a more normative standard. See *infra* notes 246-250 and accompanying text.

³⁴ See *infra* Part I.

³⁵ See *infra* Part II.

³⁶ For an early and prescient statement of this idea, see THOMAS STARKIE, A TREATISE ON THE LAW OF SLANDER, LIBEL, SCANDALUM MANGATUM, AND FALSE RUMOURS, 4 (1813).

³⁷ Jeremy Waldron, *Dignity and Defamation - The Visibility of Hate*, 123 HARV. L. REV. 1596, 1602 (2009).

games. This leads to the claim that courts should openly acknowledge their role, demystify the doctrine, and develop principled strategies.

The third arc applies these ideas to three case studies involving different types of bigoted defamation cases.³⁸ The case studies help show how a robust understanding of status theory is productive not only in understanding the doctrinal architecture of defamation law but also in deciding cases and crafting policy.

The thrust of the argument is that defamation law has ex-ante effects on behavior. Judges should acknowledge these effects and use them to decide cases. This is in contrast to the contemporary view which places an almost exclusive emphasis on remedying harm.³⁹ The last arc takes the modern view in its own terms and offers a critical analysis, arguing that harm considerations are far less compelling than traditionally understood. Many of the private harms defamatory remarks cause tend to disappear once we take a more holistic social perspective. In fact, under some conditions, defamatory remarks may *improve* society. The exact contours of the argument are somewhat technical, but the argument is not that we should encourage defamation, only that the focus on harm is overstated.⁴⁰ If defamation law is to be justified, it must be on other grounds: specifically, its broader, downstream effects on status games.

This is perhaps an ambitious project, but much of the argument draws on an established and mature literature in sociology and economics. It is also deeply grounded in defamation doctrine and ideas many judges have sought to express over the years. Importantly, status theory does not mean to exhaust (and is certainly incapable of exhausting) all that defamation law does. It very clearly leaves out the economic domain of defamation law. Nor does status theory render previous accounts obsolete. Ultimately, despite many differences along the way, the Article's ultimate conclusions hew closely to Robert Post's magisterial analysis from the 1980s, emphasizing "civility norms" which can be thought of as cousins of status games.⁴¹ Thus, a status theory of defamation is not a complete break from the orthodoxy. It is best read as a refinement of old ideas, inchoate but ever present throughout the evolution of this tort. It is hoped that by grounding defamation law more firmly and more openly in the realities in which it operates, the Article points the way toward more responsive, principled, and better reform of a troubled area of the law.

³⁸ See *infra* Part III.

³⁹ To be sure, the traditional view is not entirely ex-post factum—it does recognize downstream effects on the chilling of speech.

⁴⁰ See *infra* Part I.

⁴¹ See Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691 (1986). I am bound by reasons of exposition to draw a line that is too bright between social status and dignity and status, but the nexus is deep and tight.

STATUS AND DEFAMATION LAW

That the law accords defamation law a privileged position is clear—it regularly overrides First Amendment values. What is deeply unclear is what justifies this privileged position, a confusion that was described as lying in the midst of an “intellectual wasteland.”⁴² This Part opens with a friendly critique of our modern understanding of defamation law. It offers a comprehensive critique of the concepts we use to justify defamation law, arguing that they lack in the Dworkian fit and justification—they are at odds with doctrine and are not particularly appealing. This critique is nonetheless friendly, because there are grains of truth in the way we think about defamation law. Thus, this Part continues with an introduction of status theory and shows how it offers a strong, and in my view, compelling, doctrinal fit.

1. Defamation Law in Search of Meaning: The Interpretative Gap

Initially, the answer seems obvious. The state’s interest in regulating defamatory speech lies in the protection of an individual’s good name from harm.⁴³ Many Supreme Court decisions consider this answer self-evident. For instance, in *Rosenblatt v. Baer*, the Court explained the purpose of defamation law as implementing the state’s “pervasive and strong interest in preventing and redressing attacks upon reputation.”⁴⁴ In his concurrence, Justice Stewart famously added that the right to protection of reputation “reflects no more than our basic concept of the essential dignity and worth of every human being.”⁴⁵ Later, in *Gertz v. Welch*, the Court framed defamation as a simple measure of evincing the “legitimate state interest” of “compensation of individuals for the harm inflicted on them by defamatory falsehood.”⁴⁶

Four decades ago, Robert Post offered his seminal account of defamation law, where he powerfully argued that the state’s interest in protecting reputation is actually quite mystifying.⁴⁷ It is far from clear what reputation even means, or why the state is so committed to protecting it—at the expense of First Amendment rights no less. The simplistic account offered by the courts offers no

⁴² Post, *supra* note 41, at 691.

⁴³ See, e.g., *Bustos v. A & E Television Networks*, 646 F.3d 762, 764 (10th Cir. 2011) (“In American law, defamation is ... about protecting a good reputation honestly earned.”); *Bruning v. Carroll Cmty. Sch. Dist.*, No. C04-3091-MWB, 2006 WL 1234822 at *14 (N.D. Iowa 2006) (“The gravamen or gist of an action for defamation is damage to the plaintiff’s reputation.”); Jessica L. Chilson, *Unmasking John Doe: Setting A Standard for Discovery in Anonymous Internet Defamation Cases*, 95 VA. L. REV. 389, 396 (2009) (“The law of defamation ... was formulated to limit the right of free expression to protect reputation.”).

⁴⁴ *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966).

⁴⁵ *Id.* at 92 (Stewart, J., concurring).

⁴⁶ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974); see also *United States v. Alvarez*, 567 U.S. 709, 734 (2012).

⁴⁷ See Post, *supra* note 41, at 692 (“Reputation, however, is a mysterious thing.”); *Id.* at 740 (“Reputation is not a single idea.”).

explanation of what makes defamation law unique; no guidance on the boundaries of the doctrine; and, troublingly, no way to assess whether defamation law achieves its goals. To understand the compelling state interest in regulating defamation, we must dig deeper.

Post did not just diagnose the problem, he also offered a systematic exploration of the values that good name interests protect.⁴⁸ Based on an investigation of defamation law's evolution, Post concluded that it involved three fundamental values: honor, property, and dignity.⁴⁹ The state's interest in protecting good name is, at bottom, an attempt to protect these values.

Post's clear-eyed analysis of the court's vague terminology proved highly influential. Many modern commentators found it intuitive to think about good name interests through the prism of dignity or honor, while also acknowledging the economic valence of good name interests that are reminiscent of property. Thus, the tripartite understanding of defamation law was established.

Despite its ecumenical approach and broad acceptance in the profession, this theory leaves a number of important questions open. This is not entirely surprising: Post's analysis was conceived as a descriptive investigation of concepts inherent in the common law,⁵⁰ rather than an attempt to settle internal incoherencies.⁵¹ Still, the gaps in our modern understanding of defamation law were never systematically analyzed. If reformers wish to avoid the Cheshire cat's dilemma, it is critical that they understand what is broken with our modern understanding of defamation law.⁵² The rest of this section attempts to offer an answer.

Take first the concept of honor. Honor is defined by Post as an unearned quality arising strictly out of one's social station, normally assigned at birth—for instance, King or Lord.⁵³ The problem here is straightforward: this understanding of honor appears largely obsolete by modern standards.⁵⁴ There is no continued social interest in upholding social rank gained by pedigree or heritage.⁵⁵ And in terms of doctrinal fit, challenges to honor may well be based

⁴⁸ See generally Post, *supra* note 41.

⁴⁹ *Id.* at 693.

⁵⁰ *Id.* at 696 (“This Article will attempt simply to identify and analyze the concepts, and to demonstrate their influence on common law defamation.”).

⁵¹ *Id.* at 697-99.

⁵² See *supra* notes 7-23 and accompanying text.

⁵³ See Post, *supra* note 41, at 699-707.

⁵⁴ James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 YALE L.J. 1279, 1283 (2000) (describing “honor, a concept regarded by most Americans as almost laughable”). This point, however, should not be overstated. Paul Horwitz offers a competing account based on a richer definition of the concept that is relevant today. Paul Horwitz, *Honour, Oaths, and the Rule of Law*, 32 CANADIAN J. L. & JURISPRUDENCE, 389 (2019). Moreover, it would seem like some of the elements of honor have metamorphosed into the idea of status. See, e.g., RIDGEWAY, *supra* note 2 (“Status is based on differences in esteem, honor, and respect.”).

⁵⁵ See *infra* notes 193-197 and accompanying text.

on opinions ('you are a coward'), or truth (reminding publicly of a shameful affair)—but this is not the scope of defamation law.

The property view, despite being widely shared,⁵⁶ is no less problematic. The idea here is that good name—or, more commonly in this context, good will—is a valuable asset, one that the law protects just as it protects any other property interest. The metaphor of property (for status is not a tangible good)⁵⁷ has initial plausibility because it is undoubtedly true that one can amass good will through personal exertion, which resonates with Lockean ideas of property.⁵⁸ It is also true that good will has a value that the market can price.⁵⁹ However, consideration reveals that even if we can set aside the racial undertones of the property metaphor,⁶⁰ these considerations do not make good name into property.⁶¹

Good will is a shorthand for the good will of *others*. I can own a widget, you can own land, but no one can own the good will of other people.⁶² It matters little that the market can price good will: if all the kids start trading a specific type of sports cards, the stock market will immediately react by an increase in the price of the company that sells them, resulting in a new price accurate to two decimal points. But no investor can claim they own this new trend, and if the children lose interest overnight, all the investors can do is swear their luck—no bring suit. Successful movie stars have surely invested much into their public image, and their image definitely carries a clear financial value. But if the vicissitudes of public taste lead fans to admire a new star, the complaints of the forgotten star will be met with a mix of embarrassment and compassion. Even doctrinally, the property view is off the mark. In *Paul v. Davis* the Supreme

⁵⁶ See, e.g., Joseph Blocher, *Reputation as Property in Virtual Economies*, 118 YALE L.J. POCKET PART 120, 120 (2009), <http://thepocketpart.org/2009/01/19/blocher.html>; Richard A. Epstein, *Was New York Times v. Sullivan Wrong?*, 53 U. CHIC. L. REV. 782, 800-01 (1986); David S. Ardia, *Reputation in a Networked World: Revisiting the Social Foundations of Defamation Law*, 45 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 261, 290 (2010) ("The ... most dominant[] conception of reputation embodied in American defamation law is that of reputation as property."); Ronald J. Krotoszynski Jr., *Fundamental Property Rights*, 85 GEO. L.J. 555 (1997).

⁵⁷ See Nick Emler, *Gossip, Reputation, and Social Adaptation*, GOOD GOSSIP 135 (R. F. Goodman & A. Ben-Ze'ev eds., 1994) ("[R]eputations do not exist except in the conversations that people have about one another").

⁵⁸ JOHN LOCKE, TWO TREATISES ON GOVERNMENT, Book II Chapter V. (Bartleby.com, Inc. 2010) (1690), <https://perma.cc/4LD7-XDK5>.

⁵⁹ David E. Vance, *Return on Goodwill*, 26 J. APPLIED BUS. RSCH. 93 (2010).

⁶⁰ See generally Harris, *supra* note 27 (discussing the relationship between racial status and property).

⁶¹ See Post, *supra* note 41, at 693-700. The most compelling defense of the property view is Krotoszynski, *supra* note 56, at 591-607, who tracks state constitutions, scholarly attitudes, and various substantive arguments. A key difference is that his emphasis is on questions of constitutional classification for due process purposes. *Id.* at 598.

⁶² The value of goodwill attributed to one spouse may well be split evenly upon dissolution of the marriage—but the court clearly cannot command that the public hold each partner in half regard. See, e.g., *In re Marriage of Lukens*, 558 P.2d 279, 283 (Wash. Ct. App. 1976) (ordering the spouses to share the value of goodwill).

Court expressly held that harm to reputation is markedly different than harm to reputation for the purposes of the Fourteenth Amendment.⁶³ Ultimately, our opinion on other people belong to us, not them.⁶⁴

Dignity is the strongest candidate of the three.⁶⁵ Most modern jurists would probably instinctively link defamation to dignity, and in foreign jurisdictions where dignity has a more established legal basis, it has been proffered as the explicit basis for defamation law.⁶⁶ Given its pervasiveness and persuasiveness, it is worth offering a more sustained critique of dignity than we have provided for property or honor. The short of it is that the dignity view has problems of fit and justification that were mostly undiagnosed so far and thus the dignity view cannot support, explain, or justify the American law of defamation. But despite the intensity of the critique, I must emphasize that I ultimately consider dignity to be relevant even under status theory, even if in a more limited role.

Under the modern understanding of dignity, the notion of dignity is inherent to our person, regardless of what we do or what others think of us. Our dignity is innate. Even if the meaning of dignity is socially influenced and culturally constructed, dignity is ultimately an individualistic concept.⁶⁷ In the words of political scientist Sharon Krause, “Dignity ... is a fixed status that attaches to all persons. Everyone has dignity and has it in the same measure inherently, which means independently of one’s particular conditions and actions. Dignity conceived in this way is impossible to lose.”⁶⁸

This is not how defamation works. The very idea animating defamation law is that good name is very much something that can be lost. Dignity, according to some, is “impossible to lose.” Even odder, we are all endowed with dignity,⁶⁹ but defamation law considers some people libel-proof, i.e., incapable of suffering cognizable harm from defamation.⁷⁰ We can further see that good name is not a

⁶³ *Paul v. Davis*, 424 U.S. 693, 701 (1976) (“the interest in reputation asserted in this case is neither “liberty” nor “property” guaranteed against state deprivation without due process of law.”). See also *Siebert v. Gilley*, 500 U.S. 226, 233-35 (1991). The property view is also inconsistent with the common law rule that defamation lawsuits do not survive the death of the defamed. See *Menefee v. CBS, Inc.*, 329 A.2d 216, 221 (Penn. 1974).

⁶⁴ Anything can be given property-like protection, from abstract patent rights to sunlight and the stars. The question here is what can be said to *belong* to us.

⁶⁵ The dignity view has been highly influential. See, e.g., *W.J.A. v. D.A.*, 43 A.3d 1148, 1159 (N.J. 2012) (“That defamation is a ‘dignitary tort,’ is not a matter of dispute.”).

⁶⁶ For Israel, see 5 HCJ 6126/94. *Szenes v. Broadcasting Authority* at §27 (Chief Justice Barak).

⁶⁷ Oliver Sensen, *Human Dignity in Historical Perspective: The Contemporary and Traditional Paradigms*, 10 EUR. J. POL. THEORY 71 (2011). For Post’s response, see *infra* note 78 and accompanying text. I also return to the limits of the dignity conception in the context of hate speech, see *infra* notes 276-282 and accompanying text.

⁶⁸ SHARON R. KARUSE, LIBERALISM WITH HONOR, 15 (2002).

⁶⁹ *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring) (Arguing that defamation law is rooted in “our basic concept of the essential dignity and worth of every human being”).

⁷⁰ *Cardillo v. Doubleday & Co.*, 518 F.2d 638, 639 (2d Cir. 1975) (holding that a “habitual criminal” was libel proof). SACK ON DEFAMATION, *supra* note 8, at § 2:4.18. See *infra* note 132.

proxy for dignity when individuals bring claims that show clear dignitary harms, but are bereft of any harm to good name. Such ‘naked’ dignitary harms suits are summarily rejected by the courts.⁷¹

The dignity view also misunderstands the essence of defamation law. The tort is all but individualistic: it is called, after all, a social tort.⁷² Accordingly, the common law’s definition of defamation is deeply rooted in the reactions of others,⁷³ focusing only on expressions that tend to expose an individual social aversion.⁷⁴ This definition is social, and while it has dignitary undertones, those seem epiphenomenal. Similarly, defamation law incorporates a fragmented view of social standing, where people occupy different social positions in different sub-communities.⁷⁵ This is quite distinct from the immutable dignity we carry in our pocket wherever we go. Ultimately, one must reach the following conclusion: dignity is personal; defamation is social.⁷⁶

Dignity also clashes with some of the most central aspects of the doctrine: publication, falsity, and the fact/opinion distinction.⁷⁷ To the dignity view, the requirement that statements be published appears alien. While public pillory is hurtful, we can surely be demeaned and debased in private.⁷⁸ Why stop, then, at public statements? Likewise, why require that the statement be false? If anything, true aspersions are more hurtful to our dignity because the truth about our faults is harder to dismiss or rationalize. More than anything, it is unprincipled from a

⁷¹ See, e.g., *Kimmerle v. New York Evening Journal*, 186 N.E. 217, 217-218 (N.Y. 1933) (holding that plaintiff’s “own [highly negative] reaction ... has no bearing”); see also *Whitman*, *supra* note 54, at 1297 (studying the actionability of naked insults in Germany).

