

DEFAMATION MODULE

“Sticks and stones will break my bones, but words will never hurt me” – so goes the popular adage. The law of defamation though, would beg to differ. If every sanction in this module can be imagined as a tussle between free expression and a competing value, then that value in the instance of Defamation law is the right to Reputation. Multiple understandings of the idea of reputation permeate and guide the development of Defamation law. The course material aims to unpack those variegations before proceeding to engage with the struggle between free expression and reputation.

Lawrence Friedman categorizes reputation as being integrally a question of information flow.¹ A study of reputation is a study of the flow of information about other people, and the power to control that flow. Reputation for many people is as much a product of what others do not know about them, as it is about publicly available information. Truth is a defense to a claim of defamation, but only in civil cases is it an absolute one, while in criminal defamation, there is a question of public interest involved. To that extent, the law clearly privileges a certain ambit of privacy claimed by an individual, acting as a deterrent from it crossing over into the public domain.

The question of how we define defamation then becomes an important entry point in navigating the public/private divide. In discussing the rationale behind criminalizing blackmail, James Boyle roots it in the law’s unwillingness to commodify relationships in the private realm.² The act of commodifying could itself be seen as a violation of the private realm. To commodify a violation of privacy, then, would be doubly reprehensible. This proposition is supported by the way blackmail law allows the victim to determine whether or not particular information is of a nature that should be hidden, whether it can, in other words, become the subject matter of a blackmail attack. As he notes, the comparison to the law of libel is instructive.

¹ See Lawrence Friedman, *GUARDING LIFE’S DARK SECRETS: LEGAL AND SOCIAL CONTROLS OVER REPUTATION, PROPRIETY AND PRIVACY*, Stanford University Press, 2007.

² James Boyle, *SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY*, Harvard University Press, 1996.

INDEX		
I.	Reputation	2
II.	A Brief History of Defamation	5
III.	Elements and Defences	7
IV.	The Process is the Punishment: Defamation as a tool against Free Expression	10
V.	Production of Knowledge/ The Social Life of Defamation	12
VI.	An Ideal Law of Defamation?	15

I. Reputation

Readings

- Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution* (1986), Faculty Scholarship Series, Paper 217, available at http://digitalcommons.law.yale.edu/fss_papers/217.
- What's in a Name? (The Economic Times. March 8, 2003), available at http://www.reputationinstitute.com/press/India_030803.html
- *The Englishman v. Lala Lajpat Rai* ((1910) ILR 37 Cal 760)
- *Indian Express Newspapers v. Jagmohan Mundhra and Anr* (AIR 1985 Bom. 229.)
- *Janardan Karandikar v. Tilak*
- *Sonakka Gopalagowda Shanthaveri v. U.R. Anantha Murthy and Ors.*, (AIR 1988 Kar. 255)

The first section of the module uses a seminal Robert Post article to approach the idea of Reputation from different perspectives, accompanied by relevant Indian caselaw. **Post delineates the idea of reputation into three strands: as property, as honour and as dignity³.**

³ Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution* (1986), Faculty Scholarship Series, Paper 217, available at http://digitalcommons.law.yale.edu/fss_papers/217.

First, following the Lockean understanding of property, he defines reputation as something that one creates and earns, with the concomitant State interest then following the rationale for protecting private property.

Coming to Indian case law, that “property” depreciated in *The Englishman v. Lala Lajpat Rai*⁴ when the Court found that the damages done to the reputation of a person who had a great role to play in inflaming the minds of the crowd against Government should be treated at a far lower level than that of a person who was not in the same position. The “trading character” of the Indian Express was the subject of a reputational attack in *Indian Express Newspapers v. Jagmohan Mundhra and Anr.*⁵ The case is relevant in exemplifying how acts of free expression as commentary tend to be subverted by various tools of the law – in this case, defamation.

Post notes that a pure economic analysis, as this approach undertakes, cannot however account for all the ins and outs of defamation law, nor can it give us a satisfying definition of reputation.

