A Social Status Theory of Defamation Law

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Despite deep inequality in social status and social capital in American society, legal scholarship has done relatively little to understand the structures that produce status and maintain its distribution. The Article argues that defamation law plays such a role.

The orthodox view is that defamation law's goal is to protect dignity. This view was expressed in a famous Supreme Court holding in 1966, which held that defamation law is necessary to protect "the essential dignity" of "every human being." The later seminal work of Robert Post cemented it. Seemingly unrelated, scholars of defamation law have found its structure mystifying, claiming for decades that it is "full of anomalies and absurdities." This Article argues that the two positions are connected. The problem lies not so much in the law but in our perspective.

Dignity, while truly important to human flourishing, cannot function as defamation's linchpin because it is, at bottom, an individualistic concept, while defamation is a social tort through and through. Defamation law cares not just about the harm to the individual but also about the value of speech, its publication, and its effects on the opinions of members of the public. The discontent with doctrine is but one symptom of the problem. The dignity turn has also had unintended harmful consequences, mystifying and perpetuating the use of defamation law to enact racial and sexist social hierarchies.

In contrast, this Article argues that defamation law protects the legitimate pursuit of status. Drawing on rich sociological theory dating back to Weber and Veblen, the Article constructs an understanding of status as it applies to the law. This interpretation has a surprisingly tight explanatory fit with defamation doctrine, offering clarity in an area notorious for its opaqueness. Such clarity is urgent given the strong calls for reform that reverberate across the entire political spectrum. This thesis also provides a firm normative perch from which to reevaluate defamation law. A status understanding decloaks the judicial role, exposes

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what judges truly do when they decide cases, and unveils a normative outlook for future decision-making.

INTRODUCTION

The pursuit of social status is a fundamental human motivation.[1] Motivated by the basic psychological need for acceptance, sociologists find status pursuits pervading all social communities.[2] Social capital manifests itself in radically different forms. For those deemed high status—sages, public intellectuals, royalty, gurus, celebrities—status entails deference, prestige, and esteem. For those on the margins of society, low status spells indifference, contempt, and violence. Some sociologists think of high and low status as positions on a ladder; others see the concept as a more complex, diffused notion.[3] But regardless of its precise character, it is abundantly clear

1. John C. Harsanyi, *A Bargaining Model for Social Status in Informal Groups and Formal Organizations*, 11 BEHAV. SCI. 357, 357 (1966) ("Apart from economic payoffs, social status (social rank) seems to be the most important incentive and motivating force of social behavior."). 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 a notion of status as a legally established social station (e.g., lord, tenant) or a bundle of legally assigned rights and duties (e.g., a minor, natural-born citizen, firstborn). 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. Cameron Anderson, John Angus D. Hildreth & Laura Howland, *Is the Desire for Status a Fundamental Human Motive? A Review of the Empirical Literature*, 141 PSYCH. BULL. 574 (2015).

3. *See, e.g.*, 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").

that status satisfies human needs that transcend material wants or economic advantage.[4]

To attain social status, individuals expend copious amounts of energy, time, and material resources competing in "status games"—community-specific social structures that determine how status is gained and lost.[5] Some status games involve ownership of luxury goods, others, fine taste, and fashion; yet others, credentials and titles. We may be loath to admit it even to ourselves, but our choice of clothes, books, music, social milieu, and even our gait and accent all carry status game undertones.[6] Lest *games* imply any sense of frivolity, status games are played with utmost earnestness. As sociologists Park and Burgess observe, "men work for wages . . . [but] they will die to preserve their status."[7]

While material wants and economic pursuits have been amply recognized, the pursuit of social status has been somewhat neglected in legal scholarship.[8] Perhaps this is because of a certain sense of taboo in American society around explicit discussions of status and class.[9] "Class consciousness has been replaced by class cluelessness," writes Professor Joan Williams.[10] Instead, as James Whitman argues, the conceit of American society is that "we all stand together on the lowest rung of the social ladder."[11] This may be a comforting myth, but, to draw on an example from my lived experience as an immigrant with a healthy dose of accent, quite disingenuous. American society routinely stigmatizes speakers with nonrhotic,

4. *See* Anderson, Hildreth & Howland, *supra* note 2.

5. *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).

6. *See* Scott Alexander, *Staying Classy*, SLATESTARCODEX (Jan. 30, 2016), https://slatestarcodex.com/2016/01/30/staying-classy/ [https://perma.cc/J55D-Q3A2], for an effective introduction to the allocation of status in the modern United States. *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://slatestarcodex.com/2014/04/22/right-is-the-new-left/ [https://perma.cc/P6WP-W7FV].

7. 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).

8. *See* Richard H. McAdams, *Relative Preferences*, 102 YALE L.J. 1, 10–14 (1992).

9. 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.").

10. JOAN C. WILLIAMS, WHITE WORKING CLASS: OVERCOMING CLASS CLUELESSNESS IN AMERICA 3 (2017).

11. James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 YALE L.J. 1279, 1286 (2000).

ethnic, and foreign accents,[12] deeming them less smart or trustworthy.[13] At the same time it pretends that other speech patterns are somehow a "neutral" way of speaking "without" an accent.[14] Pulitzer-winning journalist Isabel Wilkerson recently argued that, comforting myths notwithstanding, there is a deep racial component to the distribution of status within American society.[15] If legal scholarship ever wishes to deal with reality rather than its euphemized expressions in American culture, it cannot avoid status, its accumulation, and its distribution.

Nowhere is the lack of attention to social status more puzzling than in defamation law, where social status is at the very crux of the law—or so this Article will argue.[16] Defamation law is a branch of tort law that sanctions published false communications of fact that harm their target's good name.[17] Despite centuries of development, it would seem today like everyone has something bad to say about it. The commentariat decries the doctrine as an "unsatisfying . . . morass."[18] It is said to be replete with "anomalies and absurdities for which no legal writer ever has had a kind word."[19]

This dissatisfaction translates to strong reform impetus. 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 accountability for speech communicated in social and traditional media.[21] Scholars of opposing ideological persuasions believe that reform

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12. WILLIAM LABOV, THE SOCIAL STRATIFICATION OF ENGLISH IN NEW YORK CITY (2d ed. 2006). In the forty years that have passed since the publication of the first edition, thirty-seven follow-up studies were repeated, and "significant social stratification of language variables is found in all but one study." *Id.* at 397.

13. For some of the other effects of accent, see, for example, John Tsalikis, Oscar W. DeShields, Jr. & Michael S. LaTour, *The Role of Accent on the Credibility and Effectiveness of the Salesperson* 11 J. Pers. Selling & Sales Mgmt., 31 (1991) which finds in an experiment that, compared with a Greek accent, a salesperson's American accent conveyed intelligence, competence, and credibility.

14. *See generally* Agata Gluszek & John Dovidio, *The Way They Speak: A Social Psychological Perspective on the Stigma of Nonnative Accents in Communication*, 14 PERSONALITY & SOC. PSYCH. REV. 214 (2010).

15. ISABEL WILKERSON, CASTE: THE ORIGINS OF OUR DISCONTENTS (2020). One example is that status is associated with language presentation. *See* John McWhorter, *The 'Ax Versus 'Ask' Question*, L.A. TIMES, Jan. 19, 2014 (explaining the racialized stigmatization of the "ax" pronunciation as "illiterate, which makes the word a small tragedy in its way").

16. 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 (3d ed. 2009) [hereinafter SACK ON DEFAMATION].

17. DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, HORNBOOK ON TORTS § 37.1, at 936 (2d ed. 2015); RESTATEMENT (SECOND) OF TORTS § 558 (AM. L. INST. 1977).

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

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

20. Berisha v. Lawson, *cert denied*, 141 S. Ct. 2424, 2424–30 (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.

is due,[22] and pundits with contradictory political commitments follow suit.[23] In the midst of all this, a new Restatement project is underway with its own reform agenda.[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]

Before we reform the law of defamation, then, we might as well learn why we have it in the first place. The magisterial work of Robert Post marks the best attempt to pose and answer this question.[26] According to Post, the law vacillates between three justifications or conceptions of reputation: a dignity view, a property view, and an honor-based view.[27] And because we could never quite settle on any of these values, Post argues, we find doctrine today in its sorry state.

One influential expression of at least one of these views is the Supreme Court's oft-repeated assertion that protecting reputation "reflects no more than our basic concept of the essential dignity and worth of every human being."[28] Post further explains that it is because we could never quite decide what defamation law is that we find doctrine in its current sorry state.[29]

It is possible, however, that there is another way to understand defamation law. For all their inner differences and conflicts, the three prevailing conceptions share one thing in common: they are highly individualistic. Yet, defamation law is a social tort through and through.[30] And this difference suggests that we might find

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POST (Jan. 18, 2021); Michael M. Grynbaum, *Trump Renews Pledge to 'Take a Strong Look' at Libel Laws*, N.Y. TIMES (Jan. 10, 2018), https://www.nytimes.com/2018/01/10/business/media/trump-libel-laws.html [https://perma.cc/M2XJ-JW8M]; Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 5, 2018, 6:33 AM).

22. *See, e.g.*, 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, DOUGLAS A. KYSAR & RICHARD N. PEARSON, 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*, AM. CONSERVATIVE (Feb. 27, 2019, 1:00 PM), https://www.theamericanconservative.com/articles/end-the-first-amendment-sanctuary-for-fake-news/ [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://www.gaycitynews.com/hoylman-said-stronger-law-would-protect-lincoln-projects-ivanka-jared-billboards/ [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. *See* Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CALIF. L. REV. 691 (1986).

27. *Id.* at 693.

28. *Id.* at 707 (quoting Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J. concurring)).

29. *Id.* at 720-21.

30. Jerome H. Skolnick, *Foreword: The Sociological Tort of Defamation*, 74 CALIF. L. REV. 677 (1986) ("Defamation is a distinctively sociological tort.").

answers in sociology rather than law.

Drawing on rich sociological literature, this Article argues that defamation law can be profitably understood as seeking to protect legitimately earned social status against transgressions. Viewed from this social perspective, we will see that much of doctrine (although emphatically not all) no longer appears anomalous or absurd; indeed, it will become quite sensible.[31] Moreover, this perspective will also illuminate the normative stakes of defamation law. Given the key importance of status to human flourishing, protecting status has deep normative and intuitive appeal. And in light of recent reform pressures, status theory further offers a coherent understanding of doctrine while offering a blueprint for future reforms.

