

## Defamation, Antidiscrimination and the Incredible Shrinking Actress

### Introduction

Anyone familiar with American popular culture and mass media is entirely all too familiar with the mantra “thin is in.” Over the past few decades, a new standard of American beauty has imploded on movie and television screens across the nation as leading ladies seem to vie for awards premised upon who has the smallest dress size. Celebrity magazines routinely praise stars for weight loss and tout the latest fitness trend or diet craze among the women of Hollywood. The public appears hungry for stars that are slimmer, trimmer, and thinner than ever before.

Yet, even the largest appetite has a satiating limit. The summer of 2005 saw an interesting reversal of this trend. Although the glossy star laden magazines still advertised the Hollywood quest for thinness, articles began to appear questioning how thin was too thin.<sup>1</sup> Apparently, there is a tipping point where an actress’ weight merits something resembling concern rather than praise by the media. This new breed of article often involved pictures of (shockingly) thin actresses accompanied by stories raising concerns about their health and alleging the possibility of eating disorders. Coinciding with an increase in the nation’s concern with health and health issues, it was no longer appropriate for movie stars to project an image that is considered unhealthy for their audience of young American women.

This is one interpretation of the magazine’s intentions; and it is certainly laudable. However, the sensational manner of the reporting has led some actresses to protest the

---

<sup>1</sup> See, e.g., *Skin & Bones: Why Hollywood Stars go too far*, STAR MAGAZINE, available at <http://www.starmagazine.com/news/61616>.

use of the pictures and the allegations accompanying them. The accusation, even the mere speculation, of having an eating disorder is no small matter, after all. In November of 2005, one actress had decided she had had enough. After a series of photos appeared alongside speculation that the actress was suffering from an eating disorder that had made her gaunt and ill-looking, Kate Hudson decided to take legal action. She authorized a British law firm to “begin legal claims for defamation, privacy and data protection against media outlets that published photos of Hudson and insinuated that she had an eating disorder.”<sup>2</sup> The publications in question include celebrity magazines such as the *Daily Mail*, *National Enquirer* and *Star*.<sup>3</sup>

Hudson’s claim of defamation reveals two important things about the reporting: 1) Hudson alleges that the allegations regarding her weight are false; and 2) that these allegations have the potential to economically impact her career by adversely impacting her reputation and her marketability as an actress. Although the articles “suggested that she had an eating disorder that was so grave and serious that she was wasting away to the extreme concern of her mother and family,”<sup>4</sup> her lawsuit implies the effects of these allegations to be far more significant in scope. Not only is her personal life and her reputation among her immediate circle affected by the reports, but the weighty allegations are also “of commercial and artistic concern to those who might cast her in movies and choose to use her image to endorse products.”<sup>5</sup> Thus, Hudson’s claim rests on the potential impact these stories regarding her weight could have upon her career as an actress. The success of Hudson’s claim, to be heard at the High Court in London in

---

<sup>2</sup> Tim Stack, *Monitor: Courts*, ENTERTAINMENT WEEKLY, November 18, 2005 at 30.

<sup>3</sup> *Kate Hudson files suit over published photos*, THE ADVOCATE, November 9, 2005 at A3.

<sup>4</sup> *Id.* at A3.

<sup>5</sup> *Id.* at A3.

2006,<sup>6</sup> will impact not only the importance of weight in Hollywood, but also has interesting implications for the role of perceptions of weight in American society.

Hudson's defamation suit raises many interesting questions. But perhaps most interestingly, this situation raises implications for the role of the media in shaping both defamation law and antidiscrimination law, two seemingly disparate areas of jurisprudence that may have more in common than previously understood. This relationship is premised on the notion that the law is not monolithic and static; rather, the law is a social institution that shapes and is shaped by society. As such, areas of the law like defamation and antidiscrimination have the potential to reflect social values and mores by revealing which actions and behaviors society prohibits through the law and which actions and behaviors society chooses to validate. The development of the law in these areas also demonstrates the shifting of social values; as society changes to accept new behaviors and reject old notions of propriety and morality, so does the law.

As reflections of social values and attitudes, this paper explores the connection between defamation law and antidiscrimination law. These two aspects of the law can be interpreted together to provide a larger picture of social values generally. Furthermore, they also interact with each other in ways that contribute to the development of both areas of the law.

### I. The Legal Frameworks

In order to explore the interactions between these two areas of law, a brief discussion of what defamation and antidiscrimination laws look like and mean within society is necessary.

---

<sup>6</sup> *Id.* at A3.

### A. Defamation law

Defamation law is a prime example of how law both reflects and shapes social values and norms. Although the exact definition of what constitutes a successful tort claim of defamation varies by jurisdiction, the basic elements of a defamation claim are generally defined by the Restatement, 2d of Torts as:

- (a) a false and defamatory statement concerning another;
- (b) an unprivileged publication to a third party;
- (c) fault amounting at least to negligence on the part of the publisher; and
- (d) either actionability of the statement irrespective of the special harm caused by the publication.<sup>7</sup>

To put it simply, a defamation claim involves a complaint of a materially false statement of fact, defamatory in nature, made about the plaintiff and published to a third party with fault, resulting in injury to the plaintiff.

