

CHAPTER I

THE GENERAL ARGUMENT

Who steals my purse steals trash; . . .
But he that filches from me my good name
Robs me of that which not enriches him
And makes me poor indeed.

William Shakespeare, Othello, Act III, Scene 3

SHAKESPEARE, as usual, was onto something. Reputation—a good name—is something that most people cherish. Your reputation, what people think about you, is not a simple thing. It is constructed brick by brick for each person out of the opinions of friends and neighbors, or, if the person is famous or an expert, out of the swirling mass of information and conjecture that pours out of modern media. A dense, subtle network of social norms—rules and standards of behavior, thought, action—determine what your reputation is or ought to be. Some of these rules are written down; some are implicit. A person who seems to follow the norms, who seems to behave properly, who gains the respect of his or her community—such a person has (we say) a good reputation. An obvious norm-breaker has a bad one.

The word *reputation* itself is one of those English words with two meanings of a particular type. *Reputation* refers generally to *any* reputation, good or bad. But the word can also mean a *good* reputation when it stands by itself. *Luck* is a similar word; there is good luck and bad luck; but when you say *luck* by itself, you mean good luck. In this book, generally, when I discuss reputation and how it is protected and nurtured, I refer, of course, to good reputation.

Reputation—good reputation—depends, as I said, on compliance with social

norms. Or at least the *appearance* of compliance. The social norms that make up reputation, as with all social norms, are anything but static. They change with the times. For example, if a middle-class woman in nineteenth-century England had sex with a man before she was married or had sex with a man, not her husband, after she was married, she risked utterly losing her reputation as a respectable woman. This is obviously much less true in middle-class society today. Normative structures are always in the process of change.

In any complex society (and maybe in all societies) the legal system tends to embody or express the norms that define proper and improper behavior, the norms that make or break reputation. It does this in many ways; the whole system of criminal justice has this task. Criminal codes are, if nothing else, catalogs of forbidden actions. In everything the legal system does, which includes resolving conflicts and defining and upholding property rights, there are implicit assumptions about correct and incorrect ways of living and doing. The legal system also defines values and expresses values, and it acts to protect those values. Many of the values are economic. Some are not. Reputation, a good name, standing in the community—these are among the values that the legal system both defines and protects. This book is about the ways that the legal system has protected reputation. Some of these ways are quite obvious. Others are more subtle and covert.

Why should formal and informal law worry about individual reputations? Because, of course, people *value* reputation, and the institutions they create reflect their values. But the protection of reputation is also part of a larger and more general function. One key role of the legal order in society, a role backed up by force if necessary, is to keep society on an even keel, to preserve it more or less as it is, and, so far as change is concerned, to guarantee that change occurs in orderly and regular ways, in ways that society approves. In short, the legal system guards the status quo. Guarding the status quo sounds like a fairly reactionary thing to do. Many people never utter the phrase “status quo” without something of a sneer. In fact, there is nothing sinister or even reactionary about protecting the status quo. Everybody wants to protect some or all of the status quo. Even the most flaming revolutionary wants to overturn some things and not others.

Naturally, the existing order works best for the haves, the rich, the powerful, the people on top. But it can and does have some benefit for other people

too—more or less, depending on the society. In any event the status quo is much more than a matter of money, power, and position. It is also a moral code and a set of norms. The status quo freezes a certain distribution of wealth and influence; it also freezes a certain distribution of standing, reputation, and social capital. The law thus can and does act to protect social capital, perhaps at times almost as vigorously as it acts to protect a person's house, money, power—and his or her rights in general.

My subject is the connection between law and reputation and between law and propriety and how these have changed over time. Specifically, I deal with social and legal culture roughly since the nineteenth century. What elements were part of the definition of propriety and good behavior—the elements that make up a good reputation—and how did the law act to protect respectable people and their reputations?

Reputation is not just a matter of feelings or of social intercourse. It has enormous economic importance. For businesses a bad reputation can be lethal. Trademark law, for example, is a branch of law that protects the name and goodwill of companies. If I make a shoddy wristwatch and pass it off as a Rolex, I am hurting the reputation *and* the business of the people who make Rolex watches. They can and do fight to protect that reputation, with the help of the law. Trademarks are enormously important in modern economies. Thousands of businesses need and demand trademark protection. Their value to a large extent depends on trademarks, logos, symbols, and the like. But in this particular book I want to focus primarily on individuals, not businesses, that is, on *personal* reputation.¹

With regard to personal reputation, one branch of law, the law of defamation—libel and slander—has the overt and obvious function of protecting reputation.² Defamation is a tort—a civil wrong. The victim can sue for damages. Winning a lawsuit is also a way to vindicate oneself and to reclaim one's good name. But there are also other, less obvious ways in which law protects and guards reputation. In this book I will talk about some of these and how they have evolved over time. The starting point, roughly, is the nineteenth century; the end point, roughly, is now.