To offer a précis of the practical stakes of these theoretical differences, let us consider one of the most basic elements of any defamation lawsuit: the publication requirement.[32] Defamation law will simply not defend against statements made in private. However, we know perfectly well that some of the worst indignities are visited in private. A racist comment in a job interview, a sexist remark in the office, bullying by an abusive romantic partner, or even a disparaging hand wave—closed doors often hide and facilitate a great deal of abuse. From a dignity perspective, it must be puzzling why defamation law would turn a cold shoulder to these affronts, especially when it readily recognizes them in the context of other torts, such as intentional infliction of emotional harm.[33] To explain even this basic requirement, the dignity view would require some theoretical epicycles. But from a social status perspective, there is no gap at all. Social status is socially constructed. Private communications that do not reach the ears of society have no bearing on it. Thus, the publication requirement, rather than an anomaly or an exception, is a necessary element made to ensure the social aspects of the tort.

The Article applies a similar analysis to many other aspects of the doctrine, both prominent and arcane.[34] It proves how a status understanding of defamation law results in a parsimonious, yet highly potent means of mapping and understanding the doctrinal architecture of this tort. Indeed, status theory offers such a tight fit to the doctrine that it would appear that an unarticulated notion of social status was present in this tort throughout its long history. In contrast, trying to understand these aspects of the doctrine from a dignity perspective often puts it in a grotesque light, which may well explain the pervasive sense of despair among commentators.[35] So, while dignity interest may well be implicated in our desire to protect reputation, the attempt to build defamation law around dignity ultimately fails.

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31. *See infra* Part I.C.

32. *See infra* notes 98–100 and accompanying text.

33. Alexander Brown, *Retheorizing Actionable Injuries in Civil Lawsuits Involving Targeted Hate Speech: Hate Speech as Degradation and Humiliation*, 9 ALA. C.R. & C.L.L. REV. 1, 9 (2018) (surveying the success and failure of intentional infliction of emotional distress in combating hate speech).

34. *See infra* Part I.3.

35. Anderson, *supra* note 22, at 489 ("As it stands today, libel law is not worth saving.").

At a very concrete level, status theory explains why courts *should* not require individuals who bring suit to prove that they were personally offended (in contrast to the dignity view). It further instructs, contrary to the property view, that lawsuits should be allowed to proceed even if the defamatory statement did not have a *pecuniary* effect on the defamed. And it illuminates how we should think about practical questions. At times it is necessary to determine the location where defamation took place. The status theory suggests that we should focus not on the location of the defamed but on the location of publication.

Beyond the doctrinal and analytical clarity offered by status theory, the theory also packs a normative punch. The dignity protection view positions the law as a *reactive* mechanism for addressing wrongdoings, rather than a proactive force for shaping social dynamics. But this view is myopic, much in the same way it is myopic to think of trademark law as only protecting property interests from infringement while turning a blind eye to the law's effects on competition, investments in design and quality, and the distribution of wealth and access to goods.[36]

The way the law regulates reputation has important motivating effects on how individuals lead their own affairs.[37] The first instance of murder in the bible is a story of status envy.[38] In stark contrast, the Renaissance, *the great rebirth*, owes as much to the status aspirations of the de' Medici as it is to the artistic genius of Da Vinci and Michelangelo.[39] Much like how the scope of trademark affects competition, the design of defamation law affects the types of status competitions that individuals engage in and the level of intensity with which they pursue them.[40] A better understanding of status and its role in law, including defamation, leads to better channeling of status instincts: from duels, racialized hierarchies, and other noxious status games to benevolent, prosocial, and productive activities.[41] One particular point of emphasis is that judges in defamation cases do more than redress harms; they create, affirm, and dismantle status norms.

To develop the practical stakes of these theoretical ideas, the Article reviews one of the most intricate and sensitive challenges in defamation law: bigoted defamation cases. Bigoted defamation is a category of thorny cases where a member

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

37. For an early and prescient statement of the motivating power of reputation in disciplining human affairs, see THOMAS STARKIE, A TREATISE ON THE LAW OF SLANDER, LIBEL, SCANDALUM MAGNATUM, AND FALSE RUMOURS,3-4 (1813) ("There are, it is true, other and strong motives for good conduct; but, however powerful such are or ought to be, common experience proves, that their practical operation upon the mass of mankind, is weak when compared to the love of character.").

38. *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).

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

40. *See infra* notes 200–216 and accompanying text.

41. This point was well understood by the gentry of England who strategically used defamation law to uphold their status privileges. Jeremy Waldron, *Dignity and Defamation: The Visibility of Hate*, 123 HARV. L. REV. 1596, 1602 (2010).

of a group that holds bigoted views alleges harm due to being falsely associated with a discriminated group. Prototypical cases are white people in the South in the early twentieth century, coming to the court complaining they were alleged to be black; a Christian, a Jew; straight men, gay; or "chaste" women, promiscuous.[42] Those not tainted by bigotry will see these cases for what they are: a naked attempt to perpetuate harmful social stigma through the courts. Yet, the traditional approach, emphasizing dignity, property, and honor,[43] take such claims as meriting consideration because, as an empirical matter, the claimant suffered harm. This led to toxic jurisprudence that has been confounding the courts for centuries.

To illustrate, consider the following case. In 1888, a white person sued for defamation in Louisiana because he was alleged to be black. The court readily held in his favor.[44] Using the protection-from-harm frame, the judges portrayed themselves as disinterested social scientists who are merely "concerned with [the] social conditions simply as facts."[45] From their "neutral" perch, they "observed" that "under the social habits, customs and prejudices prevailing in Louisiana, it cannot be disputed that charging a white man with being a [offensive term for a black person] is calculated to inflict injury and damage [on the white man]."[46]

This shameful episode repeated itself time and time again until, belatedly and inconsistently, judges started retreating from their historical positions and began denying *some* bigoted defamation claims.[47] But the protection-of-reputation frame caused a dissonance because until we have eradicated homophobia, anti-Semitism, racism, misogyny, and other social ills, it is simply the case that bigoted defamation can inflict harm to plaintiffs within their own *bigoted* community.[48] To resolve this

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

43. Property in this context is far from neutral. *See* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1713–18 (1993) (discussing racial "passing" and racial status privileges). Note that the traditional view is not entirely ex-post factum—it does recognize downstream effects on the chilling of speech. This renders the courts' selective approach all the more mystifying.

44. Spotorno v. Fourichon, 4 So. 71 (La. 1888).

45. *Id.*

46. *Id.* 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); Samuel Brenner, *Negro Blood in His Veins: The Development and Disappearance of the Doctrine of Defamation Per Se by Racial Misidentification in the American South*, 50 SANTA CLARA L. REV. 333 (2010). For further discussion, see *infra* Part II.

47. As late as 1957, the South Carolina Supreme Court held that claiming that a white woman is black is "libelous per se," because it is "calculated to affect her standing in society and to injure her in the estimation of her friends and acquaintances." Bowen v. Indep. Pub. Co., 230 S.C. 509, 513, 96 S.E.2d 564, 566 (S.C. 1957). The Supreme Court of Mississippi held in an older case that this is the rule in "South Carolina, Louisiana, Kentucky, Tennessee [sic] and Oklahoma, states whose social customs are very similar to those of the State of Mississippi." Natchez Times Pub. Co. v. Dunigan, 221 Miss. 320, 325, 72 So. 2d 681, 684 (Miss. 1954).

48. *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

dissonance, judges start engaging with the fiction that racism and bigotry spontaneously combusted in the middle of the twentieth century. This is best illustrated by a 1977 case where a court pronounced that calling the plaintiff [a three-letter pejorative used against gay men] was incapable of harm because of "the changing temper of the times."[49] The court made this determination seemingly unperturbed by the existence of deeply held and institutionalized homophobic attitudes.[50] Such artifice may produce the right outcomes, but at the same time, it whitewashes the existence of bigotry.

Status theory allows courts to reach the right outcomes without engaging in such fiction. The status perspective emphasizes that bigoted defamation lawsuits are actions brought by members of bigoted groups who ask the court to protect their status privileges. Rather than asking whether they lost such privileges, the status perspective emphasizes the natural question of whether they are entitled to them in the first place. Bigoted defamation cases should be rejected not because the plaintiff did not suffer a loss to their status privileges but because these privileges are inherently illegitimate.[51] If the courts would protect these privileges, they would entrench racist status games—and this the courts must not do.[52]

Status theory underscores 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 that do not explicitly consider status.[53] 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

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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. (Sep. 9, 2016), https://igpa.uillinois.edu/wp-content/uploads/2022/03/Krysan-Moberg-September-9-2016-1.pdf [https://perma.cc/V7BX-NJNE].

49. Moricoli v. Schwartz, 361 N.E.2d 74 (Ill. App. Ct. 1977).

50. It was not until 2003 that the Supreme Court ruled sodomy laws unconstitutional. Lawrence v. Texas, 539 U.S. 558 (2003).

51. 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 15, at 178–90.

52. *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. 336 (Mass. 1927) (authorizing the operation of trains despite the noise of train whistles because of the broader, positive social effects of the activity).

53. While the rhetoric is couched in objective determinations, the decisions themselves are highly normative. *See* Lyrissa B. Lidsky, *Defamation, Reputation, and the Myth of Community*, 71 WASH. L. REV. 1, 9, 13, n. 104 (1996) (criticizing the use of objective language). Commentators debate the use of a more empirical or a more normative standard. *See infra* notes 267–271 and accompanying text.

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 is developed across three arcs. Part I articulates the theoretical deficit in defamation law today and the relevance of social status to doctrine. Part II draws attention to the way status is produced, allocated, maintained, and sometimes lost through "status games"—status competitions that define the rules of the status race.[54] Part III applies these ideas to racist defamation and other types of bigoted defamation cases.[55]

Before beginning the investigation, it is important to emphasize three points. Firstly, status theory is not meant to be an exhaustive theory of defamation law. There is more to what the law does than this (or any) single theory could exhaust. Secondly, the Article is neither advocacy nor apologia for status games. It builds on rich sociological literature that documents their existence in diverse aspects of our social life and shows how understanding these games helps us better understand the law and how to channel them, to the extent they must exist, to their most beneficial ends. Finally, despite the sustained attack on the dominant dignity view of defamation law, there is much intellectual debt here to Robert Post's magisterial analysis from 1986 and his nuanced ideas on "civility norms."[56] Dignity *does* matter, but we must not let it obscure the role that defamation law plays in shaping status norms. While we are all equally imbued with dignity since our birth, our society does not allocate its status rewards equally, and I hope this Article invites more scholars to engage with this reality.

I. STATUS AND DEFAMATION LAW

That the law accords defamation law a privileged position is clear. What is deeply unclear is what justifies this privileged position, a confusion that was described as lying in the midst of an "intellectual wasteland."[57] This Part opens with an exposition of our current understanding of the commitment to the protection of reputation. While identifying value in these concepts, it offers the first systematic critique of their lack in doctrinal fit and normative justification. The Part continues with an introduction of status theory and shows its robust doctrinal fit and appealing normative features.

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54. *See infra* Part II.

55. *See infra* Part III.

56. *See* Post, *supra* note 26. 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.

