

**DRAWING TRUMP NAKED:  
CURBING THE RIGHT OF PUBLICITY TO PROTECT CULTURAL DEMOCRACY**

*Thomas E. Kadri\**

INTRODUCTION.....	2
I. UNPACKING THE RIGHT OF PUBLICITY .....	5
A. The Right of Publicity’s Commercial Core.....	6
B. Expressive Works and the Right of Publicity .....	7
II. FROM BORK TO BALKIN: SOME FIRST AMENDMENT FIRST PRINCIPLES .....	9
A. Politico-Centric Theories .....	9
B. Cultural Theories.....	13
III. THE PUBLIC-FIGURE AND NEWSWORTHY DOCTRINES.....	14
A. A Tale of Two Doctrines.....	15
B. Politico-Centric Defenses to the Right of Publicity .....	19
1. The Constitutional Affirmative Defense.....	20
2. Actual Malice .....	21
3. State-Law Exceptions .....	23
4. Narrowed Tort Elements.....	25
IV. CURBING THE RIGHT OF PUBLICITY TO PROTECT CULTURAL DEMOCRACY .....	27
A. How Donald Trump Might Win.....	27
B. The Right to Portray Real People.....	33
CONCLUSION.....	36

---

\* Ph.D. Candidate, Yale Law School; Resident Fellow, Information Society Project. My thanks to Alvin Klevorick, Don Herzog, Ignacio Cofone, Jack Balkin, Jennifer Rothman, Kate Klonick, Patrick Kabat, Robert Post, and Steven Calabresi, as well as to the participants at the ISP Writing Workshop and the Foundations of Legal Scholarship seminar.

## INTRODUCTION

It's been a worrying few years for creators of expressive works. They've been sued by a bizarre cast of characters, from Panamanian dictator Manuel Noriega<sup>1</sup> to wayward actress Lindsey Lohan<sup>2</sup> to convicted murderer Christopher Porco.<sup>3</sup> They've been hauled into court by the dying<sup>4</sup> and the dead.<sup>5</sup> They've even been threatened by Donald Trump.<sup>6</sup>

What have these creators done to provoke litigation? They portrayed real people in their works. After releasing books, films, paintings, cartoons, or videogames, these creators were accused of violating someone's right of publicity—a state-law tort that imposes civil liability for the unauthorized use of a person's name, likeness, and other identifying characteristics.<sup>7</sup> Several courts have encouraged these lawsuits by denying the creators' claims to First Amendment protection.<sup>8</sup> Even when creators have prevailed, the protection has been equivocal.<sup>9</sup> Intuitively, we might feel confident that, as a matter of law, Mark Zuckerberg couldn't have blocked 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

---

<sup>1</sup> *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”).

<sup>2</sup> *Gravano v. Take-Two Interactive Software, Inc.*, 142 A.D.3d 776, 777 (N.Y. App. Div. 2016) (suing the creators of the *Grand Theft Auto V* videogame that featured a “look-alike” avatar that had her “bikini, shoulder-length blonde hair, jewelry, cell phone, and signature peace sign pose” (cleaned up)); *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”). Litigious Lohan lost both times.

<sup>3</sup> *See Porco v Lifetime Entm’t Servs., LLC*, 147 A.D.3d 1253, 1253 (N.Y. App. Div. 2017) (suing the makers of the film *Romeo Killer: The Christopher Porco Story* for allegedly creating a “knowing and substantially fictionalized account” about him “and the events that led to his incarceration”).

<sup>4</sup> *de Havilland v. FX Networks, LLC*, No. B285629, 2018 WL 1465802, at \*2 n.3 (Cal. Ct. App. Mar. 26, 2018) (suing the producers of the docudrama *Feud* for portraying 101-year-old plaintiff Olivia de Havilland, who a doctor said “will not survive for any extended period of time”).

<sup>5</sup> Complaint, *CMG Worldwide Inc. v. Slitherine Ltd.*, No. 3:14-cv-05124 (N.D. Cal. Nov. 19, 2014) (suing the creators of the *History Legends of War: Patton* videogame for using the name of long-deceased war hero, Lieutenant General George Patton).

<sup>6</sup> 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/>; *see also infra* Part IV.

<sup>7</sup> *See, e.g.*, WASH. REV. CODE ANN. § 63.60.050 (2017). The list of interesting recent examples goes on. Claims have also been brought by the former manager of rap group N.W.A., the record holder in the “Donkey Kong” arcade game, and the banker who inspired the toupee-wearing crook in *The Wolf of Wall Street*. *See Heller v. NBCUniversal, Inc.*, No. CV-15-09631-MWF-KS, 2016 WL 6573985, at \*1 (C.D. Cal. Mar. 30, 2016); *Mitchell v. Cartoon Network, Inc.*, No. CV 15-5668, 2015 WL 12839135, at \*1 (D.N.J. Nov. 20, 2015); *Greene v. Paramount Pictures Corp.*, 138 F. Supp. 3d 226, 229 (E.D.N.Y. 2015).

<sup>8</sup> *E.g.*, *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 169 (3d Cir. 2013).

<sup>9</sup> For example, the Ninth Circuit has ruled that the First Amendment protects the right to portray a real-life U.S. Army sergeant in a movie but not a real-life college athlete in a videogame. *Compare Sarver v. Chartier*, 813 F.3d 891, 905–06 (9th Cir. 2016), *with Keller v. Elec. Arts, Inc. (In re NCAA Student-Athlete Name & Likeness Licensing Litig.)*, 724 F.3d 1268, 1282–83 (9th Cir. 2013). Both the movie and the videogame are forms of speech presumptively entitled to First Amendment protection. *See United States v. Paramount Pictures*, 334 U.S. 131, 166 (1948) (movies); *Brown v. Entm’t Merchants Ass’n*, 131 S. Ct. 2729, 2733 (2011) (videogames). But whereas the sergeant in *Sarver* didn’t “invest time and money to build up economic value in a marketable performance or identity,” the athletes in *Keller* apparently did. *Sarver*, 813 F.3d at 905; *see also Keller*, 724 F.3d at 1280–81. This distinction was “critical[.]” to the *Sarver* court’s decision that, unlike in *Keller*, “applying California’s right of publicity . . . would violate the First Amendment.” *Sarver*, 813 F.3d at 905–06.

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 makes two contributions to the debate about how to reconcile the right of publicity with the First Amendment.<sup>10</sup> First, by exploring various theories of free speech, it gives a thicker account of when and why the First Amendment protects portrayals of real people in expressive works. Traditional “politico-centric” theories of the First Amendment are grounded in concerns about democratic self-governance; they tie speech protection to the role that speech plays in informing citizens about matters of public concern.<sup>11</sup> But understanding how the right of publicity interacts with portrayals of real people requires a different conception of free speech under the First Amendment—a conception that protects cultural democracy and cultural pluralism. Building on prior cultural theories, this Article argues that portrayals of real people are protected as part of the right to participate in the production and distribution of culture that draws on real life.<sup>12</sup> This right stems not only from an autonomy rationale—that people may pursue forms of “meaning-making”<sup>13</sup> by creating expressive works—but also from a richer conception of power in a democracy, which encompasses private influence and goes beyond state-focused political democracy. In short, this right exists regardless of whether the portrayal serves politico-centric ends.

This Article’s second contribution builds on this foundation to illustrate a simple but important point: the theories we use to justify rights matter. This point is particularly important in First Amendment doctrine, which often operates categorically: a theory about what speech is *protected* is also a theory about what speech is *unprotected*.<sup>14</sup> Judges use precedent to explain why particular speech fits or doesn’t fit in

---

<sup>10</sup> In past work, I’ve criticized the “transformative use” test deployed by some courts to square the right of publicity with the First Amendment. See Thomas E. Kadri, *Fumbling the First Amendment: The Right of Publicity Goes 2–0 Against Freedom of Expression*, 112 MICH. L. REV. 1519 (2014) (arguing that a test requiring artists to “transform” someone’s likeness and refrain from realism cannot be reconciled with the First Amendment). Although this Article doesn’t directly critique this test, the way that courts have denied protection to expressive works because they are too realistic to be “transformative” is incompatible with the theory that the First Amendment protects cultural democracy. See *infra* Parts II.B & IV.B.

<sup>11</sup> See J.M. Balkin, *Populism and Progressivism as Constitutional Categories*, 104 YALE L.J. 1935, 1985–86 (1995) [hereinafter Balkin, *Populism and Progressivism as Constitutional Categories*] (coining the term “politico-centrism” to describe the phenomenon of “overstress[ing] the importance of politics to the life of ordinary citizens”); Jack M. Balkin, *Cultural Democracy and the First Amendment*, 110 NW. L. REV. 1053, 1056 (2015) [hereinafter Balkin, *Cultural Democracy and the First Amendment*] (ascribing the “politico-centric” label to Alexander Meiklejohn’s theory of the First Amendment) see also Alexander Meiklejohn, *The First Amendment is an Absolute*, 245 SUP. CT. REV. 255 (1961) [hereinafter Meiklejohn, *The First Amendment is an Absolute*]; OWEN M. FISS, *THE IRONY OF FREE SPEECH* (1996); CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20–35 (1971). In other works, Balkin has alternatively dubbed these theories “progressivist/republican.” See 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*]; Balkin, *Cultural Democracy and the First Amendment*, *supra*, at 1055–59.

<sup>12</sup> See Balkin, *Digital Speech and Democratic Culture*, *supra* note 11, at 1; Balkin, *Cultural Democracy and the First Amendment*, *supra* note 11, at 1053; see also Kadri, *supra* note 10, at 1528–29 (“Realistic portrayal is an important feature of our diverse creative palate. . . . Realism is too vivid an artistic tool to squander.”).

<sup>13</sup> See Balkin, *Cultural Democracy and the First Amendment*, *supra* note 11, at 1053.

<sup>14</sup> As Balkin has said, “Every theory of free speech protection is also a theory of free speech regulation. The values that justify a theory of freedom of speech give us a sense of its extension; conversely, the same values also give us a sense of where the theory does not extend, because the underlying constitutional value is not served or otherwise does not apply.” Balkin, *Cultural Democracy and the First Amendment*, *supra* note 11, at 1063. In private conversations with me, Balkin has attributed this point to Stanley Fish.

the protected box; if the theory underlying a right draws the box too small, and a narrow conception of the right becomes entrenched, bad law usually follows.<sup>15</sup>

In few places is this risk clearer than in the interplay between the right of publicity and freedom of expression. In cases where the two are in tension, a pair of unexpected threats to portrayals of real people has increasingly gained influence: the public-figure doctrine<sup>16</sup> and the newsworthy doctrine.<sup>17</sup> Think of these doctrines as enemies from within. Although they've both offered potent speech protection in other jurisprudential areas,<sup>18</sup> recent litigation has seen them used instead to complicate and undermine defendants' ability to oppose the right of publicity. This is because both doctrines ultimately rely on politico-centric theories to justify speech protection; in so doing, they draw the box too small. As this Article argues, the First Amendment should protect portrayals of real people in expressive works, regardless of whether the portrayal furthers narrow notions of self-governance by informing citizens about matters of public concern. Courts should embrace cultural theory to prevent the right of publicity from meddling with the creative palette and chilling expressive works.<sup>19</sup>

This Article proceeds in four parts. Part I introduces the tension between the right of publicity and the First Amendment, as it surveys the doctrine and scholarship on this issue. Part II contrasts politico-centric First Amendment theories (which tie protection for speech to informed self-governance) with cultural theories (which don't). Part III delves into the public-figure and newsworthy doctrines, tracing their roots in other jurisprudential domains and exploring their increasing effect on the right of publicity. Finally, Part IV shows why these doctrines should be jettisoned when the right of publicity is used to

<sup>15</sup> Symmetrical concerns might also arise when judges draw the box too big and create an overly broad conception of a constitutional right. Some have argued that this is happening with modern courts' increasing solicitude for commercial-speech rights, a phenomenon that has been dubbed First Amendment "Lochnerism," "Imperialism," and "Expansionism." See Genevieve Lakier, *Imagining an Antisubordinating First Amendment*, 118 COLUM. L. REV. (forthcoming 2018); see also Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133 (2016); Daniel J.H. Greenwood, *First Amendment Imperialism*, 1999 UTAH. L. REV. 659 (1999); Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY L. REV. 1199 (2015); Amanda Shanor & Robert Post, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165 (2015).

<sup>16</sup> Except when I discuss the Supreme Court's doctrinal moves in the defamation context, I use the term "public figure" to encompass both what the Court has referred to as a "public official" and nonpolitical persons of prominence. See generally *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 155 (1967) (explaining that the interest of the public and publisher was no less when the story concerned a public figure instead of a public official).

<sup>17</sup> For the Supreme Court's treatment of newsworthiness, see *Snyder v. Phelps*, 131 S. Ct. 1207, 1216 (2011) (analyzing when speech is a "matter of public concern"), and *Time, Inc. v. Hill*, 385 U.S. 374, 400 (1967) (Black, J., concurring) (discussing when speech is "newsworthy"). As others have observed, the newsworthiness standard "involves essentially the same inquiry as a 'public concern' test." Mary-Rose Papandrea, *Citizen Journalism and the Reporter's Privilege*, 91 MINN. L. REV. 515, 580 (2007); see also FLA. STAT. § 90.5015 (2011) ("News" means information of public concern relating to local, statewide, national, or worldwide issues or events.).