The Restatement also provides some further clarifying points to help decode this dense statement. The form of the communication, which the restatement allows to be “by innuendo, by figure of speech, by expressions of belief, by allusion or by irony or satire,”<sup>8</sup> matters less than the way in which the message is received. In order for a statement to be understood as defamatory, it must be understood to be defamatory to the individual that the statement was made about, and its false message must be comprehended by the reasonable person familiar with the language used.<sup>9</sup> As long as something is recognized as defamatory by both the individual named and a third party, this element of the claim is met. However, the Restatement also advises that the statement must be interpreted within the context in which it appears; thus, a statement

---

<sup>7</sup> RESTAT. 2D OF TORTS, §558 (1977)

<sup>8</sup> *Id.* at §563(c).

<sup>9</sup> *Id.* at § 563(b), (c).

that appears defamatory on its own may not be when considered within its larger context.<sup>10</sup>

But what does it mean for a statement to be defamatory? Again, the Restatement provides some guidance. Statements can be regarded as defamatory “because they tend to expose another to hatred, ridicule or contempt.”<sup>11</sup> Defamatory statements are often thought of as having an adverse impact on an individual’s reputation, but “a defamatory communication may tend to disparage another by reflecting unfavorably upon his personal morality or integrity or it may consist of imputations which, while not affecting another’s personal reputation, tend to discredit his financial standing in the community ...”<sup>12</sup> Defamatory statements have the potential to injure an individual’s sense of her self as well as her place within the community, to the extent that “they tend to deter third persons from associating” with her.<sup>13</sup> If the defamation led to a quantifiable monetary loss, such as loss of business or ability to be hired, then the person at whom the statement was leveled may be entitled to receive monetary damages as well, revealing another way the statements can also affect an individual’s quality of life.<sup>14</sup> Finally, it is important to note that the defamatory statement need not actually result in any of the above stated harms; rather, “it is enough that the communication would tend” to create these harms to self and reputation.<sup>15</sup>

One last element necessary to establish the tort of defamation makes it especially relevant to situations arising within the world of entertainment and media: defamatory

---

<sup>10</sup> *Id.* at §563(d).

<sup>11</sup> *Id.* at §559(b)

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at §559(c).

<sup>14</sup> *Id.* at §559(d).

<sup>15</sup> *Id.* at §559(e).

statements must be communicated to a third party in some way; in other words, it must be published. As the Restatement describes it, “[t]he word ‘communication’ is used to denote the fact that one person has brought an idea to the perception of another.”<sup>16</sup>

Defamatory statements are false and hurtful statements made about someone to somebody else. Thus, publications such as newspapers and even entertainment glossies can serve as vehicles for defamatory statements. When defamatory statements appear in print, they are also referred to as libel; likewise, when the statement is spoken – including being spoken in a television or radio program – it is referred to as slander.<sup>17</sup>

The construction of the defamatory statement contains many elements, but one can see how defamation case law can reveal social attitudes and norms. A court’s decision to recognize certain claims over others on the basis of how damaging the alleged defamation is reveals what type of personal characterization our society believes is dangerous, or at the very least, unkind to an individual’s reputation. Words have power, and reputations have values; the law of defamation has developed to validate these ideas by protecting reputation from harmful libel and slander. In doing so, defamation law reveals classifications and aspects of both personal and group identity that are considered repugnant to how an individual is and should be valued by the larger community.

### B. Antidiscrimination Law

Antidiscrimination law is another developing area of the law that similarly reflects society back on itself. Developed in large part as a response to the Civil Rights Movements of the 1960s and propelled by the message of the 14<sup>th</sup> amendment, antidiscrimination law recognizes rights for individuals based on their membership within

---

<sup>16</sup> *Id.* at §559(a).

<sup>17</sup> *Id.* at §568.

a certain class. These classifications, which originally included race and have expanded to cover age, religion, marital status, and in some jurisdictions even sexual orientation, reflect group identities that are both recognized by society and are validated as deserving protections under the law. Antidiscrimination law prohibits adverse discriminatory actions taken against individuals on the basis of these certain group identities. At the heart of antidiscrimination law is the belief that prejudice is not something that is to be tolerated in society. To that end, “[a]ntidiscrimination law seeks to neutralize widespread forms of prejudice that pervasively disadvantage persons based on inaccurate judgments about their worth or capacities.”<sup>18</sup> This reveals two values: both the belief that certain groups should be protected from prejudice and discrimination as well as the broader value of promoting equality in society.

