DRAWING TRUMP NAKED:
CURBING THE RIGHT OF PUBLICITY TO PROTECT PORTRAYALS OF REAL PEOPLE

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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 shouldn't be able to block his portrayal in The Social Network *movie, that Marilyn Monroe couldn't have stopped Andy Warhol from exhibiting his vibrant paintings, that O.J. Simpson couldn't have demanded money from FX to air the* American Crime Story *docudrama. 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 First Amendment theory that has motivated many of the past decisions confronting the right of publicity. It then reframes the doctrine in a new way: as four distinct 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 discusses alternatives that would reframe First Amendment theory as it relates to the right of publicity.

This Article argues that to best protect creators and their expressive works under the First Amendment, we must abandon traditional "educative" listener-based 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 revenge porn—this challenge will only intensify. To address it, courts should apply a different framework when publicity rights face off against expressive rights—a framework 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 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 works[4] have faced legal challenges brought by a bizarre cast of characters, from Panamanian dictator Manuel

[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/.

[2] Interview with Illma Gore (Feb. 19, 2018).

[3] Voon, *supra* note 1.

[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's 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 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, 131 S. Ct. 2729, 2733 (2011) (discussing First Amendment protection of some expressive works); ROBERT POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 169 (1995) [hereinafter POST, CONSTITUTIONAL DOMAINS].

Noriega[5] to Mexican drug lord "El Chapo" Guzmán[6] to wayward actress Lindsey Lohan[7] to 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]

Concern about the right of publicity hasn't been driven merely by an uptick in litigation. In response to new technologies, scholars have renewed their interest in this area[10] 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 technology.[12] Some commentators have encouraged steps to prevent the right of publicity from being a "bloated monster" that imperils free speech,[13] while others have argued for broader publicity rights that would place greater limits on portrayals of real people.[14] Either future could come to pass: absent meaningful guidance from the Supreme Court,[15] lower courts have been experimenting with a variety of confusing and contradictory tests to reconcile these competing visions.[16] The circuit split

[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. Mar. 26, 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 (2017) (representing an archetypal publicity statute).

[10] *See* Jesse Lempel, *Combatting Deep Fakes through the Right of Publicity*, LAWFARE (Mar. 30, 2018), https://www.lawfareblog.com/combatting-deep-fakes-through-right-publicity; JENNIFER ROTHMAN, THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD 1 (2018); *see also* Mark A. Lemley, *Privacy, Property, and Publicity* (July 27, 2018), https://ssrn.com/abstract=3221274.

[11] *See* Jacob Gershman, *Critics Pounce on Proposed PRINCE Act in Minnesota*, WALL STREET J. (May 16, 2016), 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), 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] ROTHMAN, *supra* note 10, at 7.

[14] *See, e.g.*, *Update on NY Right of Publicity*, SAG-AFTRA (2018), https://www.sagaftra.org/update-ny-right-publicity (supporting the creation of post-mortem publicity rights).

[15] 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). Mr. Zacchini, a "human cannonball" performer, did his stunt at a local Ohio fair. After a news station televised Zacchini's entire act, he claimed his right of publicity had been violated. The news station claimed First Amendment protection for its broadcast, but the Court allowed Zacchini's claim to proceed and called for a balancing test to weigh the competing interests at play. Unfortunately, the Court gave scant guidance on how this balancing test should work. *See id.* at 574–75.

[16] Petition for Writ of Certiorari at 14–21, Elec. Arts Inc. v. Davis, 136 S. Ct. 1448 (No. 15-424) (2015) (cataloging the tests adopted by state and federal courts around the country).

is deepening,[17] the petitions for certiorari are piling up,[18] and federal courts are even asking their state counterparts for help with particularly difficult questions.[19] 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.

In the meantime, this lingering uncertainty is problematic for free speech: creators of expressive works don't 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,[20] but plaintiffs may seek nationwide injunctive relief to remedy violations,[21] with damages that aren't limited to emotional distress and can include compensation for various forms of commercial injury.[22] Even when creators of expressive works have prevailed in court, they've often had to wage costly wars to win, sometimes after years of litigation and multiple appeals.[23] 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. Stuck in legal limbo, creators of expressive works may make their portrayals less realistic or refrain from including real people altogether.[24] At the very least, anyone depicting a real person must tread carefully.

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.[25] They have questioned, for example, if publicity rights actually create incentives for people to invest in their personae[26] and if we even want to create these incentives in the first place.[27] 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.[28] But absent from

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[17] *Id.*

[18] *Id.*; *see also* Petition for Writ of Certiorari, National Collegiate Athletic Association v. Edward J. O'Bannon, Jr., 137 S. Ct. 277 (No. 15-1388) (2016); Petition for Writ of Certiorari, Saderup v. Comedy III Prods., Inc., 122 S. Ct. 806 (No. 01-368) (2001).

[19] Daniels v. FanDuel, Inc., 884 F.3d 672, 673–75 (7th Cir.), *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).

[20] *See, e.g.*, N.Y. CIV. RIGHTS L. §§ 50, 51 (2018).

[21] Jennifer 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).

[22] 2 J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY §§ 11:30–35 (2d ed. 2017).

[23] 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 U.S. 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).

[24] *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).

[25] *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).

[26] ROTHMAN, *supra* note 10, at 100; Lemley, *supra* note 10, at 7; *see also* Mark A. Lemley, *Ex Ante Versus Ex Post Justifications for Intellectual Property*, 71 U. CHI. L. REV. 129, 141–48 (2004).

[27] 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 25, at 215–19.

[28] *See, e.g.*, Kadri, *supra* note 24, at 1525–31; ROTHMAN, *supra* note 10, at 138–59; *see also* 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); Roberta Rosenthal Kwall, *The Right of Publicity vs. The First Amendment: A Property and*

this conversation has been a thorough analysis of an important objection to publicity rights: that restricting portrayals of real people inhibits speech on matters of public concern.[29] 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 in a new way: as four distinct defenses that have developed to assuage concerns about publicity rights interfering with speech on matters of public concern. 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.[30] 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."[31] 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.[32]

This Article argues that a different free-speech theory should animate the analysis—a theory that recognizes that the essential objective of the First Amendment, and of free-speech policy more generally, should be to protect a speaker's right to participate in public discourse. This right to participate in public discourse includes the right to create expressive works that enable the formation of public opinion, even when those works feature real people. Accordingly, 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 free-speech 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 advances a theory to justify individual rights to participate in public discourse and offers a framework to implement this theory and thereby curb publicity rights when real

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Liability Rule Analysis, 70 IND. L.J. 47, 47 (1994); 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); Dogan & Lemley, *supra* note 27, at 1217–20.

[29] 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.

[30] *See, e.g.*, Groucho Marx Prods., Inc. v. Day & Night Co., 523 F. Supp. 485, 492 (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").

[31] *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) [hereinafter Post, *Data Privacy and Dignitary Privacy*] (citing ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1960) [hereinafter MEIKLEJOHN, POLITICAL FREEDOM]).

[32] For prominent examples of educative theory, see, for example, Alexander Meiklejohn, *The First Amendment is an Absolute*, 245 SUP. CT. REV. 255, 255 (1961) [hereinafter Meiklejohn, *The First Amendment is an Absolute*]; OWEN M. FISS, THE IRONY OF FREE SPEECH (1996) [hereinafter FISS, THE IRONY OF FREE SPEECH]; 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).

people are portrayed in expressive works. Finally, it discusses how these approaches might address some of the toughest questions that courts, legislatures, and scholars are facing today, including issues raised by new technology such as "deep fake" videos, revenge pornography, realistic videogames, fantasy-sports games, virtual-reality simulations, and fictional works of various stripes.

I. WHAT'S THE PROBLEM?

The right of publicity may scarcely appear on a "1L" Torts syllabus, but it is a legal claim of growing importance.[33] A creature of both statute and common law, the tort's scope varies somewhat from state to state.[34] 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.[35]

Courts and scholars have suggested a slew of justifications for publicity rights.[36] Some focus on benefits to the public, such as the idea that publicity rights efficiently maximize wealth and allocate resources,[37] or that they create incentives for people to act in ways that ultimately advance public welfare.[38] Other justifications claim to serve individual interests by, for example, rewarding labor and preventing unjust enrichment caused by freeloading[39] or addressing injuries that unauthorized portrayals inflict on a person's autonomy, dignity, liberty, and privacy.[40] 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.[41] Many of these purported justifications have been undermined or debunked—a matter we'll 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,[42] 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.[43]

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[33] *See* sources cited *supra* notes 5–8, 10–14.

