

THE LOCUS OF DEFAMATION LAW SINCE THE CONSTITUTION OF OXFORD

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Defamation law has a long history — being established, as a result of the Fourth Lateran Council, in the first half of the 13th century. Unsurprisingly, given its age, the nature of what was being protected by defamation law has not been consistent over that time. This research maps the focus of the action across the medieval period, the 17th century, and the 19th century. That, at different stages, there have been emphases on ‘false facts’, ‘honour’, ‘character’, ‘name’ and ‘reputation’ shows that the law has not been stable. The argument is not that the law should be stable, but that any assumptions around the centrality of reputation over the course of the development of defamation law are ill-founded.

I INTRODUCTION

The concept of ‘reputation’ is said to be central to the law of defamation. A majority judgment of the High Court of Australia, for example, opened with the claim that ‘[t]he common law recognises that people have an interest in their reputation and that their reputation may be damaged by the publication of defamatory matter about them to others’¹ — thereby directly linking reputation and defamation. McNamara, further, asserts, in the opening sentence of his text, that the ‘aim of defamation law ... is to protect reputation’.² There is no room in these statements for anything else to be protected by the (current) law.³ In addition, the noted historian Holdsworth, when writing of the early modern law, refers to civil claims for defamation as compensating for the ‘loss of reputation’.⁴ This suggests that defamation, since the beginning of the 20th century at least, has been inexorably linked with the protection of reputation.

The timing of this modern emphasis may be seen to reflect a particular, and historically contextualised, view of the ‘self’. This is evident in the law’s expanded definition of the impact of defamatory words: the ‘injuries that [a plaintiff] sustains may be classified under two heads: (1) the consequences of the

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1 *Radio 2UE Sydney Pty Ltd v Chesterton* (2009) 238 CLR 460, 466.

2 Lawrence McNamara, *Reputation and Defamation* (Oxford University Press, 2007) 1.

3 Further, a ‘libel action is fundamentally an action to vindicate a man’s reputation’: *Associated Newspapers Ltd v Dingle* [1964] AC 371, 396, quoted, with approval, in *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44, 69.

4 W S Holdsworth, ‘Defamation in the Sixteenth and Seventeenth Centuries’ (Pt 1) (1924) 40 *Law Quarterly Review* 302, 302. See also Frank Carr, ‘The English Law of Defamation: With Especial Reference to the Distinction between Libel and Slander’ (1902) 18 *Law Quarterly Review* 255, 256; R C Donnelly, ‘History of Defamation’ [1949] *Wisconsin Law Review* 99, 99.

attitude adopted towards him by other persons ... and (2) the grief or annoyance caused by the defamatory statement to the plaintiff himself”.⁵ This understanding requires an acknowledgement of an ‘internal life’ of both the defamed party and of others who may hear of the defamed party. Recent research has indicated that the English legal system only began to engage, significantly, with the internal life of parties in the 19th century.⁶ This relatively recent interest of the English courts,⁷ in turn, suggests that earlier courts would not have had the same sense of reputation in mind when deciding defamation cases.

That is not to say that the current conception of reputation is straightforward. Central to contemporary understandings of ‘reputation’ is Robert Post’s work that argues that there are three distinct notions that are bound up in the notion — ‘property’, ‘dignity’ and ‘honour’.⁸ This is in contrast to a recent high-profile defamation case, involving the actor Rebel Wilson, that linked the ‘reputation’ of the plaintiff with their ‘honesty, integrity and judgment’.⁹ Obviously, this is a different grab bag of concepts of the self than ‘dignity’ and ‘honour’ — that, in turn, highlights the inconstant meaning of ‘reputation’. There are two other broad issues to be taken with Post’s characterisation. First, he does not extend his analysis back beyond the early modern period; and second, his argument is explicitly centred on the law of the United States. These limitations, coupled with what appears to be his static understanding of what is to be protected by the law (despite the fact that he takes his concepts from different points in history), suggest that his characterisation is worth revisiting.

This piece, therefore, goes back to the 13th century, through to the 19th century, in order to produce a more complete understanding of what has been protected by

5 *McCarey v Associated Newspapers Ltd [No 2]* [1965] 2 QB 86, 107, quoted, with approval, in *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44, 70–1.

6 For example, in the 19th century, trade mark law began to consider that customers could be ‘confused’: Chris Dent, ‘Confusion in a Legal Regime Built on Deception: The Case of Trade Marks’ (2015) 5 *Queen Mary Journal of Intellectual Property* 2. Conduct, across a range of areas, began to be assessed in terms of the ‘reasonableness’ of the parties: Chris Dent, ‘The “Reasonable Man”, His Nineteenth-Century “Siblings”, and Their Legacy’ (2017) 44 *Journal of Law and Society* 406; and, while ‘consent’, for a medical procedure, was first raised in *Slater v Baker* (1767) 2 Wils KB 359; 95 ER 860, ‘informed consent is a more recent phenomenon’: Ruth R Faden, Tom L Beauchamp and Nancy M P King, *A History and Theory of Informed Consent* (Oxford University Press, 1986) 114. Faden, Beauchamp and King were writing of the US law; however, there is no indication that the English doctrine developed any earlier — note, for example, Justice Peter W Young, *The Law of Consent* (Law Book, 1986) ch 9, with his discussion of late 19th and early 20th century cases. More generally, law only took a significant interest in what parties knew (a key aspect of their internal life) after the Enlightenment: see, further, Chris Dent, ‘The Rise in References to “Knowledge” in 19th Century English Law’ (2016) 16 *Legal History* 27.

7 For a discussion of this shift in the US context, see Susanna L Blumenthal, *Law and the Modern Mind: Consciousness and Responsibility in American Legal Culture* (Harvard University Press, 2016).

8 Robert C Post, ‘The Social Foundations of Defamation Law: Reputation and the *Constitution*’ (1986) 74 *California Law Review* 691.

9 *Wilson v Bauer Media Pty Ltd* [2017] VSC 521 (13 September 2017) [59], quoting *Hockey v Fairfax Media Publications Pty Ltd* (2015) 237 FCR 33, 113 [446]. The appeal in this case, reported as *Bauer Media Pty Ltd v Wilson [No 2]* (2018) 361 ALR 642, focused on the damages awarded, and therefore did not challenge the legal test of harm used in the lower court.

defamation actions. It will be shown that, in addition to Post's 'honour',¹⁰ there was the individual's protection from 'false facts' about them and the protection of the role of 'offices', as well as 'name' and 'character'. This historical investigation makes it clear that 'reputation' was never the only, or even the central, concept to be protected. Given the constraints of publication, it does not profess to be a complete history; instead, it is a sampling of three key periods over the past 800 years. This overview shows that there was, in fact, little room in the past statements of the law for Post's ideas of 'property' and 'dignity'.¹¹

First, however, there needs to be an engagement with the terms 'defamation', 'libel' and 'slander'. The latter two terms came to have distinct, and specific, meanings in the law for a while and then they became assimilated.¹² As the two actions have not always been separate,¹³ for simplicity's sake, and because the focus of this research is on that which is being protected, the discussion here will focus on defamation broadly. The term defamation will, therefore, be used throughout as it has specific links with the language of the Fourth Lateran Council — the starting point for the law in the area.

II THIRTEENTH TO FIFTEENTH CENTURIES

The consideration of the historical episodes of defamation law in England starts in the Late Middle Ages. It is not novel to assert that, in that period, proceedings in the manorial courts, those in the ecclesiastical courts and those for *scandalum magnatum* are relevant to a history of defamation. That there were more than three distinct jurisdictions used for actions for defamation¹⁴ at least suggests that caution should be taken when analysing the period. It is easy to assume that all three were used for the same purpose, and with the same world view, as informs defamation actions in the 21st century. A more nuanced reading suggests that, instead of the modern conception of 'reputation', the focus of the actions was on 'false facts'.

- 10 It may be noted that another area of law, also relating to the regulation of expression, suggests that 'honour' and 'reputation' are distinct concepts. 'Derogatory treatment', with respect to the moral rights of authors, is defined, in part, as 'anything ... that is prejudicial to the author's honour *or* reputation': *Copyright Act 1968* (Cth) s 195AJ (emphasis added).
- 11 Post, also, based his discussion of 'reputation' as 'dignity' on the reception of a mid-20th century US case (*Rosenblatt v Baer*, 383 US 75 (1966)): Post, above n 8, 707–8; and as such may be seen to have been established in (US) law after the period covered in this article.
- 12 Mitchell provides a good overview of the separation, and the assimilation, of the two actions: Paul Mitchell, *The Making of the Modern Law of Defamation* (Hart Publishing, 2005) ch 1.
- 13 It has been noted that, despite the medieval origins of defamation, the 'distinction has [only] been made between written and spoken slander as far back as Charles the Second's time, and the difference has been recognized by the Courts for at least a century back': *Thorley v Lord Kerry* (1812) 4 Taunt 355, 364; 128 ER 367, 371.
- 14 There were also the borough courts. These courts were a feature of 'vills ... which have attained a certain degree of organization and independence': Sir Frederick Pollock and Frederic William Maitland, *The History of English Law before the Time of Edward I* (Liberty Fund, first published 1895, 2010 ed) vol 1, 560.

A The Origin of Defamation in England

The origin of the action in England was ‘a constitution enacted by the Council of Oxford in 1222’.¹⁵ This, in turn, was based on the Canons of the 1215 Fourth Lateran Council — with the Oxford document reflecting the efforts of the ‘first provincial council to legislate’ to incorporate the Pope’s decrees into the administration of the Church in England.¹⁶ This means that the first forum to adjudicate claims for defamation was ecclesiastical.¹⁷ The provision in the Constitution read:

We excommunicate all those who, for the sake of hatred, profit, or favour, or for whatever other cause, maliciously impute a crime to any person who is not of ill fame among good and substantial persons, by reason of which purgation at least is awarded to him or he is harmed in some other manner.¹⁸

First, the centrality of the spiritual is evident — the penalty has primacy in the provision and that penalty is excommunication. Second, the words ‘reputation’ and ‘honour’ are not used.

While others have highlighted the relevance of the Lateran Council,¹⁹ there has not been an engagement with the role of speech within the Church that was formalised by the Council. Without understanding the foundation of the provision, there can be less clarity about its purpose and intended operation — particularly as there is no ‘immediate connection’ between the Constitution and the Lateran decrees.²⁰ So, speech is seen to have primacy in a number of canons.²¹ Canons 2 and 3 prohibit heresies — with the former focused on the work of Joachim of Fiore. Canon 9 requires that, in polyglot dioceses, the bishop should ensure that all languages are accommodated in the ministries. Canon 18 holds that priests cannot be involved in trials by ordeal²² — thereby privileging the role of juries and oral evidence in court. Canon 21 requires all followers to make confession at

15 R H Helmholz, ‘Canonical Defamation in Medieval England’ (1971) 15 *American Journal of Legal History* 255, 256.

16 C R Cheney, ‘Legislation of the Medieval English Church’ (Pt 2) (1935) 50 *English Historical Review* 385, 389.

17 The jurisdiction of the ecclesiastical courts, rather than the royal courts, to hear defamation actions was formalised by the *Statute of Circumspecte Agatis* 1285, 13 Edw 1.

18 R H Helmholz (ed), *Select Cases on Defamation to 1600* (Selden Society, 1985) xiv.

19 See, eg, McNamara, above n 2, 72.

20 Helmholz (ed), *Select Cases on Defamation to 1600*, above n 18, xiv. Cheney highlights that there is no single, authoritative, text of the Oxford Constitution (Cheney, above n 16, 390); however, there is nothing to suggest that provision in the Constitution relevant to the defamation action was not part of the original version of the document.

21 A useful, though not necessarily authoritative, translation may be found at *Medieval Sourcebook: Twelfth Ecumenical Council: Lateran IV 1215*, Fordham University <<https://sourcebooks.fordham.edu/basis/lateran4.asp>>.

22 It may be noted that this Canon from the Lateran Council did not appear in the Oxford Constitution suggests that the ‘custom [of trial by ordeal] was already dying in England’ (Marion Gibbs and Jane Lang, *Bishops and Reform 1215–1272: With Special Reference to the Lateran Council of 1215* (Oxford University Press, 1934) 129), despite the fact that the ‘rights’ to ordeals lasted ‘long after 1215’: Paul R Hyams, ‘Trial by Ordeal: The Key to Proof in the Early Common Law’ in Morris S Arnold et al (eds), *On the Laws and Customs of England: Essays in Honor of Samuel E Thorne* (University of North Carolina Press, 1981) 90, 113.

least once a year.²³ Canon 47 requires a previous admonition, in the presence of ‘suitable persons’, before a person can be sentenced to excommunication. Canon 52 states that hearsay, and so the risk of false evidence, is not permitted, except in limited circumstances, when assessing the issue of consanguinity. The truth of statements is central to these requirements. As such, the Lateran Council, and therefore the Oxford Constitution, demonstrates the institutional importance of *true* speech.