The paradigmatic example of antidiscrimination legislation in form, function and interpretation is the Civil Rights Act. This is the umbrella under which Title VII (prohibiting discrimination in the employment context), Title VI (prohibiting racial discrimination by institutions which receive federal funding, such as universities) and Title VIII (also known as the Fair Housing Act, prohibiting discrimination in access to housing) are found.<sup>19</sup> These statutes establish groups as deserving of protection from discrimination within these contexts because of the nature of that group identity. The ultimate goal is to combat the stigma attached to each of these groups in order to promote the ideals of individual worth, fair assessment and equal opportunity within society regardless of the stigma and resulting discrimination based on certain identity traits.

---

<sup>18</sup> ROBERT C. POST, *THE LOGIC OF AMERICAN ANTIDISCRIMINATION LAW* 10 (2001).

<sup>19</sup> *See generally*, 42 USCS §2000; 42 USCS §2000e; 42 USCS §2000d.

Antidiscrimination law reinforces the idea of which aspects of identity can and should be evaluated, and what role those identities should play within larger society.

## II. At the intersections of Defamation and Antidiscrimination Law

In general, there are three main ways the two branches of the law could be conceived of interacting: recognized defamation claims can reinforce the need for antidiscrimination laws for specific classes, defamation claims can reveal where existing antidiscrimination law may not be effective enough, and defamation claims can sometimes help shape the future developments in antidiscrimination laws by revealing new classifications that society may deem to merit antidiscrimination protection.

The interactions between defamation claims and the group identities that form the basis for antidiscrimination laws and collective rights can be understood through the use of hypotheticals and case law. I will now try to illustrate the three major categories of these interactions.

### A. Parallelism and Acceptance

Defamation claims can parallel antidiscrimination law, thereby reinforcing the idea that certain groups require protection on the basis of their group identity. The original identity classification that served as the driving force behind early antidiscrimination law is that of race. Indeed, race and ethnicity are the most intricately linked with the purpose and design of antidiscrimination laws in public thought; so much so that all new rights movement are based at least in part on the race centered Civil Rights model. This model did, after all, make significant headway in terms of helping the

passage of the 1964 Civil Rights Act. Given the nation's long and uncomfortable history with race and racial inequalities, a history that leads to disturbingly persistent disparities between racial groups in the nation today, antidiscrimination laws play an important role in recognizing the importance of prohibiting racial discrimination in order to achieve a true and equal democracy among the American citizenry.

Defamation law also intersects with issues of race, and in ways which reinforce the message sent by antidiscrimination law prohibiting racial discrimination. One of the most salient examples of this is in the role of criminal defamation statutes. Most states have passed legislation criminalizing communications that are defamatory in nature and would also threaten to cause a breach of the peace. This applies to communications made defaming entire races through hate literature alleging inferiority or other falsehoods about groups based on their race. The United States Supreme Court had an opportunity to review the constitutionality of an Illinois criminal libel statute by balancing the legislative construction against the First Amendment protections of speech in *Beauharnais v. Illinois*.<sup>20</sup> *Beauharnais* was the president of a supremacist group called the White Circle League in Chicago, and he had developed and distributed a series of pamphlets urging the Mayor and Chicago City Council to “halt the further encroachment, harassment and invasion of white people, their property, neighborhoods and persons, by the Negro ....”<sup>21</sup> He was arrested, charged and convicted under the Illinois criminal libel statute, which prohibited declarations such as this one which had the potential to incite public violence. In analyzing the issue, the Court looked to Chicago's long and difficult history with race riots and public violence to recognize that it “would deny experience to say that the

---

<sup>20</sup> 343 U.S. 250 (1952).

<sup>21</sup> *Id.* at 252.

Illinois legislature was without reason in seeking to curb false or malicious defamation of racial ... groups , made in public places and by means calculated to have a powerful emotional impact on those to whom it was presented.”<sup>22</sup> The threat of racial violence was and is very real, and the Court recognized the role of legislature in curbing this, finally holding the statute to be constitutional in light of the First Amendment. The Appellate Court of Illinois again used the statute in 1964 to uphold the conviction of a group of young men who brought on a public disturbance that threatened to turn into a full out race riot after passing out anti-Black and anti-Jewish hate literature.<sup>23</sup> Misrepresenting an entire race of people through defamatory statements does not only raise problematic moral concerns, these communications have the serious potential for dangerous public violence. Both defamation law and antidiscrimination law recognize this and work to prevent these situations from occurring.

Defamation claims based on race have the ability to show the salience of racial stereotypes and their accompanying stigma, as well as the pervasive existence of racial discrimination within society. In *Holden v. American News Co., et al.*, a White plaintiff brought suit against a publication for running a story in which he was described as a sympathizer of the Japanese race.<sup>24</sup> Although the plaintiff was a known supporter of Japanese business interests in the Seattle area, he alleged that the article defamed him by portraying him as un-American because of his relationships with both Japanese and Japanese American individuals and businesses. The plaintiff also made a calculation of damages that this blow to his reputation had cost him, based upon “his mental suffering resulting from the article ... [that] he received many phone calls and letters concerning it

---

<sup>22</sup> *Id.* at 260.