[34] 1 MCCARTHY, *supra* note 22, at § 6:2.

[35] RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (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 24 & n.99 ("[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.").

[36] *See generally* ROTHMAN, *supra* note 10, at 98–112 (analyzing the various purported interests); C.B.C. Distrib. & 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).

[37] Mark F. Grady, *A Positive Economic Theory of the Right of Publicity*, 1 UCLA ENT. L. REV. 97, 103–04, 126 (1994); WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW ch. 8 (2003); Richard A. Posner, *The Right of Privacy*, 12 GA. L. REV. 393, 412–13 (1978); Matthews v. Wozencraft, 15 F.3d 432, 437–38 & 438 n.2 (5th Cir. 1994).

[38] Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 576 (1977).

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

[40] *See, e.g.*, ROTHMAN, *supra* note 10, 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).

[41] Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225 (2005); Lemley, *supra* note 10, at 16–17.

[42] Madow, *supra* note 25, at 178–238; *see also* Rothman, *supra* note 25, at 245 n.218.

[43] 1 MCCARTHY, *supra* note 22, at § 6:2; Jennifer Rothman, *The Law*, ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY, https://www.rightofpublicityroadmap.com/law.

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

To understand the tension between publicity rights and free speech, it's important to recognize the tort's "commercial core."[44] 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 had violated his right of publicity.[45] The combination of the commercial advertisement and the unauthorized use of his name and legendary apparel would likely satisfy the tort's elements in most jurisdictions. It's 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 wouldn't sound in a theory of endorsement, but he could still challenge the commercial appropriation of his name and likeness.[46]

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.[47] This commercial core has important constitutional implications because it means that many publicity claims challenge uses in "commercial speech,"[48] which has a "special meaning" in the First Amendment context.[49] 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"[50] and "does no more than propose a commercial transaction."[51] 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.[52]

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.[53] 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.[54] Second, even if speech is *not* false or misleading, by merely being commercial it is entitled to lesser First

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[44] By using the term "commercial core," 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.

[45] This hypothetical isn't all that hypothetical. Jordan v. Jewel Food Stores, Inc., 743 F.3d 509, 512, 522 (7th Cir. 2014) (reviving Jordan's challenge to a supermarket's "*A Shoe In!*" ad).

[46] *See* Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, 967 (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.

[47] *See Cardtoons, L.C.*, 95 F.3d at 967; Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 802 (2001).

[48] *See, e.g.*, Newcombe v. Adolf Coors Co., 157 F.3d 686, 691 (9th Cir. 1998).

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

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

[51] Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66 (1983) (cleaned up). 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"); *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.").

[52] *See Bolger*, 463 U.S. at 66–68.

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

[54] *See id.*; Rothman, *supra* note 21, at 1955–56.

Amendment protection than noncommercial speech.[55] With limited Constitutional protection, individual states have greater leeway to regulate it.[56] Accordingly, when commercial speech portrays real people, it has little constitutional protection, and thus an increasing ability to be regulated by the states. The result is that many publicity claims will win out over any asserted right to portray real people in commercial speech.[57]

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."[58] 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 biography."[59] But as Professor Jennifer Rothman has persuasively shown, "[t]he facts on the ground . . . challenge this vision of a limited right."[60]

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.[61] Suits have been brought against filmmakers, by the former manager of rap group N.W.A.;[62] against actors, by the banker who inspired the toupee-wearing crook in *The Wolf of Wall Street*;[63] against TV-show producers, by a New Yorker convicted of murdering his parents;[64] against podcasters, by the estate of the protagonist from the hit series "S-

[55] Greater New Orleans Broad. Ass'n, Inc. v. United States, 527 U.S. 173, 183 (1999).

[56] *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 562.

[57] *See* Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180, 1184–85 (9th Cir. 2001). *But see supra* note 46.

[58] J.T. 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).

[59] Madow, *supra* note 42, at 130.

[60] Rothman, *supra* note 21, at 1951–59. It's 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.

[61] *E.g.*, *Keller*, 724 F.3d at 1282–83; *Sarver*, 813 F.3d at 905–06; *Hart*, 717 F.3d at 169; *Cardtoons, L.C.*, 95 F.3d at 970–76; C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 505 F.3d 818, 823–24 (8th Cir. 2007). 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. Ct. App. 1931) (holding that a plaintiff truthfully identified as a prostitute in a movie was entitled to block the showing of the movie).

[62] *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*).

[63] 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*).

[64] Porco v Lifetime Entm't Servs., LLC, 147 A.D.3d 1253, 1253 (N.Y. App. Div. 2017) (suit arising from the made-for-TV biopic *Romeo Killer: The Christopher Porco Story*).

Town";[65] against videogame creators, by the heirs of long-deceased war hero, Lieutenant General George Patton;[66] and even against documentarians, by the record holder in the "Donkey Kong" arcade game.[67]

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,[68] even when the works are sold commercially.[69] Expressive works don't suddenly become "commercial speech" because they are sold for profit.[70] As one court has quipped, creators "need not give away [their works] in order to bring them within the ambit of the First Amendment."[71] 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."[72] And 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.[73]

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; if it's noncommercial, it's protected. Easy as that. 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.[74] Four distinct defenses have responded to an important yet understudied objection to publicity rights: that 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'll then return to publicity rights to explore the four defenses that have emerged in that realm.

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[65] 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*).

[66] 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*).

[67] Mitchell v. Cartoon Network, Inc., No. CV 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*).

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

[69] Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501–02 (1952); Harte-Hanks Commc'ns 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.").

[70] *See* Va. State Bd. of Pharma. v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 761 (1976); Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 756 n.5 (1988).

[71] *Cardtoons, L.C.*, 95 F.3d at 967.

[72] *See* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226 (2015); *see also* Volokh, *supra* note 28, at 912 & n.35.

[73] *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 277 (1964); *see also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW § 11.3.5.1 (3d ed. 2006).

[74] *See* Lemley, *supra* note 10, at 26.

A. *Educative Free-Speech Theory*

Speech on matters of public concern is said to lie "at the core of the First Amendment."[75] Sometimes referred to as speech that's "newsworthy"[76] or about "public issues,"[77] the labels are now interchangeable.[78] No matter what you call it, courts are loath to uphold laws that restrict this kind of speech.[79]

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 necessary for informed governance."[80] 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.[81]

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.[82]

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.[83] At these meetings, he said, citizens "discuss and . . . decide matters of public policy," for "[w]hen men govern themselves, it is

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[75] 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.'").

[76] Time, Inc. v. Hill, 385 U.S. 374, 400 (1967) (Black, J., concurring).

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

[78] *See* Mary-Rose Papandrea, *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"); Richard T. Karcher, *Tort Law and Journalism Ethics*, 40 LOY. U. CHI. L.J. 781, 824 (2009) ("[W]hether something is of a legitimate public concern turns on a determination of newsworthiness."); FLA. STAT. § 90.5015 (2011) ("'News' means information of public concern relating to local, statewide, national, or worldwide issues or events.").

[79] *See, e.g.*, *Frisby*, 487 U.S. at 479 (subjecting an antipicketing ordinance to "careful scrutiny"); 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).

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

[81] *See* Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1109–23 (1993) [hereinafter Post, *Meiklejohn's Mistake*]; MEIKLEJOHN, POLITICAL FREEDOM, *supra* note 31, 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).

[82] *See infra* notes 120–128 and accompanying discussion.

[83] A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 24, 26 (1948) [hereinafter MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT].

they—and no one else—who must pass judgment upon unwisdom and unfairness and danger" of particular policies.[84] For Meiklejohn, then, "[t]he principle of the freedom of speech springs from the necessities of the program of self-government."[85] 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.[86] If citizens aren't free to learn about and then discuss matters of public concern, they can't 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."[87]

Meiklejohn's work greatly influenced later theorists. His disciples include 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."[88] 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."[89] Like Meiklejohn, then, Fiss viewed any individual speech right in instrumental terms, worthy of protection "only when it enriches public debate"[90] and serves "as a means or instrument of collective self-determination."[91] 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."[92]

The principles of educative theory, from Meiklejohn to the modern day, pervade First Amendment jurisprudence. This is particularly true where tort liability has posed a threat to free speech, when educative theory has principally appeared in two realms: the public-figure[93] doctrine and the newsworthy doctrine.[94] Both doctrines reflect listener-based concerns because they "ultimately lead to the same issue, which is the

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[84] *Id.*

[85] *Id.*

[86] MEIKLEJOHN, POLITICAL FREEDOM, *supra* note 31, 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, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT, *supra* note 83, 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.").