Helmholz provides a thorough reading of the Constitution in light of canon law — and highlights that it was ‘unjustifiable to make a public accusation without being able to prove the accusation’s truth’.²⁴ This, at least, supports the importance of true speech.²⁵ He further writes that the

canon law did adopt the substantive civil law notion that words as well as physical acts could do compensable harm ... [with] Panormitanus [writing] ‘Note firstly from the text that also in the canon law one is held to make satisfaction for damage caused by fault or negligence.’ ‘If I falsely impose insults on you outside a court of justice, I am bound’.²⁶

Neither of these privilege reputation over false speech. Hostiensis is also quoted at the same point — ‘whoever shall say or do anything in order to diminish the reputation of another is held for *iniuria*’.²⁷ It is possible that the term ‘reputation’ is imported from Roman law (as suggested by the term ‘*iniuria*’);²⁸ Helmholz, however, makes it clear that the English law of defamation is not of the same scope as Roman law.²⁹ Finally, with respect to disputes in the ecclesiastical

23 Confession was not new to the Church at this point. ‘For centuries [before the Lateran Council] various ecclesiastical pronouncements had exhorted [followers] to confess their sins several times a year and they would have heard these exhortations frequently repeated each Lent’: Pierre J Payer, ‘Foucault on Penance and the Shaping of Sexuality’ (1985) 14 *Studies in Religion* 313, 315. Despite the lack of novelty, the Council’s inclusion of the Canon reinforces the centrality of speech.

24 Helmholz (ed), *Select Cases on Defamation to 1600*, above n 18, xvi.

25 The counterclaim is that the reference to the defamed as being of ‘ill-fame’ necessarily imports a conception of reputation. The phrase in the Latin version of the text is ‘*infamatus non*’ — which is (a) a double negative — so not being ill-famed is not the same as having a good reputation; and (b) may be translated as being ‘not disgraced’ — and, so, not having been shown to be out of grace. The notion of ‘grace’, of course, reinforces the religious aspect of the provision. Further, the related term ‘*fama*’ ‘possessed multifarious definitions’ in the Middle Ages; it ‘could mean “rumor” and “idle talk”; “the things people say”; “reputation”; “memory” or “memories”; “the things people know”; “fame”, or perhaps “glory”’: Mary C Flannery, ‘Brunhilde on Trial: *Fama* and Lydgate Politics’ (2007) 42 *Chaucer Review* 139, 139. Again, this renders problematic a single, authoritative, translation of the provision in the Oxford Constitution.

26 Helmholz (ed), *Select Cases on Defamation to 1600*, above n 18, xx (citations omitted).

27 *Ibid* (citations omitted).

28 Taliadoros highlights that the Archbishop of Canterbury, Stephen Langton, a key player in the importation of the work of the Lateran Council to England, was a ‘man deeply learned in canon law’: Jason Taliadoros, ‘The Roots of Punitive Damages at Common Law: A Longer History’ (2016) 64 *Cleveland State Law Review* 251, 271. This background, however, does not require that the application of the provision by the courts, to be discussed below, fit well with the Roman law doctrine.

29 Helmholz (ed), *Select Cases on Defamation to 1600*, above n 18, xix. There is also not the scope here to go into the differences between Roman law and the common law in detail. As a result, this article focuses on the common law only. For a discussion of the intersection of the two, see Debora Shuger, *Censorship and Cultural Sensibility: The Regulation of Language in Tudor-Stuart England* (University of Pennsylvania Press, 2006) ch 4.

courts, ‘truth operated as a good defence in defamation practice’.³⁰ It appears to be at least arguable that the falsity of the speech was the key concern, rather than the reputation of the defamed party at this point in history.³¹

B The Case Law

Reference may be made to the case law, and other material, that built up from the 13th century in order to clarify how the law operated. In terms of the ecclesiastical cases, the records reproduced by Helmholz are divided, by him, into two groups — those which come from the Cause papers and those that were from the Act books.³² In part because of the action’s origins in the Lateran Council, defamation may be understood as a ‘spiritual offense in medieval England’.³³ The focus of the ecclesiastical courts was, therefore, the ‘soul’ of the defendant — and the Church was ‘answerable for the cleanliness of men’s lives’.³⁴ Maitland notes that a defamer may, for ‘his soul’s salvation ... be chastened by the ecclesiastical courts’ and that the defamed may gain ‘pleasure’ from the sight of ‘one’s adversary doing penance in a white sheet’.³⁵

The Cause paper cases are not complete records, with their emphasis being on the pleadings of the party who considered themselves defamed. The pleadings of the first, and only, 13th century case look to be based on the wording of the Oxford Constitution,³⁶ and therefore focus on ‘false and malicious’ claims, rather than reputation.³⁷ Only one of the four cases from the medieval-era Cause papers included the outcome as well as the pleadings of the defamed — *Robinson c Rayner*.³⁸ The decision in that case made no reference to the reputation of the defamed, instead stating that the ‘plaintiff ... has sufficiently proved and

30 Helmholz (ed), *Select Cases on Defamation to 1600*, above n 18, xxxii.

31 As with defamation law today, there was no need to prove a good name in order to succeed in the dispute — though ‘[p]laintiffs always claimed that they had been of good fame and upright life before the alleged defamation occurred’: *ibid* xxxv–xxxvi.

32 *Ibid* 1. Given the issues of translation, and the ‘sampling’ approach in this history, this research relies on the insuperable work of Helmholz and, later, Maitland for the medieval case law.

33 Helmholz, ‘Canonical Defamation in Medieval England’, above n 15, 255.

34 Van Vechten Veeder, ‘The History and Theory of the Law of Defamation’ (Pt 1) (1903) 3 *Columbia Law Review* 546, 551.

35 F W Maitland, ‘Slander in the Middle Ages’ (1890) 2 *Green Bag* 4, 4. Schofield refers to the fact that ‘public shaming’ through the ecclesiastical courts was a ‘powerful weapon which could be wielded to good effect’: Phillipp R Schofield, ‘Peasants and the Manor Court: Gossip and Litigation in a Suffolk Village at the Close of the Thirteenth Century’ (1998) 159 *Past & Present* 3, 31. There was still, however, the potential for the plaintiff to gain some financial compensation: Helmholz (ed), *Select Cases on Defamation to 1600*, above n 18, xv.

36 Helmholz has noted that ‘[a]ll defamation actions had ... to be based on the precise wording of the constitution’: Helmholz, ‘Canonical Defamation in Medieval England’, above n 15, 257.

37 See, eg, *Gray c Archdeacon of Buckingham* (c 1290) 101 SS 3. The term ‘reputation’ is used, but it is immediately after a claim that the defamed party had ‘canonically purged herself’ — it is possible, therefore, that the reputation stemmed from the purgation, rather than being pre-existing: at 3. Note that, in the case citation, ‘101 SS’ refers to the 101st volume of *The Publications of the Selden Society*, which is Helmholz (ed), *Select Cases on Defamation to 1600*, above n 18.

38 (1424–5) 101 SS 6. It may be noted that the ‘c’ in the case name results from the Law French in use at the time and it is an abbreviation for *contre*.

established the petition' and that the defamer should be 'canonically punished'.³⁹ The claims made in the 1381 decision of *Topcliff c Greenhode* did use the terms 'reputation' and 'public character';⁴⁰ however, it may be noted that the fourth case did not.⁴¹ As such, it may have been an unusual case, or one late enough for the action to have changed from its initial 'settings'. Further, both of these cases did emphasise the falseness of the claims being made.

There are only seven medieval-era Act book cases included by Helmholz. Each was only a summary and all came from the 15th century. Only one used any term like 'reputation' — the report for *Ex officio c Hancoke* stated that the 'official declared her legitimately purged and wrongly defamed and restored her to her good fame'.⁴² Here, it is the court process that returns the defamed party to good fame; it does not follow, necessarily, that the purpose of the process was to protect any reputation. That is, the correction of false information does not require that an abstract concept, such as 'reputation', attach to the plaintiff. Again, all the seven cases referred to the falsity of the claims being made — this, therefore, may support the claim made here that it is false facts that needed to be overturned (with a secondary interest in the soul of the defamer), rather than an abstract concept that needed to be protected.

Turning to the manorial court decisions, there are a number of defamation cases reproduced in Maitland's selection.⁴³ None of them used the term 'reputation'. The closest that any of them came to it was the word 'dishonour'.⁴⁴ All of them, however, include the plaintiff asserting that false claims were made against them. The cases from borough courts show similar results. There are 29 pre-1485 borough court cases included by Helmholz — only two use the term 'dishonour';⁴⁵ one uses the phrase 'lost her good fame';⁴⁶ and one the phrase 'deprived of his good name'.⁴⁷ All, again, refer to false claims being made or alleged to have been made. Finally, the 'hypothetical case ... in a book of precedents' cited by Maitland has the defamed being called a 'thief and lawlessman'.⁴⁸ There was no mention of honour, nor of reputation; however, it was specified that wrongful statements were made 'to divers good folk and in full market'.⁴⁹ In short, reputation does not appear to be as important to the law as does the assertion of false facts; further, there is no suggestion that reputation is, in any sense, the property of the person concerned.

39 Ibid 11–12.

40 (1318) 101 SS 4, 4–5.

41 *Colmere c Daniel* (1413) 101 SS 5.

42 (1464) 101 SS 21, 21.

43 These courts being the 'quintessential forum ... for villagers to record their deals' and settle disputes: Paul R Hyams, 'What Did Edwardian Villagers Understand by "Law"?' in Zvi Razi and Richard Smith (eds), *Medieval Society and the Manor Court* (Clarendon Press, 1996) 69, 72–3.

44 The action was between Thomas of London and Maud, wife of John Woodfull: F W Maitland (ed), *Select Pleas in Manorial and Other Seignorial Courts* (Selden Society, 1889) vol 1, 143.

45 *Wyke v Ywon* (1274) 101 SS 28, 28; *Angle v Sweyn* (1300) 101 SS 30, 31.

46 *Neunan v Dounham* (1383) 101 SS 36, 36.

47 *Bussher v Semere* (1467) 101 SS 37, 37.

48 Maitland, 'Slander in the Middle Ages', above n 35, 6.

49 Ibid.

C The Context

There is one other action that is discussed in the histories of defamation — *scandalum magnatum* — which was the first to be heard in the King's courts. There were, however, no recorded decisions under the *scandalum magnatum* statutes from the medieval period, in part because they only protected the magnates, and in part because they were 'used only sporadically'.⁵⁰ Further, unlike the manorial and ecclesiastical remedies, there was a criminal aspect of the statutes, in addition to the civil remedy⁵¹ — which means that the action is not directly comparable to those in the other courts.

That said, even under *scandalum magnatum*, there is no mention of 'reputation' or 'honour'. One of the three limbs of the 'offence', under the original 1275 Act, is that 'false News or Tales' were spread.⁵² It could be argued that another of the limbs, that the news be about the King or the 'Great Men', is indicative of a sense of reputation. It is better, however, to see the statutes as protecting the position, in the social order, of these 'Men'. The 'Great Men' were defined in one of the later statutes to be 'Prelates, Dukes, Earls, Barons, and other Nobles', as well as the holders of named offices and 'other Great Officers' of the realm.⁵³ That specified categories of individuals were reflected shows that their reputations were not the focus (as any specific baron may, in fact, have a bad 'reputation' — in the modern sense of the word — and yet still fall under the protection of the statute); instead, it was their role in the social order that was important.⁵⁴

The third limb of the provision supports this — 'whereby discord, or [occasion] of discord ... may grow between the King and his People, or the Great Men of the Realm'.⁵⁵ Commentators suggest that the statutes were enacted 'during periods of serious political unrest when it was in the interest of peace and stability to suppress the circulation of ... slanders'.⁵⁶ The purpose of the law, therefore, was

50 McNamara, above n 2, 75. McNamara suggests that the lack of reports reflected the fact that record keeping was not standard practice in the relevant courts in the medieval period: at 76 n 84.

51 Veeder notes that, in fact, the 'civil remedy was seldom used': Veeder, 'The History and Theory of the Law of Defamation' (Pt 1), above n 34, 554.

52 *Slandorous Reports Act 1275*, 3 Edw 1, c 34.

53 *Penalty for Slandering Great Men Act 1378*, 2 Ric 2, c 5.

54 The 'knight' offers a further example of the importance of 'truth' to particular social roles in the late medieval period. There was symbolic value attached to the various aspects of a knight's accoutrements. His lance represented '[t]ruth'; the head of the lance, the 'power of truth over falsehood'; and the bit and the reins of the horse, the '[a]voidance of uncouth or false words': Noel Fallows, 'Introduction' in Ramon Llull, *The Book of the Order of Chivalry* (Noel Fallows trans, Boydell Press, 2013) 1, 8 [trans of: *Llibre de l'Orde de Cavalleria*].

55 *Slandorous Reports Act 1275*, 3 Edw 1, c 34.

