

## TWO

# Searching for a Theoretical Basis of Defamation Law

### Introduction

The [previous chapter](#) explored the extent of the problem: the sheer level of technological advancement the world has experienced and the increased potential threats towards reputation this poses. The aim of this chapter is to find a working, theoretical basis for the protections offered by English defamation law. Later chapters conduct an assessment of defamation law in the digital age and offer suggestions for legal improvements. One cannot move forward onto this more specific type of analysis before the reasons and theory behind legal protections extended by the law of defamation are examined. Finding a unified approach to the theory behind the ancient tort of defamation is not easy. In order to strike the heart of what defamation law is about, one must consider what it protects: reputation. Over centuries, there have been many theories espoused by lawyers, philosophers and sociologists that attempt to underpin legal protection for reputation. [Part I](#) of this chapter considers prominent theories behind the protection for reputation and advances a modern theoretical approach that forms this book's basis for both defining and protecting reputational interests. In so doing it will also evaluate more antiquated theoretical considerations behind reputation that have since been (at least partially) discredited by later scholarship and

philosophical thought. After this jurisprudential basis has been established, [Part II](#) of the chapter considers a further element of this book's methodology. It sets out a range of named '*data-dissemination scenarios*' whereby personal, false and defamatory information is deposited on the internet. These scenarios form the medium of assessment for this monograph's subsequent analysis of the inadequate state of defamation law in light of technological change.

Defamation law is one of the most ancient laws, and torts, that currently exists in the English jurisdiction. In the Middle Ages, both spiritual and secular 'authorities' protected reputation.<sup>1</sup> Edward I's reign was the first time a solely secular jurisdiction dealt with defamation, taking it away, in large part, from the Ecclesiastical Courts.<sup>2</sup> After the King's Courts, the Star Chamber had unrestrained power and imported the Roman laws of *injuria* and *libellus famosus*, two criminal offences, to curtail the press after the Westminster Printing Press was established in 1476.<sup>3</sup> Much like the introduction of this printing press in the 15th century, another pivotal change has now occurred; the meteoric rise of the internet and internet-enabled technologies since the mid-2000s have heralded new potential for the wide dissemination of defamatory information. This book seeks to inspire a renaissance of defamation law, which it argues must adapt to overcome new and increasing threats to reputation posed by sophisticated technology. But first, this book now turns to the theory behind the importance of protecting reputational interests.

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<sup>1</sup> Van Vechten Veeder, 'The history and theory of the law of defamation I' (1903) 3(8) *Columbia Law Review* 33, 546, 547.

<sup>2</sup> Ibid 551.

<sup>3</sup> Ibid 561–3.

## Part I: The theory

Despite the vast number of words written and cases decided concerning defamation, judges and academics do not often stop to consider the *purpose* of defamation law in requisite detail. Writing comprehensively in the early 1900s, Van Veeder tells us that ‘defamation professes to protect personal character and public institutions from destructive attacks, without sacrificing freedom of thought and the benefit of public discussion’,<sup>4</sup> which can only partially now be said to be true in the English jurisdiction since public bodies cannot claim in defamation.<sup>5</sup> Others add that the law is based on ‘damage to reputation, humiliation and exposure to public ridicule’<sup>6</sup> – and regardless of whether one is telling the truth when they publicly refute a defamatory claim, it is extremely difficult to stop a lie, even if one denies it.<sup>7</sup> Therefore, defamation law plays a role in publicly exonerating and vindicating a claimant as well as punishing a defamer. Whether one can in fact adequately restore a damaged reputation, even after public exoneration by the courts, is more doubtful. One thing that unites both law and literature in this area is the agreement that defamation law, at the very least, attempts to protect reputation. This book espouses a working theory behind defamation law: that it *acts to protect reputation and its impact upon personal dignity, perception of oneself and social life*. The aspects underlying this working theory (dignity, self-perception and social life) will now be examined in turn.

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<sup>4</sup> Ibid 546.

<sup>5</sup> *Derbyshire County Council v Times Newspapers and Others* [1993] HL 18 Feb 1993.

<sup>6</sup> Jerome Neu, *Sticks and Stones: The Philosophy of Insults* (OUP 2008) 172.

<sup>7</sup> Ibid 173.

## ***I. 'Dignity' as justifying defamation law***

Dignity has been famously referred to by the US Supreme Court, as well as by certain members of the Strasbourg Court,<sup>8</sup> as the reason behind the legal protection of reputation.<sup>9</sup> Dignity was once an idea or concept that was limited to the upper class, but has over time permeated into all parts of society.<sup>10</sup> It is currently the most pervasive and persuasive explanation for what is protected when 'reputation' finds itself shielded by the law, although the term is both ephemeral and complex, as will be discussed.

### *a. The history of dignity*

Fleming argues that dignity is 'the quality of being worthy or honourable; worthiness, worth'.<sup>11</sup> Historically, the concept has a wide range of potential sources. It has roots in revolutionary rhetoric, the work of Emmanuel Kant, Christianity and the words of Cicero.<sup>12</sup> Firstly, discussion of dignity can be traced back to the Bible's Old Testament.<sup>13</sup> Kant is credited with

<sup>8</sup> *Chauvy v France* App no 64915/01 (ECHR, 29 June 2004) 23; *Lindon v France* App nos 21279/02 and 36448/02 (22 October 2007) 39 and 40. See Tanya Alpin and Jason Bosland, 'The uncertain landscape of Article 8 of the ECHR: The protection of reputation as a fundamental human right?' in Andrew Kenyon (ed), *Comparative Defamation and Privacy Law* (CUP 2016) 276.

<sup>9</sup> Robert Post, 'The social foundations of defamation law: Reputation and the constitution' (1986) 74(3) *California Law Review* 69, 708.

<sup>10</sup> Ibid 716, and see Norbert Elias, *Power and Civility* (Edmund Jephcott, trans, Pantheon Books 1982) 309.

<sup>11</sup> John Fleming, *The Law of Torts* (8th edn, Law Book Company 1992), as highlighted by Professor Richard Mullender, Newcastle University, in 2013.