Your reputation, of course, is what other people think of you. What they think of you is, obviously, a function of what they know about you or think they know about you. Hence any study of reputation is also a study of the

flow of information about other people—and the power to control that flow. Therefore *privacy* and reputation are connected. Many people earn and keep a reputation not because of what people know about them so much as because of what other people do *not* know. For people with skeletons in their closet, reputation depends on secrecy³ and privacy. Reputation is after all a matter of surfaces. Nobody can read minds or look into a person's heart and soul. What we see of other people is the way they talk and act. A good person, a respectable person, a person with a good reputation is someone who at least outwardly conforms to dominant social norms.

In an important way, then, this book is as much about privacy as it is about reputation; but the two are, as I just said, intimately bound together. Privacy and reputation and their linkages have changed over the years. My main thrust in this book is to describe these changes and explain them.

Three general trends or stories form the heart of this book. First, I describe, chiefly for the nineteenth century, a complicated network of doctrines that seemed to be designed to protect reputation and that operated chiefly for the benefit of respectable men and women—people with reputations to protect. I call this network of doctrines the Victorian compromise. The doctrines—about sexual behavior notably—in practice seemed to lead to paradoxical results. On the one hand, there were strict and unbending rules of decency and propriety, but at the same time the rules gave space for slippage, for leeways, for second chances—for ways to protect and shield respectable men and women who deviated from the official norms. In this regard, it created for them an important zone of privacy.⁴

The second theme is the destruction of this network and the death of the Victorian compromise. The Victorian compromise was first attacked by strong moralists, who detested its tolerance of sin. Then, in the second half of the twentieth century the Victorian compromise was attacked by the agents of the permissive society. As a result, the old structure was largely dismantled.

The third theme, which is closely related to the second, examines privacy in our own times. And here too there is a paradox. We live in a permissive society. On the legal side the Supreme Court has interpreted the Constitution to include a constitutional right of privacy; and this has given ordinary people much more leeway, much more freedom, especially with regard to sex, reproduction, and choices of intimate partners. On the other hand, the elites—celebrities,

public figures—have lost some of their privacy rights. They no longer have the freedom they once had to violate decency rules, with some degree of impunity, under the sheltering wing of the Victorian compromise.

At the end of the book I present a fourth theme—a theme I can only touch upon. Law and society have given ordinary people more privacy, more leeways, more choices, but technology threatens to take at least some of this away. More and more the modern world is a world of surveillance. Cameras are everywhere. Sophisticated devices can amass dossiers on everybody; our whole lives can be recorded, stored, and accessed—for what ultimate purpose, nobody knows. But only future years will tell us how this story turns out.

Of course, the subjects touched on in this book are immensely complicated. Big, complex societies never have a single code of rules that everybody subscribes to. Behavioral norms are different for men and women, for children and adults, for different classes and groups in society. In the nineteenth century men tended to be forgiven for sowing wild oats; women were not so easily forgiven. Time and place also alter the norms. Information (or gossip) that would have ruined a reputation a century ago—“living in sin,” for example—hardly raises an eyebrow in most circles today. Despite all the complications, one basic principle is clear: As social norms change, laws that touch on reputation and privacy change along with them. On the whole, I treat the legal system as the dependent variable. It is not the prime mover in society. Rather, society moves it, molds it, alters it. Of course, legal facts and legal arrangements and the living law in general all have an impact on society. But it is a more modest impact: an echo rather than the thunder-in-chief. In this book I try to explain change along these general lines.

Much of the material in this book, unfortunately, is qualitative and even speculative. This is an exploration of legal culture and, indeed, in large part an exploration of *past* legal culture. By legal culture I mean the ideas, attitudes, and values that people hold with regard to the legal system.⁵ We know little about legal culture in our own times. The past is largely a buried city. In principle, legal culture can be tested and measured empirically, through opinion surveys, for example. But for most issues in the nineteenth century and part of the twentieth century, no such surveys or other quantitative indicators existed. For most of the past we have to rely on other sources, none of them as clean and as rigorous as we might want.

Before we begin, we have to answer a few preliminary questions. The first, which might seem simpleminded, is, Why bother to protect reputation legally? Why not just leave it alone—leave it to the marketplace of ideas? The law does not protect *every* value. There are no laws today against lying. There are no laws in the United States explicitly against insulting people.⁶ In Germany it might be a (minor) crime to call somebody a jerk, a fool, a nitwit, or to make an obscene gesture; but this is apparently not the case in the United States, at least not at present.⁷ Why bother, then, with attacks on reputation? The obvious answer is this: The *social* and *economic* value of reputation is enormous and practically demands protection. If you call a shop owner a cheat and spread this around or say that a restaurant owner allows cockroaches, the customers will stay away by the hundreds. A lost reputation is more than hurt feelings and fewer invitations to parties. For this reason Robert Post argues that reputation “can be understood as a form of intangible property akin to good will.”⁸ It is this intangible property that the law of defamation protects.