[87] MEIKLEJOHN, POLITICAL FREEDOM, *supra* note 31, at 26; *see also id.* at 55; MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT, *supra* note 83, 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, *The First Amendment is an Absolute*, *supra* note 32, 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.").

[88] Owen M. Fiss, Essay, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1409–10 (1986) [hereinafter Fiss, *Free Speech and Social Structure*].

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

[90] Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 786 (1987) [hereinafter Fiss, *Why the State?*].

[91] Fiss, *Free Speech and Social Structure*, *supra* note 88, at 1409–10.

[92] Cass R. Sunstein, *Television and the Public Interest*, 88 CAL. L. REV. 499, 518 (2000); *see also* J.M. Balkin, *Populism and Progressivism as Constitutional Categories*, 104 YALE L.J. 1935, 1935 (1995).

[93] 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).

[94] I use this nomenclature for simplicity's sake, though at times the courts use alternative language. *See* sources cited *supra* note 78.

nature of the public and its right to demand information."[95] Thus, the public-figure and newsworthiness doctrines can be thought of as educative doctrines.

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.[96] The doctrine developed principally in defamation law, beginning with the Supreme Court's landmark decision in *New York Times Co. v. Sullivan*.[97] 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."[98] 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.[99]

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's crucial that citizens be fully informed about them.[100] So strong is this interest that the First Amendment protects even some false speech about public figures—which is "inevitable in free debate"[101]—because only such a prophylactic rule could foster the "breathing space" required for the circulation of speech about public issues.[102] 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."[103]

The newsworthy doctrine, too, acts as a shield for speech on matters of public concern.[104] Even before the *Sullivan* Court constitutionalized defamation law because of the importance of "debate on public issues,"[105] the common-law defamation defense of fair comment and criticism sought to protect discussion of matters in the public interest.[106] Nowadays, the newsworthy doctrine has constitutional or quasi-

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[95] Post, *The Social Foundations of Privacy*, *supra* note 80, at 997.

[96] *See, e.g.*, *N.Y. Times Co.*, 376 U.S. at 277, 279–80.

[97] *Id.*

[98] 376 U.S. 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 Publishing 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").

[99] Hustler Magazine v. Falwell, 485 U.S. 46, 56 (1988).

[100] *See* Garrison v. State of La., 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.").

[101] *N.Y. Times Co.*, 376 U.S. at 271–72.

[102] *Id.*

[103] 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.

[104] *See* Snyder v. Phelps, 131 S. Ct. 1207, 1216 (2011); Thornhill v. Alabama, 310 U.S. 88, 101–02 (1940).

[105] *N.Y. Times Co.*, 376 U.S. at 270.

[106] W.P. KEETON, 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 newsworthy doctrine. In *Rosenbloom v. Metromedia, Inc.*, 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. 403 U.S. 29, 43 (1971), *abrogated by* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). In *Gertz v. Robert Welch, Inc.*, however, a majority expressly reject the extension of the actual-malice standard to private persons caught up in matters of public concern. 418 U.S. 323, 346 (1974). 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,

constitutional[107] import in a wide swath of legal disputes, including cases involving defamation,[108] public disclosure of private facts,[109] false light,[110] intentional infliction of emotional distress,[111] copyright,[112] government-employee speech,[113] and freedom of the press.[114] The doctrine has also been coopted 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.[115]

Like the public-figure doctrine, the newsworthy doctrine is animated by an educative theory of the First Amendment. As the Supreme Court has 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 exigencies of their period."[116] The electorate, as arbiters of political decisions in a democratic system, relies on information to make educated decisions.[117] The public, therefore, "is presumptively entitled to all information that is necessary for informed governance."[118]

There's no escaping the fact that a listener-based educative theory underlies much First Amendment doctrine, and that's 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's incorrect—it's 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 free speech 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.[119]

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.[120] Although it's important that we remain informed

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the newsworthy doctrine clung on, perhaps to return again when a particular justice found the results of the public-figure approach intolerable.

[107] By "quasi-constitutional," I refer principally to various newsworthy defenses or exceptions under *state* law that aim to avoid First Amendment concerns under *federal* law. *See also infra* Parts III.B.3 and 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 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").

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

[109] *See* DANIEL J. SOLOVE & PAUL M. SCHWARTZ, PRIVACY AND THE MEDIA 124 (2008).

[110] Time, Inc. v. Hill, 385 U.S. 374, 388 (1967).

[111] *Snyder*, 131 S. Ct. at 1216.

[112] *Nat'l Rifle Ass'n Am.*, 15 F.3d at 562.

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

[114] Bartnicki v. Vopper, 532 U.S. 514, 535 (2001).

[115] R.I. GEN. LAWS § 9-33-1.

[116] *Thornhill*, 310 U.S. at 101–02; *see also* Lyrissa Barnett Lidsky, *Nobody's Fools: The Rational Audience as First Amendment Ideal*, 2010 U. ILL. L. REV. 799, 810 (2010).

[117] POST, CONSTITUTIONAL DOMAINS, *supra* note 4, at 77–78.

[118] *Id.* at 78.

[119] *See* MEIKLEJOHN, POLITICAL FREEDOM, *supra* note 31, at 26.

[120] For background on the concept of "public discourse" as the 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

about public issues, "[w]hat falls within public discourse and what falls outside of it does not depend on the content of the speech," but instead on our understanding of the social function of particular communications.[121] 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]."[122] We thus contribute to the formation of public opinion by expressing our ideas, beliefs, and opinions to one another, and this expression enables us to engage in processes of mutual influence that shape the political and cultural power in our communities.[123] 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."[124] 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."[125] 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.[126] 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."[127] 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

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, CONSTITUTIONAL DOMAINS, *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"); 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 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, *Participatory Democracy as a Theory of Free Speech: A Reply*, 97 VA. L. REV. 617, 621 (2011); Post, *Meiklejohn's Mistake*, *supra* note 81, 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 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*]; 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; Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183, 1210–20 (2016) [hereinafter Balkin, *Information Fiduciaries and the First Amendment*].

[121] Balkin, *Information Fiduciaries and the First Amendment*, *supra* note 120, at 1214.

[122] *Id.* at 1211.

[123] *See id.* at 1211–12; Jack M. Balkin, *Cultural Democracy and the First Amendment*, 110 NW. 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*]; and Madow, *supra* note 25, at 127, 239.

[124] Post, *The Constitutional Status of Commercial Speech*, *supra* note 120, at 7.

[125] Post, *Meiklejohn's Mistake*, *supra* note 81, at 1115; *see also* Post, *The Constitutional Status of Commercial Speech*, *supra* note 120, at 7; THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 7 (1970) (emphasizing the role of free speech in "provid[ing] for participation in decisionmaking by all members of society.").

[126] Balkin, *Information Fiduciaries and the First Amendment*, *supra* note 120, at 1211.

[127] *Id.*

people must be free to participate in the formation of public opinion by creating expressive works.[128]

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 won't 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, he relied on its ability to assist the voter in making decisions.[129] 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."[130] In his view, art may help voters develop "knowledge, intelligence, [and] sensitivity to human values"—all of which guide our decisions when we vote.[131] 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."[132] In other words, the speaker is the listener's handmaiden.

The listener-baser educative theory also creates an additional risk for free speech: by tying the decision about whether an expressive work gets protection on its ability to "inform" the public, the theory opens the door to snobbery. To understand why, 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 *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*."[133] At the other end lie the *capacious* theorists, like Meiklejohn, who cram a lot into their informing-the-public box.[134] This spectrum carries over into the courts, where judges broadly or narrowly construe what constitutes a matter of public concern.[135]

This educative spectrum invites elitism. This commonly takes the form of "politico-centrism," which

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[128] *See* Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 485–86 (2011); Balkin, *Digital Speech and Democratic Culture*, *supra* note 123, at 5.

[129] Meiklejohn, *The First Amendment is an Absolute*, *supra* note 32, at 255–57.

[130] *Id.* at 255.

[131] *Id.* at 256; *see also id.* 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").

[132] Balkin, *Cultural Democracy and the First Amendment*, *supra* note 123, at 1056.

[133] Bork, *supra* note 32, at 20 (emphasis added); 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 modem jurist or academic").

[134] *See supra* notes 129–131 and accompanying text.