<sup>12</sup> Remy Debes, 'Dignity', *Stanford Encyclopedia of Philosophy* (18 February 2023) Part 1.2.1 <https://plato.stanford.edu/entries/dignity/> accessed 29 July 2024.

<sup>13</sup> See Genesis 49:3, Esther 6:3, Ecclesiastes 10:6 and Habakkuk 1:7 in the King James Bible. The general concept of dignity could also be argued

popularizing a modern view of dignity, arguing that everyone is entitled to a ‘kind of moral respect’,<sup>14</sup> although Kant’s thinking was in turn inspired by Rosseau and Samuel von Pufendorf.<sup>15</sup> There is also a moral concept of dignity, which emerges from Christianity – although there are arguments that the Christian concept does not clearly align with the modern view of dignity as constituting an inherent right of all humans.<sup>16</sup> Classical orator Cicero is thought to have had an unusually modern view of dignity; however, if his words are closely examined he does not clearly argue that dignity should engender basic human rights in order to protect it.<sup>17</sup> It is clear, then, that one universal historical ‘origin story’ cannot be found to ground the concept. Rather, the modern notion of dignity is perhaps an amalgamation of all the thinking described, subject to a wide range of influences and backgrounds.

### *b. Conceptualizing dignity*

Due to the wide range of different meanings of the term dignity and different philosophical attitudes towards what it encompasses, many have argued that the term is now meaningless,<sup>18</sup> which is an unhelpfully pessimistic analysis.

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to be present in Jesus’ teachings in the New Testament. With thanks to the Rev. Hugh Burgess for discussions on this point.

<sup>14</sup> Debes (n 12); and see Immanuel Kant, ‘Groundwork of the metaphysics of morals (1785)’, in Mary J Gregor (ed), *Practical Philosophy* (The Cambridge Edition of the Works of Immanuel Kant) (CUP 1996).

<sup>15</sup> Ibid Debes (n 12); and see Frederick C. Beiser, ‘Kant’s intellectual development: 1746–1781’, in Paul Guyer (ed), *The Cambridge Companion to Kant* (CUP 1992) and Stephen Darwall, ‘Pufendorf on morality, sociability, and moral powers’ (2012) 50(2) *Journal of the History of Philosophy* 213 and ‘Equal dignity and rights’ in Remy Debes (ed), *Dignity: A History* (OUP 2017).

<sup>16</sup> Bonnie Kent, ‘In the image of God: Human dignity after the fall’ in Debes (n 15).

<sup>17</sup> Darwall (n 15).

<sup>18</sup> Debes (n 12).

Kolani has espoused that the term instead ‘reflects something of “the beautiful”’,<sup>19</sup> however unspecific this may be. Dignity may in fact be closer to a metaphorical term that represents what is at stake when another infringes someone’s right to construct their own image. Attitudes towards dignity also differ around the globe. Strębska observes that Eastern and Western cultures diverge; the East adopts a ‘face culture’ concerned with traditional values (and external perceptions of how someone views another) and the West a ‘dignity culture’, more entwined with allowing individuals to choose how to represent themselves.<sup>20</sup> Indeed, one of the arguments in favour of the Western protection of personality interests such as privacy and reputation is on the grounds of individual autonomy, crucial to allowing individuals to present particular versions of themselves in public, by only disclosing personal information they so choose. Strębska’s observations show that dignity is therefore capable of being seen as both a private right and a public issue.<sup>21</sup> There has to be, then, a relationship between the private and the public self, as Cooley and Mead have argued.<sup>22</sup> If there is a relationship between the private and the public self, it follows that there must also be a relationship between reputation as protecting both private and public welfare. Howarth notes that when discussing defamation reform, the Ministry of Justice made the mistake of viewing reputation as only impacting ‘individual welfare’, which clearly does not align with statements from the judiciary in cases such

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<sup>19</sup> Ibid and Aurel Kolani, ‘Dignity’ (1976) 51(197) *Philosophy* 251.

<sup>20</sup> Katarzyna Strębska, ‘Aging wars with words: Libel and slander in the Polish statutory law and English common law’ (2014) 38(51) *Studies in Logic, Grammar and Rhetoric* 197, 205.

<sup>21</sup> Ibid 206.

<sup>22</sup> Post (n 9) 708, and see Charles Cooley, *The Two Major Works of Charles H. Cooley: Social Organization, Human Nature and the Social Order* (Free Press 1956) and George Herbert Mead, *Mind, Self, and Society* (University of Chicago Press 1934).

as *Reynolds*, to the effect that reputation (and therefore the protection of dignity) is inherent to the public interest and public good, affecting society more generally if it is allowed to be infringed.<sup>23</sup>

One thing that many philosophers agree on is that dignity has a connection to certain basic rights.<sup>24</sup> Dignity can be used positively to ‘protect what has dignity’.<sup>25</sup> Waldron has observed that although theory may tell us that everyone is entitled to personal dignity, not everyone will find their dignity upheld – which is why the word is used to argue that the right should find protection in practice.<sup>26</sup> Dignity’s ‘home’, he argues, should therefore be in the law.<sup>27</sup> One place where dignity is both clearly represented and protected is through the protection of reputation in defamation law.

### c. Issues with dignity

#### i. Definitional difficulties

There are at the very least four definitions of dignity from the perspective of philosophy: dignity as manners, dignity as living up to certain modes of conduct, dignity as social status, and dignity as something that everyone has inherently and everyone must share.<sup>28</sup> Despite these differing viewpoints,

<sup>23</sup> David Howarth, ‘Libel: Its purpose and reform’ (2011) 74(6) *Modern Law Review* 845, 847.

<sup>24</sup> Debes (n 12) and see Teresa Iglesias, ‘Bedrock truth and the dignity of the individual’ (2001) 4(1) *Logos: A Journal of Catholic Thought and Culture* 114 and Doron Shultziner, ‘Human dignity: Functions and meanings’, in Jeff Malpas and Norelle Lickiss (eds), *Perspectives on Human Dignity: A Conversation* (Springer 2007) 73.

<sup>25</sup> Ibid Debes (n 12) and also in ‘Dignity’s gauntlet’ (2009) 23 *Philosophical Perspectives* 45, 61–2.