56 John C Lassiter, 'Defamation of Peers: The Rise and Decline of the Action for *Scandalum Magnatum*, 1497–1773' (1978) 22 *American Journal of Legal History* 216, 217.

political — and so not necessarily about honour or reputation⁵⁷ — on the basis that the positions, and roles, of the Great Men needed to be protected in order to reduce dissent. The key to the *Slanderous Reports Act 1275*, 3 Edw 1, c 34 may be evident in the conclusions of Anderson: ‘the personal power of the [Angevin] monarch was soon ... followed by precocious collective institutions of the feudal ruling class ... it became accepted, after Edward I, that no monarch could decree new statutes without the consent of Parliament’.⁵⁸ In other words, the protection of the Great Men from dissent may have been the result of pressure on the Crown from them.⁵⁹

In the same way that *scandalum magnatum* statutes reflect the political context of the time, the defamation cases in the manorial and ecclesiastical courts reflect the social and economic context of the medieval period. Before this point is pursued, it should be noted that, in both these courts, there were no judges to hear cases. In the local courts, there was an obligation on the tenants of the manor to attend court and participate in the adjudicatory processes.⁶⁰ The law was customary and the decision was based on compurgation or oath-helping.⁶¹ For Milsom:

A defendant who believed in God and hell would not swear lightly. Nor would he persuade neighbors to swear to him if they were not sure of him ... Beyond the religious pressure, the community pressure was great ... If swearing was a serious matter, so was putting another to his oath ...⁶²

The essence of the process, therefore, was on the sworn words of the defendant and their fellow citizens. Further, even where defamation cases were heard by juries,⁶³ the process may be linked to that of compurgation on the basis that the defamed needs to ‘convince his or her peers of personal moral cleanliness and the opponent’s moral turpitude’.⁶⁴

57 One interpretation that is not evident in legal histories is the linking of ‘honour’ with the politics of the time. It has been noted that the Latin term *honor* retained, into the 13th century, the ‘classical sense of “office”’: Ariella Elema, *Trial by Battle in France and England* (PhD Thesis, University of Toronto, 2012) 87, citing Glyn Sheridan Burgess, *Contribution a l’Étude du Vocabulaire Pré-Courtois* (Librairie Droz, 1970) 68–90; Yvonne Robreau, *L’Honneur et la Honte: Leur Expression dans les Romans en Prose du Lancelot-Graal (XII^e–XIII^e Siècles)* (Librairie Droz, 1981) 7–41. The concept of ‘office’ is discussed further below.

58 Perry Anderson, *Lineages of the Absolutist State* (New Left Books, 1974) 114–15.

59 This suggestion is reinforced by the fact that the *Slanderous Reports Act 1275*, 3 Edw 1, c 34 was passed only 60 years after the *Magna Carta* was signed. The Great Charter is also best seen as a ‘privilege which was devised mainly in the interests of the aristocracy’: J C Holt, *Magna Carta* (Cambridge University Press, 3rd ed, 2015) 36. There is also a more direct link between medieval defamation and the *Magna Carta* — in that Stephen Langton also had a role in the creation of the *Magna Carta*, though the precise scope of his role is subject to debate: David A Carpenter, ‘Archbishop Langton and *Magna Carta*: His Contribution, His Doubts and His Hypocrisy’ (2011) 126 *English Historical Review* 1041, 1041.

60 John S Beckerman, ‘Procedural Innovation and Institutional Change in Medieval English Manorial Courts’ (1992) 10 *Law and History Review* 197, 200.

61 Compurgation was, by 1300, viewed ‘less favourably’ than trial by jury — though this change was particularly noticeable for the ‘higher trespasses’: Schofield, above n 35, 35.

62 S F C Milsom, *A Natural History of the Common Law* (Columbia University Press, 2003) 9.

63 For an understanding of the role of juries in the manorial courts, see Maureen Mulholland, ‘The Jury in English Manorial Courts’ in John W Cairns and Grant McLeod (eds), *The Dearest Birth Right of the People of England: The Jury in the History of the Common Law* (Hart Publishing, 2002) 63.

64 Schofield, above n 35, 37.

With respect to the procedure of the ecclesiastical courts, the process was similar to that in the manorial courts.⁶⁵ Canonical purgation required the formal taking of an oath on the part of the alleged defamer and that person would have to ‘find a number of compurgators who would support his oath by swearing that they believed he had sworn truly’.⁶⁶ The focus of the compurgators was not the truth or falsity of the accusation, but the trustworthiness of the person in question.⁶⁷ The number of compurgators required was ‘within the judge’s discretion’ decided, in part, on the ‘character of the accused’.⁶⁸ Further, the compurgators had to be ‘free from ... *infamia*’.⁶⁹ In the context of defamation, then, the ‘technology’ for resolving the dispute is similar to that of the offence — with the spoken word being central.

Turning to the claims made in the courts, many were based on accusations of economic crimes⁷⁰ — as such, they reflected both the social and economic connections of the individuals. As examples,⁷¹ many were accused of larceny or theft;⁷² one was called a ‘counterfeiter and a traitor’;⁷³ and another a ‘manslayer’.⁷⁴ There were accusations of improper business practices such as the sale of an unsound piglet;⁷⁵ that ‘wares were false and rotten’;⁷⁶ one man was a ‘cheater of his neighbour’s goods’;⁷⁷ and another was said to have ‘brought a certain dead man into Ipswich and put him in a certain privy’ which caused the plaintiff to lose sales of bread;⁷⁸ and as a final economic example, one man was called a ‘perjurer in all pleas of debt’.⁷⁹ Other claims were more social — a Peter Kiwel was accused

65 For a more complete description of the procedure as it was in the 15th century, see Franklyn C Setaro, ‘A History of English Ecclesiastical Law’ (1938) 18 *Boston University Law Review* 102, 131–6.

66 R H Helmholz, ‘Crime, Compurgation and the Courts of the Medieval Church’ (1983) 1 *Law and History Review* 1, 13. Harding notes that, by 1400, jury trials had replaced compurgation in the church courts: Alan Harding, *The Law Courts of Medieval England* (George Allen & Unwin, 1973) 45.

67 Though they were ‘not simple “character witnesses”’: Helmholz, ‘Crime, Compurgation and the Courts of the Medieval Church’, above n 66, 13.

68 Ibid 16–17.

69 Ibid 17.

70 The focus on crime reflects the requirement, in the Oxford Constitution, that crimes be imputed to the defamed. Helmholz argues that this requirement was understood broadly and included all sins: Helmholz, *Select Cases on Defamation to 1600*, above n 18, xxvi.

71 The reports of the cases described here are brief — in some cases, as short as three sentences: see, eg, *Fulk v Kenep* (1245) 101 SS 28. There is, therefore, no description of the facts that give rise to the decision, with much of the text relating to procedural matters.

72 See, eg, Maitland (ed), *Select Pleas in Manorial and Other Seigneurial Courts*, above n 44, 19, 109; *ibid*. One man was accused of being a ‘false side-glance thief’ (*Robinson c Rayner* (1424–25) 101 SS 6, 7), though it is not clear what the adjective adds to the alleged offence.

73 *Ferur v Leech* (1287) 101 SS 29, 29. It may be noted that this case was from 1287 — a time at which there were significant problems with counterfeit coin coming from Europe and debasing the English currency (which may explain the linking of counterfeiting with being a traitor): Diana Wood, *Medieval Economic Thought* (Cambridge University Press, 2002) 128.

74 Maitland (ed), *Select Pleas in Manorial and Other Seigneurial Courts*, above n 44, 116.

75 *Wyke v Ywon* (1274) 101 SS 28.

76 *Engham v Burton* (1287) 101 SS 29, 29. In *Curteys v Poyfof*, the accusation of ‘rotten’ fish was made ‘during the full fish market’: (1289) 101 SS 30, 30.

77 *Butcher v Smalegrave* (1291) 101 SS 30, 30.

78 *Geyst v Dunwich* (1292) 101 SS 30, 30.

79 *Fitz Robert v Gillardon* (1318) 101 SS 33, 33.

of being a ‘false man full of frauds and a picker of quarrels’;⁸⁰ another was called a ‘seducer’;⁸¹ and women were called ‘whore[s]’⁸² or adulterers.⁸³ Being called ‘faithless’ was also a repeated accusation, even in the local courts.⁸⁴ These claims against the person also had a commercial aspect. One woman was defamed on the basis that she was accused of having ‘leprosy’, however, the complaint was phrased in terms of the impact of the disease on the beer she sold — ‘many people were afraid to drink’ it.⁸⁵

Two aspects of these examples of defamatory words may be highlighted. First, they all can be seen as false facts. That is, they are simple allegations that relate to specific actions (with the exception of being ‘faithless’). While they may be seen to go to what would now be referred to as a reputation, this would be a post facto justification — in that the term is used now, because that is how defamation is currently understood, regardless of the understanding of the purpose of the action at the time of the courts’ decisions. The second aspect is the importance of matters economic. Of all the cases reproduced by Helmholz and Maitland, only one of the imputed crimes was not related to theft or counterfeiting. In that case, there was the allegation of being a killer, but the man was also said to be a ‘thief, a seducer ... and other enormous things’⁸⁶ — suggesting a degree of hyperbole. The focus on theft, in addition to the allegations of bad business practices, suggests that a significant proportion of the disputes related to the commercial life of the time — they may have been claims made to denigrate competitors or based on an understanding that hurting the income of a person was an effective way of causing harm.⁸⁷ Such a focus is understandable given the observation that from the end of the 12th century, ‘[m]ore families became dependent upon the market economy, sometimes having to find customers for their services from many different villages.’⁸⁸ This, in turn, suggests false allegations, made in the

80 Maitland (ed), *Select Pleas in Manorial and Other Seignorial Courts*, above n 44, 36.

81 Ibid 116. Another man was accused, by a widow, of ‘carnally’ knowing the wife of another: *Wetwang v Isabelle* (1339) 101 SS 36, 36.

82 See, eg, *Avice v Aldwinkle* (1303) 101 SS 31, 31. Poos notes that while women were ‘more likely to be the victims of sexual defamation ... women were most often cited for sexually defaming others, especially other women’: L R Poos, ‘Sex, Lies, and the Church Courts of Pre-Reformation England’ (1995) 25 *Journal of Interdisciplinary History* 585, 586. It has also been noted that a century later, women did ‘enjoy some degree of quasi-public power ... as brokers of gossip’: Martin Ingram, ‘“Scolding Women Cucked or Washed”: A Crisis in Gender Relations in Early Modern England?’ in Jennifer Kermod and Garthine Walker (eds), *Women, Crime and the Courts in Early Modern England* (University of North Carolina Press, 1994) 48, 49.

83 *Gray c Archdeacon of Buckingham* (c 1290) 101 SS 3, 3. In a potentially related allegation, one woman was called a ‘Redmodyr’ — as the ‘wrong [was] to Henry Neunan and Agnes his wife’ (*Neunan v Dounham* (1383) 101 SS 36, 36), it may have been one of infidelity — though, now, the meaning of ‘Redmodyr’ is unclear.

84 See, eg, *Goscelyn v Baker* (1324) 101 SS 34, 34.

85 *Colmere c Daniel* (1413) 101 SS 5, 5.

86 Maitland (ed), *Select Pleas in Manorial and Other Seignorial Courts*, above n 44, 116.

87 A further aspect of the link between the economy and defamation is the fact that the term “serf” or equivalent’ was ‘[o]ccasionally’ used by defamers until the 15th century: Poos, above n 82, 591.

88 Richard H Britnell, *The Commercialisation of English Society, 1000–1500* (Manchester University Press, 2nd ed, 1996) 79.

interests of tipping the scales of competition, were a key focus of actions in the late medieval period.⁸⁹

The next aspect of the context of medieval defamation law to be considered is the understanding of legal principles themselves in the manorial courts. That is, there is the question of ‘whether a jury of villagers, living in such immediate proximity, could force and maintain a distinction between legal issues based upon substantive law and factual equities based upon cultural norms’.⁹⁰ Beckerman discusses the work of Bonfield and Milsom in his analysis of the role of substantive law in manorial courts, concluding that an ‘important purpose’ of them was the ‘peaceful resolution of disputes, in conformity with customary rules embodying prescriptive behavioural norms’;⁹¹ or what Hyams refers to as ‘vernacular’ law.⁹² As such, there may be difficulties in asserting any rigorous definition of what is being protected in defamation actions — the Oxford Constitution may have been clear, but the application of its requirements, in a secular, non-royal court, may not have centred on a consistent conception (like ‘reputation’) as has been suggested in the more recent literature.

The final aspect of the medieval system to be raised relates to the concept of ‘honour’ — a term largely missing from the material discussed to date. Honour is relevant here in two ways. First in relation to duelling — a practice that is, at times, referred to in the history of defamation, though mostly from the early modern period.⁹³ References, generally, to duelling in the medieval period make links with combat between knights and even with trials by ordeal.⁹⁴ These, however, relate to the circumstances of single combat, rather than any conception of the individual that is sought to be redressed by the fight. The second aspect of honour relates to perceptions of its place in other areas of law. Beckerman, for example, links ‘honour’ with the development of rules around liability.⁹⁵ He does this via linking ‘status’ and honour⁹⁶ — of little value, here, where there is no suggestion that the *scandalum magnatum* statutes, based in the concept of status, were used to protect honour. Beckerman also refers to compensation claims for ‘shame’,

89 The importance of truth in the medieval marketplace is reinforced by the fact that informal contracts, including oral contracts, ‘were generally enforceable in England’ ‘[u]ntil the end of the thirteenth century’: Albert Kiralfy, ‘Custom in Mediaeval English Law’ (1988) 9 *Journal of Legal History* 26, 35.