⁷² See John C. Watson, *Defamation by a Racial Misidentification: A Study of the Social Tort*, 4 RUTGERS RACE & L. REV. 77, 104 (2002) (“Defamation has been called the sociological tort.”); DAVID ROLPH, REPUTATION, CELEBRITY AND DEFAMATION LAW, 5 (2016). See also *Kimmerle*, 186 N.E. at 218 (stating that defamation only consists of “the reaction of others”).

⁷³ See, e.g., *Cox*, 761 P.2d at 561 (“The tort of defamation protects only reputation. A publication is not defamatory simply because it is nettlesome or embarrassing to a plaintiff, or even because it makes a false statement about the plaintiff.”).

⁷⁴ *Id.* (describing defamation as exposing an individual “to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation, or disgrace, ... and [may] deprive one of their confidence and friendly intercourse in society.”; see also *Celle v. Filipino Rep. Enters., Inc.*, 209 F.3d 163, 177 (2d Cir. 2000).

⁷⁵ See *infra* Section I.2 (discussion of the status aspects of defamation law).

⁷⁶ Sensen, *supra* note 67, at 71 (“[S]cholars who [study the ontological value of dignity] consider the value to be a non-relational property.”). Status, in contrast, is deeply relational. See *infra* Appendix.

⁷⁷ See *infra* Section I.3.

⁷⁸ Post contends that the publication requirement is justified once one recognizes that private degradation will only have “equivocal significance:” is it the target or the speaker who acted improperly? Post, *supra* note 41, at 711. This is unconvincing. One can suffer deep trauma from derogatory behaviors—discrimination, verbal abuse, harassment, etc.—that are completely private. See, e.g., Rosa E. Brooks, *Dignity and Discrimination: Toward a Pluralistic Understand of Workplace Harassment*, 88 GEO. L.J. 1 (1999). While I disagree with Post here, I do not find James Whitman’s critique of Post persuasive either. Whitman argues that Post’s account fails until “he can demonstrate that there are American norms of civility.” Whitman, *supra* note 54, 1383-1384, note 353. American law is *overflowing* with norms of civility and deference. See *infra* II.3.

dignity perspective to exempt opinions.⁷⁹ Human dignity does not become immune to vituperative remarks if they are not based on hard facts. It also doesn't help the dignity view that the remedy is money. As Post himself notes, money is arguably beside the point, because the "plaintiff's dignity is rehabilitated" by the court's "authoritativ[e] determin[ation]."⁸⁰ Worse, apologies are not recognized as a defense.⁸¹

Finally, we arrive at how courts actually decide cases, where we find that—from the perspective of dignity—defamation is inexplicably both under- and over-inclusive. Overinclusive because courts deem defamatory many statements that have little to do with dignity and much to do with commercial interests, revealingly lacking any requirement that the target will be personally offended.⁸² Underinclusive because statements and insults that are deeply vituperative, demeaning, racist, or pose an affront to one's core identity are deemed non-defamatory.⁸³ It is hard to conjure an image more debasing than the one litigated in *Hustler v. Falwell*, but the Supreme Court did not find it defamatory.⁸⁴ And when it comes to damages, one treatise explains that "the orthodoxy has been that the law of defamation exists not to provide compensation for emotional disturbance but to remedy a wrongful disruption in the "relational interest" that an individual has in maintaining personal esteem in the eyes of others." The focus on relational harm when determining damages, rather than the degree of personal insult, is in tension with a dignity-based view.⁸⁵

⁷⁹ See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 417 (1974) ("Under the First Amendment there is no such thing as a false idea ... but there is no constitutional value in false statements of fact."); *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 12 (1990); RESTATEMENT OF TORTS, *supra* note 9, at § 566.

⁸⁰ Post, *supra* note 41, 42, at 638. See also Pierre N. Leval, *The No-Money, No-Fault Libel Suit: Keeping "Sullivan" in Its Proper Place*, 101 HARV. L. REV. 1287 (Proposing the award of judgments without compensation).

⁸¹ See generally Jane E. Kirtley, *Getting to the Truth: Fake News, Libel Laws, and "Enemies of the American People"*, 43 HUMAN RIGHTS Magazine 4, <https://perma.cc/DJK8-W6XX>.

⁸² See, e.g., *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (Powell, J., plurality opinion) (stating that a false report of corporate bankruptcy is defamatory); *Blake v. Ann-Marie Giustibelli, P.A.*, 182 So. 3d 881, 883–84 (Fla. Dist. Ct. App. 2016) (affirming \$350,000 in damages for online defamatory reviews of attorney services). Such interests are best seen as reputational concerns (rather than social status).

⁸³ Political affiliation is often seen as a core part of an individual's identity. Yet, false allegations of political affiliation are not defamatory. See, e.g., *Cox v. Hatch*, 761 P.2d 556, 562 (Utah 1988), *Frinzi v. Hanson*, 140 N.W.2d 259, 262 (Wis. 1966). Many would consider allegations that they are dead to be an affront to their dignity; but these statements are not defamatory, see, e.g., *Cardiff v. Brooklyn Eagle*, 75 N.Y.S.2d 222, 224 (Sup. Ct. 1947); *Decker v. Princeton Packet, Inc.*, 561 A.2d 1122 (N.J. 1989).

⁸⁴ *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (holding that a cartoon of a minister "engaged in a drunken incestuous rendezvous with his mother in an outhouse" is not defamatory because it was not understood as describing facts). The false light doctrine allows recovery for emotional injuries resulting from publications that are not necessarily false. See *Braun v. Flynt*, 726 F.2d 245, 247 (5th Cir. 1984).

⁸⁵ See DOBBS, *supra* note 9, AT § 9:26. See also *Smith v. Durden*, 2012-NMSC-010, 276 P.3d 943 (N.M. 2012); *Richie v. Paramount Pictures Corp.*, 544 N.W.2d 21, 28 (Minn. 1996).

Perhaps some sophisticated refinement of the idea of dignity might answer these challenges. Indeed, status theory does not make dignity irrelevant. But I think it is fair to question whether dignity is a natural fit here, keeping our eyes open to other alternatives. After all, the human preoccupation with good name is older than our legal understanding of dignity and has been the subject of intense research by sociologists and economists. There is voluminous literature in these disciplines, utilizing a variety of methodological tools, which closely study the meaning and importance of good name. The challenges faced by the standard classification suggest that there is a potential for great profit in learning from these schools of thought.

2. Status Theory: An Introduction

Given the uncertainty about the values that underlie defamation law, the only sound premise, shared by all, is that defamation law protects good name interests. The most promising way forward, then, is to understand what these interests are.

A core insight found in sociology and economics is that good name reflects two distinct but interrelated human pursuits—*reputation* and *status*.⁸⁶ The overly simplistic way to introduce them is to think about reputation as an economic concept, a measure of the desirability of transacting with its subject. Status is a social concept, a measure of the desirability of affiliating, befriending, or socializing with its subject. The nation's leading surgeon has good reputation; the President has high status. Both values are of deep, sometimes mortal, importance to individuals, and together they explain a large part of the law of defamation.

Thus, it should be clear at the outset that status theory is not meant as an exclusive interpretation of defamation law. Defamation law, I believe, cares about both social status and reputation, and while these two concepts are often intertwined, they possess different core meanings. Having wrestled with the concept of reputation elsewhere,⁸⁷ I will only make here brief remarks about reputation and instead focus on exploring the theory of status.⁸⁸

The concept of status emerges from an old tradition in sociology, dating back to at least Weber.⁸⁹ Sociologists define status as “the prestige accorded to

⁸⁶ The legal literature uses inconsistent terminology and does not offer a holistic framework that clearly distinguishes between them. See, e.g., Randall P. Bezanson, *The Libel Tort Today*, 45 WASH. & LEE L. REV. 535, 537 (1988) (calling status “community reputation”).

⁸⁷ See Yonathan A. Arbel & Murat Mungan, *The Case Against Expanding Defamation Law*, 71 ALA. L. REV. 453 (2019); Yonathan A. Arbel, *The Protection of Reputation in Defamation Law*, work-in-progress (on file with author).

⁸⁸ There are important and deep ties between status and reputation. See DAVID ROLPH, REPUTATION, CELEBRITY AND DEFAMATION LAW, 3-6 (2008).

⁸⁹ Economists have considered the role of status, dating back at least to Adam Smith. ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 112-13 (D.D. Raphael & A.L. Macfie eds., Clarendon Press 1976) (1759). Yet, the role of status is often overshadowed by more tractable and simple models of human behavior. See Richard H. McAdams, *Relative Preferences*, 102 YALE L.J. 1, 10-14 (1992).

individuals because of the abstract positions they occupy rather than because of immediately observable behavior.”⁹⁰ Status arises organically in social groups—from the small fraternity to the modern complex society—⁹¹ and reflects a social hierarchy within the group; a pecking order.⁹² Possessing status is a matter of great importance to individuals, and satiates what psychologists and sociologists believe to be a basic human desire.⁹³ Various studies show that “status difference determines the observable power and prestige within the group.”⁹⁴ ⁹⁵With status comes “deference behavior”—that is, “compl[iance] with that individual’s wishes, desires, and suggestions . . . unaccompanied by threat or coercion.”⁹⁶

Status matters in some unexpected ways. Within the aircrew positions of a B-26 bomber, there is a clear military hierarchy: pilots rank over navigators who rank over gunners. Interestingly, this military hierarchy, based on operational considerations, carries over also to purely social settings, where researchers find that pilots’ opinions are given a dominant role at the expense of gunners.⁹⁷ In science, a distinct domain, one finds that high-status scientists will attract many more citations for similar ideas than their low-status peers.⁹⁸ While status is often sought for its own ends, high status also opens doors in market settings by giving high-status individuals greater access to opportunities and capital.⁹⁹ It is not just

⁹⁰ Roger V. Gould, *The Origins of Status Hierarchies: A Formal Theory and Empirical Test*, 107 AM. J. SOCIOLOGY 1143, 1147 (2002). This definition helps distinguish between status and reputation.

⁹¹ *Id.* at 1143 (2002) (Social differentials have a “near-universality . . . across a wide range of scales and contexts, actors are sorted into social positions that carry unequal rewards, obligations, and expectations.”); see also Bernardo A. Huberman, Christoph H. Loch & Ayse Öncüler, *Status as a Valued Resource*, 67 SOC. PSYCH. Q. 103–114 (2004) (finding a strong preference for status in an experiment across five cultures); Jessica Kiski, Hongling Xie, & Ingrid R. Olson, *Understanding Social Hierarchies: The Neural and Psychological Foundations of Status Perception*, 10 SOC. NEUROSCIENCE 527 (2015) (“A wealth of evidence indicates social hierarchies are endemic, innate, and most likely, evolved to support survival within a group-living context.”).

⁹² The commonly used term ‘pecking order’ reflects a real phenomenon which showcases the ubiquity of status and status games, as chicken direct most of their pecks at lower status fowls. A. M. Guhl, *The Social Order of Chickens*, 194 SCI. AM. 42 (1956).

⁹³ See SMITH, *supra* note 89, at 336 (“The desire of being believed, the desire of persuading, of leading, and directing other people, seems to be one of the strongest of all our natural desires.”).

⁹⁴ Joseph Berger, Bernard P. Cohen & Morris Zelditch, Jr., *Status Characteristics and Social Interaction*, AM. SOCIO. REV. 241, 243 (1972).

⁹⁵ Joan C. Williams, Marina Multhaup, & Sky Mihyalo, *Why Companies Should Add Class to Their Diversity Discussions*, Harv. Bus. Rev. (Sept 5, 2018) (“[I]n the United States, talking about class is taboo”).

⁹⁶ Cameron Anderson, John A. D. Hildreth & Laura Howland, *Is the Desire for Status a Fundamental Human Motive? A Review of the Empirical Literature*, 141 PSYCH. BULL. 574, 575 (2015). See also JOEL M. PODOLNY, STATUS SIGNALS 14 (2005).

⁹⁷ *Id.* at 241–42.

⁹⁸ Robert K. Merton, *The Matthew Effect in Science*, 159 SCI. 56 (1968); see also Michael Sauder, Freda Lynn & Joel M. Podolny, *Status: Insights from Organizational Sociology*, 38 ANN. REV. SOCIO. 267 (2012). On biased citation practices in law, see Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 PENN. L. REV. 561 (1984).

⁹⁹ Sauder, Lynn & Podolny, *supra* note 98, at 272–73; PODOLNY, *supra* note 96, at 27–29

that high-status signals merit;¹⁰⁰ it is also that having high status makes everyone's evaluations of you more favorable.¹⁰¹ For instance, prestigious law firms can charge higher prices, and one wonders how much of that is attributable to higher quality.¹⁰²

Lawyers, and future lawyers in particular, may find special interest and concern in learning that interview invitations to elite law firms are highly influenced by status markers. "[E]mployers discriminate on the basis of status characteristics," write Rivera and Tilcsik, who find that adding a high-status marker to a student's resume—being on the sailing team or listening to classical music—results in a significantly higher rate of interview invitations than listing low status markers—being on the track and field team or enjoying country music.¹⁰³

As to why individuals, firms, and countries compete for status, sociologists propose three possibilities.¹⁰⁴ First, individuals may pursue status instrumentally to achieve those material advantages just noted.¹⁰⁵ Second, individuals may seek status as a terminal value simply because having status is pleasurable and losing it is painful.¹⁰⁶ Consistently, psychologists find that "[p]eople's emotional state, their short-term moods and long-term happiness, often depend on their ranking in comparison with others."¹⁰⁷ Lastly, the pursuit of status may also be explained by evolutionary adaptations to collaboration in group settings, a view supported by the ubiquity of competition for status within the animal kingdom.¹⁰⁸

Let us pause to briefly consider the interrelated concept of reputation. Much like status, reputation is also a communal concept. It is aggregated information regarding the quality of a person, service, or product based on past experience.

("[S]tatus lowers the transaction costs associated with the exchange between buyer and seller."); Michael Jensen, Bo Kyung Kim & Heeyon Kim, *The Importance of Status in Markets: A Market Identity Perspective*, STATUS IN MGMT. AND ORG. 87, 87 (2010).

¹⁰⁰ Huberman, Loch & Öncüler, *supra* note 91, at 105 (reporting a "strong theoretical basis as well as empirical support for the fact that status signals competence [and] provides access to power and resources").

¹⁰¹ Gould, *supra* note 90, at 1158.

¹⁰² Brian Uzzi & Ryon Lancaster, *Embeddedness and Price Formation in the Corporate Law Market*, 69 AM. SOCIO. R. 319, 341 (2004) (finding in the market for corporate legal services that "status has an effect on prices that is independent of the quality of the firm").

¹⁰³ Lauren A. Rivera & Andrés Tilcsik, *Class Advantage, Commitment Penalty*, 81 AM. SOC. REV. 1115, at 1122 (2016).

¹⁰⁴ See RIDGEWAY, *supra* note 2, at 20-47 (arguing that status serves to coordinate cooperation within groups).

¹⁰⁵ See, e.g., PODOLNY, *supra* note 96, at 30 ("[H]igher-status actors will be able to offer goods of a given quality at a lower cost.").

¹⁰⁶ Anderson, Hildreth, & Howland, *supra* note 96, at 591-93. (reviewing diverse literature and finding that status pursuits appear to be a fundamental human desire with important effects on wellbeing); see also Huberman, Loch & Öncüler, *supra* note 91, at 104.