57. *Id.* at 691.

A. Defamation Law in Search of Meaning: The Limits of the Modern Understanding

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.[58] 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."[59] 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."[60] 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."[61]

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.[62] 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 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.[63] Based on an investigation of defamation law's evolution, Post concluded that it involved three fundamental values: honor, property, and dignity.[64] 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 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

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58. *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.").

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

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

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

62. *See* Post, *supra* note 26, at 692 ("Reputation, however, is a mysterious thing."); *Alvarez*, 567 U.S. at 740 ("Reputation is not a single idea.").

63. *See generally* Post, *supra* note 26.

64. *Id.* at 693.

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[65] rather than an attempt to settle internal incoherencies.[66] Still, commentators have generally accepted the theory as is, leaving unexamined many of the gaps it leaves open. If reformers wish to avoid the Cheshire cat dilemma, it is critical they understand what is broken with our modern understanding of defamation law before they set out to change it.[67]

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.[68] The problem here is straightforward: this understanding of honor appears largely obsolete by modern standards.[69] There is no continued social interest in protecting social rank gained by pedigree or heritage.[70] And in terms of doctrinal fit, acts of dishonor do not meet the doctrinal boundaries such as the fact-opinion distinction and truth-false distinction. To utter "you are a coward" is to dishonor someone, even though the matter may be based on pure opinion or based on true facts. More deeply, honor structures tend to be familial and communal, where the attack on the individual is construed as the shaming of the whole.[71] But defamation law firmly denies standing for those indirectly affected by defamation.

The property view was described by some commentators as the "most dominant[] conception of reputation."[72] Leading commentators offered the property view vigorous defense[73] and tracked its influence across various areas of

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65. *Id.* at 696 ("This Article will attempt simply to identify and analyze the concepts, [sic] and to demonstrate their influence on common law defamation.").

66. *Id.* at 697–99.

67. *See supra* notes 7–24 and accompanying text.

68. *See* Post, *supra* note 26, at 699–707.

69. *See* Whitman, *supra* note 11, at 1283 (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. & JURIS., 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 3 ("Status is based on differences in esteem, honor, and respect.").

70. *See infra* notes 248–252 and accompanying text.

71. *See e.g.*, Yivette van Osch, Seger M. Breugelmans, Marcel Zeelenberg & Pinar Bölük, *A Different Kind of Honor Culture: Family Honor and Aggression in Turks.*, 16 GRP. PROCESSES & INTERGROUP REL. 334 (2013).

72. David S. Ardia, *Reputation in a Networked World: Revisiting the Social Foundations of Defamation Law*, 45 HARV. C.R.-CIV. L.L. REV. 261, 290 (2010).

73. *See, e.g.*, Joseph Blocher, *Reputation as Property in Virtual Economies*, 118 YALE L.J. POCKET PART 120, 120 (2009), https://www.yalelawjournal.org/forum/reputation-as-property-in-virtual-economies [https://perma.cc/G3CB-QKNR]; Richard A. Epstein, *Was* New York Times v. Sullivan *Wrong*?, 53 U. CHIC. L. REV. 782, 800–801 (1986); Ronald J. Krotoszynski, Jr., *Fundamental Property Rights*, 85 GEO. L.J. 555 (1997).

the law.[74] The idea of property draws its appeal from at least two lines of argumentation. First is the notion that good name is often the result of personal exertion, thus resonating with Lockean notions of property.[75] Second is the notion that market actors often place a price on goodwill and, in some instances, trade it, making it appear like other market commodities.[76] So, it appears sensible that the law should protect reputation the way it protects other assets.

On closer examination, however, the property view fails. Even putting aside the fact that good name is not tangible like the main categories of property, [77] we cannot ignore the racial undertones of this metaphor in light of its history.[78] As noted, defamation law was mobilized to protect property interests in abhorrent racial classifications, rooted in the notion that the comments deprived white people of what they considered to be valuable assets.[79]

The problem is also conceptual. Goodwill is a shorthand for the goodwill of *others*. I can own a widget, you can own land, but no one can own the goodwill of other people.[80] If I mix materials with my sweat, I can build a table; and I can exert myself to no end yet cannot demand that I must be liked. 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. It also matters little that the market can price goodwill: when children discover a new trading card, the stock market immediately reacts, spiking the price of the company that sells them with the accuracy of two decimal points. But no investor can claim they own the trend, and if the children lose interest overnight, all the investors can do is swear their luck—not bring suit. Ultimately, our opinions of other people belong to us, not them.[81]

Even doctrinally, the property view is unappealing. Two instances would be enough to make the doctrinal point clear. First, while theft or property harms

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74. *See* Post, *supra* note 26, at 693–700. The most compelling defense of the property view is Krotoszynski, *supra* note 73, 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. Krotoszynski, *supra* note 73, at 598.

75. 2 JOHN LOCKE, TWO TREATISES ON GOVERNMENT, ch. V. (Bartleby 2010), https://www.bartleby.com/169/205.html [https://perma.cc/4LD7-XDK5].

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

77. *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.").

78. *See generally* Harris, *supra* note 43 (discussing the relationship between racial status and property).

79. *See supra* notes 40–42 and accompanying text.

80. The value of goodwill attributed to one spouse may 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).

81. 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.

remain with the estate of the deceased, courts have made it clear that defamation claims expire.[82] Second, in *Paul v. Davis* the Supreme Court expressly held that harm to reputation is markedly different than harm to reputation for the purposes of the Due Process Clause.[83] Tellingly, after many years of consideration, defamation law expert David Anderson eventually recounted his attachment to a property view.[84]

Dignity is the strongest candidate of the three.[85] Undoubtedly, the most famous proponent of a dignity-based approach to defamation law is Jeremy Waldron, who explicated it at great length and depth.[86] While its appeal is intuitive in the United States, the dignity view exerts even stronger force in foreign jurisdictions where human dignity has a more formalized constitutional basis.[87]

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 undiagnosed problems of fit and justification with respect to the American law of defamation. But despite the intensity of the critique, the argument is not that dignity is irrelevant; a right to status can be linked to notions of dignity—it is just that dignity is insufficiently robust to serve as load bearing for the weight of the doctrine.

The first set of problems with the idea of dignity is, as Waldron explains, "not that we lack a theory of dignity. We have many such theories—too many, perhaps, to allow the term to do any determinate work."[88] While courts approach its meaning as self-evident, it is hard to hang defamation's hat on a concept described as

82. Menefee v. CBS, Inc., 329 A.2d 216, 221 (Pa. 1974).

83. Paul v. Davis, 424 U.S. 693, 701 (1976) ("[T]he interest in reputation asserted in this case is neither 'liberty' nor 'property' guaranteed against state deprivation without due process of law."). *See also* Siegert v. Gilley, 500 U.S. 226, 233–35 (1991).

84. David A. Anderson, *Rethinking Defamation*, 48 ARIZ. L. REV. 1047, 1049 (2006) ("Robert Post is right: The law aims to do more than protect one's proprietary interest in one's good reputation.").

85. 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." (citation omitted)).

86. WALDRON, THE HARM IN HATE SPEECH (2014). Waldron relies on a definition of dignity that, as he freely admits, may be controversial. For example, he would consider defamation to be harmful to dignity even when the individual in question is not offended and will ignore some claims of subjective harm: "What we call identity politics is largely an irresponsible attempt on the part of individuals, groups, and communities to claim more by way of influence and protection for their interests and opinions than they are entitled to." *Id.* at 131. Still, Waldron is quite open to a different concept than dignity—"I base nothing on the word"—and I would hazard that his arguments are more effective if grounded explicitly in social status theory. *Id.* at 139.

87. *See, e.g.*, GRUNDGESETZ [GG] [Basic Law] art. I, May 23, 1949, translation at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html [https://perma.cc/WS5P-S76N] (stating that "human dignity shall be inviolable" under German law).

88. WALDRON, *supra* note 86, at 137.

"mercurial"[89] and which courts deploy in at least five distinct ways.[90] Even if there is some core shared understanding of dignity, one must still worry about the anachronism inherent to explaining a centuries-old doctrine with a highly modern concept.[91] Indeed, as the Restatement notes suggest, "The words 'dignity' and 'dignitary' do not appear at all in the 1935 McCormick treatise on damages."[92]

Lawyers, however, seem content to move with a looser, intuitive sense of dignity, and to do their view justice, it is worth overlooking all of these conceptual problems. At the core of this looser understanding, I believe, is a notion of innate dignity, imbued in us upon our birth. What seems to lie at the heart is a view of dignity that, even if socially and culturally mediated, is ultimately an individualistic concept.[93] 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."[94]

The problem is that this is not how defamation works. The very idea animating defamation law is that good name is very much something that can be lost. Even odder, we are all endowed with dignity,[95] but defamation law considers some people libel proof (i.e., incapable of suffering cognizable harm from defamation).[96] And perhaps most puzzling, courts are wholly disinterested in defamation lawsuits that involve "naked" dignitary harms; if one cannot show the existence of reputational harm, one will find the lawsuit summarily rejected.[97]

The dignity view also misunderstands the essence of defamation law. If there is one core prescription of the dignity view, it is the negative command not to

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89. Stephen Riley & Gerhard Bos, *Human Dignity*, INTERNET ENCYCLOPEDIA OF PHILOSOPHY (https://iep.utm.edu/human-dignity) [https://perma.cc/XS6Q-UK37] (last visited Apr. 6, 2024); *see also* Christopher McCrudden, *In Pursuit of Human Dignity: An Introduction to Current Debates*, *in* UNDERSTANDING HUMAN DIGNITY, 1–58 (2013).

90. *See* Leslie M. Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169 (2011).

91. *See* Charles R. Beitz, *Human Dignity in the Theory of Hyman Rights: Nothing but a Phrase?*, 41 PHIL. & PUB. AFFAIRS 259, 268 (2013) ("The idea of human dignity is absent from most of the prewar efforts to promote human rights."). The earliest account seems to be from 1848, but others date it to as late as 1948. McCurdoch, 4–5.

92. RESTATEMENT (THIRD) OF TORTS: REMEDIES § 22 (AM. L. INST., Tentative Draft No. 2, 2023).

93. 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 100 and accompanying text. I also return to the limits of the dignity conception in the context of hate speech. *See infra* notes 295–303 and accompanying text.

94. SHARON R. KRAUSE, LIBERALISM WITH HONOR 15 (2002).

95. 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").

96. 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 16, at § 2:4.18. *See also infra* note 156.

