

Ostracism and the Law of Defamation

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This article compares the classical political institution of ostracism with the modern law of the United States concerning defamation. The classical institution of ostracism, was a political tool of very limited scope. In modern society the term "ostracize" generally means to exclude a person from all or some of the benefits of a group. The law of defamation is a rather limited means of protecting an individual's reputation, consequently protecting individuals from being ostracized. The article concludes that United States law concerning defamation is generally inadequate as a means of protection from certain social consequences that resemble ostracism, such as job and educational discrimination. In addition, the article concludes that "the law seems to foster an unarticulated public policy that drifts in accordance with the preferences of individuals who have a great deal of personal or institutional power."

INTRODUCTION

Ostracism in ancient Greece was a political institution. It came into being in Athens in the Sixth Century, B.C. ¹It appears to have been a means of curbing political power of certain men who achieved prominence, hence power, in the Athenian democracy. The mechanism was simple. Each year the Athenian citizens would meet to determine if anyone should be ostracized. If they determined that an ostracism should be held, they would meet again 6 weeks later and cast their votes inscribed on potsherds. If there was a vote of at least 6000 (out of a population of approximately 40,000 Athenian citizens), the individual who was named on the largest number of potsherds would be required to leave Attica for 10 years. He was permitted to keep his property. No crime or specific malfeasance had to be established in order to ostracize a person. The institution would certainly have applied only to the very prominent,

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¹Please see Sumner, *Class. Quart.* 1961 p. 37; Dover, *Class. Rev.* 1963 pp. 256-257; Meister, *Chiron* 1971 pp. 85-88 Rhodes, *Comm. Ath. Pol.* (Oxford 1981) pp. 268-9. The author wishes to thank Professor Robert W. Wallace of the School of Humanities and Social Sciences at North Carolina State University for the specific citations and references in this footnote.

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because it was very unlikely that a lesser person would receive a majority negative vote in the ostracism. Since the vote was popular and universal (at least as to citizens) the ostracism must be viewed as a form of democratic rule.

In modern society we "ostracize," but in a more informal sense. If we say that someone is being ostracized, we simply mean that he or she is being shunned or avoided. A person who has acquired a bad reputation is likely to be ostracized or shunned in modern days. The impact is not the same as ancient ostracism; one need not pack one's bags and leave for 10 years. The blows received by virtue of a "bad reputation" may nevertheless be severe. One may be denied a job, refused a promotion, and excluded from very important opportunities.

One's reputation can be viewed as a sort of "alter ego."² This second self is an image of you which others carry in their minds. People may act upon your reputation even when they have no personal knowledge of you or your actions. Thus, it is one thing if a friend begins to refuse to play a game with you because he believes you cheat; it is quite another if people begin to decline to play with you because they have heard that you are a "cheater." In the latter situation you have acquired a bad reputation as a player. Reputation is a very delicate thing; and powerful.

THE LAW OF DEFAMATION

The modern law of defamation is strictly concerned with reputation. If someone says to your face, "I know you stole that money; you embezzled it," you have no case in defamation, unless someone else overhears the remark. If a third person does overhear this accusation, then you have a defamation claim. A defamation suit is intended to provide a remedy for the harm, namely the shunning or avoidance that a harmful remark might cause. Thus, it is a specific legal remedy for ostracism.

The law of defamation provides protection to virtually all kinds of reputation³. You may have a case in defamation for any remark that causes you to be "shunned or avoided." This broad scope of potential to sue for a blemish to any kind of reputation is significantly narrowed by the legal

²From its inception, the law of defamation has been strictly concerned with the issue of reputation. This is underscored by the requirement that a defamatory remark must be heard by someone else other than the person defamed if there is to be a case in defamation. *Prosser and Keeton on Torts* (fifth edition) pp. 797-799. Thus, the law of defamation focuses upon the image which one has of an individual: It is literally true that a second self (referred to as alter ego in the text) is what is protected by the law of defamation. "The importance of the publication requirement in defamation is that it shifts the attention of the law from the emotional tranquility of the plaintiff to the plaintiff's reputation in the eyes of others." Gregory and Kalven, *Cases and Materials on Torts* (second edition) p. 1017.

³See, for example, *McGuire v. Adkins*, 226 Southern 2d 659 (and footnote 2 above).

requirement that you also prove that the defamatory remark harmed you economically in some specific way. In other words, it is not sufficient that you prove that you were defamed, you must also, with certain exceptions, prove that you were in fact economically harmed.

It is the pattern of exceptions to the requirement that one show special or economic damage that reveals the substance of the modern law of reputation.⁵ As was the case with the institution of ostracism in ancient Greece, we will see that the United States law of defamation is political: it deals with the distribution and preservation of social power. Like the law of ostracism, the legal protection of reputation has a specific impact on the course of public policy.