¹⁰⁷ Richard H. McAdams, *Relative Preferences*, 102 YALE L. J. 1, 31 (1992).

¹⁰⁸ Joey T. Cheng & Jessica L. Tracy, *Toward a Unified Science of Hierarchy: Dominance and Prestige are Two Fundamental Pathways to Human Social Rank*, THE PSYCHOLOGY OF SOCIAL STATUS 3 (2014).

¹⁰⁹ Barring reputation failures, ¹¹⁰ one could expect higher quality from a product that has good reviews. ¹¹¹ The common observation that a firm or brand “has” a good reputation means that many share a favorable expectation of its quality. ¹¹² I think it is easiest to think of reputation as a *prediction*, although I am also partial to political scientist Robert Axelrod’s calling reputation “a shadow of the future.”¹¹³ It follows quite naturally why reputation is valuable: it allows its subject to capitalize on it. ¹¹⁴

In reality, there is often overlap between the distinct concepts of status and reputation, so it is understandable why the literature conflated them. ¹¹⁵ It is especially easy to mistake them in a society that has an ethos of meritocratic allocation of status, where supposedly those admired are the most competent. ¹¹⁶ Still, even twins are different people. While reputation measures quality, status measures relative social standing; while reputation is mostly an instrumental value, status is at least partly a terminal one; and while one builds reputation by accumulating positive reviews of past experiences, status is earned through the accumulation of ‘deference behavior.’¹¹⁷ Quality is key to reputation, but secondary to status. The late sociologist Roger Gould went as far as showing that

¹⁰⁹ See RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 272 (1981) (“A person’s reputation is other people’s valuation of him as a trading, social, marital, or other kind of partner. It is an asset of potentially great value which can be damaged both by false and by true defamation.”); Yonathan Arbel, *Reputation Failure: The Limits of Market Discipline in Consumer Markets*, 54 WAKE FOREST L. REV. 1239, 1255 (2019) (“reputational information is like a poll” as it “helps consumers predict their own experiences based on the distribution and valence of experiences of past consumers”). See also Roy Shapira, *Reputation Through Litigation: How the Legal System Shapes Behavior by Producing Information*, 91 WASH. L. REV. 1193, 1203–04 (2016).

¹¹⁰ See generally Arbel, *supra* note 109 (exploring factors leading to reputation failures in markets).

¹¹¹ See Simon Board & Moritz Meyer-Ter-Vehn, *Reputation for Quality*, 81 *ECONOMETRICA* 2381, 2381 (2013) (defining reputation “as the market’s belief about ... quality”); Benjamin Klein & Keith B. Leffler, *The Role of Market Forces in Assuring Contractual Performance*, 89 J. POL. ECON. 615, 616 (1981).

¹¹² The statement that a brand enjoys a good reputation is intelligible, but it would be highly confusing from a perspective of honor, property, or dignity.

¹¹³ ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 126 (1984).

¹¹⁴ See Benjamin Klein & Keith B. Leffler, *The Role of Market Forces in Assuring Contractual Performance*, 89 J. POL. ECON. 615, 616 (1981).

¹¹⁵ See Olav Sorenson, *Status and Reputation: Synonyms or Separate Concepts?*, 12 *STRATEG. ORG.* 62, 63 (2014). Economists have frequently conflated the two meanings by redefining status as a measure of quality. See, e.g., Michael Jensen, Bo Kyung Kim & Heeyon Kim, *The Importance of Status in Markets: A Market Identity Perspective*, *STATUS MANAGEMENT ORG.* 87–117 (2010). The distinction developed here maps into a distinction in trademark law, which considers brands as either informational signals of quality or markers of prestige. See Shahar J. Dillbary, *Famous Trademarks and the Rational Basis for Protecting Irrational Beliefs*, 605 *GEO. MASON L. REV.* 605, 610–15 (2011).

¹¹⁶ See generally RIDGEWAY, *supra* note 2, at 6–7 (offering a merit based view of status allocation). Podolny posits that status is also a predictor of quality in market relations used to complement gaps in reputational information. PODOLNY, *supra* note 96, at 18.

¹¹⁷ See, e.g., Sauder, Lynn & Podolny, *supra* note 98, at 268.

“it is possible for a stable system of ranked social positions to emerge endogenously in the absence of underlying variation in individual attributes.”¹¹⁸

Another difference is that it would be relatively easy for an outsider to evaluate the reputation of various agents based on the demand for their services. However, an outsider will find it difficult to track and quantify the allocation of status, which manifests in non-market behavior.¹¹⁹ And even the internal experience is different: reputation is about what we *expect* to get and status is what we *should* get.¹²⁰

A final point about status is that it is a *relative* property. We see that in the way we talk about high status, as opposed to good reputation. There is no high status without low status: leaders imply followers; cool kids, nerds; upper-class, lower-class; patricians, plebeians; Brahmins, Sudras; gold medals, bronze medals; and Ivy League schools, exposed-brick schools. We always measure status relative to others.¹²¹ But reputation is different. Because reputation is a prediction of future quality, it is not impossible for all the restaurants in a given area to enjoy a high reputation for the quality of their food.¹²² This is not to say that reputation is not competitive—every firm would like to be the only one with a high reputation—but only to illustrate the different dynamics that sociologists and economists attach to status and reputation.¹²³

3. A Status Interpretation of Defamation Law

This brief introduction to status theory cannot do justice to such a mature theory, but if we are willing to accept some sacrifice of nuance, we can test the pudding by its eating. What follows is an attempt to read defamation law through the lens of status theory. The analysis has no ambition of explaining all of defamation law. Nor need it. Status theory could be valuable if it can persuasively explain a fair portion of the law in a coherent manner—or, at least, if it can do so better than our existing accounts of dignity, honor, or property.

The nexus between status and defamation law is first observed in the rhetoric surrounding the doctrine. The Supreme Court endorsed a description of defamation law as protecting individuals from loss of “standing in the

¹¹⁸ Gould, *supra* note 90, at 1149.

¹¹⁹ The difficulty of tracking status may explain defamation law’s liberal allowance of recovery of presumed damages. *See* *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 760 (1985) (quoting PROSSER, *supra* note 10, at 765) (“[P]roof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact.”); *see also* SACK ON DEFAMATION, *supra* note 8, at § 2:4.2. Insiders develop a quick and intuitive sense of internal social hierarchies, which they share among themselves with regularity.

¹²⁰ The ‘should’ here is sociologically, not morally, normative. On the norms guiding the attainment of status. *See infra* 0.1.

¹²¹ *See, e.g.*, Jensen, Kim, & Kim, *supra* note 115, at 91 (“[S]tatus is best defined as a position in a social system.”).

¹²² *Cf.* ROY SHAPIRA, LAW AND REPUTATION 120 (2020).

¹²³ *See infra* Appendix.

community,”¹²⁴ a telling reference to the social aspect of the tort. Consistently, the common definition of defamatory expressions refers to statements that expose individuals to “hatred, contempt, ridicule, or obloquy, or which cause[]... any person to be shunned or avoided.”¹²⁵ This is status-laden language, clearly geared towards the social effects of statements.¹²⁶ Some commentators have likewise explained the need for monetary compensation in defamation cases in the need to rehabilitate a “relational interest” that defamation jeopardizes.¹²⁷

Dignity theory was criticized for its lax doctrinal fit. Let us measure how status theory fares on this measure. Consider, first, the publication requirement. For dignity theories, this requirement raises difficulty, because even private statements can be extremely demeaning. In contrast, such a requirement is inescapable if the value protected is social status. Unlike dignity, social status cannot be lost in private. One can only lose status by being viewed negatively in the eyes of *others*.¹²⁸ The mechanisms of status loss render publication a non-negotiable prerequisite.

We can also derive from first principles the community judgment requirement. The measure of whether any given statement is defamatory is its reception in the community. As Justice Holmes put it, statements are only defamatory if they would “hurt the plaintiff in the estimation of an important and respectable body of the community.”¹²⁹ This requirement is puzzling if one views dignitary harm as the crux of defamation. Why limit recovery to harm in the eyes of the community and not, say, in the eyes of a loved one?¹³⁰ And why should it matter if those people are respectable or not? But from a status perspective, these requirements are natural. Status only emerges within social communities, and the existence of harm requires a change in the views of their

¹²⁴ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).

¹²⁵ ROBERT H. PHELPS & E. DOUGLAS HAMILTON, *LIBEL: RIGHTS, RISKS, RESPONSIBILITIES* 6 (1966); see also *Phelan v. May Dep’t Stores Co.*, 819 N.E.2d 550, 553 (Mass. 2004) (quoting *Stone v. Essex Cty Newspapers, Inc.*, 330 N.E.2d 161, 165 (Mass. 1975)) (defining defamation as a statement that “would tend to hold the plaintiff up to scorn, hatred, ridicule or contempt”).

¹²⁶ W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 111, at 771 (5th ed. 1984) (citing “personal disgrace”) [hereinafter *PROSSER AND KEETON*]; *Kimmerle v. New York Evening J.*, 186 N.E. 217 (N.Y. 1933) (“[I]nduce an evil opinion of one in the minds of right-thinking persons, and to deprive one of their confidence and friendly intercourse in society.”).

¹²⁷ RODNEY A. SMOLLA, 1 *THE LAW OF DEFAMATION* 18 (2d ed. 2020) (citing LEON GREEN, *CASES ON INJURIES TO RELATIONS* 193-276 (1940)).

¹²⁸ RIDGEWAY, *supra* note 2, at 65. Likewise, emotional pain and suffering are considered ‘parasitic’ on other harms and cannot exist by themselves.

¹²⁹ *Peck v. Tribune*, 214 U.S. 185 (1909); see also *RESTATEMENT OF TORTS*, *supra* note 9, at §559 cmt. e. (“[T]he communication would tend to prejudice [the victim] in the eyes of a substantial and respectable minority.”); *Mycroft v. Sleight*, 90 L. J. K. B. 883 (1921) (“[I]n the minds of ordinary, just and reasonable citizens.”).

¹³⁰ *Lidsky*, *supra* note 33, at 19 (“[I]f the single individual who finds the statement defamatory is the plaintiff’s spouse or boss, the plaintiff will receive no recovery despite the very real and substantial nature of his injury.”).

members. And the more respect and status audience members possess, the more impactful the statement can be on one's status.¹³¹

We can also revisit the libel-proof doctrine. Being libel proof means that one's standing is so low that no harm is visited by a defamatory allegation.¹³² From a dignity perspective, such a doctrine is inexplicable, as all individuals have equal dignity.¹³³ But from a status perspective, it would make sense that those on the lowest social rung are not losing much status from defamation.¹³⁴ While one may not be "dignity proof," being status proof is entirely plausible (albeit tragic).

Finally, the most important and nuanced aspect of defamation doctrine is the inveterate requirement that the statement is false, a requirement that long predates modern concepts of free speech.¹³⁵ From a dignity- or honor-based perspective, this limitation is clearly puzzling.¹³⁶ If anything, the humiliation a person suffers from derogatory remarks is greater when those remarks prove true. From a status perspective, however, the falsity requirement is a natural corollary.¹³⁷ The meaning of this requirement will be clarified once status games are introduced; it is enough, for now, to note that status games' integrity requires some arbitration of which claims are false and which are not.¹³⁸ After all, if a person claims a status privilege on the basis of her honesty or piety, then it is essential that others could truthfully expose her dishonesty or impiety.¹³⁹

Majority of commentators today converge on a dignity of defamation law. Beyond the Supreme Court itself,¹⁴⁰ a prominent exemplar is legal philosopher Jeremy Waldron who espouses a full-throated dignity-based view of defamation

¹³¹ See, e.g., PODOLNY, *supra* note 96, at 15 ("[R]eceiving deference from a high-status actor generally has a greater impact on one's own status than receiving deference from a low-status individual."). The torts of intentional infliction of harm and breach of privacy are designed to address cases that do not fit within this category. See David A. Logan, *Tort Law and the Central Meaning of the First Amendment*, 51 U. PITT. L. REV. 493, 524 (1990).

¹³² *Cardillo v. Doubleday & Co.*, 518 F.2d 638, 639 (2d Cir. 1975) (holding that a "habitual criminal" was libel proof). SACK ON DEFAMATION, *supra* note 8, at § 2:4.18.

¹³³ See *supra* notes 71-81 and accompanying text.

¹³⁴ This is consistent with the mitigation of damages for individuals with low-status, as they presumably suffer a lesser status harm. The reverse is true for individuals with high standing. SMOLLA, *supra* note 127, at § 13.17 ("Evidence that the plaintiff already has a bad reputation is admissible in mitigation of damages."); Mike Steenson, *Presumed Damages in Defamation Law*, 40 WM. MITCHELL L. REV. 1492, 1504 (2014).

¹³⁵ Originally, as the law of libel was concerned with preserving the peace, it did not concern itself with the veracity of allegations. See generally Van Vechten Veeder, *The History and Theory of the Law of Defamation*, 8 COLU. L. REV. 546 (1903).

¹³⁶ See Post, *supra* note 41, at 705-06.

¹³⁷ For an early statement of the truth defense, see 3 WILLIAM BLACKSTONE, COMMENTARIES *433-34.

¹³⁸ In the context of bigoted defamation, our goal is to *disrupt* the underlying status game, which is why the law does not regulate the veracity or mendacity of statements. See *infra* Part II.

¹³⁹ See *infra* Part III.1.

¹⁴⁰ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974) (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring)).

law.¹⁴¹ Another is defamation law expert Professor Lyrissa Lidsky, who argued that “[b]y protecting reputation, defamation law safeguards the dignity of citizens.”¹⁴² Beyond these leading voices, examples abound;¹⁴³ in fact, despite the voluminous literature on the topic, it is hard to locate different views who challenge the dominance of the dignity or property view of defamation.

Despite its dominance, the dignity view faces difficult challenges. The discussion above was sufficient, I hope, to illustrate how many difficult doctrinal requirements that confound dignity, property, and honor interpretations appear logical, even necessary, when viewed from the lens of status theory. The publication requirement, the use of monetary compensation, the categories of per-se libel, the indifference to naked dignitary harms, are but some of the features that are easily interpretable from within the status perspective.

I would conjecture that the goodness of fit between theory and doctrine suggests is not coincidental. Courts and commentators may have employed a proto-theory of status for a long time, even if they lacked the theoretical vocabulary to articulate it clearly. In fact, many of Post’s original ideas also fit comfortably within this framework, suggesting theoretical consilience. Thus, while status theory claims greater explanatory power, it does not claim much in the way of novelty. At best, it is a refinement of older ideas and concepts that are already present in the law. If it earns its interpretative keep, it is by expounding these ideas clearly and parsimoniously.

DEFAMATION LAW AND STATUS GAMES

Interpreting defamation law from a status perspective offers a way to coherently understand doctrine. Interpretative projects are important in themselves, especially in areas that are cloudy and mystifying. Status theory, however, is a more capacious framework; it offers prescriptive guidance to courts, legislators, and reformers. The goal of this Part is to explicate the normative side of the theory—employing a socio-economic-legal analysis.

In the traditional legal account, defamation law only protects good name interests. The argument developed here is that the traditional account sells defamation law short. By intervening in status competitions, that is, by protecting some claims to status and denying others, defamation law inexorably affects the choices individuals make in the first instance about how to acquire

¹⁴¹ See Waldron, *supra* note 37. See also *infra* notes 276-282 and accompanying text.

¹⁴² Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 885 (2000)

¹⁴³ See generally Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 217-18 (2011) (discussing courts defamation dignity jurisprudence); Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183, 253-58 (2011) (considering, from a comparative perspective, dignity in the context of defamation law).

status.¹⁴⁴ This Part introduces the concept of status games –the status competitions through which individuals gain and lose status. On this basis, it explains how determinations in particular cases affect the choice of status games, and then develops the normative argument that courts should openly recognize their role and consider status games explicitly when they adjudicate cases. In other words, courts play a regulatory role in status games and, while there are important institutional constraints, a judicial reckoning of this role is vital.

