


Drawing Trump Naked: Curbing the Right of Publicity to Protect Public Discourse

Thomas E. Kadri

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DRAWING TRUMP NAKED: CURBING THE RIGHT OF PUBLICITY TO PROTECT PUBLIC DISCOURSE

THOMAS E. KADRI*

From Donald Trump to Lindsay Lohan to Manuel Noriega, real people who are portrayed in expressive works are increasingly targeting creators of those works for allegedly violating their “right of publicity”—a state-law tort that prohibits the unauthorized use of a person’s name, likeness, and other identifying characteristics. Intuitively, we might feel confident that Mark Zuckerberg should not be able to block his portrayal in The Social Network movie, that Marilyn Monroe could not have stopped Andy Warhol from exhibiting his vibrant paintings, that O.J. Simpson could not have demanded money from FX to air the American Crime Story docu-drama. But what supports these intuitions? And should we be so confident?

This Article provides a new framework to reconcile publicity rights with a robust commitment to free speech under the First Amendment. After describing the current landscape in the courts, this Article scrutinizes the “educative” First Amendment theory that has motivated many of the past decisions confronting the right of publicity—a listener-focused theory that relies on the public’s right to receive information. This Article then reframes the doctrine in a new way: as four distinct educative defenses that have developed to assuage concerns about publicity rights interfering with speech on matters of public concern. These four defenses might seem encouraging to those who worry that publicity rights impair expressive rights. But all too often they have instead complicated and undermined the opposition to publicity rights and, as a result, they pose an unexpected and underestimated threat to free speech. To combat this threat, this Article recalibrates First Amendment theory as it relates to the right of publicity.

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To adequately protect creators and their expressive works, this Article argues that we must abandon educative models of the First Amendment and instead adopt an approach that also protects the speaker as a central part of enabling public discourse. Failure to adopt this speaker-focused theory in publicity doctrine will perpetuate confusion in the courts and state legislatures, an outcome that will have a chilling effect on creators who seek to portray real people in their work. Yet we must also recognize the interests that publicity rights can serve. As we move into an era of new technology and innovation—from “deep fakes” to nonconsensual pornography—this challenge will only intensify. To address it, courts should refer to the constitutional concept of “public discourse” when publicity rights face off against expressive rights—a concept that not only empowers free expression, but also considers the narrow interests that we should all have in preventing certain uses of our images.

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INTRODUCTION

In the months before the 2016 presidential election, Donald Trump had more than polling numbers on his mind. While Trump wooed crowds with his promise to restore national greatness, painter Illma Gore depicted the future president in a nude and unflattering portrait aptly titled *Make America Great Again*.¹ Her goal was to highlight “the significance we place on our

1. Claire Voon, *The Donald Threatens to Sue Artist over Her Trump Micropenis Portrait*, HYPERALLERGIC (Apr. 20, 2016), <https://hyperallergic.com/292436/the-donald-threatens-to-sue-artist-over-her-trump-micropenis-portrait/>.

physical selves” and challenge the idea that appearance defines “your ability, your power, or your status.”² But when images of the portrait went viral, Trump’s legal team threatened to sue Gore for painting him without his permission.³

Trump’s dispute with Gore is part of a growing trend. In recent years, creators of expressive works⁴ have faced legal challenges brought by a bizarre cast of characters, including Panamanian dictator Manuel Noriega,⁵ Mexican drug lord “El Chapo” Guzmán,⁶ wayward actress Lindsey Lohan,⁷ and Hollywood dame Olivia de Havilland.⁸ What have these creators done to provoke litigation? They portrayed real people. After releasing documentaries, songs, paintings, films, or videogames, they were accused of violating someone’s “right of publicity”—a state-law tort that prohibits the unauthorized use of a person’s name, likeness, and other identifying characteristics.⁹

2. Interview with Illma Gore, Artist & Creator, *Making America Great Again*, in New Haven, Conn. (Feb. 19, 2018).

3. Voon, *supra* note 1; see Patrick Greenfield, *Artist Threatened with Lawsuits If She Sells Nude Donald Trump Painting*, *GUARDIAN* (Apr. 17, 2016), <https://www.theguardian.com/us-news/2016/apr/17/nude-donald-trump-painting-illma-gore-lawsuits>.

4. I use the term “creators” here because, for my purposes, it comes closest to capturing the diverse set of actors involved in producing and distributing expressive works—from movie-makers to singers to documentarians to journalists to YouTubers. Defining what constitutes an “expressive work” is, at times, a vexing task. It is ultimately a construct shaped by social practice, and any definition must capture any medium of expression that we commonly use to communicate ideas and opinions. When I use the term “expressive works,” I mean to capture not only the more traditional forms of news and entertainment media—such as paintings, books, newspapers, movies, documentaries, music, and photography—but also those media of a more recent vintage—such as videogames, memes, and Tweets—that now serve as vehicles for so much of our public discourse. See *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 790 (2011) (discussing First Amendment protection of some expressive works); ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* 169 (1995).

5. *Noriega v. Activision/Blizzard, Inc.*, No. BC 551747, 2014 WL 5930149, at *1 (Cal. Super. Ct. Oct. 27, 2014) (suing the makers of the *Call of Duty* videogame for portraying him “as an antagonist and as the culprit of numerous fictional heinous crimes”).

6. Dolia Estevez, *Do Univision and Netflix Have to Pay Drug Lord ‘El Chapo’ Guzmán to Air His Life Story?*, *FORBES* (June 1, 2016), <https://www.forbes.com/sites/doliaestevez/2016/06/01/do-univision-and-netflix-have-to-pay-drug-lord-el-chapo-guzman-to-air-his-life-story/#af177385f224> (reporting on Guzmán’s plan to sue the makers of a television series because they recounted his life story and used his nickname without his permission and without compensating him).

7. Litigious Lohan tried and failed twice. See *Lohan v. Take-Two Interactive Software, Inc.*, 97 N.E.3d 389, 392 (N.Y. 2018) (suing the creators of the *Grand Theft Auto V* videogame because it featured a “blonde woman . . . wearing a red bikini and bracelets, taking a ‘selfie’ with her cell phone, and displaying the peace sign with one of her hands”); *Lohan v. Perez*, 924 F. Supp. 2d 447, 451 (E.D.N.Y. 2013) (suing the rapper Pitbull after he sang that he was “tiptoein’, to keep flowin’ . . . got it locked up like Lindsay Lohan”).

8. *De Havilland v. FX Networks, LLC*, 230 Cal. Rptr. 3d 625, 630–31 (Cal. Ct. App. 2018) (suing the producers of the docudrama *Feud* for portraying 101-year-old actress Olivia de Havilland).

9. See, e.g., WASH. REV. CODE ANN. § 63.60.050 (West 2017) (representing an archetypal publicity statute).

Concern about the right of publicity has not been driven merely by an uptick in litigation. In response to new technologies, scholars have renewed their interest in this area¹⁰ and state legislatures across the country have been debating laws that could alter existing protections for expressive works.¹¹ Courts, too, have seen a slew of high-profile cases that pit publicity rights against expressive rights in ways that have been complicated by emerging technologies.¹² Some commentators have encouraged steps to prevent the “extravagant”¹³ right of publicity from being a “bloated monster” that imperils free speech,¹⁴ while others have argued for broader publicity rights that would place greater limits on portrayals of real people.¹⁵ Either future could come to pass: absent meaningful guidance from the Supreme Court,¹⁶ lower courts have been experimenting with a variety of confusing and contradictory tests to reconcile these competing visions.¹⁷ The circuit split is deepening,¹⁸ the petitions for certiorari are piling up,¹⁹ and federal courts are even asking

10. See JENNIFER E. ROTHMAN, *THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD* 1 (2018); Jesse Lempel, *Combating Deep Fakes Through the Right of Publicity*, LAWFARE (Mar. 30, 2018, 8:00 AM), <https://www.lawfareblog.com/combating-deep-fakes-through-right-publicity>; see also Stacey Dogan, *Stirring the Pot: A Response to Rothman’s Right of Publicity*, 42 COLUM. J.L. & ARTS 321 (2019); Mark A. Lemley, *Privacy, Property, and Publicity*, 117 MICH. L. REV. 1153 (2019).

11. See Jacob Gershman, *Critics Pounce on Proposed PRINCE Act in Minnesota*, WALL ST. J.: L. BLOG (May 16, 2016, 2:17 PM), <https://blogs.wsj.com/law/2016/05/16/critics-pounce-on-proposed-prince-act-in-minnesota/>; Jennifer E. Rothman, *New York Right of Publicity Bill Resurrected Again*, ROTHMAN’S ROADMAP TO THE RIGHT OF PUBLICITY (June 6, 2018, 12:45 PM), <https://www.rightofpublicityroadmap.com/news-commentary/new-york-right-publicity-bill-resurrected-again>.

12. See, e.g., *Keller v. Elec. Arts, Inc. (In re NCAA Student-Athlete Name & Likeness Licensing Litig.)*, 724 F.3d 1268, 1270–84 (9th Cir. 2013).

13. Dogan, *supra* note 10, at 329.

14. ROTHMAN, *supra* note 10, at 7. For additional critiques dating back over twenty years, see Mark S. Lee, *Agents of Chaos: Judicial Confusion in Defining the Right of Publicity-Free Speech Interface*, 23 LOY. L.A. ENT. L. REV. 471, 488–98 (2003); Diane Leenheer Zimmerman, *Who Put the Right in the Right of Publicity?*, 9 DEPAUL J. ART., TECH. & INTELL. PROP. L. 35 (1998).

15. See, e.g., *Update on N.Y. Right of Publicity*, SAG-AFTRA (June 23, 2017), <https://www.sagaftra.org/update-ny-right-publicity> (supporting the creation of post-mortem publicity rights).

16. The Supreme Court’s only dalliance with the right of publicity came forty years ago in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), where the Court allowed a publicity claim to proceed over a First Amendment defense without giving much guidance on how future courts should reconcile similar cases. *Id.* at 574–75.

17. *Davis v. Elec. Arts Inc.*, 775 F.3d 1172, 1177–81 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 1448 (2016) (cataloguing the tests adopted by state and federal courts around the country); *Petition for Writ of Certiorari at 14–21, Elec. Arts Inc. v. Davis*, 136 S. Ct. 1448 (2016) (No. 15-424) (same).

18. *Id.*

19. *Id.*; see also *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 802 F.3d 1049 (9th Cir. 2015), *cert. denied*, 137 S. Ct. 277 (2016); *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797 (Cal. 2001), *cert. denied*, 534 U.S. 1078 (2002).

their state counterparts for help with particularly difficult questions.²⁰ It seems like only a matter of time before the Supreme Court addresses the right of publicity for the first time in over forty years.²¹

In the meantime, this lingering uncertainty is problematic for free speech: creators of expressive works do not know where they stand, and the stakes are too high to take a risk because violating publicity rights has serious consequences. Not only do some states criminalize the underlying conduct,²² but plaintiffs may seek potent forms of relief to remedy violations, including nationwide injunctions²³ and damages for emotional distress and commercial injuries.²⁴ Even when creators of expressive works have prevailed in court, they have often had to wage costly wars to win, sometimes after years of litigation and multiple appeals.²⁵ And due to state-by-state variations in the right of publicity and the defenses to it, the strength of expressive rights shifts across state lines. This patchwork protection creates a chilling effect.²⁶ Stuck in legal limbo, creators of expressive works may make their portrayals less

20. *Daniels v. FanDuel, Inc.*, 884 F.3d 672, 673–75 (7th Cir. 2018), *certified question accepted*, 94 N.E.3d 696 (Ind. 2018) (asking the Indiana Supreme Court whether online fantasy-sports games may use Indiana’s “newsworthy” and “public interest” exceptions to the right of publicity to block a lawsuit brought by former college athletes whose names, pictures, and on-field statistics were used without permission).

21. The United States Supreme Court last addressed the right of publicity in 1977. *See Zaccchini*, 433 U.S. at 562.

22. *See, e.g.*, N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 2019).

23. Jennifer E. Rothman, *Commercial Speech, Commercial Use, and the Intellectual Property Quagmire*, 101 VA. L. REV. 1929, 1950 (2015); Zayn Siddique, *Nationwide Injunctions*, 117 COLUM. L. REV. 2095, 2115–16 (2017).

24. J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* §§ 11:30–11:35 (2d ed. 2017).

25. Consider, for example, the publicity claim brought against the makers of the movie *The Hurt Locker*. The claim was filed in a New Jersey district court in 2010, transferred to California district court in 2011, appealed and argued before the United States Court of Appeals for the Ninth Circuit in 2013, and finally decided on appeal in 2016—nearly six years after the movie won the Oscar for Best Picture. *See Sarver v. Chartier*, 813 F.3d 891, 891–96 (9th Cir. 2016).

26. *See Dogan, supra* note 10, at 327 (arguing that “the lack of a coherent normative rudder for the right of publicity has led courts to balance publicity and speech interests in an ad hoc manner that favors traditional forms of expression, penalizes uses that courts view as exploitative, and inevitably chills speech”).

realistic or refrain from including real people altogether.²⁷ At the very least, anyone depicting a real person must tread carefully.²⁸

Against this backdrop, there have been diverse proposals to reconcile the First Amendment with an individual's right to prevent others from portraying her. Some scholars have focused on the theoretical justifications for the tort.²⁹ They have questioned, for example, whether publicity rights actually create incentives for people to invest in their personae³⁰ and whether we even want to create these incentives in the first place.³¹ Other scholars have criticized the court-created tests that purport to address competing First Amendment interests, often proposing new frameworks that they believe would strike a better balance.³² But absent from this conversation has been a thorough analysis of an important objection to publicity rights: restricting

27. See Thomas E. Kadri, *Fumbling the First Amendment: The Right of Publicity Goes 2–0 Against Freedom of Expression*, 112 MICH. L. REV. 1519, 1529 (2014). The chaotic state of publicity law brings to mind Professor Lon Fuller's list of formal criteria that law must meet. Fuller catalogued various violations of his principles of legality, including "[1] a failure to publicize, or at least to make available to the affected party, the rules he is expected to observe; . . . [2] a failure to make rules understandable; [3] the enactment of contradictory rules; [and] . . . [4] introducing such frequent changes in the rules that the subject cannot orient his action by them." LON L. FULLER, *THE MORALITY OF LAW* 39 (rev. ed. 1969). For Fuller, "[a] total failure in any one of these [four] directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all, except perhaps in the Pickwickian sense in which a void contract can still be said to be one kind of contract." *Id.* at 40. Although a law like the right of publicity cannot hope to establish perfect ex-ante notice of liability, the current doctrinal disarray might have tempted Fuller to declare many of his principles violated. *Cf.* Dogan, *supra* note 10, at 329 (remarking that the right of publicity "is excessive and unpredictable, it lacks an adequate normative rationale, and it poses unjustifiable costs on speech and other interests").

28. See Stacey Dogan, *Haelan Laboratories v. Topps Chewing Gum: Publicity as a Legal Right*, in *INTELLECTUAL PROPERTY AT THE EDGE: THE CONTESTED CONTOURS OF IP* 17, 20 (Rochelle Cooper Dreyfuss & Jane C. Ginsburg, eds., 2014) ("[W]hile courts often rule in favor of the defendant on First Amendment grounds, they do so by applying murky legal standards that offer little certainty or comfort to parties thinking about selling a product that draws upon a celebrity identity.").

29. See Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125, 178–238 (1993); Jennifer E. Rothman, *Copyright Preemption and the Right of Publicity*, 36 U.C. DAVIS L. REV. 199, 245 n.218 (2002).

30. ROTHMAN, *supra* note 10, at 100; Lemley, *supra* note 10, at 1157; see also Mark A. Lemley, *Ex Ante Versus Ex Post Justifications for Intellectual Property*, 71 U. CHI. L. REV. 129, 141–48 (2004).

31. ROTHMAN, *supra* note 10, at 101; Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161, 1187–88 (2006) ("Even if celebrities [could be incentivized to invest in personae], it is not at all clear that society should want to encourage fame for fame's sake."); Madow, *supra* note 29, at 215–19.

32. See, e.g., ROTHMAN, *supra* note 10, at 138–59; Kadri, *supra* note 27, at 1525–31; see also Dogan & Lemley, *supra* note 31, at 1217–20; Roberta Rosenthal Kwall, *The Right of Publicity vs. The First Amendment: A Property and Liability Rule Analysis*, 70 IND. L.J. 47, 47 (1994); Jennifer E. Rothman, *The Inalienable Right of Publicity*, 101 GEO. L. J. 185, 223 (2012); Eugene Volokh, *Freedom of Speech and the Right of Publicity*, 40 HOUS. L. REV. 903, 913–30 (2003); Diane Leenheer Zimmerman, *Fitting Publicity Rights into Intellectual Property and Free Speech Theory: Sam, You Made the Pants Too Long*, 10 DEPAUL-LCA J. ART & ENT. L. 283, 286 (2000).

portrayals of real people inhibits speech on matters of public concern.³³ This Article fills that void.

In bridging this gap, this Article reviews how courts are actually responding to this objection. It then reframes the doctrine as four distinct defenses that have developed to assuage concerns about publicity rights interfering with speech on matters of public concern: (1) a constitutional affirmative defense to shield expressive works relating to matters of public concern; (2) a constitutional requirement that public-figure plaintiffs prove “actual malice” in order to prevail on their publicity claims; (3) state-law exceptions to the right of publicity for portrayals that are “newsworthy” or in the “public interest”; and (4) a method of constitutional avoidance in which courts narrowly construe publicity tort elements to evade certain free-speech concerns. These four defenses might initially seem encouraging to those who worry that publicity rights impair expressive rights. But all too often they have instead complicated and undermined the opposition to publicity rights and, as a result, they pose an unexpected and underestimated threat to free speech.³⁴ This is because many courts have adopted what I call an “educative” free-speech theory to explain these defenses. This theory focuses only on the listener’s interests in receiving information—not the speaker’s interests in speaking—and conditions protection for expressive works on their ability to “communicat[e] information to voters.”³⁵ As a result, educative theory offers only parasitic protection: expressive works are protected only to the extent that they convey accurate information that facilitates democratic deliberation.³⁶

This Article argues that a different free-speech theory should animate the analysis—a theory that recognizes that an essential objective of the First Amendment should be to protect a speaker’s right to participate in public

33. Nearly forty years ago, Peter L. Felcher and Edward L. Rubin touched on this issue when discussing certain problems that publicity rights pose given that “the news and entertainment media frequently portray real people without authorization.” Peter L. Felcher & Edward L. Rubin, *Privacy, Publicity, and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577, 1577 (1979). But much has changed in the last four decades, and Felcher and Rubin’s work, while still relevant and influential, is ripe for reassessment.

34. See, e.g., *Groucho Marx Prods., Inc. v. Day & Night Co.*, 523 F. Supp. 485, 492, 494 (S.D.N.Y. 1981), *rev’d on other grounds*, 689 F.2d 317 (2d Cir. 1982) (denying First Amendment protection to play featuring performers who imitated the style and appearance of the Marx Brothers because the play was neither “biographical” nor “an attempt to convey information about the Marx Brothers themselves or about the development of their characters”).

35. See Robert C. Post, *Data Privacy and Dignitary Privacy: Google Spain, The Right to Be Forgotten, and the Construction of the Public Sphere*, 67 DUKE L.J. 981, 1009 n.112 (2018) (citing ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* (1965)).

36. For prominent examples of educative theory, see OWEN M. FISS, *THE IRONY OF FREE SPEECH* (1996); CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20–35 (1971); Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255.

discourse. This right to participate in public discourse includes the right to create expressive works, even when those works feature real people, and the use of a person's name or likeness in public discourse should rarely provide a basis for liability. In critiquing educative defenses against the right of publicity, this Article provides a theory to limit publicity rights that has been lacking in other scholarship—a theory that considers not only the interests underlying the tort, but also the First Amendment interests in portraying real people.

This Article proceeds in three parts. Part I introduces the tension between publicity rights and free speech. Part II explores the four defenses raised when publicity rights interfere with speech on matters of public concern, critiquing the educative theory that courts have adopted to limit protection for expressive works under these defenses. Part III explains how the constitutional concept of public discourse offers a superior way to comprehend the limits of publicity rights when real people are portrayed in expressive works. Finally, Part III also discusses how courts might address some of today's toughest questions in this area, including issues raised by new technologies such as “deep fake” videos, nonconsensual pornography, and realistic videogames.

I. WHAT'S THE PROBLEM?

The right of publicity may scarcely appear on a first-year Torts syllabus, but it is a legal claim of growing importance.³⁷ A creature of both statute and common law, the tort's scope varies somewhat from state to state.³⁸ It generally encompasses the right to prevent the unauthorized use of peoples' names and likenesses, though some jurisdictions even recognize a right to prohibit others from merely “evoking” a person in the minds of viewers or listeners.³⁹

Courts and scholars have suggested a slew of justifications for publicity rights.⁴⁰ Some focus on benefits to the public, such as the idea that publicity

37. See *supra* notes 5–8, 10–15.

38. MCCARTHY, *supra* note 24, at § 6:2.

39. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (AM LAW INST. 1995) (“One who appropriates the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade is subject to liability . . .”); Lemley, *supra* note 10, at 1169 (“[T]he situation is so bad that the actual elements of the right of publicity cause of action in California are (1) use of something that reminds someone of a person (2) for economic advantage.”).