90 Schofield, above n 35, 37.

91 John S Beckerman, ‘Toward a Theory of Medieval Manorial Adjudication: The Nature of Communal Judgments in a System of Customary Law’ (1995) 13 *Law and History Review* 1, 21.

92 Hyams, ‘What Did Edwardian Villagers Understand by “Law”?’; above n 43, 94–5.

93 See, eg, McNamara, above n 2, 78.

94 See, eg, V G Kiernan, *The Duel in European History: Honour and the Reign of Aristocracy* (Oxford University Press, 1988) ch 3.

95 John S Beckerman, ‘Adding Insult to *Iniuria*: Affronts to Honor and the Origins of Trespass’ in Morris S Arnold et al (eds), *On the Laws and Customs of England: Essays in Honor of Samuel E Thorne* (University of North Carolina Press, 1981) 159.

96 He quotes the work of Pitt-Rivers to support the claim. The quotation used is ‘[i]f honour establishes status, the converse is also true’: Julian Pitt-Rivers, ‘Honour and Social Status’ in J G Peristiany (ed), *Honour and Shame: The Values of Mediterranean Society* (Weidenfeld and Nicholson, 1965) 19, 23, quoted in *ibid* 161 n 9. These words do not show that the concepts are ‘interdependent’ (at 161), merely that, in some circumstances, one will contribute to the other (and vice versa).

‘dishonor’, ‘insult’, ‘outrage’ and ‘disparagement’.⁹⁷ Despite him referring to them all as ‘dishonor’,⁹⁸ they are conceptually different. Further, the Latin term he translates as dishonour is *dedecus* — it may be noted that he cites only one case that uses the term,⁹⁹ and that it may also be better translated as ‘disgrace’ or ‘shame’.¹⁰⁰ The lack of reference to honour, at least in the way the term is used now, is not surprising given that the term, in the ‘sense “honourableness of character” ... is a relatively rare usage even in Shakespeare’s day’.¹⁰¹ The defamation law of the century of Shakespeare’s death is considered next.

III SEVENTEENTH CENTURY

Both the governance of England and the practices around the seeking of redress for defamatory words changed during the early modern period — with the focus here being the law of the 17th century. It was during the early modern period that the royal courts became a focus for defamation litigation.¹⁰² This is evident in the fact that the court of King’s Bench heard a greater number of defamation cases,¹⁰³ as did the Court of Star Chamber (until its abolition in 1641)¹⁰⁴ — though it may be noted that the latter body was only interested in criminal cases around written defamation.¹⁰⁵ This analysis will, first, consider the maintenance of the social order of the time — including the role of the aristocracy, ‘officers’, and the criminal justice system. Following this, the more ‘personal’ aspects of the cases will be considered — looking at morals, revenge and, finally, how ‘reputation’ was understood in that century.¹⁰⁶

97 Beckerman, ‘Adding Insult to *Iniuria*’, above n 95, 173.

98 *Ibid.*

99 *Ibid.* 174.

100 Donnelly, for example, uses ‘shame’ as the translation for *dedecus*: Donnelly, above n 4, 101.

101 Frank Henderson Stewart, *Honor* (University of Chicago Press, 1994) 39, quoting C L Barber, *The Theme of Honour’s Tongue: A Study of Social Attitudes in the English Drama from Shakespeare to Dryden* (Göteborg, 1985) 32.

102 It was, for example, by a 1641 statute (the *Abolition of High Commission Court Act 1640*, 16 Car 1, c 11) that the ‘ecclesiastical courts and jurisdiction were abolished in England’: Franklyn C Setaro, ‘A History of English Ecclesiastical Law’ (Pt 2) (1938) 18 *Boston University Law Review* 342, 361.

103 It is clear that defamation was a ‘popular’ action at the time. Fox states that there were more than 8200 cases brought before the courts during the reign of James I: Adam Fox, ‘Ballads, Libels and Popular Ridicule in Jacobean England’ (1994) 145 *Past & Present* 47, 56; a fact partially explained by the assessment that ‘[s]ome people seem to have made it their continual and regular sport to engage in ... ridicule’: at 52.

104 Under what is known as the *Habeas Corpus Act 1640*, 16 Car 1, c 10, s 1.

105 McNamara, above n 2, 85.

106 While virtually all defamation actions involved the use of words, there was at least one case involving defamation by action. In the case, the plaintiff claimed that he was a ‘hackneycoachman, and that the defendant with an intent to disgrace him did *ride Skimmington*, and describes how, thereby surmising that the plaintiff’s wife had beat the plaintiff, and by reason thereof persons who formerly used him, refused to come into his coach and to be carried by him’: *Mason v Jennings* (1680) T Raym 401, 401; 83 ER 209, 209–10 (emphasis in original). To ‘ride Skimmington’ is to ride behind a woman on a horse. The plaintiff won the case.

A The 17th Century Law and the Social Order

The most obvious process for protecting the social order was the continued, though at times limited,¹⁰⁷ use of *scandalum magnatum*. That cause of action was to avoid the risk that ‘great peril and mischief may come to all the realm’ and to avoid its ‘subversion and destruction’.¹⁰⁸ The decisions show two ways in which the action privileged the role of the nobility¹⁰⁹ — in addition to the obvious fact that the statutes only benefited the ‘Great Men’. First, the procedures around the action were skewed in their application. In *Count of Standford v Nedham*, the forum for the dispute was set in terms of the location that is ‘most convenient’ for the peer.¹¹⁰ Second, words that were held to be actionable under the statutes may not have been actionable under the common law — ‘words are actionable upon the statute, though in the case of a common person they are not actionable’.¹¹¹ More specifically, allegedly defamatory words were to be interpreted differently under the statutes than under the common law. For the latter actions, words ‘shall be taken in mitiori sensu, and in the other in the worst sense against the speaker, that the honour of such great persons may be preserved’.¹¹² Another decision said that the words should be interpreted not ‘in a rigid or mild sense, but according to the genuine and natural meaning’;¹¹³ in other words, the courts could ‘choose’ between two interpretations, and favour the plaintiff in their choice. Such special treatment of those referred to in the statutes reinforces the idea that the action was there to protect the existing social hierarchy.¹¹⁴

That is not to say that the social order was static across the medieval and early modern periods. One of the significant developments was the greater role of ‘offices’ in the governance of the country.¹¹⁵ These positions were, at times,

107 The extent to which the action was important in the first half of the 17th century may be inferred from the fact that March only refers to two decisions under the statutes in his treatise: *The Lord Cromwell’s Case* (1578) 4 Co Rep 12b; 76 ER 877 and *The Earl of Lincoln v Roughton* (1606) Cro Jac 196; 79 ER 171; John March, *Actions for Slander, or, a Methodical Collection under Certain Grounds and Heads, of What Words Are Actionable in the Law, and What Not?* (1648) 105, 132. Lassiter notes that the use of the action ‘reach[ed] its peak in the reign of Charles II’: Lassiter, above n 56, 219.

108 *The Earl of Northampton’s Case* (1612) 12 Co Rep 132, 133; 77 ER 1407, 1408. Aspects of this decision have been doubted in later cases (see, eg, *M’Pherson v Daniels* (1829) 10 B & C 263; 109 ER 448; *Lewis v Walter* (1821) 4 B & Ald 605, 614; 106 ER 1058, 1061); however, its understanding of *scandalum magnatum* was not in question.

109 The ‘body politick [of the] Lords in Parliament’: *Lord of Leicester v Mandy* (1657) 2 Sid 21, 22; 82 ER 1234, 1235.

110 (1661) 1 Lev 56, 56; 83 ER 295, 295. That report includes the claim that the ‘action is as well on behalf of our lord the King, as himself [the plaintiff]’ — thereby emphasising the link between the statutes and protecting the King’s peace. On the other hand, an action under the statutes had the disadvantage that a successful plaintiff would not be awarded costs: *Lord Peterborough v Williams* (1686) 2 Show KB 505, 506; 89 ER 1068, 1068. Lassiter suggests that this case was the first in which this outcome was instituted: Lassiter, above n 56, 232.

111 *Earl of Pembroke v Staniel* (1672) 1 Freem KB 49, 49; 89 ER 38, 38.

112 *The Earl of Peterborough v Mordant* (1670) 1 Vent 59, 60; 86 ER 42, 42. March said that, under the common law, ‘words ... shall always be taken in the best sense for him that speaks them ... because usually they are spoken in choler and passion’: March, above n 107, 5.

113 *Lord Townsend v Hughes* (1677) 2 Mod 150, 159; 86 ER 994, 999.

114 Lassiter highlights that some actions, at least, were more personal — a number of actions being brought by Charles II’s brother in the period 1682–84 that represented the ‘extreme to which the Stuarts were willing to carry the law in their request for revenge’: Lassiter, above n 56, 229.

115 In the late 16th century, Coke, when arguing a case, said, ‘[w]here a man is touched in the duty of his office, or in the course of life, an action lieth’: *Walgrave v Agurs* (1590) 1 Leo 335, 336; 74 ER 305, 305.

granted by the Crown and, at others, related to an individual's profession.¹¹⁶ For all, there was a significant ethical aspect to them — there was an 'expectation that people must behave according to the requirements of their respective offices'.¹¹⁷ The corollary to this was that, should an office-holder have allegations made about them that went against these expectations, they had the potential to cause particular damage.¹¹⁸ For example, in *Harper v Beamond*, an action was said to lie in words on the ground that, as the plaintiff was a 'justice of peace', the allegation referred to an 'outrageous act', one that is 'against his oath'.¹¹⁹ Even where a commission did not require an oath to be sworn, the role itself may justify protection.¹²⁰ That said, where an office-holder was allegedly libelled, if the allegation '[did] not touch [the plaintiff] in his office', then the action would not lie.¹²¹ It may be noted that the law did not use the concept of 'office' as widely as it could be used. Condren, for example, refers to the office of the lawyer;¹²² however, libel cases brought by lawyers were not decided on the basis of such an office.¹²³ So, again, the 17th century application of the law of libel was used to reinforce a key feature of the social order of the time.¹²⁴

The next aspect of institutional reinforcement is a little more conjectural. The notion that specific crimes needed to be imputed for a successful libel action persisted into the 17th century.¹²⁵ It is possible to read this continued requirement in terms of the protection of the justice system itself.¹²⁶ In the early modern period, there were three procedures for getting an accused person to trial — an appeal, an indictment and an information, with the information generally being

- 116 It may be noted that Lull also spoke of the 'office' of the knight in the late medieval period: Ramon Llull, *The Book of the Order of Chivalry* (Noel Fallows trans, Boydell Press, 2013) 44–55 [trans of: *Llibre de l'Orde de Cavalleria*]. That office had a moral foundation that stemmed from their role in the social order and not from their appointment to the position by the reigning monarch.
- 117 Conal Condren, *Argument and Authority in Early Modern England: The Presupposition of Oaths and Offices* (Cambridge University Press, 2006) 25.
- 118 This concept is different from the situation where an individual is subject to (allegedly) libellous claims about them in their occupation — this situation will be discussed below.
- 119 (1605) Cro Jac 56, 56; 79 ER 47, 47.
- 120 *Moor v Foster* (1605) Cro Jac 65; 79 ER 55.
- 121 *Tasburgh v Day* (1618) Cro Jac 484, 485; 79 ER 413, 414. The plaintiff in this case was also a justice of the peace. The ubiquity of justices of the peace in this context may be why the court, when discussing the hypothetical libelling of someone in office, used the example of a justice of the peace: *Viscount Say and Seal v Stephens* (1628) Cro Char 135, 136–7; 79 ER 719, 720.
- 122 Condren, above n 117, 30.
- 123 See, eg, *Scroop's Case* (1674) 1 Freem KB 276, 276; 89 ER 198, 198.
- 124 Office-holders, however, had a minor role in challenging the social order — as they began to buy land in the country that was previously held, via inheritance, by the landed elite. See, eg, Lawrence Stone and Jeanne C Fawtier Stone, *An Open Elite? England 1540–1880* (Oxford University Press, 1984) 164.
- 125 See, eg, *Kellan v Manesby* (1604) Cro Jac 39; 79 ER 32. The requirement prompted disputes about the interpretation of the allegedly libellous words. In this case, the words were '[t]hou art a thief, and hast stolen my corn': at 39; 32. The arguments for the defendant included the assertion that the words may have meant 'he stole his standing corn, which is not felony'. Similar examples included the question whether stealing 'wood' meant stealing standing, or felled, wood (*Robins v Hildredon* (1605) Cro Jac 65; 79 ER 55); and the legal interpretation of having 'stolen bars of iron out of other men's windows' — where it was held that bars in windows are part of the freehold, and therefore their theft is not a felony: *Powell v Hutchins* (1608) Cro Jac 204, 204; 79 ER 179, 179.
- 126 It is not sufficient to argue that the 17th century law required an allegation of felony because that was a requirement in the medieval period. The allegation was not a requirement in the 19th century, so it would have been possible for that change to occur earlier. The argument here is that a significant reason for it to be retained is the fact that it reinforces the Stuart desire to maintain order by protecting the image of the justice system.

used to ‘[suppress] economic offences’ rather than prosecuting alleged felons.¹²⁷ With respect to the other two procedures, as Herrup notes, ‘private complaints in criminal matters (appeals) had been virtually replaced by public accusations (indictments)’ by the 17th century.¹²⁸ The prosecution of an indicted individual involved a multi-staged process.¹²⁹ Even up until the 18th century, the ‘typical prosecution in England was on indictment at the initiative of a private citizen who was the victim of a crime and who conducted the prosecution in almost all cases’.¹³⁰ In short, the criminal justice system was, as it is now, a core institution for maintaining social order — given that it was undergoing a process of ‘transformation’ in the early modern period,¹³¹ its operation and the perceptions around its operation may have been subject to challenge.