In understanding reputation as honour, Post says that reputation may not always stand in line with the values of the marketplace – The Bible for instance, asserts that a good name be chosen rather than great riches. In this approach to reputation, it cannot be earned; rather, it is ascribed. The individual “personally identifies with the normative characteristics of a particular social role and in return personally receives from others the regard and estimation that society accords to that role.” The State interest here lies in protecting the social structure, with the understanding that Defamation law affirms and *produces*

What is the centrality of reputation to the human experience? Rousseau believed that our need for reputation arose as soon as humankind emerged from the state of nature into communal existence: “Man lives constantly outside himself, and only knows how to live in the opinion of others, so that he seems to receive the consciousness of his own existence merely from the judgment of others concerning him”.

normative standards of human conduct. Vindication is an important term in this analysis, and it is the key word in *Janardan Karandikar v. Tilak*⁶: An action for defamation failed when the Court found that the defendant was responding to the plaintiff’s own defamatory statements in the first place, and thus resolved to the strong usage of language in an effort to vindicate himself.

⁴ (1910) ILR 37 Cal 760.

⁵ AIR 1985 Bom. 229.

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Post finally evaluates dignity as a component of reputation, saying it involves violations of society's rules of civility and the idea of community membership: the understanding here is that violation of an individual's reputation leads to a breach in understood norms of reciprocal civil behavior, and a threat of exclusion from membership of the community. The dual functions of defamation law then become protection of the individual's interest in his own dignity, and protection of society's own interest in maintaining its own rules of civility and thus its own constitution. Defamation law then serves to provide confirmation (or rejection) of the individual's community membership.

In *Sonakka Gopalagowda Shanthaveri v. U.R. Anantha Murthy and Ors*⁷, the Karnataka High Court adjudicated a claim for restraining republication of an allegedly defamatory account of politician Gopala Gowda, as well as exhibition and screening of a film based on the novel. The plaintiffs claim of merely one rupee was encouraged by the Court - "loss of reputation and consequent loss of character and dignity in one's life cannot be compensated in terms of money".

⁷ AIR 1988 Kar. 255

II. A Brief History of Defamation

Readings

- Van Vechten Veeder, *The History and Theory of the Law of Defamation*, Columbia Law Review, Volume 3, Number 8, December 1903.
- *Doubt*, Miramax, 2008.
- Rajeev Dhawan, *Private Lives and Public Reputations: Career and Prospects of the Law of Defamation in India*, in PUBLISH AND BE DAMNED, Tulika Books, 2008. (p. 101-112)
- *No Stopping Movie View of Mark Zuckerberg*, The New York Times, October 3, 2010.
- *Easy A*, Screen Gems, 2010.
- “Bad Reputation”, *Glee*, Season 1 (2010)

“Since the law of defamation professes to protect personal character and public institutions from destructive attacks, without sacrificing freedom of thought and the benefit of public discussion, the estimate formed of the relative importance of these objects, and the degree of success attained in reconciling them, would be an admirable measure of the culture, liberality, and practical ability of each age.” So begins Veeder before going on to decry the “grotesque anomalies” of defamation law, in charting the development of libel and slander from the time of the ecclesiastical courts. In locating the modern law of defamation, he finds that compensating harm to reputation was not the original purpose of the law of defamation – slander actions were proscribed by ecclesiastical courts to protect the soul of the slanderer, while libel actions were created primarily as a means of protecting the government from the power of the printing press.

Scandal and gossip are the offshoots of a pop cultural understanding of Defamation. The 2008 ensemble drama *Doubt* features a popular church sermon on the intractable nature of Gossip. Here, our protagonist priest recounts the story of a woman who finds that taking back false tales she has spread is akin to attempting to gather feathers from a split pillowcase floating in the wind.

Dhawan steps in from around the point Veeder's analysis trails off, tracing the development of the law in India from colonial times. Following Macaulay's introduction of defamation as a criminal offence, we see the law developing by way of the unlimited possibilities it offers to harass one's opponents. The module ends with 2 instances of the evolving idea of defamation - vis-à-vis the internet, and in the realm of the modern day celebrity.