40. See generally *C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 443 F. Supp. 2d 1077, 1089–90 (E.D. Mo. 2006), *aff'd*, 505 F.3d 818 (8th Cir. 2007); ROTHMAN, *supra* note 10, at 98–112 (analyzing the various purported interests).

rights efficiently maximize wealth and allocate resources,⁴¹ or that they create incentives for people to act in ways that ultimately advance public welfare.⁴² Other justifications claim to serve individual interests by, for example, rewarding labor and preventing unjust enrichment caused by freeloading⁴³ or addressing dignitary injuries that unauthorized portrayals inflict on a person's autonomy, liberty, and privacy.⁴⁴ And some justifications seek to vindicate both public and individual concerns, like the notion that publicity rights provide a remedy for false product endorsements that deceive consumers and inflict dignitary injuries on the person falsely associated with the product.⁴⁵ Many of these purported justifications have been undermined or debunked—a matter we will return to later. For now, it suffices to say that, although there may be sound reasons to doubt the wisdom of recognizing a right of publicity at all,⁴⁶ that ship has likely sailed. At least thirty-three states now recognize some form of the tort, and that number seems more likely to grow than shrink.⁴⁷

A. *The Right of Publicity's Commercial Core*

To understand the tension between publicity rights and free speech, it is important to recognize the tort's *commercial core*.⁴⁸ A typical use of the right of publicity is to challenge the unauthorized use of a person's name or image in association with a commercial advertisement or product. If, for example, a supermarket promotes itself in a magazine by sticking its logo next to Michael Jordan's name and a pair of basketball shoes bearing his famed number "23," Jordan might have a viable claim that the supermarket violated his right of publicity.⁴⁹ The combination of the commercial advertisement and the unauthorized use of his name and legendary apparel would likely satisfy the

41. *Matthews v. Wozencraft*, 15 F.3d 432, 437–38, 438 n.2 (5th Cir. 1994); WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 210–53 (2003); Mark F. Grady, *A Positive Economic Theory of the Right of Publicity*, 1 UCLA ENT. L. REV. 97, 103–04, 126 (1994); Richard A. Posner, *The Right of Privacy*, 12 GA. L. REV. 393, 412–13 (1978).

42. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576 (1977).

43. ROTHMAN, *supra* note 10, at 105–10 (summarizing and critiquing this justification).

44. *See, e.g., id.* at 111–12; Roberta Rosenthal Kwall, *Preserving Personality and Reputational Interests of Constructed Personas Through Moral Rights: A Blueprint for the Twenty-First Century*, 2001 U. ILL. L. REV. 151, 158–59 (2001); Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225 (2005).

45. *See generally* Lemley, *supra* note 10, at 1163–64; McKenna, *supra* note 44.

46. Madow, *supra* note 29, at 178–238; *see also* Rothman, *supra* note 29, at 245 n.218.

47. MCCARTHY, *supra* note 24, at § 6:2; *The Law*, ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY, <https://www.rightofpublicityroadmap.com/law> (last visited May 2, 2019).

48. By using this term, I mean not to imply that publicity rights originally or exclusively protected commercial interests. As Rothman has shown, the right of publicity has long been concerned with privacy harms that need not be economic. *See* ROTHMAN, *supra* note 10, at 1–64.

49. This hypothetical isn't all that hypothetical. *Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509, 512 (7th Cir. 2014) (reviving Jordan's challenge to a supermarket's "A Shoe In!" ad).

tort's elements in most jurisdictions.⁵⁰ It is important to note, however, that publicity rights need not depend on misleading implications of *endorsement*. Suppose that a supermarket frequented by fans of a rival team published an advertisement saying: "MJ may be a six-time NBA champion and the star of *Space Jam*, but he's never graced our grocery store!" Jordan's claim would not sound in a theory of endorsement, but he could still challenge the commercial appropriation of his name and likeness.⁵¹

At the very least, then, publicity rights have been understood as a form of "property protection" that allows people to "profit from the full commercial value of their identities" and challenge the "false and misleading impression" of association with a commercial product or service.⁵² This commercial core has important constitutional implications because it means that many publicity claims challenge uses in "commercial" speech,⁵³ which has a "special meaning" in the First Amendment context.⁵⁴ Although the line between commercial and noncommercial speech can be elusive, the clearest example is speech that is "related solely to the economic interests of the speaker and its audience"⁵⁵ and "does 'no more than propose a commercial transaction.'"⁵⁶ Even if an advertisement contains speech about important public issues, it may nonetheless constitute commercial speech if it promotes a product and is economically motivated.⁵⁷

50. These elements vary slightly from jurisdiction to jurisdiction, but the Restatement (Second) of Torts provides a representative model: "One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy." RESTATEMENT (SECOND) OF TORTS § 652C (AM. LAW INST. 1977). Jordan's lawyers would surely have endorsed the accompanying comment, which states that the "common form" of this tort "is the appropriation and use of the plaintiff's name or likeness to advertise the defendant's business or product, or for some similar commercial purpose." *Id.* § 652C cmt.

51. See *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 967–68 (10th Cir. 1996) (formulating a similar hypothetical based on Madonna's distaste for bananas). In my view, there might be constitutional and policy grounds to question a broad publicity-based protection for mere associations.

52. See *id.* at 968; *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 802 (Cal. 2001).

53. See, e.g., *Newcombe v. Adolf Coors Co.*, 157 F.3d 686, 691 (9th Cir. 1998) (involving a claim by a Major League Baseball player against a publishing company for using his likeness to its commercial advantage).

54. *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1184–85 (9th Cir. 2001).

55. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 561 (1980).

56. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983) (quoting *Va. State Pharmacy Bd. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976)). Following *Bolger*, lower courts have distilled three factors relevant to deciding if speech is commercial. See, e.g., *Dryer v. Nat'l Football League*, 814 F.3d 938, 943 (8th Cir. 2016) (considering "(i) whether the communication is an advertisement, (ii) whether it refers to a specific product or service, and (iii) whether the speaker has an economic motivation for the speech" (quoting *Porous Media Corp. v. Pall Corp.*, 173 F.3d 1109, 1120 (8th Cir. 1999)); see also *Cardtoons, L.C.*, 95 F.3d at 970 ("[C]ommercial speech is best understood as speech that merely advertises a product or service for business purposes.").

57. See *Bolger*, 463 U.S. at 66–68.

The right of publicity's commercial core is important for two reasons. First, as the doctrine currently stands, *false or deceptive* commercial speech enjoys *no* First Amendment protection.⁵⁸ This rule liberates many publicity claims from constitutional scrutiny entirely, for the First Amendment offers no shield against liability for misleading commercial associations, like the ones in our Michael Jordan examples.⁵⁹ Second, even if speech is *not* false or misleading, by merely being commercial it is entitled to lesser First Amendment protection than noncommercial speech.⁶⁰ Because of this limited constitutional protection, states have greater leeway to regulate commercial speech.⁶¹ The result is that many publicity claims will win out over any asserted right to portray real people in commercial speech.⁶²

B. Expressive Works and the Right of Publicity

If the core of the right of publicity is commercial, what does the right of publicity have to do with expressive works? One answer might be “nothing at all.” The author of the leading treatise on the right of publicity, Professor J. Thomas McCarthy, has made such a claim: “[T]he only kind of speech impacted by the right of publicity is commercial speech—advertising. Not news, not stories, not entertainment and not entertainment satire and parody—only advertising and similar commercial uses.”⁶³ Even Professor Michael Madow, who fretted over the burgeoning right of publicity, confidently declared that “personas may be freely appropriated for . . . ‘entertainment’ purposes . . . [and] permission need not be obtained, nor payment made, for use of a celebrity’s name or likeness in a news report, novel, play, film, or

58. *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 563–64.

59. *See id.*; Rothman, *supra* note 23, at 1955–56.

60. *Greater New Orleans Broad. Ass’n, Inc. v. United States*, 527 U.S. 173, 183 (1999).

61. *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 562.

62. *See Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1184–85 (9th Cir. 2001). *But see supra* note 51. The right of publicity’s commercial core might be important for a third reason. Although this is somewhat conjectural, it might explain why so much publicity doctrine has adopted the listener-focused theory of free speech discussed in this Article. As a constitutional category, commercial speech is subjected to greater regulation in part because courts have adopted a listener-focused theory in shaping the doctrine. The constitutional analysis is built around consumers’ interests in receiving accurate information about commercial products. The commercial speaker, then, gains constitutional protection primarily as a means to ensure that the listener receives non-misleading information. *See Friedman v. Rogers*, 440 U.S. 1, 12, 16 (1979) (upholding a state law prohibiting optometrists’ use of trade names because “[a] trade name conveys no information about the price and nature of the services”); Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771, 775–76 (1999) (“Conventional First Amendment doctrine holds that the Constitution protects commercial speech only to enable listeners to receive valuable ‘information’ about the market.”).

63. J. Thomas McCarthy, *The Spring 1995 Horace S. Manges Lecture—The Human Persona As Commercial Property: The Right of Publicity*, 19 COLUM.-VLA J.L. & ARTS 129, 131 (1995); *see also* J. Thomas McCarthy & Paul M. Anderson, *Protection of the Athlete’s Identity: The Right of Publicity, Endorsements and Domain Names*, 11 MARQ. SPORTS L. REV. 195, 198 (2001).

biography.”⁶⁴ But as Professor Jennifer Rothman has persuasively shown, “[t]he facts on the ground . . . challenge this vision of a limited right.”⁶⁵

Rothman’s “facts on the ground” are shown in case after case, where courts have not dispatched with publicity claims through a commercial-speech-only rule but instead grappled with whether publicity rights may prevent or punish portrayals of real people in expressive works.⁶⁶ Lawsuits have been brought against filmmakers, by the former manager of rap group N.W.A.;⁶⁷ against actors, by the banker who inspired the toupee-wearing crook in *The Wolf of Wall Street*;⁶⁸ against TV-show producers, by a New Yorker convicted of murdering his parents;⁶⁹ against podcasters, by the estate of the protagonist from the hit series *S-Town*;⁷⁰ against videogame creators, by the heirs of long-deceased war hero, Lieutenant General George Patton;⁷¹ and even against documentarians, by the record holder in the *Donkey Kong* arcade game.⁷²

For free-speech enthusiasts, it might be surprising that the viability of these claims is even debatable. The First Amendment generally provides robust protection for expressive works as a speech medium,⁷³ even when the

64. Madow, *supra* note 29, at 130.

65. Rothman, *supra* note 23, at 1951–59. It is important to note that, although most states require the unauthorized use to be for “a commercial purpose,” sometimes “any purpose or advantage” will suffice. *See id.* at 1950.

66. *E.g.*, *Sarver v. Chartier*, 813 F.3d 891, 905–06 (9th Cir. 2016); *Keller v. Elec. Arts Inc. (In re NCAA Student-Athlete Name & Likeness Licensing Litig.)*, 724 F.3d 1268, 1282–83 (9th Cir. 2013); *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 169 (3d Cir. 2013); *C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 823–24 (8th Cir. 2007); *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 970–76 (10th Cir. 1996). Although these claims seem to be cropping up with increasing regularity, they are by no means new. *See, e.g.*, *Melvin v. Reid*, 297 P. 91, 93–94 (Cal. Dist. Ct. App. 1931) (holding that a plaintiff truthfully identified as a prostitute in a movie was entitled to block the showing of the movie).

67. *See Heller v. NBCUniversal, Inc.*, No. CV-15-09631-MWF-KS, 2016 WL 6573985, at *1 (C.D. Cal. Mar. 30, 2016) (suit arising from the biographical film *Straight Outta Compton*).

68. *Greene v. Paramount Pictures Corp.*, 138 F. Supp. 3d 226, 229 (E.D.N.Y. 2015) (suit arising from the movie *The Wolf of Wall Street*).

69. *Porco v. Lifetime Entm’t Servs., LLC*, 47 N.Y. S.3d 769, 769 (N.Y. App. Div. 2017) (suit arising from the made-for-TV biopic *Romeo Killer: The Christopher Porco Story*). In another recent case, the makers of a TV miniseries have faced publicity claims brought by the Fox News staffer whose sexual-harassment allegations against former Fox News chief Roger Ailes led to his ouster. *See Complaint, Luhn v. Scott*, No. 1:19-cv-01180 (D.D.C. Apr. 23, 2019).

70. Matt Stevens, ‘*S-Town’s* Treatment of Its Main Character Was Riveting. But Was It Unlawful?’, N.Y. TIMES (July 20, 2018), <https://www.nytimes.com/2018/07/20/arts/s-town-podcast-lawsuit-john-b-mclemore.html> (reporting on suit arising from the podcast *S-Town*).

71. *Complaint, CMG Worldwide Inc. v. Slitherine Ltd.*, No. 3:14-cv-05124 (N.D. Cal. Nov. 19, 2014) (suit arising from the videogame *History Legends of War: Patton*).

72. *Mitchell v. Cartoon Network, Inc.*, Civ. No. 15-5668, 2015 WL 12839135, at *1 (D.N.J. Nov. 20, 2015) (suit arising from the documentary *The King of Kong: A Fistful of Quarters*).

73. *Kaplan v. California*, 413 U.S. 115, 119–20 (1973) (“[P]ictures, films, paintings, drawings, and engravings . . . have First Amendment protection . . .”).

works are sold commercially.⁷⁴ Expressive works do not suddenly become commercial speech because they are sold for profit.⁷⁵ As one court has quipped, creators “need not give away [their works] in order to bring them within the ambit of the First Amendment.”⁷⁶ What’s more, the First Amendment disfavors content-based speech restrictions, and publicity claims that challenge portrayals of real people in expressive works “target speech based on its communicative content.”⁷⁷ It is no response to say that publicity claims involve disputes between private parties; civil liability for speech acts must still comport with the Constitution, even if the issue arises in a private tort suit.⁷⁸ As the Supreme Court made clear long ago in *New York Times v. Sullivan*,⁷⁹ torts like the right of publicity are “mere labels” of state law that “can claim no talismanic immunity from constitutional limitations” and instead “must be measured by standards that satisfy the First Amendment.”⁸⁰

All of this might suggest that the resolution in these cases is actually quite simple. The dispositive inquiry is whether the speech is commercial or noncommercial; and if it is noncommercial, it is protected. But, of course, such a straightforward resolution has not emerged from the courts. Instead, as Part II illustrates, courts have struggled to agree on how to square publicity rights with free-speech rights when real people are portrayed in expressive works.

II. WHAT’S THE MATTER (OF PUBLIC CONCERN)?

How have courts been trying to resolve the tension between publicity rights and free speech? Because the tort’s elements plausibly regulate so much protected speech, most of the work in confining the scope of publicity rights has been done by defenses.⁸¹ Creators of expressive works have raised a slew of defenses against claims brought by people whose likenesses they employ, and courts have developed various tests to address these conflicts

74. *Harte-Hanks Commc’ns, Inc. v. Connaughton*, 491 U.S. 657, 667 (1989) (“If a profit motive could somehow strip communications of the otherwise available constitutional protection, our cases from *New York Times* to *Hustler Magazine* would be little more than empty vessels.”); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501–02 (1952).

75. *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976); *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 756 n.5 (1988).

76. *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d at 970.

77. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015); *see also Volokh, supra* note 32, at 912 & n.35.

78. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964); *see also* ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* § 11.3.5.1 (3d ed. 2006).

79. 376 U.S. 254 (1964).

80. *Id.* at 269 (applying this analysis in the context of state defamation law).

81. *See Lemley, supra* note 10, at 1170.

between publicity rights and free speech.⁸² Four distinct defenses have responded to an important yet understudied objection to publicity rights: restricting portrayals of real people in expressive works inhibits speech on matters of public concern.

This Part begins by recounting how First Amendment doctrine and theory have traditionally framed protections for speech on matters of public concern. This tale takes us away from the right of publicity, as much of the history focuses on free-speech challenges to other torts. We will then return to publicity rights to explore the four defenses that have emerged in that realm.⁸³

A. *Educative Free-Speech Theory*

Speech on matters of public concern is said to lie “at the core of the First Amendment.”⁸⁴ Sometimes referred to as speech that is “newsworthy”⁸⁵ or about “public issues,”⁸⁶ the labels are now interchangeable.⁸⁷ No matter what you call it, courts are loath to uphold laws that restrict this kind of speech.⁸⁸

One reason courts hold speech on matters of public concern so dear is that First Amendment theory and doctrine have lauded access to *information* as essential to the public’s ability to engage in self-government. This listener-focused justification “views the public, in its role as the electorate, as ultimately responsible for political decisions,” and thus the First Amendment creates a presumption that the public is “entitled to all information that is

82. See generally Eric E. Johnson, *Disentangling the Right of Publicity*, 111 NW. U. L. REV. 891, 910–19 (2017) (observing that “the First Amendment is invoked to micromanage the application of right of publicity law” and that “[t]he doctrine gets much of its essential shape from courts’ habitual use of free-speech-type defenses, even as the application of these defenses is often incoherent” (emphasis omitted)).

83. See *infra* Section II.B.

84. *Frisby v. Schultz*, 487 U.S. 474, 479 (1988); see also *Schenck v. Pro-Choice Network of W.N.Y.*, 519 U.S. 357, 377 (1997) (“Leafletting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment.”); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (“[E]xpression on public issues ‘has always rested on the highest rung of the hierarchy of First Amendment values.’” (quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980))).

85. *Time, Inc. v. Hill*, 385 U.S. 374, 400 (1967) (Black, J., concurring).

86. *Frisby*, 487 U.S. at 479; *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

87. See FLA. STAT. ANN. § 90.5015 (West 2011) (“‘News’ means information of public concern relating to local, statewide, national, or worldwide issues or events.”); Richard T. Karcher, *Tort Law and Journalism Ethics*, 40 LOY. U. CHI. L.J. 781, 824 (2009) (“Whether something is of a legitimate public concern turns on a determination of newsworthiness”); Mary-Rose Pappadrea, *Citizen Journalism and the Reporter’s Privilege*, 91 MINN. L. REV. 515, 580 (2007) (observing that the newsworthiness standard “involves essentially the same inquiry as a ‘public concern’ test”).

88. See, e.g., *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (holding that speech in a “public place on a matter of public concern . . . is entitled to ‘special protection’ under the First Amendment”); *Frisby*, 487 U.S. at 479 (subjecting an antipicketing ordinance to “careful scrutiny”).

necessary for informed governance.”⁸⁹ For many years, the dominant theory used to explain and justify the First Amendment’s reach relied on this connection between access to information and political self-governance. Let’s call this theory “educative,” because it focuses on the role that information plays in educating voters so that they can engage in democratic deliberation—it justifies speech protection not because of any individual right of expression but instead because of the need to create an informed public.⁹⁰

As a threshold matter, a helpful way to think of educative theory in contrast to other First Amendment theories is in terms of concern over protecting the *listener* versus protecting the *speaker*. Educative theory is a listener-focused theory because it concerns the public’s right to receive information and to be informed. In contrast, speaker-based theories focus not on the public’s ability to use speech as a means to the end of becoming informed, but instead because it promotes some other value for the speaker.⁹¹

The father of modern educative theory is Alexander Meiklejohn. He emphasized the role of free speech in enabling people to have access to information in order to make informed political decisions, famously using the idea of the “town meeting” to explain the First Amendment’s boundaries.⁹² At these meetings, he said, citizens “discuss and . . . decide matters of public policy,” for “[w]hen men govern themselves, it is they—and no one else—who must pass judgment upon unwisdom and unfairness and danger” of particular policies.⁹³ For Meiklejohn, then, “[t]he principle of the freedom of speech springs from the necessities of the program of self-government.”⁹⁴ Meiklejohn’s theory frames the First Amendment as a means to an end: free speech is necessary so that citizens can be good listeners and remain informed about public issues, can hold government accountable, and, ultimately, engage in self-governance.⁹⁵ If citizens are not free to learn about and then

89. Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957, 999 (1989).

90. See MEIKLEJOHN, *supra* note 35, at 55 (arguing that the First Amendment “has no concern about the ‘needs of many men to express their opinions’” but rather is concerned with “the common needs of all the members of the body politic”); *id.* at 56–57, 61 (criticizing Zechariah Chafee, Jr.’s “inclusion of an individual interest within the scope of the First Amendment,” and Justice Oliver Wendell Holmes’s “excessive individualism” on this front); Robert Post, *Meiklejohn’s Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1109–23 (1993).

91. See *infra* notes 129–137 and accompanying discussion.

92. ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 24, 26 (1948).

93. *Id.*

94. *Id.*

95. MEIKLEJOHN, *supra* note 35, at 75 (arguing that the First Amendment’s “purpose is to give to every voting member of the body politic the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal”); MEIKLEJOHN, *supra* note 92, at 88–89 (“The primary purpose of the First Amendment is, then, that all the citizens shall, so far as possible, understand the issues which bear upon our common life.”).

discuss matters of public concern, they cannot set political agendas, advance ideas, and criticize elected officials. But although Meiklejohn's account might at first seem to take the *speaker* into account, his famous phrase shows us otherwise. The point of free speech, he stressed, is not that everyone shall speak but that "everything worth saying shall be said."⁹⁶

Meiklejohn's work greatly influenced later theorists. His disciples include Professor Owen Fiss, who argued that "[t]he purpose of free speech is not individual self-actualization, but rather the preservation of democracy, and the right of a people, as a people, to decide what kind of life it wishes to live."⁹⁷ Thus, according to Fiss, "[w]e allow people to speak so others can vote" because "[s]peech allows people to vote intelligently and freely, aware of all the options and in possession of all the relevant information."⁹⁸ Like Meiklejohn, then, Fiss viewed any individual speech right in instrumental terms, worthy of protection "only when it enriches public debate"⁹⁹ and serves "as a means or instrument of collective self-determination."¹⁰⁰ Professor Cass Sunstein has echoed these sentiments, maintaining that the primary purpose of free speech is to promote deliberative democracy—"a system in which citizens are informed about public issues and able to make judgments on the basis of reasons."¹⁰¹

The principles of educative theory, from Meiklejohn to the modern day, pervade First Amendment jurisprudence. This is particularly true where tort liability would pose a threat to free speech, when educative theory has principally appeared in two realms: the public-figure doctrine¹⁰² and the newsworthiness doctrine.¹⁰³ Both doctrines reflect listener-based concerns because they "ultimately lead to the same issue, which is the nature of the public

96. MEIKLEJOHN, *supra* note 35, at 26; *see also id.* at 55; MEIKLEJOHN, *supra* note 92, at 25 ("The First Amendment, then, is not the guardian of unregulated talkativeness. It does not require that, on every occasion, every citizen shall take part in public debate. Nor can it even give assurance that everyone shall have opportunity to do so."); Meiklejohn, *supra* note 36, at 255 ("The First Amendment does not protect a 'freedom to speak.' It is concerned, not with a private right, but with a public power, a governmental responsibility.").

97. Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1409–10 (1986).

98. OWEN M. FISS, *LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER* 13 (1996).

99. Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 786 (1987).

100. Fiss, *supra* note 97, at 1409–10.

101. Cass R. Sunstein, *Television and the Public Interest*, 88 CAL. L. REV. 499, 501 (2000); *see also* J.M. Balkin, *Populism and Progressivism as Constitutional Categories*, 104 YALE L.J. 1935, 1935 (1995).

102. A "public figure" is any person who has "assumed roles of especial prominence in the affairs of society," either because they "occupy positions of such persuasive power and influence" or because they "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974).

103. I use this nomenclature for simplicity's sake, though at times the courts use alternative language. *See supra* note 87.

and its right to demand information.”¹⁰⁴ Thus, the public-figure and news-worthiness doctrines can be glossed as educative doctrines—and courts will often do so.

Under the public-figure doctrine, speech on public issues receives heightened protection through a requirement that public-figure plaintiffs satisfy heightened evidentiary burdens in certain tort actions.¹⁰⁵ The doctrine developed principally in defamation law, beginning with the Supreme Court’s landmark decision in *New York Times Co. v. Sullivan*.¹⁰⁶ Under *Sullivan* and its progeny, public figures in defamation actions must prove that the defendant made the allegedly defamatory statement with actual malice—that is, “with knowledge that it was false or with reckless disregard of whether it was false or not.”¹⁰⁷ The Court subsequently extended this rule to tort claims brought by public figures for intentional infliction of emotional distress, meaning that public-figure plaintiffs who bring these claims must satisfy the rigors of actual malice if they are to prevail.¹⁰⁸

The rationale behind this heightened burden in the public-figure doctrine derives from listener-based educative concerns. Because public figures play an important role in society, it is crucial that citizens be fully informed about them.¹⁰⁹ So strong is this interest that the First Amendment protects even some false speech about public figures—which is “inevitable in free debate”¹¹⁰—because only such a prophylactic rule could foster the “breathing space” required for the circulation of speech about public issues.¹¹¹ Thus, at its core, the public-figure doctrine adopts an educative theory of the First Amendment. Indeed, Meiklejohn himself proclaimed that the *Sullivan* decision was “an occasion for dancing in the streets.”¹¹²

104. Post, *supra* note 89, at 997.

105. See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 277, 279–80 (1964).

106. *Id.*

107. *Id.* at 279–80 (establishing the rule for public officials); *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 274 (1971) (extending the rule to candidates for political office); *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 154–55 (1967) (extending the rule to nonpolitical public figures); see also *id.* at 163 (Warren, C.J., concurring) (positing that any differentiation between public figures and officials “would have no basis in law, logic, or First Amendment policy”).

108. *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988).

109. See *Garrison v. Louisiana*, 379 U.S. 64, 72–73 (1964) (“[W]here the criticism is of public officials and their conduct of public business, the interest in private reputation is overborne by the larger public interest, secured by the Constitution, in the dissemination of truth.”).

110. *N.Y. Times Co.*, 376 U.S. at 271–72.

111. *Id.*

112. Harry Kalven, Jr., *The New York Times Case: A Note on “The Central Meaning of the First Amendment,”* 1964 SUP. CT. REV. 191, 221 n.125.

The newsworthiness doctrine, too, acts as a shield for speech on matters of public concern.¹¹³ Even before the *Sullivan* Court constitutionalized defamation law because of the importance of “debate on public issues,”¹¹⁴ the common-law defamation defense of fair comment and criticism sought to protect discussion of matters in the public interest.¹¹⁵ Nowadays, the newsworthiness doctrine has constitutional or quasi-constitutional¹¹⁶ import in a wide swath of legal disputes, including cases involving defamation,¹¹⁷ public disclosure of private facts,¹¹⁸ false light,¹¹⁹ intentional infliction of emotional distress,¹²⁰ copyright,¹²¹ government-employee speech,¹²² and freedom of the press.¹²³ The doctrine has also been co-opted by a growing number of state statutes—often dubbed “anti-SLAPP” laws—that offer defendants certain procedural protections against frivolous lawsuits aimed at chilling speech on public issues.¹²⁴

Like the public-figure doctrine, the newsworthiness doctrine is animated by an educative theory of the First Amendment. As the Supreme Court explained, people must be free to discuss “all issues about which information is needed or appropriate to enable the members of society to cope with the

113. *See Snyder v. Phelps*, 562 U.S. 443, 453 (2011); *Thornhill v. Alabama*, 310 U.S. 88, 101–02 (1940).

114. *N.Y. Times Co.*, 376 U.S. at 270.

115. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 831 (5th ed. 1984). As with the public-figure doctrine, defamation law played a salient role in the development of the newsworthiness doctrine. In *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), *abrogated by Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), a plurality of the Court attempted to extend the *Sullivan*’s standard to all matters of public concern, regardless of whether the plaintiff was a public or private figure. *Id.* at 43. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), however, the majority expressly rejected the extension of the actual-malice standard to private persons caught up in matters of public concern. *Id.* at 346. But even the *Gertz* Court could not bring itself to jettison newsworthiness entirely. When the Court explored the contours of who would qualify as a public figure, it remarked that most commonly they would be those people who have “thrust themselves to the forefront of particular *public controversies* in order to influence the resolution of the *issues* involved.” *Id.* at 345 (emphases added). Even on its deathbed, the newsworthiness doctrine clung on, perhaps to return again when a particular justice found the results of the public-figure approach intolerable.

116. By “quasi-constitutional,” I refer principally to various newsworthiness defenses or exceptions under *state* law that aim to avoid First Amendment concerns under *federal* law. *See also infra* Sections III.B.3, III.B.4. But it could also describe instances where federal law is construed to leave breathing room that might otherwise be required by the First Amendment. *See, e.g., Nat’l Rifle Ass’n of Am. v. Handgun Control Fed’n of Ohio*, 15 F.3d 559, 562 (6th Cir. 1994) (noting that “[t]he scope of the fair use doctrine is wider when the use relates to issues of public concern”).

117. *See, e.g., Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 763 (1985).

118. *See DANIEL J. SOLOVE & PAUL M. SCHWARTZ, PRIVACY AND THE MEDIA* 123–24 (2008).

119. *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967).

120. *Snyder v. Phelps*, 562 U.S. 443, 451 (2011).

121. *Nat’l Rifle Ass’n of Am.*, 15 F.3d at 562.

122. *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968).

123. *Bartnicki v. Vopper*, 532 U.S. 514, 519, 535 (2001).

124. *See, e.g., 9 R.I. GEN. LAWS* § 9-33-1 (2012).

exigencies of their period.”¹²⁵ The electorate, as the arbiter of political decisions in a democratic system, relies on information to make educated decisions.¹²⁶ The public, therefore, “is presumptively entitled to all information that is necessary for informed governance.”¹²⁷

There is no escaping the fact that a listener-based educative theory underlies much First Amendment doctrine, and that is not going anywhere anytime soon. But for all its widespread adoption and acceptance, the theory fails to capture something important about the right to free speech. The problem with educative theory is not that it is incorrect—it is that the theory is incomplete. By single-mindedly protecting speech for the sake of the listener, educative theory misses half of the equation: protecting discussion for the sake of the speaker. Educative theory subordinates individual expressive rights to concerns about creating an informed public and, in so doing, undervalues the crucial role that the First Amendment should play in protecting speakers’ rights to participate in public discourse. To revise Meiklejohn’s mantra, the objective of free speech should be that everyone may speak, not merely that everything worth saying gets said.¹²⁸

This brings us to the speaker-based theories used to justify First Amendment protection. Professors Robert Post and Jack Balkin have developed non-educative theories to explain why the First Amendment should protect our ability to participate in “public discourse”—that is, to participate as a speaker in the communicative processes that form public opinion.¹²⁹ Although it is important to remain informed about public issues, the boundaries

125. *Thornhill v. Alabama*, 310 U.S. 88, 101–02 (1940); see also Lyrissa Barnett Lidsky, *Nobody’s Fools: The Rational Audience as First Amendment Ideal*, 2010 U. ILL. L. REV. 799, 810 (2010).

126. POST, *supra* note 4, at 77–78.

127. *Id.* at 78.

128. See MEIKLEJOHN, *supra* note 35, at 26.

129. For background on the concept of “public discourse” as an animating concern of the First Amendment, see ROBERT C. POST, *CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION 49* (2014) [hereinafter POST, *CITIZENS DIVIDED*] (“I shall use the term *public discourse* to describe the communicative processes by which persons participate in the formation of public opinion.”); ROBERT C. POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE 15* (2012) [hereinafter POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM*]; POST, *supra* note 4, at 7 (defining public discourse as “an open structure of communication” in which there can be “reconciliation of individual and collective autonomy”); Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183, 1210–20 (2016); Robert Post, *Participatory Democracy as a Theory of Free Speech: A Reply*, 97 VA. L. REV. 617, 621 (2011); Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 7 (2000) (“Public discourse is comprised of those processes of communication that must remain open to the participation of citizens if democratic legitimacy is to be maintained.”) [hereinafter Post, *The Constitutional Status of Commercial Speech*]; Post, *supra* note 90, at 1115–16 (using the term “public discourse” to refer to the “communicative processes sufficient to instill in citizens a sense of participation, legitimacy, and identification”); Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601, 637–38 (1990) (defining public discourse as “critical interaction” between members of a community and noting

of public discourse depend not on the content of speech but rather on the social function of particular communications.¹³⁰ We are “social creatures” who become who we are “through conversation, through absorbing popular art and culture, and through being influenced by the ideas and opinions of the people around [us].”¹³¹ We thus contribute to the formation of public opinion by expressing our ideas, beliefs, and opinions to one another. This expression enables us to engage in processes of mutual influence that shape the political and cultural power in our communities.¹³² The objective of free speech, then, is to protect the speaker’s right to participate in public discourse, not simply the listener’s right to receive information.

Post and Balkin offer slightly different reasons to explain why the First Amendment should protect a right to participate in public discourse. Post ties his theory to the need for democratic legitimacy, which “depends upon citizens having the warranted belief that their government is responsive to their wishes.”¹³³ In order to sustain this belief, citizens in a democracy must be free to engage in communicative processes that instill a sense of “participation, legitimacy, and identification.”¹³⁴ Balkin’s approach does not deny that participation in public discourse serves this legitimating function in a democracy. But whereas Post ultimately grounds his theory in political self-governance, Balkin’s justification focuses on cultural power, of which political power is but one element.¹³⁵ In Balkin’s view, “[p]eople have a right to participate in forms of power that reshape and alter them because what is literally at stake is their own selves.”¹³⁶ Participation in public discourse empowers people to shape the formation of culture, and for that reason it should receive the highest constitutional protection. The differences between Post’s and Balkin’s theories matter not for purposes of this Article. What matters is their common conviction—one that I share—that people must be free to

that “[c]ontemporary constitutional doctrine looks to this debate to constitute that ‘universe of discourse’ within which public opinion, and hence democratic policy, may be formed”); Robert Post, *An Analysis of DOJ’s Brief in Masterpiece Cakeshop*, TAKE CARE (Oct. 18, 2017), <https://takecareblog.com/blog/an-analysis-of-doj-s-brief-in-masterpiece-cakeshop>.

130. Balkin, *supra* note 129, at 1214.

131. *Id.* at 1211.

132. *See id.* at 1211–12; Jack M. Balkin, *Cultural Democracy and the First Amendment*, 110 NW. U. L. REV. 1053, 1056 (2015) [hereinafter Balkin, *Cultural Democracy and the First Amendment*]; Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 27–28 (2004) [hereinafter Balkin, *Digital Speech and Democratic Culture*]; Madow, *supra* note 29, at 127, 239.

133. Post, *The Constitutional Status of Commercial Speech*, *supra* note 129, at 7.

134. Post, *supra* note 90, at 1115; *see also* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 7 (1970) (emphasizing the role of free speech in “provid[ing] for participation in decision making by all members of society”); Post, *The Constitutional Status of Commercial Speech*, *supra* note 129, at 7.

135. Balkin, *supra* note 129, at 1211.

136. *Id.*

participate in the formation of public opinion by creating expressive works.¹³⁷

When the purpose of free speech is recast in these terms, the limited protection offered by educative theory is easier to see. If you justify protecting speech based solely on its ability to inform a listener about matters of public concern, the theory and the jurisprudence it creates offer less protection to speech that fails to serve an educative function. Hinging speech rights on conveying information to listeners is a limiting, and damning, approach for some expressive works: should a work fail to inform a listener, in whatever context that might be, it will not receive robust First Amendment protection. At best, educative theory provides creators of expressive works with parasitic protection: as speakers, their rights feed off the listener's right to receive information, and their rights perish if they fail to convey information that listeners need to know.

Educative theorists like Meiklejohn have admitted this limitation. When pushed on why art, for example, might deserve First Amendment protection, Meiklejohn relied on its ability to assist the voter in making decisions.¹³⁸ Self-government, he insisted, "can exist only insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express."¹³⁹ In his view, art may help voters develop "knowledge, intelligence, [and] sensitivity to human values"—all of which guide our decisions when we vote.¹⁴⁰ This means-to-an-end account of the constitutional value of expressive works pegs First Amendment protection to the works' ability to assist the public in exercising political judgment. As Balkin has remarked, in Meiklejohn's world, "culture is instrumentally valuable to the extent that it assists political self-governance, by allowing people to understand the issues of the day."¹⁴¹ In other words, the speaker is the listener's servant.

The listener-based educative theory also creates an additional risk for free speech: it opens the door to elitism by tying the decision to protect an expressive work to its ability to "inform" the public.¹⁴² To understand why,

137. See Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 485–86 (2011); Balkin, *Digital Speech and Democratic Culture*, *supra* note 132, at 5.

138. Meiklejohn, *supra* note 36, at 255–57.

139. *Id.* at 255.

140. *Id.* at 256.

141. Balkin, *Cultural Democracy and the First Amendment*, *supra* note 132, at 1056.

142. Balkin has critiqued the educative theories proffered by the likes of Meiklejohn, Fiss, and Sunstein in similar terms:

The First Amendment does not protect mass culture for the sake of avant-gardism and high art; rather it protects the latter because they are part of a larger phenomenon—the carnival of public discourse and popular culture that arises in a democratized society. The First Amendment is about Spielberg as much as Bergman, about the Jackson Five as much as Jackson Pollock, about Rambo as much as Rimbaud. Meiklejohn and his intellectual progeny have always shared this dual failing: Defending art in the name of politics

it helps to imagine the various educative theorists as falling along a spectrum based on their answers to a seemingly simple question: What information does the public need to know? The determination of the informative value of speech runs along a spectrum between what I call *cramped* educative theory and *capacious* educative theory. At one end, the cramped theorists, the most notable being Robert Bork, argue that “[c]onstitutional protection should be accorded only to speech that is *explicitly political*.”¹⁴³ Cramped theorists accept that the public must remain informed about important issues but adopt a narrow view of what the public needs to know. Meanwhile, at the other end of the spectrum lie capacious theorists like Meiklejohn who cram a lot into their informing-the-public box.¹⁴⁴ Like cramped theorists, capacious theorists laud the need for an informed public, but, unlike cramped theorists, they see informative value in all sorts of popular culture that Bork would constitutionally disparage.¹⁴⁵

This educative spectrum invites elitism that undervalues popular culture. This commonly takes the form of “politico-centrism,” which is the tendency to “overstress the importance of politics to the life of ordinary citizens.”¹⁴⁶ Politico-centrists often belittle and devalue speech that is not clearly linked to electoral politics, and this free-speech myopia creates hazardous conditions for a host of expressive works that primarily seek to entertain rather than inform.¹⁴⁷ That is not to say, of course, that expressive works cannot do both. Many do. It is just that it is easier for politico-centrists to hide their elitism when an expressive work serves no obvious informative function, as is true for many expressive works.

and all art in the name of high art, they inevitably neglect the cultural and condescend towards the popular.

Balkin, *supra* note 101, at 1963.

143. Bork, *supra* note 36, at 20 (emphasis added); *see also* Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 598–99 (1982) (calling Bork’s approach “the most narrowly confined protection of speech ever supported by a modern jurist or academic”).

144. *See supra* notes 138–140 and accompanying text.

145. *Compare* Bork, *supra* note 36, at 20 (“Constitutional protection should be accorded only to speech that is explicitly political. There is no basis for judicial intervention to protect any other form of expression, be it scientific, literary or that variety of expression we call obscene or pornographic.”), *with* Meiklejohn, *supra* note 36, at 257 (justifying protection for “[l]iterature and the arts” because “[t]hey lead the way toward sensitive and informed appreciation and response to the values out of which the riches of the general welfare are created”).

146. Balkin, *supra* note 101, at 1985–86.

147. *See id.* at 1957–58, 1961 (“For Meiklejohn, art is protected because it serves politics; for Sunstein art is protected because it is continually threatened by politicians. In both cases, the constitutional value of art is a reflection of its relation to politics—either as its aid or its enemy, either as its servant or its victim, either as an instrument of its realization or as its familiar and recurrent prey.”).

Even capacious educative theorists like Meiklejohn could be accused of politico-centric elitism,¹⁴⁸ but others have been more flagrant in their disdain for popular culture and their fondness for politics. Sunstein, for example, has suggested that nonpolitical art should receive diminished First Amendment protection,¹⁴⁹ while Bork would not protect nonpolitical art at all.¹⁵⁰ Fiss, meanwhile, argued that government programs like the National Endowment for the Arts should promote discussion of public issues by supporting artists whose works deal with matters of public concern.¹⁵¹ This proposal sounds fine in principle, but it takes on a different tone when paired with Fiss's skepticism about the constitutional value of some popular culture, such as when he disdainfully contrasts MTV and *I Love Lucy* with "the information [citizens] need to make free and intelligent choices about government policy, the structure of government, or the nature of society."¹⁵² My point is not that we must ignore that some speech better equips voters to make informed decisions; it is that educative doctrine—which asks courts to pick the information that voters need to know—is susceptible to elitism that prejudices expressive works having little to do with electoral politics.

This educative spectrum carries over into the courts, where judges broadly or narrowly construe what constitutes a matter of public concern.¹⁵³ As we will see in greater detail shortly, consider the various state-law exceptions to the right of publicity for speech that is "newsworthy" or in the "public interest."¹⁵⁴ The Indiana Supreme Court recently construed Indiana's newsworthy exception "broadly" to cover the use of college athletes' names, images, and statistics in conducting fantasy-sports games.¹⁵⁵ The United States Court of Appeals for the Ninth Circuit, however, adopted a narrow under-

148. See MEIKLEJOHN, *supra* note 35, at xv–xvi (lamenting that privately owned television broadcasters were "dangerous" to the public's "morality and intelligence" because they were "destroying and degrading our intelligence and our taste by the use of instruments which should be employed in educating and uplifting them"); Balkin, *Cultural Democracy and the First Amendment*, *supra* note 132, at 1056 (ascribing the "politico-centric" label to Meiklejohn's theory of the First Amendment).

149. SUNSTEIN, *supra* note 36, at 153–59; see also *id.* at 84–91 (belittling "low quality" television programming that appeals to tastes of uneducated).

150. Bork, *supra* note 36, at 26–28.

151. FISS, *supra* note 36, at 40–45.

152. Fiss, *supra* note 99, at 788; see also Fiss, *supra* note 97, at 1413 ("From the perspective of a free and open debate, the choice between *Love Boat* and *Fantasy Island* is trivial.").

153. This judicial inconsistency is likely exacerbated by the fact that the term is ambiguously defined both normatively (what the public *ought* to know) and descriptively (what the public *wants* to know). See *Snyder v. Phelps*, 562 U.S. 443, 453 (2011) (defining a "matter of public concern" as speech that is "fairly considered as relating to any matter of political, social, or other concern to the community" or "a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public" (first quoting *Connick v. Myers*, 461 U.S. 138, 146 (1983); then quoting *San Diego v. Roe*, 543 U.S. 77, 83–84 (2004))); Post, *supra* note 35, at 1057.

154. See *infra* Section II.B.3.

155. *Daniels v. FanDuel, Inc.*, 109 N.E.3d 390, 396 (Ind. 2018).

standing of California's analogous exception, holding that a videogame featuring college athletes did not concern "matters in the public interest" because it was merely "a game, not a reference source," and involved no "publication or reporting" of "factual information" or "factual data."¹⁵⁶ Bork would have smiled at the Ninth Circuit's judicial line-drawing, while Meiklejohn may well have frowned.

B. Educative Defenses to Publicity Rights

Over the years, educative theory has crept into the realm of the right of publicity.¹⁵⁷ Four listener-based educative defenses have emerged: (1) a constitutional affirmative defense to shield expressive works relating to matters

156. *Keller v. Elec. Arts, Inc. (In re NCAA Student-Athlete Name & Likeness Licensing Litig.)*, 724 F.3d 1268, 1282–83 (9th Cir. 2013).