97. S*ee, 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 11, at 1297 (studying the actionability of naked insults in Germany).

humiliate others.[98] Humiliation, note, is primarily an individualistic notion. But the tort of defamation is all but individualistic: it is called, after all, a social tort.[99] The very definition of defamatory remarks reflects this,[100] focusing not on expressions that humiliate another but on those which tend to expose an individual social aversion.[101] 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 subcommunities.[102] This is quite distinct from the immutable dignity we carry in our back pockets wherever we go. And when it comes to the rather metaphysical question of the *location* of harm, the Supreme Court favored the location of the audience rather than the location of the victim.[103] Ultimately, dignity is personal; defamation is social.[104]

Dignity also clashes with some of the most central aspects of the doctrine: publication, falsity, and the fact-opinion distinction.[105] 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.[106] 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

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98. Avishai Margalit, *Human Dignity between Kitsch and Deification*, *in* PHILOSOPHY, ETHICS, AND A COMMON HUMANITY: ESSAYS IN HONOUR OF RAIMOND GAITA, 116–20 (Christopher Cordner ed. 2011).

99. *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").

100. *See, e.g.*, Cox v. Hatch, 761 P.2d 556, 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.").

101. *Id.* (describing defamation as exposing an individual "to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation, or disgrace, . . . [which 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).

102. *See infra* Section I.2 (discussing the status aspects of defamation law).

103. Walden v. Fiore, 571 U.S. 277, 288 (2014). *See also* Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 777 (1984) ("[T]he tort of libel is generally held to occur wherever the offending material is circulated.").

104. Sensen, *supra* note 93, 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* note 143.

105. *See infra* Section I.3.

106. Post contends that the publication requirement is justified once one recognizes that private degradation will only have "equivocal significance" because it will be unclear whether it is the target or the speaker who acted improperly. Post, *supra* note 26, 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 11, 1383–84, note 353. American law is *overflowing* with norms of civility and deference. *See infra* Section II.3.

harder to dismiss or rationalize. More than anything, it is unprincipled from a dignity perspective to exempt opinions.[107] 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]."[108] Worse, apologies are not recognized as a defense.[109]

Finally, we arrive at how courts actually decide cases, where we find that—from the perspective of dignity—defamation is inexplicably both under and overinclusive. Overinclusive because courts deem defamatory many statements that have little to do with dignity and much to do with commercial interests and, in any way, do not even require that the target will be personally offended.[110] Underinclusive because statements and insults that are deeply vituperative, demeaning, racist, or pose an affront to one's core identity are deemed nondefamatory.[111] 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.[112]

Perhaps some sophisticated refinement of the idea of dignity might answer these challenges. Indeed, under the theory advanced here, dignity is still relevant. 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 not only of interest to lawyers but 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

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107. *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 16, at § 566.

108. Post, *supra* note 26, 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).

109. *See generally* Jane E. Kirtley, *Getting to the Truth: Fake News, Libel Laws, and "Enemies of the American People,"* AMERICAN BAR ASSOCIATION, https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-ongoing-challenge-to-define-free-speech/getting-to-the-truth/ [https://perma.cc/H4WU-NWHC] (last visited Mar. 27. 2024).

110. *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).

111. 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). False allegations of one's death are another example of an affront to dignity that are nonetheless nondefamatory. *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).

112. 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).

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.

B. Status Theory and the Double Crux of Defamation Law

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*.[113] 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 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. Having wrestled with the concept of reputation elsewhere,[114] this Article takes on the task of exploring the theory of status.[115]

The concept of status emerges from an old tradition in sociology, dating back at least to Weber.[116] Sociologists define status as "the prestige accorded to individuals because of the abstract positions they occupy rather than because of immediately observable behavior."[117] Status arises organically in social groups—from the small fraternity to the modern complex society[118]—and reflects a social hierarchy within the group, a pecking order.[119] Possessing status is a matter of great

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113. 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").

114. *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).

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

116. 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).

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

118. *Id.* at 1143 (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 Önçüler, *Status as a Valued Resource*, 67 SOC. PSYCH. Q. 103–14 (2004) (finding a strong preference for status in an experiment across five cultures); Jessica E. Koski, 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.").

119. The commonly used term "pecking order" reflects a real phenomenon that showcases the

importance to individuals and seems to be a basic human desire.[120] Status is so important because it endows the bearer with "prestige" and entitles her to "deference behavior"—that is, "compl[iance] with that individual's wishes, desires, and suggestions[,] a compliance unaccompanied by threat or coercion."[121] Many studies show that "status difference determines the observable power and prestige within the group."[122]

Status matters in 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.[123] In science, a distinct domain, one finds that high-status scientists will attract many more citations for similar ideas than their low-status peers.[124] 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.[125] It is not just that high status signals merit;[126] it is also that having high status makes everyone's evaluations of you more favorable.[127] For instance, prestigious law firms can charge higher prices, and one wonders how much of that is attributable to higher quality.[128]

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 high-status markers to a student's

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ubiquity of status and status games as chickens direct most of their pecks at lower status fowls. A. M. Guhl, *The Social Order of Chickens*, 194 SCI. AM. 42 (1956).

120. *See* SMITH, *supra* note 116, 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.").

121. 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).

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

123. *Id.* at 241–42.

124. 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).

125. *Id.* at 272–73; PODOLNY, *supra* note 121, at 27–29 ("[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. & ORG. 87, 87 (2010).

126. Huberman, Loch & Önçüler, *supra* note 118, 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").

127. Gould, *supra* note 117, at 1158.

128. Brian Uzzi & Ryon Lancaster, *Embeddedness and Price Formation in the Corporate Law Market*, 69 AM. SOCIO. REV. 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").

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.[129]

As to why individuals, firms, and countries compete for status, sociologists propose three possibilities.[130] First, individuals may pursue status instrumentally to achieve those material advantages just noted.[131] Second, individuals may seek status as a terminal value simply because having status is pleasurable and losing it is painful.[132] 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."[133] 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.[134]

Let us pause to briefly consider the interrelated concept of reputation. Much like status, reputation is a communal concept. It is aggregated information regarding the quality of a person, service, or product based on past experience.[135] Barring reputation failures,[136] one could expect higher quality from a product that has good reviews.[137] The common observation that a firm or brand "has" a good reputation

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129. "A central argument of the Leviathan has to do with the political importance of education. Hobbes wants his book to be taught in universities and expounded much in the manner that Scripture was. Only thus will citizens realize what is in their hearts as to the nature of good political order. Glory affects this process in two ways. The pursuit of glory by a citizen leads to political chaos and disorder. On the other hand, God's glory is such that one can do nothing but acquiesce to it. The Hobbesian sovereign shares some of the effects of glory that God has naturally; this, however, must be supplemented by awe and that but fear." Tracy B. Strong, *Glory and the Law in Hobbes*, 16 EUR. J. OF POL. THEORY 61 (SAGE Publications Jan. 2017); Lauren A. Rivera & András Tilcsik, *Class Advantage, Commitment Penalty*, 81 AM. SOC. REV. 1115, at 1122 (2016).

130. *See* RIDGEWAY, *supra* note 3, at 20–47 (arguing that status serves to coordinate cooperation within groups).

131. *See, e.g.*, PODOLNY, *supra* note 121, at 30 ("[H]igher-status actors will be able to offer goods of a given quality at a lower cost.").

132. Anderson, Hildreth & Howland, *supra* note 121, at 591–93 (reviewing diverse literature and finding that status pursuits appear to be a fundamental human desire with important effects on well-being); *see also* Huberman, Loch & Önçüler, *supra* note 118, at 104.

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

134. 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).

135. *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, 1254–55 (2019) ("[R]eputational 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).

136. *See generally* Arbel, *supra* note 135 (exploring factors leading to reputation failures in markets).

137. *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)

means that many share a favorable expectation of its quality.[138] 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."[139] It follows quite naturally why reputation is valuable: it allows its subject to capitalize on it.[140]

In reality, there is often overlap between the distinct concepts of status and reputation, so it is understandable why the literature conflated them.[141] 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.[142] Still, even twins are different people. While reputation measures quality, status measures relative social standing; while reputation is an instrumental value, status is a terminal one; and while one builds reputation by accumulating positive reviews of past experiences, status is earned through the accumulation of "deference behavior."[143] Quality is key to reputation but secondary to status. The late sociologist Roger Gould went as far as showing that "it is possible for a stable system of ranked social positions to emerge endogenously in the absence of underlying variation in individual attributes."[144]

Another difference is that it would be relatively easy for an outsider to evaluate the reputation of various agents based on demand for their services. However, an outsider will find it difficult to track and quantify the allocation of status, which manifests in nonmarket behavior.[145] And even the internal experience is different: reputation is about what we *expect* to get, and status is what we *should* get.[146]

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138. 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.

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

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

141. *See* Olav Sorenson, *Status and Reputation: Synonyms or Separate Concepts?*, 12 STRATEGIC ORG. 62, 63 (2014). Economists have frequently conflated the two meanings by redefining status as a measure of quality. *See, e.g.*, Jensen, Kim & Kim, *supra* note 125, at 87–117. 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).

142. *See generally* RIDGEWAY, *supra* note 3, 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 121, at 18.

143. *See, e.g.,* Sauder, Lynn & Podolny, *supra* note 124, at 268.

144. Gould, *supra* note 117, at 1149.

145. 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 19, 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 16, at § 2:4.2. Insiders develop a quick and intuitive sense of internal social hierarchies, which they share among themselves with regularity.

146. The "should" here is a sociological, not moral, normative. On the norms guiding the attainment of status see *infra* Section II.1.

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.[147] But reputation is different. Because reputation is a prediction of future quality, it is not impossible for many firms to have good reputation.[148]

We arrive, then, at a key insight about the nature of status that is widely shared by sociologists and economists: *status is a zero-sum game*.[149] In a more technical sense, if we were to conceive of status itself as the distance of individuals from each other in terms of status, the sum of all such individual distances would be zero.[150] 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."[151] 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."[152] Sociologist Joel Podlonsky summarizes this view:

> 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.[153]

C. Defamation Law & Status

We now turn to examine status theory's relation to defamation law. As will emerge, there is a strong fit between status theory and the doctrinal aspects of defamation law. The goodness of fit suggests that courts and commentators have employed a prototheory of status for a long time but may have lacked the theoretical

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147. *See, e.g.*, Jensen, Kim & Kim, *supra* note 125, at 91 ("[S]tatus is best defined as a position in a social system.").

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

149. 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 & Henri A. Walker, *Status Structures*, SOCIO. PERSPS. 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).

150. Status is not one-dimensional. *See supra* note 89 (discussion of dignity being a unified concept). But in each dimension, we should expect the sum of distances to be zero.

151. *See, e.g.*, Douadia Bougherara, Sandrine Costa-Migeon Costa, Gilles Grolleau & Lisette Ibanez, *Do Positional Preferences Cause Welfare Gains?*, 39 ECONS. BULL. 1228, 1229 (2019) ("[S]tatus being the ultimate positional good."); Congleton, *supra* note 5, 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.").

152. *Id.* at 1228.