Yet, as Post recognizes, a purely economic analysis cannot account for all the ins and outs of defamation law, nor can it give us a satisfying definition of reputation. Most people value their reputation, whether or not losing it will take a single penny out of their pockets. Reputation is also honor—and dignity, the “respect . . . that arises from full membership in society.”⁹ Losing a reputation, as Shakespeare put it, makes a person poor indeed. Shakespeare was not thinking of money. He was thinking of standing in the community, of a person’s place in society. Human beings are social animals. They live in families, groups, communities. Their happiness or misery depends on how they fill their place in these families, groups, and communities. Some societies use ostracism or banishment as punishments for violating certain social norms. In all societies bad reputation is a source of shame and hurt.

But reputation—and this is one theme of this book—has a *social* meaning as well as an individual meaning. Damage to the reputation of a president, a judge, a community leader hurts the society as well as the individual. It can harm society to claim that a business leader or a politician is corrupt. It may be worse if the accusation is a lie, but it is also harmful, and possibly even more so, when the accusation is true. A cover-up would protect the business leader or politician, but it can be argued that it might in some cases even protect society—might keep it from rotting away under the caustic acid of critical

judgments. This is one reason that society may want to shield its elites, even when they do not deserve this protection.

Reputation has different meanings in different societies and is gained and lost in different ways. Reputation poses special problems in modern societies, because these are mobile societies—societies in which people move about in physical and social space and in which people spend much of their lives and careers interacting with strangers. In a mobile society certain kinds of information are scarce and valuable. In a small, traditional community, say, a village, where everybody knows everybody else, reputation is based on personal knowledge or on local gossip, and information circulates in a face-to-face community. But in a big, heterogeneous society—the kind of society that developed in England or the United States in the nineteenth century—reputational information can be harder to come by. For the first time identity becomes an issue and at times a puzzle. This situation opened the door to various kinds of frauds, to confidence men, to bigamists, to sharp operators who made money out of fake identities and imaginary reputations.¹⁰

These mobile societies were also market societies. A market society floats on a sea of credit. In the nineteenth century accurate credit information was also hard to come by. Credit, then, depended heavily on general reputation. Business and financial reputation are crucial features that support and maintain a market society. Reputation is also vital in other kinds of markets. Rumors that a young middle-class woman was sleeping around could kill her chances in the marriage market. In a period when marriage and family were the chief role for a “decent” woman, losing a reputation for chastity or virtue was a severe blow indeed. This social fact, as we will see, was the basis of actions for breach of promise of marriage or for seduction.

Accusing a man of fooling around, sexually speaking, was much less damaging; the double standard was in full flower in the nineteenth century. Still, to accuse a clergyman of sleeping with a parishioner, for example, would strike at the very heart of his professional reputation. The sensation of the 1870s was the scandal and trial involving Henry Ward Beecher, one of the country’s most famous clergymen. Beecher was accused of committing adultery with a married woman, Elizabeth Tilton.¹¹ Scandal could be as painful as a sharp and jagged knife. Similarly, consider the example of a businessman accused of cheating. A man of affairs was supposed to be honest and upright. A certain

amount of shrewdness and cunning in business affairs could be tolerated—or even admired; but outright dishonesty was another story.

Everybody, of course, has a reputation of one sort or another. But the law has never concerned itself with everybody's reputation. In the nineteenth century the law was not disposed to worry, for example, about what people thought of burglars or prostitutes. Nor, for that matter, did anybody care much about the reputation of slaves or of tramps, hoboes, or the lumpenproletariat in general. Only people with a certain stake in society had a reputation, had something that was precious and worthy of legal protection (so people thought). In addition, only people with a certain stake in society were concerned with something called *honor*.

Honor is not an easy concept to define. It is obviously related to reputation, although honor is not the same as reputation. To be sure, both refer to a person's place in the hierarchy of respect.¹² Honor seems to imply some kind of behavior—action that conforms to some explicit or implicit code. In many societies almost nothing could be worse than dishonorable behavior, nothing more destructive than an act that brings dishonor to the family. The punishment for such an act might even be death. There are societies in which fathers kill their own daughters, if the daughters bring dishonor to the family, by sexual misconduct, for example.

In some societies, to call a man a liar or to insult him was to attack his honor; and honor required him to respond in a particular way. The *duel* was a more or less ritualized response to insult in such societies.¹³ Where dueling cultures flourished, honor belonged exclusively to men, and it depended also on social class, just as reputation did. Honor was an attribute of men of the upper class. A ditchdigger had no honor. Obviously, ditchdiggers had their own sense of honor and their own mode of responding to insults and the like, and these responses could in fact be violent.¹⁴ But the dueling codes were exclusively upper class. The equivalent of honor for upper-class women was virtue. A man who did not defend his own honor or the honor of his family was a coward, or worse; he suffered an irreversible loss of esteem. Honor had to be safeguarded through behavior; reputation, on the other hand, was safeguarded through character as well as behavior. (Women were expected, of course, to defend their virtue.) Honor had much more of a *subjective* element than reputation. Reputation is exclusively what

other people think of you. Honor, in an important sense, flows from what you think of yourself.