<sup>18</sup> Cf. ROBERT POST, CONSTITUTIONAL DOMAINS 76 (1995) ("In conceptualizing the claims of the public, courts have tended to follow two distinct forms of inquiry. The first is directed toward the social status of the plaintiff, the second toward the social significance of the information at issue."); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW § 11.3.5.2 (3d ed. 2006) ("[T]he Supreme Court has attempted to strike this balance by developing a complex series of rules that depend on the identity of the plaintiff and the nature of the subject matter.").

<sup>19</sup> Defining what constitutes an "expressive work" is, at times, a vexing task, one that this Article will not address at length. When I use the term, I mean to capture not only the more traditional forms of creative expression—such as paintings, literature, and photography—but also other forms of noncommercial expression—such as documentaries, videogames, memes, music, and many others—that today form so much of our cultural discourse. See generally *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2733 (2011) (discussing First Amendment protection of artistic works); cf. Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1253 (1995) (analyzing the Court's treatment of film under the First Amendment where it "assumed that if a medium were constitutionally protected by the First Amendment, each instance of the medium would also be protected" because "courts need not and perhaps should not ask whether any particular film succeeded in communicating its specific message"); POST, *supra* note 18, at 169 (contrasting content-based approaches with those that focus on "how speech is disseminated").

challenge portrayals of real people in expressive works. The doctrines cannot completely or persuasively explain protection for portrayals of real people and, worse still, they can undermine constitutional rights and create doctrinal confusion. Instead, portrayals of real people should receive robust protection against the right of publicity—a protection grounded in a cultural theory of the First Amendment. Unlike the piecemeal defenses offered by the politico-centric public-figure and newsworthy doctrines, this kind of protection will halt the right of publicity’s encroachment on freedom of expression.

### I. UNPACKING THE RIGHT OF PUBLICITY

The right of publicity may scarcely appear on a “1L” Torts syllabus, but it’s a legal claim of growing importance.<sup>20</sup> A creature of both statute and common law, the tort’s scope varies somewhat from state to state,<sup>21</sup> though it generally encompasses the right to prevent the unauthorized use of peoples’ “names, likenesses, and other indicia of identity.”<sup>22</sup> Violating this right can have serious consequences. Not only do some states criminalize the underlying conduct,<sup>23</sup> but, because the tort creates a property interest, plaintiffs may seek nationwide injunctive relief to remedy violations.<sup>24</sup> What’s more, damages aren’t limited to emotional distress and can include compensation for various types of commercial injury.<sup>25</sup> Anyone thinking about portraying a real person should tread carefully.

Courts and scholars have suggested a slew of interests advanced by the right of publicity, including “fostering creativity, safeguarding the individual’s enjoyment of the fruits of her labors, preventing consumer deception, and preventing unjust enrichment.”<sup>26</sup> Although there may be sound reasons to

<sup>20</sup> See JENNIFER ROTHMAN, *THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD* (2018) (“Who controls how one’s identity is used by others? This legal question, centuries old, demands greater scrutiny in the Internet age.”). As Balkin has implicitly argued, the digital age has raised the stakes for a broad right of publicity because the Internet and other new technologies have had a democratizing effect on our ability to engage in speech that draws on existing cultural resources. See Balkin, *Digital Speech and Democratic Culture*, *supra* note 11, at 11, 31–32 (“What I have called glomming on—the creative and opportunistic use of . . . cultural icons[] and bits of media products to create, innovate, reedit, alter, and form pastiches and collage—is a standard technique of speech in the digital world. Glomming on is cultural bricolage using cultural materials that lay to hand. Precisely because of the astounding success of mass media in capturing the public imagination during the twentieth century, the products of mass media, now everywhere present, are central features of everyday life and thought. Mass media products—popular movies, popular music, trademarks, commercial slogans, and commercial iconography—have become the common reference points of popular culture.”).

<sup>21</sup> 1 J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 6:2 (2d ed. 2017).

<sup>22</sup> Thomas F. Cotter & Irina Y. Dmitrieva, *Integrating the Right of Publicity with First Amendment and Copyright Preemption Analysis*, 33 COLUM. J. L. & ARTS 165, 166 (2010) (internal quotation marks omitted); accord 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.”); 1 MCCARTHY, *supra* note 21, at § 1:3 (defining it as “the inherent right of every human being to control the commercial use of his or her identity”); Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 216 (1954) (defining it as “the right of each person to control and profit from the publicity values which he has created or purchased”); *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128, 1138 (7th Cir. 1985) (Posner, J.) (defining it as “the right to prevent others from using one’s name or picture for commercial purposes without consent”), *cert. denied*, 475 U.S. 1094 (1986).

<sup>23</sup> See, e.g., N.Y. CIV. RIGHTS L. §§ 50, 51 (2014) (providing both criminal and civil liability for unauthorized use of a living person’s name, portrait, or picture for advertising purposes or for the purposes of trade).

<sup>24</sup> 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) (claiming that “every state has recognized some form of the right of publicity or protecting one’s likeness, and courts will issue nationwide injunctions premised on invocations of this right” (citing *Bosley v. Wildwett.com*, 310 F. Supp. 2d 914, 935 (N.D. Ohio 2004))); *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215, 222 (2d Cir. 1978), *abrogated on other grounds*, *Pirone v. MacMillan, Inc.*, 894 F.2d 579 (2d Cir. 1990).

<sup>25</sup> 2 MCCARTHY, *supra* note 21, at §§ 11:30–35.

<sup>26</sup> Roberta Rosenthal Kwall, *The Right of Publicity v. The First Amendment*, 70 IND. L.J. 47, 54 (1994) (footnotes omitted); see also Jennifer E. Rothman, *The Inalienable Right of Publicity*, 101 GEO. L. J. 185, 187 (2012) (“Publicity rights

doubt the wisdom of recognizing a right of publicity at all,<sup>27</sup> that ship has likely sailed. At least thirty-three states now recognize some form of the tort.<sup>28</sup>

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

A paradigmatic 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.<sup>29</sup> 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.<sup>30</sup> 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. But 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.<sup>31</sup>

"Publicity rights, then, are a form of property protection,"<sup>32</sup> one that allows people to "profit from the full commercial value of their identities"<sup>33</sup> and challenge the "false and misleading impression" of association with a commercial product or service.<sup>34</sup> This commercial core has important constitutional implications because it means that many publicity claims feature only "commercial speech,"<sup>35</sup> which has a "special meaning" in the First Amendment context.<sup>36</sup> Although the line between commercial and

---

have been justified on a variety of grounds including autonomy, dignity, natural rights, labor-reward, and unjust enrichment."); 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) (cataloguing the policy considerations behind the right of publicity outlined in The Restatement (Third) of Unfair Competition § 46).

<sup>27</sup> For a thorough and skeptical analysis of the arguments commonly made in support of the right of publicity, see Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125, 178–238 (1993); see also Jennifer E. Rothman, *Copyright Preemption and the Right of Publicity*, 36 U.C. DAVIS L. REV. 199, 245 n.218 (2002) (critiquing arguments that the right of publicity is necessary to foster creativity or prevent consumer deception). Although Madow stopped short of calling for the "immediate abolition" of the right of publicity, he persuasively argued that "a coherent and convincing case for the right of publicity . . . has yet to be made." Madow, *supra*, at 127, 135.

<sup>28</sup> 1 MCCARTHY, *supra* note 21, at § 6:2; see also Rothman, *supra* note 27, at 202 n.9 (2002); Jennifer Rothman, *The Law, ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY*, <https://www.rightofpublicityroadmap.com/law>.

<sup>29</sup> 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 Rothman, *supra* note 24, at 1950. This equivocation, as well as the fact that many states and courts disagree on the type of commerciality required, exacerbates the tension between the right of publicity and the First Amendment explored throughout this Article. See *id.* at 1950–51; *infra* Parts I.B, III, & IV.

<sup>30</sup> 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 Jewel-Osco supermarkets' "A Shoe In!" ad).

<sup>31</sup> *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).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> See *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 802 (2001).

<sup>35</sup> See, e.g., *Newcombe v. Adolf Coors Co.*, 157 F.3d 686, 691 (9th Cir. 1998) (use of pitcher's image in printed beer advertisement); *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407, 409 (9th Cir. 1996) (use of basketball star's former name in television car commercial); *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1097–98 (9th Cir. 1992) (use of imitation of singer's voice in radio snack-food commercial); *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1396 (9th Cir. 1992) (use of game-show hostess's "identity" in print advertisements for electronic products); *Midler v. Ford Motor Co.*, 849 F.2d 460, 461 (9th Cir. 1988) (use in television car commercial of "sound-alike" rendition of song singer had recorded).

<sup>36</sup> *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1184–85 (9th Cir. 2001).

noncommercial speech can be elusive, the clearest example is speech that “does no more than propose a commercial transaction”<sup>37</sup> and is “related solely to the economic interests of the speaker and its audience.”<sup>38</sup> 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.<sup>39</sup>

The right of publicity’s commercial core is important for at least two reasons. First, as the doctrine currently stands, deceptive commercial speech enjoys *no* First Amendment protection.<sup>40</sup> This rule liberates many publicity claims from constitutional scrutiny entirely, for the First Amendment offers no shield against liability for misleading commercial associations, like those in our Jordan examples.<sup>41</sup> Second, even non-misleading commercial speech is entitled to lesser First Amendment protection than noncommercial speech,<sup>42</sup> so the state has greater leeway to regulate it.<sup>43</sup> It’s unsurprising, then, that many publicity claims will “trump” any asserted right to portray real people in commercial speech.<sup>44</sup>

### B. *Expressive Works and the Right of Publicity*

So what does the right of publicity have to do with expressive works? Given the tort’s commercial core, one answer might be “nothing at all.” The author of the leading treatise on the right of publicity, J. Thomas McCarthy, has made such a bold 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.”<sup>45</sup> Even 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.”<sup>46</sup>

<sup>37</sup> *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983) (cleaned up).

<sup>38</sup> *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 561 (1980).

<sup>39</sup> See *Bolger*, 463 U.S. at 66–68; 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.” (citing *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (plurality opinion))).

<sup>40</sup> *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 563–64 (“[T]here can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it . . .”).

<sup>41</sup> See *id.*; Rothman, *supra* note 24, at 1955–56.

<sup>42</sup> *Greater New Orleans Broad. Ass’n, Inc. v. United States*, 527 U.S. 173, 183 (1999) (setting out four-part test to evaluate constitutionality of governmental regulation of “speech that is commercial in nature”).

<sup>43</sup> *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 562; see also *44 Liquormart, Inc.*, 517 U.S. at 495–504.

<sup>44</sup> See *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1184–85 (9th Cir. 2001); *Jordan*, 743 F.3d at 512. But see Theodore F. Haas, *Storehouse of Starlight: The First Amendment Privilege to Use Names and Likenesses in Commercial Advertising*, 19 U.C. DAVIS L. REV. 539, 568 (1986) (arguing that the First Amendment protects accurate statements in an advertisement that someone who isn’t employed by a company uses the company’s product); Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1257 n.275 (1983) (arguing that, absent deception, advertisers should have the right to tell the public which public figures buy their products).

<sup>45</sup> 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). Others have echoed McCarthy’s view that the right of publicity poses little threat to free speech because it is—or at least should be—confined to unauthorized portrayals in commercial speech. See, e.g., Andrew Beckerman-Rodau, *Toward a Limited Right of Publicity: An Argument for the Convergence of the Right of Publicity, Unfair Competition and Trademark Law*, 23 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 132, 177 (2012); George P. Smith, II, *The Extent of Protection of the Individual’s Personality Against Commercial Use: Toward a New Property Right*, 54 S.C. L. REV. 1, 42 (2002).

<sup>46</sup> Madow, *supra* note 27, at 130; see also *id.* (“Under current law, the ‘life stories’ of celebrities are, for all intents and purposes, common property—available to be told and retold at the pleasure, and for the profit, of the teller.”).