<sup>23</sup> *City of Chicago v. Lambert, et al.*, 47 Ill. App. 2d 151 (1964).

<sup>24</sup> 52 F. Supp. 24 (E.D. Washington, 1943).

which interfered with his work and that he had received no salary increase since the article was published.”<sup>25</sup> Context is indeed important to defamation claims, and the court found that “[v]iewed by these standards, the libelous character of this publication cannot be doubted. It was published during December, 1942, at a time when, for a year, we had been at war with Japan. Without question, the Japanese race was then hated and reviled by the recipients of this magazine.”<sup>26</sup> What the court takes so lightly as a basic truth is that the stigma associated with being Japanese was so strong that it had serious adverse effects even on a White individual who was accused of being sympathetic in some manner with this group. This strong stigma is the grounds for discrimination and other acts of hatred and fear, and claims such as this one illustrate the important need for existing antidiscrimination law designed to protect racial minorities.

To put issues of race based defamation into a contemporary context, imagine that in the days after September 11, 2001, a local newspaper runs an editorial accusing a candidate of Indian descent in a local election of actually being of Middle Eastern Background. The editorial also hints at the possibility of the candidate having ties to terrorist organizations. As a result, the candidate loses the election in a landslide, and also finds that his small business in the town suffers. Let us also assume that our wronged candidate decides to bring a defamation claim in state court against the local newspaper, and is able to prove all the necessary elements of a libel claim. This was a materially false statement (Indian is not Middle Eastern), the alleged link to terrorists was clearly defamatory in nature, and the publication of the statement led to an economically measurable injury to reputation in terms of the loss of business and perhaps the potential

---

<sup>25</sup> *Id.* at 30-31.

<sup>26</sup> *Id.* at 31.

loss of wages the elected position may have provided. By ruling in favor of the plaintiff, the court is validating this claim. This in turn supports both the local state and federal statutes that prohibit discrimination on the basis of race and national origin. Defamation claims recognize that certain classifications have the potential to seriously damage reputations. When these classifications are based on immutable characteristics such as race, the success of the defamation claim reveals the bias and prejudice associates with that trait, thus supporting the need for antidiscrimination statutes.

One last interesting interaction between defamation and antidiscrimination laws based on race reveals how, because of the way antidiscrimination statutes have been narrowly interpreted by courts in ways that sometimes prevent relief being granted to those who complain of discrimination, defamation law may provide an alternative venue. One example of this is in cases of racial profiling. In 1998, John Garret, a Black man, was shopping at the local Radio Shack. Although he was not the only patron at the time, he was the only Black patron. After he left, a computer was reported as stolen from the store. The employees forwarded a description of Garret, but of no other customer who was there at the same time, to the local police, who in turn interrogated Garret only to find that he had nothing to do with the stolen goods. Garret then filed suit, alleging racial discrimination by the employees of the radio shack as well as defamation; both claims were dismissed by the district court.<sup>27</sup> On appeal, the court found that the facts were insufficient to allege racial discrimination under the standards established by the judicial interpretations of the First Circuit; however, the court did find the defamation claim

---

<sup>27</sup> Garret v. Tandy Corp., 142 F. Supp. 2d 117 (D. Me., 2001).

persuasive.<sup>28</sup> “An accusation that X ‘suspects’ Y of having committed a crime ... is not necessarily a non-actionable statement of opinion, but, rather, a statement that implies the existence of underlying facts that can be proven true or false (and, thus, potentially actionable).”<sup>29</sup> What the court found even more persuasive in this case was that the allegation of suspected theft seemed to have been made “without a reasonable basis in fact”<sup>30</sup>, but on a suspicion motivated by race. Racial stereotypes, and the stigma associated with them, should not be the basis for snap decisions made about an individual. While both antidiscrimination law and defamation law recognize this, defamation law may be able to provide more direct relief.

#### B. Shortcomings and Cultural Shifts

A corollary to this parallelism is when successful defamation claims reveal the shortcomings of antidiscrimination law, showing where antidiscrimination laws are not doing enough to promote equality. This is often the case with categories that have been recognized as deserving protection through antidiscrimination legislation in some jurisdictions, but not on a universal basis. A clear example of such a category is sexual orientation. The rights of individuals based on their status as gay or lesbian is a controversial topic which has the potential to polarize the nation, as evidenced by the most recent presidential election.<sup>31</sup> The very fact that protections based on sexual orientation incite such debate reveals the potential for this category to be seen as

---

<sup>28</sup> *Garret v. Tandy Corp. d/b/a Radio Shack*, 295 F.3d 94 (1st Cir. 2002).