153. PODOLNY, *supra* note 121, at 25.

vocabulary to articulate it clearly. In fact, many of Post's original ideas also fit comfortably within this framework. In this sense, status theory is not a novel framework, rather only a refinement of older ideas and concepts that are already present in the law and scholarship.

What follows has no ambition of explaining all of defamation law. Nor does it aspire to. Status theory will earn its keep 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.

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 community,"[154] 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."[155] This is status-laden language clearly geared towards the social effects of statements.[156] Some commentators have likewise explained the need for money compensation in defamation cases in the need to rehabilitate a "relational interest" that defamation jeopardizes.[157]

Dignity theory was criticized for its bad doctrinal fit. Let us measure how status theory fares. Consider, again, the publication requirement, which only permits action on published statements. While dignity can be degraded in private, status cannot. After all, one can only lose status by being viewed negatively in the eyes of *others*,[158] so the existence of the other is a nonnegotiable prerequisite.

We can also derive from first principles the community judgment requirement. A statement can only be defamatory if, in Justice Holmes's words, it would "hurt the plaintiff in the estimation of an important and respectable body of the community."[159] This community requirement seems puzzling if one views dignitary

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

155. 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 Cnty. 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").

156. W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, 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, 218 (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.").

157. RODNEY A. SMOLLA, THE LAW OF DEFAMATION 18 (2d ed.) (citing LEON GREEN, CASES ON INJURIES TO RELATIONS 193–276 (1940)).

158. RIDGEWAY, *supra* note 3, at 65. Likewise, emotional pain and suffering are considered "parasitic" on other harms and cannot exist by themselves.

159. Peck v. Tribune Co., 214 U.S. 185, 190 (1909); *see also* RESTATEMENT OF TORTS, *supra* note 17, 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, (1921) 90 L.J.K.B. 883 (explaining that a statement can be defamatory only if it is considered defamatory "in the minds of ordinary, just and reasonable citizens").

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?[160] 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 their views. Moreover, the "unrespectable" parts of society are presumably low-status individuals who may lack much power to confer or harm status.[161]

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.[162] From a dignity perspective, such a doctrine is inexplicable as all individuals have equal dignity.[163] But from a status perspective, it would make sense that those on the lowest social rung are not losing much status from defamation.[164] While one may not be *dignity proof*, being status proof is entirely plausible.

Finally, the most important and nuanced aspect of the doctrine is the inveterate requirement that the statement be false, a requirement that long predates modern concepts of free speech. From a dignity- or honor-based perspective, this limitation is clearly puzzling.[165] 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.[166] The meaning of this requirement will be clarified once status games are introduced; it's enough for now to note that their integrity requires some arbitration of which claims are false and not.[167] 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.[168]

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160. Lidsky, *supra* note 53, 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.").

161. *See, e.g.*, PODOLNY, *supra* note 121, 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).

162. 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 16, at § 2:4.18.

163. *See supra* notes 91–103 and accompanying text.

164. This is consistent with the mitigation of damages for individuals with low status, as they presumably suffer a lower status harm. The reverse is true for individuals with high standing. SMOLLA, *supra* note 157, at § 13.17 ("Evidence that the plaintiff already has a bad reputation is admissible in mitigation of damages."); Mike K. Steenson, *Presumed Damages in Defamation Law*, 40 WM. MITCHELL L. REV. 1492, 1504 (2014).

165. *See* Post, *supra* note 26, at 705–06.

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

167. 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.

168. *See infra* Part III.1.

Status theory offers a natural interpretation of the fundamental aspects of defamation doctrine. Requirements that confound dignity, property, or honor theories appear sensible, if not inevitable, under status theory.

Seeing defamation law as the law of status offers an interesting perspective on the evolution of status structures in our modern society. As interpreted by Jeremy Waldron, the common law of defamation arose from the old common law doctrine of *scandalum magnatum*, which protected the rank and status of aristocrats against calumny by both nobles and commoners.[169]

Importantly, the law did not grant such recourse to the common man.[170] Per Waldron, the abolition of nobility did not entail an abolition of status. Far from it, the abolition of nobility *democratized* status.[171] Today we all have our private "standing in the community," and this fact is given legal effect by courts of law.[172] This interpretation may even be more dramatic than Waldron makes it. As a byproduct of the modern understanding of the First Amendment in *N.Y. Times v. Sullivan* and its progeny, society offers much *less* protection to public figures relative to private individuals.[173] Thus, it is not so much that modern society flattened the pyramid; instead, it might have flipped it over.[174]

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This Part explored the theory of status and its relation to defamation law. A key argument here is that there is a strong fit between status and the doctrinal features of defamation law—a fit that avoids many of the harsh difficulties faced by the contemporary honor-, property-, or dignity-based views of defamation law. Having a robust understanding of the values protected by defamation law is key to understanding the doctrine and evaluating it. With that in mind, we can now put status theory to the task of elucidating what defamation law *should* do.

II. DEFAMATION LAW AND STATUS GAMES

The strong fit between status theory and the doctrinal structure hints at the purposes of defamation law, yet it still remains to be seen how informed courts, legislators, and reformers could incorporate it. The traditional view on this question

169. Waldron, *supra* note 41, at 103–12 (discussing the elements of the action, noting that it was both civil and criminal). As discussed *infra* Part IV.2., "punching up" can have favorable redistributive effects, but the doctrine was meant to preserve a specific distribution of social status.

170. BLACKSTONE, *supra* note 166, at *433; *see also* Jeremy Waldron, *Dignity, Rank, and Rights*, *in* THE TANNER LECTURES ON HUMAN VALUES 209, 233 (2009) (citing The Earl of Lincoln against Roughton, 79 Eng. Rep. 171; Cro. Jac. 196 (1606)); Waldron, *supra* note 41, at 1605.

171. *See also* Bezanson, *supra* note 113, at 537 ("[Over time] the tort was democratized . . . the imbalance between the state as the original claimant of protection and the citizen, who was first the object of the action before becoming its beneficiary, was corrected.").

172. Waldron, *supra* note 41. *See also* DAVID GRAEBER, DEBT: THE FIRST 5000 YEARS, 122–24 (2012).

173. *See* Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

174. But note that, within the category of private plaintiffs, the law distinguishes between people of high or low status. SMOLLA, *supra* note 157, at § 13.17.

is reactionary in nature: defamation law's purpose is to remedy harms to good name where it finds them.[175] The reactionary view, I believe, is mistaken (or at least highly overstated). The real reason why harms to status should be remedied lies in the broader effects resulting from remediation. However, we can postpone this specific critique because even those who believe trespass law should remedy harms to property rights agree that a broader account is necessary to define what *should* count as harm, such as in the cases of overhead flights, underground drilling, and light projections. In this spirit, we now move on to consider the broader social effects of defamation law.[176]

This Part makes both the evaluative argument that defamation law influences the choice of status games and the normative argument that courts should come to terms with their role and consider status games explicitly when they adjudicate cases. After offering a short exposition of status games and their social import, this Part moves to explain how determinations in defamation law cases induce participation in some status games and dissuade participation in others. While there are some valid institutional concerns about judicial systems' capacity to regulate status games, this Part also offers some guiding principles.

A. Status Games

Thus far, we have taken status to be a given. A deeper question is how status is created in the first place. Here we find that a near-universal property of any social group is that its members engage in a variety of status games.[177] Status games are social systems with recognized rules of how one acquires status, what status entails, and how status is lost.[178] Pertinent information is diffused within the social system through a variety of means, most commonly gossip and the observed treatment of individuals by others.[179] The variety of status games is dazzling, and they move from the immediately recognizable (the consumption of expensive items) to the nuanced and seemingly "natural" (accent, manners, and even body language).

Status games serve crucial social functions, yet these functions are not always visible to their participants.[180] Economist Roger Congleton explains this is because

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175. *See supra* note 66.

176. *See infra* Part IV.

177. *See* Jessica Koski, Ingrid R Olson & Hongling Xie, *Understanding Social Hierarchies: The Neural and Psychological Foundations of Status Perception*, 10 SOC. NEUROSCIENCE 527, 528 (2015) ("[S]ocial hierarchies are highly pervasive across human cultures . . . and they appear to emerge naturally in social groups . . . . [T]his 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 . . . .").

178. *Id.* at 529.

179. *See* Terence D. Dores Cruz, Terence D. Dores Cruz, Bianca Beersma, Maria T. M. Dijkstra & Myriam N. Bechtoldt, *The Bright and Dark Side of Gossip for Cooperation in Groups*, 10 FRONTIERS PSYCH. 1374 (2019) (noting the function of gossip in enforcing group norms and its universality in human societies).

180. *See* SHAPIRA, *supra* note 148, at 137–38 (discussing the signal "broadcast efficiency" based on its social effects).

many benefits of status games accrue to *non*-participants.[181] For instance, civilized behavior may well be a part of a status game where low status is assigned to those who fail to behave amicably, altruistically, and prosocially. It is often said that philanthropy is done not only for its own sake but as a form of acquiring status and social standing in the community.[182] A more radical account was proposed by sociologist Ervin Goffman, who made the claim that the entire presentation of the self is a form of soliciting social impressions.[183] 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.[184] But as media magnate Ted Turner realized, we can capitalize on such motives.[185] The journal Slate subsequently created an exclusive list of top-sixty donors and reported that "[w]hether by coincidence or not, philanthropy has blossomed since Slate's list was created."[186]

Status games may also reduce some forms of inequality. Economist Robert Frank developed an account where status considerations equalized wages within firms. He argued that workers 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.[187]

Alongside their more salutary implications, one must admit there is also a dark side to status games.[188] In *The Darwin Economy*, economist Robert Frank argues that status games often result in socially destructive outcomes.[189] 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.[190] Similarly, Frank argues human

181. Congleton, *supra* note 5, at 176.

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

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

184. Evan Westra, *Virtue Signaling and Moral Progress*, 49 PHIL. & PUB. AFF. 156, 156 (2021) ("What makes the act in question an instance of virtue signaling is not the content of the moral expression itself, [sic] but rather the status-seeking desires of the person or corporate entity making it.").

185. Nicholas Kristof, *How Giving Became Cool*, N.Y. TIMES (Dec. 27, 2012), https://www.nytimes.com/2012/12/27/opinion/kristof-how-giving-became-cool.html [https://perma.cc/C4LT-4EFL].

186. Sebastian Mallaby, *The Slate 60 Turns 10*, SLATE (Feb. 20, 2006), https://slate.com/human-interest/2006/02/the-60-largest-american-charitable-contributions-of-2005.html [https://perma.cc/D2RX-AEPJ].

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

188. *See, e.g.*, Bougherara et al., *supra* note 151 ("In an economy with private consumption goods, positional preferences lead to a welfare loss."); Congleton, *supra* note 5, at 176 ("A substantial portion of the investment in positional goods may be regarded as a dead-weight loss."). The term "positional arms race" is due to Robert H. Frank, *Should Public Policy Respond to Positional Externalities?*, 92 J. PUB. ECON. 1777, 1778 (2008).