A question that should be thrown up for discussion at this point: Is reputation less important today than it once was?

"He that filches from me my good name/ Robs me of that which not enriches him/ And makes me poor indeed". These lines from Shakespeare's Othello find themselves repeated in a surprisingly large number of writings about Reputation. At face value they speak highly of the importance of reputation – and yet, they are uttered by Iago, one of the more despicable Shakespearean villains. True to form, he does an about turn on his position later: *"reputation is an idle and most false imposition, oft got without merit and lost without deserving".*

The importance that the law attaches to reputation might be surveyed with some skepticism: as David Anderson argues⁸, many of our ideas about reputation are products of an era where entire lives were lived in one community; where good reputation was painstakingly earned – and not easily rebuilt when lost. With a growing ease of social, social geographical and professional movement, the notion of reputation is possibly a lot more transitory. Even if one's reputation is harmed, the victim is not condemned automatically to live out his or her life in disgrace. The movie *Easy A* plays fast and loose with modern day transitory ideas of reputation, with its protagonist actually mining a bad reputation advantageously. A bad reputation also seems to be a pretty good aspiration for the Mc Kinley High Glee club in the Season 1 episode of *Glee – Bad Reputation*.

The counterpoint to this devaluing of reputation of course is the sheer velocity of information flow over the internet, and the near-impossibility of any kind of complete retraction of allegedly defamatory material.

⁸ David A. Anderson, *Reputation, Compensation and Proof*, 25 Wm. & Mary L. Rev. 747 (1984), available at <http://scholarship.law.wm.edu/wmlr/vol25/iss5/3>.

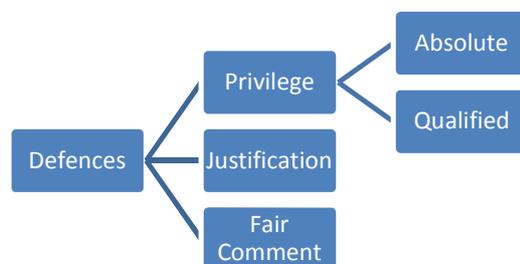
III. Elements and Defences

Readings

- Madhavi Goradia Diwan, *Defamation in FACETS OF MEDIA LAW* (Eastern Book Company, Lucknow)
- Lawrence M. Friedman, “Truth or Fiction”, *Sticks and Stones – The Law of Defamation*, in *GUARDING LIFE’S DARK SECRETS: LEGAL AND SOCIAL CONTROLS OVER REPUTATION, PROPRIETY AND PRIVACY*, Stanford University Press, 2007 (pp. 54 – 62)
- *The Dark Knight*, Warner Brothers, 2008.

Madhavi Diwan discusses various aspects of Defamation law - Common law categorizes libel (published defamation) as a civil and criminal offence, while slander is only a civil wrong; libel is actionable per se while slander requires proof of special damage except in a few cases. Indian law designates both as criminal offences under Section 499 of the Indian Penal Code, while also simultaneously allowing for civil liability. The chief difference between the civil and criminal law of defamation is the significance of good faith in the latter: intention is otherwise considered irrelevant in the tort of Defamation.

As for the essentials of Defamation: the statement in question must be defamatory and injure a person’s reputation. The statement should be defamatory in its ordinary and natural meaning - unless it constitutes an innuendo. Further, any person aggrieved by the offence may make a complaint of defamation, not necessarily the defamed parties themselves. The statement in question must further be published by the defendant. Said publication may take place in a variety of ways such as conversation, verbally, through gestures, by a letter, in a magazine or a newspaper, book, television, film or through the internet.