Dueling was well known in the United States as well as in European aristocratic circles. The most famous instance was the duel between Aaron Burr and Alexander Hamilton; Hamilton died as a result.¹⁵ A gentleman who was insulted was supposed to find satisfaction “on the field of honor.” But a gentleman never dueled with a “person of the lower estates”; instead, such a person could be “horsewhipped or caned.”¹⁶ Dueling was, in short, a mark of status. It was not available to people whose rank was too low. Of course, in the United States, where there was no real aristocracy, dueling practices filtered much lower down in the social order than they did in Europe.

The duel between Hamilton and Burr took place in New Jersey, and Hamilton at the time was living in New York; but dueling was, in general, more closely associated with the conservative, aristocratic South.¹⁷ Dueling fitted the ethos of the Northern states rather poorly and was never as common there as in the South. Many people strongly disapproved of dueling, North and South, and the practice gradually died out. Many states passed laws making dueling a crime. There were antidueling movements in the South as well as in the North. In Georgia an 1890 law barred duelists from holding public office. Later, it became a crime to challenge a person to a duel. After a duel in 1828 between two prominent young men—one of them died as a result—the legislature passed a law demanding that anybody who held any public position had to swear that he had not taken part in any duel after January 1, 1829.¹⁸ As we will see, one way that some states tried to enforce laws against dueling was to open the door to libel actions that would, in theory, act as a substitute for the practice.¹⁹

My subject, however, is reputation, not honor; but the differences between these two are important. Honor is something a man must defend for himself. Reputation, however, is far more objective. It lends itself, then, to objective measures of protection. Hence reputation is, to a greater degree than honor, something the law has concerned itself with.

For example, some legal institutions have the obvious aim of shielding people against direct and unwarranted attacks on reputation. Libel and slander laws protect people who are victims of lies. What is even more interesting are those legal institutions that act to protect the reputation of people who are *not*

innocent—people who are the victims, not of lies, but of the bitter truth. And these legal institutions are one of the main subjects of this book.

Take, for example, the crime of blackmail.²⁰ Suppose that I demand money from a man and threaten to reveal his guilty secret unless he pays up. This is blackmail; this is an act labeled a serious crime in many criminal codes. Yet who is the victim here? It is a man who has committed a crime or who has done some scandalous or awful act, one that would blacken his reputation if the news got out. Yet the law defines him as a victim. The blackmailer will be the one to go to jail. When society makes blackmail a crime, it does this not to protect the innocent but curiously enough to protect the guilty. (Whether the law actually has much of an impact on behavior one way or another is a different question.)

Blackmail is only one example of a more general phenomenon. Take the old law about breach of promise.²¹ If a man promises to marry a woman and then backs out, she can sue him for damages. In many cases her real complaint is that she had sexual intercourse on the strength of his promise. For a respectable woman loss of virginity and, especially, birth of a bastard, could have a devastating effect on prospects of marriage and a middle-class life. Sometimes the lawsuit or the threat of a lawsuit could force the bouncer to marry the woman and salvage her reputation. Yet here too the woman, like the blackmail “victim,” is hardly innocent. She violated nineteenth-century norms. She was guilty of fornication, which in many states was actually a crime. But despite her sins and transgressions, the law gave her this remedy. Like the victim of blackmail, this sinner too was classified as a victim, with the right to seek recourse from the man who had victimized her.

The living law of prostitution is yet another example of protection for those who, in theory, had forfeited the right to protection. Prostitutes themselves were mostly social pariahs. No social leaders ever spoke out in favor of prostitution. Nonetheless, prostitution flourished. There were brothels and streetwalkers in every city. Once in a while the police cracked down on the trade. They swept prostitutes off the street, closed houses of prostitution, arrested whole troops of “sporting” women. Yet, curiously enough, prostitution itself for much of our history was not actually illegal. Prostitutes were jailed as vagrants, and brothel keepers could be prosecuted, but buying and selling sex itself was not clearly labeled a crime. What this meant is that *customers* of prostitutes were immune

from prosecution. All the crusading zeal was directed against the women (especially streetwalkers) and against madams and landlords who ran disorderly houses. A screen of silence, and even some aspects of the formal law, shielded the men and protected their privacy and their reputations.

The protective rules were related to a larger legal phenomenon that I have called the Victorian compromise. This compromise put enormous emphasis on surface behavior. The official rules remained in place, sometimes expressed in quite general or absolute terms; meanwhile, the law in action was quite different. There is a kind of double standard. No real attempt is made to enforce the official rules with vigor.²² They remain slogans or a kind of facade; or they are enforced selectively, according to norms and rules that are never made explicit. The legal position of prostitution is a good example. It was never exactly legal but never exactly illegal. There were thousands of women who sold their bodies for a living, and these women all had customers, men who came from every walk of life. Obviously, any man who had sex with a prostitute or visited a brothel was guilty of fornication or adultery; and these were criminal acts in many states. Yet no man was prosecuted for these crimes.