1. Status Games

Defamatory remarks jeopardize social status. Obviously, not all statements about me jeopardize my status. To falsely say that I cannot grow yams will have nil effect on *my* social status, but it would be devastating if I lived in a different society.¹⁴⁵ There are specific social rules at play that govern status, rules that define how status is lost, but also how it is gained. It is those rules that give structure to the status competitions that are played within status games.

Status games are emergent social systems of recognized rules of status acquisition, maintenance, and deprivation, alongside the entailments of status.¹⁴⁶ Status games are a near-universal property of any social group, forming spontaneously and often informally and subconsciously.¹⁴⁷ The variety of status games is dazzling, and they span the immediately recognizable (the consumption of expensive items, titles, and physical appearance) to the nuanced and seemingly “natural” (accent, manners, and even body language). A 19th-century lady is instructed to “never read in company,” and when encountering a “gentleman at the foot of flight of stairs,” she shall “Stop, bow, and motion him to precede.”¹⁴⁸ These overtly sexist rules were codified in etiquette books, which themselves fell out of fashion, only to be replaced by modern, less legible, status games. Probably the most radical account of status games is the one proposed by sociologist Ervin Goffman, who famously claimed that the entire presentation of the self is a form of soliciting social impressions.¹⁴⁹

Because many native status games are invisible from within, a useful tell is the feeling one experiences when imagining transgressions. A faux-pas evokes such a visceral response that it even redounds to third parties—in what is known as

¹⁴⁴ The Technical Appendix develops a critique of the protection account on its own terms. It explains why, from a social perspective, defamatory remarks are not necessarily harmful, thus undermining the protection imperative. See *infra* Technical Appendix.

¹⁴⁵ William R. Bascom, *Ponapean Prestige Economy*, 4 SW. J. ANTH. 211, 213 (1948).

¹⁴⁶ See e.g., Anderson et al., *supra* note 96, at 116.

¹⁴⁷ See Jessica Koski et al., *Understanding Social Hierarchies: The Neural and Psychological Foundations of Status Perception*, 10 SOC. NEUROSCIENCE 527 (2015) (“[S]ocial hierarchies are highly pervasive across human cultures ... and they appear to emerge naturally in social groups ... this group organization is not strictly a product of human cognition, as almost every group-living species demonstrates a natural tendency to organize into a social hierarchy.”).

¹⁴⁸ FLORENCE HARTLEY, *THE LADIES' BOOK OF ETIQUETTE, AND MANUAL OF POLITENESS*, 284-85 (1860).

¹⁴⁹ ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* (1959).

‘cringe’—just imagine accidentally calling the President ‘dude’, burping in a company dinner, or the ubiquitous nightmare of coming to school with no pants.¹⁵⁰

Reports of social ‘fouls’ diffuse in the community through informal mechanisms such as gossip.¹⁵¹ This is obviously relevant to defamation law, which is focused on sanctioning false reports. It is worth noting that individuals seem to take pleasure in diffusing and consuming such reports: the promise of ‘juicy’ gossip sustains much of the tabloid industry.

A key observation is that status games do more than allocate status, they also affect society itself. Status games consume resources, time, and psychic energy, while the form of the status game impacts individuals, for better or worse.¹⁵² These effects are not always visible because, as economist Roger Congleton recognized, they accrue to *non*-participants.¹⁵³ For instance, politeness and civility is a form of a status game that directly improves the well-being of others by rewarding only those who act amicably, patiently, and pro-socially. Philanthropy is another example of a status game that creates a real difference in the lives of others—sometimes literally saving them.¹⁵⁴ It has become fairly common to complain today of virtue-signaling: the conspicuous display of prosocial attitudes motivated by selfish concerns of status and public image. But perhaps the effects of such signaling is not all bad. In an intriguing account, economist Robert Frank argued that status games sometimes help economic inequality. He argued that workers do not only care about their own absolute wages but also about their relative earnings. When employers use differential wages, they sow the seeds of discontent. To preserve morale, managers must maintain a certain degree of pay equality or else risk attrition.¹⁵⁵

Alongside their more salutary implications, one must admit, there is also a dark side to status games.¹⁵⁶ In *The Darwin Economy*, Frank argues that status

¹⁵⁰ Modern television shows engage in intensive exploration of this feeling. *See generally* Julia Havas and Maria Sulimma, *Through the Gaps of My Fingers: Genre, Femininity, and Cringe Aesthetics in Dramedy Television*, 21 TELEVISION & NEW MEDIA 75–94 (2021) (theorizing the role of cringe in contemporary television shows).

¹⁵¹ *See* Terence D. Dores Cruz et al., *The Bright and Dark Side of Gossip for Cooperation in Groups*, 10 FRONTIERS IN PSYCH. 1374 (2019) (noting the function of gossip in enforcing group norms and its universality in human societies).

¹⁵² *See* SHAPIRA, *supra* note 122, at 137–38 (discussing the signal “broadcast efficiency” based on its social effects).

¹⁵³ Congleton, *supra* note 3, at 176.

¹⁵⁴ *See* Amihai Glazer & Kai A. Konrad, *A Signaling Explanation for Charity*, 86 AM. ECON. REV. 1019 (1996).

¹⁵⁵ *See* Robert Frank, *Are Workers Paid Their Marginal Products?*, 74 AM. ECON. REV. 549 (1984).

¹⁵⁶ *See, e.g.*, Douadia Bougherara et al., *Do Positional Preferences Cause Welfare Gains?*, 39 ECON. BULL. 1228, 1229 (2019) (“In an economy with private consumption goods, positional preferences lead to a welfare loss.”); Congleton, *supra* note 3, at 176 (“A substantial portion of the investment in positional goods may be regarded as a dead-weight loss.”). The term “positional

games often result in socially destructive outcomes. Frank's ideas draw on Darwinian competitions for female attention in nature, where elks grow unwieldy antlers, elephant seals grow to unsustainable sizes, and peacocks boast heavy and flashy tails—all features that make survival harder.¹⁵⁷ Similarly, Frank argues, human competition for status can result in races that consume resources but produce no improvement. We might compare this to an overcrowded concert. If one person stands on her tiptoes, she can see the show better. But this can lead to a cycle where everybody else also stands on their toes, resulting in everyone standing uncomfortably and no one seeing any better for it.¹⁵⁸

A powerful example of pernicious status races comes from Nobel Laureate economist Thomas Schelling. He noted the oddity that, given a choice, hockey players would choose to skate without a helmet, but if asked to vote on a league rule, the overwhelming majority of players would require helmets. The reason for this dissonance stems from the underlying race. Any player not wearing a helmet sees the field slightly better and is thus more likely to reap status and financial rewards. But if all players skate without a helmet, this advantage vanishes, and the original competitive ranking is maintained while leaving all players more vulnerable to serious injuries.¹⁵⁹

Keeping up with the Joneses is a familiar status race among neighbors, where entire neighborhoods are drawn into a one-upmanship game of maintaining large lawns, driving lavish cars, and donning expensive brands. The game is not played because of the inherent utility of these actions, it is played in order to save face.¹⁶⁰ As Veblen noted, individuals often engage in such “conspicuous consumption” to impress others and win their envy, although they would rarely admit to such motives.¹⁶¹ While status races may not always be conscious, their existence in our daily life is illuminated by the common and seemingly innocuous pursuit of “decent” clothes, a “good” car, or a “nice” house, which, “upon analysis, turn out to be (at least partly) relative to what others have.”¹⁶²

arms race” is due to Robert H. Frank, *Should Public Policy Respond to Positional Externalities?*, 92 J. PUB. ECON. 1777, 1778 (2008).

¹⁵⁷ ROBERT H. FRANK, *THE DARWIN ECONOMY: LIBERTY, COMPETITION, AND THE COMMON GOOD* 8-9 (2011).

¹⁵⁸ FRED HIRSCH, *SOCIAL LIMITS TO GROWTH* 5 (1995); see also Erzo Luttmer, *Neighbors as Negatives: Relative Earnings and Well-Being*, 120 Q.J. ECON. 963 (2005) (arguing that individuals feel worse off when their neighbors do better).

¹⁵⁹ FRANK, *supra* note 157.

¹⁶⁰ See, e.g., Frank, *supra* note 156, at 1778 (suggesting large houses are a source of positional utility); FRANK, *supra* note 157, at 68-69.

¹⁶¹ THORSTEIN VEBLEN, *THE THEORY OF THE LEISURE CLASS*, 33-48 (1925) (noting that status pursuits may not be entirely conscious “so much as it is a desire to live up to a conventional standard of decency in the amount and grade of goods consumed.”). See also ROGER S. MASON, *CONSPICUOUS CONSUMPTION: A STUDY OF EXCEPTIONAL CONSUMER BEHAVIOUR* 42 (1981) (stating that a conspicuous consumer, “anxious to display wealth and gain in prestige, will rarely if ever explicitly admit to any such intentions”).

¹⁶² Richard H. McAdams, *Relative Preferences*, 102 YALE L.J. 1, 43 (1992).

In such situations, one can easily identify a “positional treadmill,”¹⁶³ where players end up roughly where they started, only poorer. If resources are spent, used up, or misused along the way—say, land that could be used for habitation is converted into a fancy lawn—society itself suffers. Thus, we can see how status, the product of status games, is a matter of great social interest. Some games played can enrich society while other can greatly impoverish it.¹⁶⁴

2. Defamation Law as a Regulator of Status Games

People invest their best efforts, most precious resources, and a great degree of mental energy in status competitions. “To exalt my station,” wrote Alexander Hamilton to one of his friends, “I would willingly risk my life, though not my character.”¹⁶⁵ What if some of this energy could be directed toward positive games, or at least redirected away from antisocial ones?

This basic insight occurred to media magnate Ted Turner.¹⁶⁶ He looked at the Forbes 400 list of the top wealthiest Americans and realized that it might actually be keeping people *from* giving. If one is located in the 10th place, giving away money could cost them their spot in the top-10—and the same goes for those in the 50th place, 100th, up to the person in the 400th place, who would be especially anxious to give away any money. He also realized that status games are somewhat malleable. With his influence, the journal *Slate* created an exclusive list of top-sixty donors. The effects, at least according to *Slate*, were large and noticeable. “Whether by coincidence or not, philanthropy has blossomed since *Slate*’s list was created.”¹⁶⁷

To understand the place of defamation law in this ecosystem, consider the fundamental problem of status. The ROI of status games, the return on all of this investment, is measured in the currency of status: the name we develop for ourselves. The trouble is that unlike hard currency, which can be safeguarded in banks and vaults, good name is easily deprived. The fruits of the investment are a vicious rumor away from being destroyed. In other words, status is fragile. Indeed, investment mogul Warren Buffett observed that “It takes 20 years to

¹⁶³ Cass R. Sunstein & Robert H. Frank, *Cost-Benefit Analysis and Relative Position*, SSRN 237665 (Aug. 14, 2000), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=237665.

¹⁶⁴ HIRSCH, *supra* note 158, at 10-11 (“Positional goods ... become an increasing brake on the expansion and extension of economic welfare.”); *see also id.* at 37-38. Even philanthropic activity may be excessive. *See* Glazer & Konrad, *supra* note 154.

¹⁶⁵ Alexander Hamilton to Edward Stevens, November 11, 1769, quoted in Ron Chernow, ALEXANDER HAMILTON 31 (2004).

¹⁶⁶ Nicholas Kristof, *How Giving Became Cool*, N.Y. TIMES (Dec. 27, 2012), <https://perma.cc/C4LT-4EFL>.

¹⁶⁷ Sebastian Mallaby, *The Slate 60 Turns 10*, SLATE (Feb. 20, 2006, 8:19 AM), <https://perma.cc/D2RX-AEPJ>.

build a reputation and five minutes to ruin it.”¹⁶⁸ With this comes the idea of “status anxiety,” the recurring fear that we will become ‘nobodies’ overnight.¹⁶⁹

Most people are attracted to safer investments, ones that promise predictable and durable returns. If some forms of status are more fragile than others, this creates a problem for the underlying status game—but also an opportunity for the law to play a role.

In the Hobbesian society, attaining the status of a great inventor is for suckers.¹⁷⁰ Take a budding researcher, who daydreams about making a name for himself by making groundbreaking discoveries in the natural world. He does not harbor this aspiration because it is good for his financial welfare. In fact, his relatives keep telling him that he would do better plowing the fields than the skies. But our scholar is determined. However, despite all of his determination and willingness to forgo more material pursuits, he is shaken by the realization that his accomplishments will always be tentative. He will be forever exposed to gossipmongers who can sully his good name by spreading rumors on how he stole his best ideas from others. The scholar’s only recourse to defending his hard-earned status might be violence or duels—and as 20-year-old French genius Galois discovered, being a prodigal genius is quite distinct from being a good marksman.¹⁷¹ Foreseeing all of this difficulty, the scholar decides to abandon the innovation race altogether. He sets his aims at attaining status that cannot be so easily deprived, through conspicuous consumption, the hoarding of property, and ostentatious displays of power.

This thought experiment reveals the potential of defamation law. Vicious rumors and false allegations, left unchecked, deprive their subjects of the fruit of their investment. Defamation law secures the ROI in status games, by both sanctioning the gossipmonger and compensating the subject. We know that when judges protect property, they guard the incentive to maintain it; when they protect contractual claims, they invite reliance and investment; and when they deny enforcement of illegal contracts, they discourage illicit transactions.¹⁷² By the same token, when judges extend defamation protection, they secure status

¹⁶⁸ Snyder, Benjamin. “7 Insights from Legendary Investor Warren Buffett.” CNBC, May 1, 2017. <https://www.cnbc.com/2017/05/01/7-insights-from-legendary-investor-warren-buffett.html>.

¹⁶⁹ See generally ALAIN DE BOTTON, STATUS ANXIETY (2008) (exploring the concept).

¹⁷⁰ It is perhaps no coincidence that Hobbes was skeptical about ‘glory’. See generally Strong, *supra* note 103.

¹⁷¹ See PROSSER AND KEETON, *supra* note 126, at § 111 p. 772 (arguing that defamation law came to replace duels and blood feuds). See also JOHN LYDE WILSON, THE CODE OF HONOR OR RULES FOR THE GOVERNMENT OF PRINCIPALS AND SECONDS IN DUELLING 6 (1858) (“[I]n cases where the laws ... give no redress ... it is needless and a waste of time to denounce the [dueling.]”); see also STARKIE, *supra* note 36, at 6 (recounting a case where the plaintiff said that if he could not expect recovery in court “he would have cut the defendant’s throat”).

¹⁷² See generally Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967).

and thus promote participation in the underlying status game.¹⁷³ With defamation law in place, the Scholar will be less likely to be defamed and, even if he will be, could recover some compensation from the offender. Conversely, if one day the law decides that allegations of plagiarism, real or false, are beyond its purview, then this can have a significant impact on certain intellectual status games. What defamation law protects, it encourages; what it shuns, it discourages.

To be sure, defamation law affects status games only on the margin. The law is hardly the only thing that binds them together. There were status games between Cain and Abel long before any legal system evolved.¹⁷⁴ Still, along the relevant margins, defamation law affects the choice of status games that individuals play—and the intensity with which they play them.¹⁷⁵ Not a small feat.

Yet the standard account is seemingly oblivious to these regulatory effects. It talks in terms of protection, not regulation. But it should be clear that by protecting, the law also has broader behavioral effects. And it is not that modern defamation law does not consider social effects. After all, the primary thrust of *New York Times v. Sullivan* is the fear that stringent defamation standards can chill the incentive to participate in public debates.¹⁷⁶ What courts fail to recognize, however, is that stringent defamation standards also secure rewards in the underlying status game.¹⁷⁷ It is like thinking about liability for accidents only in terms of compensating victims and the good drivers it may deter from driving, not considering at all how safer roads benefit drivers and pedestrians alike.