But as Jennifer Rothman has persuasively argued, “[t]he facts on the ground . . . challenge this vision of a limited right.”<sup>47</sup>

In case after case, courts have grappled with whether the First Amendment prevents the right of publicity from inhibiting portrayals of real people in expressive works.<sup>48</sup> The First Amendment, after all, generally protects the creation of expressive works,<sup>49</sup> even when the works are sold commercially.<sup>50</sup> Put another way, expressive works don’t suddenly become “commercial speech” because they are sold for profit.<sup>51</sup> As one court has quipped, creators “need not give away [their works] in order to bring them within the ambit of the First Amendment.”<sup>52</sup>

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 such simplicity is a far cry from what we’ve seen in the courts. Absent meaningful guidance from the

---

<sup>47</sup> Rothman, *supra* note 24, at 1951–59; *see also* *Wendt v. Host Int’l, Inc.*, 197 F.3d 1284, 1288 (9th Cir. 1999) (Kozinski, J., dissenting from denial of rehearing en banc); *White v. Samsung Elec. Am., Inc.*, 971 F.3d 1395, 1407–08 (9th Cir. 1992) (Alarcon, J., dissenting); *Carson v. Here’s Johnny Portable Toilets, Inc.*, 698 F.2d 831, 841 (6th Cir. 1983) (Kennedy, J., dissenting); *Keller v. Elec. Arts, Inc. (In re NCAA Student-Athlete Name & Likeness Licensing Litig.)*, 724 F.3d 1268, 1284–90 (9th Cir. 2013) (Thomas, J., dissenting); *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 170–76 (3d Cir. 2013) (Ambro, J., dissenting); Eugene Volokh, *Freedom of Speech and the Right of Publicity*, 40 HOUS. L. REV. 903 (2003); Diane Leenheer Zimmerman, *Fitting Publicity Rights into Intellectual Property and Free Speech Theory: Sam, You Made the Pants Too Long*, 10 DEPAUL-LCA J. ART & ENT. L. 283 (2000).

<sup>48</sup> *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).

<sup>49</sup> *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981) (“Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works fall within the First Amendment guarantee.”); *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (“Music, as a form of expression and communication, is protected under the First Amendment.”); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (“[E]xpression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments.”); *United States v. Paramount Pictures*, 334 U.S. 131, 166 (1948) (“We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment.”); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995) (referencing “the unquestionably shielded painting of Jackson Pollock, music of Arnold Schönberg, or Jabberwocky verse of Lewis Carroll”); *Brown v. Entm’t Merchants Ass’n*, 131 S. Ct. 2729, 2733 (2011) (“Like the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices . . . and through features distinctive to the medium . . . . That suffices to confer First Amendment protection.”); *see also* Sheldon H. Nahmod, *Artistic Expression and Aesthetic Theory: The Beautiful, the Sublime and the First Amendment*, 1987 WIS. L. REV. 221, 221 (1987) (advocating that “artistic expression should be granted independent status as constitutionally protected speech”).

<sup>50</sup> *Joseph Burstyn, Inc.*, 343 U.S. at 501–02 (holding that the fact that books and movies are “published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment”); *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.”).

<sup>51</sup> *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).

<sup>52</sup> *Cardtoons, L.C.*, 95 F.3d at 967. What’s more, civil liability based on speech must comport with the Constitution, even if the issue arises in private tort suits like those involving the right of publicity. *See* *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964) (“What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. The fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute.”); *see also* CHEMERINSKY, *supra* note 18, at § 11.3.5.1 (“Although tort litigation is generally between two private parties, there is state action in that it is the state’s law, whether statutory or common law, that allows recovery. Besides, it is a branch of the government, the judiciary, that is imposing liability for the speech.”).



Supreme Court,<sup>53</sup> state and lower federal courts have experimented with a variety of contradictory tests to reconcile the right of publicity with constitutional protection for free speech.<sup>54</sup> The result is a doctrinal mess.<sup>55</sup> As we'll see, both courts and scholars have struggled to agree on how to square the right of publicity with the First Amendment when real people are portrayed in expressive works.

## II. FROM BORK TO BALKIN: SOME FIRST AMENDMENT FIRST PRINCIPLES

To understand the interplay between freedom of expression and the right of publicity, some exploration of First Amendment theory is essential. Although there are many ways to slice and dice these theories,<sup>56</sup> it's helpful here to distinguish between politico-centric and cultural theories. Politico-centric theories pervade First Amendment doctrine, often explicitly, whereas cultural theories tend to operate more obliquely, filling in gaps created by stubborn politico-centricity. Although politico-centric theories can teach us a lot about the First Amendment's scope, ignoring cultural theories would be misguided—particularly when analyzing publicity claims against the creators of expressive works.<sup>57</sup>

### A. Politico-Centric Theories

For many years, the dominant theories used to explain and justify the First Amendment's reach have been politico-centric.<sup>58</sup> Both courts and scholars have repeatedly tied speech protection to democratic self-governance. The finer details of these theories are, of course, important, but the thrust is the same: free speech is essential for the informed discussion that enables democratic self-governance.<sup>59</sup>

Robert Bork was perhaps the most unyielding politico-centric theorist. Before Bork became a judge, he argued that “[c]onstitutional protection should be accorded only to speech that is explicitly political.”<sup>60</sup>

<sup>53</sup> 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. Frustratingly, the Court gave scant guidance on how this balancing test should work. *See id.* at 574–75. Count me as part of the school that believes *Zacchini* should be construed as narrowly as possible and confined to the rare instances when a *performance* is rebroadcast *in its entirety* without permission. *See, e.g.,* Volokh, *supra* note 47, at 906; PATRICK KABAT, *THE RIGHT OF PUBLICITY: THROUGH THE THICKET?* 11–12 (2015), available at <https://law.yale.edu/right-publicity-through-thicket> (noting two possible arguments to limit *Zacchini*: (1) Zacchini's claim was about “performance, not likeness” because it “would have been the same if he had launched a pig, rather than himself, from the canon”; and (2) Zacchini's claim was “common-law copyright” in an unfixed performance that wasn't preempted because it predated the express preemption provision in the 1976 Copyright Act); Brief of Entm't Software Ass'n as Amicus Curiae in Support of Petitioner at 19–24, *Elec. Arts Inc. v. Davis*, 136 S. Ct. 1448 (No. 15–424).

<sup>54</sup> *Petition for Writ of Certiorari, Elec. Arts Inc. v. Davis*, 136 S. Ct. 1448 (No. 15–424) (cataloging the tests adopted by state and federal courts around the country).

<sup>55</sup> *See id.*; Kadri, *supra* note 10.

<sup>56</sup> *See, e.g.,* Toni M. Massaro, Helen Norton, & Margot E. Kaminski, *SIRI-OUSLY 2.0: What Artificial Intelligence Reveals About the First Amendment*, 101 MINN. L. REV. 2481, 2487–96 (2017) (grouping First Amendment theories as either “positive” or “negative,” whereby positive theories “discuss the primary values that speech promotes” and negative arguments “focus on the dangers of government action in this area”).

<sup>57</sup> Balkin, *Digital Speech and Democratic Culture*, *supra* note 11, at 30 (summarizing the limitations of politico-centric theories).

<sup>58</sup> *See generally* Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 300–01, 304–17 (1978) (discussing the “political speech principle,” the notion that the First Amendment “protects only ‘political’ speech—speech that participates in the processes of representative democracy”).

<sup>59</sup> *See generally* Balkin, *Digital Speech and Democratic Culture*, *supra* note 11, at 27–29 (exploring how the social conditions of speech in the Progressive Era explain the rise of politico-centric theories to confront the challenges of that time).

<sup>60</sup> Bork, *supra* note 11, at 20.

Under Bork's theory, which seeks "neutral principles" to cabin judicial discretion, there is no constitutional basis to protect *any* nonpolitical speech—"be it scientific, literary or that variety of expression we call obscene or pornographic."<sup>61</sup> His philosophy would take judges out of the business of protecting nonpolitical expression altogether, meaning that expressive works would receive no First Amendment protection unless they constituted political speech.<sup>62</sup> For that reason, his account has been called "the most narrowly confined protection of speech ever supported by a modern jurist or academic."<sup>63</sup>

Other politico-centric theorists have made room for nonpolitical expression in their accounts. Their theories remain politico-centric, however, because they focus on the informed discussion and deliberation key to democratic self-governance. Alexander Meiklejohn, for example, emphasized the role of free speech in enabling people to make informed political decisions. He famously used the idea of the "town meeting" to explain the First Amendment's boundaries.<sup>64</sup> At these meetings, he said, citizens "discuss and . . . decide matters of public policy," for "[w]hen men govern themselves, it is they—and no one else—who must pass judgment upon unwisdom and unfairness and danger" of particular policies.<sup>65</sup> For Meiklejohn, then, "[t]he principle of the freedom of speech springs from the necessities of the program of self-government."<sup>66</sup>

Meiklejohn's theory frames the First Amendment as a means to an end: free speech is necessary so that citizens remain informed about public issues, can hold government accountable, and, ultimately, engage in self-governance.<sup>67</sup> If citizens aren't free to 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 focus on the *speaker*, 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."<sup>68</sup>

Meiklejohn's account was broader than Bork's; it didn't require speech to be explicitly political to warrant protection. Instead, Meiklejohn proposed that democratic self-government "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."<sup>69</sup> Under Meiklejohnian theory, then, the

---

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 26–28.

<sup>63</sup> Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 598–99 (1982)

<sup>64</sup> A. Meiklejohn, *Free Speech and its Relation to Self-Government* 24, 26 (1948) [hereinafter *Meiklejohn, Free Speech and its Relation to Self-Government*].

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 75 (1960) (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").

<sup>68</sup> *Id.* at 26; *see also id.* 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); MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT*, *supra* note 64, 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.").

<sup>69</sup> Meiklejohn, *The First Amendment is an Absolute*, *supra* note 11, at 255; *see also* MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT*, *supra* note 64, 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. That is why no idea, no opinion, no doubt, no belief, no counterbelief, no relevant information, may be kept from them. Under the compact upon which the Constitution rests, it is agreed that men shall not be governed by others, that they shall govern themselves."); 9 WRITINGS OF JAMES MADISON 103 (G. Hunt ed. 1910) ("A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern

First Amendment would half-heartedly protect nonpolitical expressive works only to the extent that they help us develop “knowledge, intelligence, [and] sensitivity to human values”—all of which guide our decisions when we vote.<sup>70</sup> This instrumental account of the constitutional value of expressive works conditions First Amendment protection on the works’ ability to assist the public in exercising political judgment.<sup>71</sup> As Jack 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.”<sup>72</sup>

Meiklejohn’s account greatly influenced later theorists. Owen Fiss has 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.”<sup>73</sup> Thus, according to Fiss, “We allow people to speak so others can vote. Speech allows people to vote intelligently and freely, aware of all the options and in possession of all the relevant information.”<sup>74</sup> Fiss doesn’t discount the value of speaker autonomy entirely, but, like Meiklejohn, he views it in instrumental terms, worthy of protection “only when it enriches public debate.”<sup>75</sup> In other words, “[a]utonomy is protected not because of its intrinsic value, as a Kantian might insist, but rather as a means or instrument of collective self-determination.”<sup>76</sup>

Again following Meiklejohn’s lead, Fiss assigns value to expressive works that further the ultimate goal of democratic deliberation. For example, he has 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.<sup>77</sup> As this example suggests, all expressive works are not created equal for Fiss. Indeed, his skepticism about the constitutional value of some popular culture is clear, such as when he compares 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.”<sup>78</sup>

Cass Sunstein has echoed many of these sentiments. He, too, thinks that the primary purpose of free speech is to promote democratic deliberation about issues of public policy.<sup>79</sup> In Sunstein’s politico-centric account, speech is divided into higher and lower tiers of protection: “Speech most worthy of government protection is concerned with deliberation about public issues; the rest is subject to varying degrees of government regulation.”<sup>80</sup> Like Fiss, Sunstein believes government should play an active role in

---

ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.”).

<sup>70</sup> Meiklejohn, *The First Amendment is an Absolute*, *supra* note 11, at 256. For similar academic exploration of this point, see 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.”); Mark Tushnet, *Art and the First Amendment*, 35 COLUM. J.L. & ARTS 169, 204–05 (2012); Redish, *supra* note 63, at 596–97; Marci A. Hamilton, *Art Speech*, 49 VAND. L. REV. 73, 76 (1996) (asserting that art performs an essential democratic function of challenging government); and David Munkittrick, *Music As Speech: A First Amendment Category Unto Itself*, 62 FED. COMM. L.J. 665, 667 (2010) (hailing “the essential role art music plays in the political world” because of its “unrivaled ability to solemnize events and to express political sentiment without direct confrontation”).

<sup>71</sup> Cass Sunstein has made similar arguments. See CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 153–59 (1993) (suggesting that nonpolitical art should receive less First Amendment protection).

<sup>72</sup> Balkin, *Cultural Democracy and the First Amendment*, *supra* note 11, at 1056.

<sup>73</sup> Owen M. Fiss, Essay, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1409–10 (1986) [hereinafter Fiss, *Free Speech and Social Structure*].

<sup>74</sup> OWEN M. FISS, *LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER* 13 (1996).

<sup>75</sup> Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 786 (1987) [hereinafter Fiss, *Why the State?*].

<sup>76</sup> Fiss, *Free Speech and Social Structure*, *supra* note 73, at 1409–10.

<sup>77</sup> FISS, *supra* note 11, at 40–45.

<sup>78</sup> Fiss, *Why the State?*, *supra* note 75, at 788; see also Fiss, *Free Speech and Social Structure*, *supra* note 73, at 1413 (“From the perspective of a free and open debate, the choice between *Love Boat* and *Fantasy Island* is trivial.”).

<sup>79</sup> SUNSTEIN, *supra* note 11, at 252.