There is an old saying: If you can't be good, be careful. This could have been the motto for many laws about vice and sexual misconduct in the middle of the nineteenth century. Be discreet. If you must sin, sin quietly and privately. If you keep what you do under wraps, you can preserve your reputation, your place in respectable society. A man lost his reputation if he was a flagrant, blatant womanizer. A woman who had sex outside marriage forfeited any claims to decency. The same was true, of course, for people who lied and cheated, who staggered around the streets in a drunken fog, and so on. But men and women who were careful, whose sins were secret and well camouflaged, were able to avoid most evil consequences. For much of the nineteenth century it was not a person's "private" life as such that was decisive but rather the way he or she *managed* this private life.

The Victorian compromise should not be dismissed as mere hypocrisy. The living law had a curious double standard, but this had a purpose, at least implicitly. Again, we can take prostitution as an example. Men, people thought, had powerful sex drives. They could not satisfy these drives with respectable women. They had to find some other outlet. It was useless to try to stamp out vice.²³ What society should aim at was moderation, control, some way to

keep the lid on. The laws relating to prostitution were like laws against speeding today. Nobody really thinks speed limits are totally effective. Everybody violates them from time to time. Enforcement is a sometime thing. But the laws, at existing levels of enforcement, are not useless or hypocritical. Arguably, they keep the *amount* of speeding under control. If you took off the lid entirely, who knows how fast and how recklessly some drivers might drive on the roads.

The great French sociologist, Émile Durkheim, had a stunning insight about the functions of criminal law. When a society defines some behaviors as criminal and provides that these behaviors can be punished, it is drawing a map of the moral boundaries of society. Punishing crime, therefore, is not simply a way of bringing to judgment people who do dangerous acts; it also reaffirms and supports the moral boundaries of society.²⁴ Public enforcement of the laws acts as a kind of didactic theater, as a school for teaching people where the boundary lines run and what lies on this side and that side of the line. Thus the penal code—and the other codes of conduct—have symbolic and educational purposes as well as instrumental purposes. In a sense, the criminal code is a kind of price list; it is a catalog of rights and wrongs, and the table of punishments tells the public which acts are worse than others and why and by how much.

But what if the list or catalog is, in a sense, misleading? What is the social function of codes that are *not* enforced—or enforced only sometimes or only against some people? This is part of the terrain that I am exploring here. The living law also has its messages and its functions. Its ambiguities and apparent hypocrisies serve certain purposes. And one purpose—the one that I stress in this book—is to protect the people who matter in society. In part, this is because these people surely want this protection and have the power to demand it. In part, though, it is because this protection, this shield of immunity, has a broader function: It protects society itself from severe structural damage.

The penal codes of the nineteenth century rather clearly expressed the official moral code—the code that, in effect, defined respectability. This moral code was also expressed in other laws and in literature, sermons, speeches, textbooks, and the press. The code supported the status hierarchy of the nineteenth century. The basic norms of the times are familiar enough—they are what are still called traditional values. Sex outside marriage was a sin. In some

circumstances it was also an actual crime. Adultery and fornication were forbidden. It goes without saying that the “crime against nature” was also a crime against the state. So was bestiality.²⁵ Public drunkenness was against the law, and so, too, was gambling. Men were supposed to be faithful, moderate, law abiding; they were supposed to avoid all sorts of vice and debauchery. Women were supposed to be chaste before marriage and humble, faithful, and obedient afterward. There were of course dissenters from this or that aspect of the code—proponents of free love or Mormon polygamists, for example. In general, people treated these dissenters with horror or scorn or outright hostility.²⁶

The criminal justice system was supposed to protect and maintain the traditional code by punishing those who violated that code. Paradoxically, however, protection of the moral code also meant something that on the surface seems totally inconsistent: protection of the very people who *violated* the code—or to be more accurate, protection for *some* of the people who violated it and for some who violated it in a particular way. This was the thrust of the Victorian compromise. In other words, the law did two things at once. First, it defined respectability, virtue, good reputation (reflecting wider social norms). But second, it engaged in a kind of cover-up. One strain or tendency in the law actually acted to make it more difficult for respectable people to lose their reputations. This subtle and implicit task worked to provide a kind of limited safety valve for those who gave in to their “animal” instincts. Some people (especially men) who transgressed in certain ways got second chances. The flesh, after all, was weak. In short, law and society protected bourgeois respectability in two quite distinct ways: first, by punishing (gross) deviations from the standards; and, second, by providing a shield or cover-up for *some* deviations from those very standards. How and why this second job was accomplished is one of the themes of this book.