To suggest that an individual, who had not been convicted, is a felon is to imply that the system has failed¹³² — either the magistrate may have failed or the jury may have failed (including the decision to not indict the individual concerned).¹³³ So, to allow those who were unjustifiably accused of a felony to sue provides a mechanism by which false allegations about failures of the system could be redressed. The importance of the protection of the institution is evident through the privileging of claims against those in a justice-related office;¹³⁴ the capacity of ‘counsellor’ to repeat what was told to them by their client was protected;¹³⁵ and ‘[w]ords spoken in a course of justice are not actionable’.¹³⁶ Further, Coke expressly linked the libelling of magistrates with social order, asserting that if a libel

be against a magistrate, or other public person, it is a greater offence; for it concerns not only the breach of the peace, but also the scandal of Government; for what greater scandal of Government can there be than to have corrupt or wicked

127 See generally J H Baker, *An Introduction to English Legal History* (Oxford University Press, 3rd ed, 2005) 578.

128 Cynthia B Herrup, *The Common Peace: Participation and the Criminal Law in Seventeenth-Century England* (Cambridge University Press, 1987) 68.

129 For a doctrinal overview, see Sir James Fitzjames Stephen, *A History of the Criminal Law of England* (Macmillan, 1883) vol 1, 184–307.

130 Douglas Hay, ‘Controlling the English Prosecutor’ (1983) 21 *Osgoode Hall Law Journal* 165, 168. This, in turn, meant that, if the accuser did not turn up for the trial, the accused walked free: J M Beattie, *Crime and the Courts in England 1660–1800* (Princeton University Press, 1986) 400. That said, a justice of the peace or magistrate may have gathered evidence and questioned the accused before committing them to trial: at 36.

131 Thomas Andrew Green, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury 1200–1800* (University of Chicago Press, 1985) 105.

132 Hindle refers to the “‘dark figure’ of unprosecuted crime’ that was evident in the culture of the time: Steve Hindle, *The State and Social Change in Early Modern England, c 1550–1640* (Palgrave, 2000) 122.

133 For Green, imputations of crime are a problem for the social order because the system may be compelled, on the basis of the alleged defamation, to investigate the crime: Review, ‘Slander and Libel’ (1872) 6 *American Law Review* 593, 605. The review is anonymous; however, Veeder attributes it to St John Green: Veeder, ‘The History and Theory of the Law of Defamation’ (Pt 1), above n 34, 560 n 1.

134 In addition to the justice of the peace decisions referred to above, there were those involving plaintiffs in the ‘office of a constable’ — see, eg, *Taylor v How* (1601) Cro Eliz 861, 861; 78 ER 1087, 1087.

135 *Brook v Montague* (1605) Cro Jac 90, 90; 79 ER 77, 77.

136 *Weston v Dobniet* (1617) Cro Jac 432, 432; 79 ER 369, 369. This was an action upon the case; however, the report states that the Chief Justice was ‘in mind of’ a libel case (*Brook v Montague* (1605) Cro Jac 90; 79 ER 77) when coming to his decision: *Weston v Dobniet* (1617) Cro Jac 432, 432; 79 ER 369, 370.

magistrates to be appointed and constituted by the King to govern his subjects under him? And greater imputation to the State cannot be, than to suffer such corrupt men to sit in the sacred seat of justice, or to have any meddling in or concerning the administration of justice.¹³⁷

In short, while there remained a focus on allegations of felonies, it is at least arguable that this throwback to the Lateran Council was adopted to meet the immediate concerns of the early modern state.

There are two further aspects of the social order that may be considered separately — the questions of certain diseases and duelling. With respect to the former, it is often remarked that only some imputations of disease have been actionable and that the reason for the limitation is not clear¹³⁸ — with leprosy and the pox¹³⁹ being two of the actionable diseases.¹⁴⁰ The plague is usually considered to be another; however, as Holdsworth notes, March ‘cites no authority’ for the proposition that an imputation of such an infection is actionable.¹⁴¹ It is possible that the allegations that were seen to be defamatory were included because, should the allegations be taken at face value, the individual would be outcast — physically excluded from the social order.¹⁴² This was made express in *Taylor v Perkins*, where imputations of leprosy were held to be actionable, ‘for a leper shall be secluded’.¹⁴³ As has been noted, ‘[w]hen a person became affected with the leprosy, he was considered as legally and politically dead, and lost the privileges belonging to his right of citizenship’,¹⁴⁴ and, therefore, he fell outside the social order.

In terms of the links between defamation and duelling, there is a greater discussion of the links between the law and the practice in the literature than there is in

137 *The Case de Libellis Famosis* (1605) 5 Co Rep 125a, 125a; 77 ER 250, 251 (emphasis altered).

138 See, eg, McNamara, above n 2, 84.

139 One such case is *Levet's Case* (1592) Cro Eliz 289; 78 ER 543. This is, of course, not a 17th century case; it is included as it can be seen as an early injurious falsehood decision as it relates to the harm that an inn-keeper may suffer, in his business, as a result of a false tale that the house, and his wife, was infected.

140 More tangentially, there was a cultural association in the early 17th century, at least, between an infection of the (French) pox, the implied contact with ‘foreign bodies’ and the ‘potentially deleterious ... effects of trade with foreign nations’: Jonathan Gil Harris, *Sick Economies: Drama, Mercantilism, and Disease in Shakespeare's England* (University of Pennsylvania Press, 2004) 30–1. Drawing a long bow, then, there may be a link between imputations around the pox and corruption from without the country — treason being a not uncommon allegation in libel actions: see, eg, *Hollis v Briscon* (1605) Cro Jac 58; 79 ER 49; *Sydenham v May* (1615) Hob 180; 80 ER 327.

141 W S Holdsworth, ‘Defamation in the Sixteenth and Seventeenth Centuries’ (Pt 2) (1924) 40 *Law Quarterly Review* 397, 399–400 n 1. It may be that while the plague is highly infectious, the mortality rates may be so high that the veracity of the claim is evident soon enough. Alternatively, the accusation may have been too serious. According to Foucault, in 17th century Europe, if a person under quarantine leaves their house, then they ‘will be condemned to death’: Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Alan Sheridan trans, Allen Lane, 1977) 195 [trans of: *Surveiller et Punir: Naissance de la Prison* (first published 1975)].

142 With respect to pox, in particular, it may be tempting to consider that it was the lack of morality implied in being infected by a sexually-transmitted disease. It was held, however, that the ‘slander is not in the wicked means of getting them, but in the odiousness of the infection, as [in the case of] a leper’: *Crittall v Horner* (1618) Hob 219, 219; 80 ER 366, 367.

143 (1607) Noy 117, 117; 74 ER 1082, 1082.

144 ‘Slander and Libel’, above n 133, 605 (citations omitted).

the case law.¹⁴⁵ There were only a small number of 17th century decisions that highlighted the role of the law in preventing ‘private revenge of ill words’.¹⁴⁶ As another example, in a *scandalum magnatum* case, the action was held to be available to ‘prevent those dangers that otherwise might ensue if the lords should take revenge themselves’¹⁴⁷ — though this is not the justification included in the statutes. Given that, according to Stone, the ‘number of duels and challenges mentioned in newsletters and correspondence jumps suddenly from 5 in the 1580’s to nearly 20 in the next decade, to rise thereafter to a peak of 33 in the ten years 1610–19’,¹⁴⁸ it may be that the courts, in their pursuit of maintaining order, were motivated by the threat posed by *potential* duelling rather than a significant number of incidents.¹⁴⁹

The final aspect of the protection of the social order to be considered relates to the broader conception of morality.¹⁵⁰ There are four types of imputations included here — those relating to chastity, to witchcraft, to bankruptcies and to employment. With respect to the first of the four, the common law courts would not find for the plaintiff unless there was evidence of special damage.¹⁵¹ When a minister was accused of being unchaste, he won the case on the basis that he ‘lost the chaplainship’ as a result of the libel.¹⁵² On the other hand, where a woman was accused of having a child, because there was ‘no loss of marriage’,

145 In addition to the McNamara reference (see above n 93), Donnelly refers to the link between defamation and duelling (Donnelly, above n 4, 113) and Hindle highlights that Bacon used the Court of Star Chamber to ‘trounce “duellers”’ (Hindle, above n 132, 74, quoting Thomas G Barnes, ‘A Cheshire Seductress, Precedent, and a “Sore Blow” to Star Chamber’ in Morris S Arnold et al (eds), *On the Laws and Customs of England: Essays in Honor of Samuel E Thorne* (University of North Carolina Press, 1981) 359, 368).

146 *Lord Darcy v Markham* (1616) Hob 120, 121; 80 ER 270, 270. The report did highlight that, in the communications, ‘though there [was] no direct challenge to my Lord Darcy to fight, yet there were plain provocations to it’. The lack of clear words may have been the result of rules against parties of different social strata facing off; although, in the end, Stone notes that duelling challenged the social order by ‘blurring the distinction between gentry and nobility’: Lawrence Stone, *The Crisis of the Aristocracy: 1558–1641* (Oxford University Press, 1965) 245.

147 *Lord Townsend v Hughes* (1677) 2 Mod 150, 160; 86 ER 994, 1000.

148 Stone, above n 146, 245. Another commentator gives a higher number of 172 duels during the reign of Charles II: Richard Cohen, *By the Sword: A History of Gladiators, Musketeers, Samurai, Swashbucklers, and Olympic Champions* (Random House, revised ed, 2012) 50. This, however, is still only an average of seven duels a year.

149 Coke did refer to duelling in Sir Edward Coke, *The Third Part of the Institutes of the Laws of England* (Lawbook Exchange, first published 1644, 2002 ed) — but it was in a chapter that combined ‘Monomachia, Single Combate, Duell, Affrays, and Challenges, and ... Private Revenge’: at 157. His summary was not confined to duels over a person’s honour — ‘This single combat between any of the kings subjects, of their own heads, and for private malice, or displeasure is prohibited by the laws of this realm: for in a settled state governed by law, no man for any injury whatsoever, ought to use private revenge; for revenge belongeth to the magistrate, who is Gods lieutenant’.

150 At an even higher level, the use of defamation actions to protect the social order may be inferred from the use of five biblical passages in *The Case de Libellis Famosis* (1605) 5 Co Rep 125a; 77 ER 250. Coke cites the Book of Ecclesiastes (at 126a; 252, quoting *Ecclesiastes* 10:20 (Vulgate)), with the specific verse being ‘Curse not thy King’ (King James Version), suggesting that to slander others is a sin against God.

151 The requirement to show special damage was the result of the fact that the writ used was an action on the case: Holdsworth, ‘Defamation in the Sixteenth and Seventeenth Centuries’ (Pt 1), above n 4, 304.

152 *Payne v Beuwmorris* (1668) 1 Lev 248, 248; 83 ER 391, 391.

the words were not actionable.¹⁵³ Finally, in a case where a woman was called a ‘whore’, the common law could not find for the plaintiff, unless there was special damage; instead ‘she ought to sue in the Spiritual Court; for this matter of scandal appertains to their consuance’.¹⁵⁴ It is, of course, possible to see this distinction along gender lines¹⁵⁵ — (employed) men who were accused of unchastity may succeed, but women may not.

Allegations of witchcraft, on the other hand, were treated as if they were allegations of criminal behaviour.¹⁵⁶ A mere claim that a woman was a witch was insufficient to found a successful claim; however, if the imputation was that she had ‘bewitch[ed] a man or a beast’, then it would have been actionable.¹⁵⁷ This applied even where the subject of the imputation of being a witch was male.¹⁵⁸ That said, if the allegation was about heresy, then, as with claims of unchastity, unless there was evidence of special damage, then it should have been taken to the Ecclesiastical Court.¹⁵⁹ It is not clear, to 21st century eyes, why two matters relating to belief would have been treated differently.¹⁶⁰ It is clear, however, that unless there was damage to a plaintiff in the real world, or specific accusations of damage done by the accused (rather than just being attributed as a witch) — both reflecting on the social order — the common law courts were not interested.