<sup>29</sup> *Id.* at 104.

<sup>30</sup> *Id.* at 106.

<sup>31</sup> *See, e.g.*, Katherine M. Franke, *Sexuality and Marriage: The politics of same-sex marriage politics*. 15 COLUM. J. GENDER & L. 236, 237 (2006) (“Some have even argued that this issue [of same sex marriage] affected, if not determined, the outcome of the 2004 presidential election.”).

stigmatized within society. Therefore, this classification has the potential to form the basis of both defamation claims and grounds for antidiscrimination legislation.

Hollywood is no stranger to defamation claims based on sexual orientation. Although it is debatable whether or not allegations of a certain sexual orientation will help or hurt an aspiring actor in the current social milieu, many actors have litigated on this type of allegation. Tom Cruise is a prime example of an actor who has striven to maintain the image of a certain sexual orientation in Hollywood, to the point of bringing defamation suits in court. On June 4, 2001, Cruise filed a \$100 million dollar lawsuit in Los Angeles Superior Court against Bold Magazine publisher Michael Davis.<sup>32</sup> Cruise's complaint alleged that Davis had made "false and defamatory written statements" about his sexual orientation, including the claim of possession of a videotape featuring Cruise engaged in sexual activity with another man.<sup>33</sup> Apparently, Davis had released these statements to several media outlets, and Cruise was concerned that these rumors "were of the sort calculated to cause [Cruise] harm both personally and professionally."<sup>34</sup> This was not the first defamation claim of this sort that Cruise had brought; earlier that year in May, he had filed another \$100 million suit against an adult film actor for allegedly telling a French publication that he had been sexually involved with Cruise.<sup>35</sup> Eventually, the suit against Davis settled, with the publisher making a public statement retracting the former claims by announcing that Cruise "is not, and never has been,

---

<sup>32</sup> Jason Schossler, *Magazine Publisher Admits to Lying About Tom Cruise Videotape*, THE ENTERTAINMENT LITIGATION REPORTER, February 28, 2002.

<sup>33</sup> *Cruise Files \$100 Million Suit over Gay Rumors*, THE ENTERTAINMENT LITIGATION REPORTER, June 30, 2001 at 10.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

homosexual and has never had a homosexual affair.”<sup>36</sup> Cruise seemed deeply concerned about what the stigma attached with being a homosexual would do to his reputation and marketability as an actor; he is clearly aware of the negative consequences associated with this classification and wishes to avoid them, even at the expense of litigation. This level of stigma arguably merits antidiscrimination protection.

Cruise is not the only individual to bristle all the way to the courthouse over allegations of homosexuality. In October of 1991, *The Advocate*, a publication that is openly marketed towards a gay and lesbian audience, ran a photo editorial on the theme of lust. The pictures and accompanying captions were sexual in nature, and implied both homosexuality and certain sexual behaviors of the models used in the pictorial. This was, at least, the basis of the lawsuit brought by James Rejent, one of the models used in the magazine.<sup>37</sup> Rejent claimed that he was unaware that his pictures would be used in such a manner, and complained of defamation because of what was implied from the way his image was used in the magazine. The Supreme Court of New York found in favor of Rejent, finding that the nature of the photographs and accompanying captions were such that a third party could reasonably impute the “defamatory connotation that plaintiff is lustful and sexually promiscuous.”<sup>38</sup> The court also looked to the context of the communication, and concluded that its appearance in a gay and lesbian publication “only heightens the allegedly false and defamatory impression” created by the communication.<sup>39</sup> The supreme court then goes even further, recognizing that “libelous

---

<sup>36</sup> Schossler, *supra* note 19.

<sup>37</sup> *Rejent v. Liberation Publications, Inc.*, 197 A.D.2d 240 (1994)

<sup>38</sup> *Id.* at 243.

<sup>39</sup> *Id.* at 244.

words imputing sexual misconduct to a man have been held to be defamatory per se.”<sup>40</sup>

This is an important recognition; for something to be held defamatory per se means that the false communication had such potential to have an egregious effect on the individual it was leveled against that it will be assumed to be defamatory. In this case, the court appears to interpret “sexual misconduct” as a euphemism for homosexuality, revealing the stigma associated with sexual orientation as recently as 1994 when this case was decided.

Social reactions and attitudes towards homosexuals, as towards any marginalized group, shift and change with time, and this shift can be seen in the jurisprudence.