To be sure, when I talk about subtle and implicit functions, I mean exactly that: subtle and implicit. There were no treatises, no pamphlets, no writings that clearly expressed these goals. Most people never really understand their own society, what makes it tick. Rarely or never do people recognize their cultural assumptions. Almost no one in a society can describe cultural assumptions in the way that a good anthropologist might, or perhaps a historian. We are blind to whatever is closest to us. This applies as well to lawyers and judges. In a legal culture, as in culture in general, only the outside observer is likely

to have sharp vision. The outside observer may understand the system better than it understands itself.

All societies have institutions that concern themselves with socialization—molding the new generation in the shape of the old one. In all societies education means a lot more than teaching children to read and write and add up numbers. It means instilling norms and values in their minds, showing them what is good and bad behavior and what people have a right to expect of them. Parents and family do much of this educating; so do the schools in modern societies. But in a broader sense every important social system is concerned with education. Certainly this is true of the legal system.

Education and socialization have both a positive and a negative side. The negative or protective function is to keep harmful and corrupting influences away from young hearts and minds. Laws about pornography and obscenity, laws about sexual behavior, drug laws, and many other laws can be labeled this way. Historically, many societies also depended on censorship laws to keep evil influences away from children, and also from adults—the broad mass of the public, including millions of people who did not particularly want to be protected. Defamation laws, blackmail laws, and other laws that protected reputation were also part of the system for preventing these evil influences, which might otherwise engulf society and destroy it.

In short, underlying the Victorian compromise was a theory of society. Society was a delicate plant. It was at all times in unstable balance. Each generation had to be trained in the proper norms and values. Rules about reputation and propriety were *necessary*. Vice and debauchery, unless they were controlled, would run riot; and the whole system of order would come tumbling down. Nobody articulated this theory precisely in this way, and it was, perhaps, largely unconscious; but it was there nonetheless in society in the nineteenth century. We can see it if we read carefully between the lines, if we observe how the system behaved and how it formulated its basic principles. In later chapters I try to do this—that is, to read between the lines.

Social understandings, typically, are unstable. Modern societies in particular are societies in rapid evolution. Everything is in flux; change is the rule, not the exception. The implicit theory I have described ran into trouble in the late nineteenth century for complex reasons, which I try to explore later in Chapter 8. The protective shield around men and women of high standing

began to erode. The Victorian compromise broke down at that time in the United States and also in England. Powerful elements in society launched a serious war against vice and sexual misconduct. The war was fueled by the belief that society could no longer afford to ignore sin, corruption, debauchery—could no longer afford to protect respectability at the cost of tolerating vice. Vice extracted too high a social cost.

What happened in the late nineteenth century seems to me, looking back, rather sudden and dramatic. In fact, social change is not an overnight thing. Structures smolder before they burst into flames. If we go back far enough, we find a legal system that supported a strongly hierarchical society. Elites had everything, or almost everything; they had the power and the money and the rights; the common folk had virtually nothing. In the Middle Ages those who defended the system described it as part of a natural God-given order. Of course, the reality of medieval life was much more complex, but in general the idea of a natural hierarchy was powerful and ubiquitous. Over time the system became weaker, more unstable. In one rather long view of history, the situation I described for the nineteenth century was the final act in a long, drawn-out drama—the last gasps of a structure of dominance that was doomed to disappear. It was disappearing, to be sure, more rapidly in the United States than in England and in other European countries. Some old rules of hierarchy were in the process of decay, even at the beginning of the nineteenth century. One instance, which I discuss in Chapter 3, was the reworking of the law of defamation—in particular, the rise of *truth* as a defense.

Social and technological change in the twentieth century was especially rapid and dramatic. In the early twentieth century the war against vice had reached some sort of climax. This was the period in the United States of the Mann Act, of the first significant federal drug laws, and of national Prohibition. By the middle of the twentieth century there were clear signs of another turn of the wheel. Prohibition had lasted little more than a decade. Later on, the war against vice lost a number of important battles. By 2007 many of the old norms of propriety, the old pillars on which a solid reputation rested, had been reduced to rubble. When the wheels of society turn, everything turns with them. Reputation and propriety get reshuffled as well. Censorship of offensive material is basically gone. Sin and vice have been substantially redefined—sometimes redefined out of existence. The private lives and sexual

habits of consenting adults have been decriminalized in the United States and in many other countries. Of course, the thief and the check forger are still treated as despicable and are punished. The drug pusher and the pedophile are still social pariahs. But other acts, once vilified, have moved out of the shadows. Virginity is not what it used to be. In some countries and some cities chastity before marriage is an endangered species. Nobody blinks an eye at couples who live together without bothering to get married. Many couples—in some countries, *most* couples—live together before they go to the altar, if they go at all. In France, for example, 87 percent of all “cohabiting unions” in the 1990s had begun “outside marriage.”²⁷ In a country such as France—or in much of the United States—in urban, middle-class circles a woman who has sex before marriage no longer forfeits her reputation or her chance at a decent marriage and social status.