<sup>80</sup> Balkin, *Populism and Progressivism as Constitutional Categories*, *supra* note 11, at 1935.

promoting expressive works that inform the public and enable democratic self-governance. He has argued, for example, that the goal of television regulation should be to promote deliberative democracy—“a system in which citizens are informed about public issues and able to make judgments on the basis of reasons.”<sup>81</sup> Little surprise, then, that nonpolitical expressive works are relegated to a lower tier of First Amendment protection in Sunstein’s account.<sup>82</sup>

These politico-centric theories map onto much of First Amendment doctrine. The Supreme Court has said that speech about issues of public concern is “at the core of the First Amendment.”<sup>83</sup> In cases involving expressive works, the Court has explained that constitutional protection derives from concerns about suppressing *political* speech.<sup>84</sup> For example, in explaining why the First Amendment protects artistic expression, the Court has proclaimed that “[t]he line between the informing and the entertaining is too elusive for the protection of that basic right,” for “[w]hat is one man’s amusement[] teaches another’s doctrine.”<sup>85</sup> More recently, the Court has stressed that the First Amendment “exists principally to protect discourse on public matters,” but protection extends beyond political speech because “it is difficult to distinguish politics from entertainment, and dangerous to try.”<sup>86</sup> In other words, expressive works enjoy a parasitic protection because the line between entertainment and politics is hard to draw.<sup>87</sup>

<sup>81</sup> Cass R. Sunstein, *Television and the Public Interest*, 88 CAL. L. REV. 499, 518 (2000).

<sup>82</sup> See SUNSTEIN, *supra* note 11, at 153–59; see also *id.* at 84–91 (belittling “low quality” programming that appeals to tastes of uneducated).

<sup>83</sup> *Frisby v. Schultz*, 487 U.S. 474, 479 (1988); see also *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 377 (1997) (“Leafletting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment.”); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (“[E]xpression on public issues ‘has always rested on the highest rung of the hierarchy of First Amendment values.’” (quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980))).

<sup>84</sup> See *Winters v. New York*, 333 U.S. 507, 510 (1948). The canon of constitutional jurisprudence on freedom of artistic expression is surprisingly light. See Thomas P. Leff, *The Arts: A Traditional Sphere of Free Expression? First Amendment Implications of Government Funding to the Arts in the Aftermath of Rust v. Sullivan*, 45 AM. U. L. REV. 353, 392 (1995) (“This paucity of constitutional jurisprudence is due, in part, to the infrequency of litigation over rights inherent to artistic expression. . . . Because the courts have heard only occasional cases, general principles of First Amendment protection for artistic expression have developed in a piecemeal and haphazard fashion, often one artistic medium at a time.”). Art has been called the “forbidden fruit of the First Amendment,” one that the justices are loath to taste unless they absolutely must. See RANDALL P. BEZANSON, *ART AND FREEDOM OF SPEECH 1* (2009); see also *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (Holmes, J.) (expressing belief that judging the worth of art is a “dangerous undertaking for persons trained only in the law”); *Pope v. Illinois*, 481 U.S. 497, 505 (1987) (Scalia, J., concurring) (“Just as there is no use arguing about taste, there is no use litigating about it. For the law courts to decide ‘What is beauty’ is a novelty even by today’s standards.”).

<sup>85</sup> *Winters*, 333 U.S. at 510; see also *Miller v. California*, 413 U.S. 15, 40–41 (1973) (Douglas, J., dissenting) (“What shocks me may be sustenance for my neighbor. What causes one person to boil up in rage over one pamphlet or movie may reflect only his neurosis, not shared by others.”); *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 969 (10th Cir. 1996) (“Speech that entertains, like speech that informs, is protected by the First Amendment.”).

<sup>86</sup> *Brown v. Entm’t Merchants Ass’n*, 131 S. Ct. 2729, 2733 (2011).

<sup>87</sup> It’s true that the Court has occasionally exalted the ability of expressive works to communicate ideas in less politico-centric terms, explaining that artistic expression “may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought.” *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952); see also *id.* (“It cannot be doubted that motion pictures are a significant medium for the communication of ideas.”). But even this account is largely instrumental: the Court’s chief concern is that limiting artistic expression will limit public discourse and thus restrain our ability to inform ourselves. The underlying theory, then, leads back to politico-centric concerns about democratic self-governance.

## B. Cultural Theories

Unlike these politico-centric First Amendment theories, Jack Balkin’s “democratic culture” theory is not so devoutly tied to democratic self-governance. A key purpose of free speech, in his view, is to promote and protect cultural democracy.<sup>88</sup> Cultural democracy “is more than representative institutions of democracy, and it is more than deliberation about public issues.”<sup>89</sup> Instead, it is “about individual liberty as well as collective self-governance; it is about each individual’s ability to participate in the production and distribution of culture.”<sup>90</sup> The theory recognizes that culture is “interactive” and, in so doing, “captures the inherent duality of freedom of speech: Although freedom of speech is deeply individual, it is at the same time deeply collective because it is deeply cultural.”<sup>91</sup>

Balkin argues that members of the public, as the “architects of their culture,”<sup>92</sup> rely on the freedom of speech to secure cultural democracy as well as political democracy.<sup>93</sup> The word “democracy,” explains Balkin, comes from the Greek words “*demos*,” meaning “people,” and “*kratos*,” meaning “power”—so “democracy” literally means “power to the people.”<sup>94</sup> Like politico-centric theorists, then, Balkin accepts that the First Amendment exists in part to make state power accountable to the people.<sup>95</sup> But Balkin’s account goes beyond the narrower conceptions of free speech offered by the likes of Bork, Meiklejohn, Fiss, and Sunstein, for he emphasizes the importance of letting the public develop “forms of *cultural* power that *transcend the state*.”<sup>96</sup> For Balkin, there’s a particular power that’s tied to culture—a power that has pervasive influence in our daily lives. But because cultural power isn’t subject to a democratic vote, it isn’t accountable or changeable in the same way that state power is. According to Balkin, the main way for people to influence the character of culture in their society is to “talk back” to it—to interact, to create, to build, to route around and glom on, to take from the old and produce the new, and to talk about whatever they want to talk about, whether it be politics, public issues, or popular culture.<sup>97</sup>

Balkin’s theory builds on the work of media scholar John Fiske, whose idea of “semiotic democracy” illuminates the importance of popular participation in culture.<sup>98</sup> Fiske’s work also influenced Michael Madow’s important work on the stifling effects that publicity rights can have on free speech. Madow defined semiotic democracy as “a society in which all persons are free and able to participate actively, if not equally, in the generation and circulation of meanings and values.”<sup>99</sup> Although Madow wasn’t commenting directly on how First Amendment theory might incorporate and implement this vision of

<sup>88</sup> Balkin, *Digital Speech and Democratic Culture*, *supra* note 11, at 3.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 3–4; *see also* T.M. Scanlon, *Why Not Base Free Speech on Autonomy or Democracy?*, 97 VA. L. REV. 541, 544 (2011) (“As potential audiences to expression by others, we have interests in having access to information and opinion . . . and as third parties we have an interest in having the benefits of a society in which our fellow citizens’ participant and audience interests are fulfilled, a society with a healthy politics and a vibrant cultural life.”); Redish, *supra* note 63, at 604. Under Balkin’s theory, the First Amendment’s guarantees are best understood as securing a kind of symbiotic protection: the interactive nature of speech binds together the speaker and the listener for the two will inevitably trade roles. Balkin, *Digital Speech and Democratic Culture*, *supra* note 11, at 4.

<sup>91</sup> Balkin, *Digital Speech and Democratic Culture*, *supra* note 11, at 4–5.

<sup>92</sup> *Id.* at 5.

<sup>93</sup> Balkin, *Cultural Democracy and the First Amendment*, *supra* note 11, at 1053.

<sup>94</sup> *Id.* at 1060–61.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 1053 (emphases added).

<sup>97</sup> Balkin, *Digital Speech and Democratic Culture*, *supra* note 11, at 42.

<sup>98</sup> JOHN FISKE, TELEVISION CULTURE 236, 239 (1987); *see also* Balkin, *Digital Speech and Democratic Culture*, *supra* note 11, at 3 n.2 (referencing Fiske’s “semiotic democracy” as a term used “to describe popular participation in the creation of meanings, often by turning existing forms of mass culture to different uses” (citing FISKE, *supra* note 98, at 236–39).

<sup>99</sup> Madow, *supra* note 27, at 146 (citing FISKE, *supra* note 98, at 239).

democracy, his discussion of the importance of “cultural pluralism” is reminiscent of Balkin’s ode to cultural democracy.<sup>100</sup> Likewise, legal scholars have channeled Fiske in advocating that intellectual-property law should promote popular access and participation in cultural discourse,<sup>101</sup> and similar principles underlie in Lawrence Lessig’s vision of “free culture”<sup>102</sup> and David Lange’s re-imagination of the public domain.<sup>103</sup>

At their core, these cultural theories recognize the crucial role that speech can play in restraining the inequalities that can flow from privatization and centralization of cultural power.<sup>104</sup> In so doing, they not only provide a normative account for why the First Amendment should protect and promote cultural democracy, but they also offer a more coherent explanation for why speech enjoys constitutional protection even when it has little or nothing to do with political self-governance.<sup>105</sup> As we’ll see, this becomes especially important to the question of when and why the First Amendment should protect portrayals of real people in expressive works, despite the existence of laws recognizing broad rights of publicity.<sup>106</sup>

### III. THE PUBLIC-FIGURE AND NEWSWORTHY DOCTRINES

Courts have adopted politico-centric theories of the First Amendment to explain protection for speech that lies “at the core of the First Amendment.”<sup>107</sup> Particularly when tort liability has posed a threat

<sup>100</sup> Compare Madow, *supra* note 27, at 127, with Balkin, *Digital Speech and Democratic Culture*, *supra* note 11, at 1–5, 30–40. See also Madow, *supra*, at 239 (comparing “centralized, top-down management of popular culture” to “a more decentralized, open, ‘democratic’ cultural practice on the other”).

<sup>101</sup> See, e.g., William W. Fisher III, *Property and Contract on the Internet*, 73 CHI.-KENT L. REV. 1203, 1217 (1998) (“In an attractive society, all persons would be able to participate in the process of meaning-making. Instead of being merely passive consumers of cultural artifacts produced by others, they would be producers, helping to shape the world of ideas and symbols in which they live.”); Kenneth Karst, *Local Discourse and the Social Issues*, 12 CARDOZO STUD. L. & LIT. 1, 27 (2000) (defining cultural democracy as “the broadest possible participation in the cultural processes that define and redefine the sort of society we shall be”); 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 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). As Balkin has noted, scholars like Neil Weinstock Netanel “have sought to connect the proper scope of copyright, fair use and the public domain to the promotion of democracy in the sense of public discussion of public issues” in a way that is more politico-centric. See Balkin, *Digital Speech and Democratic Culture*, *supra* note 11, at 33 n.56; see also 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).

<sup>102</sup> LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* 9–10 (2001).

<sup>103</sup> David Lange, *Reimagining the Public Domain*, 66 LAW & CONTEMP. PROBS. 463, 475–83 (2003).

<sup>104</sup> See, e.g., Madow, *supra* note 27, at 127.

<sup>105</sup> *Id.*; see also STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* 48 (1990) (“[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.”).

<sup>106</sup> See *infra* Part IV.B.

<sup>107</sup> *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.”).

to free speech, these politico-centric theories have been implemented in two principal ways: the public-figure doctrine and the newsworthy doctrine.<sup>108</sup> Both doctrines “ultimately lead to the same issue, which is the nature of the public and its right to demand information.”<sup>109</sup> Through these doctrines, speech receives constitutional protection because citizens need to be informed about matters of public concern.<sup>110</sup> Although the speech need not be explicitly political in a Borkian sense, both doctrines rest on creating an informed public, assisting democratic deliberation, and protecting democratic self-governance—and for that reason, they are politico-centric. This Part will explore how these doctrines emerged in various jurisprudential domains before turning to their application as defenses against the right of publicity.

### A. *A Tale of Two Doctrines*

In our constitutional system, prominence comes at a price.<sup>111</sup> The public-figure doctrine provides greater First Amendment protection for speech about public figures by requiring public-figure plaintiffs to satisfy heightened burdens in certain tort actions.<sup>112</sup> Indeed, the public-private distinction effectively settles the outcome of many of these actions, for public figures have only “extremely attenuated” rights to inhibit speech about themselves.<sup>113</sup>

The public-figure doctrine developed principally in defamation law, though its reach has extended to other torts and its influence pervades other areas of First Amendment jurisprudence. Beginning with the Supreme Court’s landmark decision in *New York Times v. Sullivan*, public-official plaintiffs have had to prove by clear and convincing evidence that an allegedly defamatory statement was made with actual malice—that is, “with knowledge that it was false or with reckless disregard of whether it was false or

<sup>108</sup> I use this nomenclature for simplicity’s sake, as others have done before. See, e.g., Catherine Hancock, *Origins of the Public Figure Doctrine in First Amendment Defamation Law*, 50 NYLSL REV. 81, 89–90 (2006). I recognize that that simplicity may come at a cost—for example, I may say that a court invoked the “newsworthy doctrine” even when the word “newsworthy” appears nowhere in the opinion, though the phrase “matter of public concern” or “public interest” does—but it’s a small price to pay because the concepts I group together under the “public-figure” and “newsworthy” labels are essentially of the same species. See Papandrea, *supra* note 17, at 580 (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.”); Harry Kalven, Jr., *The Reasonable Man and the First Amendment*: Hill, Butts and Walker, 1967 SUP. CT. REV. 267, 280 (merging the two doctrines by describing them as a privilege for speech about “newsworthy events or people”); Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957, 997 & n.179 (1989) (“In conceptualizing the claims of the public, courts have tended to follow two distinct forms of inquiry. The first is directed toward the social status of the plaintiff; the second toward the social significance of the information at issue.”).