The requirement that one prove economic damages is dispensed with if the defamation is in the form of libel, that is, written form, or if it is an oral defamation (slander) that assailed certain aspects of one's reputation.⁶ One is not required to show specific economic damage under common law rules if an oral statement accuses one of being afflicted with a "loathsome disease", of being an unchaste woman, of having committed a crime, or of being unfit to practice one's business or profession. Also, there have been some decisions that have held that to accuse one of being a Communist or homosexual is actionable in itself.⁷

Several of the categories of slander per se are based on general conceptions of the social order. That is, they tend to reinforce general social norms or rules by protecting people against accusations of having stepped

⁴ This is the "special damages" requirement in United States defamation law. Please see *Terwilliger v. Wands*, 17 New York 54 (1858) and *Prosser on Torts*, 4th ed., page 760.

⁵ Defamation law is the branch of law that specifically addresses problems of harm to reputation. t.; In some sense it may be said that defamation law is "the law of reputation." The social power of reputation, however, indicates that the law of reputation is much broader than the law of defamation. However "law" is defined, its core remains institutional and social power exercised to control individual behavior. In many respects the "law of reputation" operates outside of the courts; that is a primary point in this essay. In this way, the law of reputation functions more broadly than the law which is confined to court judgments. It is "law" in the broader sense described by Eugen Ehrlich. Ehrlich concludes that if the lawyer or jurist "would only take the unfamiliar trouble of observing men in their activities he would easily convince himself that for the most part they do not think at all of the coercion of courts. So far as they do not do what is naturally according to the rule of the situation, they give quite different reasons for their decisions: they might, if they act differently, fall out with their dependents, lose their positions and trade, and get the reputation of a quarrelsome, dishonorable, unreliable man." Ehrlich, *The Fundamental Principles of the Sociology of Law*, quoted in Cohen and Cohen, (*Readings in Jurisprudence and Legal Philosophy*, p. 428. In the present author's view, the law of defamation is a thin, but revealing, slice of the law of reputation." In addition to providing material of intense human interest, the law of defamation may at times stake on particular political significance." Gregory and Kalven, *Cases and Materials on Torts*, (2nd ed.,) p. 1014.

⁶ Actually, libel is not confined simply to written statements. Any statement that is written, pictorial, or preserved in some permanent form, or that is disseminated to a larger, remote audience, as by radio or television, is probably libel under modern rules. See 50 ALR 3d 1311.

⁷ See 33 ALR 2d 1196, *Nowark v. Macguire*, 155 NYS 2d 318 (1964) and *Moricoliv. Schwart*, '361 NE 2d 74 (1977), 33 ALR 4th 747, and *Moricoliv. P. and S. Management Co., Inc.*, 432 NE. 2d 903 (1982).

outside of those rules. ⁸ The categories of slander per se that fit this description are discussed in the sections that follow.

Accusation of Crime

The accusation of criminal conduct generally denotes someone who defies basic rules of behavior within the society. One who is a lawbreaker ought to be treated as such and given less benefit by the society as a whole.

Accusation of Communism

This accusation is charged with an array of emotional responses that people in the United States have to left wing social revolutionary movements in general, and "Kremlin directed" Communism in particular. In common understanding the accusation that one is a Communist probably represents an odious statement that is antagonistic to one's own people and their values.

Homosexuality

The accusation that one is a homosexual may present a declaration to a large proportion of the population that the named individual does not comply with the "normal" demands of sexual life. The accused person steps outside the accustomed rules.

I wish to emphasize that, for the categories of slander described above, it is these described attitudes that actually create the basis for these statements being viewed as defamatory in themselves. These attitudes may or may not be justified. Whether they are depends primarily on one's political, moral, or religious point of view. ⁹

The other categories of slander, discussed in the following sections,

⁸ The question that is examined in this chapter is the basic definition of those statements which are regarded as defamatory or harmful to one's reputation. American law also establishes certain rules or privileges which, in effect, allow one to defame another person with impunity under certain circumstances. One of the most notable of these is the privilege to defame a public official or public figure so long as one's defamatory statement is not made "with reckless disregard of whether it was false or not." *New York Times v. Sullivan*, 376 U.S. 254, 280 (1964). On the basis of this privilege, *Time* magazine won a libel suit against it by former Israeli Defense Minister Ariel Sharon in 1985. A federal court jury found that *Time* had published a false and defamatory report that Sharon had "discussed" the need to avenge the death of Lebanese President Ehab Gemayel immediately prior to a 1982 massacre in Lebanon. The jury found that the statement was false and defamed Sharon. They also found that the magazine was privileged, because it was not published with reckless disregard to the truth or falsity of the matter stated. *Los Angeles Daily Journal*, January 28, 1985, p. 19.