The truth is that when courts decide cases, they cannot help but play a key role in the regulation of status games. Any time the court announces, for example, that calling a person a “slacker” for avoiding the draft is defamatory, it promotes status based on service to the nation.¹⁷⁸ When the courts decide to treat allegations of female ‘promiscuity’ in a special manner, as per-se defamatory, they promote a status game built around chastity.¹⁷⁹ And when courts deny the aegis of defamation law in the case of bigoted defamation, they weaken the bonds that hold bigoted status games together.¹⁸⁰

¹⁷³ Cf. Waldron, *supra* note 37, at 1605 (“A democratic republic might equally be concerned with upholding and vindicating important aspects of legal and social status... and with protecting that status (as a matter of public order) from being undermined by various forms of obloquy.”).

¹⁷⁴ *Genesis* 4.

¹⁷⁵ Other laws also interact with status games. See *infra* Part III.3.

¹⁷⁶ *New York Times Co. v. Sullivan*, 376 U.S. 254, 300 (1964).

¹⁷⁷ For a critique of the theory of the chilling of speech, see Daniel Jacob Hemel & Ariel Porat, *Free Speech and Cheap Talk*, 11 J. LEGAL ANALYSIS 46 (2019); see also Arbel & Mungan, *supra* note 87.

¹⁷⁸ *Choctaw Coal & Mining Co. v. Lillich*, 86 So. 383, 384-85 (1920) (holding that ‘slacker’ is per se libelous as it is “unquestionably a term of the severest reproach”).

¹⁷⁹ See *infra* Part III.3.

¹⁸⁰ See *infra* Part III.1.

In sum, status games involve intense investment, but their rewards can be fragile. Defamation law secures these rewards when it sanctions false allegations, thus contributing to the integrity of status games. Any judicial decision that either expands or contracts the scope of defamation law inevitably affects the status games that individuals play, in terms of both the choice of which games to play and the intensity with which individuals play them. This understanding elucidates what judges are really doing when they decide cases; it also opens the way to a more normative view on what judges should be doing.

3. The Judicial Role in Defamation cases

The diagnosis invites a prescription. For reasons of judicial integrity and accountability, I believe courts must openly acknowledge that they regulate status games when they decide defamation cases. It is what judges—and to a lesser extent legislators—do, and recognition of this fact is necessary. Professor Lidsky once noted that a troubling aspect of defamation doctrine today is “not that value choices are made but rather that they are cloaked in the deceptively neutral language of determining defamatoriness.”¹⁸¹ It is now time to decl cloak the courts’ role in regulating status games by turning away from the obfuscatory protection-from-harm view. Perhaps judges are not always conscious of the full effects of their decisions, but this only means that they cannot hope to perform their role well. Courts should openly admit the role they are playing, and have been playing for generations, in regulating status games.¹⁸²

Acknowledgment is the first step; the more ambitious one is the license to shape defamation law’s scope on the basis of the underlying status game. In short, courts should extend status protection when society approves of the status game in which the status was attained, and deny protection when society views the status game with opprobrium. If society wants to protect innovation in the Hobbesian society, it may need to create some form of defamation law; and if it wants to disrupt status games based on bigoted hierarchies, it should let anyone spread rumors freely. Protection-from-harm, the center of the standard account, is an instrument in status theory. Harm to status should only be remedied when the claim to status is legitimate. Harm is the tail, not the dog.

This means a reconstruction of the judicial role, from *protecting* status to *regulating* status. Robert Post had the foresight to recognize this point. He explained that “the meaning and significance of reputation will depend upon the kinds of social relationships that defamation law is designed to uphold.”¹⁸³ But

¹⁸¹ Lidsky, *supra* note 33, at 9.

¹⁸² See, e.g., *Bovard v. Am. Horse Enters.*, 247 Cal. Rptr. 340 (Cal. Ct. App. 1988).

¹⁸³ Post, *supra* note 41, at 693.

his focus on fostering social relationships was left mostly unheeded.¹⁸⁴ Perhaps status theory can help amplify this message and guide decision-making.

4. Which Status Games are Worth Protecting?

The difficult question is not *whether* courts and legislators should regulate status games, but *how*.

They say that the first step is admitting that you have a problem. It will be an important first step to explicitly recognize that the hidden underbelly of defamation law determinations is the craft of regulating status games. Such an open admission could lead, over time, to the evolution of decision and accountability norms. To be sure, regulation of status games is an involved decision, but this point calls for moderation and caution as much as it does for transparency and accountability. Thus, on its own, admitting that defamation law is in the business of regulating status games would be the first step towards developing a robust caselaw.

There are also some good reasons to think that a principled approach to the regulation of status games is within reach. When a claim involves loss of status, the next question should ascertain the origin of that status—what is the underlying status game that gave rise to the plaintiff’s status in the first place? Such an investigation will reveal some status games that are virtuous, many that are of ambiguous value, and some that are clearly noxious.¹⁸⁵ Then depending on the nature of the status game, judges can craft the scope of protection that best fulfills society’s goals.¹⁸⁶

Virtuous Status Games. Status games that are valuable can be discerned by their positive spillovers. Scholastic status races fit well in this category, as they lead scholars to exert themselves to become the first to discover a vaccine, observe an important physical phenomenon, or develop a new theory.¹⁸⁷ A different example comes from the Bill and Melinda Gates Foundation, a non-profit

¹⁸⁴ Defamation law scholar David Anderson, in a road to Damascus moment, recognized the regulatory role of defamation law. “Compensation is not the only legitimate purpose of defamation law. Robert Post is right . . . [the Law also aims] to enforce society’s civility norms.” David A. Anderson, *Rethinking Defamation Law*, 48 ARIZ. L. REV. 1047, 1049 (1991).

¹⁸⁵ See Congleton, *supra* note 3, at 182-183 (arguing that status games involving positive externalities may need to be subsidized, while negative externalities should be met with a Pigouvian tax); see also Huberman, Loch & Öncüler, *supra* note 91, at 103 (“Intrinsic status seeking by individuals has important implications for social and economic systems because it can provide a powerful motivation to perform; it also can lead to unproductive competitions . . . such as in the overconsumption of positional goods.”).

¹⁸⁶ See Congleton, *supra* note 3, at 181 (“If status-seeking activities affect only the welfare of others in the status game, it is relatively straightforward to demonstrate that too many resources will be invested in the quest for status.”).

¹⁸⁷ Some ancient texts recognize the motivating force of envy on scholarship, holding that “jealousy among teachers increases wisdom.” Talmud Bava Batra, 21a https://www.sefaria.org/Bava_Batra.21a?lang=bi. For a skeptical account, see Brian L. Frye, *Plagiarize This Paper*, 60 IDEA 294 (2020) (“[A]cademic plagiarism norms are primarily an inefficient and illegitimate form of extra-legal academic rent-seeking that should be ignored.”).

devoted to fighting poverty, improving healthcare, and expanding access to information technology.¹⁸⁸ Here, the pursuit of legacy—sometimes maligned as selfish and narcissistic—led the Gates’ to donate \$36 billion dollars to help improve the world. Status games around magnanimity and generosity of spirit are key drivers of philanthropy everywhere. Similarly, the quest for fame harnesses the creative energies of many individuals, directing them to use those energies to create art that will make everyone “remember *my* name.”¹⁸⁹

Ambivalent status games. Other status games are not so clearly virtuous, yet they feature some positive elements. Through surveys, sociologists have mapped the way individuals perceive the distribution of status among occupations.¹⁹⁰ The distribution sometimes appears justified, other times arbitrary and even unjust. A typical survey found that biologists (ranked at 6.9) outperform bankers (6.1) and that barbers (4.0) outperform bartenders (3.6). The extremes are particularly telling. On the lowest end, one finds corner street drug dealers (1.9) and panhandlers (2.1), as well as table clearers (2.3) and the loaded category of agricultural migrant workers (2.7). On the opposite extreme, one finds surgeons (7.7),¹⁹¹ astronauts (7.4), and mayors of large cities (7.2). While some of these allocations are sensible, others appear harsh and unfair. In fact, there are signs of racism, ageism, and sexism in the allocation of status among occupations.¹⁹² So there is nothing particularly compelling about the current occupational status distribution. But as long as the idea of occupational status is not contested, courts may want to extend defamation law’s protection in this area.

Noxious status games. The last set of status games are those that prove pernicious due to their negative social externalities. At one point in history, alleging that a person was a “bastard” was a matter of great offense, involving deeply held social mores of wedlock and matrimony.¹⁹³ This view reflected what

¹⁸⁸ BILL & MELINDA GATES FOUNDATION, <https://www.gatesfoundation.org> (last visited Jan. 29, 2022).

¹⁸⁹ IRENE CARA, *FAME* (RSO Records 1980).

¹⁹⁰ Tom W. Smith & Jaesok Son, *Measuring Occupational Prestige on the 2012 General Social Survey*, 122 GSS METHODOLOGICAL REP. (2014), <https://perma.cc/58ZW-AKV7>. The relative ranking of occupations appears fairly robust to the manner in which the question is asked. Margaret M. Marini, *Occupational and Career Mobility*, ENCYCLOPEDIA SOCIO. 1989 (2d ed. 2000).

¹⁹¹ Worryingly, lawyers (6.4) rate below medical doctors and narrowly overtake social scientists (6.2).

¹⁹² See, e.g., Wun Xu & Ann Leffler, *Gender and Race Effects on Occupational Prestige, Segregation, and Earnings*, GENDER & SOC. 377, 383-84 (finding race and gender effects); Michael Hout et al., *Prestige and Socioeconomic Scores for the 2010 Census Codes*, 124 GSS METHODOLOGICAL REP. 13 (2016) (reporting some evidence of race and gender effects); Anthony Lemelle, *The Effects of the Intersection of Race, Gender and Educational Class on Occupational Prestige*, 26 WESTERN J. BLACK STUD. 89 (2002) (finding that “race, gender and educational class are important in the distribution of occupational prestige”).

¹⁹³ BLACKSTONE, *supra* note 139 at *433; *Harris v. Nashville Tr. Co.*, 162 S.W. 584, 585 (Tenn. 1914) (holding that it is “libelous per se to charge one in print or writing with being illegitimate”); *Jerald v. Huston*, 242 P. 472, 474 (Kan. 1926) (“[C]ast[ing] aspersions on a man’s pedigree ... [is] slanderous per se.”).

sociologists call a “closed stratification system” where status is “ascribed” based on one’s pedigree.¹⁹⁴ Slowly, society moved to a more open stratification system where status is “achieved,” meaning that status mobility was possible based on one’s accomplishments.¹⁹⁵ As society opened,¹⁹⁶ judicial attitudes towards bastardy started changing in the 1960s, culminating in a 1997 decision, where a court simply shrugged off such allegations as patently unimportant.¹⁹⁷

Disputes in this area point to an underlying status game of “legitimacy,” and it is one that modern society rejects. It joins a larger class of noxious status games involving immutable characteristics, such as race, ethnicity, and sex.¹⁹⁸ The task of identifying the status game involved does not require expertise that courts lack. In many of these cases, one does not even feel the need for an overarching status theory to know that the underlying status games are socially venomous.

5. Regulating Status Games: Legitimacy and Institutional Capacity

Calling for courts to openly embrace their role in regulating status games raises several objections. One objection comes from James Whitman’s analysis of the laws of civility.¹⁹⁹ His account suggests that American law lacks the cultural foundations to deal with the regulation of norms of civility. Another related issue is the law’s legitimacy in regulating status games, a deeply social phenomenon. Finally, there is also a narrower but no less important institutional concern about the capability of courts to intervene in status games effectively.

This section grapples with these issues. The response to the first and second concerns is a demonstration of the depth of American law’s interest in the regulation of status. The response to the third concern is, for the most part, an open acknowledgment of the problem.

Let us first consider the concern that American society either lacks status games or is disinterested in regulating them. This objection is found most forcefully in Whitman’s influential critique of norms of civility.²⁰⁰ This account holds that American law either lacks the interest or the foundation to regulate what he calls “civility rules,” a concept that roughly maps onto status games.

¹⁹⁴ HUGHES & KROEHLER, *supra* note 207, at 176-177.

¹⁹⁵ *Id.*

¹⁹⁶ Congleton suggests that the move to status on the basis of merit rather than heritage is one of the sources of strength for capitalist societies. Congleton, *supra* note 3, at 188. Under this view, the move from status to contract may be seen as a change not so much in legal technology but in the type of status games played.

¹⁹⁷ *Levinsky’s, Inc. v. Wal-Mart Stores, Inc.*, 127 F.3d 122, 128 (1st Cir. 1997) (“For better or worse, our society has long since passed the stage at which the use of the word “bastard” would occasion an investigation into the target’s lineage or the cry “you pig” would prompt a probe for a porcine pedigree.”); *Bolton v. Strawbridge*, 156 N.Y.S.2d 722, 723 (Sup. Ct. 1956) (“Despite their vulgarity and profanity, the words ‘bastard’ and ‘no good’ have been held not slanderous per se and not actionable without proof of special damage.”).

¹⁹⁸ Society seems to tolerate allocation of status on the basis of *some* immutable traits, such as beauty, intelligence, height, and physique.

¹⁹⁹ Whitman, *supra* note 54.

²⁰⁰ *See id.*

According to Whitman, modern era American, German, and French cultures have all leveled the distribution of status, motivated by an egalitarian ideal of social equality. The difference is that German and French societies, drawing on their aristocratic traditions, decided to level-up status—treating everyone equally with the respect once reserved for aristocrats.²⁰¹ But the U.S., which lacks these traditions, has “leveled-down” civility and thus endorses treating everyone as a commoner, with equal (dis)respect.²⁰² The upshot is that “American incivility is woven into the cloth of the American egalitarian tradition,”²⁰³ which means that “*in general*, America has no law of civility.”²⁰⁴

If this theory only claims that there are differences in the *manifestations* of civility norms or the status games played between these societies, it is obviously true. But if the contention is that the essence of American society is “incivility,” i.e., lacking strict rules and regulation of social behavior due to the elision of social status differences, this is a profound error—and a harmful one at that. To be sure, the presence of status and class in American society is not always explicit and so it may be easy to miss. People always take their own culture to be a natural reflection of the way things should be.²⁰⁵ This is especially true in the context of American culture, which is said to deem taboo the acknowledgment of class and status differences.²⁰⁶ But as sociologists universally recognize, civility norms are dyed in the wool of American society,²⁰⁷ and the law is hardly disinterested in the regulation of status games.

When I first immigrated to the United States, I found myself hurtling at an invisible wall of civility rules and status games. Each person was carrying around them an invisible perimeter of space that belonged to them—their ‘personal space’—and while everybody knew the metes and bounds of each person’s perimeter, I did not.²⁰⁸ Worse, the dimension of the invisible perimeter changes

²⁰¹ Whitman contrasts American law in particular with the German doctrine of insult, which gives rise to an action for simply showing disrespect. *See generally id.* at 1297.

²⁰² *See id.* at 1387-90.

²⁰³ *See id.* at 1398.

²⁰⁴ *See id.* at 1384.

²⁰⁵ *See, e.g.*, DAVID GRAEBER, *DEBT: THE FIRST 5000 YEARS*, 122 (2012) (“Consider the custom, in American society, of constantly saying “please” and “thank you.” To do so is often treated as basic morality ... but [based on comparative cultural analysis] it is not.”).

²⁰⁶ Joan C. Williams, Marina Multhaup, & Sky Mihyalo, *Why Companies Should Add Class to Their Diversity Discussions*, *Harv. Bus. Rev.* (Sept 5, 2018) (“[I]n the United States, talking about class is taboo”).

²⁰⁷ *See* MICHAEL HUGHES & CAROLYN J. KROEHLER, *SOCIOLOGY: THE CORE* 177 (2011) (“The United States is founded neither on the idea that all people should enjoy equal status nor on the notion of a classless society.”); *see also* GRAEBER, *supra* note 205, at 122-24 (arguing that it is American middle-class behavior that treats everyone with “feudal deference”).

²⁰⁸ *See* Agnieszka Sorokowka et al., *Preferred Interpersonal Distances: A Global Comparison*, 48 *J. CROSS-CULTURAL PSYCH.* 577 (2017) (reporting the preferred interpersonal distances in a survey of 42 countries).

based on one's gender, age, and social status.²⁰⁹ You wouldn't stand as close to your boss or teacher as you would with a classmate, but I did. And how about the rules that dictate how and when you can interject in your interlocutor's speech? The rules are not written anywhere, but as someone who still unwittingly breaks them, I assure you that they exist.²¹⁰ Time norms are another sore topic, for someone from a culture who has a different set of rules on timeliness. The idea that American society is somehow 'incivil' at its core thus appears far-fetched.