<sup>26</sup> Ibid Debes (n 12) and Jeremy Waldron, ‘Dignity, rank, and rights’, in Meir Dan-Cohen (ed), *Berkeley Tanner Lecture* (OUP 2012).

<sup>27</sup> Ibid.

<sup>28</sup> Ibid Debes (n 12) Part 2.

some philosophical work has been undertaken to find common ground. A theory advanced by Killmister has merit as a unification of many different philosophical definitions of dignity; while it may not be easy for academics to agree on one *positive* definition of dignity, it is easier to find agreement when dignity has been violated.<sup>29</sup> Dignity is therefore harmonized through shared understandings of when it is infringed,<sup>30</sup> as it is a particular type of wrong which is ‘normatively distinctive’.<sup>31</sup> To respect someone is intrinsically about human dignity – it is the ‘operative fact’ behind why we do so – and individuals are entitled to dignity as they have rational autonomy and souls.<sup>32</sup>

There are other legitimate critiques of dignity on a definitional basis. Rosen and McCrudden have argued that the concept is vacuous – the concept is not necessary to explain the law and the word is instead a ‘placeholder’ for other ideological ‘battles’ which are being fought.<sup>33</sup> There is indeed an ideological war being waged under the auspices of dignity as far as the protection of reputation and defamation law is concerned. The unrelenting struggle is between reputational control on the one hand, and unbridled freedom of expression on the other. But, unlike the views of Rosen and McCrudden, it is argued here that there is clear value in examining the theoretical rationale that underpins reputation, as this will help navigate the thin line that must be drawn between reputation’s

<sup>29</sup> Ibid Debes (n 12) and Suzy Killmister, *Contours of Dignity* (OUP 2020).

<sup>30</sup> Ibid Debes (n 12).

<sup>31</sup> Ibid Debes (n 12) and Adam Etinson, ‘What’s so special about human dignity?’ (2020) 48(4) *Philosophy & Public Affairs* 353, 357.

<sup>32</sup> Ibid Debes (n 12) and several texts by Stephen Darwall: ‘Two kinds of respect’ (1977) 88(1) *Ethics* 36; ‘Respect as honour and accountability’, in Stephen Darwall, *Honour, History and Relationship: Essays in Second-Personal Ethics II* (OUP 2013); and ‘Equal dignity and rights’, in Debes (n 15) 181.

<sup>33</sup> Ibid Debes (n 12) and Michael Rosen, *Dignity: Its History and Meaning* (Harvard University Press 2012) 149 and Christopher McCrudden, *Understanding Human Dignity* (OUP 2013), ch 1.



protection and expression in ‘hard’ cases. In terms of legal theory, Gearty has argued that the ambiguity of dignity can mean that it is ‘easily abused’ in courtrooms and in works on theoretical rights.<sup>34</sup> This is undoubtedly sometimes the case; it will be argued later in this book that the Defamation Act 2013, in its concerted prioritization of freedom of expression, failed to give reputation and therefore dignity sufficient credit and protection under the law.

## *ii. Dignity and balancing rights*

Dignity cannot be universally protected by any aspect of the law. This is the case if, for example, another competing right is weighed against it – most obviously freedom of expression. Scott and Mullis have noted that a central problem with the balancing exercise between Article 8 ECHR and Article 10 rights is that it implies there is an objectively correct outcome, which they contend is not the case; both rights are mutually exclusive and judges will forever be criticized for how a case is decided when there is room for argument.<sup>35</sup> Many academics have criticized the ad hoc balancing of reputation – dignity values – and speech.<sup>36</sup> Descheemaeker has observed that the English courts’ obligations to observe both ECHR rights and Strasbourg case law under the Human Rights Act has caused difficulties for this balancing act.<sup>37</sup> Despite these sincere

<sup>34</sup> Ibid Debes (n 12) and see Conor Gearty, ‘The state of human rights’ (2014) 5(4) *Global Policy* 391.

<sup>35</sup> Alistair Mullis and Andrew Scott, ‘The swing of the pendulum: Reputation, expression and the recentering of English libel law’ (2012) 61(3) *Northern Ireland Legal Quarterly* 27, 45.

<sup>36</sup> See, for example, Melville B Nimmer, ‘The right to speak from times to time: First Amendment theory applied to libel and misapplied to privacy’ (1968) 56(4) *California Law Review* 935.

<sup>37</sup> Eric Descheemaeker, ‘Mapping defamation defences’ (2015) 78(4) *Modern Law Review* 641, 648.

concerns, there is no clear alternative to the law engaging in some form of balancing exercise when competing rights of equal value conflict. There is also the question of whether dignity is engaged if a defamatory remark fails to damage an individual's psychological integrity. Using Mullis and Scott's argument, this should not engage Article 8 protection and dignity would fail to be protected, despite the fact that it could be negatively impacted.<sup>38</sup> This aligns with the viewpoint of the European Court of Human Rights (ECtHR), the court famously stating in *Karako* that harm to Article 8 interests is harm to 'psychological integrity' and only when libel is 'sufficiently serious' does it culminate in damaging such integrity.<sup>39</sup> This is problematic, as it introduces a threshold of seriousness before defamation can engage Article 8 interests. But both this threshold itself, as well as its measurement, are conceptually problematic. There is no clear dividing line when personal information becomes public or remains private, or is reputationally damaging *enough* to warrant Article 8 protection.<sup>40</sup> In echoes of Gearty's earlier warning,<sup>41</sup> the Strasbourg Court held that dignity is only *partly* protected by ECtHR law. It is also important to note that dignity of communication is a two-way right; it concerns both the dignity of the person 'attacked' (perhaps reputationally) by the communication, but is also concerned with the dignity of the speaker in communicating a message and, as such, forms a basis for the protection of freedom of expression.<sup>42</sup> Finally,

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<sup>38</sup> Mullis and Scott (n 35) 47.

<sup>39</sup> Ibid 40; see also *Karako v Hungary* App no 39311/05 (ECHR, 28 April 2009) [21]. Also see *A v Norway* App no 28070/06 (ECHR, 9 April 2009), which concurs on this point.

<sup>40</sup> On this, see Fiona Brimblecombe and Gavin Phillipson, 'Regaining digital privacy? The new "right to be forgotten" and online expression' (2018) 4(1) *Canadian Journal of Comparative and Contemporary Law* 1, 37.