[135] 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, 131 S. Ct. 1207, 1216 (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'" (citations omitted)); Post, *Data Privacy and Dignitary Privacy*, *supra* note 31, at 1057.

is the tendency to "overstress the importance of politics to the life of ordinary citizens."[136] Politico-centrists often belittle and devalue speech that isn't 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. That's not to say, of course, that expressive works can't do both. Many do. It's just that it's easier for politico-centrists to hide their snobbery when an expressive work serves no obvious informative function, as is true for many expressive works.

Even capacious educative theorists like Meiklejohn could be accused of politico-centric snobbery,[137] 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,[138] while Bork wouldn't protect nonpolitical art at all.[139] 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.[140] 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."[141] My point isn't that we must ignore that some speech better equips voters to make informed decisions; it's 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.

B. *Educative Defenses to Publicity Rights*

Over the years, educative theory has crept into the realm of the right of publicity.[142] Four listener-based

[136] Balkin, *supra* note 92, at 1985–86.

[137] *See* MEIKLEJOHN, POLITICAL FREEDOM, *supra* note 31, 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 123, at 1056 (ascribing the "politico-centric" label to Meiklejohn's theory of the First Amendment).

[138] SUNSTEIN, *supra* note 32, at 153–59; *see also id.* at 84–91 (belittling "low quality" television programming that appeals to tastes of uneducated).

[139] Bork, *supra* note 32, at 26–28.

[140] FISS, THE IRONY OF FREE SPEECH, *supra* note 32, at 40–45.

[141] Fiss, *Why the State?*, *supra* note 90, at 788; *see also* Fiss, *Free Speech and Social Structure*, *supra* note 88, at 1413 ("From the perspective of a free and open debate, the choice between *Love Boat* and *Fantasy Island* is trivial.").

[142] *See, e.g.*, Campbell v. Seabury Press, 614 F.2d 395, 397 (5th Cir. 1980) (acknowledging that courts faced with publicity claims have "recognized two closely related yet analytically distinct privileges": "the privilege to publish or broadcast facts, events, and information relating to public figures," and "the privilege to publish or broadcast news or other matters of public interest"); 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 plaintiff's escapades made him a "notorious public figure"); C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 505 F.3d 818, 823 (8th Cir. 2007) (considering newsworthiness and finding persuasive that there was "substantial public interest"); Keller v. Elec. Arts, Inc. (*In re* NCAA Student-Athlete Name & Likeness Licensing Litig.), 724 F.3d 1268, 1282–83 (9th Cir. 2013) (considering newsworthiness and ultimately rejecting the defense); Perkins v. LinkedIn Corp., No. 13-CV-04303-LHK, 2014 WL 6618753, at *15 (N.D. Cal. Nov. 13, 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"); 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'" (citations omitted)); Hill v. Pub. Advocate of the U.S., No. 12-CV-02550-WYD-KMT, 2014 WL 1293524 (D. Colo. Mar. 31, 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"); Somerson v.

educative defenses have emerged: (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.

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.[143] Thus, as with the educative defenses to other torts, these four defenses provide limited, parasitic protection to speakers.[144] 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*, 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.[145] Because Leopold's crime remained "an American *cause celèbre*" and a "matter of 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.[146] These rights rested on educative justifications about the public's "strong curiosity and social and news interest in the crime."[147]

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"); 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"); 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'"); Leviston v. Jackson, 980 N.Y.S.2d 716 (N.Y. Super. Ct. 2013) (explaining that, under New York law, plaintiff cannot recover "if the use to which his or her image was put is in the context of reporting a newsworthy incident"); Stayart v. Google Inc., 710 F.3d 719 (7th Cir. 2013) (explaining that, under Wisconsin law, the "newsworthiness" exception applies "where a matter of legitimate public interest is concerned"); *see also* Jesse Koehler, Fraley v. Facebook*: The Right of Publicity in Online Social Networks*, 28 BERKELEY TECH. L.J. 963, 967–68 (2013).

[143] In some instances, the courts didn't denominate the right as a "right of publicity" in the decisions discussed below. 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 42, 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" doesn't matter. For the sake of clarity, I will refer to the tort as the "right of publicity" throughout.

[144] *See* Lemley, *supra* note 10, at 28 ("Some states have created protections for news reporting and some creative works, but those are often quite limited.").

[145] 259 N.E.2d 250, 254 (Ill. 1970).

[146] *Id.*

[147] *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 (Cal. Super. Ct. Oct. 27, 2014) (concluding that plaintiff's

Similarly, in *Ann-Margret v. High Society Magazine, Inc.*, a federal district court invoked the First Amendment when considering an actress's claim against a magazine that published photos of her without her consent.[148] The court noted that the right of publicity "can be severely circumscribed as a result of an individual's newsworthiness"[149] 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."[150] These educative concerns meant that publicity rights would "rarely" prevail when a person's name or picture are 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."[151] Because the photos informed the public about "a newsworthy event," the court held that the First Amendment barred the actress's claim.[152]

But defendants' pleas for an affirmative constitutional shield have not always been successful. In *Groucho Marx Productions, Inc. v. Day & Night Co.*, 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.[153] The play portrayed the famous comedic troupe "in a new situation and with original lines,"[154] 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."[155] In other words, the play was unprotected because it failed to serve educative goals of informing the public about the real-life Marx Brothers.[156]

2. The Constitutional Actual-Malice Requirement

Educative theory has also affected publicity through judicial importation of the constitutional actual-malice standard from defamation law.[157] 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

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claim "cannot survive defendants' First Amendment defense" in part because his escapades as the "Dictator of Panama" made him a "notorious public figure").

[148] 498 F. Supp. 401, 405 (S.D.N.Y. 1980).

[149] *Id.* at 405 (quoting Time, Inc. v. Hill, 385 U.S. 374, 382 (1967)).

[150] *Id.* at 404.

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

[152] *Id.* at 405–06.

[153] 523 F. Supp. 485, 492 (S.D.N.Y. 1981), *rev'd on other grounds*, 689 F.2d 317 (2d Cir. 1982).

[154] *Id.*

[155] *Id.* at 493; *see also* Groucho Marx Prods., Inc. v. Day & Night Co., 689 F.2d 317, 319 (2d Cir. 1982).

[156] The California Supreme Court, too, has raised the public-figure and newsworthy doctrines and yet ruled against defendants raising a First Amendment defense. In *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 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." 21 P.3d 797, 803–04 (Cal. 2001). 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—wasn't sufficiently "transformative" to get First Amendment protection. *Id.* at 811.

[157] *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.").

statement of fact" that the defendant published with "knowledge of its falsity" or "reckless disregard of its truth."[158]

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.[159] 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."[160] 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.[161] 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."[162] Because the court concluded that Hoffman couldn't satisfy that burden, the First Amendment barred his claim.[163]

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.[164] The district court explained that the magazine "fabricated" the photo and published it "knowing it was false."[165] 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.[166] 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.[167] 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

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[158] 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."). For other examples of plaintiffs employing the actual-malice standard as a shield against the right of publicity, see, for example, Dora v. Frontline Video, Inc., 18 Cal. Rptr. 2d 790, 792 (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"); 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"); Doe v. TCI Cablevision of Mo., No. ED 78785, 2002 WL 1610972, at *13 (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."); 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, 112–13 (Cal. Ct. App. 2010) (concluding that "a defendant publisher may assert that the actual malice standard applies to claims for commercial misappropriation").

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

[160] *Id.* at 1183.

[161] *Id.*

[162] *Id.* at 1187 (emphasis added).

[163] *Id.* at 1189.

[164] 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.

[165] *Hoffman*, 33 F. Supp. 2d at 875.

[166] *Id.*

[167] *Hoffman*, 255 F.3d at 1186–89.

result, the First Amendment offered no defense against the right of publicity.[168] The court of appeals reversed only after engaging in a fact-intensive inquiry about whether the magazine's editors had knowingly or recklessly misled readers into believing that Hoffman had actually posed for the photo.[169] 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.[170] The author admitted that he had "fictionalized and dramatized" aspects of Spahn's life so that the book would appeal to "a juvenile readership."[171] This included "imaginary incidents, manufactured dialogue and a manipulated chronology,"[172] all of which the author insisted were important and common "literary techniques" of the genre.[173] 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.[174] 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."[175] 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.[176]

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 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."[177] 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."[178] In other

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

[169] *Hoffman*, 255 F.3d at 1186–89.

[170] Spahn v. Julian Messner, Inc., 21 N.Y.2d 124, 127 (N.Y. 1967).

[171] Spahn v. Julian Messner, Inc., 23 A.D.2d 216, 219 (N.Y. App. Div. 1965), *aff'd*, 18 N.Y.2d 324 (N.Y. 1966), *vacated sub nom.* Julian Messner, Inc. v. Spahn., 387 U.S. 239 (1967).