Culture has moved from emphasis on self-discipline to an emphasis on self-actualization. Modern society exalts individual choice. A dominant ethos is what Robert Bellah and his associates have called expressive individualism. This is the notion that a person’s main task in life is to develop, as much as possible, the self, the personality, in all its uniqueness.²⁸ Moreover, in the last half of the twentieth century in particular, legal and social culture changed dramatically. Old structures of cultural and political dominance broke down. The civil rights revolution swept away racial segregation. A powerful feminist movement achieved striking results. Women broke out of the kitchen, and some made it all the way into boardrooms, high government circles, and even the United States Supreme Court. Every suppressed and subordinate group began to demand its rights, its place in the sun: Chicanos, Native Americans, prisoners, students, gay people, aliens, Chinese Americans, deaf people, old people. The demands were insistent, persistent—and often successful.

Success—in life, politics, and so on—has become less dependent on traditional morality. Traditional morality depended heavily on a kind of *privacy*: on shielding the private life of elite and respectable people. Talk about sex and sex life was taboo. Sex was entirely private: a secret activity, behind closed doors, in dark rooms, in the dead of night. And legitimate sex took place only in the bedrooms of married people. Even there it was a secret—as Walter Houghton put it, it was “the skeleton in the parental chamber. No one mentioned it.” There was a “conspiracy of silence.”²⁹ Any deviation from the strict rules of

privacy and prudery was totally excluded—except insofar as it was part of the Victorian compromise.

We often hear that the nineteenth century was the century of the individual and that our own times are much more collective. There is, of course, some truth to this statement, but in some ways the situation was actually the other way around. Governments surely did less in the nineteenth century to regulate the economy (although more than most people think).³⁰ But the moral code was much tighter, the laws and rules about sexual behavior, about marriage, divorce, and family life were more restrictive, the pressure to conform was much more severe, and the social punishment for deviation was more heartless and unyielding. It is the late twentieth and early twenty-first centuries that glorify the needs, wants, and desires of the individual self. Society was once more permissive toward business, less permissive toward private life. The opposite is true today. Now people feel freer to experiment with ways of life; they can try on different hats and different habits, can eat different kinds of food, can try new paths to salvation, can pursue new ways of making dreams come true. An Irish American woman might turn Buddhist, a baseball player might announce he is gay, and millions of native citizens might abandon hamburgers in favor of sushi.

Society is an organism of incredible complexity. Explaining social change is sometimes as hopeless a job as predicting the weather. But there are at least some obvious factors that lie behind the zigs and zags of social thought and social structure. One is capitalism itself, in particular, its inevitable handmaiden, advertising. These spread a religion of consumerism, a religion of self-satisfaction. Another important influence has been the regime of science and technology. These have transformed the modern world. They have bred affluence, upset old arrangements, and fostered a restless if not reckless spurt of economic growth. Modern science and technology seem both cause and effect of modern capitalism. Sour, hard-working, ambitious, disciplined men, imbued with an extreme form of the Protestant ethic, may have been the pillars of a capitalist order and hard-driven workaholics may still be the men and women who found great companies. But, ironically, the world they created or helped to create carries the seeds of its own destruction in one sense. The economies of developed countries foster and *have* to foster a different sort of individual—men and women who are born to shop. The system depends on

the consumer and on consumption—buying, selling, getting and spending, using, discarding. And advertising is among the keys to consumption.

Yet buying and selling are, inherently, intensely individual processes. People buy for themselves or for their families. Advertising is a textbook of individualism. It is directed to the individual, the consumer, the man on the couch watching television, the woman sitting next to him. The modern economic system has been a roaring success for the broad middle class in North America, Western Europe, Japan, and other developed countries. It has created enormous wealth, and with wealth goes leisure. In France, Hong Kong, Sweden, or Canada, most men and women no longer slave away until they drop, earning barely enough to feed their bellies, and sometimes not even that. They have houses full of furniture; they have cars, refrigerators, television sets. They have yearly vacations. Extra time—leisure—creates an insatiable demand for pleasure, fun, entertainment. People fill their time with hobbies, activities, sports; they play cards, they go to the movies, they bowl, they take tennis lessons or classes in the arts, they go on cruises, they visit the Taj Mahal.

All these activities, again, are at their core strikingly individual. We get to choose our own clothing, and (within limits) we pick out the colors and the styles. Democratic societies do not have uniforms. What we wear is supposed to express our personalities. Only autocratic orders require uniforms—the army, certain groups of nuns, and the people who lived in Mao Tse-tung's China. A clothing company does not advertise to nuns or sergeants; what they wear is fixed and settled, prescribed for them in every detail. In the larger society suppression and repression are in bad odor. And what is true of clothing is also true of food, religion, sexuality—in short, almost everything in modern society.