<sup>41</sup> Gearty (n 34).

<sup>42</sup> Ronald Dworkin, *Freedom's Law* (OUP 1999), ch 8.

there is also some limited philosophical disagreement over whether dignity forms the basis of rights. Waldron does not exclusively agree with this viewpoint – he instead argues that dignity is not the normative basis of rights, but legal rights *do* act to protect human dignity.<sup>43</sup> Others have noted that the concept of dignity actually pre-dates rights, giving rise to a ‘chicken and egg’ scenario.<sup>44</sup> Despite the fact that dignity is the most all-encompassing and compelling explanation for why the law seeks to protect reputation, it is clearly not without flaws as a theoretical basis.

*d. ‘Rival’ theories to reputation as dignity*

This chapter has argued that the most convincing theoretical basis that can comprehensively be understood as underpinning reputation is dignity. However, in historical works on defamation theory, several other theoretical justifications have been posited to lie behind reputation. These other theories have now been at least partially discredited by subsequent philosophical and legal thought, but are nevertheless important to consider as they have influenced law making in defamation’s more distant past.

*i. Defamation law as protecting honour*

The idea of defamation law as protecting one’s honour can be found in a range of historical sources, such as the works of Shakespeare and the Bible.<sup>45</sup> This type of honour, Post argues, is one of occupying a particular position in society, a

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<sup>43</sup> See Waldon (n 26).

<sup>44</sup> See Debes (n 12); Michael Meyer, ‘Dignity, rights and self-control’ (1989) 99(3) *Ethics* 520, 521; and Jack Donnelly, ‘Human rights and human dignity: An analytic critique of non-Western conceptions of human rights’ (1982) 76(2) *American Political Science Review* 303.

<sup>45</sup> Post (n 9) 699.

certain ‘social role’, and others acknowledging this and acting accordingly.<sup>46</sup> This view has historically influenced defamation law; in the distant past, defamation laws only applied to noblemen according to the *De Scandalis Magnatum*, which was designed to stop upset between ‘the King and his people or the great men of the realm’.<sup>47</sup> Duelling was also seen as a remedy or a resolution to defamation, something the Star Chamber sought to stop.<sup>48</sup> This form of honour or status was not earned but inherited.<sup>49</sup> Despite these historical origins, there are several important deficiencies that negate honour as a sufficient theoretical basis for reputation. Firstly, damages or monetary compensation as a remedy for defamation do not align with honour as it is protected by the law. The loss of honour, one’s good name – ‘can scarcely be comprehended by pecuniary damages’ as the ‘laundry of honour is only bleached with blood’.<sup>50</sup> More importantly, this is an antiquated stance. Western society has been steadily moving away from rigid social hierarchies and people no longer duel to defend their reputation. Honour is not a ground concept in the same way as dignity; what honour is concealing is a specific type of social worth and self-worth.<sup>51</sup> Dignity is in fact at the root of both. Past case law also demonstrates that it was not just the ruling classes who were interested in protecting their reputation; ‘ordinary people’ would also bring cases if they felt their honour was in jeopardy.<sup>52</sup> This is a trend that has very much continued into 2025 – although there have been many high-profile celebrity cases in defamation, one of the most well-known modern Supreme Court decisions on defamation

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<sup>46</sup> Ibid 700.

<sup>47</sup> See Veeder (n 1) 554 and the document at 1,275.

<sup>48</sup> Veeder (n 1) 555.

<sup>49</sup> Post (n 9) 705.

<sup>50</sup> Ibid 703 and 705 respectively.

<sup>51</sup> Laurence McNamara, *Reputation and Defamation* (OUP 2007) 48.

<sup>52</sup> Ibid.

in the digital age, *Stocker v Stocker*, concerns a purely private couple and Facebook.<sup>53</sup> In fact, none of the three most recent Supreme Court defamation decisions concern high-profile claimants.<sup>54</sup> Defamation law is as valuable to purely private individuals today as it was ever.

## *ii. Personality rights as property*

Another even earlier theory that was suggested as forming the basis for defamation law's protections was the idea of personality rights as proprietary rights. Post has observed that defamation at common law shows aspects of both the viewpoint of reputation as a market good – or property – and reputation as dignity.<sup>55</sup> Academics have argued that reputation and property are closely aligned, reputation akin to a tangible 'asset', if a 'peculiar one'.<sup>56</sup> This notion was widely popularized by Pound's article in the *Harvard Law Review* in 1915,<sup>57</sup> which suggests reputation is 'incorporeal property'.<sup>58</sup> The theory of personality rights as property rests on the idea that reputation can help individuals in the labour market.<sup>59</sup> This theory argues that someone can earn their reputation through talent and skill.<sup>60</sup> A real-life situation that aptly illustrates this particular claim were the lives of Roman merchants, an underclass who could, nevertheless, through hard work, earn a good living in Roman society. Sancinito explains:

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<sup>53</sup> *Stocker v Stocker* [2019] UKSC 17.

<sup>54</sup> The other two being *Lachaux v Independent Print* [2019] UKSC 27 and *Serafin v Malkiewicz* [2020] UKSC 23.

<sup>55</sup> Post (n 9) 717.

<sup>56</sup> McNamara (n 51) 39.

<sup>57</sup> Roscoe Pound, 'Interests of personality' (1915) 28(4) *Harvard Law Review* 343, 349.

<sup>58</sup> Ibid 349. Pound in turn took inspiration from seminal work of Herbert Spencer, *Justice* (Williams and Norgate 1891).

<sup>59</sup> Post (n 9) 693.

<sup>60</sup> Ibid 694.