[172] *Id.*

[173] *See Spahn*, 21 N.Y.2d at 128.

[174] *Id.* at 127.

[175] *Id.*

[176] *Id.* at 127–28.

[177] *Id.* at 128.

[178] Spahn v. Julian Messner, Inc., 18 N.Y.2d 324, 329 (N.Y. 1966), *vacated sub nom.* Julian Messner, Inc. v. Spahn., 387 U.S. 239 (1967).

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 Exceptions

Educative theory has also influenced publicity claims through state-law exceptions for portrayals that are "newsworthy" or in "the public interest.[179] 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.[180] Although courts often rely on First Amendment principles in construing these exceptions, their application is a matter of state law.[181]

Where states have recognized common-law publicity rights, courts have often crafted judicial exceptions for newsworthy uses.[182] The Georgia Supreme Court adopted such an exception for portrayals related to "an incident [that] is a matter of public interest, or the subject matter of a public investigation."[183] Many states now guarantee similar exceptions by statute.[184] Indiana law, for example, exempts portrayals in "[m]aterial that has political or newsworthy value"[185] and "in connection with the broadcast or reporting of an event or a topic of general or public interest."[186]

In California—a state where celebrity plaintiffs often seek to enforce publicity rights—statutory and common-law exception exceptions exist to serve educative ends. As a statutory matter, the right of publicity doesn't apply to portrayals connected to "any news, public affairs, or sports broadcast or account, or any

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[179] *See* Eastwood v. Superior Court, 198 Cal. Rptr. 342, 350 (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); Bosley v. Wildwett.com, 310 F. Supp. 2d 914, 920 (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.").

[180] *See* New Kids on the Block v. News Am. Publ'g., Inc., 971 F.2d 302, 309-10 & n.10 (9th Cir. 1992) (noting that California's "public affairs" exception to the right of publicity "is not coextensive with the First Amendment" but rahter "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").

[181] 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" (internal citations omitted)).

[182] 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 publicity cause of action where the plaintiff's name or picture was used in connection with a matter of public interest.").

[183] 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.").

[184] *See, e.g.*, Ariz. Rev. Stat. Ann. § 12-761 (2017); Ariz. Rev. Stat. Ann. § 13-3726 (2017); Fla. Stat. Ann. § 540.08 (2017); 765 Ill. Comp. Stat. Ann. 1075 (2017); Mass. Gen. Laws Ann. ch. 214, § 3A (2017); Neb. Rev. Stat. § 20208 (2017); Ohio Rev. Code Ann. § 2741 (2017); Okla. Stat. Ann. tit. 12, § 1448 (2017); Okla. Stat. Ann. tit. 12, § 1449 (2017); 42 Pa. Cons. Stat. § 8316 (2017); Tex. Prop. Code Ann. § 26.012 (2017); Wash. Rev. Code Ann. § 63.60.070 (2017); Wis. Stat. Ann. § 895.50 (2017).

[185] IND. CODE § 32-36-1-1(c)(1)(B) (2017).

[186] *Id.* § 32-36-1-1(c)(3).

political campaign."[187] 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."[188] Some courts have suggested that this defense is limited in scope, extending only to "reporting of recent events"[189] 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.'"[190]

In a prominent case involving the application of these state-law exceptions to expressive works, the Ninth Circuit in *Keller v. Electronic Arts, Inc.* adopted a cramped interpretation of California's exceptions to conclude that they did not apply to a videogame that featured real-life college athletes playing in games that had never actually occurred.[191] Although the court acknowledged that California law provides that the right of publicity doesn't apply to "newsworthy items" and "matters in the public interest," the court held that the videogame's creators could be liable because the videogame didn't involve the "publication or reporting" of "factual information" or "factual data."[192] 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."[193] 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.[194] The court held that the exceptions didn't apply because the videogame "is not a publication of facts about college football; it is a game, not a reference source."[195] In short, the videogame served no informative function and thus served no educative end.

A federal district court in Ohio sung a similar tune in *Bosley v. Wildwett.com*, 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.[196] The court granted the news anchor's request to enjoin a

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[187] CAL. CIV. CODE § 3344.1(j) (2017).

[188] *Hilton,* 599 F.3d at 912 (quoting *Montana v. San Jose Mercury News, Inc.,* 34 Cal.App.4th 790, 793, 40 Cal.Rptr.2d 639 (1995)).

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

[190] Stewart v. Rolling Stone LLC, 181 Cal. App. 4th 664, 681 (Cal. Ct. App. 2010) (quoting Gionfriddo v. Major League Baseball, 114 Cal. Rptr. 2d 307, 313 (Cal. Ct. App. 2001)); *see also* Arenas v. Shed Media U.S. Inc., 881 F. Supp. 2d 1181, 1191–92 (C.D. Cal.), *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 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"); Edme v. Internet Brands, Inc., 968 F. Supp. 2d 519 (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"); Dryer v. Nat'l Football League, No. CIV. 09-2182 PAM/FLN, 2014 WL 5106738, at *13 (D. Minn. Oct. 10, 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").

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

[192] *Id.*

[193] *Id.*

[194] *Id.*

[195] *Id.*

[196] Bosley v. Wildwett.com, 310 F. Supp. 2d 914, 917–18, 920 (N.D. Ohio 2004) ("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

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."[197] Likewise, in *Cardtoons, L.C. v. Major League Baseball Players Association*, the Tenth Circuit held that the exception under Oklahoma law "provide[d] no haven" for portrayals of professional baseball players on parody trading cards.[198] 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 didn't apply because the players' likenesses were not used "in connection with any news account."[199]

Finally, even when courts have recognized that an expressive work relates to public issues, these state-law exemptions don't necessarily provide a defense if the plaintiff's identity was used in a "knowingly false manner."[200] As a result, in *Browne v. McCain*, the court rejected presidential candidate John McCain's motion to dismiss a publicity claim against a singer, Jackson Browne, whose song McCain's campaign had used in a political commercial. 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."[201] Because Browne hadn't given McCain permission to use the song, he argued that using it falsely implied an endorsement of McCain's candidacy, when in fact Browne had been a strong supporter of Barack Obama.[202] The court allowed Browne's claim to proceed.

4. Narrowed 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 a broad publicity rights.[203] To assuage these concerns, they've narrowly construed elements to avoid liability for speech about matters of public concern.[204]

For example, under New York law, the unauthorized portrayal must be for "the purposes of trade" for there to be liability under the state's statute.[205] 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.[206] Thus, in *Rosemont Enterprises, Inc. v. Random House, Inc.*, the New York Supreme

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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)).

[197] *Id.* at 927.

[198] 95 F.3d 959, 968 (10th Cir. 1996) (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. ANN. tit. 12, § 1449(D))).

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

[200] Browne v. McCain, 611 F. Supp. 2d 1062, 1071 (C.D. Cal. 2009); *see also* Solano v. Playgirl, Inc., 292 F.3d 1078, 1089 (9th Cir. 2002) (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").

[201] *Browne*, 611 F. Supp. 2d at 1070.

[202] *Id.* at 1067.

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

[204] *Id.*

[205] N.Y. CIV. RIGHTS L. § 51 (2014).

[206] *Rosemont Enters., Inc.*, 294 N.Y.S.2d at 127.

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."[207] Similarly, in *Paulsen v. Personality Posters, Inc.*, the court noted that "dissemination of news or information concerning matters of public interest" does not constitute a use for "the purposes of trade."[208]

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."[209] In *Binns v. Vitagraph Co. of America*, the defendant produced a film based on true events about a wireless operator whose heroics helped rescue passengers from a shipwrecked boat.[210] The real wireless operator sued the filmmaker for portraying him without his permission.[211] 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."[212] 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.[213] 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."[214]

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[207] *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 & Pub., 94 N.Y.2d 436, 441 (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., 304 N.Y. 354, 359 (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.").

[208] 299 N.Y.S.2d 501 (N.Y. Sup. Ct. 1968). 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, 350 (Cal. 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").

[209] *Messenger ex rel. Messenger*, 94 N.Y.2d at 446. This rule also applies to discussion of real people in newspaper articles. In 1937, in *Sarat Lahiri v. Daily Mirror*, the New York Supreme Court explained that an unauthorized use would not be for "purposes of trade"—and, accordingly, would be protected by the newsworthy 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." 295 N.Y.S. 382, 388 (N.Y. Sup. Ct. 1937). 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 newsworthy doctrine if the articles were "educational and informative in character." *Id.* at 389.