189. ROBERT H. FRANK, THE DARWIN ECONOMY: LIBERTY, COMPETITION, AND THE COMMON GOOD (2011).

190. *Id.* at 8–9.

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 tiptoes, resulting in everyone standing uncomfortably and no one seeing any better for it.[191]

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.[192]

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.[193] 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.[194] 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."[195]

In such situations, one can easily identify a "positional treadmill,"[196] 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 may suffer from these races. Ted Turner, whose top philanthropy list was discussed above, also had another important

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191. 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).

192. FRANK, *supra* note 189.

193. *See, e.g.,* Frank, *supra* note 188, at 1778 (suggesting large houses are a source of positional utility); FRANK, *supra* note 189, at 68–69.

194. THORSTEIN VEBLEN, THE THEORY OF THE LEISURE CLASS 33–48, 102 (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").

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

196. Robert H. Frank & Cass R. Sunstein, *Cost-Benefit Analysis and Relative Position*, 68 U. CHI. L. REV. 323, 327 (2001).

insight. He argued that the Forbes 400 top wealthiest people list might actually be keeping people *from* giving.[197] If one gives, they endanger their rank on the list and, thus, their social status. This is why creating a top donor list was so essential—to undo the hoarding incentive created by the Forbes list.

In sum, status is produced within status games and some of these status games are socially positive as they encourage prosocial behavior. But status games can also lead to status races with deadweight and other social losses.[198]

B. Regulating Status Games

Defamation law matters for more than the compensation of victims; like liability for car accidents, it also affects the way people conduct themselves. Indeed, since at least *N.Y Times v. Sullivan*, it is widely recognized that defamation law should focus on more than the immediate, case-specific effects. In *N.Y. Times*, the Court endorsed the view that decisions must also balance downstream effects on the chilling of speech and participation in public debate.[199] Since then, courts have sought to balance the chilling effect against the greater protection of good name.[200] To be sure, the balance is more nuanced than *N.Y. Times* recognizes, and recent literature has highlighted how strong defamation laws could unintentionally increase the credibility of falsehoods.[201] But the basic principle—that defamation law must account for its downstream effects—stands uncontested.

What the standard debate misses is that there are other downstream effects besides the chilling of speech—as the following thought experiment seeks to reveal.

In the Hobbesian society, attaining the status of a great inventor is for suckers.[202] Take a budding researcher who aspires to gain respect by developing innovative theories. He does not harbor this aspiration because it is good for his financial welfare. In fact, his relatives keep telling him that he would gain much more by working the fields or becoming a merchant, but our scholar is willing to make this sacrifice. The problem is that even if the scholar would be able to overcome all hurdles and make important discoveries, he will be forever exposed to gossipmongers who can sully his reputation by spreading rumors about how he stole

197. Nicholas Kristof, *How Giving Became Cool*, N.Y. TIMES (Dec. 27, 2012), https://www.nytimes.com/2012/12/27/opinion/kristof-how-giving-became-cool.html [https://perma.cc/C4LT-4EFL].

198. HIRSCH, *supra* note 191, 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 182.

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

200. Courts seek to only chill defamatory speech. *See, e.g.,* Rosenblatt v. Baer, 383 U.S. 75, 86 (1966) ("Society has a pervasive and strong interest in preventing and redressing attacks upon reputation.").

201. *See* Daniel Jacob Hemel & Ariel Porat, *Free Speech and Cheap Talk*, 11 J. LEGAL ANALYSIS 46 (2019); *see also* Arbel & Mungan, *supra* note 114.

202. It is perhaps no coincidence that Hobbes was skeptical about "glory." *See generally* Strong, *supra* note 129.

his best ideas from others. Without defamation law, the scholar's best recourse to defending his hard-earned status might be violence or duels—and as twenty-year-old French genius Galois discovered, being a prodigal genius is quite distinct from being a good marksman.[203] Foreseeing the difficulty of reaping and maintaining the status benefits attached to innovation, the scholar might decide to abandon the innovation status game altogether. He will then set his aims at attaining status that cannot be so easily deprived, perhaps by engaging in activities not so fragile to gossipmongers, such as conspicuous consumption, hoarding property, or making other ostentatious displays of power.

If society wants more people to participate in status games around innovation—games that are fragile by nature—it needs to make these games more robust. 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.[204] By the same token, when judges extend defamation protection, they promote participation in the underlying status game by making status more robust to taking.[205] If society prizes status games that are susceptible to rumors, such as innovation, it should award a reasonable degree of protection to status thus attained. Making great discoveries should not be a losing proposition.

This conclusion—that participation in status games is influenced by the protection of status—may seem to mirror the standard reactionary account, which holds that defamation law exists to protect reputation from harm. But this views the binoculars from the wrong end. In those cases where we choose to protect from harm, we do it not because of the harm itself but rather because of respect to the status game from which the harmed status emerged. This flaw in the standard account will become more apparent when the existence of *any* harm will be challenged later but for now, it is worth emphasizing that our concern for status depends on our concern for the underlying status game.[206]

This is not to say that defamation law is all that binds status games together: there were status games between Cain and Abel, long before any legal system evolved.[207] Status games are a universal property of all social systems, eliminating

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203. *See* PROSSER & KEETON, *supra* note 156, at § 111 (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 for injuries received, . . . it is needless and a waste of time to denounce the [dueling.]"); *see also* STARKIE, *supra* note 37, at 6, 24 (recounting a case where the plaintiff said that if he could not expect recovery in court "he would have cut the defendant's throat").

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

205. *Cf.* Waldron, *supra* note 41, 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.").

206. *See infra* Part IV.

207. *Genesis* 4.

one will not eliminate all. The point here is more modest: defamation law affects the choice of status games that individuals play and the intensity with which they play—at least on the margins.[208] Thus, offering protection promotes some status games and denying it undermines others.

The analysis so far means that courts cannot help but play a key role in the regulation of status games when they decide cases. For example, any time the court announces that calling a person a "slacker" for avoiding the draft is defamatory, it promotes status based on service to the nation.[209] When the courts hold that implying that a woman is "promiscuous" is per se defamatory, they promote a status game built around chastity.[210] 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.[211]

This role is not new to courts; they have been regulating status games for many generations. What courts did not do, however, is recognize their role. Instead, courts and commentators framed the judicial role as reactive and passive. The rhetoric evinces the reactionary model, where good name is something that simply exists and needs to be protected from harm. This narrow view obscures how court decisions affect the initial decision to attain good name in any specific status game. The law of accidents used to be like this before internalizing that rules of compensation affect how carefully people drive and cross the street. 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."[212] But his focus in this statement on fostering social relationships was left mostly unheeded, and there is still a deep confusion regarding the role of defamation.

From this analysis follows the current proposal: courts should openly acknowledge that they regulate status games when they decide defamation law cases. 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."[213] It is now time to decloak the courts' role in regulating status games by turning away from the obfuscatory protection-from-harm view.[214] Courts should admit the role they have been playing in regulating status games and once they do, explicitly consider how their determinations in the specific case affect the underlying status game.[215] Defamation

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

209. Choctaw Coal & Mining Co. v. Lillich, 86 So. 383, 384–85 (Ala. 1920) (holding that "slacker" is per se libelous as it is "unquestionably a term of the severest reproach").

210. *See infra* Part III.3.

211. *See infra* Part IV.1.

212. Post, *supra* note 26, at 693.

213. Lidsky, *supra* note 53, at 9.

214. As Lidsky notes that construction of harm in defamation is "cryptonormative." *Id.* at 19.

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

law is not about *protecting* status; it is about *regulating* it.

C. The Legitimacy of Regulating Status Games and Institutional Capacity

This conclusion—that courts should acknowledge and embrace their role in regulating status games—may raise several objections. One objection comes from James Whitman's analysis of the laws of civility.[216] His account suggests that American law lacks the cultural foundations to deal with the regulation of norms of civility.[217] 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 effectively intervene in status games. This section grapples with these issues. The response to the first two concerns is to demonstrate 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.[218] 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.[219] 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 equally everyone with the respect once reserved for aristocrats.[220] But the United States, which lacks these traditions, has "leveled down" civility and thus endorses treating everyone as a commoner with equal (dis)respect.[221] The upshot is that "American incivility is woven into the cloth of the American egalitarian tradition,"[222] which means that "*in general,* America has no law of civility."[223]

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., lack

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216. Whitman, *supra* note 11.

217. *Id.*

218. *See id.*

219. *Id.*

220. 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. It is doubtful that American *law* does not recognize insults. *See e.g.*, Mauck v. Martinsburg, 167 W. Va. 332, 334, 280 S.E.2d 216, 218 (1981) ("All words which, from their usual construction and common acceptation, are construed as insults and tend to violence and breach of the peace, shall be actionable.").

221. *See id.* at 1387–90.

222. *See id.* at 1398.

223. *See id.* at 1384.

of 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.[224] 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.[225] This is especially true in the context of American culture, which is said to deem taboo the acknowledgement of class and status differences.[226] But as sociologists universally recognize, civility norms are dyed in the wool of American society,[227] and the law is hardly disinterested in the regulation of status games.[228]

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 the CEO gave a decent 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 catalogues class differences in the 1980s that still feel mordant

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224. *See id.* at 1397.

225. *See, e.g.,* GRAEBER, *supra* note 172, at 122 ("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.").

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

227. *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 172, at 122–24 (arguing that it is American middle-class behavior that treats everyone with "feudal deference").