Although attitudes have been shifting towards a more accepting stance and recognition of the need for protection from discrimination against homosexuals, the communication that one is gay is still arguably stigmatizing and defamatory. A 2005 case, *Amrak Productions, Inc., et al v. Morton, et al*, illustrates this.<sup>41</sup> In *Amrak*, a former bodyguard of Madonna brought suit against a book publisher for mislabeling a picture of him with the singer. In the book, the caption to the photo described him as a backup singer, who the plaintiff alleged was commonly known to be gay. Thus, the plaintiff alleged that the miscaptioning was defamatory; this claim was ultimately unsuccessful, however, in large part because the rest of the caption described the individual pictured as Madonna’s former lover, thus undercutting any claim of homosexuality.<sup>42</sup> The Court of Appeals for the First Circuit upheld the district court’s holding that “imputing homosexuality cannot be considered defamatory per se in Massachusetts,” revealing that the homosexuality is not as stigmatic as it was in earlier times and no longer qualifying as a per se violation.<sup>43</sup>

---

<sup>40</sup> *Id.* at 244.

<sup>41</sup> 410 F.3d 69 (1st Cir. 2005).

<sup>42</sup> *Id.* at 73.

<sup>43</sup> *Id.* at 72.

However, the court does leave open the possibility of a successful claim alleging the defamatory nature of an erroneous communication that an individual is a homosexual if the facts establish all the requisite elements of the tort of defamation.

The responses of the court, as well as of individuals accused of being of a certain sexual orientation, are based in the reality of the existence of discrimination along the lines of sexual orientation. These statements would not be regarded as defamatory, either by the complaining parties or the deciding courts, if there was no stigma attached to these classifications. The goal of antidiscrimination law in general is to eliminate actions based on biases developed in response to certain attributes of individuals. Thus, certain states and local jurisdictions have adopted antidiscrimination statutes on the basis of sexual orientation, as well as the more traditional categories of race, gender, religion, etc. However, as the above discussed examples show, the existence of antidiscrimination law alone may not always be enough to erase the stigma associated with this classification. It is arguable that the law has not gone far enough to cause the requisite shift in societal attitudes towards gays and lesbians in order to achieve equality for these classes of individuals. Sexual orientation based defamation claims demonstrate the potential of defamation claims to show where antidiscrimination law has not, and maybe cannot, go far enough.

### C. Liminal categories and the future of the law

A final interaction between defamation law and antidiscrimination law may be the most interesting, as it has the greatest implication for the future of both areas of the law. There are certain liminal areas of antidiscrimination law – categories that exist but have not yet been recognized for group based protection. Defamation claims on the basis of

certain categories can help illuminate the need for expansion of antidiscrimination law. Discrimination and defamation claims based on weight illustrate this interaction. Studies have provided empirical results of discrimination on the basis of weight, making it a contender for antidiscrimination statute protection. Traditionally, the discrimination is thought of to be against the overweight, but the converse may also be true. I will now explore this interaction in greater detail.

### III. *Is thin in?* The (uneasy) marriage between Hollywood and the Fat Acceptance Movement

Recently, a slew of Hollywood magazines have run reports on how shockingly thin starlets have become. Weight has become the latest catch-22 for starlets; with each new edition of celebrity magazines and tabloids, stars are either criticized for being overweight or, now, skeletal. The new trend of expressing supposed concern over the shrinking waistlines of young Hollywood have culminated in certain magazines speculating, or outright stating, that certain stars have eating disorders. Rather than chalking it up to the accepted belief that thin is always in, actress Kate Hudson brought a defamation suit against several magazines for printing such allegations about her. The basic logic behind her claim is that such misstatements of fact would adversely affect her reputation in a way that would hurt her career by decreasing the movie roles she would be offered and decreasing her respect in the public's eye. If a court were to recognize this type of claim, it would be because there is at least an implicit recognition that people are discriminated against on the basis of weight and that this discrimination can occur in the form of negative impact on one's reputation. This would support legal recognition of the

existence of a class of people who are discriminated against on the basis of weight and would encourage the development of antidiscrimination law to prohibit this. It is interesting to note that Hudson's suit coincides with a developing fat acceptance movement in American society, providing a unique opportunity to witness a potentially concurrent and mutually supportive development in both defamation law and antidiscrimination law. New developments in defamation law could encourage the expansion and development of antidiscrimination law in this way.

#### A. Defamation Analysis

It may be useful to analyze Hudson's claim according to the basic elements set out by the Second Restatement discussed in Section I.<sup>44</sup> If Hudson's situation could satisfactorily establish a claim of defamation, then the law of defamation could in turn recognize the stigma and danger to one's reputation communications regarding weight can have for an individual.