157. *See, e.g., id.* at 1282–83 (9th Cir. 2013) (considering newsworthiness and ultimately rejecting the defense); *Stayart v. Google Inc.*, 710 F.3d 719, 722 (7th Cir. 2013) (explaining that, under Wisconsin law, the "newsworthiness" exception applies "where a matter of legitimate public interest is concerned" (quoting *Van Straten v. Milwaukee Journal Newspaper-Publisher*, 447 N.W.2d 105, 112 (Wis. Ct. App. 1989))); *C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 823–24 (8th Cir. 2007) (considering newsworthiness and finding persuasive that there was "substantial public interest"); *Campbell v. Seabury Press*, 614 F.2d 395, 397 (5th Cir. 1980) (acknowledging that courts faced with publicity claims have "recognize[d] two closely related yet analytically distinct privileges": (1) "the privilege to publish or broadcast facts, events, and information relating to public figures," and (2) "the privilege to publish or broadcast news or other matters of public interest"); *Perkins v. LinkedIn Corp.*, 53 F. Supp. 3d 1222, 1249 (N.D. Cal. 2014) (explaining that, under California law, "[n]o right of publicity cause of action 'will lie for the publication of matters in the public interest, which rests on the right of the public to know and the freedom of the press to tell it'" (quoting *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1001 (9th Cir. 2001))); *Hill v. Pub. Advocate of the U.S.*, 35 F. Supp. 3d 1347, 1355 (D. Colo. 2014) (explaining that, under Colorado law, there is a "privilege that permits the use of a plaintiff's name or likeness when that use is made in the context of, and reasonably relates to, a publication concerning a matter that is newsworthy or of legitimate public concern" (quoting *Joe Dickerson & Assocs., L.L.C. v. Dittmar*, 34 P.3d 995, 1003 (Colo. 2001))); *Somerson v. World Wrestling Entm't, Inc.*, 956 F. Supp. 2d 1360, 1366–67 (N.D. Ga. 2013) (explaining that, under Georgia law, the "newsworthiness" exception applies "where an incident is a matter of public interest, or the subject matter of a public investigation" (quoting *Toffoloni v. LFP Publ'g Grp., LLC*, 572 F.3d 1201, 1208 (11th Cir. 2009))); *Peckham v. New England Newspapers, Inc.*, 865 F. Supp. 2d 127, 130 (D. Mass. 2012) (explaining that, under Massachusetts law, the "newsworthiness" defense applies if "the publication touches upon a matter of 'legitimate public concern'"); *Arenas v. Shed Media U.S. Inc.*, 881 F. Supp. 2d 1181, 1191 (C.D. Cal. 2011) (explaining that, under California law, the "public interest defense" extends to publications about "people who, by their accomplishments, mode of living, professional standing or calling, create a legitimate and widespread attention to their activities" (quoting *Downing*, 265 F.3d at 1001)); *Chapman v. Journal Concepts, Inc.*, 528 F. Supp. 2d 1081, 1097 (D. Haw. 2007) (explaining that, under Hawaii law, "newsworthiness" reflects "a line . . . to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern" (quoting *Virgil v. Time, Inc.*, 527 F.2d 1122, 1129 (9th Cir. 1975))); *Noriega v. Activision/Blizzard, Inc.*, No. BC 551747, 2014 WL 5930149, at *2 (Cal. Super. Ct. Oct. 27, 2014) (considering public-figure status and ultimately concluding that the plaintiff's escapades made him a "notorious public figure"); *Leviston v. Jackson*, 980 N.Y.S.2d 716, 720 (Sup. Ct. 2013) (explaining that, under New York law, a plaintiff cannot recover "if the use to which his or her image was put is in the context

of public concern;¹⁵⁸ (2) a constitutional requirement that public-figure plaintiffs prove “actual malice” in order to prevail on their publicity claims;¹⁵⁹ (3) state-law exceptions to the right of publicity for portrayals that are “newsworthy” or in the “public interest”;¹⁶⁰ and (4) a method of constitutional avoidance in which courts narrowly construe publicity tort elements to evade certain free-speech concerns.¹⁶¹

The unfortunate takeaway is that, despite the ostensible protection provided by these four defenses, the outcome is unfavorable for many creators of expressive works who portray real people. Plaintiffs often prevail unless their publicity claim would harm the public’s ability to remain informed about matters of public concern.¹⁶² Thus, as with the educative defenses to other torts, these four defenses provide limited, parasitic protection to speakers.¹⁶³ The result is that creators of expressive works can be prevented from portraying real people in public discourse.

1. *The Constitutional Affirmative Defense*

The first educative challenge arises when defendants raise the First Amendment as an affirmative defense to liability under the right of publicity. Under this defense, an expressive work portraying a real person might get constitutional protection if the person portrayed is a public figure or the portrayal relates to a newsworthy event.

In *Leopold v. Levin*,¹⁶⁴ for example, the Illinois Supreme Court held that the First Amendment barred a claim brought by convicted murderer Nathan Leopold against the creators of a book and movie about his crime.¹⁶⁵ Because Leopold’s crime remained “an American *cause célèbre*” and a “matter of

of reporting a newsworthy incident”); see also Jesse Koehler, *Fraley v. Facebook: The Right of Publicity in Online Social Networks*, 28 BERKELEY TECH. L.J. 963, 967–68 (2013).

158. See *infra* Section II.B.1.

159. See *infra* Section II.B.2.

160. See *infra* Section II.B.3.

161. See *infra* Section II.B.4.

162. See Dogan, *supra* note 28, at 29 (asserting that courts will generally protect expressive works against publicity claims when those works are “perceived as newsworthy and informational”). In some of the decisions discussed below, the courts did not denominate the right as a “right of publicity.” This is particularly true for several older cases, where the court conceived of the unauthorized use as implicating the right of *privacy*. See generally Madow, *supra* note 29, at 167–78 (discussing the historical interplay between the rights of privacy and publicity); Robert C. Post, *Rereading Warren and Brandeis: Privacy, Property, and Appropriation*, 41 CASE W. RES. L. REV. 647 (1991) (exploring the relationship between privacy and property interests in the misappropriation and publicity torts). For purposes of discussing educative challenges to the right to prevent unauthorized use of one’s image, the label of “privacy” or “publicity” does not matter. For the sake of clarity, I will refer to the tort as the “right of publicity” throughout.

163. See Lemley, *supra* note 10, at 1170 (“Some states have created protections for news reporting and some creative works, but those are often quite limited.”).

164. 259 N.E.2d 250 (Ill. 1970).

165. *Id.* at 254.

public interest,” and because of Leopold’s “consequent and continuing status as a public figure,” the court explained that his publicity rights had to give way to the creators’ First Amendment rights.¹⁶⁶ These rights rested on educative justifications about the public’s “strong curiosity and social and news interest in the crime.”¹⁶⁷

Similarly, in *Ann-Margret v. High Society Magazine, Inc.*,¹⁶⁸ a federal district court relied upon the First Amendment when considering an actress’s claim against a magazine that published photos of her without her consent.¹⁶⁹ The court noted that the right of publicity “can be severely circumscribed as a result of an individual’s newsworthiness”¹⁷⁰ and explained that constitutional concerns could override New York’s right of publicity, “especially in the context of persons denominated ‘public figures,’ so as ‘to avoid any conflict with the free dissemination of thoughts, ideas, newsworthy events, and matters of public interest’ guaranteed by the First Amendment.”¹⁷¹ These educative concerns meant that publicity rights would “rarely” prevail when a person’s name or picture is used “in the context of an event within the ‘orbit of public interest and scrutiny’”—a category that includes “most of the events involving a public figure.”¹⁷² Because the photos informed the public about “a newsworthy event,” the court held that the First Amendment barred the actress’s claim.¹⁷³

But defendants’ pleas for an affirmative constitutional shield have not always been successful. In *Groucho Marx Productions, Inc. v. Day & Night Co.*,¹⁷⁴ for example, a federal district court denied First Amendment protection to a play featuring performers who imitated the style and appearance of the Marx Brothers.¹⁷⁵ The play portrayed the famous comedic troupe “in a new situation and with original lines,”¹⁷⁶ but the court held that the First Amendment defense did not apply because the play was neither “biographical” nor “an attempt to convey information about the Marx Brothers themselves or about the development of their characters.”¹⁷⁷ In other words, the

166. *Id.*

167. *Id.* at 255. For an analogous, and more contemporary, example from a different court, see *Noriega v. Activision/Blizzard, Inc.*, No. BC 551747, 2014 WL 5930149, at *2–*4, (Cal. Super. Ct. Oct. 27, 2014) (concluding that plaintiff’s claim “cannot survive defendants’ First Amendment defense” in part because his escapades as the “Dictator of Panama” made him a “notorious public figure”).

168. 498 F. Supp. 401 (S.D.N.Y. 1980).

169. *Id.* at 404.

170. *Id.* at 405.

171. *Id.* at 404 (quoting *Time, Inc. v. Hill*, 385 U.S. 374, 382 (1967)).

172. *Id.* at 405 (quoting *Meeropol v. Nizer*, 560 F.2d 1061, 1066 (2d Cir. 1977)).

173. *Id.* at 405–06.

174. 523 F. Supp. 485 (S.D.N.Y. 1981), *rev’d on other grounds*, 689 F.2d 317 (2d Cir. 1982).

175. *Id.* at 493.

176. *Id.*

177. *Id.* at 494; *see also Groucho Marx Prods., Inc.*, 689 F.2d at 319.

play was unprotected because it failed to serve educative goals of informing the public about the real-life Marx Brothers.¹⁷⁸

2. *The Constitutional Actual-Malice Requirement*

Educative theory has also affected publicity through judicial importation of the constitutional actual-malice standard from defamation law.¹⁷⁹ Some courts have held that public-figure plaintiffs who are portrayed in “news or material of public concern” may prevail only if the portrayal constituted a “false statement of fact” that the defendant published with “knowledge of its falsity” or “reckless disregard of its truth.”¹⁸⁰

178. The California Supreme Court, too, has raised the public-figure and newsworthiness doctrines and yet ruled against defendants raising a First Amendment defense. In *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 21 P.3d 797 (Cal. 2001), the court expressed its concern that “[g]iving broad scope to the right of publicity has the potential of allowing a celebrity to accomplish through the vigorous exercise of that right the censorship of unflattering commentary that cannot be constitutionally accomplished through defamation actions.” *Id.* at 803–04. The court even stressed that, “[o]nce the celebrity thrusts himself or herself forward into the limelight, the First Amendment dictates that the right to comment on, parody, lampoon, and make other expressive uses of the celebrity image must be given broad scope.” *Id.* at 807. Ultimately, though, the court ruled that the portrayal—a charcoal drawing of “The Three Stooges” comedy trio—was not sufficiently “transformative” to get First Amendment protection. *Id.* at 811.

179. See Russell Hickey, *Refashioning Actual Malice: Protecting Free Speech in the Right of Publicity Era*, 41 TORT TRIAL & INS. PRAC. L.J. 1101, 1117 (2006) (“If . . . the work is classified as pure speech, the plaintiff should bear the burden of proving actual malice. Otherwise, the possibility remains that public figure plaintiffs will increasingly exploit the right of publicity as a means for curtailing legitimate speech that should otherwise be fully protected under the First Amendment.”).

180. *William O’Neil & Co. v. Validea.com Inc.*, 202 F. Supp. 2d 1113, 1117 (C.D. Cal. 2002) (“Because [the book about the public-figure plaintiff] involves matters of public concern, [his] complaint can only be sustained if it alleges that [the publisher defendant] acted with ‘actual malice’ in publishing it. That is, . . . with knowledge that it contains false statements of fact, or with reckless disregard for the truth.”). There are numerous other examples of plaintiffs employing the actual-malice standard as a shield against the right of publicity. See, e.g., *Cher v. Forum Int’l, Ltd.*, 692 F.2d 634, 639 (9th Cir. 1982) (explaining that a publisher may be liable under the right of publicity if it knowingly or recklessly “falsely claim[s] that the public figure endorses that news medium”); *Carafano v. Metrosplash.com Inc.*, 207 F. Supp. 2d 1055, 1074 (C.D. Cal. 2002), *aff’d on other grounds*, 339 F.3d 1119 (9th Cir. 2003) (“[B]ecause Plaintiff cannot establish a triable issue with respect to actual malice, . . . Plaintiff cannot sustain her claim for misappropriation of the right to publicity.”); *Stewart v. Rolling Stone LLC*, 105 Cal. Rptr. 3d 98, 113 (Cal. Ct. App. 2010) (concluding that “a defendant publisher may assert that the actual malice standard applies to claims for commercial misappropriation”); *Dora v. Frontline Video, Inc.*, 18 Cal. Rptr. 2d 790, 793 (Cal. Ct. App. 1993) (holding that a documentary featuring a well-known surfer was “constitutionally protected in the absence of a showing that the publishers knew that their statements were false or published them in reckless disregard of the truth”); *Doe v. TCI Cablevision*, No. ED 78785, 2002 WL 1610972, at *14 (Mo. Ct. App. July 23, 2002), *rev’d*, 110 S.W.3d 363 (Mo. 2003) (“Before [the plaintiff] can recover on his right of publicity claim he must, therefore, satisfy the *New York Times* ‘actual malice’ standard, knowledge that the statements are false or in reckless disregard of their truth.”).

The United States Court of Appeals for the Ninth Circuit, for instance, required a showing of actual malice when actor Dustin Hoffman sued a magazine that altered a photo of him from the movie *Tootsie* as part of a composite of celebrities sporting the latest fashion trends.¹⁸¹ Hoffman's photo appeared in an article entitled *Grand Illusions*, for which the magazine had "used computer technology to alter famous film stills to make it appear that the actors were wearing Spring 1997 fashions."¹⁸² In the original photo from *Tootsie*, Hoffman had been wearing a red sequined dress, but the magazine modified the image to put him in a different designer gown.¹⁸³ When analyzing Hoffman's claim under California's right of publicity, the court explained that, because Hoffman was a public figure, he had to show actual malice—that is, he had to demonstrate by clear and convincing evidence that the magazine "intended to create the false impression in the minds of its readers that when they saw the altered 'Tootsie' photograph they were seeing Hoffman's body."¹⁸⁴ Because the court concluded that Hoffman could not satisfy that burden, the First Amendment barred his claim.¹⁸⁵

Although the magazine was ultimately successful in rebuffing Hoffman's claim in that appeal, the decision in the district court—and even the analysis in the court of appeals—shows that victory was far from certain.¹⁸⁶ The district court explained that the magazine "fabricated" the photo and published it "knowing it was false."¹⁸⁷ By "false," the court meant that the magazine knew that Hoffman had "never worn the designer clothes he was depicted as wearing" and that it was "not even his body" in the photo.¹⁸⁸ These findings were, of course, factually correct—the magazine *had* purposefully edited the photo to replace Hoffman's body and change his attire, as it had done with the other celebrities in the composite.¹⁸⁹ Because the magazine admitted that "it intended to create the false impression in the minds of the public that they were seeing Mr. Hoffman's body," the district court held that Hoffman had shown actual malice and, as a result, the First Amendment offered no defense against the right of publicity.¹⁹⁰ The court of appeals reversed only after engaging in a fact-intensive inquiry about whether

181. *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1184–86 (9th Cir. 2001).

182. *Id.* at 1183.

183. *Id.*

184. *Id.* at 1187.

185. *Id.* at 1189.

186. *Hoffman v. Capital Cities/ABC, Inc.*, 33 F. Supp. 2d 867, 873–75 (C.D. Cal. 1999), *rev'd*, 255 F.3d 1180 (9th Cir. 2001); *Hoffman*, 255 F.3d at 1186–89.

187. *Hoffman*, 33 F. Supp. 2d at 875.

188. *Id.*

189. *Hoffman*, 255 F.3d at 1186–89.

190. *Hoffman*, 33 F. Supp. 2d at 875 (internal quotation marks omitted).

the magazine's editors had knowingly or recklessly misled readers into believing that Hoffman had actually posed for the photo.¹⁹¹ Thus, although the courts asked different falsity-related questions, they both conditioned constitutional protection on whether the magazine had knowingly or recklessly conveyed false information to the public by publishing an intentionally fictionalized photo.

Where movie star Dustin Hoffmann failed, baseball player Warren Spahn prevailed. In a case brought against the author of a fiction-infused book that featured Spahn, New York's highest court applied the actual-malice standard to decide whether the author violated Spahn's publicity rights.¹⁹² The author admitted that he had "fictionalized and dramatized" aspects of Spahn's life so that the book would appeal to "a juvenile readership."¹⁹³ This included "imaginary incidents, manufactured dialogue and a manipulated chronology,"¹⁹⁴ all of which the author insisted were important and common "literary techniques" of the genre.¹⁹⁵ Yet it was these very techniques—"invented dialogue, imaginary incidents, and attributed thoughts and feelings"—that the court declared were sufficient to show actual malice.¹⁹⁶ The court explained that a public figure seeking recovery for "unauthorized presentation of his life" must show "that the presentation is infected with material and substantial falsification and that the work was published with knowledge of such falsification or with a reckless disregard for the truth."¹⁹⁷ One passage in particular reveals how the court turned the book's intentional dramatization against the author:

Exactly how it may be argued that the "all-pervasive" use of imaginary incidents—incidents which the author knew did not take place—invented dialogue—dialogue which the author knew had never occurred—and attributed thoughts and feelings—thoughts and feelings which were likewise the figment of the author's imagination—can be said not to constitute knowing falsity is not made clear by the defendants. Indeed, the arguments made here are, in essence, not a denial of knowing falsity but a justification for it.¹⁹⁸

This actual-malice inquiry in *Spahn* shows the limited protection that this educative defense provides to creators of expressive works that feature fictional elements. The court chastised the author for his lack of "research

191. *Hoffman*, 255 F.3d at 1186–89.

192. *Spahn v. Julian Messner, Inc.*, 233 N.E. 2d 840, 842 (N.Y. 1967).

193. *Spahn v. Julian Messner, Inc.*, 260 N.Y.S.2d 451, 454 (App. Div. 1965), *aff'd*, 221 N.E. 2d 543 (N.Y. 1966), *vacated sub nom. Julian Messner, Inc. v. Spahn.*, 387 U.S. 239 (1967).

194. *Id.*

195. *See Spahn*, 233 N.E. 2d at 842.

196. *Id.*

197. *Id.*

198. *Id.*

effort” after he “admitted that he never interviewed Mr. Spahn, any member of his family, or any baseball player who knew Spahn,” and that he “did not even attempt to obtain information from the Milwaukee Braves, the team for which Mr. Spahn toiled for almost two decades.”¹⁹⁹ The court had already alluded to these failings in educative terms in an earlier opinion in the same litigation, explaining that “[n]o public interest is served by protecting the dissemination” of fictional works, which are “quite different” from “[t]he free speech which is encouraged and essential to the operation of a healthy government.”²⁰⁰ In other words, the court faulted the author for failing to ascertain—and then convey—truthful and actual information about Spahn to the public.

3. State-Law “Newsworthiness” and “Public Interest” Exceptions

Educative theory has also influenced publicity claims through state-law exceptions for portrayals that are “newsworthy” or in “the public interest.”²⁰¹ Defendants may raise these exceptions as a defense that is distinct from any First Amendment argument they might make, for the two protections are not necessarily coextensive.²⁰² Although courts often rely on First Amendment principles in construing these exceptions, their application is a matter of state law.²⁰³

Where states have recognized common-law publicity rights, courts have often crafted judicial exceptions for newsworthy uses.²⁰⁴ The Georgia Supreme Court adopted such an exception for portrayals related to “an incident

199. *Id.* at 843.

200. Spahn v. Julian Messner, Inc., 221 N.E. 2d 543, 546 (N.Y. 1966).

201. See *Bosley v. Wildwett.com*, 310 F. Supp. 2d 914, 923 (N.D. Ohio 2004) (“In recognition of the potential clash between the First Amendment and the right of publicity, courts and legislators carve out a public affairs or newsworthiness exception to the right.”); *Eastwood v. Superior Court*, 198 Cal. Rptr. 342, 349, 351 (Cal. Ct. App. 1983) (explaining that “[p]ublication of matters in the public interest, which rests on the right of the public to know, and the freedom of the press to tell it, cannot ordinarily be actionable,” and thus speech on “a matter of public concern . . . would generally preclude the imposition of liability” under the right of publicity).

202. See *New Kids on the Block v. News Am. Publ’g, Inc.*, 971 F.2d 302, 309–10, 310 n.10 (9th Cir. 1992) (noting that California’s Section 334(d) “public affairs” exception to the right of publicity “is not coextensive with the First Amendment” but rather “is designed to avoid First Amendment questions . . . by providing extra breathing space for the use of a person’s name in connection with matters of public interest”).

203. *Keller v. Elec. Arts, Inc. (In re NCAA Student-Athlete Name & Likeness Licensing Litig.)*, 724 F.3d 1268, 1282 (9th Cir. 2013) (explaining that California’s common-law and statutory exceptions “are based on First Amendment concerns” but “are not coextensive with the Federal Constitution,” and so “their application is thus a matter of state law” (citations omitted)).