Diwan goes on to discuss various defences to a charge of defamation. First, the fact that the statement in question is a truthful one serves as a complete defence in civil law. Under the criminal law of defamation however, truth is only a defence when the statement is made in the public good. The second defence, of special relevance to the media since it enables the expression of opinion and fair criticism, is that of fair comment: an opinion made in public interest, in good faith and untainted by malice. Privilege, absolute and qualified, serves as the third general defence. Absolute privilege attaches to statements made in the course of parliamentary, judicial, military, naval and state proceedings. Qualified privilege on the other hand attaches to any occasion where the person who makes a communication has an interest of a duty, legal, social or moral to make it to another person, and this person in turn has a corresponding duty or interest to receive it.

Where Diwan gives us a broad understanding of the law relating to defamation in India, Friedman in his extract is more concerned with evaluating the specific aspect of the defence of truth as a component of the law. He goes on to weed out the public dimension of defamation – the perception being that “*Calumny against people of high station was a threat to the social structure. The law of defamation, at least potentially and if properly structured, could perform a valuable protective service for pillars of the community-and thus for the community itself.*”

The cohesive force, the importance of this kind of protection to “people of high station” plays out in the climactic scenes of *The Dark Knight*, with Bruce Wayne electing to take the fall for Senator Harvey Dent’s crimes so that the latter’s reputation stands – consequently allowing for Gotham City’s social structure to stay in place.

The “Small Penis Rule”, less sinister than it sounds, is an informal strategy used by authors to evade libel lawsuits. This would typically involve slipping in a mention of the target’s unusually small genitalia. The reasoning? “Now no male is going to come forward and say, ‘That character with a very small penis, that’s me!’”

Reputation is the facet of individual personality the society views; character on the other hand is the more intrinsic truth about a person. If Defamation law considers truth to be a defence – more completely where civil law is concerned – how does this affect the moral basis of the law?

Alternatively, is the fact that reputation is simply a snapshot of a person’s character that may not have

any basis in reality mean it is a flawed value? To what extent *then* should Defamation law aim to protect such a conjectured illusion?

IV. “The Process is the Punishment”: Defamation as a tool against Free Expression

Readings

- G.W. Pring and P. Canan, *Strategic Lawsuits against Public Participation*, Social Problems, Vol. 35, No. 5, December 1988.
- S.P. Sathe, *Defamation and Public Advocacy*, *Economic and Political Weekly*, Vol. 38, No. 22 (May 31 - Jun. 6, 2003), pp. 2109-2112, <http://www.jstor.org/stable/4413610>.
- Kamayani Bali Mahabal, *A Cheeky Videogame by Greenpeace but Corporate Giant TATA is not amused*, The Free Speech Hub available at <http://www.thehoot.org/web/freetracker/story.php?storyid=134§ionId=15>
- Subramaniam Swamy, *Defamation Litigation: A Survivor’s Toolkit*, The Hindu, available at <http://www.hindu.com/2004/09/21/stories/2004092103551000.htm>.
- Gordon Rayner, *How Libel Tourism became an embarrassment to Britain’s reputation*, The Telegraph, available at <http://www.telegraph.co.uk/news/7301403/How-libel-tourism-became-an-embarrassment-to-Britains-reputation.html>.
- *S. Charanjit Singh v. Arun Purie*, (1983) 4 DRJ 86
- *R. Rajagopal v. State of Tamil Nadu*, (1994) 6 SCC 632
- *IIPM v. Caravan Magazine*, Silchar District Court 2011.
- *The People vs. Larry Flynt*, Columbia Pictures, 1996.
- “The Death Zone”, *The Good Wife*, Season 3 (2011).

A term first used in the opening reading of this section, SLAPPs refer to cases where suits have been filed with the intent of silencing voices of protest and public opinion. Defamation law’s proclivities to SLAPP litigation are detailed in the subsequent readings. The cases present a clear imbalance in the protection of reputation vis-à-vis free speech: the mere process of summons and deposing evidence in far-off courts often results in compromises, whereas civil cases follow the conservative traditions of English law in granting injunctive relief.