<sup>109</sup> Post, *supra* note 108, at 997.

<sup>110</sup> See, e.g., *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988) (“At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern.”); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974) (observing that public figures “invite attention and comment”); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 164 (1967) (“Our citizenry has a legitimate and substantial interest in the conduct of [public figures].”); *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966) (“There is, first, a strong interest in debate on public issues, and, second, a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues.”).

<sup>111</sup> See *Gertz*, 418 U.S. at 345 (explaining that, once a person obtains public-figure status, “they invite attention and comment”). As Post has remarked, “The underlying metaphor is that of the expropriation of private property, for ‘public men are, as it were, public property.’” POST, *supra* note 18, at 76 (quoting *Beauharnais v. Illinois*, 343 U.S. 250, 263 n.18 (1952)).

<sup>112</sup> See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 277, 279–80 (1964).

<sup>113</sup> See POST, *supra* note 18, at 76.

not.”<sup>114</sup> The Court promptly extended this standard beyond candidates for political office<sup>115</sup> to nonpolitical public figures.<sup>116</sup> Now, the main legal dispute tends to be whether someone qualifies as a public figure—that is, a 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.”<sup>117</sup> If they are a public figure, their chances of prevailing on these claims are slight—so slight that it is usually not worth bringing the claim at all.

The public-figure doctrine stems from politico-centric concerns about protecting democratic self-governance. Because public figures play an important role in society, it is crucial that citizens be fully informed about them.<sup>118</sup> So strong is this interest that the First Amendment protects even some false speech about public figures—which is “inevitable in free debate”<sup>119</sup>—because only such a prophylactic rule could foster the “breathing space” required for free expression.<sup>120</sup> Thus, at its core, the public-figure doctrine adopts a politico-centric theory of the First Amendment. Indeed, Meiklejohn himself proclaimed that the *Sullivan* decision was “an occasion for dancing in the streets.”<sup>121</sup>

Like the public-figure doctrine, the newsworthy doctrine stems from politico-centric concerns. The difference between the two doctrines is that the newsworthiness “inquiry focuses not on the social status of the plaintiff, but rather on the nature of the information at issue.”<sup>122</sup> In essence, the doctrine acts as a shield for speech on “matters of public concern.”<sup>123</sup> The Supreme Court has traced the doctrine back to

---

<sup>114</sup> 376 U.S. at 279–80; *see also* *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966) (“[T]he ‘public official’ designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.”).

<sup>115</sup> *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 274 (1971).

<sup>116</sup> *Curtis Publ’g Co.*, 388 U.S. at 154–55 (explaining that the interest of the public and publisher was no less when the story concerned a public figure instead of a public official); *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”). The public-figure doctrine has steadily crept beyond defamation and into other jurisprudential areas. For example, the Supreme Court applied it in *Hustler Magazine v. Falwell* to a claim for intentional infliction of emotional distress (IIED), which means that public-figure plaintiffs who suffer emotional distress as a result of parody must satisfy the rigors of actual malice if they are to prevail. 485 U.S. 46, 56 (1988).

<sup>117</sup> *Gertz*, 417 U.S. at 345. Or, as one court has remarked, a public figure is “anyone who is famous or infamous because of who he is or what he has done.” *Cepeda v. Cowles Magazines & Broad., Inc.*, 392 F.2d 417, 419 (9th Cir. 1968).

<sup>118</sup> *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.”). The public-figure doctrine also reflects the belief that a public figure is in a better position than a private person to respond to commentary and criticism. *Gertz*, 418 U.S. at 344; *see also* Anthony Lewis, *New York Times v. Sullivan Reconsidered: Time to Return to “The Central Meaning of the First Amendment,”* 83 COLUM. L. REV. 603, 622 (1983).

<sup>119</sup> *Sullivan*, 376 U.S. at 271–72.

<sup>120</sup> *Id.*; *see also* *Rosenblatt*, 383 U.S. at 85 (“Criticism of government is at the very center of the constitutionally protected area of free discussion. Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized.”).

<sup>121</sup> 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.

<sup>122</sup> Post, *supra* note 108, at 998.

<sup>123</sup> *See* *Snyder v. Phelps*, 131 S. Ct. 1207, 1216 (2011); *Thornhill v. Alabama*, 310 U.S. 88, 101–02 (1940) (holding that the First Amendment “embraces at the least the liberty to discuss publicly and truthfully all matters of public concern”); *Time, Inc. v. Hill*, 385 U.S. 374, 400 (1967) (Black, J., concurring); Papandrea, *supra* note 17, at 580; Karcher, *supra* note 108, at 824; Dan Laidman, *When the Slander Is the Story*, 17 UCLA ENT. L. REV. 74, 89 (2010) (explaining that, in addition to defamation law, the Court “continues to weigh whether speech is a matter of public concern in its current doctrinal formulations in related First Amendment areas such as public employee speech and the unwanted publication of truthful information”).



the colonial period, when the Framers’ “efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need for information and education with respect to the significant issues of the times.”<sup>124</sup> Thus, the doctrine reflects a politico-centric conception of the public: “Because American law views the public, in its role as the electorate, as ultimately responsible for political decisions, the public is presumptively entitled to all information that is necessary for informed governance.”<sup>125</sup>

Even before the Court in *Sullivan* constitutionalized state defamation laws because of the importance of “debate on public issues,”<sup>126</sup> the common-law defamation defense of fair comment and criticism sought to protect discussion of matters in the public interest.<sup>127</sup> In the privacy context, too, the newsworthy doctrine has been influential. Warren and Brandeis’s seminal work advocating for a vigorous right to privacy nonetheless stressed that such a right “does not prohibit any publication of matter which is of public or general interest.”<sup>128</sup> Indeed, the first decision to acknowledge a right of privacy contained a similar caveat.<sup>129</sup>

As the name suggests, the newsworthy doctrine is connected to the question of what the press may publish—it has sometimes been called the “privilege to report news” or the “privilege to publicize newsworthy matters”—but it isn’t limited to press-related claims.<sup>130</sup> Nowadays, the newsworthy doctrine has constitutional or quasi-constitutional<sup>131</sup> import in a wide swath of legal disputes, including cases

<sup>124</sup> *Thornhill*, 310 U.S. at 102.

<sup>125</sup> Post, *supra* note 108, at 999; see also *id.* at 1004 (“Because we understand the public, in its role as the electorate, to be the ultimate source of political authority, it follows that information pertinent to informed governance should be made public. As Walter Lippmann observed at the dawn of the modern first amendment era, ‘[N]ews is the chief source of the opinion by which government now proceeds.’” (quoting W. LIPPMANN, *LIBERTY AND THE NEWS* 12 (1920))).

<sup>126</sup> *Sullivan*, 376 U.S. at 270.

<sup>127</sup> 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). Justice Brennan, *Sullivan*’s author, wrote for the plurality that a matter of public concern “cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not ‘voluntarily’ choose to become involved.” *Id.* After all, he explained, “[t]he public’s primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant’s prior anonymity or notoriety.” *Id.* In Justice Brennan’s view, the First Amendment must protect robust discussion of “far more than politics in a narrow sense” because “vast areas of economic and social power that vitally affect the nature and quality of life in the Nation” lie in “private hands.” *Id.* The *Rosenbloom* plurality’s rule lasted only three years. In *Gertz v. Robert Welch, Inc.*, a majority expressly reject the extension of the actual-malice standard to private persons. 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, the newsworthy doctrine clung on, perhaps to return again when a particular justice found the results of the public-figure approach intolerable. Cf. *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring) (“Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys . . .”).

<sup>128</sup> Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 214 (1890).

<sup>129</sup> *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 74 (1905) (“[T]he truth may be spoken, written, or printed about all matters of a public nature, as well as matters of a private nature in which the public has a legitimate interest.”); see also Post, *supra* note 108, at 996.

<sup>130</sup> Post, *supra* note 108, at 995–96 (quoting Harry Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 336 (1966), and *Virgil v. Time, Inc.*, 527 F.2d 1122, 1128 (9th Cir. 1975)).

<sup>131</sup> 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 *infra* Parts III.B.3 and III.B.4. But it could also describe

involving defamation,<sup>132</sup> public disclosure of private facts,<sup>133</sup> false light,<sup>134</sup> copyright,<sup>135</sup> government-employee speech,<sup>136</sup> and freedom of the press.<sup>137</sup> The doctrine has also been coopted by a growing number of state statutes—often dubbed “anti-SLAPP” laws—that seek to protect defendants against frivolous lawsuits aimed at chilling speech.<sup>138</sup> And, as with the public-figure doctrine,<sup>139</sup> the idea of newsworthiness bled into the constitutional analysis for claims of intentional infliction of emotional distress.<sup>140</sup> In *Snyder v. Phelps*, the Court barred such a claim after observing that “[s]peech deals with matters of public concern when it can ‘be fairly considered as relating to any matter of political, social, or other concern to the community,’ or when it ‘is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.’”<sup>141</sup>

Like the public-figure doctrine, the newsworthy doctrine reflects a politico-centric theory of the First Amendment because it seeks to protect democratic self-governance. As the Supreme Court has explained, “[f]reedom of discussion . . . must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.”<sup>142</sup> The electorate, as arbiters of

---

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”).

<sup>132</sup> *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 763 (1985) (“[P]ermitting recovery of presumed and punitive damages in defamation cases absent a showing of ‘actual malice’ does not violate the First Amendment when the defamatory statements do not involve matters of public concern.”); *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 768–69 (1986) (“[A]t least where a newspaper publishes speech of public concern, a private-figure plaintiff cannot recover damages without also showing that the statements at issue are false.”); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19 (1990) (“[S]tatement on matters of public concern must be provable as false before there can be liability under state defamation law.”); *see also Beauharnais v. Illinois*, 343 U.S. 250, 270, 272 (1952) (Black, J., dissenting) (rejecting the notion “that either state or nation can punish people for having their say in matters of public concern” because “[e]very expansion of the law of criminal libel so as to punish discussions of matters of public concern means a corresponding invasion of the area dedicated to free expression by the First Amendment”).

<sup>133</sup> *See DANIEL J. SOLOVE & PAUL M. SCHWARTZ, PRIVACY AND THE MEDIA* 124 (2008) (observing that “the newsworthiness test is an element of the tort of public disclosure”).

<sup>134</sup> *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967) (extending *Sullivan*’s rule to protect against claim of false light when magazine published a story about a private person involved in a matter of public concern).

<sup>135</sup> *Nat’l Rifle Ass’n Am.*, 15 F.3d at 562.

<sup>136</sup> *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968) (holding that constitutionality of government’s decision to fire an employee depended on the employee’s “interests . . . as a citizen, in commenting upon matters of public concern”).

<sup>137</sup> *Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001) (explaining that freedom of the press protected a media defendant who obtained a recording through “a stranger’s illegal conduct” if it qualified as “speech about a matter of public concern”).

<sup>138</sup> R.I. GEN. LAWS § 9-33-1 (establishing protection from strategic lawsuits against public participation to ensure “full participation by persons and organizations and robust discussion of issues of public concern”).

<sup>139</sup> *Supra* note 116.

<sup>140</sup> *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988) (rejecting IIED claim after observing that “[a]t the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern”).

<sup>141</sup> 131 S. Ct. 1207, 1216 (2011) (quoting *Connick v. Myers*, 461 U.S. 138, 146 (1983), and *San Diego v. Roe*, 543 U.S. 77, 83–84 (2004)); *see also Clay Calvert, Defining “Public Concern” After Snyder v. Phelps: A Pliable Standard Mingles with News Media Complicity*, 19 VILL. SPORTS & ENT. L.J. 39, 53 (2012) (arguing that *Snyder* demonstrates that newsworthiness “defies and transcends any silo of communications law” and thus “permeates First Amendment jurisprudence”).