##### i. A false and defamatory statement concerning another

A materially false statement lies at the heart of any defamation claim. In this instance, the communicated falsehood is that Hudson has developed an eating disorder, as evidenced by the pictures in these publications which portray her as dangerously thin. The publications showcasing these images speculate that perhaps she has taken to starving herself because of pressure from the industry, or maybe she has taken to bingeing in order to please her fans. The implication of these speculations is that Hudson has become so thin that her health may be in risk. According to press reports, Hudson also takes issue with the fact that the publications allege that she has become so thin as to

---

<sup>44</sup> Although Hudson's claim was brought in a British court and is therefore subject to British common law, I am analyzing it under American standards to see what implications this type of suit, if brought in an American court, may have for American antidiscrimination law.

cause great concern to her family.<sup>45</sup> Thus, the false statements not only apply directly to Hudson, they also reign in her family members and others who are close to the actress.

ii. An unprivileged publication to a third party

The nature of celebrity, or of any position in the public eye, makes an individual susceptible to having their every move dissected by the media in order to satisfy the public appetite. Anything a star does will be displayed to hundreds of thousands of third parties, and the vehicles for these communications are often the types of magazines involved in Hudson's lawsuit.<sup>46</sup> This only heightens the danger of the consequences of defamatory statements that appear amongst those glossy pages; the general public may become aware of the statement and unquestioningly believe the truth of it. This is made more so because the nature of the publications and the size of the market they reach completely undermine any claim of an existing protecting privilege. Indeed, the very public nature and the scope of the audience for these communications may help Hudson's claim.

iii. Fault amounting at least to negligence on the part of the publisher

If a publisher knows that its publication is the vehicle for many communications about an individual to an extremely large audience, then it can be argued that the publisher has a duty to make sure the statements are at best true, and at the very least, not harmful. Hudson will have to show that the publishers that chose to run the stories about her alleged eating disorder did so in at least a negligent fashion. She might do this by showing that they failed to research the validity of their statements, or that the photos were not properly captioned. The negligence issue will turn on how reliable the

---

<sup>45</sup> See *supra* note 3, at A3.

<sup>46</sup> *Id.* at A3 (publications include *Daily Mail*, *National Enquirer*, *Heat*, *Closer* and *Star*).

information published was, how reliably it was presented, and how dangerous the harm to Hudson really was.

- iv. Either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication

In order for the tort of defamation to be established, there must have been some cognizable harm caused by the communication. Words can have power, and defamation law has developed in recognition of this truism. In order for a false communication to be actionable, then, it must have caused a harm by its publication to a third party. In this instance, Hudson's claim of harm is twofold, both relating to harm to her reputation.<sup>47</sup> First, there was a harm to her immediate circle of family, loved ones and other people close to Hudson. Although this does not directly translate into a monetary value, this is certainly a harm. The second harm is more tangible; Hudson is concerned that these reports will affect her reputation as an actress "to those who might cast her in movies and choose to use her image to endorse products."<sup>48</sup> As an actress, Hudson's marketability depends in large part on her public image. These false statements have the serious potential to hamper her economic success within her chosen profession. This is the type of situation defamation law seeks to prohibit. Furthermore, this harm to her professional credibility may also serve as grounds for monetary damages, which may be significant given Hudson's usual salary per picture or per endorsement deal.

Hudson's situation could potentially satisfy all the necessary elements needed to establish defamation according to the Second Restatement definition. If the court were to recognize such a claim and find in favor of Hudson, this would also lend support to and

---

<sup>47</sup> See Stack, *supra* note 2, at 30.

<sup>48</sup> *Supra* note 3, at A3.

recognition of the powerful stigma attached with issues of weight and the negative consequences of being mislabeled as a weight deviant within society.

### B. Antidiscrimination Analysis

When I use the term “weight deviant,” I am relying on an understanding that there is a normative standard of what is considered an appropriate or healthy weight to be. The ability of an individual to conform to this standard thus affects the way he or she is treated by society as a whole; the closer one is to the normative weight standard, the more one is rewarded. A weight deviant, then, is removed from the standard by being too far away in either direction, by being too thin or too fat.<sup>49</sup> These individuals experience the stigma that arises from deviance from the norm. This experience has founded a new movement within American society that analogizes this stigma with that experienced by other minorities in order to embark on a new rights recognition movement. This movement has been called the fat acceptance movement and follows organizing models such as those used for racial groups and groups based on sexual orientation in order to campaign for rights recognition in order to combat the stigma.<sup>50</sup>

One of the major difficulties facing any nascent rights movement is that rights are recognized somewhat grudgingly. If this were not the case, then the need for collective action such as seen in the Civil Rights movement would not be accepted as necessary, nor would that movement serve as a model for all new movements. While it appears that society has accepted that discrimination based on race is invalid, and seems to be approaching a similar acceptance regarding discrimination on the basis of sexual

---

<sup>49</sup> I want to emphasize the fact that I do not want to imply anything pejorative by using the term deviant; rather, it is an acknowledgement that society often places those outside the norm in a pejorative context with negative consequences.