228. On a personal note, when I first immigrated to the United States, I found myself hurtling at an invisible but intricate net of civility rules. The construction of "personal space" here is wholly different than it is elsewhere in the world. *See* Agnieszka Sorokowska, Piotr Korokowski, Peter Hilpert, Katarzyna Cantarero, Tomasz Frackowiak, Khodabakhsh Ahmadi, Ahmad M. Alghraibeh, Richmond Aryeetey, Anna Bertoni, Karim Bettache, Sheyla Blumen, Marta Blazejewska, Tiago Bortolini, Marina Butovskaya, Felipe Nalon Castro, Hakan Cetinkaya, Diana Cunha, Daniel David, Oana A. David, Fahd A. Dileym, Alehandra del Carmen Dominguez Espinosa, Silvia Donato, Daria Dronova, Seda Dural, Jitka Fialova, Maryanne Fisher, Evrim Gulbetekin, Akkaya Hamamcioglu, Hromatko Aslihan, Raffaella Iafrate, Mariana Iesyp, Bawo James, Jelena Jaranovic, Feng Jiang, Charles Obadiah Kimamo, Grete Kjelvik, Firat Koc, Amos Laar, Fivia de Araujo Lopes, Guillermo Macbeth, Nicole M. Marcano, Rocio Martinez, Norbert Mesko, Natalya Molodovskaya, Khadijeh Moradi, Zahrasadat Motahari, Alexandra Muhlhauser, Jean Carlos Natividade, Joseph Ntayi, Elisabeth Oberrzaucher, Oluyinka Ojedokun, Mohd Sofian Bin Omar-Fauzee, Ike E. Onyishi, Anna Paluszak, Alda Portugal, Eugenia Razumiejczyk, Anu Realo, Ana Paula Relvas, Maria Rivas, Muhammad Rizwan, Svjetlana Salkicevic, Ivan Sarmany-Schuller, Susanne Schmehl, Oksana Senyk, Charlotte Sinding, Eftychia Stamkou, Stanislava Stoyanova, Denisa Sukolova, Nina Sutresna, Meri Tadinac, Andero Teras, Edna Lucia Tinoco Ponciano, Ritu Tripathi, Nachiketa Tripathi, Mamta Tripathi, Olja Uhryn, Maria Emilia Yamamoto, Gyesook Yoo & John D. Pierce, Jr., *Preferred Interpersonal Distances: A Global Comparison*, 48 J. CROSS-CULTURAL PSYCH. 577 (2017) (reporting the preferred interpersonal distances in a survey of forty-two countries). Civility is tied to the volume of speech, to touching (hugging, kissing on the cheek, holding hands) based on nuanced rules of degrees of acquaintance and sex differences, to asking about how much one earns, to paying for dining outside, and to infinite other rules that are felt by insiders only when they are broken.

today.[229] 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.[230] Fussel offers an empirical hypothesis: you could gauge a town's class by measuring its bowling alleys per capita.[231] 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.

Not only is there a deep social infrastructure to govern status games but the legal system is also deeply implicated in their regulation.[232] It takes willpower to resist the call of cultural Marxism to construe the sustained insistence that "America has no law of civility"[233] 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. After all, there is an entire branch of government that dresses its members in special regalia, insists on referring to them as *your 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, "[T]hat's bullshit"—to which the judge responded by condemning him to three years in prison.[234]

Beyond the judicial branch, buried in history are numerous attempts to regulate away unwanted status games such as honor duels,[235] blood feuds, potlatch traditions, and, more contemporarily, street racing.[236] Sometimes the law is invoked not to outlaw status games but to moderate them. The use of tax law often

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229. *See generally* FUSELL, *supra* note 6. For a review and discussion, see Scott Alexander, *Book Review Fussell on Class*, ASTRAL CODEX TEN, (Feb. 24, 2021), https://www.astralcodexten.com/p/book-review-fussell-on-class [https://perma.cc/WUN5-CMMW].

230. FUSELL, *supra* note 6, at 114–16.

231. *Id.*

232. 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").

233. *See id.* at 1384.

234. 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 (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.").

235. 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 Mahmooei & Mehrdad Vahabi, *Dueling for Honor and Identity Economics*, MUNICH PERSONAL REPEC ARCHIVE (2012), https://mpra.ub.uni-muenchen.de/44370/2/MPRA_paper_44370.pdf [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).

236. Congleton, *supra* note 5, at 183 (discussing potlatch). The potlatch serves as a cautionary tale because many think it insidious to impose European values on indigenous people.

exemplifies this.[237] Between 1990 and 2002 a luxury tax was applied to yachts, jewelry, expensive furs, and private jet planes.[238] 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.[239] Tellingly, the regulation of status games is selective; higher education was not taxed, despite the surge in costs.[240] While Congress has since abandoned the luxury tax, some states still employ a "mansion" tax on luxury homes,[241] and similar taxation is common around the world.[242]

There are other status games that the law wants to *encourage*, and one way of doing so 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.[243] 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.[244] Or consider the 1978 Act designating the exclusive right to use the word "Olympic" to the United States Olympic Committee (USOC).[245] When a California nonprofit sought to promote awareness of gay rights by organizing an event called the "Gay Olympic Games," the USOC objected. The case reached the Supreme Court, which approved limiting

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237. On the idea of Pigouvian taxes and subsidies on status games, *see* Congleton, *supra* note 5, at 182–183; David Jinkins, *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 undersaving. Nick Feltovich & Ourega-Zoe Ejebu, *Do Positional Goods Inhibit Saving? Evidence from a Life-Cycle Experiment*, 107 J. ECON. BEHAV. & ORG. 440 (2014).

238. 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), https://www.latimes.com/archives/la-xpm-1992-01-31-fi-1159-story.html#:~:text=In%20his%201993%20annual%20budget,was%20proposed%20for%20those%20goods [https://perma.cc/WV7K-B2LQ].

239. 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).

240. 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 [https://web.archive.org/web/20201002191723/https://research.collegeboard.org/trends/college-pricing/figures-tables/growth-in-published-charges] (last visited Oct. 2, 2020).

241. 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 [https://perma.cc/S5ZR-NJ22].

242. Nadine Schmidt & Sheena McKenzie, *Tampons Will No Longer be Taxed as Luxury Items After Landmark German Vote*, CNN: WORLD (Nov. 8, 2019), https://www.cnn.com/2019/11/08/europe/tampon-tax-germany-luxury-item-grm-intl/index.html [https://perma.cc/8F9F-8FGC].

243. 18 U.S.C § 704 (2006).

244. 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://www.congress.gov/bill/113th-congress/house-bill/258/all-info [https://perma.cc/9SET-L2V7].

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

freedom of speech to foster status exclusivity.[246]

And of course, trademark law is a central locus of status regulation. While the law has various functions—prevention of confusion chief among them[247]—it is hard to understand other parts without invoking notions of status games. Consider the postsale confusion doctrine, which has little to do with confusion and a lot to do with status dilution.[248] 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.[249] This doctrine fights such sales because of concern with status[250]: If *they* can afford a nice Rolex, why should *we* buy one?[251]

As these examples illustrate, American law is brimming with status concerns which reflect a deep cultural interest in status games.[252] 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 Nusbaum argues[253]:

> 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 institutional 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

246. 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.").

247. 15 U.S.C. § 1066 (2018).

248. *See* U.S. 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).

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

250. *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).

251. *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 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")).

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

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

question requires much deeper analysis than the present scope allows. But leaving such judgments aside, what matters most is that judges are *already* making such determinations when they determine defamation law cases. The difficult question is not *whether* courts and legislators should regulate status games but *how*.

D. How to Regulate Status Games?

They say that the first step is admitting that you have a problem. So even if we cannot articulate clear rules on how to regulate status games, simply observing the lack of guidance would be fruitful. But there are also some good reasons to think that a principled approach to the regulation of status games is within reach. In what follows I will sketch some of these principles.

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.[254] Then depending on the nature of the status game, judges can craft the scope of protection that best fulfills society's goals.[255]

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.[256] A different example comes from the Bill and Melinda Gates Foundation, a nonprofit devoted to fighting poverty, improving healthcare, and expanding access to information technology.[257] Here, the pursuit of legacy—sometimes maligned as selfish and narcissistic—led the Gateses to donate thirty-six 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

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254. *See* Congleton, *supra* note 5, 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 & Önçüler, *supra* note 118, 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.").

255. *See* Congleton, *supra* note 5, 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.").

256. 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 [https://perma.cc/ZXE6-DQJU]. 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.").

257. BILL & MELINDA GATES FOUND., https://www.gatesfoundation.org/ [https://perma.cc/9JVX-YYTX] (last visited Jul. 15, 2024).

"remember *my* name."[258]

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.[259] 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).[260] 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).[261] On the opposite extreme, one finds surgeons (7.7),[262] astronauts (7.4), and mayors of large cities (7.2).[263] 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.[264] 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.[265] This view reflected what sociologists call a "closed stratification system" where status is "ascribed" based on one's pedigree.[266] Slowly, society moved to a more open stratification system where status is "achieved," meaning that status mobility was possible based on one's

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258. IRENE CARA, FAME (RSO Records 1980).

259. Tom W. Smith & Jaesok Son, *Measuring Occupational Prestige on the 2012 General Social Survey*, 122 GSS METHODOLOGICAL REP. (2014), http://gss.norc.org/Documents/reports/methodological-reports/MR122%20Occupational%20Prestige.pdf [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*, in ENCYCLOPEDIA SOCIO. 1989 (2d ed. 2000).

260. Smith & Son, *supra* note 261, at 13.

261. *Id.* at 29, 23, 24, 29.

262. Worryingly, lawyers (6.4) rate below medical doctors and narrowly overtake social scientists (6.2). *Id.* at 21, 28.

263. *Id.* at 13, 22, 29.

264. *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, Tom W. Smith & Peter V. Marsden, *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").

265. BLACKSTONE, *supra* note 166; 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.").

266. HUGHES & KROEHLER, *supra* note 227, at 176–177.

accomplishments.[267] As society opened,[268] 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.[269]

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.[270] The task of identifying the status game involved does not require an 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.

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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. When we focus on defamation law, we find that not only are status games 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 status privileges that plaintiffs claim and consider the legitimacy status games in which they came to obtain those privileges. When the status privileges are uncontroversial, as they would be in most cases, judges protect the plaintiff's claim. If the status privilege arises within a noxious status game, judges would explicitly refuse to lend it any protection. This would help destabilize those status games and, in any case, will not imprint them with the judicial imprimatur. Changing social mores may require larger legal pivots, and status theory offers an opportunity for legislators to play a larger role in the new jurisprudence. All of this demonstrates that status theory is not just an abstract way

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267. *Id.*

268. 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 5, 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.

269. 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.").

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

of thinking about defamation law but rather a theory that directly contributes to guiding the decisions courts and legislators make. The following Part works this logic through three case studies.

III. CASE STUDIES

A. Racist and Bigoted Speech

One of the biggest 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 not white, that a straight person is gay, or that a cisgender person is transgender.[271] The plaintiff argues that the allegation impugned her social standing and thus she seeks recompense. To be sure, 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.

Under the reactionary-harm-based approach, the crux of defamation lawsuits is positive harm to one's standing in the community.[272] This framework led courts to find defamation where a straight person was called gay[273] or when a person was alleged to be black.[274] The reactionary approach provided convenient cover for the judge, as it portrays the judicial role as merely identifying the effects of a statement on social attitudes.[275]

Fortunately, courts are increasingly retracting their old positions.[276] But this development is tempered by the compromise compelled by the reactionary model—courts engage in the fiction that society abolished bigotry.[277]

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

272. *See supra* note 66.

273. *See generally* Anthony Michael Kreis, *Lawrence Meets Libel: Squaring Constitutional Norms with Sexual-Orientation Defamation*, 122 YALE L.J. F. 125, 129 (2012). *See also* Lidsky, *supra* note 53 ("Courts have been slow to embrace a progressive view by declaring that an allegation of homosexuality cannot be libelous.").