One's claim on that position was not something that could be relied upon to be stable or permanent, but, with sufficient work and luck, a merchant might achieve a good reputation, and once acquired and properly maintained, that reputation could be used to overcome the stigma against merchants, to reduce an individual's transaction costs, and to smooth the way to a successful career.<sup>61</sup>

This theory expounds that damaging someone's reputation can engender monetary loss,<sup>62</sup> which explains defamation law's role in protecting reputation – as good character equals creditworthiness.<sup>63</sup> McNamara observes that this idea is rooted in the idea of liberalism in 18th-century philosophy and the market society.<sup>64</sup>

There are several glaring problems with this theoretical position. Firstly, while this theory was at one time given credence by case law as underpinning defamation law, in recent history judges have moved away from crediting it as justifying reputational interests, instead now favouring language grounded in human dignity and human rights.<sup>65</sup> The property theory also fails to explain a great deal of the quirks of common law defamation, such as why harm or damage were automatically presumed for libel.<sup>66</sup> The theory also fails to explain why, for

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<sup>61</sup> Jane Sancinito, *The Reputation of the Roman Merchant* (University of Michigan Press 2024) 8.

<sup>62</sup> Post (n 9) 694.

<sup>63</sup> Ibid 695.

<sup>64</sup> McNamara (n 51) 41.

<sup>65</sup> Ibid 40 and Post (n 9) 717 and 721. See, by way of example, Lord Wilson in *Serafin*. He discussed ECHR principles and ECtHR cases in the course of his assessment of the s 4 defence and the decisions of lower courts: *Serafin v Malkiewicz* [2020] UKSC 23 at [60] and [74].

<sup>66</sup> Post (n 9) 697–9. Note this position has subsequently changed as both slander and libel now must meet the serious harm threshold in s 1 Defamation Act 2013.

example, the s 1 serious harm threshold in the Defamation Act can implicitly be met without proof of economic loss for cases concerning private individuals; and in fact the point is often not argued at all and rather the threshold is assumed to be met with certain types of defamatory statements.<sup>67</sup> Most importantly, the property theory does not explain what is accurately lost from one's intrinsic being when someone has been defamed, publicly shamed or when damaging personal information concerning them has been posted online. It does not acknowledge that dignity is an inherent human right and that everyone has the right to have their dignity protected. Instead, the 'reputation as property' theory reduces the protection of reputation from the *human and the essential* to purely being a way to protect certain types of monetary interests.

## ***II. The looking-glass self theory***

The previous section has argued that dignity is the theory that most adequately explains what reputation is protecting through defamation law. However, this is not the end of the story. There are two other related *sub-theories* that are annexed to dignity and which illuminate, in a more specific way, certain aspects of the dignity theory and precisely what reputation is guarding against. The first of these sub-theories is the idea of the 'looking-glass self'. This notion argues that the perception of others fundamentally effects one's psychological perception of oneself.<sup>68</sup> The idea is that your identity is constructed not just by yourself but by other third-party individuals as well – and how they view you.<sup>69</sup> Howarth has argued that our perception of ourselves is in part based on the perceptions of others.<sup>70</sup> This is relevant in the Polish legal system, as 'integrity'

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<sup>67</sup> See Chapter 3.

<sup>68</sup> Mullis and Scott (n 35) 41.

<sup>69</sup> Post (n 9) 709.

<sup>70</sup> Howarth (n 23) 854.

extends to the image that a person has of themselves, as well as how others perceive them.<sup>71</sup>

The looking-glass self theory originates from the works of Cooley and the idea is that it is the perception of our esteem in the eyes of others that in turn influences what we think about ourselves.<sup>72</sup> Socrates argued that the ‘nobler’ someone is, the more enraged they will be if treated unfairly – and Mullender has observed that this point applies ‘not just to self-esteem, but to reputation’.<sup>73</sup> Therefore, there is a strong connection between reputation, self-esteem and, ultimately, dignity. Despite this, English law has not always accorded with this viewpoint. Strębska has argued that English law is more concerned with how the person reading the defamatory statement feels, rather than a claimant.<sup>74</sup> This is still – partially – true. In the recent case of *Dyson v Channel 4* that considered the requirement of reference to the claimant, the Court of Appeal stated that when an irrefutably clear reference is not obviously made, a court may need to consider the statement itself and the ‘attributes of a claimant known to the hypothetical acquaintance’ (or reader).<sup>75</sup> A great deal of importance is therefore attached to what a reader (or audience member) thinks, knows or feels – rather than a claimant. However, there have been other recent changes to the law which cast doubt on Strębska’s rather blanket statement. In assessing whether the serious harm threshold has been met, the Supreme Court

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<sup>71</sup> Strębska (n 20) 207.

<sup>72</sup> Alpin and Bosland (n 8) 270.

<sup>73</sup> Plato, *Republic* (440c–d). This point was made by Professor Richard Mullender, Newcastle University Law School, in 2013, and the direct quotation is from his lecture.

<sup>74</sup> Strębska (n 20) 207.

<sup>75</sup> [2023] EWCA Civ 884 and Helena Shipman, ‘Case law: *Dyson v Channel 4*, Court of Appeal grants claimants’ appeal on reference’ (*Inform’s Media Law Blog*, 29 July 2023) <https://inform.org/2023/07/29/case-law-dyson-v-channel-4-court-of-appeal-grants-claimants-appeal-on-reference-helena-shipman/> accessed 31 July 2024.



in *Lachaux* explained that a relevant consideration is *how many people that knew the claimant in the course of everyday life had seen the defamatory content* and therefore how much the claimant's life will be impacted – and in turn, how far will it affect how they feel about themselves.<sup>76</sup> Consequently, it seems that at least some recent interpretations at common law originate from the looking-glass self theory.

The theory also finds support in Strasbourg jurisprudence. In *Karako*, the ECtHR found that the protection of reputation is important because of the harm caused through a particular, negative view of a person being presented – and the ultimate effect on that person about how they feel about themselves.<sup>77</sup> Others, however, have argued that the decision in *Karako* also questions the looking-glass theory, as the ECtHR differentiated between *self-esteem* that is protected by reputation and capable of being damaged by 'external valuation' and *personal integrity*, which 'remains inalienable'.<sup>78</sup> The court found that statements or publications must be sufficiently serious 'as to undermine personal integrity'.<sup>79</sup> In this respect, the decision of the court is conceptually flawed, as it draws an arbitrary distinction between two things which are aspects of the same. A significant blow to one's self-esteem through reputational harm can engender damage to personal integrity itself, as this is surely influenced by self-worth. If the ECtHR felt it necessary to instate a threshold of severity, it would have been more prudent for the court to simply argue that to engage Article 8 rights, reputational infringements have to be sufficiently serious as to warrant the court's attention – as the ECtHR is not concerned with trifles.<sup>80</sup> Judge Jočine

<sup>76</sup> *Lachaux* (n 54) [21].