R. Rajagopal v. State of Tamil Nadu – popularly referred to as the Auto Shankar case – is a particularly important free speech/ defamation related- judgment. At the heart of the case were

the memoirs of a serial killer, which exposed the criminal conduct of police and prison officials. In working out a balance between free speech and governance, the Court effectively took away the privilege hitherto enjoyed by public officials to stifle public discussion on the discharge of public interest.

Auto Shankar and his gang were found responsible for the murders of 6 teenage girls over a period of 2 years. He initially blamed the cinema for influencing him – it “made a devil of him” – but a month before his execution stated that he had kidnapped the girls for sexual abuse by powerful state politicians.

The shadow of the judgment doesn't seem to have fallen far enough however, as demonstrated by a recent free speech challenge – this time involving a Rs. 50 crore suit filed by IIPM against Caravan magazine for a piece on Arindam Chaudhari filed not in Delhi (where both IIPM and the magazine's publisher, Delhi Press are based) but 2,200 km away in Silchar, Assam.

Forum shopping rears its head in the form of libel tourism, which, *The Telegraph* notes, is a stamp that the UK is becoming increasingly notorious for. The broad requirement for publication coupled with the reach of the internet has contributed in making the country a forum of choice for litigants seeking injunctions or compensatory relief. The episode of *The Good Wife* included in this module deals with one such case, in the process following the life of a particularly twisted defamation trial as it winds to a conclusion nestled under the defense of a statement made in public interest.

The People v. Larry Flynt finds an unlikely battle for free speech playing out, prominently featuring a libel case brought against Hustler magazine by politician Jerry Falwell.

V. Production of Knowledge/ The Social Life of Defamation

Readings

- Legal Notice issued to Gaurav Sabnis by IIPM, available at <http://gauravsabnis.blogspot.com/2005/10/im-disconnecting-my-cable-connection.html>
- *Bite in the Blog Bark*, Outlook Magazine, available at <http://www.outlookindia.com/article.aspx?229084>
- The trial of Oscar Wilde, available at <http://law2.umkc.edu/faculty/projects/ftrials/wilde/Wildelibeltranscript.html>
- Manish Tewari apologizes in writing; Hazare closes case, available at <http://economictimes.indiatimes.com/news/politics/nation/manish-tewari-apologises-in-writing-anna-hazare-closes-case/articleshow/10071962.cms>

Acts of prohibition produce their own objects, says Annette Kuhn⁹. Regulation is not an imposition of rules upon some pre-existing entity, but a process of constituting objects from and for its own practices.

By way of the different kinds of imputations that crop up before the Courts in Defamation matters, we may trace a legal vocabulary of insulting words. These cases further act to produce categories of individuals that are deserving of being defamed: in the example here, the infamous trial of Oscar Wilde carves out the category of Sodomite into judicial discourse.

Though married, Wilde maintained several “associations” with men, one of his better known relationships being with Lord Alfred Douglas, the son of the Marquess of Queensbury. Historical accounts are not clear, yet it was well-established that the Marquess did not approve of such an intimate relationship between his youngest son and Mr. Wilde. On 10 February 1895, the Marquess visited the Albemarle Club (which Oscar Wilde was a member of) in search of Mr. Wilde, not having found him there; he left his visiting card with the porter on which he had

⁹ Annette Kuhn, *CINEMA, CENSORSHIP AND SEXUALITY, 1909-1925*, Routledge Publications 1988.

written “Oscar Wilde posing as a sodomite”. On 1 March, 1895, a warrant was applied for and the Marquess was arrested the next day¹⁰.

Wilde’s famous wit didn’t desert him even when he was on the stand.

Cross Examiner: What was there in common between this young man and yourself? What attraction had he for you?

Wilde: I delight in the society of people much younger than myself. I like those who may be called idle and careless. I recognize no social distinctions at all of any kind; and to me youth, the mere fact of youth, is so wonderful that I would sooner talk to a young man for half-an-hour than be, well, cross-examined in Court.