Status norms are not only everywhere in the United States, they are also hierarchical and not leveled by any measure. A working-class person goes to the beach; a high-class person summers at "the Vineyard." The CEO can approach the frontline employee, tap them on the shoulder, and say "good work"—but the worker may not return the favor after a positive earnings call. Between the person who repairs your car and the person who repairs your body, you can only "Hi, man" one of them.

Paul Fussell catalogs class differences in the 1980s that still feel mordant today.²¹¹ Working-class Americans are *fans* of Football, middle-upper class Americans *follow* tennis and golf; one class wears clothes with conspicuous brand names plastered on them, the higher class finds such behavior 'tacky'; one class finds the possessive apostrophe redundant in communication, the other finds mixing 'its' and 'it's' to be an affront against all that is sacred in this world.²¹² The empirically minded could gauge a town's class, Fussell argues, by measuring its bowling-alleys-per-capita.²¹³ What defines status games in the United States is not their absence, but the pretense of their absence—the ethos of having abolished class and status in favor of merit and mobility.

Any fair observer of social life in America is bound to conclude that status permeates society even large parts of the legal system.²¹⁴ It takes willpower to resist the call of cultural Marxism to construe the sustained insistence that "America has no law of civility"²¹⁵ as being itself a mark of class and class ideology. The legal system (or state apparatus, to those lacking willpower) takes civility with great solemnity. There is, after all, an entire branch of government that dresses its members in special regalia, insists on referring to them as *your*

²⁰⁹ Ann Leffler et al., *The Effects of Status Differentiation on Nonverbal Behavior*, 45 SOCIAL PSYCHOLOGY Q. 153, 154 (1982) (Summarizing research showing that "persons of higher status have more and better [personal] space for their use than do persons of lower status").

²¹⁰ *Id.* at 159 (finding that status differences predict speech interruptions).

²¹¹ See generally FUSELL, *supra* note 5. For a review and discussion, see Scott Siskind, *Book Review: Fussell on Class*, ASTRAL CODEX TEN, <https://perma.cc/W9M2-U3F4>.

²¹² FUSELL, *supra* note 5, 114-16.

²¹³ *Id.*

²¹⁴ Nestor M. Davidson, *Property and Relative Status*, 107 MICH. L. REV. 757, 812 (2009) (noting that "law both reinforces and undermines property's hierarchical signaling" and the "intimate involvement of the state in what might at a remove seem a private dynamic").

²¹⁵ See *id.* at 1384.

honor, and makes the expression of contempt towards them a *criminal* offense. In 2020, a Rhode Island man discovered these civility laws; when the judge read his judgment, he impolitely said, “that’s bullshit”—to which the judge responded by condemning him to three years in prison.²¹⁶

Beyond the judicial branch, buried in history are numerous attempts to regulate away unwanted status games such as honor duels,²¹⁷ blood feuds, potlatch traditions, and, more contemporarily, street racing.²¹⁸ Sometimes the law is invoked not to outlaw status games, but to moderate them. The use of tax law often exemplifies this.²¹⁹ Between 1990 and 2002 a luxury tax was applied to yachts, jewelry, expensive furs, and private jet planes.²²⁰ The idea, owing to John Stuart Mill, was that if these goods are purchased because they are expensive, no harm will befall society from taxing them.²²¹ Tellingly, the regulation of status games is selective; higher education was not taxed, despite the surge in costs.²²² While Congress has since abandoned the luxury tax, some

²¹⁶ *In re Lamontagne*, 228 A.3d 631 (R.I. 2020) (remanding for resentencing and finding a sentence of more than six months excessive); see also *People v. Sweat*, 23 N.E.3d 955 (N.Y. 2014) (“[A] court may hold a person in criminal contempt for ... contemptuous, or insolent behavior” that may “impair the respect due to [the court’s] authority.”).

²¹⁷ Weber notes that in Germany, army officers were legally required to participate in duels even though the criminal code prohibited this practice. MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETATIVE SOCIOLOGY*, 318 (1968). See also Hassani Mahmooui et al., *Dueling for Honor and Identity Economics*, MUNICH PERSONAL REPEC ARCHIVE (Jul. 30, 2012), <https://perma.cc/27MC-58ZH> (arguing that duels served an organizing social function and emerged within the aristocracy, but became a middle-class institution in France and Germany).

²¹⁸ Congleton, *supra* note 3, at 183 (discussing potlatch). The potlatch serves as a cautionary tale because many think it insidious to impose European values on indigenous people.

²¹⁹ On the idea of Pigouvian taxes and subsidies on status games, see Congleton, *supra* note 3, at 182-183; David Jenkins, *Conspicuous Consumption in the United States and China*, 127 J. ECON. BEHAV. & ORG. 115 (2016) (“Luxury taxes on ... conspicuous goods skew consumption back toward the no-signaling optimum.”). One study finds that status-driven concerns lead to excessive consumption and under-saving. Nick Feltoch & Ourega-Zoe Ejebu, *Do Positional Goods Inhibit Saving? Evidence from a Life-Cycle Experiment*, 107 J. ECON. BEHAV. & ORG. 440 (2014).

²²⁰ Omnibus Budget Reconciliation Act of 1990 Pub. L. No. 101-508, 104 Stat. 1388 (1990), 42 U.S.C. § 1396 (1990). The scope of the tax changed throughout this period. On the reaction to the tax, see, e.g., Kevin E. Cullinane, *The Bush Budget: Luxury Tax is a Luxury Nation Cannot Afford, Industries Say*, L.A. TIMES (Jan. 31, 1992 12:00 AM), <https://www.latimes.com/archives/la-xpm-1992-01-31-fi-1159-story.html#:~:text=In%20his%201993%20annual%20budget,w%20proposed%20for%20those%20goods>.

²²¹ 5 JOHN S. MILL, *PRINCIPLES OF POLITICAL ECONOMY WITH SOME OF THEIR APPLICATIONS TO SOCIAL PHILOSOPHY*, ch. 6, pt. 7 (1848). For an alternative view of the luxury tax, see Joseph Bankman & David A. Weisbach, *The Superiority of an Ideal Consumption Tax over an Ideal Income Tax*, 58 STAN. L. REV. 1413, 1428 (2006).

²²² Higher education is not *only* a status good, but it is hard to ignore the status qualities of “being educated.” On costs, see <https://research.collegeboard.org/trends/college-pricing/figures-tables/growth-in-published-charges>.

states still employ a “mansion” tax on luxury homes,²²³ and similar taxation is common around the world.²²⁴

There are other status games that the law wants to *encourage*, and one way of doing it is gatekeeping who can claim status. A particularly clear demonstration comes from the Stolen Valor Act—an attempt to regulate status by rationing its allocation only to war heroes.²²⁵ The Supreme Court struck down its original version on First Amendment grounds, but Congress has shown incredible vigor and rare unanimity in passing a revised (albeit weaker) version.²²⁶ Or consider the 1978 Act designating the exclusive right to use the word “Olympic” to the United States Olympic Committee (USOC).²²⁷ When a California non-profit sought to promote awareness to gay rights by organizing an event called the “Gay Olympic Games,” the USOC objected. The case reached the Supreme Court, which approved limiting freedom of speech to foster status exclusivity.²²⁸

And, of course, trademark law is a central locus of status regulation. While the law has various functions—prevention of confusion chief among them²²⁹—it is hard to understand other parts without invoking notions of status games. Consider the post-sale confusion doctrine, which has little to do with confusion and a lot to do with status dilution.²³⁰ This doctrine applies to a situation where a competitor sells counterfeit items to buyers who know (and are thus not confused) that they are purchasing a counterfeit at a presumably lower price.²³¹ This doctrine fights such sales because of concern with status:²³² If *they* can afford a nice Rolex, why should *we* buy one?²³³

²²³ Michael Leachman & Samantha Waxman, *State “Mansion Taxes” on Very Expensive Homes*, CENTER ON BUDGET AND POLICY PRIORITIES (Oct. 1, 2019), <https://www.cbpp.org/research/state-budget-and-tax/state-mansion-taxes-on-very-expensive-homes>.

²²⁴ Nadine Schmidt & Sheena McKenzie, *Tampons Will No Longer be Taxed as Luxury Items After Landmark German Vote*, CNN: WORLD (Nov. 8, 2019, 4:24 AM), <https://www.cnn.com/2019/11/08/europe/tampon-tax-germany-luxury-item-grm-intl/index.html>.

²²⁵ 18 U.S.C. § 704 (2006).

²²⁶ *U.S. v. Alvarez*, 567 U.S. 709, 737 (2012). Stolen Valor Act of 2013 (Pub.L. 113–12) (passed unanimously in the senate and 390-3 in the House), <https://perma.cc/9SET-L2V7>.

²²⁷ Amateur Sports Act of 1978, Pub. L. No. 95-606, 92 Stat. 3045 (1978).

²²⁸ *San Francisco Arts & Athletics v. U.S. Olympic Comm.*, 483 U.S. 522, 539 (1987) (“[M]uch of the word’s value comes from its limited use.”).

²²⁹ 15 U.S.C. § 1066 (2018).

²³⁰ See *United States v. Gillette Co.*, 828 F. Supp. 78, 80-82 (D.D.C. 1993); Mark P. McKenna, *A Consumer Decision-Making Theory of Trademark Law*, 98 VA. L. REV. 67, 104 (2012). On the history of the doctrine, see Connie D. Powell, *We All Know It’s a Knock Off - Re-Evaluating the Need for the Post-Sale Confusion Doctrine in Trademark Law*, 14 N.C. J.L. TECH. 1, 17-24 (2012).

²³¹ See Irina D. Manta, *Hedonic Harms*, 11 OHIO ST. L.J. 241, 268-69 (2013).

²³² See, e.g., *Rolex Watch U.S.A. v. Canner*, 645 F. Supp. 484, 493, 495 (S.D. Fla. 1986) (offering a mixed reputation and status based rationale for the doctrine).

²³³ *Id.* at 495; see also *Hermes Int’l v. Lederer de Paris Fifth Ave., Inc.*, 219 F.3d 104 (2d Cir. 2000) (describing the harm as individuals “achieving the status of owning the genuine article at a

As these examples illustrate, American law is brimming with status concerns which reflect a deep cultural interest in status games.²³⁴ Indeed, status is so deeply embedded in the American system that some believe the law should intervene to *shelter* individuals from status games. As Martha Nussbaum argues:²³⁵

Social groups will continue to inflict shame on others with or without the cooperation of the law, so the law needs to do more than simply refuse to join in this behavior. It should actively protect the individual who may want a place of retreat from the shame that inevitably will continue to attach to unusual people and behavior.

Seeing the deep involvement of the law in status games helps assuage concerns of legitimacy. But it does leave open the question of capacity—how capable are sitting judges and legislators of making *good* determinations on the regulation of status games? This is a larger question, and it involves not just technical expertise but also questions of ideology. My personal view is that courts and legislators should make such determinations cautiously and rarely—but I think this question requires much deeper analysis than the present scope allows. What matters most, I think, is that judges are already making such determinations when they determine defamation law cases and that there is no divorcing case outcomes from the regulation of status games.

The social drama associated with loss of status, insult, and humiliation has captivated audiences throughout human history. This drama, inherent to any defamation lawsuit, can easily distract us and make us lose sight of broader considerations, mainly, the status games that produced the lost status and whose preservation is now at stake. When we turn our attention to these status games, we see that American law has a keen interest in them, although it tends to do so in a particularly American fashion—focusing on commercial trademarks and military valor. The investigation revealed that not only are status claims implicated in all defamation lawsuits, but also that the law proactively maintains some and dismantles others.

The recognition that defamation law is enlisted to stabilize and destabilize status games opens the way to new defamation law jurisprudence. In the new jurisprudence, judges openly confront the underlying status game and ask whether it is one worth preserving. If so, judges perhaps question whether more

knockoff price”). See also Jeremy N. Sheff, *Veblen Brands*, 96 MINN. L. REV. 769, 790-804 (2012) (discussing Kal Raustiala & Christopher J. Sprigman, *Rethinking Post-Sale Confusion*, 108 TRADEMARK REP. (2018) (noting the framing of the doctrine in “consumers’ generalized desire for exclusivity and specialness”).

²³⁴ For a comprehensive analysis, see Richard H. McAdams, *Relative Preferences*, 102 YALE L.J. 1 (1992).

²³⁵ MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW* 297 (2004).

zealous protection is actually needed. If it is a noxious status game, judges would explicitly refuse to lend it any protection. Large legal pivots in light of changing mores are especially apt to legislative determination, and legislators may come to play a larger role in the new jurisprudence. Status theory and the evolving jurisprudence around it is not just an abstract way of thinking about defamation law, it directly contributes to the decisions courts and legislators make in specific cases. Demonstrating this claim is the task of the following Part.

CASE STUDIES

1. Racist and Bigoted Speech

One of the deepest quagmires of defamation doctrine is that of bigoted defamation. This category contains such allegations as asserting that a Christian person is a Jew, that a white person is of a different race, that a straight person is gay, or that a cisgender person is transgender.²³⁶ These cases feature a plaintiff who claims that these allegations are false and that they have impugned her social standing within her bigoted community; thus, she seeks recompense for the harm she suffered.

Such claims are deeply disturbing: a person sues so they can continue to keep a privilege that results from a social hierarchy that humiliates others. Yet lawsuits in this fashion are frequently made, presenting a vexing problem to the standard view of defamation law that portrays defamation law as simply *reacting to* and redressing harm. If harm to social standing is all there is, then it is difficult to deny that bigoted statements cause a person to lose their (illegitimate) standing within a bigoted community—indeed, the bigoted accusation was probably made for that reason.

This reasoning emboldened courts to find defamation in a host of problematic cases, such as when a straight person was called gay,²³⁷ or when a white person was alleged to be black.²³⁸ Worse, if judges are seen as simply reacting to harm—rather than enforcing social norms of behavior—they evade accountability for the implications of their decisions. As noted earlier, Judges were actively portraying themselves as disinterested social scientists who make

²³⁶ See generally John Watson, *Defamation by a Racial Misidentification: A Study of the Social Tort*, 4 RUTGERS RACE & L. REV. 77 (2002).

²³⁷ See generally Anthony Michael Kreis, *Lawrence Meets Libel: Squaring Constitutional Norms with Sexual-Orientation Defamation*, 122 YALE L.J. FORUM 125, 128 (2012). See also Lidsky, *supra* note 33 (“Courts have been slow to embrace a progressive view by declaring that an allegation of homosexuality cannot be libelous.”).

²³⁸ See, e.g., *Eden v. Legare* 1 S.C.L. 68, 1 Bay 171, at 71 (1791) (finding that allegation that a white person is black is “calculated to inflict injury”); *Bowen v. Independent Pub. Co.*, 96 S.E.2d 564 (S.C. 1957); *Stultz v. Cousins*, 242 F. 794 (6th Cir. 1917) (holding that it was libelous to allege that a white man was black). See generally John C. Watson, *Defamation by a Racial Misidentification: A Study of the Social Tort*, 4 RUTGERS RACE & L. REV. 77, 104 (2002).