<sup>77</sup> *Karako v Hungary* (n 39) and *Mullis and Scott* (n 35) 28.

<sup>78</sup> *Karako* (n 77) [22].

<sup>79</sup> *Ibid.*

<sup>80</sup> Which is the justification behind the s 1 threshold introduced in the Defamation Act 2013.

in the case also expressed concerns about this aspect of the majority decision in *Karako*, with the matter (in her learned opinion) requiring ‘careful future consideration’.<sup>81</sup>

Howarth questions the simplicity of the looking-glass theory, arguing that an adult’s perception of themselves is not a mirror image of what others think about them – and that a person would instead contest someone’s opinion about them rather than blindly accept it.<sup>82</sup> This is undoubtedly true, as the looking-glass self theory only describes one narrow aspect of what can be protected against by defamation law – and does not necessarily reflect the whole measure of how someone feels about themselves, which is influenced by a myriad of internal and external factors. This is why the looking-glass self theory can only be accepted as an explanation of a little part of what reputation rights protect against, itself a small annexed theory to the broader notion of *dignity* as what is fundamentally shielded by defamation law.

### ***III. Defamation law as protecting human sociality and relationships***

The second and final *sub-theory* of reputation as protecting dignity that needs to be examined is the idea that reputational protection strengthens human sociality and interpersonal relationships. Again, like the looking-glass self, this is a sub-theory which is related to the broader and more encompassing notion that reputation and therefore defamation law shield human dignity.

The sociality theory is famously argued by Post in his article in the early 1900s. Post believed that defamation law had two functions: ‘rehabilitation of individual dignity and maintenance of communal identity’.<sup>83</sup> The notion is also supported by

<sup>81</sup> *Karako* (n 77) ‘Partly Concurring Opinion of Judge Jočienė’ [7].

<sup>82</sup> Howarth (n 23) 857.

<sup>83</sup> Post (n 9) 715.

philosophical works, such as that by Iglesias, who argues that dignity and the human rights that protect it shield not just *individual* dignity but also ‘community relationships’.<sup>84</sup> Post explains that defamation law serves a function of ‘an enforcement of society’s interest in its rules of civility’.<sup>85</sup> Howarth concurs and argues that the idea of defamation as simply protecting individual dignity is unduly basic, as it fails to consider how it can also protect human relationships.<sup>86</sup> Modern literature concerning social media has also been inspired by the sociality theory as a theoretical basis; the ‘importance of social networks to the formulation of reputations(s)’ has been discussed by Craik.<sup>87</sup> The theory also holds true for civilizations in ancient history: when considering reputations of Roman merchants, Sancinino argues that reputation is ‘a collaborative endeavour’.<sup>88</sup> It appears, then, that this theory has stood the test of time.

The idea that reputation strengthens community bonds has sociological roots. In sociology, community itself is a moral good; traditions are reinforced by participation in the community and those who do not comply are eventually removed from the fold.<sup>89</sup> Society also equals ‘association’ – participation in society makes life easier, in that it both connects and separates us from others.<sup>90</sup> Defamation law supports society as it protects certain social values that are deemed to have merit (at the time) and holds potentially defamatory statements to account against these values.<sup>91</sup> In this sense, the law must

<sup>84</sup> See Debes (n 12) and Iglesias (n 24) 130.

<sup>85</sup> Post (n 9) 711.

<sup>86</sup> Howarth (n 23) 853.

<sup>87</sup> Kenneth H. Craik, *Reputation: A Network Interpretation* (OUP 2009) and Sancinino (n 61) 14.

<sup>88</sup> Sancinino (n 61) 15.

<sup>89</sup> McNamara (n 51) 24 and Ferdinand Tönnies, *Gemeinschaft and Gesellschaft* (Fues’s Verlag 1887).

<sup>90</sup> Tönnies (n 89) and McNamara (n 51) 24 and 25.

<sup>91</sup> Neu (n 6) 180.

be careful about what statements it considers defamatory, as finding that this is the case signals that these statements are undesirable,<sup>92</sup> and sends social and moral messages to society as a result. This reinforces some behaviours and condemns others. Reputation is also ‘one of the key means through which humans defend cooperation’.<sup>93</sup> Physical (and mental) repercussions like shame and pride transform our behaviour when we have done (or experienced) something ‘socially damaging or rewarding’.<sup>94</sup> Reputation has a contextually objective good in that it maintains certain types of social bonds and socialization.<sup>95</sup> This has been the case since the dawn of civilization: in the case of ancient Rome, ‘fear of losing a good reputation, or developing a bad one, pressured merchants to avoid certain kinds of conduct, and encouraged them to behave in socially acceptable ways’.<sup>96</sup>

Beyond supporting community groups, academics have argued that *individual* personality also depends on ‘general social perspectives’.<sup>97</sup> In other words, the internalization of social roles and third-party perspectives can also constitute individual identity. Post argues that individual identity is constituted through social interactions, as people live by certain rules in a social order.<sup>98</sup> As alluded to, the results of a bad reputation are social ‘ostracism’.<sup>99</sup> Howarth notes that the negative effects of this should not be trivialized as there has been research that observes extreme human reactions to social ostracism, such as illness.<sup>100</sup> He argues that part of the reason defamation should

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<sup>92</sup> Ibid.

<sup>93</sup> John Whitfield, ‘The biology of reputation’, in Hassan Masum and Mark Tovey (eds), *The Reputation Society* (MIT Press 2011) 40.

<sup>94</sup> Ibid.

<sup>95</sup> Howarth (n 23) 849.

<sup>96</sup> Sancinito (n 61) 9.

<sup>97</sup> Post (n 9) 708, and Mead (n 22).

<sup>98</sup> Post (n 9) 708 and 709.

<sup>99</sup> Howarth (n 23) 850.