274. *See, e.g.,* Eden v. Legare 1 S.C.L. 68, 1 Bay 171, at 71 (1791) (finding that an 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).

275. *See supra* note 42.

276. *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.").

277. Lidsky, *supra* note 53, 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.").

The logical chain leading to such artifice starts and ends with the issue of harm. As a descriptive matter, bigoted audiences would think less of an individual because of their ethnicity or group identity—this is what bigots do. In this narrow view, a bigoted statement is indeed harmful. To circumvent the finding of defamation, courts needed to minimize and deny the existence of harm. Courts have done so by limiting the scope of the audience, focusing only on "right-thinking" parts of society or a "substantial and respectable minority" to the exclusion of bigoted groups.[278] However, even this test may lead to unwanted conclusions: to this day, there are nonnegligible 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.[279] This way, courts were able to find that a statement that a woman "would do anything for five dollars" did not impute unchastity in 1956[280] or that calling a man "f**" was not harmful in 1977 due to the "the changing temper of the times."[281] While the outcome is desirable, ignoring the persistence of bigotry is not only naïve—it is actively harmful.

Scholars wrestled with these tensions. In an insightful early article, defamation law scholar Lyrissa Lidsky suggested to resolve the tensions by dividing the investigation into (1) an objective, empirical determination of harm; and (2) an explicitly normative element, the choice of the community whose opinions matter.[282] Making the normative step explicit would "reinforce[] defamation's symbolic role in the definition, affirmation, and enforcement of community values in America."[283] In a later article, Lidsky explains that this requires an evaluation of the reaction of a "rational" audience, rather than the actual audience.[284] In contrast, David Han argued that courts should focus on the first part 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."[285]

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.[286] Both of these accounts, however, still rely on a

278. *Id.* at 7.

279. *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.").

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

281. 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 273, at 125.

282. Lidsky, *supra* note 53, at 48.

283. *Id.* at 49.

284. *See* Lyrissa B. Lidsky, *Nobody's Fools: The Rational Audience as First Amendment Ideal*, 2010 U. ILL. L. REV. 799 (2010).

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

286. Lidsky, *supra* note 284, at 838–49 (explaining why focusing on actual audiences rather than "rational" audiences can result in various democratic harms).

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 LGBTQs in a negative light are *substantial*, *respectable*, or *rational*—intolerance of the LGBTQ+ community is still a current issue, only recently starting to shamefully 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 allows her to recoup her investment in status attainment. The lawsuit also vindicates the plaintiff, alerting other players in the status game 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 a 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 illegitimate because it arises out of a status game that the court will not reinforce, legitimize, or even ignore.[287] Courts must pointedly say: we reject bigoted status games.[288]

B. Collaborators & Snitches

Law enforcement requires the assistance of collaborators, but in some parts of society, cooperating with the government carries a social stigma.[289] This gives rise to an interesting dilemma in defamation law jurisprudence: what do snitches get?

For example, take the *Saunders* case in which a local TV station reported that the plaintiff, an inmate, was an FBI informant. [290] Saunders sued for defamation, alleging harm to his social standing among his community of inmates, which caused him "physical and mental damage."[291] 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

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287. 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.

288. *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.

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

290. Saunders v. Bd. of Dirs., 382 A.2d 257 (Del. Super. Ct. 1978).

291. *Id.* at 258.

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 a real harm within his community—a fact that the *Saunders* court reluctantly recognized.

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 prevailing generally which an action for defamation is designed to protect."[292] Thus, the court rejected the plaintiff's claim. Courts around the country engage in similar maneuvers as well.[293] The problem is that the reactionary protection-from-harm view has no problem protecting *other* minority views only held by small communities.[294] For example, in *Air Wisconsin Airlines v. Hoeper,* 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.[295] 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.[296]

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,"[297] the court should have said that it recognizes that some communities play status games around contempt for law enforcement and fidelity to violent organizations. The court does not endorse such status games, and so it refuses to lend defamation law protection to status claims resulting from these

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292. *Id.* at 259. *See also* RESTATEMENT OF TORTS, *supra* note 17, § 559 (defamation, even in the eyes of "a substantial group is not enough if the group is one whose standards are . . . anti-social").

293. Agnant v. Shakur, 30 F.Supp.2d 420, 424 (S.D.N.Y.1998) (Mukasey, J.) (noting that every American court surveyed has held that identifying someone as a government informant is not defamatory as a matter of law).

294. PROSSER AND KEETON, *supra* note 156, at § 111 ("[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 that 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 157, at § 4:44.

295. *See* Air Wisconsin Airlines Corp. v. Hoeper, 571 U.S. 237, 239 (2014). *See also* David S. Ardia, *Reputation in a Networked World: Revisiting the Social Foundations of Defamation Law*, 45 HARV. C.R.-C.L. 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 156.

296. 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).

297. 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.

games. To an extent, such a decision can destabilize status pursuits in these illicit status games, and it is therefore justified.

C. Female Sexual Autonomy

The last case study involves allegations that a woman is unchaste. Here, we find a truly twisted doctrinal frontier. As captured by the first and second restatements of torts, calling a woman a "whore" or otherwise imputing sexual promiscuity is per se defamatory.[298] Per se rules in defamation are the exception, and it is particularly peculiar to find a special rule for women. But the reactionary model insists that this merely reflects harm differentials. As Prosser argued, "Such a rule never has been applied to a man, since the damage to his reputation is assumed not to be as great."[299] However, on close examination, 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.[300] It's one thing to say that harm is hard to prove;[301] it is entirely another to say that its existence is presumed beyond proof.

A second sign comes from the rule's history. While female chastity was a central theme of eighteenth-century England,[302] it did not emerge at its moment of zenith. Rather, it only emerged a century later[303]—and by a special act of Parliament, no less[304]—when chastity concerns (and with them, good name harms) started *declining*.

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298. RESTATEMENT (SECOND) OF TORTS § 574 (1977). For some modern examples, *see* Bryson v. News Am. Publ'ns, Inc., 174 Ill. 2d 77, 94, (Ill. 1996) (holding that an article referring to the female plaintiff as 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").

299. PROSSER, *supra* note 19, at 760. *See also* Sexton v. Todd, Wright 316, 320–21 (1833) ("[An allegation of sexual impropriety] is vastly more injurious to a female than to our sex.").

300. *See* Post, *supra* note 26, at 698 ("The fact that the presumption of general damages is irrebuttable is inexplicable from the standpoint of the concept of reputation as property.").

301. *See* Post, *supra* note 26, at 697-98.

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

303. The common law before then did not consider allegations of unchastity to be slanderous per se. PROSSER AND KEETON, *supra* note 156, 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 R. Pruitt, *Her Own Good Name: Two Centuries of Talk About Chastity*, MD. L. REV. 401, 406 (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)).

304. 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 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).

Viewed from a harm perspective, the rule is mystifying; but from a status perspective, the true meaning of this rule is obvious. 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.[305] This mainstream eighteenth-century status game faced new challenges in the nineteenth century, as women started entering the labor market and were starting to reevaluate their social fetters.[306] The hypothesis would be that the per se rule was an attempt to solidify a threatened status game. It did so by securing the return on investment in one's chastity, making it expensive to impugn a chaste woman's name. If true, this explains why the per se rule did not emerge when the harm from sexual slander was at its zenith but instead arose much later and then only by special legislative intervention. This is not to say that any of this reasoning 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."[307]

This perspective also allows us to rethink a seemingly progressive reform in the Second Restatement of Torts. In an attempt to make the rule more modern, the drafters restated it in a gender-neutral fashion,[308] winning the praise of commentators for the progressive stance.[309] Never mind the fact that this rule is almost never applied to men,[310] the critical point here is that the rule itself should

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305. 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 157, 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 302.

306. For a critique of these laws, see Pruitt, *supra* note 303, at 405. ("[T]he law's adjudication of [per se defamation lawsuits for lack of chastity] has negatively reinforced society's expectations of what constitutes women's 'proper' sexual behavior.").

307. 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 273, at 128.

308. 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 extramarital affair directed at a man was per se defamatory). All cases found that cite to § 574 that are applied to men do not concern sexual promiscuity in general, only adultery.

309. *See* SMOLLA, *supra* note 157, 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.").

310. 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.

be abolished. The problem is not with its inequal 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. A reactionary harm model obscures this issue.[311] 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.

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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 restricts the scope of defamation law. This is only partly true. Status theory may also be used to ground a much more ambitious role for defamation law, as the regulation of hate speech demonstrates. In Jeremy Waldron's Holmes Lecture, he offered to view hate speech as a form of defamation called group libel.[312] Viewed as group libel, he made the case that hate speech should be restricted in order to reduce "the presence of visible hatred" and protect vulnerable minorities' "equal standing in society against public denigration."[313] That is, Waldron offers what he describes as "a dignitarian rationale" to the regulation of hate speech.[314]

For all of its importance, dignity can only do so much.[315] 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.[316]

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).

311. *See* Kreis, *supra* note 273, at 128.

312. *See generally* Waldron, *supra* note 41.

313. *Id.* at 1600.

314. *Id.* at 1612.

315. 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).

316. Robert Mark Simpson, *Dignity, Harm, and Hate Speech*, 32 LAW PHILOS. 701, 723 (2013) (critiquing Waldron's account of harm to dignity as "exercise in consequentialist speculation"); *see also*

Many may experience a deep offense, but others may ignore the malarkey of racists (or at least not feel denigrated by them).[317] 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 it is a cognizable social harm, independent of any individual's experience of dignitary harm.[318] Unfettered by any individual's reactions, status-based regulation can thus achieve more than the dignity view alone.[319]

CONCLUSION

Isabel Wilkerson writes: "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 of gender and ancestry—superficial differences that have nothing to do with who we are inside."[320]

Perhaps it is the case that we can't avoid status games. It is surely the case that 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."

But even if status games cannot be undone, this does not mean the legal system can afford to treat them with helpless indifference. As the Wilkerson epigraph reminds us, status games can be profoundly unjust. To be sure, 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.

This Article builds on the sociological concept of status to argue that defamation law is best seen as governing status games. In some cases, the law offers a positive contribution, whereas in others, it fosters toxic status norms and bigoted status competitions. This is not all that defamation law does, but status concerns help explain and justify a large part of this 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

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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).

317. *Id.* at 542 (critiquing Waldron's injury to dignity view).

318. *See* Simpson, *supra* note 316, at 727 (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.

319. 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 inflection of emotional harm. Limiting the ability of social agents to enforce racial hierarchies threatens the underlying status game.

320. WILKERSON, *supra* note 15.

of the link between defamation and status games, society can decide which ones to nurture and which ones to abandon in the twenty-first century. Scholars well beyond defamation law may well take heed of the hidden power status plays in our society.