⁹ The problem is roughly as follows: If one believes that people ought to be free to practice homosexuality or advocate communism, the one probably ought to prefer a rule that does not make such accusations defamatory in themselves. Under such a view, these practices simply ought not to be viewed as odious. On the other hand, a good deal of suffering can be created by such false accusations. Furthermore, they may be predictably very damaging in terms of reputation.

appear to be based on protection of certain economic interests and recognition of certain economic roles.

Accusation that a Woman is Unchaste

This category of slander may seem a bit quaint in the last quarter of the 20th Century. Its origins, however, are frankly economic. At earlier times women did not possess guaranteed property rights or economic status. A woman's "good name" was a specific and important economic value. It was a bargaining chip upon which other things depended.

Statements Regarding Business or Profession

These defamatory statements concern preservation of one's own economic value and reaffirmation of the commercial order as it exists today. If you lose your good reputation in a business sense, you will get less business. In addition, this category of slander per se tends to underscore the commercial and entrepreneurial organization of business in the United States. It is probably those business reputations that are "worth money" that tend to get recognized by this rule.

Accusation of Having a Loathsome Disease

This category concerning loathsome disease does not fit neatly under either the "rules of the game" label or the economic label. It is, rather, more of a recognition of an irrational abhorrence of certain conditions. People feel an aversion to others with disease. At common law this category has been restricted to such diseases as plague, leprosy, and venereal disease. Also, there is some overlap between the rules of the game rationale and the economic one. The rules of the game tend to reflect the economic order. Thus, the accusation that one is a "Communist" may be viewed as outside of the "rules of the game" because of its threat to the economic base.

REPUTATION AND SOCIAL CONTROL

The Athenian institution of ostracism was an overt means of social control. Reputation was dealt with as a powerful political commodity. Those whom the general voice determined should be purged were sent away for a long period of time. Their influence on public policy was thus, theoretically, curbed. Defamation law handles reputation more indirectly. It seems to assume the existence of standard rules of the game or economic norms. The law of defamation reinforces these norms by giving certain "standard reputations" a better chance of being vindicated in court. Because of the expense of litigation, the delay involved in legal processes, and the general

difficulties of obtaining favorable verdicts, this advantage granted to standard reputations is no small thing.

The Greek institution of formal exclusion by ostracism may have been an effective vehicle in framing public policy ... It may have provided certain major signposts in the change of direction of Athenian politics. For example, Themistocles, the hero of a naval battle of Salamis against the Persians, was ostracized. Such an event could have been a powerful influence on public policy. Much the same thing occurs in modern times as when a prime minister is decisively turned out of office, or when former President Nixon was forced to resign as a result of Watergate. Acknowledging the impact that formal ostracism may have had, I must nevertheless insist that informal ostracism - that is, the rebuke imposed by a "bad reputation" applied to the common man or woman in modern times - is far more serious in its consequences for public policy.

The economic and social norms that are constantly reinforced by the law of defamation affect every element of the modern social order. Individuals are channeled into conformity by reputations in ways that are far more pervasive and effective than ever before. The prime example is the personnel file, which forms an integral part of the career or employment record of workers today. For the employee, the personnel record is an alter ego that may far outweigh the individual himself when it comes to questions of job assignment, promotion, or authority. The slightest damaging remark may keep an individual from advancing his or her work.¹⁰ This gives extraordinary power to the makers and keepers of reputations - the managers of businesses, government bureaucracies, educational institutions, and other employers.

It would be reaching way too far to state that these managers of large enterprises consciously create the characteristics of standard desirable reputations. They do not do this. Instead they draw upon the commonly accepted 'rules of the game' some of which are reflected formally in the law of defamation. Because our society's forms emanate as much from the unspoken and informal rules as from the laws that are written in our statute books, public policy is intimately linked to reputation.

¹⁰The problem that the worker or colleague faces is that excessive subjectivity may cause havoc in his or her job. Courts have begun to recognize the damaging role that excessive subjectivity may have in the work environment. This has particularly been the case in situations involving alleged racial discrimination. For example, one court has said "where a considerable portion of the evaluation depends upon judgment of a vague and subjective nature, as here, the entire procedure is permeated with susceptibility to bias, making it 'a ready mechanism for discrimination'." *Wade v. Mississippi Cooperative Extension Service*, 372 Fed. Supp. 126 (1964). One author has noted: "Subjective assessments play a role in most upper level employment decisions regarding hiring, promotion, job placement, and salary. Tests and objective criteria such as education and experience requirements are ordinarily used on the upper level primarily as minimum qualifications for certain positions. Once minimum qualifications are met, they and the objective criteria are usually considered only as part of an overall subjective assessment, which is typically based on a variety of subjective procedures: an interview, an evaluation of biographical information, an evaluation of performance in previous educational or work settings." Elizabeth Bartholet, an "Application of Title VII to Jobs in High Places," 95 *Harvard Law Review* 947, at 973 (1982).