<sup>100</sup> Ibid 852.

be actionable is the ‘pain’ caused by ostracism.<sup>101</sup> An individual’s private life would undoubtedly be impacted by exclusion or impending exclusion from their social group.<sup>102</sup>

Defamation law as facilitating human relationships/sociality is a theory relied on in both English and Strasbourg case law. In *Guardian News and Media Ltd*, the Supreme Court observed that control against defamatory material facilitated personal relationships in society,<sup>103</sup> and considered how the claimant’s interpersonal relationships and his relationships within the community would be affected.<sup>104</sup> Further, in *Pfeifer v Austria*, the Strasbourg Court considered that an individual’s interactions with others fall under the auspices of Article 8 ECHR.<sup>105</sup> Strębska argues that in defamation cases how a person is perceived in the public eye is crucial.<sup>106</sup> This is, of course, directly concerned with ‘face’ and how lack of ‘face’ may impact external relationships. In terms of harm, Alpin and Bosland also observe that the sociality theory is focused on the physical and psychological damage of social ties being broken, which is different to self-esteem.<sup>107</sup> It is argued here that the looking-glass self theory is more concerned with self-esteem. Howarth argues in favour of the sociality sub-theory at the root of defamation law, distilling the purpose of the law into a few sentences: ‘The most important lesson to be drawn is that defamation protects a fundamental human interest in sociality, an interest that is fully capable of justifying restraints on freedom of expression in many circumstances.’<sup>108</sup>

<sup>101</sup> Ibid.

<sup>102</sup> Alpin and Bosland (n 8) 272.

<sup>103</sup> Scott and Mullis (n 35) 41 and *Re Guardian News and Media Ltd* [2010] UKSC 1, [2010] 2 AC 697 [42] and [74].

<sup>104</sup> Ibid.

<sup>105</sup> Howarth (n 23) 857; *Pfeifer v Austria* App no 12556/03 (ECHR, 15 November 2007) [33].

<sup>106</sup> Strębska (n 20) 208.

<sup>107</sup> Alpin and Bosland (n 8) 272.

<sup>108</sup> Howarth (n 23) 864.

This sub-theory is, of course, broader than simply claiming that reputation protects individual relationships; it also argues that reputational protection protects human sociality *more generally*, and strengthens communities by reinforcing shared values and a sense of belonging, as Post has famously noted. Finally, before concluding, it is important to consider how defamatory statements can more specifically damage social ties.

*a. Strong and weak ties*

One of the reasons that robust defamation law is crucial for strong societies is because if an individual is falsely accused of something extremely serious, this can damage even ‘strong ties’ or previously robust social bonds; the impact of this on mental health can be catastrophic.<sup>109</sup> It is this sort of life-altering claim that engenders strong reputational protection from the law and this is still broadly the case even after the enactment of the Defamation Act 2013, which reduced reputational protection. A less serious defamatory claim may only break ‘weak ties’, perhaps rendering financial rather than social harm.<sup>110</sup> However, the importance of the protection of weak ties should also not be overlooked; financial harm is very much a real harm (indeed, the demonstration of ‘serious financial loss’ can prove the s 1(2) serious harm threshold for businesses is met). Loss of a livelihood can render families destitute. Social networks more broadly can also be lost in the rupturing of weak ties;<sup>111</sup> one can still be ostracized from the social group if a myriad of weak ties have been broken. Defamation law has often accorded with an assessment of how likely social ties are to be broken by a given statement – the more likely they are to be broken, the more likely a claim is held to be

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<sup>109</sup> Ibid 856.

<sup>110</sup> Ibid.

<sup>111</sup> Ibid 857.

actionable. Neu has observed that in the French Press Law of 1881, defamation was determined on how severe the claim was – and therefore the more likely to damage ties – and not its truth.<sup>112</sup> Similarly, as will be discussed in the [next chapter](#) of this book, s 1 of the Defamation Act 2013 now obliges courts to consider whether a defamatory statement has rendered or is likely to render serious harm to a claimant's reputation.

To summarize this pervasive sub-theory, defamation law 'must imply confirmation of membership in that community' when 'interests in civility' have been violated.<sup>113</sup> The relationships/sociality theory supports the idea of dignity lying behind reputation, as dignity is restored if a court upholds a defamation claim and finds community norms have been breached.<sup>114</sup> A court in this instance is speaking for the community – the ruling confirms the claimant's right to be part of it and signals that they are worthy of respect.<sup>115</sup> Until jury trials were all but abolished by s 11 of the Defamation Act 2013, the community *was* directly speaking in defamation trials as a jury decided on the meaning of the words; a judge now instead decides, representing the social group at large.

#### ***IV. Concluding remarks for Part I***

This chapter has argued that the most convincing, all-encompassing and prevalent theoretical justification behind the legal protection of reputation is dignity. Dignity as a definition is not without drawbacks; it is a wide notion, including personal dignity and dignity as it supports society and wider social groups. Despite being a broad concept born of many

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<sup>112</sup> Neu (n 6) 172, 176.

<sup>113</sup> Post (n 9) 712.

<sup>114</sup> Ibid 713.

<sup>115</sup> Ibid 713.

different historical roots, philosophers have proved that the term is capable of definition – even if this is a negative one (it is clear when dignity rights have been violated).<sup>116</sup> As has been argued, a violation of dignity is both recognizable and distinctive in the law – and is therefore deserving of robust protection by the laws of defamation. The notion of defamation common law and statutes as protecting honour or property has had some historical influence over law making, but this chapter has argued that both concepts are redundant in the modern era. The idea of honour as defamation law's theoretical basis is outdated as it subscribes to a rigid class system which is no longer a feature of contemporary society. The concept of reputation as personal property was fundamentally legally flawed from the start – the idea of reputation as being solely something traded for profit does not adequately explain what is lost when reputation has been damaged. The smaller, more specific theories of reputation as protecting someone's view of themselves (the looking-glass self theory) and the idea of defamation law as protecting social relationships and society more generally are both also persuasive, and illustrate specific negative repercussions when reputation is harmfully infringed. Both ultimately collapse into the idea of personal dignity as the theoretical backbone that underpins reputation. The working theory that this book will proceed with, then, is that defamation law *acts to protect reputation and its impact upon personal dignity, perception of oneself and social life*. The following legal analysis that this book undertakes will conduct analysis from this theoretical standpoint.

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<sup>116</sup> See Killmister (n 29).