204. *Curran v. Amazon.com, Inc.*, No. CIV.A. 2:07-0354, 2008 WL 472433, at *9 (S.D.W. Va. Feb. 19, 2008) (“Courts have engrafted exceptions and restrictions to the rights of publicity and privacy in order to ‘avoid any conflict with the free dissemination of thoughts, ideas, newsworthy events, and matters of public interest,’ guaranteed by the First Amendment.” (quoting *Time, Inc. v. Hill*, 385 U.S. 374, 382 (1967))); *Rogers v. Grimaldi*, 695 F. Supp. 112, 121 (S.D.N.Y. 1988), *aff’d*, 875 F.2d 994 (2d Cir. 1989) (“Courts have been consistently unwilling to recognize the right of

[that] is a matter of public interest, or the subject matter of a public investigation.”²⁰⁵ Many states now guarantee similar exceptions by statute.²⁰⁶ Indiana law, for example, exempts portrayals in “[m]aterial that has political or newsworthy value”²⁰⁷ and “in connection with the broadcast or reporting of an event or a topic of general or public interest.”²⁰⁸

In California—a state where celebrity plaintiffs often seek to enforce publicity rights—statutory and common-law exceptions exist to serve educative ends. As a statutory matter, the right of publicity does not apply to portrayals connected to “any news, public affairs, or sports broadcast or account, or any political campaign.”²⁰⁹ And under California’s common-law “public interest” defense, “no cause of action will lie for the publication of matters in the public interest, which rests on the right of the public to know and the freedom of the press to tell it.”²¹⁰ Some courts have suggested that this defense is limited in scope, extending only to “reporting of recent events.”²¹¹ Other courts, however, have stressed that the defense is “not limited to news stories on current events” because “[e]ntertainment features receive the same constitutional protection as factual news reports.”²¹²

publicity cause of action where the plaintiff’s name or picture was used in connection with a matter of public interest.”).

205. *Waters v. Fleetwood*, 91 S.E.2d 344, 348 (Ga. 1956); *see also Somerson v. World Wrestling Entm’t, Inc.*, 956 F. Supp. 2d 1360, 1366 (N.D. Ga. 2013) (“The right to publicity is in tension with freedoms of speech and the press guaranteed by the First Amendment to the U.S. Constitution In order to carefully balance these rights against the right of publicity, the Georgia courts have adopted a ‘newsworthiness’ exception to the right of publicity.”).

206. *See, e.g.,* ARIZ. REV. STAT. ANN. §§ 12-761, 13-3726 (2017); FLA. STAT. ANN. § 540.08 (West 2017); 765 ILL. COMP. STAT. ANN. 1075/35 (West 2017); MASS. GEN. LAWS ANN. ch. 214, § 3A (West 2017); NEB. REV. STAT. § 20-208 (2017); OHIO REV. CODE ANN. § 2741.09 (LexisNexis 2017); OKLA. STAT. ANN. tit. 12, § 1448 (West 2017); OKLA. STAT. ANN. tit. 12, § 1449 (West 2017); 42 PA. CONS. STAT. § 8316(e)(2) (2017); TEX. PROP. CODE ANN. § 26.012 (West 2017); WASH. REV. CODE ANN. § 63.60.070 (West 2017); WIS. STAT. ANN. § 895.50 (West 2017).

207. IND. CODE § 32-36-1-1(c)(1)(B) (2017).

208. *Id.* § 32-36-1-1(c)(3).

209. CAL. CIV. CODE § 3344.1(j) (2017).

210. *Hilton v. Hallmark Cards*, 599 F.3d 894, 912 (9th Cir. 2010) (quoting *Montana v. San Jose Mercury News, Inc.*, 40 Cal. Rptr. 2d 639 (Ct. App. 1995)).

211. *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1001 (9th Cir. 2001).

212. *Stewart v. Rolling Stone LLC*, 181 Cal. App. 4th 664, 681 (Ct. App. 2010) (quoting *Gionfriddo v. Major League Baseball*, 114 Cal. Rptr. 2d 307, 313 (Ct. App. 2001)); *see also Dryer v. Nat’l Football League*, 55 F. Supp. 3d 1181, 1198 (D. Minn. 2014), *aff’d*, 814 F.3d 938 (8th Cir. 2016) (explaining that, under Texas law, the “newsworthiness defense” is “broad and extends beyond subjects of political or public affairs to all matters of the kind customarily regarded as ‘news’ and all matters giving information to the public for purposes of education, amusement or enlightenment, where the public may reasonably be expected to have a legitimate interest in what is published”); *Edme v. Internet Brands, Inc.*, 968 F. Supp. 2d 519, 528 (E.D.N.Y. 2013) (explaining that, under New York law, “‘newsworthiness’ is applied broadly . . . and includes not only descriptions of actual events, but also articles concerning political happenings, social trends or any subject of public interest”); *Arenas v. Shed Media U.S. Inc.*, 881 F. Supp. 2d 1181, 1191–92 (C.D. Cal. 2011), *aff’d*, 462 F. App’x 709 (9th Cir. 2011); *Nichols v. Moore*, 334 F. Supp. 2d 944, 956 (E.D. Mich. 2004) (explaining that courts in various jurisdictions “have been consistently unwilling to recognize

In a prominent case involving the application of these state-law exceptions to expressive works, the Ninth Circuit in *Keller v. Electronic Arts, Inc.*²¹³ adopted a cramped interpretation of California's exceptions and concluded that they did not apply to a videogame featuring real-life college athletes playing in games that had never actually occurred.²¹⁴ Although the court acknowledged that California law provides that the right of publicity does not apply to "newsworthy items" and "matters in the public interest," the court held that the videogame's creators could be liable because the videogame did not involve the "publication or reporting" of "factual information" or "factual data."²¹⁵ The court explained that the videogame "is a means by which users can play their own virtual football games, not a means for obtaining information about real-world football games."²¹⁶ Although the videogame's creators had incorporated "actual player information"—such as the players' real heights and weights—their invocation of the state-law exceptions was "considerably weakened" because they failed to include the players' names alongside their likenesses and statistical data.²¹⁷ The court held that the exceptions did not apply because the videogame "is not a publication of facts about college football; it is a game, not a reference source."²¹⁸ In short, the videogame served no informative function and thus served no educative end.

A federal district court in Ohio sang a similar tune in *Bosley v. Wildwett.com*,²¹⁹ where the court narrowly construed the statutory exceptions under Ohio and Florida law in a case involving a renowned television news anchor videotaped at a wet t-shirt contest.²²⁰ The court granted the news anchor's request to enjoin a website from making the footage available online, holding that the state-law exceptions did not apply because the footage did not "contain any editorial content" and was "not accompanied by any dialog discussing Plaintiff's status as a former news anchor."²²¹ Likewise, in

the right of publicity cause of action where the plaintiff's name or picture was used in connection with a matter of public interest, be it news or entertainment").

213. 724 F.3d 1268 (9th Cir. 2013).

214. *Id.* at 1282–83.

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. 310 F. Supp. 2d 914 (N.D. Ohio 2004).

220. *Id.* at 921 ("A use of an aspect of an individual's persona in connection with any news, public affairs, sports broadcast, or account does not constitute a use for which consent is required." (quoting OHIO REV. CODE § 2741.02(D)(1))); *id.* ("The provisions of this section shall not apply to: (a) The publication, printing, display, or use of the name or likeness of any person in any newspaper, magazine, book, news broadcast or telecast, or other news medium or publication as part of any bona fide news report or presentation having a current and legitimate public interest and where such name or likeness is not used for advertising purposes." (quoting FLA. STAT. § 540.08)).

221. *Id.* at 927.

Cardtoons, L.C. v. Major League Baseball Players Ass'n,²²² the United States Court of Appeals for the Tenth Circuit held that the exception under Oklahoma law “provide[d] no haven” for portrayals of professional baseball players on parody trading cards.²²³ The court recognized that the cards were “commentary on an important social institution” and “provide[d] social commentary on public figures,” but it nonetheless held that the exception did not apply because the players’ likenesses were not used “in connection with any news account.”²²⁴

Finally, even when courts have recognized that an expressive work relates to public issues, these state-law exemptions do not necessarily provide a defense if the plaintiff’s identity was used in a “knowingly false manner.”²²⁵ As a result, in *Browne v. McCain*,²²⁶ the federal district court rejected presidential candidate John McCain’s motion to dismiss a publicity claim against a singer, Jackson Browne, whose song McCain’s campaign used in a political commercial.²²⁷ The court accepted that Browne’s voice was “sufficiently distinctive and widely known” that the use of his song “could constitute use of his identity.”²²⁸ Because Browne had not given McCain permission to use the song, he argued that using it implied an endorsement of McCain’s candidacy, when in fact Browne had been a strong supporter of Barack Obama.²²⁹ The court allowed Browne’s claim to proceed.²³⁰

4. Judicial Construction of Tort Elements

The final influence that educative theory has had on the right of publicity comes through judicial interpretation of the tort’s elements. Several courts have fretted over the constitutional implications of broad publicity rights.²³¹ To assuage these concerns, they have narrowly construed elements to avoid liability for speech about matters of public concern.²³²

222. 95 F.3d 959 (10th Cir. 1996).

223. *Id.* at 968 (explaining that Oklahoma’s “news” exception “exempts use of a person’s identity in connection with any news, public affairs, or sports broadcast or account, or any political campaign, from the dictates of the statute” (citing OKLA. STAT. tit. 12, § 1449(D))).

224. *Id.* at 968–69. The court ultimately concluded for separate reasons that the cards were protected under the First Amendment. *See id.* at 968–76.

225. *Browne v. McCain*, 611 F. Supp. 2d 1062, 1071 (C.D. Cal. 2009) (citing *Solano v. Playgirl, Inc.*, 292 F.3d 1078, 1089 (9th Cir. 2002)); *see also Solano*, 292 F.3d at 1089 (holding that “the newsworthiness privileges do not apply where a defendant uses a plaintiff’s name and likeness in a knowingly false manner to increase sales of the publication”).

226. 611 F. Supp. 2d 1062 (C.D. Cal. 2009).

227. *Id.* at 1065.

228. *Id.* at 1070.

229. *Id.* at 1065, 1067.

230. *Id.* at 1073.

231. *Rosemont Enters., Inc. v. Random House, Inc.*, 294 N.Y.S.2d 122, 127 (Sup. Ct. 1968), *aff’d*, 301 N.Y.S.2d 948 (App. Div. 1969).

232. *Id.*

For example, under New York law, the unauthorized portrayal must be for “the purposes of trade” for there to be liability.²³³ New York courts have long recognized “[t]he dominance of the public interest in obtaining information about public figures” and have construed the statute’s “trade” element accordingly.²³⁴ Thus, in *Rosemont Enterprises, Inc. v. Random House, Inc.*,²³⁵ the New York Supreme Court explained that “[t]he publication of a newspaper, magazine, or book which imparts truthful news or other factual information to the public does not fall within ‘the purposes of trade’ contemplated by the New York statute”²³⁶ Similarly, in *Paulsen v. Personality Posters, Inc.*,²³⁷ the court noted that “dissemination of news or information concerning matters of public interest” does not constitute a use for “the purposes of trade.”²³⁸

Despite this sweeping language in favor of free speech, these narrowing constructions have been used against creators of expressive works that contain fictional elements. New York’s highest court has stressed that a work “may be so infected with fiction, dramatization or embellishment that it cannot be said to fulfill the purpose of the newsworthiness exception.”²³⁹ In *Binns v. Vitagraph Co. of America*,²⁴⁰ the defendant produced a film based

233. N.Y. CIV. RIGHTS LAW § 51 (McKinney 2019).

234. *Rosemont Enters., Inc.*, 294 N.Y.S.2d at 127, 129.

235. *Id.* at 127.

236. *Id.* at 128–29 (“Because of [First Amendment] considerations, a public figure can have no exclusive rights to his own life story, and others need no consent or permission of the subject to write a biography of a celebrity.”); see also *Messenger ex rel. Messenger v. Gruner + Jahr Printing & Publ’g*, 727 N.E.2d 549, 552 (N.Y. 2000) (explaining that, under New York law, “a newsworthy article is not deemed produced for the purposes of advertising or trade”); *Gautier v. Pro-Football, Inc.*, 107 N.E.2d 485, 488 (N.Y. 1952) (“It has long been recognized that the use of name or picture in a newspaper, magazine, or newsreel, in connection with an item of news or one that is newsworthy, is not a use for purposes of trade within the meaning of the [New York] Civil Rights Law.”).

237. 299 N.Y.S.2d 501 (Sup. Ct. 1968).

238. *Id.* at 506. In a sense, the statutory state-law exceptions discussed in the previous subsection are a legislative analog to the judicial carve outs discussed in this subsection. See, e.g., *William O’Neil & Co. v. Validea.com Inc.*, 202 F. Supp. 2d 1113, 1117 (C.D. Cal. 2002) (explaining that, under California statutory law, “a use of a name, photograph or likeness in connection with any news . . . shall not constitute a use for purposes of advertising or solicitation”); *Eastwood v. Superior Court*, 198 Cal. Rptr. 342, 349 (Ct. App. 1983) (explaining that, under California common law, if a use falls within the statutory “news” exception, it is not actionable under common law because “[p]ublication of matters in the public interest, which rests on the right of the public to know, and the freedom of the press to tell it, cannot ordinarily be actionable”).

239. *Messenger ex rel. Messenger*, 727 N.E.2d at 555. This rule also applies to discussion of real people in newspaper articles. In 1937, in *Sarat Lahiri v. Daily Mirror*, 295 N.Y.S. 382 (Sup. Ct. 1937), the New York Supreme Court explained that an unauthorized use would not be for “purposes of trade”—and, accordingly, would be protected by the newsworthiness doctrine—if it was connected to “an article of current news or immediate public interest,” but the use would lose protection under the doctrine if paired with an “article of fiction.” *Id.* at 388–89. If an article’s contents were “neither strictly news items nor strictly fictional in character,” the court announced that the “general rule” was that the use was protected by the newsworthiness doctrine if the articles were “educational and informative in character.” *Id.* at 389.

240. 103 N.E. 1108 (N.Y. 1913).

on true events about a wireless operator whose heroics helped rescue passengers from a shipwrecked boat.²⁴¹ The real wireless operator sued the filmmaker for portraying him without his permission.²⁴² The court recognized that the film was “mainly a product of the imagination,” even though it was based “largely upon such information relating to [the] actual occurrence as could readily be obtained.”²⁴³ This finding was fatal for the filmmaker. Although truthfully “recounting or portraying an actual current event” would be protected, the court explained that this film was designed to “amuse” the audience rather than to “instruct or educate” them.²⁴⁴ Later courts have buttressed this distinction by emphasizing that the protection for a “newsworthy” portrayal of a public figure “does not extend to commercialization of his personality through a form of treatment distinct from the dissemination of news or information.”²⁴⁵

Similarly, in *Hicks v. Casablanca Records*,²⁴⁶ the heir and assignees of mystery writer Agatha Christie sought to enjoin the distribution of the film and book *Agatha*.²⁴⁷ The federal district court ruled that the works were fictional and not biographical, and that the inclusion of some “facts” did not make the works “newsworthy.”²⁴⁸ This kind of educative reasoning, whereby creators of expressive works are denied protection when their work does not inform the public about actual events, remains influential to this day. Just last year, a New York appellate court revived a claim against the filmmakers of *Romeo Killer: The Christopher Porco Story*.²⁴⁹ Christopher Porco, who had been convicted of murdering his father and attempting to murder his mother, alleged that the film was a “knowing and substantially fictionalized account” of his life.²⁵⁰ That allegation alone defeated the argument that the film was entitled to the protection for “reports of newsworthy events or matters of public interest.”²⁵¹

241. *Id.* at 1109.

242. *Id.*

243. *Id.* at 1110.

244. *Id.* at 1110–11.

245. *Gautier v. Pro-Football, Inc.*, 107 N.E.2d 485, 488 (N.Y. 1952); *see also Redmond v. Columbia Pictures Corp.*, 14 N.E.2d 636, 636–37 (N.Y. 1938); *Sutton v. Hearst Corp.*, 98 N.Y.S.2d 233, 234–35 (App. Div. 1950); *Franklin v. Columbia Pictures Corp.*, 284 N.Y.S. 96, 96–98 (App. Div. 1935), *aff'd*, 2 N.E.2d 691 (1936).

246. 464 F. Supp. 426 (S.D.N.Y. 1978).

247. *Id.* at 427, 431.

248. *Id.* at 427.

249. *Porco v. Lifetime Entm't Servs., LLC*, 47 N.Y.S.3d 769, 770–72 (App. Div. 2017).

250. *Id.* at 1255.

251. *See id.* at 1254 (quoting *Messenger ex rel. Messenger v. Gruner + Jahr Printing & Publ'g*, 727 N.E.2d 549, 552 (N.Y. 2000)).

C. *Why Trump Might Win*

The four defenses discussed above suffer from the same limitation that plagues educative theory more generally: the premise that the speaker's value is contingent on his ability to inform the listener. My qualm is not with the idea that creating an informed public capable of self-government is an unworthy goal, but rather with the mandate that speech serve a narrow informative function in order to gain protection. This emphasis undervalues speakers' expressive interests and encourages politico-centric elitism. There are, of course, some portrayals of real people in expressive works that advance educative goals, or at least one could tell a plausible story for why they do. But as we have seen, educative defenses have offered incomplete and, at times, unpersuasive protection against the right of publicity. This leaves creators of expressive works vulnerable when they portray real people.

To hone in on why educative defenses are ill-suited to protect expressive works against publicity claims, some examples will be useful. There is no need for hypotheticals—as luck would have it, two interesting publicity problems have been offered by the same person: Donald Trump.

In 2011, when Trump was a real-estate magnate, reality-television celebrity, and billionaire, but not yet a candidate for political office, rapper Mac Miller released a song titled “Donald Trump.”²⁵² Miller rapped about his plans to “[t]ake over the world” while “on [his] Donald Trump shit,” encouraging us to “[l]ook at all this money” because “[a]in’t that some shit?”²⁵³ Trump took umbrage at the use of his name, implying on Twitter that Miller had violated his right of publicity:

Little @MacMiller —I don’t need your praise . . . just pay me the money you owe.²⁵⁴

Little @MacMiller, you illegally used my name for your song ‘Donald Trump’ which now has over 75 million hits.²⁵⁵

Little @MacMiller, I want the money not the plaque you gave me!²⁵⁶

Little @MacMiller, I’m now going to teach you a big boy lesson about lawsuits and finance. You ungrateful dog!²⁵⁷

252. Dave Gilson, *Most Presidents Ignore Products That Rip off Their Names. Will Trump?*, MOTHER JONES (Feb. 13, 2017), <http://www.motherjones.com/politics/2017/02/trump-name-publicity-rights/>.

253. Mac Miller, *Donald Trump*, on BEST DAY EVER (Rostrum Records, LLC 2011).

254. Donald Trump (@realDonaldTrump), TWITTER (Jan. 31, 2013, 10:09 AM), <https://twitter.com/realDonaldTrump/status/297043874369650688>.

255. Donald Trump (@realDonaldTrump), TWITTER (Jan. 31, 2013, 12:45 PM), <https://twitter.com/realDonaldTrump/status/297083228706201600>.

256. Donald Trump (@realDonaldTrump), TWITTER (Jan. 31, 2013, 12:50 PM), <https://twitter.com/realDonaldTrump/status/297084584334589952>.

257. Donald Trump (@realDonaldTrump), TWITTER (Jan. 31, 2013, 1:03 PM), <https://twitter.com/realDonaldTrump/status/297087613851017216>.

Miller's song was not Trump's only experience with his identity being used in an expressive work. As we saw earlier, Illma Gore's *Make America Great Again* painting prompted Trump to threaten Gore with a lawsuit.²⁵⁸

These two examples provide insight into the perils of relying on educative defenses to shield expressive works. Artists like Miller and Gore might have had reason to worry.²⁵⁹ As we have seen, educative defenses pose problems for creators of expressive works for two main reasons. First, by focusing on the rights of listeners to receive information, they give short shrift to the expressive interests of speakers. Second, they invite politico-centric elitism that valorizes speech about politics and supposedly "serious" public issues and undervalues popular culture. Even if the defenses could fend off Trump's publicity claims, the arguments that Miller and Gore would have had to make in the process could imperil other creators of expressive works whose claims to educative protection are more tenuous.

As the cases discussed in the previous section reveal, creators of expressive works who invoke educative defenses usually prevail only if their works convey information that courts consider to be valuable for democratic deliberation.²⁶⁰ This can be a tough standard to meet for expressive works—particularly those that are fictional, abstract, or nonverbal. That is not to say it is impossible. But when serious consequences can result from liability,²⁶¹ an unclear and unpredictable standard will have a chilling effect.

Consider Miller's rap: "Take over the world when I'm on my Donald Trump shit /Look at all this money! Ain't that some shit?"²⁶² Miller uses Trump's name not as a way to impart any information about Trump, except perhaps that Miller saw Trump as a figure synonymous with success. The song was written years before Trump became president, and the lyrics suggest no connection to a particular political or public issue. At most, then, the

258. See *supra* notes 1–3 and accompanying text. Unfortunately, Gore's painting could not be reprinted here for publication-related reasons, but its omission should not be construed as diminishing Gore's talent or the painting's majesty. For those eager to feast their eyes on the masterpiece, the internet is a wonderful place. See *Make America Great Again*, ILLMA GORE, <http://illmagore.com/work-1/#/798817030644/> (last visited June 7, 2019).

259. For a delightful assortment of Trump-related advertisements that might raise concerns under the right of publicity, see Mark Duffy, *President Trump, Negative Advertising Linchpin*, MEDIUM (Mar. 20, 2019), <https://medium.com/@copyranter/https-medium-com-copyranter-president-trump-negative-advertising-linchpin-f8402e7923b1> (cataloguing the ads and noting that "Trump has been used to sell everything from the Salvation Army to Sushi to toner cartridges"). Not only are none of the over fifty brand ads featuring Trump "official," but "almost all of them have used him in a negative light." *Id.* Given Trump's history of litigating unflattering portrayals, the makers of these ads might want to consult their lawyers.