[210] 103 N.E. 1108, 1108 (N.Y. 1913).

[211] *Id.*

[212] *Id.* at 1110.

[213] *Id.* at 1111.

[214] *Gautier*, 304 N.Y. at 359; *see also* Redmond v. Columbia Pictures Corp., 277 N.Y. 707, 707–08 (N.Y. 1938); Sutton v. Hearst Corp., 277 A.D. 155, 155–57 (N.Y. App. Div. 1950); Franklin v. Columbia Pictures Corp, 246 A.D. 35, 35–37 (N.Y. App. Div. 1935), *aff'd*, 271 N.Y. 554 (N.Y. 1936).

Similarly, in *Hicks v. Casablanca Records*, the heir and assignees of mystery writer Agatha Christie sought to enjoin the distribution of the film and book *Agatha*.[215] 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."[216] This kind of educative reasoning, whereby creators of expressive works are denied protection when their work doesn't 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*.[217] 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.[218] That allegation alone defeated the argument that the film was entitled to the protection for "reports of newsworthy events or matters of public interest."[219]

C. *Why Trump Might Win*

The four defenses discussed above suffer from the same limitations that plague educative theory more generally: their 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 snobbery. 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've 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's no need for hypotheticals—as luck would have it, two interesting publicity problems have been offered by the same person: Donald Trump.

In 2013, when Trump was a real-estate magnate, reality television celebrity, billionaire, but not yet a candidate for political office, rapper Mac Miller released a song titled "*Donald Trump*,"[220] which featured the following lyrics:

> Take over the world when I'm on my Donald Trump shit
> Look at all this money! Ain't that some shit?
> Take over the world when I'm on my Donald Trump shit
> Look at all this money! Ain't that some shit? . . .
>
> Yeah the party never end, this life is what I recommend
> And if you got a hoe picked for me, then she better be a ten
> I ain't picky, but these girls be actin' tricky
> When the situation's sticky and the liquor got 'em silly
> But I take over the world when I'm on my Donald Trump shit
> Look at all this money! Ain't that some shit?[221]

[215] 464 F. Supp. 426, 431 (S.D.N.Y. 1978).

[216] *Id.*

[217] Porco v Lifetime Entm't Servs., LLC, 147 A.D.3d 1253, 1253–56 (N.Y. App. Div. 2017).

[218] *Id.* at 1255.

[219] *See id.* at 1254 (quoting *Messenger ex rel. Messenger*, 94 N.Y.2d at 441).

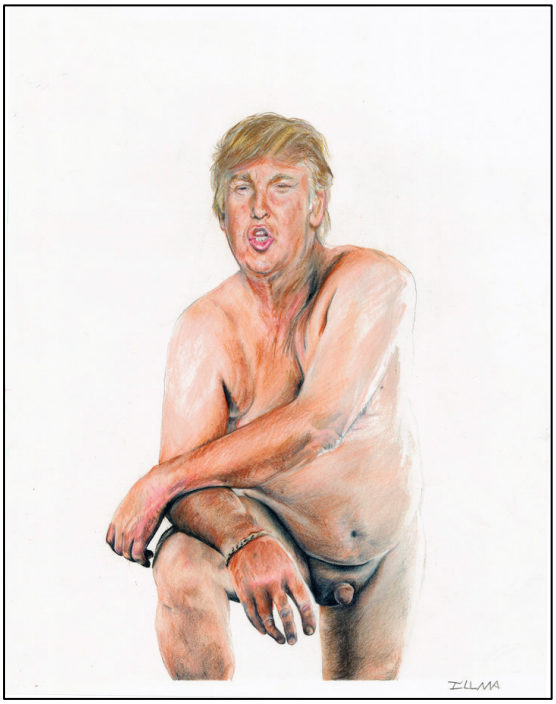
[220] Dave Gilson, *Most Presidents Ignore Products That Rip Off Their Names. Will Trump?*, MOTHER JONES (Feb. 13, 2017), http://www.motherjones.com/politics/2017/02/trump-name-publicity-rights/.

[221] *Donald Trump*, GENIUS, https://genius.com/Mac-miller-donald-trump-lyrics.

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.[222]
>
> Little @MacMiller, you illegally used my name for your song 'Donald Trump' which now has over 75 million hits.[223]
>
> Little @MacMiller, I want the money not the plaque you gave me![224]
>
> Little @MacMiller, I'm now going to teach you a big boy lesson about lawsuits and finance. You ungrateful dog![225]

Miller's song wasn't 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.[226]



Make America Great Again

These two examples provide insight into the perils of relying on educative defenses to shield expressive works. Miller and Gore might have reason to worry. As we've seen, educative defenses pose problems for

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[222] Donald Trump (@realDonaldTrump), TWITTER (Jan. 31, 2013, 1:09 PM), https://twitter.com/realDonaldTrump/status/297043874369650688.

[223] Donald Trump (@realDonaldTrump), TWITTER (Jan. 31, 2013, 3:45 PM), https://twitter.com/realDonaldTrump/status/297083228706201600.

[224] Donald Trump (@realDonaldTrump), TWITTER (Jan. 31, 2013, 3:50 PM), https://twitter.com/realDonaldTrump/status/297084584334589952.

[225] Donald Trump (@realDonaldTrump), TWITTER (Jan. 31, 2013, 4:03 PM), https://twitter.com/realDonaldTrump/status/297087613851017216.

[226] *See supra* notes 1–3 and accompanying text.

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 snobbery that valorizes speech about politics and "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 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.[227] This can be a tough standard to meet for expressive works—particularly those that are fictional, abstract, or nonverbal. That's not to say it's impossible. But when serious consequences can result from liability,[228] 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?"[229] Miller uses Trump's name not as a way to impart any information about Trump, except perhaps that Miller sees 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 use of Trump's name serves as a "common point[] of reference"[230] or "symbol[]"[231] for wealth. That's how Miller sees it, too. When explaining why he chose to invoke Trump's name, he has said that Trump "was just somebody who symbolized financial success to everybody at that time,"[232] and that the line could have easily been "Take over the world when I'm on my Bill Gates shit."[233] Any educative rationale is thin.

As for Gore's painting, it's again difficult (though not impossible) to tell a credible story 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."[234] 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."[235] 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.

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[227] *See supra* Part II.B.

[228] *See supra* notes 20–22 and accompanying text.

[229] *Donald Trump*, GENIUS, https://genius.com/Mac-miller-donald-trump-lyrics.

[230] 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").

[231] 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").

[232] 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.

[233] 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.

[234] *Make America Great Again*, ILLMA GORE, http://illmagore.com/work-1/#/798817030644/ (emphasis added).

[235] *Id.*

It's 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 doesn't explicitly critique Trump's candidacy, titling it with the campaign's motto—*Make America Great Again*—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 "publication or reporting" of "factual information" or "factual data,"[236] 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.[237] 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.[238] 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 didn't use his name and likeness "in connection with any news account."[239] 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.[240]

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 her 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's 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"[241] 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.[242]

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

[237] *See* Binns v. Vitagraph Co. of Am., 103 N.E. 1108, 1110–11 (N.Y. 1913); *see also* Post, *supra* note 80, 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'" (citations omitted)).

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

[239] Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, 968 (10th Cir. 1996).

[240] *See* Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180, 1187 (9th Cir. 2001); *see also* Spahn v. Julian Messner, Inc., 21 N.Y.2d 124, 127 (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, 10:03 p.m.), https://www.vox.com/2016/3/3/11158910/trump-penis-republican-debate-fox (Donald Trump: "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.").

[241] Even though the book doesn't 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).

[242] *See* Messenger ex rel. Messenger v. Gruner + Jahr Printing & Pub., 94 N.Y.2d 436, 446 (N.Y. 2000) (explaining that an expressive work "may be so infected with fiction, dramatization or embellishment that it cannot be said to fulfill the purpose of the newsworthiness exception"); Sarat Lahiri v. Daily Mirror, 295 N.Y.S. 382, 388 (N.Y. 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., 23 A.D.2d 216, 219 (N.Y. App. Div. 1965), *aff'd*, 18 N.Y.2d 324 (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").