## Part II: The scenarios

In order to conduct the analysis that follows, this book will consider defamation law in the digital age not only using the discussed theoretical basis but also through a number of *data-dissemination* scenarios. These scenarios describe the various ways that personal, potentially defamatory content can find itself distributed on the internet. The way in which this information is deposited online has repercussions for claimants, in terms of how and against whom they can bring an action in defamation. It also has repercussions theoretically, as will be argued in this book, in terms of how the present law should be interpreted to best protect claimants who are increasingly being defamed online. The web is inherently complex, both practically and legally; these scenarios help in understanding both how the web works and the best routes for legal recourse when someone is defamed in this particular way. These defamation scenarios will also streamline analysis that will be undertaken when this book turns to the alternative course of action that an individual can undertake to remove defamatory personal data on the internet; the ‘right to be forgotten’, also known as the right to erasure in Article 17 of the UK GDPR. These dissemination scenarios are not exhaustive and discussion of legal eventualities will take place in this book outside of these categories; however, these scenarios are nonetheless significant as a methodology anchoring discussion of the most prevalent difficulties facing defamation law in the digital era.

The *data-dissemination* scenarios are such:

### ***1. The defamation by social media scenario***

Person Z uploads defamatory, personal information about person M to a social networking site that is accessible on the internet – powered by cloud-computing technology.

This could be to a more traditional social media site, such as Facebook or X/Twitter, or to a more modern version of such a site, like TikTok or Snapchat, which focuses on short-form video or photographic content rather than text. Legal questions arising from this scenario include how seriously defamatory content posted online rather than through traditional print media is considered at common law and whether content posted to social media in this way would likely satisfy the serious harm threshold as per s 1 of the Defamation Act 2013. A further question is the impact of ‘re-posting’ defamatory content that has been spread on social media in this way, either in meeting the serious harm threshold or in terms of other routes to redress for claimants.

## ***II. The third-party poster scenario***

In this *data-dissemination* scenario, defamatory content has reached the internet through being posted by person P to website Q. The owners of the host website believe in upholding freedom of expression on the internet and do not have time to regularly monitor all of the comments uploaded to their website. This particular scenario would engage the s 5 defence for operators of host websites and the annexed regulations within the statutory instrument.<sup>117</sup> Broadly explained, if a claimant complains they have been defamed in the post of a third-party to website *host*, it is a defence for a website host to comply with the terms of the statutory instrument. The regulations stipulate that the host must contact the author of the post to request their identification details so action can be taken against them; if they refuse (or cannot be contacted), the post will be removed after

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<sup>117</sup> See The Defamation (Operators of Websites) Regulations 2013, UK Statutory Instruments 2013 No 3028 [www.legislation.gov.uk/ukxi/2013/3028/schedule/made](http://www.legislation.gov.uk/ukxi/2013/3028/schedule/made) accessed 8 August 2024.

five days.<sup>118</sup> There are questions around how this defence will be interpreted by the courts in practice and whether it represents an appropriate balance between protecting the reputations of individuals and fostering freedom of speech on online platforms.

### ***III. The defamation by AI tool or virtual world scenario***

In this scenario, individual F is defamed by artificial intelligence (AI)-powered software and this defamatory content is then uploaded on the internet. There is a range of potentialities housed under this particular scenario. As AI gains provenance, it continues to be funded by large corporations and enhanced by further research to strengthen its machine-learning capabilities. The more developed AI tools become, the more likely convincing deepfakes can be easily constructed and then uploaded online in picture or video form to convey a defamatory meaning. Even in 2025, AI already presents a myriad of defamatory potentialities; as discussed in [Chapter 1](#), the website [character.ai](https://character.ai) hosts a range of chatbots, some bearing close resemblances to real people.<sup>119</sup> Chatbots could seemingly engage in conversations, powered entirely by machine learning, that could potentially render defamatory meanings. Augmented reality tools – which are even more prominent – could be used to create videos or images that could result in a defamatory innuendo by manipulating images against real-world backgrounds. Further, this scenario will also consider the possibility where person F is defamed by an avatar in a virtual world; the defamatory statement is communicated via voice or text in an online world to other living individuals, also inhabiting avatars (with access to the virtual world using a VR headset). Questions

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<sup>118</sup> Ibid Schedule 2.

<sup>119</sup> See <https://character.ai/> accessed 3 July 2025.

arise of jurisdiction, intention and who the appropriate defendant would be in such cases.

#### ***IV. The repetition of statements online over a year later scenario***

In this scenario, person W publishes a defamatory statement *on the internet* that has previously been published over a year earlier. Section 8 of the Defamation Act 2013 abolished the common law rule of *Brunswick v Harmer*, that every republication of a defamatory statement gave rise to a fresh cause of action, as it engenders new reputational harm.<sup>120</sup> This long-standing common law rule worked in favour of those defamed, as it gave claimants a fresh route to redress if a defamatory statement about them was repeated, with its previous utterance long since forgotten. In abolishing the multiple publication rule, the new s 8 ‘single publication rule’ states that time starts to run on the date of a defamatory statement’s first publication – after a year has passed, it prohibits any further action taken against the republication of the defamatory statement *in substantially the same form* by the same publisher. How widely the concept of ‘substantially the same form’<sup>121</sup> should be interpreted is ripe for consideration, in how it relates to the differences between posts first published in print and then appearing online or vice versa, and what exactly is meant by substantially the same form as far as posting on the internet is concerned (be it published on social media, the virtual world, collated by an AI tool or otherwise).

<sup>120</sup> *Duke of Brunswick v Harmer* [1950] 175 ER 441.

<sup>121</sup> There is some guidance in sections (4) and (5) of s 8 Defamation Act 2013, although these still require the courts to flesh them out through case law.

***V. Concluding remarks for Part II***

These scenarios will be discussed, along with other prevalent legal issues, in [Chapter 3](#). The dissemination scenarios are forms of literary methodology and not intended to incorporate all of the discussions that this book will engage in concerning online defamation. Rather, they are touchstones of some of the most pressing online eventualities that must be addressed in order to help both academics and practitioners navigate the interpretation of defamation law in the digital world. The [next chapter](#) of this book will examine each of these scenarios in turn.