<sup>142</sup> *Thornhill*, 310 U.S. at 101–02; *Frisby v. Schultz*, 487 U.S. 474, 479 (1988) (“The antipicketing ordinance operates at the core of the First Amendment by prohibiting appellees from engaging in picketing on an issue of public concern.”); *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.”); Lyrissa Barnett Lidsky, *Nobody’s Fools:*

political decisions in a democratic system, relies on information to make educated decisions.<sup>143</sup> The public, therefore, “is presumptively entitled to all information that is necessary for informed governance.”<sup>144</sup>

### B. *Politico-Centric Defenses to the Right of Publicity*

Over the years, the public-figure and newsworthy doctrines have crept into the realm of the right of publicity.<sup>145</sup> As the Fifth Circuit has explained, the tension between free speech and the right of publicity has led courts to “recognize[] two closely related yet analytically distinct privileges.”<sup>146</sup> The first “is the privilege to publish or broadcast facts, events, and information relating to public figures,” and the second “is the privilege to publish or broadcast news or other matters of public interest.”<sup>147</sup>

The public-figure and newsworthy doctrines have affected the right of publicity in four ways, all of which draw on the politico-centric First Amendment theories animating both doctrines. Given the overlapping concerns that animate both doctrines, the two often collapse into a unitary analysis.<sup>148</sup> The

---

*The Rational Audience as First Amendment Ideal*, 2010 U. ILL. L. REV. 799, 810 (2010) (“[S]peech dealing with issues of public concern . . . lies at the core of the First Amendment because political speech in a democracy is essential to democratic self-governance; without this information, citizens cannot play their assigned roles in choosing and instructing their representatives and in participating in the formation of public policy.”).

<sup>143</sup> POST, *supra* note 18, at 77–78 (“To restrict the news is therefore simultaneously to restrict the public.”).

<sup>144</sup> *Id.* at 78.

<sup>145</sup> See, e.g., *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. 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).

<sup>146</sup> *Campbell v. Seabury Press*, 614 F.2d 395, 397 (5th Cir. 1980).

<sup>147</sup> *Id.*

<sup>148</sup> *Hancock, supra* note 108, at 89–90 (“The newsworthiness and public figure privileges are ‘so merged as to become inseparable,’ even though, technically speaking, the public figure privilege protects publicity about a person and the

upshot is that the right of publicity usually gives way if—and only if—tort liability would harm the public’s ability to remain informed about matters of public concern and engage in democratic self-governance.<sup>149</sup>

### 1. The Constitutional Affirmative Defense

First off, the public-figure and newsworthy doctrines may curtail the right of publicity when defendants raise the First Amendment as an affirmative defense to liability. When an expressive work portrays a real person, it 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.<sup>150</sup> Because Leopold’s crime remained “an American *cause célèbre*” and a “matter of public interest,” and because of Leopold’s “consequent and continuing status as a public figure,” the court explained that his right of publicity had to give way to the creators’ First Amendment rights.<sup>151</sup> These rights rested on politico-centric justifications about the public’s “strong curiosity and social and news interest in the crime.”<sup>152</sup>

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.<sup>153</sup> The court noted that the right of publicity “can be severely circumscribed as a result of an individual’s newsworthiness”<sup>154</sup> 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.”<sup>155</sup> These politico-centric concerns meant that the right of publicity 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.”<sup>156</sup> Because the photos informed the public about “a newsworthy event,” the court held that the First Amendment barred the actress’s claim.<sup>157</sup>

---

newsworthiness privilege protects the reporting of an event.”); Kalven, *supra* note 108, at 280 (merging the two doctrines by describing them as a privilege for speech about “newsworthy events or people”).

<sup>149</sup> 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 27, 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 the effects of the public-figure and newsworthy doctrines on the right to prevent unauthorized use of one’s image, the label of “privacy” or “publicity” has had no discernible effect. For the sake of clarity, I will refer to the tort as the “right of publicity” throughout.

<sup>150</sup> 259 N.E.2d 250, 254 (Ill. 1970).

<sup>151</sup> *Id.*

<sup>152</sup> *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 claim “cannot survive defendants’ First Amendment defense” in part because his escapades as the “Dictator of Panama” made him a “notorious public figure”).

<sup>153</sup> 498 F. Supp. 401, 405 (S.D.N.Y. 1980).

<sup>154</sup> *Id.* at 405 (quoting *Time, Inc. v. Hill*, 385 U.S. 374, 382 (1967)).

<sup>155</sup> *Id.* at 404.

<sup>156</sup> *Id.* at 405 (quoting *Meeropol v. Nizer*, 560 F.2d 1061, 1066 (2d Cir. 1977)).

<sup>157</sup> *Id.* at 405–06.

But defendants' pleas for a 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.<sup>158</sup> The play portrayed the famous comedic troupe "in a new situation and with original lines,"<sup>159</sup> 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."<sup>160</sup> In other words, the play was unprotected because it failed to inform the public on matters of public concern.<sup>161</sup>

## 2. Actual Malice

The public-figure and newsworthy doctrines have also affected the right of publicity through judicial importation of the actual-malice standard from defamation law.<sup>162</sup> Some courts have held that public-figure plaintiffs who are portrayed in "news or material of public concern" may prevail only if the portrayal constituted a "false statement of fact" that the defendant published with "knowledge of its falsity" or "reckless disregard of its truth."<sup>163</sup>

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

<sup>158</sup> 523 F. Supp. 485, 492 (S.D.N.Y. 1981), *rev'd on other grounds*, 689 F.2d 317 (2d Cir. 1982).

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 493; *see also* *Groucho Marx Prods., Inc. v. Day & Night Co.*, 689 F.2d 317, 319 (2d Cir. 1982).

<sup>161</sup> 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.

<sup>162</sup> *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.").

<sup>163</sup> *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").

sporting the latest fashion trends.<sup>164</sup> 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.”<sup>165</sup> 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.<sup>166</sup> 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.”<sup>167</sup> Because the court concluded that Hoffman couldn’t satisfy that burden, the First Amendment barred his claim.<sup>168</sup>

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.<sup>169</sup> The district court explained that the magazine “fabricated” the photo and published it “knowing it was false.”<sup>170</sup> 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.<sup>171</sup> 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.<sup>172</sup> Because the magazine admitted that “it intended to create the false impression in the minds of the public that they were seeing Mr. Hoffman’s body,” the district court held that Hoffman had shown actual malice and, as a result, the First Amendment offered no defense against the right of publicity.<sup>173</sup> 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.<sup>174</sup> Thus, although the courts asked different falsity 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.

New York’s highest court has also applied the actual-malice standard to a claim of unauthorized portrayal in an expressive work. In *Spahn v. Julian Messner, Inc.*, an author wrote a fictional book that featured Warren Spahn, a famous baseball player.<sup>175</sup> The author admitted that he “fictionalized and dramatized” aspects of Spahn’s life so that the book would appeal to “a juvenile readership.”<sup>176</sup> This included “imaginary incidents, manufactured dialogue and a manipulated chronology,”<sup>177</sup> all of which the author insisted were important and common “literary techniques” of the genre.<sup>178</sup> Yet it was these very

<sup>164</sup> *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1184–86 (9th Cir. 2001).

<sup>165</sup> *Id.* at 1183.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 1187 (emphasis added).

<sup>168</sup> *Id.* at 1189.

<sup>169</sup> *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.

<sup>170</sup> *Hoffman*, 33 F. Supp. 2d at 875.

<sup>171</sup> *Id.*

<sup>172</sup> *Hoffman*, 255 F.3d at 1186–89.

<sup>173</sup> *Hoffman*, 33 F. Supp. 2d at 875 (internal quotation marks omitted).

<sup>174</sup> *Hoffman*, 255 F.3d at 1186–89.

<sup>175</sup> 21 N.Y.2d 124, 127 (N.Y. 1967).

<sup>176</sup> *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).

<sup>177</sup> *Id.*

<sup>178</sup> *See Spahn*, 21 N.Y.2d at 128.

techniques—“invented dialogue, imaginary incidents, and attributed thoughts and feelings”—that the court declared were sufficient to show actual malice.<sup>179</sup> 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.”<sup>180</sup> 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.<sup>181</sup>

This application of the actual-malice inquiry shows the effects of applying politico-centric doctrines to fictional expressive works. 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.”<sup>182</sup> The court had already alluded to these failings in politico-centric terms in an earlier opinion, 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.”<sup>183</sup> In other words, the court faulted the author for failing to ascertain—and then convey—truthful and actual information about Spahn to the public.

### 3. State-Law Exceptions

The public-figure and newsworthy doctrines have also been integrated into the right of publicity through state-law exceptions for portrayals that are in the public interest.<sup>184</sup> Many states now guarantee these exceptions by statute.<sup>185</sup>

---

<sup>179</sup> *Id.* at 127.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 127–28.

<sup>182</sup> *Id.* at 128.

<sup>183</sup> *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).

<sup>184</sup> *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.”).

<sup>185</sup> *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).

In California, for example, the right of publicity cannot apply to portrayals connected to “any news, public affairs, or sports broadcast or account, or any political campaign.”<sup>186</sup> Indiana law, meanwhile, exempts portrayals in “[m]aterial that has political or newsworthy value”<sup>187</sup> and “in connection with the broadcast or reporting of an event or a topic of general or public interest.”<sup>188</sup> Where courts have recognized a right of publicity under the common law, they’ve often crafted judicial exceptions for newsworthy uses.<sup>189</sup> 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.”<sup>190</sup>

Although some courts have broadly construed these state-law exceptions,<sup>191</sup> others have charted a narrower course. In *Keller v. Electronic Arts, Inc.*, the Ninth Circuit adopted a cramped interpretation of California’s statutory and common-law 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.<sup>192</sup> Although California law recognizes 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.”<sup>193</sup> 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.”<sup>194</sup> 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.<sup>195</sup> 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.”<sup>196</sup>

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

<sup>186</sup> CAL. CIV. CODE § 3344.1(j) (2017).

<sup>187</sup> IND. CODE § 32-36-1-1(c)(1)(B) (2017).

<sup>188</sup> *Id.* § 32-36-1-1(c)(3).

<sup>189</sup> *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.”).

<sup>190</sup> *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.”).

<sup>191</sup> *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”).

<sup>192</sup> *Keller v. Elec. Arts, Inc. (In re NCAA Student-Athlete Name & Likeness Licensing Litig.)*, 724 F.3d 1268, 1282–83 (9th Cir. 2013).

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*



television news anchor videotaped at a wet t-shirt contest.<sup>197</sup> The court granted the news anchor’s request to enjoin a website from making the footage available online, holding that the state-law exceptions did not apply because the footage did not “contain any editorial content” and was “not accompanied by any dialog discussing Plaintiff’s status as a former news anchor.”<sup>198</sup> 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.<sup>199</sup> 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.”<sup>200</sup>

#### 4. Narrowed Tort Elements

The final influence that the public-figure and newsworthy doctrines have 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 right of publicity.<sup>201</sup> To assuage these concerns, they’ve narrowly construed elements to avoid liability for speech about public figures or matters of public concern.<sup>202</sup>

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.<sup>203</sup> 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.<sup>204</sup> Thus, in *Rosemont Enterprises, Inc. v. Random House, Inc.*, the New York Supreme Court explained that “[t]he publication of a newspaper, magazine, or book which imparts truthful news or other factual information to the public does not fall within ‘the purposes of trade’ contemplated by the New York statute.”<sup>205</sup> Similarly, in *Paulsen v. Personality Posters, Inc.*, the court

<sup>197</sup> *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 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)).

<sup>198</sup> *Id.* at 927.

<sup>199</sup> 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))).

<sup>200</sup> *Id.* The court ultimately concluded for separate reasons that the cards were protected under the First Amendment. *See id.* at 968–76.

<sup>201</sup> *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).

<sup>202</sup> *Id.*

<sup>203</sup> N.Y. CIV. RIGHTS L. § 51 (2014).

<sup>204</sup> *Rosemont Enters., Inc.*, 294 N.Y.S.2d at 127.

<sup>205</sup> *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.”).

noted that “dissemination of news or information concerning matters of public interest” does not constitute a use for “the purposes of trade.”<sup>206</sup>

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.”<sup>207</sup> 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.<sup>208</sup> The real wireless operator sued the filmmaker for portraying him without his permission.<sup>209</sup> 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.”<sup>210</sup> 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.”<sup>211</sup> 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.”<sup>212</sup>

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*.<sup>213</sup> 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.”<sup>214</sup> This kind of politico-centric 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*.<sup>215</sup> 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

<sup>206</sup> 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”).

<sup>207</sup> *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.

<sup>208</sup> 103 N.E. 1108, 1108 (N.Y. 1913).

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 1110.

<sup>211</sup> *Id.* at 1111.

<sup>212</sup> *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).

<sup>213</sup> 464 F. Supp. 426, 431 (S.D.N.Y. 1978).

<sup>214</sup> *Id.*

<sup>215</sup> *Porco v Lifetime Entm’t Servs., LLC*, 147 A.D.3d 1253, 1253–56 (N.Y. App. Div. 2017).

account” of his life.<sup>216</sup> That allegation alone defeated the argument that the film was entitled to the protection for “reports of newsworthy events or matters of public interest.”<sup>217</sup>

#### IV. CURBING THE RIGHT OF PUBLICITY TO PROTECT CULTURAL DEMOCRACY

The right of publicity is on the rise. Creators of expressive works, scrambling to defend themselves, have understandably invoked the public-figure and newsworthy doctrines, which have provided robust speech protection in other jurisprudential areas. But because both doctrines justify speech protection in politico-centric terms, they offer a cramped theoretical basis to shield many expressive works. This Part will explore why that is and what we should do about it.