Social scientists have of course noticed these massive changes in norms and in social structure. They have noticed that the nineteenth century laid heavy stress on character, whereas the late twentieth century changed the emphasis to personality. They have noticed how one period underscored order, discipline, moderation, whereas the later period put the self—the individual, idiosyncratic self—at center stage.³¹ Schools in the nineteenth century were concerned with making little adults out of children, stuffing their heads with traditional habits and morals. Contemporary education is much more about creating unique *individuals*; it is centered more on the particular child, on self-realization and

expressive individualism. This is the educational world of show-and-tell. This particular device dates back to around 1950. Little children are encouraged in school to “show or tell something they find interesting to the class.” And if their “subject is very outstanding and unusual, they become the center of attraction for the rest of the day.”³² Modern elementary education is much more interactive than it used to be. Kids are free to wander about their classrooms; they do not sit rigidly at little desks fixed to the floor. These are not just American trends. Perhaps the United States was a pioneer in this development, perhaps it moved more rapidly than other countries, but the general lines of change are the same in all rich, developed democratic countries.

Basically, then, the nineteenth-century code, the code of traditional values, the code that defined reputation, entered a period of decay. Decay also set in with regard to notions of self-discipline and modesty. This was a ragged and complicated development. It had no clear beginning and no clear end. From 1870 to 1930 powerful attempts were made to keep the old code alive and to strengthen it, protecting it against the gigantic forces that social, scientific, and economic development let loose on the world. The Victorian compromise was discarded. New, tough rules about morality, vice, and sexuality were put in place.³³ In the United States the jewel in the crown was national Prohibition. This, as I said, now looks like a kind of last-gasp attempt to save a dying order. The collapse of Prohibition was followed in succeeding generations with startling reversals in the sexual code.

There was never, of course, a smooth, straight line of evolution. Change was always jagged and ragged. And the dying order refused to lie down and play dead; at the very least, it takes its time dying, if it is dying at all. It keeps fighting what may seem like a rearguard action, but it still has amazing tensile strength. Some changes seem irreversible. No one expects liquor prohibition to come back or censorship of books and movies. But other issues are still hotly contested. The rabid debates in the United States over abortion, gay rights, and traditional values in general; the tremendous power of orthodox religious beliefs; the hammer blows of fundamentalism all over the world—it is hard to write these off as nothing but the last twitches of a corpse. It may be premature to say goodbye to the old order and proclaim, “Mission accomplished.”

Nobody can predict how the culture wars are going to end. One thing seems clear, however. There is no turning back. The past never recurs. There

are no cycles in history. Movement goes in only one direction: into the future. History only *seems* to repeat itself. A religious fundamentalist of today is profoundly different from a religious fundamentalist of the nineteenth century, and light-years away from a devout soul of the Middle Ages. There are people who preach against Darwin or against the whole Western world, but they live in an age of computers and the Internet and TV; they live in an age of machine guns and homemade bombs; they spread their message with faxes and cell phones and websites. Nothing, really, ever remains static and unyielding, certainly not in the modern world.

Reputation, as I noted, was never the same as character, even in the heyday of character and discipline. Character was inside you. Reputation was what other people thought. Obviously, the two were closely related. For most people, perhaps, they were one and the same. Yet there were always people for whom they diverged. One theme of this book is how the law tried to bridge the gap between the two—what tricks and devices protected the reputation of respectable men and women and the theories of society that underlay these tricks and devices.

What about the world we live in today? Clearly, the ideology of the early twenty-first century is not the ideology of a century ago, or two centuries. The Victorian compromise depended on a particular notion of privacy. Privacy is still an important value, but its meaning has changed. There is still an important aspect of privacy that stresses the right to keep secrets, the right to hide and conceal—the right to cover one's naked body and to some extent the naked soul. But privacy is also now a value that stresses *choice* and much less a regime of silence and darkness, a regime of taboos and cover-ups. Of course, moral codes still exist. These codes are, as always, complex. And people still value, to be sure, their reputation, but its components have changed. It has always had different components for different sorts of people. What a basketball star or a rock guitarist can get away with is a long distance from what a U.S. senator can get away with or a minister of the Gospel. Even in this day and age, this freewheeling, permissive age, people have secrets, some of them highly embarrassing. Damage to reputation is still a real problem. It may be situational—if we discovered that a baseball player had a collection of whips and chains, it might not matter; if the collector was a certified public accountant, he might still be able to make a living; nursery school teachers or day

care workers would be instantly fired. Millions of people still live, or aspire and expect to live, the way that their forefathers lived, morally speaking. In their circles nobody tolerates adultery, promiscuity, or gay sex. They and their friends still have every reason to hide their sins from the outside world. But even for senators, ministers, and kindergarten teachers, the menu of choices has widened. Exactly how law and society deal with reputation in the age of television and the Internet is a complex issue. I explore this issue in some detail in later chapters.

In the rest of the book I flesh out the general lines of the argument. Chapter 2 deals with the nineteenth-century background. Chapter 3 considers the law of defamation. Chapter 4 covers some aspects of criminal law that served to protect reputation. Chapter 5 is devoted to the fascinating crime of blackmail. Chapter 6 mainly concerns the protection of women's reputations, specifically, the actions of seduction, criminal conversation, and breach of promise. The later chapters examine how the twentieth century dramatically transformed the structures built up in earlier times.