The last two categories of imputations to be raised appear to be financial, though both had a strong moral component in the 17th century. First, there were cases involving allegations of bankruptcy that were won by the plaintiff.¹⁶¹ These days there may be negative connotations to being called a bankrupt, but in the early modern period the opprobrium was stronger — the *Bankruptcy Act 1542* referring to bankrupts as those who ‘craftelye’ obtain ‘into theyre handes greate substaunce of other mennes good ... againste all reasonee, quytie and good conscience’.¹⁶² This is emphasised in obiter in cases involving slander of title, where the court

153 *Barnes v Bruddel* (1669) 1 Lev 261, 261; 83 ER 397. The court made two points. First, losing the ‘society of her neighbours’ is not sufficient damage; and if the accusation was ‘[s]he had a child’, but she has ‘not a child’, ‘she has made it away’, then this may be actionable as it ‘imports felony’.

154 *Daniel v Sterlin* (1672) 1 Freem KB 50, 51; 89 ER 39, 39.

155 See, eg, Gowing’s analysis of cases from the Consistory Court: Laura Gowing, ‘Gender and the Language of Insult in Early Modern London’ (1993) 35 *History Workshop Journal* 1.

156 It may be noted that there is analysis that has linked witchcraft in the early modern period to the prevalence of syphilis: see, eg, Eric B Ross, ‘Syphilis, Misogyny, and Witchcraft in 16th-Century Europe’ (1995) 36 *Current Anthropology* 333. This connection, however, may not have impacted on defamation law.

157 *Markham v Adamson* (1646) Aleyn 2, 3; 82 ER 883, 883.

158 *Dacy v Clinch* (1661) 1 Sid 52; 82 ER 964.

159 *Dudley v Spencer* (1678) 1 Freem KB 277; 89 ER 198.

160 Understandings of the ‘politics’ of 17th century witchcraft incorporate both the notion that practice of witchcraft was a crime and the idea that the pursuit of witches involved the ‘demonization of religious extremists and radical sectaries’: Peter Elmer, ‘Towards a Politics of Witchcraft in Early Modern England’ in Stuart Clark (ed), *Languages of Witchcraft: Narrative, Ideology and Meaning in Early Modern Culture* (Macmillan Press, 2001) 101, 111.

161 See, eg, *Selby v Carrier* (1614) Cro Jac 345; 79 ER 295.

162 *Bankruptcy Act 1542*, 34 & 35 Hen 8, c 4. Further, the marginal note to the statute, in the *Statute of the Realms* reproduction, referred to the ‘Evil of Debtors’, though, of course, that note would not have appeared in the original Act.

refers to ““thief” and “bankrupt”” as slanders that ‘imply ... temporal loss’.¹⁶³ In short, to be called a bankrupt was as bad, back then, as being called a thief.

Finally, there were a significant number of cases in which the slander was linked to the plaintiff’s occupation. In these cases, for the plaintiff to succeed, there had to be a direct link, either a ‘colloquium’ or a ‘conference’,¹⁶⁴ between the slander and the person’s livelihood.¹⁶⁵ For example, to say that ‘one is a cozener, an action lies not; yet for such a particular person [a surveyor], this touching him in his means of living, the action well lies’.¹⁶⁶ The words ‘[t]hou art no midwife, but a nurse; and if I had not pulled thee from Mrs J S, thou hadst killed her and her child’,¹⁶⁷ constituted a sufficient link to her profession for her to win the case. Without what the courts considered to be a sufficient link between the plaintiff’s work and the libel, the plaintiff would not succeed — for example, the claim that the plaintiff was a ‘bungler, and knows not how to make a good piece of work’ was not actionable because there was no reference to his work as watchmaker.¹⁶⁸ The justification for this category of actions was that a slander of this kind ‘discredits’ people in their ‘means of living: and this kind of offence may not only be cause to put [them] out of that service, but to be refused of all others’.¹⁶⁹

These employment cases also had a moral aspect because there was a strong link between work and 17th century religious thought.¹⁷⁰ For one Puritan,¹⁷¹ ‘[e]very Christian man is bound in conscience before God ... to provide for his household and family’;¹⁷² another stated that ‘[e]very man therefore is bound to do all the good he can to others, especially for the church and commonwealth ... this is not done by

163 *Law v Harwood* (1628) Cro Car 140, 141; 79 ER 724, 724.

164 *Cawdry v Highley* (1632) Cro Car 270, 270; 79 ER 835, 835–6.

165 The distinction between the two connections was made clear:

if a man says of an attorney, that he is a *knave*, the words are not actionable, unless there be a *colloquium* laid concerning his practising as an attorney. But if the words be such as do necessarily relate to his employment, then the words are actionable without any *colloquium*; as to say of an attorney “He is a knave in his practice,” or “he arresteth without taking out writs,” &c these are actionable without any *colloquium*, because they necessarily relate to his employment.

Bell v Thatcher (1675) 1 Freem KB 276, 276–7; 89 ER 198, 198 (citations omitted).

166 *Blunden v Eustace* (1618) Cro Jac 504, 504; 79 ER 430, 430.

167 *Whitehead v Founes* (1676) 1 Freem KB 277, 277; 89 ER 198, 198. That there was another midwife decision that went the way of the plaintiff (*Wharton v Brook* (1675) 1 Vent 21; 86 ER 15) suggests that there may have been limits to the gender bias of the law of the time.

168 *Redman v Pyne* (1669) 1 Mod 19, 19; 86 ER 698, 698 (emphasis in original).

169 *Bray v Hayne* (1615) Hob 76, 76; 80 ER 225, 225.

170 A 17th century case of blasphemy highlights how central the courts saw Christianity to the law: such kind of wicked blasphemous words were not only an offence to God and religion, but a crime against the laws, State and Government, and therefore punishable in this Court. For to say, religion is a cheat, is to dissolve all those obligations whereby the civil societies are preserved, and that Christianity is parcel of the laws of England; and therefore to reproach the Christian religion is to speak in subversion of the law.

Taylor’s Case (1676) 1 Vent 293, 293; 86 ER 189, 189.

171 Of course, England was strictly a Protestant country; however, by the middle of the 17th century, it was difficult to fully separate the two schools of belief. Collinson has been quoted as saying the ‘coherence of our concept of puritanism depends upon knowing as little about particular puritans as possible’: John Spurr, *English Puritanism 1603–1689* (Palgrave Macmillan, 1998) 16.

172 R H Tawney, *Religion and the Rise of Capitalism: A Historical Study* (John Murray, 2nd ed, 1936) 216, quoting Frederick J Furnivall (ed), *Phillip Stubbes’s Anatomy of the Abuses in England in Shakespeare’s Youth* (N Trübner, 1877) 115.

idleness, but by Labour'.¹⁷³ The Puritan attitude, therefore, may be summed up with the maxim *laborare est orare* — to work is to pray. In terms of modern analysis of the obligation, for Sacks, at the time it was understood that 'every free man had a godly obligation (not just a right) to earn his bread, a duty which could not be bridged without his consent'.¹⁷⁴ Further, Hindle links the Puritanism of the time to the understanding of 'idleness' as a 'moral as well as an economic offence'.¹⁷⁵ As such, slanders against a person in their occupation damaged the social order by impacting their place in the economy and their place in heaven.

B The 17th Century Law and 'False Facts' and 'Reputation'

It is time to return to the conceptualisation of what was being protected, other than society generally, by 17th century defamation law. Again, as with the law of the medieval period, the focus was not solely on the plaintiff's reputation. Four conceptual categories can be highlighted here: 'false facts', '(family) name', 'honour' and reputation.

Consistent with the law of the 15th century, there were a number of cases in which the verdict was discussed in terms of false news.¹⁷⁶ The phrase 'false and horrible messages' was used in *The Earl of Northampton's Case*¹⁷⁷ — though that may not be surprising given it was a *scandalum magnatum* action.¹⁷⁸ In a King's Bench case, the court discussed the harm suffered by the plaintiff as a result of a 'falsehood'.¹⁷⁹ In another case in that jurisdiction, 'false news' was found to be the basis of the action.¹⁸⁰ Two other cases may be highlighted here. First, *Hilsden v Mercer* referred to the fact that the defendant could not provide any 'justification' for the 'slandorous' words¹⁸¹ — with that concept now being used as a term for proving the truth of words. Second, the decision in *The Case de Libellis Famosis* is relevant to an understanding of 'truth' in libel in two ways: (1) the claim that it is 'not material whether the libel be true'¹⁸² — though no other 17th century case includes such a statement; and (2) one of the biblical passages referred to uses the term 'talebearer'¹⁸³ — thereby imparting a sense of the spreading of falsehoods. It

173 Richard Baxter, *A Christian Directory* (Richard Edwards, 1825) 580, quoted in William Lamont, *Puritanism and Historical Controversy* (UCL Press, 1996) 107.

174 David Harris Sacks, 'The Countervailing of Benefits: Monopoly, Liberty, and Benevolence in Elizabethan England' in Dale Hoak (ed), *Tudor Political Culture* (Cambridge University Press, 1995) 272, 275.

175 Hindle, above n 132, 177–8.

176 Again, as with the late medieval decisions, most of the reports do not go into significant detail around the context of the statements at the heart of the disputes.

177 (1612) 12 Co Rep 132, 133; 77 ER 1407, 1408.

178 It is arguable that the use of innuendo in *scandalum magnatum* actions marked a shift in defamation law because it was under this form of interpretation that the courts no longer had to rule on the plain meaning of the allegedly defamatory words.

179 *Bray v Hayne* (1615) Hob 76, 76; 80 ER 225, 225.

180 *Lewes v Walter* (1616) 3 Bulst 225, 225; 81 ER 189, 190.

181 (1623) Cro Jac 677, 677; 79 ER 586, 586.

182 (1605) 5 Co Rep 125a, 125b; 77 ER 250, 251.

183 Coke incorrectly cites *Leviticus* 17 (Vulgate) for the phrase '[n]on facias calumniam proximo' when seeking to support the claim that 'libelling and calumny is an offence against the law of God': ibid 125b; 252. The phrase is, in fact, found in *Leviticus* 19:13. This is translated in the King James Version as '[t]hou shalt not defraud thy neighbour'. It is possible that *Leviticus* 19:16 (King James Version) is a more appropriate quote: 'Thou shalt not go up and down as a talebearer among thy people'.

may also be seen that the cases cited were all Jacobean — as such, they may not be protecting the 17th century social order; instead, they may simply be a carryover of the understanding of the harm of libel as existed in the medieval period.

The next category of concept relates more clearly to the social order of the time. There were, for example, references to the ‘name’ of the plaintiff. Some were to their name generally,¹⁸⁴ while another case held that ‘bastard’ was a libellous term because the plaintiff may, at one point, inherit a title.¹⁸⁵ Tied to the question of ‘title’ are the *scandalum magnatum* actions — these tended to focus on ‘honour’,¹⁸⁶ ‘esteem’¹⁸⁷ or ‘disesteem’.¹⁸⁸ Names, and titles, were central to the maintenance of the aristocracy and gentry — one of the remaining roles of the Court of Chivalry in the early modern period was to resolve disputes about surnames.¹⁸⁹ Honour, too, ‘implies that identity is essentially ... linked to institutional roles’.¹⁹⁰ Tying this in with the ‘family name’ is the assessment that: ‘For a man’s very being as honourable had been transmitted to him with the blood of his ancestors, themselves honourable men. Honour therefore was not merely an individual possession, but that of the collectivity, the lineage.’¹⁹¹

Further, returning to the relevance of duelling, the concept of ‘honour’ had shifted such that, over the course of the 17th century, it came to be understood in terms of ‘sensitivity to injury and insult’.¹⁹² Unsurprisingly, it was in that century that the

184 *Peacock v Reynal* (1612) 2 Brownl 151, 152; 123 ER 868, 868; *Savill v Roberts* (1698) 12 Mod 208, 208; 88 ER 1267, 1267. It may be noted that at one point in the latter report, the term ‘name’ is used, while at another, the word ‘same’ is (at least in the English Reports version). McNamara considers that the decision refers to ‘fame’ (McNamara, above n 2, 39); however, given the other reference to ‘name’ in the judgment, that term may be more accurate.

185 *Vaughan v Ellis* (1608) Cro Jac 213; 79 ER 185.

186 See, eg, *The Earl of Lincoln v Roughton* (1606) Cro Jac 196, 196; 79 ER 171, 171; *Lord of Leicester v Mandy* (1657) 2 Sid 21, 22; 82 ER 1234, 1234.

187 See, eg, *Earl of Pembroke v Staniel* (1672) 1 Freem KB 49, 49; 89 ER 38, 38. It may be noted that this case did use the term ‘man of reputation’; however, that was used to refer to the person who heard the defamatory words spoken by the defendant, rather than being used to refer to the plaintiff.