As we saw in *Hicks*, even the inclusion of some facts might not be enough to make the book newsworthy.[243] 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.[244]

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.[245] The standard first asks whether the work contains a false statement of fact or creates a "false impression" about the person being portrayed.[246] Fiction stands in contrast to fact. As one court has 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."[247] Once falsity is established, courts ask whether the speaker showed a "reckless disregard" for the truth,[248] meaning that she told a "known lie" or "calculated falsehood."[249] Again, these standards clash with the intentional use of untruth when creating a fictitious worlds starring real people.[250] As the dissenting judge in *Spahn* cautioned:

> 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.[251]

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's also unclear what "truth" even means in this context, let alone why it should be required. As Steven Shiffrin has remarked: "[T]he idea that literature's claim to first amendment 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."[252] This might explain why the Supreme Court has referenced expressive works to explain why "a narrow, succinctly articulable message is not a condition of

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

[244] *See* Porco v Lifetime Entm't Servs., LLC, 147 A.D.3d 1253, 1255 (N.Y. App. Div. 2017).

[245] *See supra* Part II.B.2.

[246] *See Hoffman*, 255 F.3d at 1187; *Hoffman*, 33 F. Supp. 2d at 875; *see also Spahn*, 21 N.Y.2d at 127.

[247] 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 (Cal. Ct. App. Mar. 26, 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.").

[248] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

[249] Garrison v. State of La., 379 U.S. 64, 75 (1964).

[250] 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 *13 (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.").

[251] *Spahn*, 21 N.Y.2d at 131 (Bergan, J., dissenting).

[252] STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 48 (1990).

constitutional protection."[253] 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."[254] This kind of rule is at odds with an educative theory of free speech.

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.[255] 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.[256] 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.[257] 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.[258] In all, then, there are many reasons why educative defenses provide limited protection for expressive works that portray real people.

III. WHAT'S THE SOLUTION?

Having diagnosed the problems with educative defenses, let's 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 public discourse, concluding that none are satisfactory and proposing a new analytical framework. It ends by sketching how courts might use this new framework to address some of the toughest and most topical issues raised by publicity rights.

A. Why Trump (Probably) Shouldn't 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 heightened protection, even if they portray real people without permission. Under First Amendment doctrine, 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

[253] Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 569 (1995).

[254] *Id.*

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

[256] *See* POST, CONSTITUTIONAL DOMAINS, *supra* note 4, at 168.

[257] *See supra* Part II.B.

[258] *See* Siddique, *supra* note 21, at 2115–16; Bosley v. Wildwett.com, 310 F. Supp. 2d 914, 935 (N.D. Ohio 2004).

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.

To review, participation in public discourse may serve two functions: a *legitimating* function by cultivating the warranted belief that government is responsive to its citizens, and an *empowering* function by enabling processes of mutual influence through which we shape political and cultural power. Publicity rights may interfere with both functions by creating liability for some expressive works, but their more dramatic threat is to the latter of these goals of public discourse: they restrict our ability to shape cultural power. This is especially so when powerful cultural figures assert these rights, as is often the case.

On its face, 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.[259] As Michael Madow has argued, portrayals of real people serve as "important expressive and communicative resources"[260] 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."[261] 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.[262]

This point leads to the second problematic dimension of publicity rights' effect on cultural power: they entrench power with powerful by facilitating "private censorship of popular culture."[263] 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 subcommunities to which they belong."[264] By privatizing and centralizing an important form of cultural

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[259] *See* Balkin, *Digital Speech and Democratic Culture*, *supra* note 123, at 1, 34; Madow, *supra* note 25, at 134.

[260] Madow, *supra* note 25, at 128.

[261] *Id.*

[262] 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., 23 A.D.2d 216, 219 (N.Y. App. Div. 1965), *aff'd*, 18 N.Y.2d 324 (N.Y. 1966), *vacated sub nom.* Julian Messner, Inc. v. Spahn., 387 U.S. 239 (1967). But this proof didn't 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.*

[263] *Id.* at 138.

[264] Balkin, *Digital Speech and Democratic Culture*, *supra* note 123, at 3–4, 33. Balkin's work builds on the work of John Fiske, whose idea of "semiotic democracy" illuminates the importance of popular participation in culture. JOHN FISKE, TELEVISION CULTURE 236, 239 (1987). Balkin isn't 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.*, 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); 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, *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

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. Whether we see this as a constitutional concern or merely a policy matter, this trend is concerning.

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's essential to scrutinize both the interests that publicity rights purport to serve and the values furthered by the First Amendment. As we'll 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 may be times where particular countervailing interests allow public discourse to be curtailed.[265]

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 interest 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're financially rewarded in the form of an economic legal right.[266] Although this rationale has some intuitive appeal, it's unlikely to withstand scrutiny, at least outside of the narrow context when an unauthorized portrayal would be fully substitutionary.[267] Plenty of adequate incentives already exist such that publicity rights offer no meaningful enhancement. What's more, if the incentive rationale ultimately rests on enriching public welfare, we must also factor in the considerable costs to public welfare brought about by speech restrictions imposed by publicity rights.[268]

Law-and-economics scholars have advanced a second public interest based on the idea that publicity rights efficiently maximize wealth and allocate resources in ways that ultimately benefit the public.[269] This rationale depends on an assumption that unauthorized portrayals in expressive works will decrease the commercial value of a person's name or likeness. Like the incentive rationale, the efficiency rationale is likely to fall apart on closer inspection, as many have shown.[270] Many of the empirical claims that underlie the efficiency justification 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 shouldn't presume (as the efficiency rationale does) that any person deserves the *entire* value of her identity, nor can we know (and

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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); 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); 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); LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD 9–10 (2001); David Lange, *Reimagining the Public Domain*, 66 LAW & CONTEMP. PROBS. 463, 475–83 (2003).

[265] *See* Post, *Data Privacy and Dignitary Privacy*, *supra* note 31, at 1009.

[266] *See* Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 576 (1977).

[267] *See, e.g.*, Volokh, *supra* note 28, at 906.

[268] ROTHMAN, *supra* note 10, at 101–02.

[269] *See* sources cited *supra* 37.

[270] *See, e.g.*, Volokh, *supra* note 28, at 911 n.32.

indeed we might doubt) that vesting a right of portrayal in one person instead of the public actually enhances the overall public welfare.[271]

Other justifications for publicity rights focus on their ability to protect individual interests. For example, some argue that they're justified because they reward labor and prevent unjust enrichment caused by freeloading.[272] This rationale, while again intuitively attractive, can't bear the weight needed to justify publicity rights across the board. Even assuming that a person has a moral claim to reap some rewards from her labor, that claim can't 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.[273] And similar to the problem with the efficiency rationale, it's impossible to determine what allocation would be fair and therefore which uses are unjust.

A more compelling individual interest might focus on addressing dignitary injuries that unauthorized portrayals inflict on a person's autonomy, liberty, and privacy.[274] Sometimes, this interest can also be understood to vindicate public concerns, 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.[275] These justifications require some normative conception of what harms dignity and where the limit on dignitary harm might be set, vis-à-vis speech. There are all kinds of expressive uses that harm dignity or autonomy—perhaps a person simply doesn't like the actress picked to play them, or they don't like how an artist drew their nose or hair—and it's not clear that we want all of these kinds of dignitary harms to receive protection. Still, publicity rights could play a significant role in responding to dignitary harms, especially those raised by the new technologies discussed below.[276]

Building on this critical analysis of the interests served by publicity rights, let's now consider several approaches that courts and legislatures have used to curb publicity rights to protect public discourse. All of them would protect public discourse better than the educative defenses that currently rule the roost, but none are satisfactory because they are either over-protect or under-protect speech interests.

One approach to solving the problem of publicity rights might be to simply make the First Amendment a categorical defense for all expressive works. This would set a blanket rule that the First Amendment always prevents publicity rights from inhibiting 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 noncommercial speech 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.[277] Courts in other states have offered similar carve-outs that they implement through statutory construction of publicity tort elements.[278]

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[271] *See* ROTHMAN, *supra* note 10, at 100–05.

[272] *See id.* at 105–10 (summarizing arguments made by others).

[273] *See id.*; Madow, *supra* note 25.

[274] *See, e.g.*, ROTHMAN, *supra* note 10, at 111–12; Kwall, *supra* note 40, at 158–59.

[275] McKenna, *supra* note 41, at 225; Lemley, *supra* note 10, at 16–17.

[276] *See* Lemley, *supra* note 10, at 17 ("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."); Christoff v. Nestlé USA, Inc., 213 P.3d 132, 134 (Cal. 2009). *But see* Lemley, *supra* note 10, at 19–20 (worrying that the same dignity rationale might preclude portrayals of the neo-Nazis in Charlottesville or the police who have murdered African Americans).

[277] *See, e.g.*, Ariz. Rev. Stat. Ann. § 12-761(H)(1) (2017).

[278] *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").