<sup>50</sup> See Abigail C. Saguy and Kevin W. Riley, *Weighing Both Sides: Morality, Mortality, and Framing Contests over Obesity*, 30 J. HEALTH POLITICS, POL. AND L. 869 (2005).

orientation, such an embrace of fat rights or other rights based on appearance has not emerged. The public response to a recent antidiscrimination statute established by the city of Santa Cruz, California illustrates this. In 1992, the City Council proposed an antidiscrimination statute that prohibited discrimination on the basis of physical appearance altogether.<sup>51</sup> In trying to stay in line with the history of antidiscrimination law as premised upon the logic that immutable characteristics should not be punished through discriminatory behavior, “the Santa Cruz Ordinance proscribed discrimination based only on aspects of bodily appearance that were beyond a person’s control.”<sup>52</sup> The national public response to the statute varied, but a general theme was that the council had simply gone too far. The ordinance was referred to by derogatory names such as the “purple hair ordinance” and the “ugly ordinance,” revealing a public belief that not all aspects of identity should receive antidiscrimination protections.<sup>53</sup>

Where, then, does the fat acceptance movement, also more generally labeled as the size acceptance movement, enter the scene of modern antidiscrimination protection? Certain attempts have been made to organize around a disability model; the logic is that if fatness (and thinness by logical extension) is recognized by the courts as a disability, then it could fall under the Americans with Disabilities Act and gain acceptance, protection and accommodation in that way by building off of the disability rights model.<sup>54</sup> Other size acceptance activists have argued against this, supporting instead antidiscrimination

---

<sup>51</sup> Santa Cruz, Cal., Mun. Code §§9.83.01, 9.83.02(13) (1992).

<sup>52</sup> See. POST, *supra* note 18, at 7.

<sup>53</sup> WENDY BROWN, *STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY* 65-66 (1995).

<sup>54</sup> See, e.g., Anna Kirkland, *Representations of Fatness and Personhood: Pro-Fat Advocacy and the Limits and Uses of Law*, 82 REPRESENTATIONS 24 (2003)(analyzing the uses and limits of the disability model for the size acceptance movement.)

statutes that would provide protections from discrimination against individuals on the basis of their size, generally.

Defamation law may actually lend support to either of these antidiscrimination models. One of the major challenges in gaining acceptance of a rights movement is in countering public beliefs that such rights and protections are unnecessary. In the case of size and weight acceptance movements, this means countering public opinion that there is either no stigma attached with weight or that the stigma attached is minor and has no real affect on the material reality of a weight deviant. Successful defamation suits based on weight show that this is simply not the case. Weight deviancy is attached with a stigma that can lead to personal and emotional harm that extends beyond an individual to one's social circle of family, friends and acquaintances. That stigma can even lead to economic consequences as weight deviants experience harm to their reputation that translates into discrimination in employment opportunities. If there is the potential that a mere communication of an allegation that an individual is a weight deviant could harm an individual's reputation to the extent that a cognizable defamation claim arises, that potential arises from the fact that there is a very clear stigma associated with weight deviancy and that stigma has very real negative consequences. It is these consequences of stigma and bias that antidiscrimination law is designed to prohibit; therefore, defamation suits premised on weight can support the expansion of the conception of antidiscrimination law to recognize weight discrimination.

### Conclusion

Initially, the relationship between antidiscrimination law and defamation law may not appear to be obvious. An even more searching inquiry may be what this supposed

relationship has to do with the current battles between Hollywood actresses and the media over issues of weight. However, as Kate Hudson's lawsuit suggests, the current furor among starlets over allegations of eating disorders and disturbing weight loss provides a frame in which to showcase the potentially rich interactions between defamation suits and the development of antidiscrimination law.

Both defamation law and antidiscrimination law reveal societal values and mores. They are examples of attempts by the law to regulate behavior; they communicate messages about how we should treat our fellows. Both are deeply concerned with notions of stigma that are associated with aspects of an individual's identity. Both recognize that this stigma can have serious negative material consequences in the lives of these individuals and, where appropriate, both areas of the law function to combat these consequences. In defamation law, appropriateness is determined by the falsity of a statement alleging the identity that created the stigma. In antidiscrimination law, appropriateness turns on the type of identity and whether or not we as a society feel that the resulting stigma is fair and sufficiently harmful to the individual's ability to fully function within our democratic society.

When analyzed along the lines of the type of identity at the center of the claims, both antidiscrimination law and defamation law are seen to overlap and interact in ways that support each other in fighting against stigma. They reinforce societal notions of aspects of identity that are dangerously stigmatized in society; aspects such as race, sexual orientation and even weight. In this manner, the two areas of the law share an aspirational quality in that they are both working to establish a conception of society in which stigma based on these identities is no longer permitted. While this is more of an

explicit goal of antidiscrimination law, it may actually be defamation law, with its broader scope and ability to quantify the harm resulting from stigmatized identities in terms of monetary damages, that has the greatest potential in illuminating new directions for antidiscrimination protection. Defamation law concretizes the basic theory underlying discrimination law by clearly establishing the harm created by certain identities. It is then the role of antidiscrimination law to expressly prohibit those harms by forbidding discrimination on the grounds of that identity. Together, these two seemingly disparate areas of the law can interact to shape a more equal American society. Not even a movie star could object to that.