188 *Lord Townsend v Hughes* (1677) 2 Mod 150, 166; 86 ER 994, 1003. This decision also referred to argument of the defendant that the plaintiff was a ‘man of no honour’.

189 G D Squibb, *The High Court of Chivalry: A Study of the Civil Law in England* (Oxford University Press, 1959) 139.

190 Peter L Berger, Brigitte Berger and Hansfried Kellner, *The Homeless Mind: Modernization and Consciousness* (Random House, 1973) 90 (emphasis altered).

191 Mervyn James, *English Politics and the Concept of Honour 1485–1642* (Past and Present Society, 1978) 15.

192 Stewart, above n 101, 69, quoting C L Barber, *The Idea of Honour in the English Drama: 1591–1700* (Göteborg, 1957) 140. There is evidence of this assessment in the early stages of the century too. A proclamation against duelling, issued by James I stated: ‘Wrongs, which are the grounds of Quarrels, are either *Verball* ... or *Reall* ... [and include] all Libels published in any sort to the disgrace of any Gentleman ... for all these trench as deeply into reputation as the stabbe it selfe doeth into a man that esteemes Honour’: Markku Peltonen, ‘Francis Bacon, the Earl of Northampton, and the Jacobean Anti-Duelling Campaign’ (2001) 44 *Historical Journal* 1, 1–2, quoting *A Publication of His Majties Edict, and Severe Censure against Private Combats and Combatants* (Robert Barker, 1613) 42–3. This quote also suggests that there was a clear relationship made, at least in the social circles that resorted to duelling, between ‘reputation’ and ‘honour’.

‘duel of honour’ became more prevalent.¹⁹³ As [d]uelling provided a warrant of aristocratic breeding,¹⁹⁴ its role (both in terms of actual duels and the potential for them) in that century may be said to have perpetuated the social hierarchy. Its notoriety, therefore, may have contributed to the use of ‘honour’ in defamation actions involving the nobility.

There were also a number of other characterisations of the harm of libel. One said that the words ‘moved credit in the hearer’,¹⁹⁵ another referred to ‘ill opinion’¹⁹⁶ and *The Case de Libellis Famosis* used, inter alia, ‘fame and dignity’.¹⁹⁷ While these characterisations may be understood as matching the modern prism of ‘reputation’, they are not exact synonyms.¹⁹⁸ It is, perhaps, more convincing to suggest that these point to an acceptance of the internal life of the broader community — but not of the internal life of the plaintiff. In addition, there were a small number of judgments that used the term ‘reputation’. Despite not being used in the judgments of the medieval period, the term was used across the 17th century. An early use was in *Moor v Foster*¹⁹⁹ and a late one was *Somers v House*.²⁰⁰ The plaintiff of the former of the two was Sir George Moor, and he was described as a ‘person of reputation’²⁰¹ — suggesting that it was his status that was important, rather than his personal sense of reputation. That said, it may be noted that few, if any, *scandalum magnatum* actions used the term ‘reputation’, thereby suggesting that what was being protected by the different actions was understood to be different.²⁰² Nonetheless, of all the decisions referred to in this section, only one used ‘reputation’ in the way it is now, and that was six years before the beginning of the 18th century — the term, therefore, was not central to the law of the time.

Three things may be added to wrap up this discussion. First, the harm was seen as personal — there are no decisions in which trading companies brought actions

193 As opposed to the ‘judicial duel’ or the ‘duel of chivalry’. One feature that distinguished the duel of honour from the earlier versions of the duel was the fact that the rules of behaviour around them were formalised in the Code of Duelling. One such Code, from Galway, is reproduced in Robert Baldick, *The Duel: A History of Duelling* (Chapman & Hall, 1965) 34–6.

194 Kiernan, above n 94, 53.

195 *Sydenham v May* (1615) Hob 180, 181; 80 ER 327, 328.

196 *Cropp v Tilney* (1693) 3 Salk 225, 226; 91 ER 791, 791.

197 (1605) 5 Co Rep 125a, 125b; 77 ER 250, 251.

198 A further point may be made. Muldrew has argued for the importance of ‘reputation’ in the burgeoning credit economy of early modern England. The contemporaneous quotes he uses to make his argument, however, speak of the ‘honour’ of a person, or their ‘good name’: Craig Muldrew, *The Economy of Obligation: The Culture of Credit and Social Relations in Early Modern England*, (Palgrave, 1998) 148–72. Again, Muldrew seems to be reframing the concepts used at the time in terms of ‘reputation’ as it is now understood — or, at the very least, does not appear to be open to the possibility of any differences between the concepts.

199 (1605) Cro Jac 65, 65; 79 ER 55, 55.

200 (1694) Holt KB 39, 39; 90 ER 919, 919.

201 (1605) Cro Jac 65, 65; 79 ER 55, 55.

202 Some analyses of duels discuss the relationship between honour and reputation: see, eg, Markku Peltonen, *The Duel in Early Modern England: Civility, Politeness and Honour* (Cambridge University Press, 2003) 35. The early modern writers he quotes, however, do not use the term ‘reputation’.

for their ‘reputation’ in the market.²⁰³ Second, on a more conjectural note, with respect to imputations of crime at least, it is arguable that reputation as it is now understood was not the focus — if it was, then, the plaintiff’s reputation would be damaged whether they were called a ‘thief’ or it was said of them that ‘[t]hou art a thief, and hast stolen my corn’.²⁰⁴ Again, this may reinforce the notion that these actions protected the criminal justice system and not the plaintiff. Finally, the law’s understanding of what was being protected may be seen either as in flux, or at the very least, ‘reputation’ was not the ‘go-to’ concept for the justification of the action. As an example of this, for March, actions for defamation should succeed ‘where a mans life, livelihood, or reputation (which is dearer to him than the former) is much endangered by scandalous words’.²⁰⁵ This phrase, however, can be seen to be a rephrasing of Coke’s ‘libelling ... robs a man of his good name, which ought to be more precious to him than his life’.²⁰⁶ There were only 42 years between the quotes — the difference may, therefore, suggest a lack of stability in the conception underpinning the law, rather than a significant shift to the ‘correct’ interpretation of the action.

IV NINETEENTH CENTURY

Attention may now be turned to the law of the 19th century. As this is the period that is most similar to modern times, and the underlying conceptions closer to what is in place now, the discussion of it will be more brief. Two aspects will be referred to. The first of these is the ‘evolution’ of a protection first seen in the early modern period. There developed in the 19th century, the privilege, or the ‘absolute immunity’,²⁰⁷ for statements made in court. It may be summed up thus: the ‘authorities [are] clear, uniform and conclusive, that no action of libel or slander lies, whether against judges, counsel, witnesses or parties, for words written or spoken in the ordinary course of any proceeding before any court or tribunal recognized by law’.²⁰⁸ It was explicitly ‘founded on public policy’,²⁰⁹ with each of the four categories of participants²¹⁰ having to be able to fulfil their obligations with their ‘mind uninfluenced by the fear of an action for defamation or a prosecution for libel’.²¹¹ By way of another link to the 17th century law, one

203 It is not as if the trading companies were strangers to the 17th century courts. There were, for example, a number of cases around grants made to them by the Crown: see, eg, *East-India Co v Sandys* (1685) Skin 223; 90 ER 103; *The Company of Merchant Adventurers v Rebow* (1687) 3 Mod 126; 87 ER 81.

204 *Kellan v Manesby* (1604) Cro Jac 39, 39; 79 ER 32, 32. For an extreme example of where an imputation was not sufficient so as to impute a felony, see *Holt v Astgrigg* (1607) Cro Jac 184; 79 ER 161 — a case where the statement that the plaintiff cleaved the head of his cook (with additional graphic details) was not enough to succeed in a defamation action.

205 March, above n 107, 4.

206 *The Case de Libellis Famosis* (1605) 5 Co Rep 125a, 125b; 77 ER 250, 251.

207 *Royal Aquarium and Summer and Winter Garden Society, Ltd v Parkinson* [1892] 1 QB 431, 442.

208 *Dawkins v Lord Rokeby* (1873) LR 8 QB 255, 263.

209 *Munster v Lamb* (1883) 11 QBD 588, 604–5, quoting *Kennedy v Hilliard* (1859) 10 IR CL 195, 209.

210 Gatley provides a significant number of precedents for each of the categories of participants: Clement Gatley, *Law and Practice of Libel and Slander in a Civil Action* (Sweet & Maxwell, 1924) 171–82.

211 *Munster v Lamb* (1883) 11 QBD 588, 605, quoting *Kennedy v Hilliard* (1859) 10 IR CL 195, 209.

court imputed an ethical component to the privilege with a reference to the ‘office of a witness’.²¹² The privilege does not extend to those in court who are not in one of the above categories;²¹³ nor does it extend to all governmental bodies charged with making decisions.²¹⁴ It does, however, cover quasi-judicial proceedings such as military courts of inquiry.²¹⁵ In short, the defamation law of the 19th century facilitated the role of the courts in a way that had not been done before — though, as suggested above, the 17th century law can be seen in terms of protecting the judicial institution itself.

The other aspect of the law to be raised here relates to how the 19th century law of defamation understood what was being protected by the actions.²¹⁶ Generally speaking, the libel law of the time was about social, or commercial, standing,²¹⁷ or the ‘person, character, office, or occupation of the plaintiff’.²¹⁸ More specifically, to begin with, there was no unanimity about what was at the centre of the action. Comyns, for example, did not use the word ‘reputation’ in his summary of the action, instead focusing on whether there was a ‘defamation of the government, of a magistrate, or of a private person’.²¹⁹ Another commentator used general terms such as ‘detract[ing] from the qualities of any individual being’ and ‘publishing what detracts from the character of another’.²²⁰ The courts also used a variety of formulations; for example, the ‘law recognizes in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit’;²²¹ and libel was seen to include ‘publication[s] calculated to bring another into ridicule or hold him up to contempt’.²²² Further, with respect to the

212 *Seaman v Netherclift* (1876) 2 CPD 53, 61.

213 See, eg, *Delegal v Highley* (1837) 3 Bing NC 950, 961; 132 ER 677, 681.

214 It did not, for example, cover decisions of a local council in *Royal Aquarium and Summer and Winter Garden Society, Ltd v Parkinson* [1892] 1 QB 431.

215 See, eg, *Home v Lord Bentick* (1820) 2 Brod & Bing 130; 129 ER 907.

216 If the material from the political philosophy of the time is considered, then, to take one example, it was said, in a discussion of libel law, that there is ‘no external possession more solid or more valuable than an honest fame’: William Godwin, *An Enquiry Concerning Political Justice and Its Influence on General Virtue and Happiness* (C G J & J Robinson, 1793) vol 2, 642.

217 Carr lists a number of instances in which libel actions could succeed — these included ‘[i]f the imputation affect a man’s reputation for skill and address in his business, office, trade, profession, or occupation ... [w]hen the imputation tends to the disinherison of the plaintiff ... [and] [w]hen the imputation is of a breach of the Seventh Commandment on the part of a female plaintiff’: Carr, above n 4, 257.

218 *Gutsole v Mathers* (1836) 1 M & W 495, 502; 150 ER 530, 532.

219 Sir John Comyns, *A Digest of the Laws of England* (A Strahan, 4th ed, 1800) vol 4, 689. He justified the existence of the action for private individuals on the basis that defamation ‘incites the whole family to revenge’: at 690.

220 John George, *A Treatise on the Offence of Libel: With a Disquisition on the Right, Benefits, and Proper Boundaries of Political Discussion* (Taylor and Hessey, 1812) 150–1. No cases were cited for this formulation.

221 *Scott v Sampson* (1882) 8 QBD 491, 503. This quote was the opening line to Gatlley’s treatise: Gatlley, above n 210, 1.

222 *Paris v Levy* (1860) 9 CB NS 342, 362; 142 ER 135, 142. The judgments also referred to the ‘character’ of the plaintiff (at 363; 143) and ‘reputation’ was referred to in argument (at 350; 138).

references of employees, the emphasis was also on the *character* of the worker.²²³ As a final example, in another qualified privilege case, the court referred to the ‘moral and religious character and conduct of the plaintiff’.²²⁴ While McNamara emphasises the references to ‘reputation’ in the 19th century cases and treatises,²²⁵ it is clear that the concept was not the only prism through which the action was seen in that century.