260. See *supra* Section II.B.

261. See *supra* notes 22–24 and accompanying text.

262. Miller, *supra* note 253.

use of Trump's name serves as a "common point[] of reference"²⁶³ or "symbol[]"²⁶⁴ for wealth. That is how Miller saw it, too. When explaining why he chose to invoke Trump's name, he said that Trump "was just somebody who symbolized financial success to everybody at that time,"²⁶⁵ and that the line could have easily been "Take over the world when I'm on my Bill Gates shit."²⁶⁶ Any educative rationale is thin.

As for Gore's painting, it is again difficult (though not impossible) to credibly assert that it conveys information that the public needs to make political decisions. Gore says that *Make America Great Again* was created to evoke a reaction from its audience, good or bad, about the significance we place on our physical selves.²⁶⁷ She continued: "One should not feel emasculated by their penis size or vagina, as it does not define who you are. Your genitals do not define your gender, your power, or your status."²⁶⁸ If we take Gore's word for it, her painting was not directly tied to Trump's candidacy for the presidency, nor was it supposed to convey accurate information about him. Rather, Gore used Trump's image as a way to comment on the role that a physical characteristic can have on our conceptions of ourselves.

It is conceivable, of course, that a court would protect Miller and Gore under one of the educative defenses. Even before Trump ran for office, he was a public figure with considerable influence in the business world, and Miller's rap is, in some sense, a commentary about that influence. And although Gore's painting does not explicitly critique Trump's candidacy, titling it with the campaign's motto—"Make America Great Again"²⁶⁹—obviously entangles it with his political persona. But we could also imagine Trump citing cases like *Keller* to argue that neither the rap nor the painting was a

263. JOHN B. THOMPSON, *IDEOLOGY AND MODERN CULTURE: CRITICAL SOCIAL THEORY IN THE ERA OF MASS COMMUNICATION* 163 (1990) (characterizing celebrities as "common points of reference for millions of individuals who may never interact with one another, but who share, by virtue of their participation in a mediated culture, a common experience and a collective memory"); see also Marshall McLuhan, *Sight, Sound, and the Fury*, in *MASS CULTURE: THE POPULAR ARTS IN AMERICA* 489, 495 (Bernard Rosenberg & David M. White eds., 1957) (referring to celebrities as "points of collective awareness and communication").

264. RICHARD SCHICKEL, *INTIMATE STRANGERS: THE CULTURE OF CELEBRITY* viii (1985) (characterizing celebrities as a "principal source of motive power in putting across ideas of every kind—social, political, aesthetic, moral," and as "symbols for these ideas").

265. Kia Makarechi, *Mac Miller, Donald Trump's Least Favorite Rapper, Revisits Feud*, VANITY FAIR (Jan. 25, 2016), <https://www.vanityfair.com/news/2016/01/mac-miller-donald-trump-feud>.

266. Lauren Nostro, *Donald Trump Threatens Mac Miller with Lawsuit, Calls Him an "Ungrateful Dog"*, COMPLEX (Jan. 31, 2013), <http://www.complex.com/music/2013/01/donald-trump-threatens-to-sue-mac-miller>.

267. *Make America Great Again*, ILLMA GORE, <http://illmagore.com/work-1/#/798817030644/> (last visited Mar. 10, 2019) (emphasis added).

268. *Id.*

269. *About*, DONALD J. TRUMP FOR PRESIDENT, <https://www.donaldjtrump.com/about/> (last visited June 7, 2019).

“publication or reporting” of “factual information” or “factual data,”²⁷⁰ or citing *Binns* to claim that the works were “mainly a product of the imagination” that were designed to “amuse” rather than to “instruct or educate” the public.²⁷¹ Trump could quote from *Bosley* to highlight that neither work “contain[s] any editorial content” or “dialog discussing [his] status” as a business mogul or political candidate.²⁷² He could even concede that the works constituted “commentary on an important social institution” and “commentary on public figures,” as the court did in *Cardtoons*, and yet still maintain that Miller and Gore are liable because they did not use his name and likeness “in connection with any news account.”²⁷³ And, at the risk of being salacious, Trump might even contend that Gore’s painting is unprotected because it creates a “false impression” about certain aspects of his physique.²⁷⁴

Setting aside the real-world Trump examples for a moment, imagine if an aspiring novelist wanted to publish a fictional book about corruption in Atlantic City in the 1990s. One of the novelist’s characters, Ronald Grump, owns a hotel and casino in the city called Grump Plaza. Grump is a sympathetic character, though he is prone to embarrassing gaffes, and his competitors like to gossip about his odd hairdo. There is even a suspicion that he wears a toupee. What would happen if Trump heard about the book’s impending publication and wanted to stop it?

The educative defenses might not do the author much good. She has evoked Trump’s “identity”²⁷⁵ in an expressive work that entwines fact and fiction. Because educative defenses rest chiefly on truth telling, they are ill equipped to challenge publicity claims that target works that intentionally avoid literal truth.²⁷⁶ As we saw in *Hicks*, even the inclusion of some facts

270. See *Keller v. Elec. Arts, Inc. (In re NCAA Student-Athlete Name & Likeness Licensing Litig.)*, 724 F.3d 1268, 1282–83 (9th Cir. 2013).

271. See *Binns v. Vitagraph Co. of Am.*, 103 N.E. 1108, 1110–11 (N.Y. 1913); see also Post, *supra* note 89, at 1007 (noting that “[s]ome courts confine the sphere of legitimate public concern to information that is . . . ‘decontextualized,’ so that they ‘distinguish between fictionalization and dramatization on the one hand and dissemination of news and information on the other’” (footnotes omitted)).

272. See *Bosley v. Wildwett.com*, 310 F. Supp. 2d 914, 927 (N.D. Ohio 2004).

273. *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 968–69 (10th Cir. 1996).

274. See *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1187 (9th Cir. 2001); see also *Spahn v. Julian Messner, Inc.*, 233 N.E.2d 840, 842 (N.Y. 1967). Trump certainly hasn’t been shy about rebuffing insinuations about the size of his nether regions. See Emily Crockett, *Donald Trump Just Defended His Penis Size at the Republican Debate*, VOX (Mar. 3, 2016), <https://www.vox.com/2016/3/3/11158910/trump-penis-republican-debate-fox> (quoting Trump stating, “Look at those hands. Are they small hands? And he referred to my hands—if they’re small, something else must be small. I guarantee you there’s no problem, I guarantee.”).

275. Even though the book does not use Trump’s name, the Grump character certainly falls within the “identity” that some courts have recognized is protected by the right of publicity. See, e.g., *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1399 (9th Cir. 1992).

276. See *Messenger ex rel. Messenger v. Gruner + Jahr Printing & Publ’g*, 727 N.E.2d 549, 555 (N.Y. 2000) (explaining that an expressive work “may be so infected with fiction, dramatization or

might not be enough to make the book newsworthy.²⁷⁷ And depending on how far the story strayed from reality, Trump could argue—as the plaintiff did in *Porco*—that it constituted a “knowing and substantially fictionalized account” of his life that merits no protection.²⁷⁸

This kind of quasi-fictional work might also run afoul of the actual-malice standard that courts like *Hoffman* and *Spahn* applied to publicity claims.²⁷⁹ The standard first asks whether the work contains a false statement of fact or creates a “false impression” about the person being portrayed.²⁸⁰ Fiction stands in contrast to fact. As Chief Justice Bird of the Supreme Court of California once noted:

[T]he author who denotes his work as fiction proclaims his literary license and indifference to “the facts.” There is no pretense. All fiction, by definition, eschews an obligation to be faithful to historical truth. Every fiction writer knows his creation is in some sense “false.” That is the nature of the art.²⁸¹

Once falsity is established, courts ask whether the speaker showed a “reckless disregard” for the truth,²⁸² meaning that she told a “known lie” or “calculated falsehood.”²⁸³ Again, these standards clash with the intentional use of untruth when creating a fictitious world starring real people.²⁸⁴ As the dissenting judge in *Spahn* cautioned:

embellishment that it cannot be said to fulfill the purpose of the newsworthiness exception”); *Sarat Lahiri v. Daily Mirror*, 296 N.Y.S. 382, 389 (Sup. Ct. 1937) (holding that “an article of current news or immediate public interest” would be protected but an “article of fiction” would not); *Spahn v. Julian Messner, Inc.*, 260 N.Y.S.2d 451, 456 (App. Div. 1965), *aff’d*, 221 N.E. 2d 543 (N.Y. 1966), *vacated sub nom. Julian Messner, Inc. v. Spahn.*, 387 U.S. 239 (1967) (holding that an expressive work that portrays a real person is unprotected when, “by intention, purport, or format, [it] is neither factual nor historical” and explaining that “if the subject is a living person his written consent must be obtained”).

277. See *Hicks v. Casablanca Records*, 464 F. Supp. 426, 431 (S.D.N.Y. 1978).

278. See *Porco v. Lifetime Entm’t Servs., LLC*, 47 N.Y.S.3d 769, 772 (App. Div. 2017).

279. See *supra* Section II.B.2.

280. See *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1187 (9th Cir. 2001); *Hoffman v. Capital Cities/ABC, Inc.*, 33 F. Supp. 2d 867, 875 (C.D. Cal. 1999), *rev’d*, 255 F.3d 1180 (9th Cir. 2001); see also *Spahn v. Julian Messner, Inc.*, 233 N.E.2d 840, 842 (N.Y. 1967).

281. *Guglielmi v. Spelling-Goldberg Prods.*, 603 P.2d 454, 461 (1979) (Bird, C.J., concurring); see also *de Havilland v. FX Networks, LLC*, 230 Cal. Rptr. 3d 625, 646 (Ct. App. 2018) (“When the expressive work at issue is fiction, or a combination of fact and fiction, the ‘actual malice’ analysis takes on a further wrinkle. . . . [F]iction is by definition untrue. It is imagined, made-up. Put more starkly, it is false.”).

282. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

283. *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964).

284. There might be further confusion created by applying the actual-malice standard to some fiction: the requirement that the person being portrayed show by clear and convincing evidence that the false statement be “of and concerning” him. See *Doe v. TCI Cablevision of Mo.*, No. ED 78785, 2002 WL 1610972, at *15 (Mo. Ct. App. July 23, 2002), *rev’d*, 110 S.W.3d 363 (Mo. 2003) (“Even the plaintiff admits that no one could believe that the actions of the fictional Tony Twist are his actions. We conclude that a reader could not reasonably believe that the Twist comic book character is meant to portray, in actual fact, Twist the hockey player, acting as described.”).

To a fictionalized account of a public figure it is difficult to apply precisely the criteria of [actual malice]. All fiction is false in the literal sense that it is imagined rather than actual. It is, of course, “calculated” because the author knows he is writing fiction and not fact; and it is more than a “reckless” disregard for truth. Fiction is the conscious antithesis of truth.²⁸⁵

The *Spahn* court’s puzzling demand that expressive works avoid all falsity points to a deeper issue created by applying educative theory in this context: expressive works are often susceptible to many meanings. This complicates matters on two fronts: not only can it be difficult to determine what “information” a work is conveying to the public, but it is also unclear what “truth” even means in this context, let alone why it should be required. As Professor Steven Shiffrin has remarked: “[T]he idea that literature’s claim to [F]irst [A]mendment protection depends upon its relevance to political life simply does not ring true. The notion that the classics of literature cannot be suppressed solely because of their relevance to voter decisionmaking bears all the earmarks of pure fiction.”²⁸⁶ This might explain why the Supreme Court has referenced expressive works to explain why “a narrow, succinctly articulable message is not a condition of constitutional protection.”²⁸⁷ The Court has rejected the idea that the First Amendment is “confined to expressions conveying a ‘particularized message’” because that would mean protection “would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll.”²⁸⁸ Indeed, as the Court has explained:

*Most of what we say to one another lacks “religious, political, scientific, educational, journalistic, historical, or artistic value” (let alone serious value), but it is still sheltered from government regulation. Even “[w]holly neutral futilities . . . come under the protection of free speech as fully as do Keats’ poems or Donne’s sermons.”*²⁸⁹

These pronouncements are at odds with an educative theory of free speech: if the constitutional touchstone is the ability of speech to inform the public, one might think that a “particularized message” is necessary to help voters understand what is being said. The Court’s rejection of that standard—and its embrace of Pollock’s paint splatters—are telling.²⁹⁰

285. *Spahn*, 233 N.E.2d at 845 (Bergan, J., dissenting).

286. STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* 48 (1990).

287. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995).

288. *Id.*

289. *United States v. Stevens*, 559 U.S. 460, 479–80 (2010) (alterations in original) (quoting *Cohen v. California*, 403 U.S. 15, 25–26 (1971)).

290. Professor Eugene Volokh has critiqued the right of publicity’s incompatibility with the First Amendment in similar terms:

Separate from the inherent difficulty of discerning the informational benefit that an expressive work can provide, educative theory also risks undervaluing expressive works that relate to issues that have not (yet) captured the public's attention. This is particularly the case when newsworthiness is framed as a descriptive standard—when what counts is whether, as an empirical matter, the public generally knows or cares about the subject at issue.²⁹¹ Under this descriptive standard, there might be no protection for works that expose a previously unknown phenomenon, such as a yet-to-be-publicized wave of teenage suicides.²⁹² Particularly with subversive expressive works, there might be a protection lag between when people are first confronted with a topic and when it attracts enough awareness to qualify as something of public concern, yet this moment of limbo might be when protection is needed most.

Finally, the diverse and inconsistent ways in which educative defenses have been interpreted by the courts in publicity jurisprudence creates confusion for creators of expressive works. The standards differ across jurisdictions; courts waver between broadly and narrowly construing the defenses; and some courts implement statutory exceptions, while others create ad-hoc privileges based on particular facts.²⁹³ Many expressive works aspire to have national reach, but that can be perilous when the protection they receive fluctuates across state lines—especially when a nationwide injunction is among the possible remedies for successful publicity claims.²⁹⁴ In all, then, there are many reasons why educative defenses provide limited protection for expressive works that portray real people.

First Amendment law has also never distinguished “high information content” works such as books or movies from “low information content” works, a category into which some might place sculptures, prints, and T-shirts. The First Amendment protects your right to wear a jacket with a three-word slogan; your right to display a sign containing just the words “For Peace in the Gulf”; your right to display symbols, such as black armbands or burning flags, that convey a fairly simple (and often not even very precisely defined) message; and your right to create purely abstract works, such as abstract art, instrumental music, or absurdist poetry that don't convey many ideas at all.

Volokh, *supra* note 32, at 909–10 (citing *Cohen*, 403 U.S. at 25–26; *City of Ladue v. Gilleo*, 512 U.S. 43, 54–55 (1994); *Tinker v. Des Moines Indep. Cmty. School Dist.*, 393 U.S. 503, 514 (1969); *Texas v. Johnson*, 491 U.S. 397 (1989); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995)); *see also* Alfred Hill, *Defamation and Privacy under the First Amendment*, 76 COLUM. L. REV. 1205, 1304–05 (1976) (arguing that the right of publicity should not apply to fictional works); James M. Treece, *Commercial Exploitation of Names, Likenesses, and Personal Histories*, 51 TEX. L. REV. 637, 660 (1973) (arguing that fictional works should be immune from liability under the right of publicity because of the First Amendment).

291. POST, *supra* note 4, at 164; *see also* BERNARD C. HENNESSY, PUBLIC OPINION 8–9 (3d ed. 1975).

292. *See* POST, *supra* note 4, at 168.

293. *See supra* Section II.B.

294. *See* Siddique, *supra* note 23, at 2115–16; *Bosley v. Wildwett.com*, 310 F. Supp. 2d 914, 935 (N.D. Ohio 2004).

III. WHAT'S THE SOLUTION?

Having diagnosed the problems with educative defenses, let us return to the idea of public discourse to see if a different framework might work better. This Part begins by exploring how publicity rights interfere with participation in public discourse. It then considers several approaches that courts and legislatures have used to curb publicity rights and protect speakers' rights to create expressive works, concluding that none are responsive to the dynamics of public discourse. It ends by proposing a new approach and sketching how courts might use it to address some of the toughest and most topical issues raised by publicity rights.

A. *Why Trump (Probably) Should Not Win*

Expressive works deserve more than parasitic protection based on their ability to convey useful information to voters. They deserve protection because, regardless of their informational impact on listeners, they enable the formation of public opinion. This feature makes expressive works part of public discourse and thus should presumptively grant them constitutional protection, even if they portray real people without permission. Under the First Amendment, only certain justifications suffice to limit the content of public discourse. Speakers have wide latitude to choose the form and content of their speech in public discourse, where they are subject only to narrow restrictions. In the context of publicity rights, this means that—contrary to the current state of the doctrine—the mere use of a person's name or likeness in public discourse should rarely provide a basis for liability.

Speakers' rights to create expressive works form an essential part of participation in public discourse. These works help cultivate the warranted belief that government is responsive to its citizens, which is essential to the project of democratic self-government. They also enable processes of mutual influence through which we shape political and cultural power. As Post has argued, an important dimension of public discourse is the "wide circulation of 'similar social stimuli'" to help make "common experiences available to those who would otherwise remain unconnected strangers."²⁹⁵ This process occurs through various means, but expressive works are a crucial part of the "structural skeleton" of public discourse that allows democratic society to function.²⁹⁶

On their face, publicity rights could impede the creation of expressive works and thus restrict our ability to participate in public discourse. This is especially so when powerful cultural figures assert these rights, as is often

295. Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1276 (1995) (quoting JOHN W. BENNET & MELVIN M. TUMIN, *SOCIAL LIFE: STRUCTURE AND FUNCTION* 140 (1952)).

296. *Id.*

the case. The right of publicity challenges popular participation in culture by granting each of us an exclusive right to permit or refuse our portrayal by others. This exclusive right is worrying on at least two dimensions, both of which relate to the power that culture has to shape our lives and societies. The first focuses on individual liberty: by restraining the public's ability to portray real people, publicity rights restrict an important form of meaning-making.²⁹⁷ As Professor Michael Madow has argued, portrayals of real people serve as "important expressive and communicative resources"²⁹⁸ that can enable individual meaning-making. This is particularly true for portrayals of the socially prominent people more likely to sue to vindicate their publicity rights, for they often "symbolize individual aspirations, group identities, and cultural values."²⁹⁹ To grant a censorship right or veto power to people who might be portrayed in expressive works is to deprive the public of a valuable means of self-determination and cultural influence.³⁰⁰

This point leads to the second problematic dimension of publicity rights' effect on cultural power: they entrench power with the powerful by facilitating "private censorship of popular culture."³⁰¹ In so doing, they imperil what Balkin has dubbed a "participatory culture"—one that is "democratic in the sense that everyone—not just political, economic, or cultural elites—has a fair chance to participate in the production of culture, and in the development of the ideas and meanings that constitute them and the communities and sub-communities to which they belong."³⁰² By privatizing and centralizing an

297. See Balkin, *Digital Speech and Democratic Culture*, *supra* note 132, at 1, 34; Madow, *supra* note 29, at 134.

298. Madow, *supra* note 29, at 128.

299. *Id.*

300. For an example of how this affects the creation of expressive works, consider again *Spahn v. Julian Messner, Inc.*, where Warren Spahn sued over his portrayal in a fictional book directed at a juvenile audience. The appeals court in that case acknowledged that the author had "urged and, perhaps, proved, that juvenile biography requires the fillip of dramatization, imagined dialogue, manipulated chronologies, and fictionalization of events." *Spahn v. Julian Messner, Inc.*, 260 N.Y.S.2d 451, 455 (App. Div. 1965), *aff'd*, 221 N.E. 2d 543 (N.Y. 1966), *vacated sub nom. Julian Messner, Inc. v. Spahn.*, 387 U.S. 239 (1967). But this proof did not do the author any good; as the court explained, even assuming this proof, the result was simply that "the publication of juvenile biographies of living persons, even if public figures, may only be effected with the written consent of such persons." *Id.* The author had argued that public figures would use such a consent-based system "as a lever for obtaining a price for" consent. *Id.* But again, the court was unmoved, holding that "[t]he consent and the price can be avoided by writing strictly factual biographies or by confining unauthorized biographies to those of deceased historic persons." *Id.*

301. Madow, *supra* note 29, at 138.

302. Balkin, *Digital Speech and Democratic Culture*, *supra* note 132, at 3–4, 33. Balkin's work builds on the work of Professor John Fiske, whose idea of "semiotic democracy" illuminates the importance of popular participation in culture. JOHN FISKE, *TELEVISION CULTURE* 236, 239 (1987). Balkin is not the first to channel Fiske's work—a host of scholars have advocated that intellectual-property law should promote popular access and participation in cultural discourse. See, e.g., LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* 9–10 (2001); Rosemary J. Coombe, *Author/izing the Celebrity: Publicity Rights, Postmodern Politics, and Unauthorized Genders*, 10 *CARDOZO ARTS & ENT. L.J.* 365 (1992); Rosemary J. Coombe,

important form of cultural power, the right of publicity exacerbates the trend of top-down management of popular culture by powerful figures in the culture industries, at the expense of marginalized and subordinated groups.

Trump's claims against Gore and Miller strike at the heart of why the First Amendment should protect participation in public discourse. Both the song and the painting serve as mediums for the communication of ideas and opinions. That alone entitles them to a strong presumption of protection. But before we can be sure that Trump's claims should fail, we need to analyze whether any of the interests served by publicity rights are of the kind that may restrict public discourse.