##### A. *How Donald Trump Might Win*

The public-figure and newsworthy doctrines are a poor fit to defend many expressive works against the right of publicity. At their core, both doctrines focus on politico-centric concerns about democratic self-governance: they principally seek to establish truth, inform citizens, and encourage democratic deliberation.<sup>218</sup> There are, of course, some portrayals of real people in expressive works that advance these politico-centric goals, or at least one could tell a plausible story for why they do. But as the previous Part reveals, these doctrines have offered incomplete and, at times, unpersuasive defenses against the right of publicity. This leaves creators of expressive works vulnerable when they portray real people.

To unpack why these politico-centric doctrines pose problems for portrayals of real people, some examples will be useful. There’s no need for hypotheticals. As luck would have it, two actual examples have been offered by the same person: Donald Trump.

Long before Trump was a candidate for political office, rapper Mac Miller released a song titled “*Donald Trump*,”<sup>219</sup> 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

<sup>216</sup> *Id.* at 1255.

<sup>217</sup> *See id.* at 1254 (quoting *Messenger ex rel. Messenger*, 94 N.Y.2d at 441).

<sup>218</sup> *See, e.g.*, *Gionfriddo v. Major League Baseball*, 114 Cal. Rptr. 2d 307, 313 (Cal. Ct. App. 2001) (“The First Amendment requires that the right to be protected from unauthorized publicity ‘be balanced against the public interest in the dissemination of news and information consistent with the democratic processes under the constitutional guaranties of freedom of speech and of the press.’” (quoting *Gill v. Hearst Publ’g Co.*, 253 P.2d 441, 443 (Cal. 1953)); *Titan Sports v. Comics World Corp.*, 870 F.2d 85, 88 (2nd Cir. 1989) (“A court must be ever mindful of the inherent tension between the protection of an individual’s right to control the use of his likeness and the constitutional guarantee of free dissemination of ideas, images and newsworthy matters in whatever form it takes.”); *Rosemont Enters., Inc. v. Random House, Inc.*, 294 N.Y.S.2d 122, 129 (N.Y. Sup. 1968) (“Just as a public figure’s ‘right of privacy’ must yield to the public interest so too must the ‘right of publicity’ bow where such conflicts with the free dissemination of thoughts, ideas, newsworthy events, and matters of public interest.”).

<sup>219</sup> 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/>.

But I take over the world when I'm on my Donald Trump shit  
Look at all this money! Ain't that some shit?<sup>220</sup>

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.<sup>221</sup>

Little @MacMiller, you illegally used my name for your song 'Donald Trump' which now has over 75 million hits.<sup>222</sup>

Little @MacMiller, I want the money not the plaque you gave me!<sup>223</sup>

Little @MacMiller, I'm now going to teach you a big boy lesson about lawsuits and finance. You ungrateful dog!<sup>224</sup>

Miller's song wasn't Trump's only experience with his identity being used in an expressive work. While Trump was marching toward the presidency in April 2016, Illma Gore caused a stir with her painting "*Make America Great Again*." Although no case was ever filed, Trump's legal team apparently threatened Gore with a lawsuit for violating his right of publicity.<sup>225</sup>

---

<sup>220</sup> *Donald Trump*, GENIUS, <https://genius.com/Mac-miller-donald-trump-lyrics>.

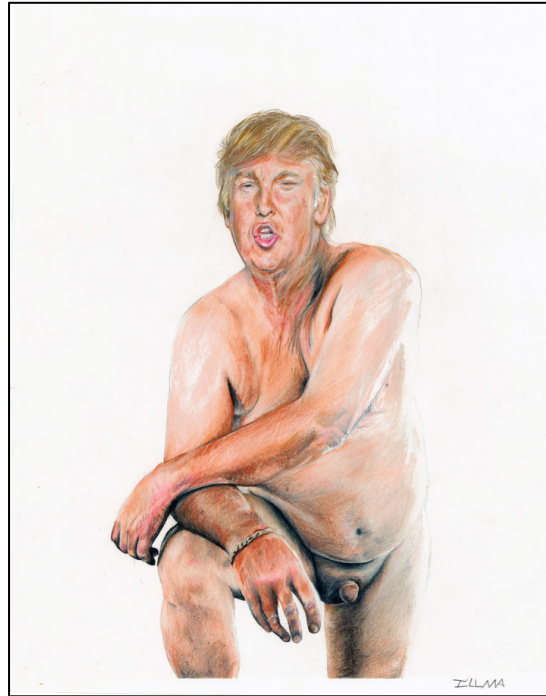
<sup>221</sup> Donald Trump (@realDonaldTrump), TWITTER (Jan. 31, 2013, 1:09 PM), <https://twitter.com/realDonaldTrump/status/297043874369650688>.

<sup>222</sup> Donald Trump (@realDonaldTrump), TWITTER (Jan. 31, 2013, 3:45 PM), <https://twitter.com/realDonaldTrump/status/297083228706201600>.

<sup>223</sup> Donald Trump (@realDonaldTrump), TWITTER (Jan. 31, 2013, 3:50 PM), <https://twitter.com/realDonaldTrump/status/297084584334589952>.

<sup>224</sup> Donald Trump (@realDonaldTrump), TWITTER (Jan. 31, 2013, 4:03 PM), <https://twitter.com/realDonaldTrump/status/297087613851017216>.

<sup>225</sup> Voon, *supra* note 6.



*Make America Great Again*

These two examples help provide a glimpse at the perils of politico-centric theories when applied to expressive works. Although the public-figure and newsworthy doctrines have at times proved successful, Miller and Gore would have reason to be wary. The doctrines have posed problems for creators of expressive works for two main reasons. First, the doctrines' politico-centricity can lead courts to valorize speech about politics and "serious" public issues at the expense of speech that does not clearly relate to democratic self-governance. Second, and more explicitly, courts applying the doctrines have conditioned speech protection on an expressive work's ability to convey information that will help the public engage in democratic self-governance. Even if the doctrines could successfully fend off a hypothetical lawsuit by Trump, the arguments that the artists would have to make in the process could imperil other creators of expressive works in the future.

As the cases discussed in Part III reveal, creators of expressive works who invoke the public-figure and newsworthy doctrines usually prevail only if their works convey information valuable for self-governance.<sup>226</sup> This can be a tough standard to meet for many 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,<sup>227</sup> a touch-and-go standard will inevitably have a chilling effect.

Take the example of 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?"<sup>228</sup> Miller uses Trump's name not as a way to impart any actual 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 Trump's politics. At most, then, the use of Trump's name serves as a "common point[] of reference"<sup>229</sup>

<sup>226</sup> See *supra* Part III.B.

<sup>227</sup> See *supra* notes 23–25 and accompanying text.

<sup>228</sup> *Donald Trump*, GENIUS, <https://genius.com/Mac-miller-donald-trump-lyrics>.

<sup>229</sup> 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

or “symbol[ ]”<sup>230</sup> 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,”<sup>231</sup> and that the line could have easily been “Take over the world when I’m on my Bill Gates shit.”<sup>232</sup>

As for Gore’s painting, it’s again difficult, though not impossible, to tell a persuasive 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.”<sup>233</sup> 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.”<sup>234</sup> If we take Gore’s word for it, her motivation was not directly tied to Trump’s candidacy for the presidency, nor was the painting supposed to convey accurate information about him. Rather, her point was to comment on the role that a physical characteristic can have on our conceptions of ourselves.

It’s conceivable, of course, that a court would protect Miller and Gore under the public-figure and newsworthy doctrines. 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, naming it after the campaign’s motto entangles it with his political persona. But we could also imagine Trump citing cases like *Keller* to argue that neither expressive work was a “publication or reporting” of “factual information” or “factual data,”<sup>235</sup> or *Binns* to claim that the works were “mainly a product of the imagination” that were designed to “amuse” rather than to “instruct or educate.”<sup>236</sup> He 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.<sup>237</sup> He could even accept 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 were liable because they didn’t use his name and likeness “in connection with any news account.”<sup>238</sup> 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.<sup>239</sup>

---

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”).

<sup>230</sup> 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”).

<sup>231</sup> 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>.

<sup>232</sup> 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>.

<sup>233</sup> *Make America Great Again*, ILLMA GORE, <http://illmagore.com/work-1/#/798817030644/> (emphasis added).

<sup>234</sup> *Id.*

<sup>235</sup> See *Keller v. Elec. Arts, Inc. (In re NCAA Student-Athlete Name & Likeness Licensing Litig.)*, 724 F.3d 1268, 1282–83 (9th Cir. 2013).

<sup>236</sup> See *Binns v. Vitagraph Co. of Am.*, 103 N.E. 1108, 1110–11 (N.Y. 1913); see also Post, *supra* note 108, 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)).

<sup>237</sup> See *Bosley v. Wildwett.com*, 310 F. Supp. 2d 914, 927 (N.D. Ohio 2004).

<sup>238</sup> *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 968 (10th Cir. 1996).

<sup>239</sup> 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

Setting aside the actual 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 public-figure and newsworthy doctrines might not do the author much good. She has used Trump's "identity"<sup>240</sup> in an expressive work that entwines fact and fiction. Because the doctrines rest chiefly on truth telling, they are ill suited as defenses when the right of publicity targets a work that intentionally avoids literal truth.<sup>241</sup> Even the inclusion of some "facts" might not be enough to make the book "newsworthy."<sup>242</sup> Depending on how far the story strayed from reality, Trump could argue that it constituted a "knowing and substantially fictionalized account" of his life that merits no protection.<sup>243</sup>

This kind of quasi-fictional work might also run afoul of the actual-malice standard that some courts have applied to publicity claims.<sup>244</sup> Courts first determine whether the work contains a false statement of fact or creates a "false impression" about the person being portrayed.<sup>245</sup> 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."<sup>246</sup> Once falsity is established, courts ask whether the speaker showed a "reckless disregard" for the truth,<sup>247</sup> meaning that she told a "known lie"<sup>248</sup> or "calculated falsehood."<sup>249</sup> Again, these

---

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.").

<sup>240</sup> 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).

<sup>241</sup> 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").

<sup>242</sup> *Hicks v. Casablanca Records*, 464 F. Supp. 426, 431 (S.D.N.Y. 1978).

<sup>243</sup> *Porco v Lifetime Entm't Servs., LLC*, 147 A.D.3d 1253, 1255 (N.Y. App. Div. 2017).

<sup>244</sup> See *supra* Part III.B.2.

<sup>245</sup> See *Hoffman*, 255 F.3d at 1187; *Hoffman*, 33 F. Supp. 2d at 875; see also *Spahn*, 21 N.Y.2d at 127.

<sup>246</sup> *Guglielmi v. Spelling-Goldberg Prods.*, 603 P.2d 454, 461 (1979) (Bird, C.J., concurring); see also *Eastwood v. Superior Court*, 198 Cal. Rptr. 342, 350 (Cal. Ct. App. 1983) (remarking that "[a]ll fiction is false in the literal sense that it is imagined rather than actual") (citing *Cohen v. California*, 403 U.S. 15, 25 (1971)); *de Havilland v. FX Networks, LLC*, No. B285629, 2018 WL 1465802, at \*13 (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."); *Fiction*, MERRIAM WEBSTER, <https://www.merriam-webster.com/dictionary/fiction> (defining "fiction" as "something invented by the imagination or feigned").

<sup>247</sup> *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

<sup>248</sup> *Garrison v. State of La.*, 379 U.S. 64, 75 (1964).

<sup>249</sup> *Id.*

standards clash with the intentional use of untruth when creating a fictitious world starring a real person.<sup>250</sup> 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.<sup>251</sup>

The court’s puzzling demand that expressive works avoid all falsity points to a deeper issue created by applying the public-figure and newsworthy doctrines in this context. Expressive works are often susceptible to many meanings. This can complicate 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.<sup>252</sup> This might explain why the Supreme Court has referenced expressive works to explain why “a narrow, succinctly articulable message is not a condition of constitutional protection.”<sup>253</sup> The Court rejected the idea that the First Amendment was “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.”<sup>254</sup>

The public-figure and newsworthy doctrines might also undervalue 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.<sup>255</sup> Under this descriptive standard, there might be no protection for works that expose a previously unknown phenomenon, such as “an especially high but as yet unnoticed rate of teenage suicide.”<sup>256</sup> 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. This moment of limbo might be when protection is needed most.

Finally, the diverse ways in which the public-figure and newsworthy doctrines have crept into the analysis create confusion for creators of expressive works. The standards differ across jurisdictions; courts waver between broadly and narrowly construing the doctrines; and some courts implement statutory exceptions, while others create ad-hoc privileges based on particular facts.<sup>257</sup> Many expressive works

<sup>250</sup> 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.”).