Of course, there were also many references over the course of the century to the reputation of the plaintiff.²²⁶ One treatise writer stated that, with respect to libel, ‘[r]eputation is a personal and an absolute right, and every attack upon it a personal wrong’.²²⁷ Another suggested that libel ‘blacken[ed] ... the reputation of one who is alive, and thereby expos[ed] him to public hatred, contempt, and ridicule’.²²⁸ In terms of the cases, it was held that ‘[e]very publication of slanderous matter is *prima facie* a violation of the right which every individual has to his good name and reputation’.²²⁹ As another example, a ‘publication, without justification or lawful excuse, which is calculated to injure the reputation of another, by exposing him to hatred, contempt, or ridicule, is a libel’.²³⁰ Again, reputation is related to character; however, they are not identical concepts — Veeder, for example, states, practically at the end of the 19th century, that ‘[c]haracter is what a person really is; reputation is what he seems to be’.²³¹ Importantly, too, the 19th century judgments did not expressly state that they were interchangeable terms — though the courts

223 See Thomas Starkie, *A Treatise on the Law of Slander, Libel, Scandalum Magnatum, and False Rumours* (W Clarke and Sons, 1813) 255–62, citing *Rogers v Clifton* (1803) 3 Bos & P 587; 127 ER 317 and two 18th century decisions — *Edmondson v Stephenson* [1766] Buller’s Nisi Prius 8; *Hargrave v Le Breton* (1769) 4 Burr 2422, 2425; 98 ER 269, 271.

224 *Whiteley v Adams* (1863) 15 CB NS 392, 417; 143 ER 838, 848. The only use of the word ‘reputation’ in that case was in the letter that contained an allegedly defamatory imputation: at 395; 839. ‘[C]haracter’ was also used in *Child v Affleck* (1829) 9 B & C 403, 406; 109 ER 150, 151; *Davison v Duncan* (1857) 7 E & B 229, 231; 119 ER 1233, 1233; *Toogood v Spyring* (1834) 1 Cr M & R 181, 193; 149 ER 1044, 1050; *Campbell v Spottiswoode* (1863) 3 B & S 769, 776; 122 ER 288, 290.

225 McNamara, above n 2, 91–4.

226 There were very few references to the ‘honour’ of plaintiffs in the 19th century. Given that such references were, in the 17th century, associated with *scandalum magnatum* actions, the lack of references may not be surprising — as the statutory action was seen as obsolete by the end of the 18th century: Lassiter, above n 56, 235. Further, duelling was on the decline in the first half of the 19th century, with the ‘last publicly recorded duel in England occur[ing] in 1852’: Donna T Andrew, ‘The Code of Honour and Its Critics: The Opposition to Duelling in England, 1700–1850’ (1980) 5 *Social History* 409, 431. That said, it was sufficiently high-profile at the end of the 18th century for Godwin to have an appendix dedicated to the topic: Godwin, above n 216, vol 2, 94–6.

227 Richard Mence, *The Law of Libel* (W Pople, 1824) vol 1, 108–9. No cases were cited for this formulation.

228 Matthew Bacon, *A New Abridgment of the Law* (A Strahan, 6th ed, 1807) vol 4, 449.

229 *M’Pherson v Daniels* (1829) 10 B & C 263, 270; 109 ER 448, 451.

230 *Parmiter v Coupland* (1840) 6 M & W 105, 108; 151 ER 340, 342.

231 Van Vechten Veeder, ‘The History and Theory of the Law of Defamation’ (Pt 2) (1904) 4 *Columbia Law Review* 33, 33. He also states that it is ‘reputation, not character, which the law aims to protect’.

did say that libel law was aimed at protecting both.²³² It is worth emphasising, nonetheless, that the courts did, at times, use ‘character’ instead of ‘reputation’.

In terms of the nature of the ‘self’, as understood by the law of the time, there is a significant ‘moral’ dimension. As has been evident since the medieval period, truth (or the sanctioning of ‘false news/facts’) remained at the heart of defamation law. To begin,

truth is an answer to the action, not because it negatives the charge of malice, ... but because it shews that the plaintiff is not entitled to recover damages. For the law will not permit a man to recover damages in respect of an injury to a character which he either does not, or ought not, to possess.²³³

While this is not a surprising proposition now, its moral dimension can be forgotten. Sanctions for untrue speech discourage such speech.²³⁴ Further, a connection between communications and other virtues was also made: a letter may encourage its recipient to ‘investigate the truth, and take such steps as prudence and justice to the parties concerned required’.²³⁵ Even the notion of ‘duty’, in qualified privilege cases, imputes an ethical obligation on the part of a party in the dispute.²³⁶ Finally, the commentators used morally-loaded terms — libellers being seen to have ‘evil motive[s]’ when defaming someone,²³⁷ reinforcing the ‘bad’ nature of those who speak loosely. In short, this promotion of virtue in society is in keeping with a key feature of 19th century law.²³⁸

This understanding of ethics may be further linked with defamation law — specifically in reference to the rise of utilitarianism.²³⁹ For Bentham, seen as the ‘father’ of utilitarianism, ‘each individual always pursues what he believes to be his own happiness’.²⁴⁰ Such an understanding privileges the role, and perspective, of the individual. Importantly, utilitarians considered that these

232 More accurately, perhaps, impugned publications were seen to have impacted on both the character and reputation of the plaintiff — see, eg, *Delegal v Highley* (1837) 3 Bing NC 950; 132 ER 677 (‘character’ is referred to at 961; 681; while ‘reputation’ is referred to, again by Tindal CJ, at 962; 681). It would be possible to argue that ‘character’ was the focus of qualified privilege cases, while ‘reputation’ was the focus of all the others — however, if malice is proven in a qualified privilege case, it would still appear that the damage is to the plaintiff’s reputation, rather than character.

233 *M’Pherson v Daniels* (1829) 10 B & C 263, 272; 109 ER 448, 451.

234 The presumption of malice also may be seen to act as a moral overlay — the attitude of the law being individuals should be particularly careful with their speech because the presumption of ‘wrongful intention’ (Gatley, above n 210, 5) acts to balance the litigation in favour of plaintiffs. Further, the capacity for plaintiffs to plead innuendo, instead of taking the words at face value, also benefits the plaintiff; as noted above, this was the case in 17th century *scandalum magnatum* actions, however, the practice spread more widely: see, eg, *Sturt v Blagg* (1847) 10 QB 906; 116 ER 343.

235 *Coxhead v Richards* (1846) 2 CB 569, 595; 135 ER 1069, 1079.

236 The courts highlighted that the duty is both ‘social and moral’: *Whiteley v Adams* (1863) 15 CB NS 392, 414; 143 ER 838, 847.

237 George, above n 220, 150.

238 See, eg, Dent, ‘The “Reasonable Man”’, above n 6.

239 McNamara links the shifts in the law around ‘reputation’ with the Enlightenment, but not utilitarianism: McNamara, above n 2, 94–5.

240 Bertrand Russell, *History of Western Philosophy* (Routledge, first published 1946, 2005 ed) 700.

individuals experience an internal life²⁴¹ — in Mill’s terms, the ‘inward domain of consciousness’.²⁴² Expressed differently, the ‘root of the matter for classical utilitarians is that utility lies in internal mental states’.²⁴³ Considering defamation law, then, in this context suggests that the law saw, and promoted, plaintiffs as individuals with the capacity to protect their own interests — as this was the ‘right’ thing to do. The law, therefore, may not have been protecting ‘reputation’ or ‘character’ per se; instead it, may have been protecting a standardised version of the individual’s perception of their place in society.²⁴⁴

Finally, reference may be made to a particular category of legal personhood — that of corporations — in order to get a wider sense of ‘reputation’ in the 19th century law. Unlike in the 17th century,²⁴⁵ in the 19th century companies did successfully bring defamation actions.²⁴⁶ As with individual plaintiffs,²⁴⁷ corporations were seen to have a ‘character’,²⁴⁸ a ‘trading character’²⁴⁹ or ‘rights and interests’²⁵⁰ that could be adversely impacted by defamatory words, as well as a ‘reputation’.²⁵¹ One of the leading cases on the defamation of corporations — *South Hetton Coal Co, Ltd v North-Eastern News Association, Ltd*²⁵² — did not use the word ‘reputation’. It should be noted, here, that the highlighted decision that did use the term ‘reputation’ also included statements to the effect that libel

241 Further, ‘by the nineteenth century the internal aspect of honor was prominent among speakers of all the major European languages’: Stewart, above n 101, 41.

242 John Stuart Mill, *On Liberty*, ed David Bromwich and George Kateb (Yale University Press, 2003) 82.

243 Wendy Donner, *The Liberal Self: John Stuart Mill’s Moral and Political Philosophy* (Cornell University Press, 1991) 68.

244 O’Malley notes that the ‘criteria for assessing ... actions for libel, are firmly grounded in the dominant ideology of the society at the time of the action’: Pat O’Malley, ‘From Feudal Honour to Bourgeois Reputation: Ideology, Law and the Rise of Industrial Capitalism’ (1981) 15 *Sociology* 79, 88 (emphasis altered). While he saw the law from more of a Marxist perspective, the observation may also apply if utilitarianism is seen as central.

245 Gatley cites a 1670 decision for partnerships being able to bring an action for defamation: Gatley, above n 210, 420. That decision, *Coryton v Lithebye* (1670) 2 Saund 115; 85 ER 823, is not, however, a defamation case.

246 The early such cases involved partnerships: see, eg, *Williams v Beaumont* (1833) 10 Bing 260; 131 ER 904. The argument in the decision focused on whether the action was allowed under the relevant (unnamed) statute, and, therefore, did not address whether the partnership was deemed to have a ‘reputation’.

247 The courts still maintained the distinction between any aspect of the corporation that may be impacted by a libel and the ‘personal reputation’ of any individual associated with the corporation: *Manchester Corporation v Williams* [1891] 1 QB 94, 96.

248 *South Hetton Coal Co, Ltd v North-Eastern News Association, Ltd* [1893] 1 QB 133, 138. Further, in a partnership case, a judge referred to the libel affecting the ‘character of one of that firm’: *Forster v Lawson* (1826) 3 Bing 452, 456; 130 ER 587, 589.

249 *South Hetton Coal Co, Ltd v North-Eastern News Association, Ltd* [1893] 1 QB 133, 145.

250 Ibid 142, quoting, with approval, the treatise Joseph Story, *Commentaries on the Law of Partnership* (Little, Brown, 4th ed, 1855) 407–9 [257].

251 *The Metropolitan Saloon Omnibus Co (Ltd) v Hawkins* (1859) 4 Hurl & N 87, 90; 157 ER 769, 770.

252 [1893] 1 QB 133.

was to protect a corporation's 'property'²⁵³ and its 'trade'.²⁵⁴ In other words, there was a tension within the judgments about the nature of what was being protected. It may suggest, too, that the broadening of libel actions to include companies matches the general tendency of the 19th century courts to protect the interests of capitalists²⁵⁵ — perhaps evidenced by the unsubstantiated statement '[t]hat a corporation at common law can sue in respect of a libel there is no doubt'.²⁵⁶ Overall, however, even without considering the case of companies, the 19th century courts did not have a single, simple, characterisation of what the 'heart' of defamation law was.

V CONCLUSION

The value of this research was not to show a new 'truth' of defamation law; instead, its purpose was to revisit one of the more simplistic observations about the history of this legal area — the assumed role of 'reputation'. The evidence shows that 'truth' (or 'false news'), and not reputation, has been at the centre of the law since its inception. That said, the disjunctions and discontinuities between eras identified here suggest that what has been protected by defamation is historically contingent. Specifically, there is very little evidence, before the 19th century, of a sense of reputation that rests on an understanding of the internal life of the plaintiff or of others in the community, and little evidence, before the 17th century, of an understanding of the internal life of third parties. As such, it is arguable that the law of defamation protected different aspects of the 'self' at different times — with the law covering a grab bag of concepts. Given that the law shifted from the medieval period to the 17th century, and then again from the 17th to the 19th century, it may be time to question whether the law has moved on from the 19th century law in a way that has not, yet, been acknowledged — such that some other concept, or combination of concepts, is really at the heart of the action for defamation in the 21st century. The reference to 'integrity' and 'judgment' in the Rebel Wilson case, referred to in the Introduction, suggests a different sense of self than 'honour', 'dignity' or 'name'. It appears, therefore, that the law may already be moving on — without any self-awareness of the process.

253 *The Metropolitan Saloon Omnibus Co (Ltd) v Hawkins* (1859) 4 Hurl & N 87, 90; 157 ER 769, 770. It may be noted that most of the surveyed 19th century defamation cases did not consider 'reputation' as 'property'. One case that did (*Dixon v Holden* (1869) LR 7 Eq 488, 492) was decided by an equity court, instead of a common law court. It may not be a coincidence that it was also in the 1860s that the equity courts were also beginning to consider trade marks, linked at the time to the reputation of firms in the market, as property: see generally Lionel Bently, 'From Communication to Thing: Historical Aspects of the Conceptualisation of Trade Marks as Property' in Graeme B Dinwoodie and Mark D Janis (eds), *Trademark Law and Theory: A Handbook of Contemporary Research* (Edward Elgar, 2008) 3.

254 *The Metropolitan Saloon Omnibus Co (Ltd) v Hawkins* (1859) 4 Hurl & N 87, 91; 157 ER 769, 770.

255 See Dent, 'The "Reasonable Man"', above n 6, 417–19, citing research in 19th century patent and restraint of trade law.

256 *The Metropolitan Saloon Omnibus Co (Ltd) v Hawkins* (1859) 4 Hurl & N 87, 90; 157 ER 769, 770.