As a people we consciously debate certain large matters of public policy. For example, the populace of the United States has recently debated issues concerning the control of nuclear armaments, appropriate means of raising general taxation revenues, and laws concerning the availability of abortions, to name but a few. The same kind of public debate does not accompany the formulation of legally protectable or standard reputations. Instead, the protectable reputation is developed quietly by customary rules in court and occasional outstanding jury determinations.

In employment settings the important elements of reputation are too often matters that are virtually without appeal. For example, a professional person is likely to obtain a good job or opportunity because of his or her "track record." The concept "track record" is not mysterious - it is a matter of past performance. Performance itself should be one excellent gauge for determining advancement. However, performance is probably often judged by subjective factors that may not be carefully examined. "Track record" is probably ultimately reduced to general reputation formulas such as: "She has excellent rapport with customers." "He should not take that position, because he does not communicate well." "He is a go-getter." "I doubt that she is dynamic enough for the job." These statements do not signify very much in terms of hard information. However, they are the kinds of observations that determine opportunities.

Employees struggle within these systems of undefined reputation. They seek to advance themselves, and yet must often do so through a system that does not clearly define its rules of advancement. In short, most of us are forced at one point or another to curry favor in a multitude of ways that do not have direct relationship to competence that are demanded by our jobs.

What is the resulting impact on social policy? In a democracy like that in the United States it is reinforcement of the status quo. Those who have economic or political power tend to have risen through the ranks of unspoken reputation requirements. In turn, they are likely to choose for advancement those people who have pleased them in a subjective sense. In general terms these are likely to be people who do not challenge basic rules of the game and who follow current general political or economic outlooks. The 1983-84 season of primary elections for the Democratic presidential nomination reflect this. During that season a new term became very common. A significant segment of the population was identified as being composed of "yuppies." Who are the yuppies? They are generally defined as "young, upwardly mobile (or urban) professionals." This is a shrewd and important identification of a portion of the American public. These are people who are very likely to make a very strong impact on our society. The critical question is: What will make them successful, that is upwardly mobile? The answer is clear: the aspiring yuppie will succeed in his or her quest for commercial or economic success dependent upon that ill-defined general or standard reputation that has been described.

IMPLICATIONS OF MODERN OSTRACISM

Human beings are fundamentally social creatures. The importance of reputation tends to underscore this fact - individuals can be denied important opportunities on the basis of a "bad" reputation. Furthermore, the rules of reputation have a direct effect on creating general social policy.

The law of defamation is specifically designed to protect reputation. Unfortunately, however, it is a relatively weak and incomplete legal mechanism. The process of getting an attorney and proceeding with a defamation suit is expensive and risky. The substance of defamation law tends to protect the individual's status only if one remains "standard" in one's actual conduct, or one claims that one's true reputation is commercially valuable. For example, defamation law does not protect one from the ostracism that is entailed by being actually involved in radical left-wing politics. Nor does defamation law provide much protection to individuals who are excluded because of their personal quirks, since most of these cannot be said to have a direct bearing of one's performance of a business or profession. Finally, defamation law provides scant protection within the employment relationship itself. Nebulous descriptions of an individual's performance or capability generally are not subject to redress in defamation suits.

Because of the inadequacies of defamation law, people must employ other means of protecting themselves against certain forms of ostracism. Employment discrimination based on race, ethnicity, sex, or age can be redressed on the basis of statutes designed to eliminate such discrimination. These statutory remedies have been very helpful. On the other hand, excessive subjectivity which causes some individuals to be excluded from job or educational opportunities is a painful reality for which no uniform legal remedy has been created. Finally, in the case where one is ostracized for being a political or social "odd ball" there seem to be no legal remedies at all.

The implications of the American system of dealing with ostracism are disturbing. In general, the legal system places a high value on two items: democratic determination of basic public policy and fair procedures in the determination of individual rights. The aspect of the legal system that has been described is weak on both these points. On the one hand, the incomplete system of protecting reputations through defamation law seems to foster an unarticulated public policy that drifts in accordance with the preferences of individuals who have a great deal of personal or institutional power. On the other hand, from the perspective of the individual, the described system tolerates situations in which individual efforts and hopes are crushed by powerful social attitudes with little chance of redress.

The Greek form of ostracism was harsh, but it was conscious and it was straightforward. The reputation of prominent persons was put to a test before a large forum. The purpose was political - to guide the society. The beneficial aspect of the Greek system was the openness of its judgment. The

capacity of our society to orient itself could be improved if the hidden processes of determining reputation were drawn more into the open. Furthermore, if ostracism is imposed or fostered by law, the person ostracized should be given reasons and have the opportunity to test the validity of the action. Ostracism is a powerful social tool. It should not be allowed to promote a hidden agenda or to injure individuals in a haphazard or thoughtless way.