<sup>251</sup> *Spahn*, 21 N.Y.2d at 131 (Bergan, J., dissenting).

<sup>252</sup> See Note, *Motion Pictures and the First Amendment*, 60 Yale L.J. 696, 704–05 (1951) (“Analysis of modern communication research casts doubt on the validity of this dichotomy between entertainment and ideas. Evidence indicates that specific ideas of importance can be conveyed within a fictional context and that fictional expression is frequently responsible for creating a general frame work for the development of public attitudes and behavior.”).

<sup>253</sup> *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 569 (1995).

<sup>254</sup> *Id.*

<sup>255</sup> POST, *supra* note 18, at 164; see also BERNARD C. HENNESSY, PUBLIC OPINION 8–9 (3d ed. 1975).

<sup>256</sup> See POST, *supra* note 18, at 168 (offering this example of a topic that might not qualify for protection under a purely descriptive account).

<sup>257</sup> See *supra* Part III.B.



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 a successful publicity claim.<sup>258</sup> In all, then, there are many reasons to be skeptical that the doctrines provide adequate protection for expressive works that portray real people.

### B. *The Right to Portray Real People*

The chief shortcoming of the public-figure and newsworthy doctrines is that they reflect an incomplete understanding of the First Amendment’s protective scope. Speech about public figures and matters of public concern may be the First Amendment’s “core” concern.<sup>259</sup> But it shouldn’t be the only one. To understand why, let’s return to the cultural theories discussed in Part II.

Expanding our conception of the First Amendment’s purpose beyond politico-centric concerns about democratic self-governance helps reveal why portrayals of real people in expressive works deserve constitutional protection. An understanding of free speech that protects “cultural democracy”<sup>260</sup> (to use Balkin’s term) or “cultural pluralism”<sup>261</sup> (to use Madow’s) takes proper account of the threat posed by publicity rights. This threat 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, we restrict an important form of meaning-making.<sup>262</sup> Portrayals of real people are “important expressive and communicative resources.”<sup>263</sup> This is particularly true for the socially prominent people more likely to sue to vindicate their publicity rights, for they often “symbolize individual aspirations, group identities, and cultural values.”<sup>264</sup> To grant a censorship right or “veto power”<sup>265</sup> to people who might be portrayed in expressive works is to deprive the public of a valuable means of self-determination and cultural influence.<sup>266</sup> Publicity rights affect “the distribution of cultural

<sup>258</sup> See Siddique, *supra* note 24, at 2115–16; *Bosley v. Wildwett.com*, 310 F. Supp. 2d 914, 935 (N.D. Ohio 2004).

<sup>259</sup> See *Frisby v. Schultz*, 487 U.S. 474, 479 (1988); see also *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (lauding the “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,” which “may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials”).

<sup>260</sup> Balkin, *Digital Speech and Democratic Culture*, *supra* note 11, at 1–5, 30–40.

<sup>261</sup> Madow, *supra* note 27, at 127.

<sup>262</sup> See Balkin, *Digital Speech and Democratic Culture*, *supra* note 11, at 1 (“A democratic culture is a culture in which individuals have a fair opportunity to participate in the forms of meaning-making that constitute them as individuals.”); Madow, *supra* note 27, at 134 (“By centralizing this meaning-making power in the celebrity herself or her assignees, the right of publicity facilitates top-down management of popular culture and constricts the space available for alternative and oppositional cultural practice.”).

<sup>263</sup> Madow, *supra* note 27, at 128.

<sup>264</sup> *Id.*

<sup>265</sup> *Id.* at 195 n.334.

<sup>266</sup> *Id.* at 238–39 (“What it comes down to, then, is that the power to license is the power to suppress. When the law gives a celebrity a right of publicity, it does more than funnel additional income her way. It gives her (or her assignee) a substantial measure of power over the production and circulation of meaning and identity in our society: power, if she so chooses, to suppress readings or appropriations of her persona that depart from, challenge, or subvert the meaning she prefers; power to deny to others the use of her persona in the construction and communication of alternative or oppositional identities and social relations; power, ultimately, to limit the expressive and communicative opportunities of the rest of us.”).

power in contemporary society”<sup>267</sup> and “facilitate private censorship of popular culture.”<sup>268</sup> As Madow has explained:

Proponents of publicity rights often talk as if all that is at stake here is money—fairly big money, perhaps, but still “only money.” For them, the controlling question is simply, “Who will benefit financially from a celebrity’s publicity values—the celebrity who created them or some freeloading stranger?” As I see it, however, the stakes are both higher and more complicated. Publicity rights are about meaning as well as money. The question “Who owns ‘Madonna?’” is not just a question about who gets to capture the immense economic values that attach to her persona. The question is also, even chiefly, about who gets to decide what “Madonna” will mean in our culture: what meaning(s) her image will be used to generate and circulate, and what meaning(s) she will have for us. By centralizing this meaning-making power in the celebrity herself or her assignees, the right of publicity facilitates top-down management of popular culture and constricts the space available for alternative and oppositional cultural practice.<sup>269</sup>

This point leads to the second dimension of the threat posed by publicity rights. Cultural democracy isn’t merely about the individual’s interest in self-determination through speech, or even the individual’s ability to influence the meaning of important cultural figures.<sup>270</sup> It’s also about a collective interest in the type of society we wish to create. Publicity rights 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.”<sup>271</sup> By privatizing and centralizing an important form of cultural power, the right of publicity exacerbates the trend of “top-down management of popular culture” by powerful figures in the culture industries, at the expense of marginalized and subordinated groups.<sup>272</sup> Whether we see this as a constitutional concern<sup>273</sup> or merely a policy matter,<sup>274</sup> we might reasonably worry about the effects that this trend has on our society.

---

<sup>267</sup> *Id.* at 134.

<sup>268</sup> *Id.* at 138. For an actual example of how this censorship 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.*

<sup>269</sup> Madow, *supra* note 27, at 134 (footnote omitted).

<sup>270</sup> *Id.* at 143 (“[P]ublicity rights impinge on our ability to influence the meaning not only of powerful people, but also of ourselves. . . . Indeed, celebrity images are among the basic semiotic and symbolic raw materials out of which individuals and groups ‘establish their presence, identity and meaning.’” (quoting PAUL WILLIS ET AL., *COMMON CULTURE: SYMBOLIC WORK AT PLAY IN THE EVERYDAY CULTURES OF THE YOUNG* 1 (1990)).

<sup>271</sup> Balkin, *Digital Speech and Democratic Culture*, *supra* note 11, at 3–4, 33.

<sup>272</sup> Madow, *supra* note 27, at 142.

<sup>273</sup> See Balkin, *Digital Speech and Democratic Culture*, *supra* note 11, at 1.

<sup>274</sup> See Madow, *supra* note 27, at 142.

Even if the First Amendment is best understood in more politico-centric terms, there's a strong argument that portrayals of real people nonetheless deserve protection. Robert Post's "public discourse" theory provides the best explanation on this score.<sup>275</sup> Post's theory may have Meiklejohnian undertones—it is, at its core, a theory about democratic self-governance—but his focus differs in important respects. Whereas Meiklejohn prized an informed public for its decisionmaking capacity, Post emphasizes the legitimating function served by the formation of public opinion.<sup>276</sup> Post's view, in essence, is that people need to feel a connection between what they say and what their governments do. For Post, then, the First Amendment must protect "all communicative processes deemed necessary for the formation of public opinion," even if those processes do not serve expressly political ends.<sup>277</sup> Commentary about nonpolitical actors can still "influence in subtle and indirect ways public deliberation of public policy" because it may "provide common points of reference for debate, or crystallize common concerns, or shape common metaphors of understanding."<sup>278</sup> Post has repeatedly justified protection for expressive works under this theory.<sup>279</sup> We might still conceive of his theory as politico-centric, but his work also recognizes the role that participation in culture formation plays in public life.

Post's theory highlights an important point in this debate. My goal has not been to show that politico-centric theories are always or inevitably wrong. Far from it. They provide a backbone to First Amendment theory and explain a great deal about the forms of speech that deserve robust protection. My point, simply, is that cultural theories provide a richer and more persuasive account for why some speech—especially speech that isn't obviously political—is constitutionally valuable and warrants similar, if not equal, protection. This point is particularly salient when analyzing the forms of speech typically at issue when publicity rights clash with the rights asserted by creators of expressive works to portray real people. Cultural theories provide a superior account of why these works are due constitutional protection. In short, we should understand the First Amendment to protect cultural democracy, not simply political democracy. Portraying real people is a valuable means of participating in the production and distribution of culture, and publicity rights shouldn't be permitted to interfere with our right to contribute to "our cultural commons"<sup>280</sup> in this way.<sup>281</sup>

<sup>275</sup> See POST, *supra* note 18; Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601 (1990); Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109 (1993).

<sup>276</sup> ROBERT POST, *CITIZENS DIVIDED* 41 (2014) (contending that the First Amendment is "designed to protect the processes of democratic legitimation").

<sup>277</sup> Robert Post, *Participatory Democracy as a Theory of Free Speech: A Reply*, 97 VA. L. REV. 617, 621 (2011).

<sup>278</sup> POST, *supra* note 18, at 168–69

<sup>279</sup> *Id.* at 620–21; Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 485–86 (2011) ("Art and other forms of noncognitive, nonpolitical speech fit comfortably within the scope of public discourse."). Post recently reiterated this argument when discussing *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, a case in which an artisan bakery claimed that making a cake for a same-sex wedding was sufficiently expressive to trigger First Amendment concerns. See 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> ("The First Amendment allows us to govern ourselves. It is, as the Court has put it, the 'guardian of our democracy.' If that guardian is to remain strong and sure-footed, we need to reserve heightened First Amendment scrutiny for occasions when core First Amendment values are threatened. We do not debate and articulate the meaning of current events through the medium of wedding cakes. We do not carry on national debates through the medium of flowers, cooking, jewelry or furniture. Artisans are in this respect different from artists, who are rightly regarded as principal participants in these debates." (quoting *Brown v. Hartlage*, 456 U.S. 45, 60 (1982))).

<sup>280</sup> Madow, *supra* note 27, at 239.

<sup>281</sup> When courts are faced with a claim that a portrayal of a real person violates the right of publicity, there's room to debate the precise way that the legal analysis could protect cultural democracy, and this Article isn't the space to explore this issue fully. But as I've previously argued in greater depth elsewhere, one approach would be for courts to first ask if the portrayal constitutes commercial speech. See Kadri, *supra* note 10, at 1525–26. If it doesn't constitute commercial

## CONCLUSION

The time has come to curb the right of publicity. 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 cultural democracy. 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 be protected as a valuable part of the public's "building of the whole culture."<sup>282</sup> By recalibrating the theoretical foundations of this debate, we can justify and explain speech protection for these works with confidence and coherence.

---

speech, the First Amendment would bar the publicity claim unless the portrayal is wholly unrelated to the expressive work or is actually a disguised commercial advertisement for the sale of goods or services. *See* *Rogers v. Grimaldi*, 875 F.2d 994, 1004 (2d Cir. 1989) (citing *Guglielmi v. Spelling-Goldberg Prods.*, 603 P.2d 454, 457 n.6 (Cal. 1979) (en banc) (Bird, C.J., concurring), and *Frosch v. Grosset & Dunlop, Inc.*, 427 N.Y.S.2d 828 (App. Div. 1980)). 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. A portrayal is "wholly unrelated" if it has no relevance whatsoever to the underlying work—a low bar, whereby the relevance must simply exceed zero. *See* *E.S.S. Entm't 2000, Inc. v. Rock Star Videos, Inc.*, 547 F.3d 1095, 1100 (9th Cir. 2008). A portrayal is a "disguised commercial advertisement" if it explicitly deceives the public by affirmatively claiming sponsorship or endorsement. (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).) 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. Applied faithfully, these standards would protect cultural democracy and yet preserve the right of publicity in cases of unauthorized exploitation of someone's identity in commercial speech.

Another plausible option be 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. In other words, courts needn't ask whether the portrayal is wholly unrelated to the expressive work or is actually a disguised commercial advertisement.

Alternatively, it might be possible to apply strict scrutiny in a way that protects cultural democracy. *See* *Sarver v. Chartier*, 813 F.3d 891, 905–06 (9th Cir. 2016). This approach would protect portrayals of real people in expressive works based on the idea that the right of publicity is a presumptively unconstitutional content-based restriction when applied to noncommercial speech. *See id.* at 903–06. Although the *Sarver* court drew a dubious distinction between publicity plaintiffs who "invest time and money to build up economic value in a marketable performance or identity" and those that don't, *see id.* at 905, other courts need not follow the same path and court instead recognize that the state never has a compelling interest to censor portrayals of real people in expressive works.

Lastly, the public-figure and newsworthy doctrines could be reformed to recognize the role that portrayals of real people play in promoting and protecting cultural democracy. This reform could be done by courts as a matter of common law or by legislatures in the form of clear statutory exemptions that recognize a richer conception of what constitutes the public interest or matters of public concern. *See* Parts III.B.3 & III.B.4.

<sup>282</sup> EMERSON, *supra* note 70, at 7.