B. Protecting Public Discourse

In order to decide on the right framework, it is essential to scrutinize both the interests that publicity rights purport to serve and the values furthered by the First Amendment. As we will see, some frameworks proposed by courts and scholars leave room for consideration of certain interests but not others. Though public discourse enjoys a strong presumption of protection against restriction, there are times when protection of particular interests is permissible within public discourse.³⁰³

Publicity rights have been said to serve both public and individual interests. The main public interest advanced to justify publicity rights is that they create incentives for people to act in ways that ultimately advance public welfare. This *incentives rationale* draws on analogies to protection for copyright and patents and relies on the premise that people will be more likely to invest the time and energy to develop their talents if they are financially rewarded in the form of an economic legal right.³⁰⁴ The corollary individual interest is the *labor-reward rationale*, which seeks to justify publicity rights on the ground that they reward labor and prevent unjust enrichment caused by freeloading.³⁰⁵

Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue, 69 TEX. L. REV. 1853 (1991); Rosemary J. Coombe, *Publicity Rights and Political Aspiration: Mass Culture, Gender Identity, and Democracy*, 26 NEW ENG. L. REV. 1221 (1992); Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 NOTRE DAME L. REV. 397 (1990); Niva Elkin-Koren, *Cyberlaw and Social Change: A Democratic Approach to Copyright Law in Cyberspace*, 14 CARDOZO ARTS & ENT. L.J. 215, 272–73 (1996); William W. Fisher III, *Property and Contract on the Internet*, 73 CHI.-KENT L. REV. 1203, 1217 (1998); Kenneth Karst, *Local Discourse and the Social Issues*, 12 CARDOZO STUD. L. & LIT. 1, 27 (2000); David Lange, *At Play in the Fields of the Word: Copyright and the Construction of Authorship in the Post-Literate Millennium*, 55 LAW & CONTEMP. PROBS. 139 (1992); David Lange, *Reimagining the Public Domain*, 66 LAW & CONTEMP. PROBS. 463, 475–83 (2003); Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965 (1990); Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 347–65 & n.310 (1996); Neil Weinstock Netanel, *Market Hierarchy and Copyright in Our System of Free Expression*, 53 VAND. L. REV. 1879 (2000).

303. See Post, *supra* note 35, at 1009.

304. See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576 (1977).

305. See ROTHMAN, *supra* note 10, at 105–10 (summarizing arguments made by others).

Although these rationales have some intuitive appeal, they must be construed narrowly to avoid absurd results. All sorts of unauthorized uses that should enjoy First Amendment protection will remove *some* incentives for people to act in ways that might ultimately benefit the public. Take the example of Mark Zuckerberg's portrayal in the *Social Network*, a movie produced by Aaron Sorkin that tells the story of Facebook's early years.³⁰⁶ The movie's creation removes some incentives for Zuckerberg to make a similar expressive work that tells the story from his perspective, but that alone cannot be sufficient to grant him a veto power simply because he was portrayed in Sorkin's rendition. Yet that is precisely what the right of publicity could allow if these rationales are loosely applied within public discourse.

The Supreme Court's only experience with the right of publicity provides guidance for how to construe these rationales narrowly to avoid First Amendment concerns. In *Zacchini v. Scripps-Howard Broadcasting Co.*,³⁰⁷ Mr. Zacchini, a "human cannonball" performer, did his stunt at a local fair.³⁰⁸ After a news station filmed and televised his entire act, he claimed his right of publicity had been violated.³⁰⁹ The state supreme court blocked the claim and granted the news station First Amendment protection for its broadcast, but the Court reversed. Although plaintiffs may wish to construe *Zacchini* broadly as protecting a robust right of publicity even in the context of public discourse, a careful reading of the decision suggests otherwise. The Court emphasized that Zacchini's "performance" and the news clip both lasted fifteen seconds, meaning that the broadcast showed his "entire performance."³¹⁰ This emphasis could support a pair of related restrictions that limit the labor-reward and incentives rationales to *performances* that are reproduced *in their entirety*.³¹¹ We might combine these restrictions into the single rule that publicity rights may restrict public discourse when the unauthorized use of someone's likeness is *substitutive*.³¹²

To understand what this might mean in the context of expressive works, we can learn a lot from *Zacchini* itself. On multiple occasions, the Court drew a distinction between reproduction of Zacchini's *performance* and other uses of a person's name or likeness. For instance, the Court explicitly noted that Zacchini's case was "more limited" than other publicity claims that "merely assert . . . some general use" of a person's name or likeness.³¹³ The

306. THE SOCIAL NETWORK (Relativity Media 2010).

307. 433 U.S. 562 (1977).

308. *Id.* at 563.

309. *Id.* at 563–64.

310. *Id.* at 564.

311. The Court's short opinion refers to Zacchini's "performance" sixteen times above the line, and the word "entire" modifies it (or a synonym for it) twelve of those times. *See id.* at 563–79.

312. *Cf.* Authors Guild v. Google, Inc., 804 F.3d 202, 219, 223 (2d Cir. 2015) (discussing the idea of "substitutive competition" and "substitutive value" in copyright law).

313. *Zacchini*, 433 U.S. at 573 n.10.

Court then described Zacchini's claim as "much narrower" because it concerned "an entire act that he ordinarily gets paid to perform."³¹⁴ This strongly suggests that the First Amendment provides *less* protection to rebroadcast a performance than other cases of unauthorized use of a person's name or likeness. It would be a "very different case," the Court explained, if the news station "had merely reported" and "described" Zacchini's performance, *even if it had also shown his picture*.³¹⁵ In dicta, the Court confidently asserted that it was "evident" that the right of publicity would not prevent someone from "reporting" facts about Zacchini's act.³¹⁶ Professor Eugene Volokh has made a similar point, noting that the Court "twice stressed that it was *not* deciding the broader question of when a plaintiff may sue the defendant for using plaintiff's name, likeness, or other attributes of identity."³¹⁷ Indeed, as Patrick Kabat has quipped, the Court's repeated emphasis on the fact that Zacchini's claim was about "performance, not likeness" suggests that the decision "would have been the same if he had launched a pig, rather than himself, from the canon."³¹⁸

The Court also implied that it was significant that the news clip showed Zacchini's "entire performance," and not merely a snippet of it.³¹⁹ Because viewing the act on the evening news served as a substitute for viewing it in person—and paying for the privilege—Zacchini's claim presented different First Amendment stakes. Although the Court's dicta did not elaborate on precisely how the outcome would differ, the opinion strongly suggests that only a narrow publicity claim could survive constitutional scrutiny in the context of public discourse. The Court not only framed the interest served by the right of publicity as a "proprietary interest of the individual *in his act*," but it also spoke in general terms when declaring that, in publicity cases, "the only question is who gets to do the publishing."³²⁰ Zacchini, the Court stressed, sought no injunction and requested only compensation for the broadcasting of his entire act.³²¹ This suggests that only cases involving substitutive uses of a likeness—that is, cases where more than one actor could

314. *Id.*; *see also id.* at 574 (distinguishing between using someone's name or likeness in "the reporting of events" from "an attempt to broadcast or publish an entire act for which the performer ordinarily gets paid").

315. *Id.* at 569.

316. *Id.* at 574; *see also id.* at 576 ("[T]he broadcast of petitioner's entire performance, unlike the unauthorized use of another's name for purposes of trade or the incidental use of a name or picture by the press, goes to the heart of petitioner's ability to earn a living as an entertainer.").

317. Volokh, *supra* note 32, at 906.

318. PATRICK KABAT, THE RIGHT OF PUBLICITY: THROUGH THE THICKET? 11 (2015), <https://www.law.columbia.edu/sites/default/files/microsites/deans-office/files/Kernochan/14.pdf>.

319. *Zacchini*, 433 U.S. at 576–77 (emphasis added).

320. *Id.* at 573 (emphasis added).

321. *Id.* at 573–74.

“do the publishing”—fall within the scope of permissible limitations of public discourse under *Zacchini*.³²²

This particular limitation can be squared with the premises of public discourse for two reasons.³²³ First, by insisting that *Zacchini*'s requested relief was in no way censorial, the Court indicated that his claim would not actually prevent the news station from broadcasting his performance. The Court felt it was “important to note” that the news station would not “be deprived of the benefit” of rebroadcasting *Zacchini*'s performance “as long as his commercial stake in his act is appropriately recognized.”³²⁴ This framing honors the speaker's right to reproduce a performance, albeit at a price.³²⁵ Although we might usually worry about having to pay for the privilege of participating in public discourse, the Court concluded that the right to compensation—but not the right to censor—was a fair constitutional compromise when the speech in question was a substitutive reproduction of an “entire performance.”³²⁶

The second reason that *Zacchini*'s narrow rule is consistent with the premises of public discourse is that its logic is grounded in protecting and encouraging *other* constitutionally protected expression. The Court highlighted that narrow claims concerning a performance like *Zacchini*'s “encourage such entertainment”³²⁷ and provide the “economic incentive” necessary for performers “to make the investment required to produce a performance of interest to the public.”³²⁸ The Court appeared comfortable with *Zacchini*'s claim only because broadcasting his “entire act pose[d] a substantial threat to the economic value of that performance.”³²⁹ Although the Court was a little vague on what constituted a “substantial threat” in this context, it did explain that “[t]he effect of a public broadcast of the performance is similar to preventing [*Zacchini*] from charging an admission fee” and “goes to the heart of [his] ability to earn a living as an entertainer.”³³⁰ In

322. *Id.*

323. I have some doubts about the Court's wisdom in concluding that viewing *Zacchini*'s performance on the nightly news is substitutive for seeing it in person. It seems to me that there are many reasons why seeing it live—when the suspense created by this daredevil stunt would surely be higher—would be a quite different experience. But *Zacchini* is binding law, at least for now.

324. *Zacchini*, 433 U.S. at 578.

325. *See id.* (emphasizing that *Zacchini* “d[id] not seek to enjoin the broadcast of his performance; he simply want[ed] to be paid for it”).

326. *Id.* at 576.

327. *Id.* at 573.

328. *Id.* at 576. In one significant passage, the Court analogized claims like *Zacchini*'s to claims under copyright law. The Court explained that copyright protections are intended “to afford greater encouragement to the production of works of benefit to the public,” and the First Amendment “does not prevent [states] from making a similar choice . . . to protect the entertainer's incentive in order to encourage the production of this type of work.” *Id.* at 577 (quoting *Washingtonian Publ'g Co. v. Pearson*, 306 U.S. 30, 36 (1939)).

329. *Id.* at 575.

330. *Id.* at 575–76.

other words, the Court concluded that televising the performance without compensating Zacchini was equivalent to depriving him of the entire economic value of his live performance.

This presents a high bar for plaintiffs to meet. In order to restrict public discourse, a plaintiff would have to show that the unauthorized broadcast of a performance would pose a substantial threat to the performer's ability to do his performance. The Court demanded more than an *abstract* threat, insisting that Zacchini prove on remand that the broadcast actually caused him to suffer an economic loss. If, for example, the "broadcast increased the value of [Zacchini's] performance by stimulating the public's interest in seeing the act live," the Court concluded that Zacchini "would not be able to prove damages and thus would not recover."³³¹ Zacchini had alleged that the broadcast caused him \$25,000 in damages, and the Court conditionally approved "compensation of this injury *if proved*."³³²

Read as a whole, *Zacchini* circumscribes the role that the labor-reward and incentives rationales can play in justifying publicity claims that would interfere with public discourse. When a use of someone's name or likeness is substitutive, it seems fair to presume that an uncompensated replication will both remove incentives and create injustice when the one who worked to create the value is left penniless and someone else gets paid. Under these narrow circumstances, allowing compensation upon proof of economic loss can be compatible with robust protection of public discourse. But the same cannot be said for non-substitutive uses. Even assuming a person has a moral claim to reap *some* rewards from her labor, that claim cannot justify hoarding *all* of the rewards that publicity rights would give them. Other actors contributed labor that created the identity's value, including consumers and the media.³³³ In sum, publicity claims premised on the labor-reward and incentives rationales cannot survive constitutional challenges unless the unauthorized portrayal is substitutive and both actually and substantially threatens a performer's ability to perform.³³⁴

331. *Id.* at 575 n.12.

332. *Id.* (emphasis added).

333. See ROTHMAN, *supra* note 10, at 105–10; Madow, *supra* note 29, at 182–84.

334. Narrowing the incentives rationale in this way is also responsive to two common critiques of a broad construction of the rationale. First, scholars have attacked the incentives rationale on the basis that plenty of adequate incentives already exist to achieve fame, such that publicity rights offer no meaningful enhancement. See, e.g., ROTHMAN, *supra* note 10, at 101–02. Second, scholars have observed that, to the extent that the incentive rationale ultimately rests on enriching *public* welfare, we must also factor in the considerable costs to the public brought about by speech restrictions imposed by publicity rights. See, e.g., *id.*

Law-and-economics scholars have advanced a similar public interest based on the idea that publicity rights efficiently maximize wealth and allocate resources in ways that ultimately benefit the public. See *supra* note 41. This *efficiency rationale* depends on an assumption that unauthorized portrayals in expressive works will decrease the commercial value of a person's name or likeness—an assumption that the Court rejected in *Zacchini*. Like a broadly construed incentives rationale, the efficiency rationale falls apart on closer inspection. See, e.g., Volokh, *supra* note 32, at 911

Other scholars have argued that publicity rights can serve individual interests by redressing dignitary injuries to a person's autonomy, liberty, and privacy.³³⁵ Depending on the context, the *dignity rationale* can also be understood to vindicate public interests, such as when publicity rights provide a remedy for false product endorsements that deceive consumers and simultaneously inflict dignitary injuries on the person falsely associated with the product.³³⁶ To understand how this rationale interacts with public discourse, we must be specific about how any particular unauthorized use harms dignity and develop some normative conception of what dignitary harms are cognizable in this context. There are all kinds of expressive uses of a person's name or likeness that could be said to harm dignity—perhaps a person simply does not like the actress picked to play them, or they do not like how an artist drew their nose or hair—and it would severely curtail public discourse if all of these uses triggered liability.³³⁷

The Supreme Court has repeatedly blocked claims that seek to redress dignitary harms caused by public discourse.³³⁸ As Justice O'Connor wrote in *Boos v. Barry*,³³⁹ the Court's constitutional doctrine furnishes the rule "that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide 'adequate "breathing space" to the freedoms protected by the First Amendment.'"³⁴⁰ This rule, as Post has observed, "essentially immunizes public discourse from the legal imposition of community norms of decency and respect,"³⁴¹ but it is subject to "the paradox of

n.32. Many of the empirical claims that underlie it are simply unknowable. For example, unauthorized portrayals do sometimes enhance the value of someone's identity, but it's impossible to know in advance which portrayals do or don't or to objectively measure "the value of someone's identity." We also should not presume (as the efficiency rationale does) that any person deserves the *entire* value of her identity, nor can we know (and indeed we might doubt) that vesting a right of portrayal in one person instead of the public actually enhances the overall public welfare. See ROTHMAN, *supra* note 10, at 100–05.

335. See, e.g., ROTHMAN, *supra* note 10, at 111–12; Kwall, *supra* note 44, at 158–59.

336. McKenna, *supra* note 45, at 225; Lemley, *supra* note 10, at 1163–64.

337. See *Christoff v. Nestlé USA, Inc.*, 213 P.3d 132, 134 (Cal. 2009); Lemley, *supra* note 10, at 1163 ("The private citizen who finds himself on the side of a coffee can as the face of instant coffee, for instance, may have lost control over his destiny in some meaningful way that the law probably should care about."). But see Lemley, *supra* note 10, at 1165 (worrying that the same dignity rationale might preclude portrayals of the neo-Nazis in Charlottesville or the police who have murdered black Americans).

338. See, e.g., *Snyder v. Phelps*, 562 U.S. 443, 460–61 (2011); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988).

339. 485 U.S. 312 (1988).

340. *Id.* at 322 (O'Connor, J., plurality opinion) (quoting *Hustler Magazine, Inc.*, 485 U.S. at 56).

341. Post, *supra* note 295, at 1276; see also *Hustler Magazine, Inc.*, 485 U.S. at 51; Cohen v. California 403 U.S. 15, 22–23 (1971); Robert C. Post, *Between Democracy and Community: The Legal Constitution of Social Form*, in *DEMOCRATIC COMMUNITY: NOMOS XXXV* 173–74 (John W. Chapman & Ian Shapiro eds. 1993).

public discourse”—a term Post has coined to capture the idea that public discourse can perform its constitutional function “only if it is conducted with a modicum of civility.”³⁴² Although enforcing civility rules may constrain free speech, people are unlikely to experience public discourse as a medium through which they may influence the construction of public opinion if it becomes sufficiently abusive and alienating.³⁴³ Under sufficiently uncivil conditions, public discourse will no longer foster the sense of legitimacy and participation, and thus the justification for protecting it will diminish.³⁴⁴

The paradox of public discourse gives us guidance on the limits that the First Amendment should place on publicity claims that seek to remedy dignitary harms. The Court has made clear that state torts like the right of publicity “can claim no talismanic immunity from constitutional limitations” and “must be measured by standards that satisfy the First Amendment.”³⁴⁵ Current constitutional doctrine means that many dignitary harms caused by speech in public discourse are not cognizable. This doctrine does not deny that speech in public discourse can cause severe harms to dignity; rather, it reflects the judgment that the First Amendment must protect forms of speech despite the harm that they cause. As Chief Justice Roberts wrote for the Court in *Snyder v. Phelps*³⁴⁶:

Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.³⁴⁷

Nevertheless, the Court has allowed certain types of dignitary harms to be redressed by state torts despite the fact that the harms stemmed from speech in public discourse. Defamation and false light provide two examples. Faced with claims that false or misleading speech in public discourse caused someone harm, the Court has crafted constitutional rules that recognize robust First Amendment rights while still allowing people to obtain a remedy if they make certain evidentiary showings.³⁴⁸

This solicitude for only certain types of dignitary claims reflects a deep tension within constitutional doctrine. Post’s “paradox” captures the troubling notion that the First Amendment “suspends legal enforcement of the

342. Post, *supra* note 35, at 1009.

343. *Id.*

344. *Id.*

345. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964).

346. 562 U.S. 443 (2011).

347. *Id.* at 460–61.

348. See, e.g., *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967); *N.Y. Times Co.*, 376 U.S. at 269.

very civility rules that make rational deliberation possible.”³⁴⁹ This tension, according to Professor Lawrence Lessig, “cannot be avoided,” for “public discourse must ‘blunt’ rules of civility if it is to assure a critical space within which reflection about community life can occur,” and “[y]et if it blunts these rules of civility too much, it will undercut the very community that it criticizes.”³⁵⁰ This has led Post and others to conclude that public discourse can perform its constitutional function only if people conduct it with a “modicum” of civility.³⁵¹ Quite what this “modicum” covers is contestable, but “legal regulation to enforce community standards of civility may be required as an unfortunate but necessary option of last resort” if the breakdown of civil discourse is sufficiently extreme.³⁵² In these circumstances, publicity claims seeking to redress dignitary harms might still be compatible with protection of public discourse.

C. *Hard Cases*

If publicity doctrine were reframed in the way I have suggested, how might courts handle the thorniest publicity-related issues of the day? It is difficult to map out hypotheticals precisely, but this Section considers how several new technologies might pose novel challenges to the doctrine. It first considers four speaker-focused approaches that courts and legislatures have used to curb publicity rights due to concerns about free speech. All of these approaches would serve speakers’ interests better than the listener-focused defenses that currently rule the roost, but none are satisfactory because they either over-protect or under-protect speech interests. This Section then concludes by sketching out preliminary thoughts about how courts should approach some of the pressing disputes that are, or soon will be, before them.

In recent years, innovation surrounding the simulation of human likeness has advanced at a rapid speed.³⁵³ So too has our ability to post and spread videos and images online. These new technologies enable the widespread creation and dissemination of “audio and video of real people saying and doing things they never said or did.”³⁵⁴ These so-called “deep fakes”

349. Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 287 (1991).

350. Lawrence Lessig, *Post Constitutionalism*, 94 MICH. L. REV. 1422, 1440 (1996).

351. Post, *supra* note 35, at 1009.

352. Post, *supra* note 349, at 287 (giving the example of “fighting words” as the “paradigmatic example” of this extreme condition).

353. Professors Robert Chesney and Danielle Citron have written a path-breaking article on this topic, shedding light on how “deep fake” technology can lead to an array of harms to individuals and society. See Robert Chesney & Danielle Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CALIF. L. REV. (forthcoming 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3213954##.

354. *Id.* (manuscript at 1).

have featured near-perfect simulations of various celebrities' faces transposed onto the bodies of actresses in pornographic movies, among other things.³⁵⁵ The technology is so widely available, there is no reason why these uses will be limited to celebrities; any stilted ex-lover could retaliate against a former partner by creating and spreading such a video on the internet. To make matters worse, advances in the field of virtual reality have the potential to transform deep fakes into a fully immersive experience.³⁵⁶ In a related vein, the proliferation of “nonconsensual pornography” or “revenge porn”—terms used to describe the “distribution of sexually graphic images of individuals without their consent”—is a problem of growing concern, particularly for women who are the overwhelming targets of such abhorrent behavior.³⁵⁷ A distinct set of challenges has arisen in response to developments in the world of sports and entertainment. Hyper-realistic videogames have featured real-world celebrities,³⁵⁸ and the market has exploded for fantasy sports that allow the public to play online competitions between made-up teams filled with actual sports stars.³⁵⁹ Meanwhile, expressive works have increasingly portrayed famous figures in fictional settings³⁶⁰ and featured deceased actors who have been “reanimated” to reprise their roles after death.³⁶¹ Lastly, the faces of cultural icons have appeared on dolls, busts, and other commemorative merchandise.³⁶²

355. *Id.*

356. These “virtual” recreations need not be technologically sophisticated. One could imagine a market for sex dolls that look like real people. Cf. Jenna Moon & Claire Floody, *North America's First Known Sex Doll Brothel Opening in Toronto*, THE STAR (Aug. 27, 2018), <https://www.thestar.com/news/gta/2018/08/26/north-americas-first-known-sex-doll-brothel-opening-in-toronto.html> (describing North America's first “sex doll brothel” where clients can seek sexual pleasure “without the many restrictions and limitations that a real partner may come with”).

357. Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 346 (2014). These images can be obtained by the revenge pornographer both non-consensually, as when taken through hidden cameras or videos of sexual assault; or consensually, as when given by an intimate partner. But in both scenarios, the publication and distribution are non-consensual, and are often done not just for voyeuristic or economic motivation but also with mal-intent for the depicted. See *id.* We owe a great debt to Professors Danielle Citron and Mary Anne Franks for their tireless and inspirational work on how the law might address the atrocity of nonconsensual pornography.

358. *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 173–74 (3d Cir. 2013); *No Doubt v. Activision Publ'g, Inc.*, 122 Cal. Rptr. 3d 397 (Ct. App. 2011); *Noriega v. Activision/Blizzard, Inc.*, No. BC 551747, 2014 WL 5930149 at *3 (Cal. Super. Ct. Oct. 27, 2014).

359. See *Daniels v. FanDuel, Inc.*, 884 F.3d 672, 673–75 (7th Cir. 2018).

360. See, e.g., Tonya Riley, *The Dubious Ethics of “Real-Person Fiction,”* DARK(ISH) WEB (Jan. 12, 2018), <https://medium.com/s/darkish-web/the-dubious-ethics-of-real-person-fiction-5cd6bd498c16>.

361. See, e.g., Catherine Shoard, *Peter Cushing Is Dead. Rogue One's Resurrection Is a Digital Indignity*, GUARDIAN (Dec. 21, 2016), <https://www.theguardian.com/commentis-free/2016/dec/21/peter-cushing-rogue-one-resurrection-cgi>.

362. See, e.g., *Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc.* 296 S.E.2d 697, 699 (Ga. 1982).

All of these portrayals of real people raise complicated questions under publicity doctrine. They all arguably occur in expressive works and thus should trigger some form of constitutional scrutiny to protect speakers' rights to participate in public discourse. One approach would be to immunize all these works under a blanket rule that publicity rights can never inhibit portrayals of real people in expressive works. Under this approach, the right of publicity would remain a viable claim to challenge unauthorized portrayals in *commercial* speech, but all portrayals in public discourse would be fully protected. Some states already guarantee statutory protection to this effect by providing an exemption to the right of publicity if the portrayal of a real person is part of an expressive work.³⁶³ Courts in other states have offered similar carve-outs through statutory construction of publicity tort elements.³⁶⁴ This sweeping approach has the advantage of leaving less uncertainty for creators of expressive works whose speech might otherwise be chilled, but it has the disadvantage of leaving no room for consideration of competing interests advanced by the right of publicity. This inflexibility is troubling when new technologies threaten novel harms that publicity rights might vindicate. Consider the example of nonconsensual pornography. These films and photographs might often qualify as expressive works that are part of public discourse,³⁶⁵ meaning that they would be immune from publicity claims under this regime. Although categorical protection would be a boon to creators of expressive works, it might ultimately undermine the premises of public discourse if it shields uses of a person's likeness that are substitutive or inflict severe dignitary harms.

A second approach would be to allow publicity rights to prevail against expressive works only if they are likely to deceive the public in some legally cognizable way. Some courts have adopted the standard from *Rogers v. Grimaldi*,³⁶⁶ which permits publicity claims to prevail only if the expressive work is actually a disguised commercial advertisement for the sale of goods or services.³⁶⁷ This approach, which has roots in trademark law, essentially serves to double check if commercial speech is masquerading as an expressive work to gain constitutional protection. Courts first ask if the portrayal is part of an expressive work; if it is, the court then considers whether the

363. See, e.g., ARIZ. REV. STAT. ANN. § 12-761(H)(1) (2017).

364. See, e.g., *Tyne v. Time Warner Entm't Co., L.P.*, 901 So. 2d 802, 810 (Fla. 2005) (holding that Florida's statutory right of publicity doesn't apply to expressive works because the statute's use of "the term 'commercial purpose' . . . does not apply to publications, including motion pictures, which do not directly promote a product or service").

365. I see many troubles with this conclusion, but it seems difficult to escape it given the constitutional treatment of film and photography as presumptively protected media for the communication of ideas. See Post, *supra* note 295, at 1253. An important caveat might be that nonconsensual pornography that is also *obtained* non-consensually would not be part of public discourse even if the person who took the video or photograph shared it publicly. See *supra* note 357.

366. 875 F.2d 994 (2d Cir. 1989).

367. *Id.* at 1004-05.

portrayal is “wholly unrelated” to the expressive work (that is, if it has “no artistic relevance” whatsoever to the underlying work) and whether the expressive work is merely a “disguised commercial advertisement” that explicitly deceives the public by affirmatively claiming sponsorship or endorsement.³⁶⁸ The main advantage of the *Rogers* test is that it would offer robust protection for public discourse. In practice, it has proven to be a speech-protective standard because it effectively recognizes only one of the interests purportedly served by the right of publicity—likelihood of consumer confusion that the plaintiff has endorsed a product or service. But that feature is also its bug. To its detriment, the *Rogers* test is inflexible in recognizing other interests that publicity rights might serve, especially those triggered by new technologies that inflict harms that have nothing to do with consumer confusion. Take the example of the dignitary harms caused by expressive works like deep fakes that feature real people’s faces transposed onto videos and photos, many of which are pornographic. The harm wrought by these expressive works is not simply that a viewer might be deceived into believing that they are watching a video that actually portrays the subject (although, that harm may also exist). Rather, it is the dignitary harm inflicted on the subject herself. If, for example, the deep fake featured a disclaimer that informed the viewer that the famous actress being depicted had not actually been filmed performing a sexual act, the deception-based claim would fail but a harm to her dignity would remain. The *Rogers* test, however, would offer no relief.

Perhaps the most commonly used—and yet most commonly criticized—way to reconcile the First Amendment with publicity rights is the transformative-use test.³⁶⁹ This test offers protection for expressive works that sufficiently “transform[]” a person’s name or likeness.³⁷⁰ In *Winter v. DC Comics*,³⁷¹ for example, the California Supreme Court held that the First Amendment protected a comic book featuring two “villainous half-worm, half-human offspring” named Johnny and Edgar Autumn (based on the sibling rock duo Johnny and Edgar Winter).³⁷² Similarly, in *Kirby v. Sega of America, Inc.*,³⁷³ the California Court of Appeals blocked a publicity claim brought against the creators of a videogame starring an avatar based on singer Kierin Kirby because the avatar was “fanciful” and appeared “in outer space

368. *See id.* at 1004 (quoting *Guglielmi v. Spelling-Goldberg Prods.*, 603 P.2d 454, 457 n.6 (Cal. 1979) (en banc) (Bird, C.J., concurring)); *E.S.S. Ent. 2000, Inc. v. Rock Star Videos, Inc.*, 547 F.3d 1095, 1099 (9th Cir. 2008).

369. *See generally* Kadri, *supra* note 27 (critiquing the test).

370. *See, e.g.*, *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 799 (Cal. 2001) (asking whether the expressive work added significant creative elements “so as to be transformed into something more than a mere celebrity likeness or imitation”).

371. 69 P.3d 473 (Cal. 2003).

372. *Id.* at 476.

373. 50 Cal. Rptr. 3d 607 (Ct. App. 2006).

in the 25th Century.”³⁷⁴ This might sound promising for creators of expressive works, but these speech-protective decisions are outliers under the transformative-use test, which has more often resulted in expressive works being penalized—especially when the works feature *realistic* depictions, unlike those in *Winter* and *Kirby*.³⁷⁵ In a pair of cases brought by college athletes against the makers of a videogame, two courts concluded that the works were not sufficiently “transformative” because the avatars were so realistic, the statistics in the game were historically accurate, and the athletes were associated with their actual colleges in their actual stadiums.³⁷⁶ The First Amendment offered no protection because the videogame “literally recreates” each player “in the very setting in which he has achieved renown.”³⁷⁷ The transformative-use test is beset by flaws, many of which I have addressed elsewhere,³⁷⁸ but the chief concern for our purposes is that forcing creators of expressive works to refrain from using realism is incompatible with the right to participate in public discourse. Many expressive works that depend on realistic portrayals—docudramas, biopics, biographies, documentaries, and portraits—would be vulnerable if the constitutional barometer required transformation to diverge from reality. The First Amendment should not be interpreted in such a manner if it is to foster cultural participation through public discourse.

Finally, courts might apply strict scrutiny to publicity claims that challenge portrayals of real people in expressive works. At least one prominent court has done so in assessing whether such a publicity claim was consistent with the First Amendment. In *Sarver v. Chartier*,³⁷⁹ the Ninth Circuit explained that “[c]ontent-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.”³⁸⁰ Applying that standard to a publicity claim brought against the makers of a movie based on a true story, the court noted that California’s right of publicity “clearly restricts speech based upon its content” and held that the plaintiff showed no compelling interest in preventing his portrayal in the expressive work.³⁸¹ Strict scrutiny has the advantage

374. *Id.* at 609–10, 618.

375. See, e.g., *Keller v. Elec. Arts, Inc. (In re NCAA Student-Athlete Name & Likeness Licensing Litig.)*, 724 F.3d 1268 (9th Cir. 2013); *Hart v. Elec. Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013); *No Doubt v. Activision Publ’g, Inc.*, 122 Cal. Rptr. 3d 397 (Ct. App. 2011).

376. *Keller*, 724 F.3d at 1276–79; *Hart*, 717 F.3d at 166, 169.

377. *Keller*, 724 F.3d at 1271; see also *Hart*, 717 F.3d at 166 (“The digital Ryan Hart does what the actual Ryan Hart did while at Rutgers: he plays college football This is not transformative.”).

378. See Kadri, *supra* note 27.

379. 813 F.3d 891 (9th Cir. 2016).

380. *Id.* at 903 (quoting *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015)).

381. *Id.* at 903–06. The *Sarver* court appeared to assume that the only interest that publicity rights could serve is to prevent a portrayal that “appropriates the economic value of a performance

of allowing courts to inspect on a case-by-case basis the particular interests that publicity rights might serve and to demand that the publicity-based remedy is narrowly tailored to serve that interest.³⁸² This flexibility is advantageous as courts are called to respond to emerging technologies that create novel harms. But there are two serious disadvantages to this approach. First, it retains much of the uncertainty that currently plagues this area of the law because it is tough to predict in advance which interests courts will find compelling and narrowly addressed in any given case. Second, and relatedly, the standard itself does not inherently curtail the long list of interests that publicity rights purportedly serve and yet fail to withstand serious scrutiny. As a result, there is no guarantee that the interests that a court will find compelling are responsive to the premises of public discourse.

Returning to our earlier discussion, I have argued that there are only two interests served by publicity rights that can be compatible with adequate protection for public discourse. The first—a modified *incentives rationale*—protects the interest in being compensated for substitutive portrayals that actually and substantially threaten a person’s ability to engage in other forms of expression.³⁸³ The second—a modified *dignitary rationale*—recognizes the interest in redressing portrayals that inflict extreme dignitary harms that are sufficiently abusive and alienating to warrant legal intervention.³⁸⁴ These are, to be sure, nuanced and delicate concepts for courts to apply, and they will not provide creators of expressive works with perfect ex-ante notice as to their potential liability. But that is sometimes the nature of constitutional analysis, particularly when strong competing interests clash. The First Amendment protects robust rights to participate in public discourse, but the state can also furnish individuals with rights under tort law that serve narrow interests compatible with protection for public discourse. As we have seen, publicity rights have often been interpreted broadly and in ways that curtail speakers’ abilities to portray real people in expressive works, but it would be unwise to swing too far in the opposite direction and conclude that the right of publicity is unequivocally unconstitutional within this realm. For one thing, *Zacchini* teaches us that certain publicity claims are compatible with the First Amendment’s protection of public discourse—the defendant that

or persona or seeks to capitalize off a celebrity’s image in commercial advertisements.” *Id.* at 905. Because the plaintiff hadn’t made “the investment required to produce a performance of interest to the public,” he couldn’t establish a compelling interest. *Id.* (quoting *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576 (1977)).

382. See *Frazier v. Boomsma*, No. CV07-08040-PHX-NVW, 2007 WL 2808559, at *11–*19 (D. Ariz. Sept. 27, 2007) (applying strict scrutiny to block publicity claims brought against an activist who sold anti-war t-shirts featuring the names of 3461 deceased soldiers alongside the slogan “Bush Lied—They Died”).

383. See *supra* Section III.B.

384. See *id.*

was found liable in that case was, after all, a news organization that was reporting current events to the public.³⁸⁵ For another, although legal recourse for violations of civility norms is rarely permissible within public discourse, there are some dignitary harms caused by uncivil speech that have withstood constitutional scrutiny.³⁸⁶

Appreciating these two interests can help courts address some of today's most challenging legal questions raised by portrayals of real people. It is impossible to resolve all of these questions in the abstract, but it is nonetheless useful to make some general observations about how publicity rights might interact with the First Amendment in some of the harder cases foreshadowed above: deep fakes, nonconsensual pornography, virtual reality, videogames, fantasy sports, fictional works, digital reanimation, and commemorative merchandise. It seems unlikely that the modified incentives rationale will justify many publicity claims raised by these uses of someone's name or likeness because they are not substitutive. In a deep fake or revenge porn video, for example, a woman suing because her nonconsensual appearance in a pornographic film causes her emotional distress is not seeking compensation because the video threatens her ability to profit from a similar expressive work.³⁸⁷ Similarly, when a person's name or likeness is used in videogames, fantasy sports, or fictional works, it is farfetched to say that the use serves as a substitute for other expression by that person. The creators of the *Grand Theft Auto* videogame, for example, did not threaten Lindsay Lohan's acting career by including an avatar that arguably invoked her image.³⁸⁸ The incentives rationale might someday be important if digital reanimation becomes a substitute for real actors and musicians. A performer recreated into a life-like and look-alike avatar might be able to make a showing that the portrayal is substitutive, but it would still appear to be a high hurdle to clear given *Zacchini's* insistence that plaintiffs relying on this rationale show actual damages caused by the portrayal.³⁸⁹

The modified dignitary rationale might be more responsive to some of the harms created by new technologies. Nonconsensual pornography—whether created artificially as in deep fakes or shared without permission as in revenge porn—might represent such an extreme violation of civility norms that legal recourse would still be consistent with the First Amendment. It is, admittedly, difficult to cabin the scope of these dignitary interests, but many of these unauthorized portrayals create abusive and alienating conditions that

385. See *Zacchini*, 433 U.S. 562.

386. See *supra* notes 338–352 and accompanying text.

387. An interesting exception to this general point might be pornographic actors portrayed in deep fakes in a way that was substitutive for their own work.

388. See *Lohan v. Take-Two Interactive Software, Inc.*, 97 N.E.3d 389, 392 (N.Y. 2018).

389. *Zacchini*, 433 U.S. at 575 n.12.

threaten the premises of protection for public discourse.³⁹⁰ Many, however, will not—and it is important to consider them when drawing constitutional lines. We have already seen many ways that deep fakes can create laudable, pro-social speech that should be shielded by the First Amendment. Consider, for example, the enhancements this technology could bring in the realm of education. In teaching about the assassination of President John F. Kennedy, a deep fake could allow us to hear the speech he was due to give on the day of his death *in his own voice*, as one Scotland-based company has now done.³⁹¹ Similarly, imagine the powerful artistic uses of deep fakes, similar to the digital manipulation in *Forrest Gump* where doctored video footage portrayed three past presidents meeting with the movie’s protagonist and saying things they never said.³⁹² Deep fakes can also spur valuable political speech, as when a Belgian political party created a deep fake depicting President Trump giving a fictional address where he says: “As you know I had the balls to withdraw from the Paris climate agreement. And so should you.”³⁹³ Although Trump never used those words in abandoning the agreement, the political party used this tool to “start a public debate” to “draw attention to the necessity to act on climate change.”³⁹⁴ All of these deep fakes deserve First Amendment protection as quintessential forms of public discourse.³⁹⁵

390. See Post, *supra* note 35, at 1009; see also Danielle Keats Citron, *Sexual Privacy*, 128 YALE L.J. 1870, 1921–24 (2019) (discussing an array of repugnant deep fakes and raising the awful specter of a deep fake featuring someone being raped). Citron argued that the right of publicity “is inapplicable” in this context “because creators of deep-fake sex videos likely do not use people’s faces or bodies for a commercial advantage.” *Id.* at 1939 n.461; see also Chesney & Citron, *supra* note 353 (manuscript at 16) (arguing that the right of publicity would be impotent against most deep fakes because, “[f]or better or worse, the commercial-gain element sharply limits the utility of this model: the harms associated with deep fakes do not typically generate direct financial gain for their creators”). Although it is true that some courts have used concepts related to commerciality to cabin the reach of publicity rights, courts in many jurisdictions would likely include deep fakes within the tort’s potential scope so long as the portrayal gave the defendant some sort of advantage. See Rothman, *supra* note 23, at 1950 (noting that, in some states, “any purpose or advantage” will suffice). To the extent that a state seeks to limit publicity liability to “commercial” uses, I agree with Citron (and Chesney) that some nonconsensual pornography might evade liability. In my view, that would be a compelling reason to reform that state’s law to remove a commerciality requirement. See Citron, *supra*, at 1951 (arguing that “[t]he privacy torts should evolve” to provide “robust protection of the ability to determine for oneself how much of one’s naked body, intimate information, or intimate activities are exposed to others”).

391. *John F Kennedy’s Lost ‘Last’ Speech Recreated*, BBC (Mar. 16, 2018), <https://www.bbc.com/news/av/uk-scotland-43436361/john-f-kennedy-s-lost-last-speech-recreated>.

392. See *FORREST GUMP* (Paramount Pictures 1994) (referring to the “I Gotta Pee,” “Shot in the Buttocks,” and “Watergate Hotel” scenes featuring Presidents John F. Kennedy, Lyndon B. Johnson, and Richard M. Nixon).

393. Hans von der Burchard, *Belgian Socialist Party Circulates ‘Deep Fake’ Donald Trump Video*, POLITICO (May 21, 2018), <https://www.politico.eu/article/spa-donald-trump-belgium-paris-climate-agreement-belgian-socialist-party-circulates-deep-fake-trump-video/>.

394. *Id.* (quoting the Flemish Socialist Party).

395. There may be other beneficial uses of deep fakes that do not fit neatly within the constitutional concept of public discourse. For example, deep fakes can enhance autonomy and equality for

Looking beyond deep fakes, the claims brought so far against creators of fantasy-sports games, videogames, and merchandise would struggle to meet the exacting standard under the modified dignitary rationale. In my view, these unauthorized portrayals do not offend civility norms in the way that nonconsensual depiction and dissemination of sexual acts does. The plaintiffs might wish to share in the profits generated by these media of expression, but their portrayals do not create the type of abusive and alienating conditions that undermine public discourse.³⁹⁶ Of course, these media could theoretically be used to inflict serious dignitary harms, and courts must be prepared to adapt to changing conditions.

IV. CONCLUSION

The time has come to curb the right of publicity and reframe the First Amendment justifications that face off against it. When plaintiffs successfully use the right of publicity against expressive works, the tort censors—or at least ransoms—the portrayal of real people and threatens public discourse. Protection for expressive works that portray real people should not depend on their providing information to citizens in voting booths or politicians in legislative chambers. Instead, this form of expression should presumptively be protected as a valuable part of the public’s participation in the “building of the whole culture.”³⁹⁷ By recalibrating the theoretical foundations of this debate, we can justify and explain speech protection for these works with greater confidence and coherence.

This Article has illustrated a simple but important point: the theories we use to justify rights matter. This realization is particularly crucial in First Amendment doctrine, which often operates categorically—a theory about what speech *is protected* is also a theory about what speech *is unprotected*. Educative theory has played an important role in protecting speech for many years, and it will surely continue to do so in certain cases. But its limits are

people with disabilities who might use the technology to virtually engage with life experiences that would be impossible in a conventional sense. Allie Volpe, *Deepfake Porn Has Terrifying Implications. But What if It Could Be Used for Good?*, MEN’S HEALTH (Apr. 13, 2018), <https://www.men-health.com/sex-women/a19755663/deepfakes-porn-reddit-pornhub> (giving the example of people suffering from physical disabilities interposing their faces along with those of their consenting partners into pornographic videos); *see also* Chesney & Citron, *supra* note 353 (manuscript at 16). These private uses raise slightly different constitutional considerations than those discussed in this Article, but they might nonetheless deserve protection under the First Amendment.

396. Justice Ruth Bader Ginsburg, for example, might have wanted a piece of the pie when a fundraising campaign amassed over \$600,000 to create “action figures” in her image. *See* Sarah Berger, *Over \$600,000 Has Been Raised on Kickstarter for a Ruth Bader Ginsburg Action Figure*, CNBC (Aug. 6, 2018), <https://www.cnbc.com/2018/08/06/fctry-kickstarter-raises-money-for-ruth-bader-ginsburg-action-figure-.html>. The “Notorious RBG” never attempted to sue, but, even if she did bring a publicity claim, I do not believe the modified dignitary rationale would justify liability in this case.

397. EMERSON, *supra* note 134, at 7.

apparent when it is raised as a shield for expressive works that portray real people. This is because free speech is not merely about the “sweat and agony of the mind” of the meticulous voter,³⁹⁸ but also the role that expression plays in legitimating democratic power and influencing cultural power. Through the idea of public discourse, we can better understand the values that should animate the doctrine—and, in so doing, be prepared to face the vexing questions that new technologies will surely compel us to answer.

398. See MEIKLEJOHN, *supra* note 35, at 10.