“objective” determinations of harm, factual determinations that led them to the ‘inevitable’ conclusion that belonging to an ethnic group is defamatory.²³⁹

Fortunately, courts are increasingly pivoting away from their old positions.²⁴⁰ This development is tempered by a pernicious compromise compelled by the standard model of reaction to harm: court can avoid a finding of defamation only by engaging in the subterfuge that society abolished bigotry.²⁴¹

The logical chain leading to such artifice starts and ends with the issue of harm. The problem in bigoted defamation cases is that bigoted statements to bigoted communities *do* cause harm—it is the very definition of a bigoted community. When courts decided they wanted to circumvent a finding of defamation, the only route they thought was open to them was to deny the existence of this harm. Courts did so by limiting the scope of the audience, focusing not on the actual, relevant audience, but on “right-thinking” parts of society or a “substantial and respectable minority” to the exclusion of bigoted groups.²⁴² Courts realized, however, that even this measure may lead to unwanted conclusions: to this day, there are non-negligible parts of society that are bigoted yet enjoy social esteem. Thus, courts had to stretch the ‘finding’ of harm further, and hold that evidence for what these “right-thinking” people actually think is not a matter for factual determination, but rather, one of judicial intuition.²⁴³ Armed with this double artifice, courts were able to ‘find’ that a statement that a woman “would do anything for five dollars” did not impute unchastity in 1956,²⁴⁴ or that a derogatory term hurled at an alleged gay man ceased being derogatory in 1977.²⁴⁵ If concluding that there is nothing defamatory in belonging to a specific race or ethnicity requires erasing bigotry and invalidating the experiences of those marginalized by bigoted communities—well, this is a serious issue for the legal system.

Scholars wrestled with these tensions. In an insightful early article, defamation law scholar Lyrisa Lidsky suggested to resolve the tensions by dividing the investigation into an objective, empirical determination of harm

²³⁹ See *supra* note 27

²⁴⁰ See, e.g., *Mitchell v. Tribune*, 99 N.E. 2d 397 (Ill. App. Ct. 1951) (holding that it was not libelous to refer to a white man as black); *Thomason v. Time-Journal, Inc.*, 379 S.E.2d 551 (Ga. App. 1989); Jay Barth, *Is False Imputation of Being Gay, Lesbian, or Bisexual Still Defamatory? The Arkansas Case*, 34 U. ARK. LITTLE ROCK L. REV. 527, 528 (2012) (“In recent years, however, courts have become conflicted on whether a false imputation of a person as LGB is defamatory.”).

²⁴¹ Lidsky, *supra* note 33, at 10 (“The resulting subterfuge is a natural outgrowth of an inquiry that has little to do with actual harm and even less to do with the actual community segment whose opinion the plaintiff values.”).

²⁴² *Id.* at 7.

²⁴³ *Id.* at 8 (“[C]ourts rely on their own intuitive judgments about who constitutes the relevant community, what values that community shares, and whether those values are respectable.”).

²⁴⁴ *Bolton v. Strawbridge*, 156 N.Y.S.2d 722, 724 (Sup. Ct. Westchester Co. 1956).

²⁴⁵ *Moricoli v. Schwartz*, 361 N.E.2d 74, 76 (Ill. App. Ct. 1977). Illinois was indeed the first state to decriminalize sodomy, in 1961. See generally Kreis, *supra* note 237, at 125.

within a community, and an explicitly normative element: choosing a specific community whose opinions matter.²⁴⁶ Making the normative step explicit, she argued, would “reinforce[] defamation’s symbolic role in the definition, affirmation, and enforcement of community values in America.”²⁴⁷ In a later article, Lidsky explains that this requires an evaluation of the reaction of a “rational” audience, rather than the actual audience.²⁴⁸ In contrast, David Han argued that courts should focus on the empirical element and predict how a “targeted audience will *likely* process the speech, rather than on a strong normative view of how an idealized ‘rational audience’ *should* process the speech.”²⁴⁹

Their differences aside, these scholars both compellingly argue that there is something deeply artificial about courts using a harm-based standard while ignoring evidence of actual harm.²⁵⁰ Both of these accounts, however, still rely on a reactionary, harm-centered approach. While they offer plausible solutions to the problems of harm from bigoted speech within the existing framework, status theory offers a direct approach that avoids the problem altogether. Under the status approach, the question posed in bigoted speech cases is not whether, as a matter of fact, a given community would judge a person negatively based on their race. It is also not about whether the communities that view gay individuals in a negative light are ‘substantial’, ‘respectable,’ or ‘rational’—intolerance to LGBTQs is still a live issue, only recently starting to retreat from the mainstream.

What matters, instead, is the nexus between defamation lawsuits and status games. When the plaintiff prevails in a defamation lawsuit, she receives money damages which allow her to recoup her investment in status attainment. The shadow of such payments deters would-be defamers from making false allegations. The lawsuit also vindicates the plaintiff’s good name, alerting other players in the status game as to whether her claim to status is rightful or not. On the flip side, when a court denies the ability to bring defamation lawsuits, it disrupts the status game. The denial makes it harder to know who claims status honestly, and easier to make unfounded claims.

The solution to bigoted defamation is plain: disrupt the underlying racial status game by denying defamation protection. If an individual suffers harm to a status privilege in a racial status game, feigning that harm does not ‘really’ exist is counterproductive. It is exactly because a harm exists that the status game is worrisome. Courts of law should openly acknowledge that the claim is

²⁴⁶ *Id.* at 48.

²⁴⁷ *Id.* at 49.

²⁴⁸ See Lyrissa B. Lidsky, *Nobody’s Fools: The Rational Audience as First Amendment Ideal*, 2010 U. Ill. L. Rev. 799 (2010).

²⁴⁹ David Han, *The Mechanics of First Amendment Audience Analysis*, WM. & MARY L. REV. 1647, 1653 (2014).

²⁵⁰ Lidsky, *supra* note 248, at 838-49 (explaining why focusing on actual audiences rather than “rational” audiences can result in various democratic harms).

illegitimate because it arises out of a status game that the court will not reinforce, legitimize, or even ignore.²⁵¹ Courts should pointedly say: we reject bigoted status games.²⁵²

Such a principled holding would communicate to members of bigoted communities that not only are ethno-racial status games illicit, but their gains are also fleeting. When participating in such status competitions, members of the majority often confront the threat that some rumor would undermine the ‘purity’ of their pedigree. With defamation law, they can deter such rumors and, once made, they can enlist the legal system to publicly disprove them, thus vindicating their claim to privilege. Without defamation law, however, majority members will find their gains tentative and unprotected, because they are always a rumor away from being challenged. Shrinking defamation law would work, then, to destabilize the status game for majority members. At the same time, shrinking defamation law’s reach would a blessing for minority members. After all, defamation law was never available to them. This is because in their case, a public statement about their identity would never be granted the protection of defamation law—no matter how harmful within his bigoted community, a public allegation that a gay man is gay cannot be defamatory if it is true.²⁵³

2. Collaborators & Snitches

Law enforcement requires the assistance of collaborators, but, in some parts of society, cooperating with the government carries a social stigma.²⁵⁴ This gives rise to an interesting dilemma in defamation law jurisprudence.

Take, for example, the *Saunders* case.²⁵⁵ There, a local TV station reported that the plaintiff, an inmate, was an FBI informant. Saunders sued for defamation, alleging harm to his social standing among his community of inmates which caused him “physical and mental damage.”²⁵⁶ If the lawsuit was a matter of negligent exposure to bodily harm or intentional infliction of emotional harm, the matter would not be so problematic. But as the lawsuit was brought in defamation, the court faced a palpable conundrum. Holding that cooperation with law enforcement is a source of humiliation sends the wrong message. But it is also hard to deny the fact that the plaintiff suffered real harm within his community—a fact that the *Saunders* court reluctantly recognized.

²⁵¹ It should be obvious that tort law, and defamation law in particular, cannot completely eradicate status games. Their modest goal is only to increase the fragility of them.

²⁵² See Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 Harv. Civ. Rts.-Civ. Liberties L. Rev. 133, 140-41 (1982) (noting the harmful social effects of racial stigmatization). I am unable to address here status games that involve falsely passing as a member of a minority group, but the criteria developed here offers a clue.

²⁵³ Other laws may be available in such scenarios—intentional infliction of emotional harm is a prominent example. But such laws remain unaffected by the scope of defamation law.

²⁵⁴ See generally ALEXANDRA NATAPOFF, *SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE* (2009).

²⁵⁵ *Saunders v. Bd. of Dirs., WHYY-TV (Channel 12)*, 382 A.2d 257 (Del. Super. Ct. 1978).

²⁵⁶ *Id.* at 258.

The court's holding in the *Saunders* case involved a maneuver that should be familiar by now. The court said that the "opprobrium" suffered by the informant was insufficient because its effect was confined only to a "limited community in which attitudes and social values may depart substantially from those generally prevailing which an action for defamation is designed to protect."²⁵⁷ Thus, the court rejected the plaintiff's claim. The problem is that the reactionary protection-from-harm view has no problem protecting *other* minority views only held by small communities.²⁵⁸ In *Air Wisconsin Airlines v. Hoeper*, for example, the Supreme Court found that the statement that the plaintiff "was an FFDO who may be armed," was defamatory in the eyes of the "reasonable TSA officer"—hardly a large segment of the population.²⁵⁹ There is also nothing that hangs on the divergence of values within a small community. Courts were willing to find defamation even though the defamatory statement was only offensive within the sub-ethnic community of Vietnamese immigrants.²⁶⁰

What the court should have done in the *Saunders* case is radically straightforward. Rather than employing the condescending criteria that inmates are not "right-thinking individuals,"²⁶¹ the court should have said that it recognizes that some communities play status games around contempt for law enforcement and fidelity to violent organizations. Consistent with the analysis above,²⁶² the court does not endorse such status games, and so it refuses to lend defamation's law protection to status claims resulting from these games. To an extent, such a decision can destabilize status pursuits in these illicit status games, and it is therefore justified.

²⁵⁷ *Id.* at 259. See also RESTATEMENT OF TORTS, *supra* note 7, at § 559 (defamation, even in the eyes of "a substantial group is not enough if the group is one whose standards are ... anti-social").

²⁵⁸ PROSSER AND KEETON, §111, at 777 ("[A] plaintiff may suffer real damage if he is lowered in the esteem of any substantial and respectable group, even though it may be quite a small minority."). Courts have also held that a statement which only hints at the identity of the plaintiff is still defamatory, as long as there are "some who reasonably" identify the plaintiff. SMOLLA, *supra* note 127, at § 4:44.

²⁵⁹ See *Air Wisconsin Airlines Corp. v. Hoeper*. See also David S. Ardia, *Reputation in a Networked World: Revisiting the Social Foundations of Defamation Law*, 45 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 261, 283 (2010) (arguing that defamation law is primarily concerned with "the impact of the statement on those who make up the plaintiff's community."); PROSSER AND KEETON, *supra* note 126.

²⁶⁰ Clay Calvert, *Difficulties and Dilemmas Regarding Defamatory Meaning in Ethnic Micro-Communities: Accusations of Communism, Then and Now*, 54 U. LOUISVILLE L. REV. 1 (2016).

²⁶¹ In *Connelly v. McKay*, 176 Misc. 685, 28 N.Y.S.2d 327 (N.Y. Misc. 1941) the court ignored the views of interstate truck drivers, who shunned a service station managed by the plaintiff who was alleged to have been an informant for the Interstate Commerce Commission.

²⁶² See *supra* Part II.4.

3. Female Sexual Autonomy

The last case study involves allegations that a woman is unchaste. According to modern doctrine, allegations that a woman is “promiscuous” are so harmful that they belong in a special category of “per se” defamatory statements.²⁶³ Per se defamation means that harm to reputation is assumed, relieving the plaintiff of a significant hurdle. A modern reader would likely be puzzled why this rule’s existence and its special application to women. Because jurists are used to thinking about defamation law through the prism of harm prevention, rather than the regulation of social norms, they might be tempted to use this logic here as well. Indeed, Prosser himself argued that this rule simply reflects harm differentials: “Such a rule never has been applied to a man, since the damage to his reputation is assumed not to be as great.”²⁶⁴ On close examination, however, the reactionary model conceals a far more troubling reality.

The first sign of trouble was noted by Post, who showed that Prosser’s logic is incongruous with the fact that the presumption of harm to women is irrebuttable.²⁶⁵ It is one thing to say that harm to social standing is hard to prove, it is entirely another to say that it cannot be proven not to exist.

A second sign comes from the rule’s history. While female chastity was a central theme of 18th century England,²⁶⁶ it did not emerge at its moment of zenith. Rather, it only emerged a century later²⁶⁷—and by a special act of Parliament, no less²⁶⁸—when chastity concerns (and with them, good name harms) have started *declining*.

²⁶³ RESTATEMENT (SECOND) OF TORTS § 574 (1977). For some modern examples, see *Bryson v. News Am. Publications, Inc.*, 174 Ill. 2d 77, 94, (Ill. 1996) (holding that an article referring to the female plaintiff a “slut” was per-se defamatory); *Doe v. Simone*, No. CIV.A. 12-5825, 2013 WL 3772532, at *5 (D.N.J. July 17, 2013) (accusations that the female plaintiff was a “slut,” the “queen of sluts,” and a “whore.”); *Walia v. Vivek Purmasir & Assocs., Inc.*, 160 F. Supp. 2d 380, 394–95 (E.D.N.Y. 2000) (holding as slander per-se the defendant’s statement that the female plaintiff was a “whore” and a “slut”).

²⁶⁴ PROSSER, *supra* note 10, at 760; see also *Sexton v. Todd*, Ohio (Wright) 316, 320-21 (1833) (“[An allegation of sexual impropriety] is vastly more injurious to a female than to our sex.”).

²⁶⁵ See Post, *supra* note 41 (“The fact that the presumption of general damages is irrebuttable is inexplicable from the standpoint of the concept of reputation as property.”).

²⁶⁶ See Soile Ylivuori, *Rethinking Female Chastity and Gentlewomen’s Honour in Eighteenth-Century England*, 59 HISTORICAL J. 71 (2016).

²⁶⁷ The common law before then did not consider allegations of unchastity to be slanderous per se. PROSSER AND KEETON, *supra* note 126, at § 92. However, “[b]y the late 1800s the vast majority of states had responded to the proliferation of sexual slander suits by designating statements that impugned a woman’s chastity to be slander per se.” LISA PRUITT, *HER OWN GOOD NAME* 4 (2004). See, e.g., Ala. Code § 7359 (1923) (cited in *Marion v. Davis*, 114 So. 357, 358 (Ala. 1927) and *Note, Bases of Slander Per Se in Ohio: Comments*, 15 OHIO STATE L.J. 312, 322-323 (1954)).

²⁶⁸ In *Roberts v. Roberts*, 122 Eng. Rep. 874 (1864), a man told the plaintiff’s husband that she was “as great a whore as any in the town of Liverpool.” Lord Cockburn C.J. lamented that he could provide no remedy absent a showing of special damages, decrying the law as “cruel.” This

The harm perspective cannot explain the rule's scope, its emergence at a specific point in time, and the need to use special legislation. But status analysis provides a considerably more viable explanation. As would be clear to most modern readers, the underlying status game played in chastity defamation cases is a sexist status game of 'purity', whereby a woman's status is gained or lost through exercise of her sexual autonomy.²⁶⁹ This mainstream 18th century status game faced new challenges in the 19th century, as women started entering the labor market and were starting to reevaluate their social fetters.²⁷⁰ The hypothesis would be, then, that Parliament realized that it could breath life into this status game by reinforcing it through defamation law: making it expensive to impugn a chaste woman's name, and cheap to besmirch a 'promiscuous' woman. It was now easier than ever to distinguish oneself based on one's sexual history, and 'innocent' women could easily claim the law's protection. If true, this explains why the per se rule only emerged after the status game's zenith, and then only by special legislative intervention. This is not to say that any of this was conscious, but as Professor Pruitt notes, "Nineteenth-century legal rules around sexual slander thus had unfortunate consequences for women, reinforcing the social significance of their sexual virtue."²⁷¹

This perspective also allows us to rethink a seemingly progressive reform in the Second Restatement of Torts. As an attempt to make the rule more modern, the drafters restated it in a gender-neutral fashion,²⁷² winning the praise of

was resolved with the enactment of the Slander of Women Act 54 & 55 Vict c. 51. *See generally* LAURENCE H. ELDREDGE, *THE LAW OF DEFAMATION* 118-19 (1978).