This 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—which, though much of this Article has argued against them, are not totally without value. This inflexibility is troubling when new technologies threaten novel dignitary harms that publicity rights might vindicate—for example, expressive works like "deep fakes," discussed more below, that feature real people's faces realistically transposed onto videos, many of which are pornographic. Categorical protection would be a boon to creators of expressive works, but it might ultimately disserve public discourse because of the "the paradox of public discourse"—that is, the idea that public discourse can perform its legitimating function "only if it is conducted with a modicum of civility."[279] 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.[280] Under sufficiently uncivil conditions, public discourse will no longer foster the sense of legitimacy and thus the justification for protecting it will diminish.[281]

A second approach might be to allow publicity rights to prevail against expressive works only if they are likely to deceive consumers in some legally cognizable way. Some courts have adopted the standard from *Rogers v. Grimaldi*, which permits publicity claims to prevail only if the portrayal is wholly unrelated to the expressive work or actually a disguised commercial advertisement for the sale of goods or services.[282] This approach, which has roots in trademark law, could essentially serve to double check if a commercial advertisement 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 portrayal is "wholly unrelated" to the expressive work (that is, if it has "no relevance" whatsoever to the underlying work), or whether the expressive work is merely a "disguised commercial advertisement" that explicitly deceives the public by affirmatively claiming sponsorship or endorsement.[283]

The main advantage of the *Rogers* test is that would offer sweeping protection for public discourse. In practice, it has proved 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 dignitary harms that have nothing to do with consumer confusion. Again, take the example of "deep fake" pornography: the harm wrought by these expressive works is not simply that a viewer might be deceived into believing that they're watching a video that actually portrays the subject (although that harm may also exist). Rather, it's the dignitary harm inflicted on the subject herself.

Finally, courts might apply strict scrutiny to publicity claims that challenge portrayals of real people in expressive works. At least one court has applied strict scrutiny to assess whether such a publicity claim was consistent with the First Amendment. In *Saver v. Charier*, 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

[279] Post, *Data Privacy and Dignitary Privacy*, *supra* note 31, at 1009.

[280] *Id.*

[281] *Id.*

[282] 875 F.2d 994, 1004 (2d Cir. 1989).

[283] *See* E.S.S. Entm't 2000, Inc. v. Rock Star Videos, Inc., 547 F.3d 1095, 1100 (9th Cir. 2008). Under this approach, sponsorship or endorsement could not be inferred solely from the use of a person's name or likeness, lest the analysis be circular. Note also that the First Amendment might still provide protection to parody or satire even if it took the form of a farcical commercial advertisement or a comical "endorsement" that wasn't reasonably believable. *See* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 57 (1988).

compelling state interests."[284] Applying that standard, 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 an expressive work.[285] Although the *Sarver* court justified its application of strict scrutiny on the fact that the right of publicity is a content-based restriction, the same rigorous standard may be justified by the fact that a particular publicity claim seeks to restrict public discourse by targeting an expressive work.

Applying strict scrutiny has the advantage of allowing courts to inspect—on a case-by-case basis—particular interests that publicity rights might serve and demand that the publicity-based remedy is narrowly tailored to serve that interest. This flexibility is advantageous as courts are called to respond to emerging technologies that create novel harms, particularly dignitary ones. But there are two fatal disadvantages to this approach. First, it retains some of the uncertainty that currently plagues this area of the law because it's tough to predict in advance which interests courts will find compelling and narrowly addressed in any given case (and, at the very least, it will provide plaintiffs with flexibility in making their arguments). Second, and relatedly, the standard itself doesn't inherently curtail the long list of interests that publicity rights purportedly serve and yet fail to withstand serious scrutiny.

[Here, I'll explain why there are only two narrow interests served by publicity rights that might be compatible with the idea of public discourse. The first is a circumscribed version of the incentive rationale discussed above. This would permit liability only when portraying a real person in an expressive work would substantially interfere with her incentive to create expressive works herself, such as when the portrayal is fully substitutionary. This rationale underlies the Supreme Court's only consideration of the interaction between publicity rights and the First Amendment in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977). The second interest is a circumscribed version of the dignity rationale discussed above. Generally speaking, the First Amendment doesn't allow civility norms to dictate the content of public discourse—such as in *Cohen v. California* (the case involving the "Fuck the Draft" t-shirt) and *Hustler v. Falwell* (the case involving the highly offensive parody of Christian minister Jerry Falwell). But there may be certain times where enforcing civility norms can be consistent with the First Amendment because of the "the paradox of public discourse," briefly discussed above. In these circumstances, publicity claims might be compatible with protection of public discourse. Otherwise, I believe none of the other interests purportedly served by publicity rights can be squared with an understanding of the First Amendment that protects public discourse. It's important to note that other torts, like false light and public disclosure of private facts, might provide protection against some unauthorized uses of a person's image, but they are subject to their own First Amendment limitations.]

C. Hard Cases

If courts were to reframe publicity doctrine in the way I have suggested, how would might this approach handle the thorniest publicity-related issues of the day? It's difficult to map out hypotheticals precisely, but this section sketches out general thoughts about how courts might approach some of the pressing disputes that are, or soon will be, before them.

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[284] Sarver v. Chartier, 813 F.3d 891, 903 (9th Cir. 2016) (quoting Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226 (2015)).

[285] *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 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 Broadcasting Co., 433 U.S. 562, 576 (1977)).

In recent years, innovation surrounding the simulation of human likeness has become incredibly advanced.[286] So too has the ability of people to post videos online. This new technology is enabling the widespread creation and dissemination of "audio and video of real people saying and doing things they never said or did."[287] These so-called "deep fakes" have featured near-perfect simulations of various celebrities' faces transposed onto the bodies of actresses in pornographic movies, among other things.[288] There have also been parallel advances in the field of virtual reality or "VR," which has the potential to transform "deep fakes" into a fully immersive experience. And, to make matters worse, the proliferation of "revenge porn"—a term 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.[289]

Another set of challenges have arisen in response to developments in the world of sports and entertainment. Hyper-realistic videogames have featured real-world college athletes, political figures, and musicians.[290] Meanwhile, the market has exploded for "fantasy sports" games that allow the public to play online competitions between made-up teams filled with actual sports stars.[291] The public's appetite for celebrity-based fantasy has also prompted expressive works that imagine the famous figures in fictional settings. Lastly, the faces of cultural icons have appeared on dolls, busts, and other commemorative merchandise.[292]

All of these portrayals of real people occur in expressive works. As a result, they should presumptively receive protection because their creators are participating in public discourse. For the reasons discussed above, many of the traditional interests that courts and scholars have raised to justify publicity rights are incompatible with protection of public discourse.

[Here I will discuss how these various "hard cases" might shake out under the analytical framework I'll develop in the previous section. For some of the reasons discussed earlier, I believe that the efficiency and labor-reward rationales have no purchase in public discourse. As for the incentive rationale, the burden would be on the plaintiffs to prove how their portrayals would substantially interfere with their incentives to create expressive works themselves. In these hard cases, my sense is that plaintiffs might have better luck invoking the dignitary interests served by publicity rights. It is, admittedly, difficult to cabin the scope of these dignitary interests, but the paradox of public discourse provides a good starting point. Because public discourse depends on certain civility rules to ensure that people are likely to experience it as a means of influencing the construction of public opinion, publicity claims could prevail against expressive works that create sufficiently abusive and alienating conditions in public discourse.[293] Convincing uses of "deep fakes," for example, might be challenged as harming both the dignity of the subject portrayed and deceiving the public into believing a reality that never existed. Although deception isn't at play with revenge porn,

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[286] Robert Chesney & Danielle Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, CAL. L. REV. (forthcoming 2019).

[287] *Id.* at 1.

[288] *Id.*

[289] 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.*

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

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

[292] *See, e.g.*, Martin Luther King, Jr., Ctr. for Soc. Change, Inc., 296 S.E.2d at 700.

[293] Post, *Data Privacy and Dignitary Privacy*, *supra* note 31, at 1009.

nonconsensual pornography inflicts a grave violation of civility norms. On the other hand, the claims we've seen against creators of fantasy-sports competitions, videogames, and merchandise would struggle to meet such an exacting standard—they do no abuse or alienate in the way that nonconsensual depiction and dissemination of sexual acts does.]

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 shouldn't 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."[294] By recalibrating the theoretical foundations of this debate, we can justify and explain speech protection for these works with 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 apparent when it's 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,[295] 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 theory 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.

[294] EMERSON, *supra* note 125, at 7.

[295] *See* MEIKLEJOHN, POLITICAL FREEDOM, *supra* note 31, at 10.