In the trial that ensued, Edwards Clarke was the counsel for the plaintiff and Edward Carson for the defendant. For the defence, Mr. Carson called several witnesses, some of who were supposedly Oscar Wilde’s earlier love interests. He also cross-examined Mr. Wilde about certain ambiguous pieces of literature written by him. Eventually, Mr. Clarke had to withdraw the prosecution as the defence had substantially established that the statement made by the Marquess of Queensbury was true, i.e. that Oscar Wilde had indulged in acts of gross indecency and sodomy¹¹.

Defamation law creates categories of disrepute: it also generates a certain threat. As the readings in the prior module demonstrate, the process may very well be the punishment. The generation of this idea of a threat can be prominently observed in IIPM’s prior face-offs with other individuals. In 2005, Rashmi Bansal’s magazine ran an “expose” unveiling the truth behind claims made by IIPM, which then demanded Rs. 25 crore from her for the presumed loss of goodwill. In quick succession, Gaurav Sabnis an IBM India employee posted his ire-filled reactions to the incident along with a link to the JAM article on his web page. IIPM pursued him with a legal notice for a Rs. 125 crore suit.

¹⁰ Trial Transcript, Opening Speech of Sir Edward Clarke, April 3, 1895, available at: <http://www.law.umkc.edu/faculty/projects/ftrials/wilde/wilde.htm>, last accessed on 05/08/2011.

¹¹ Trial Transcript, Withdrawal of Prosecution, April 5, 1895, available at: <http://www.law.umkc.edu/faculty/projects/ftrials/wilde/wilde.htm>, last accessed on 05/08/2011.

The legal notices as far as Gaurav Sabnis and Rashmi Bansal were concerned were premised on future events that did not – and quite probably would not – actually happen. And yet, the threat that was created will continue to be real – since it was *felt* to be real (Sabnis’ tongue-in-cheek reaction to the notice notwithstanding). Threat has an affective reality in the present – that of fear.¹² As Brian Massumi notes, the affective reality of threat is contagious – every singular incident featuring a particular threat stands as a frame of reference for future echoes. In this instance, the threat of legal action (never mind the legitimacy of the speech act or the implausibility of actual damages being awarded) will stand to preclude future dissenters from freely exercising free expression.

Finally, how is it that we perceive defamation law? What are the remedies that people think open to them when pursuing a defamation suit? And what does it mean to be *accused* of making a defamatory statement? The back and forth surrounding Anna Hazare’s campaign serves as one kind of entry point in examining these issues.

“Some newspapers and magazines have published articles that defame the core committee members, and are misleading people. [Congress leader] Digvijay Singh has been saying that the Jan Lokpal Movement is backed by the RSS. We will serve defamation notice on such people and ask for an apology.” This statement by Prashant Bhushan features the campaign actively using the threat of defamation action. It may be noted here that the question is of serving a legal notice to the offenders, and asking for an apology, as opposed to having the matter really be mediated by the courts. Congress spokesman Manish Tewari’s statement that Hazare was “Corrupt from head to toe” led to him being served with a notice from the campaign, one that was only recalled after a written apology was tendered. Again, the *nature* of the apology demanded may be noted here: Hazare’s team was not satisfied with a mere spoken recantation, and instead only closed the matter in the wake of a written apology from Tewari.

¹² Brian Massumi, *The Future Birth of the Affective Fact*, in Melissa Gregg and Gregory J. Seigworth (eds.), *THE AFFECT THEORY READER*, Duke University Press 2010.

VI. An Ideal law of Defamation?

Readings

- Briefing Note on International and Comparative Defamatory Standards, Article XIX.

The Government expressed its intention in early 2011 to move towards decriminalizing defamation - with members of the Union Cabinet agreeing that the criminalization of defamation has produced malicious prosecution of journalists. At this juncture, it will be fitting to re-examine the law on Defamation as a whole keeping as a touchstone the principles evolved by the NGO, Article XIX which have been endorsed in the past by the UN Special Rapporteur on Freedom of Opinion and Expression.