²⁶⁹ *Rejent v. Liberation Publ'n, Inc.*, 197 A.D.2d 240, 245 (N.Y. App. Div. 1994) ("[T]he notion that while the imputation of sexual immorality to a woman is defamatory per se, but is not so with respect to a man, has no place in modern jurisprudence."); SMOLLA, *supra* note 127, at § 7.05[5] at 7-11, 7-12 (noting that this rule is "quite blatantly sexist and discriminatory, and is based on outmoded assumptions about sexual behavior"). *See generally* Wendy N. Hess, *Slut-Shaming in the Workplace: Sexual Rumors & Hostile Environment Claims*, 40 N.Y.U. REV. L. & SOC. CHANGE 581 (2016) (exploring the social double-standard regarding male and female sexuality). The concept of chastity is far more nuanced than engagement in sexual activity. *See generally* Ylivuori, *supra* note 266.

²⁷⁰ For a critique of these laws, see Lisa R. Pruitt, *Her Own Good Name: Two Centuries of Talk about Chastity*, 63 MD. L. REV. 401, 404 (2004). ("[T]he law's adjudication of [per-se defamation lawsuits for lack of chastity] has been negative in its reinforcement of society's expectations regarding women's sexual behavior.")

²⁷¹ Lisa R. Pruitt, "On the Chastity of Women All Property in the World Depends": *Injury from Sexual Slander in the Nineteenth Century*, 78 IND. L.J. 965, 1015 (2003). Anthony Kreis criticizes courts that treated allegations of homosexuality as per-se defamatory as being stigmatizing and inconsistent with substantive due process. Kreis, *supra* note 237, at 128.

²⁷² RESTATEMENT (SECOND) OF TORTS § 574 (AM. L. INST. 1977). *Cf.* RESTATEMENT (FIRST) OF TORTS §574 (AM. L. INST. 1938) ("One who falsely and without a privilege to do so, publishes a slander which imputes to a woman unchastity is liable to her.")

Courts have applied this rule to men as well. *See, e.g.*, *Sullivan v. Malta Park*, 156 So. 3d 1200, 1213 (La. Ct. App. 2014) (holding that the allegation of an extra-marital affair, directed at a man, was per se defamatory). All cases found that cite to § 574 which are applied to men do not concern sexual promiscuity in general, only adultery.

commentators for the progressive stance.²⁷³ Never mind the fact that this rule is almost never applied to men,²⁷⁴ the critical point here is that the rule itself should be abolished. The problem is not with its unequal application, but the chastity status game itself. The progressive stance is not that both men and women should be equally shamed for exercising their sexual autonomy. Rather, it is that both sexes should be free to make sexual choices without being subject to ridicule, judgment, or humiliation—in other words, that society should refrain from sexual chastity status games for all sexes. Reforming the Restatement to ‘protect’ both women and men is about as sensible as reforming it to protect both gays and straights against false allegations concerning one’s sexuality. Neither the allegation that one is gay nor that one is straight should be considered defamatory, as the very status game is repugnant. The reactionary harm model obscures this issue.²⁷⁵ Thus, while policymakers correctly identified defamation as a vehicle for social change, their application of this insight was misguided due to a fundamental confusion about the nature of status games.

These three case studies illustrate how a clear-eyed view of status games can guide more principled decision-making in this confused area of law. Still, one might leave the present discussion with the impression that status theory only works to restrict the scope of the law, such as by denying the claims of majority members of bigoted groups.

This is only partly true. Status theory may also be used to ground a much more capacious role for defamation law, as the regulation of hate speech demonstrates. In Jeremy Waldron’s Holmes Lecture, he made the case that hate speech should be regulated by allowing defamation suits based on group libel.²⁷⁶ Waldron posed what he called “a dignitarian rationale” to the regulation of hate speech.²⁷⁷

²⁷³ See SMOLLA, *supra* note 127, at § 7.05[5] 7–11, 7–12 (“The Restatement (Second) takes a laudable lead in this area, modifying the traditional rule to a sex neutral standard that renders any imputation of ‘sexual misconduct’ by a man or woman slanderous per se.”).

²⁷⁴ Based on an analysis of all cases citing to § 574, only one exception to this rule was found. See, e.g., *Hickerson v. Masters*, 226 S.W. 1072, 1073 (Ky. 1921). Modern examples include *Dellefave v. Access Temporaries*, No. 99 Civ. 6098(RWS), 2001 WL 286771 (S.D.N.Y. Jan. 11, 2001) (holding that an allegation of a sexual relationship in the workplace was not per-se defamatory, in particular because the relationship was heterosexual); *Ricciardi v. Weber*, 795 A.2d 914, 927 (N.J. Super. Ct. App. Div. 2010) (expressing doubt that per-se slander applies to a “statement made about men as well”). A relatively recent affirmation of the rule is found in *Regehr v. Sonopress, Inc.*, No. 2:99CV690K, 2000 WL 33710902, at 4 (D. Utah 2000), *but cf.* *Rejent v. Liberation Publications, Inc.*, 197 A.D.2d 240, 243 (N.Y. App. Div. 1994) (holding that the imputation that a male model was lustful was capable of being held as libel per-se).

²⁷⁵ See Kreis, *supra* note 228, at 128.

²⁷⁶ See generally Waldron, *supra* note 37.

²⁷⁷ *Id.* at 1612.

The problem, for Waldron, is that dignity can only do so much.²⁷⁸ Dignity only offers a limited basis to expanding group libel. Racist speech is surely an affront to their target's sense of dignity, safety, and autonomy. But the dignitary effect is ultimately an empirical fact contingent on the target's subjective reaction.²⁷⁹ Many may experience a deep offense, but others may ignore the malarkey of racists (or at least not feel denigrated by them).²⁸⁰ However, status theory is not so limited by subjective offense; the problem it identifies is the objective *social* status games that racist speech engenders. If hate speech contributes to the evolution of racial social hierarchies, then this effect is cognizable social harm, independent of any individual's experience of dignitary harm.²⁸¹ Unfettered by any individual's reactions, status-based regulation can thus achieve more than the dignity view alone.²⁸²

CONCLUSION

There is no escaping status games—we all play them. Almost every choice we make is infused with status considerations: the clothes we wear, our choice of vocabulary, the unconscious decision whether to state a request with “can you” or “would you.” There is no opting out.

We should care greatly about which status games are played. Some status games are virtuous, if not in their intentions, then in their effects on the world. Being a pro-bono lawyer carries with it some status, as it should. Being a social activist fighting to feed the hungry and vindicate the downtrodden should be a matter of pride. If we cannot compensate schoolteachers, we might as well respect them. But with at least the same fervor we should reject those status games that act to create social hierarchies based on race, ethnicity, sexual identity, and the like. In the words of Isabel Wilkerson:²⁸³

The tyranny of caste is that we are judged on the very things we cannot change: a chemical in the epidermis, the shape of one's facial features, the signposts on our bodies

²⁷⁸ This is especially the case with respect to views of dignity as a negative right. *See generally* Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183 (2011).

²⁷⁹ Robert Mark Simpson, *Dignity, Harm, and Hate Speech*, 32 LAW PHILOS. 701, 723 (2013) (critiquing Waldron's account of harm to dignity as an “exercise in consequentialist speculation”); *see also* Eric Barendt, *What Is the Harm of Hate Speech?*, 22 ETHICAL THEORY MORAL PRACT. 539–553 (2019) (critiquing Waldron's account of the harm caused by hate speech).

²⁸⁰ *See* Barendt, *supra* note 279, at 542 (critiquing Waldron's injury to dignity view).

²⁸¹ *See* Robert Mark Simpson, *Dignity, Harm, and Hate Speech*, 32 LAW PHILOS. 701, 727 (2013) (questioning whether, as a matter of fact, hate speech “contributes to identity-based social hierarchies”). Notably, Simpson's account takes a status-based view of dignity.

²⁸² Status theory would thus support the decision in cases such as *Taylor v. Metzger*, 706 A.2d 685 (N.J. 1998), where racist epithets were held to be capable of amounting to intentional infliction of emotional harm. Limiting the ability of social agents to enforce racial hierarchies threatens the underlying status game.

²⁸³ WILKERSON, *supra* note 3.

of gender and ancestry—superficial differences that have nothing to do with who we are inside.

This Article builds on the sociological concept of status to argue that defamation law is best seen as regulating status games. This is not all that defamation law does, of course, but status concerns help explain and justify a large part of a tort often described as mystifying. Courts are heavily implicated in the regulation of status games, but their role is often cloaked and misunderstood. With an explicit understanding of the link between defamation and status games, society can decide which ones to nurture and which ones to abandon in the 21st century.

TECHNICAL APPENDIX

The purpose of this Appendix is to offer a technical argument for why the central justification today of defamation law is unpersuasive. As developed in the Article, many commentators justify defamation law as a tool of redressing harm to social standing. This is a decidedly ex-post perspective that ignores any behavioral effects on the attainment of status. The primary argument developed is that defamatory remarks do not *harm* status but *redistribute* it. As such, defamatory remarks can be socially neutral or even beneficial in their effect, and although they would occasionally be detrimental, the law of defamation does not even attempt to track these instances.

The analysis is motivated by a common idea in the sociological and economic literature—according to which social status is a zero-sum game.²⁸⁴ While individuals belong to a large number of social communities, and status is evaluated on the basis of multiple dimensions—the social ranking is ultimately considered to be a closed system. This is why economists consider status to be the ultimate “positional good,” one “whose value is only defined in reference to their position on an imaginary scale or ladder.”²⁸⁵ If society can be likened to this imaginary ladder, it will follow that “[e]ach step up the status ladder for one person logically requires a step down for another.”²⁸⁶ Sociologist Joel Podlonsky summarizes this view:

²⁸⁴ Frederic C. Godart & Matthew S. Bothner, *What is Social Status, Comparisons and Contrasts with Cognate Concepts*, SEMANTICS SCHOLAR (2009) (defining status as a “zero-sum relational asset.”). See also Cecilia L. Ridgeway and Henri A. Walker, *Status Structures*, SOCIO. PERSPECTIVES ON SOC. PSYCH. 281 (1995) (defining status structures as “rank-ordered relationships,” which implicitly denotes the zero-sum character of the system); Richard H. McAdams, *Relative Preferences*, 102 YALE L. J. 1, 5 (1992).

²⁸⁵ See, e.g., Bougherara et al., *supra* note 156, at 1229 (“[S]tatus being the ultimate positional good.”); Congleton, *supra* note 3, at 178 (“The common element of all status games is that relative performance rather than absolute performance ultimately determines individual utility levels, where ‘performance’ is measured by the status-assigning rules of the game of interest.”).

²⁸⁶ Bougherara et al., *supra* note 156, at 1228.

“Within any social system, status is ... zero-sum in character. One actor cannot increase his status without another losing status. As a consequence, to the extent that status is the indicator of interest, it is necessarily the case that high status will not be available to all actors within a social system.”²⁸⁷

This is not meant as an argument that *participation* in the status game is zero-sum; the major takeaway from the Article is that participation is all but zero-sum. Rather, this Appendix seeks to explore the logical consequences of the common justification. Taking its ex-post perspective at face-value, and likewise ignoring any ex-ante effects, the question is whether defamatory statements indeed cause a social harm. Using two models of status, the analysis shows that, from a social perspective, the protection justification is unpersuasive.

Ordinal Status. Suppose there is a community of $n \in \mathbb{N}$, $n \geq 2$ individuals. The individuals are assumed to be identical in all but their strict rank ordering. The relative social position of individual i is given by r_i , with $r_i < r_j, \forall i < j$. The lowest ranking individual is thus noted by r_1 and the highest by r_n . Utility from status is given by the monotonically increasing utility function $U(\cdot)$, with the utility of the individual with a status rank $r_i = U(r_i)$ and $U(0) = 0$.

Assume that the effect of defamation is to reduce one's social standing by $x > 0$ spots. It then follows that:

Corollary 1: With ordinal status, defamation is welfare neutral.

Proof:

Defamation moves the t th individual from position r_t to position $r_{t-x} < r_t$. But because rankings are relative, this implies that the individual previously in the r_{t-x} is moved up to the r_{t-x+1} position, and similarly for any individual above them with $r_i < r_t$. Thus, total utility, $\sum_1^n U(r_i)$, remains unchanged. ■

Note that individuals are assumed here to have similar utility functions, but one might plausibly argue that individuals differ in the utility they draw from status. In such a case, defamation may lead to a net increase or decrease in utility, but there is no *a-priori* reason to assume any specific allocation of utility functions.

Cardinal Status. Suppose that individuals in the community are identical in all but their initial endowment of an intangible status good, with the total endowment being $S \in (0, \infty]$.²⁸⁸ The endowment of status goods of the i th individual is denoted by s_i . This time, however, individuals do not care about their rank directly, but about their distance d_i from others. Individual i 's total distance from others is given by $d_i = \sum_{j=1}^n (s_i - s_j) = ns_i - S$.

²⁸⁷ PODOLNY, *supra* note 93, at 25.

²⁸⁸ Status goods can be thought of as the “accumulation of deference behavior”, as in Michael Sauder, Freda Lynn & Joel M. Podolny, *Status: Insights from Organizational Sociology*, 38 ANNU. REV. SOCIOLOGY 267, 268 (2012).

Because status is defined as the accumulation of deference behavior or “pellets of peer recognition,”²⁸⁹ we can think of defamation as destroying some of the target’s ‘pellets.’ That is, defamation reduces the target’s status goods by x units. Let d'_t be the target’s status ranking post defamation. We can now state the private harm to the target from defamation as:

$$|U(d_t)| - |U(d'_t)| = |U(ns_t - S)| - |U(n(s_t - x) - (S - x))|$$

That is, the target’s original utility from her status goods less her utility from having x fewer units of the status good.²⁹⁰ Note that, while defamation destroys some of the target’s status goods, this loss is partially offset by the fact that there are fewer status goods to go around, which lowers the community average.

Finally, as we are considering the idea of risk to one’s status, it will be fairly natural to assume that $U' < 0$, $U'' > 0$.²⁹¹ We can now state the following proposition.

Proposition: Punching up: Defamation, on the margin, increases welfare if it is directed at a high-status individual. **Punching down:** Conversely, defamation reduces welfare on the margin if it is directed at a low-status individual.

Proof. Defamation destroys x units of status goods, and so the effect of defamation on total welfare W is:

$$W = \sum_1^{n-1} U(ns_i - S + x) + U(ns_t - nx - S + x)$$

The derivative with respect to x is:

$$\frac{dW}{dx} = \sum_1^{n-1} U'(ns_i - S + x) + (1 - n)U'(n(s_t - x) - S + x)$$

To understand the effect of small changes, evaluate at $x = 0$

$$\left. \frac{dW}{dx} \right|_{x=0} = \sum_1^{n-1} U'(ns_i - S) + (1 - n)U'(ns_t - S)$$

Rearranging

$$\sum_1^n U'(ns_i - S) - nU'(ns_t - S)$$

By concavity, the total marginal change in utility (the first expression on the left) will be larger than the change in the target’s utility multiplied by n if and only if $s_t > \frac{S}{n}$. ■

²⁸⁹ Robert K. Merton, *The Matthew Effect in Science, II: Cumulative Advantage and the Symbolism of Intellectual Property*, 79 *ISIS* 606, 620 (1988).

²⁹⁰ We consider the absolute value of the difference, as $U(r_t)$ and $U(r'_t)$ may be negative.

²⁹¹ See GEOGGREY BRENNAN & PHILIP PETTIT, *THE ECONOMY OF ESTEEM*, 83-105 (2005).

Another way to rationalize this assumption is to see that it is plausibly more consequential to a person’s well-being to move close to those around him rather than to move farther apart. To the extent that wealth is also a status symbol, the marginal benefit from having a car rather than taking the bus is arguably greater than being able to afford a newer model.

Corollary 2: The optimal amount of defamation of an individual t is given by $x^* = \frac{ns_t - S}{n-1}$.

Proof. By the Proposition, defamation of any high-status individual is utility-maximizing on the margin, hence the optimal degree of defamation x is defined by $d_t = n(s_t - x) - S + x = 0$. Below that point, the individual becomes low-status, and punching-down is welfare-minimizing. Rearranging, this implies that $x^* = \frac{ns_t - S}{n-1}$. ■