FAKES AND DEEPFAKES: BALANCING PRIVACY RIGHTS IN THE DIGITAL AGE

Note

FAKES AND DEEPFAKES: BALANCING PRIVACY RIGHTS IN THE DIGITAL AGE

Note

INTRODUCTION

Since the dawn of celebrity culture, privacy rights have remained essential to individuals in the public eye. The availability of deepfake technology accentuates these privacy concerns, primarily due to its deceptive credibility. In the past, statements falsely attributed to public figures and officials, or inaccurate representations made about them, led to an onslaught of litigation.[1] Today, videos of a public figure making statements they never uttered create a more difficult burden of proving to society the falsity of the video; video and audio provide credibility that printed words lack. After all, as the saying goes, "seeing is believing." Thus, as the technology continually advances and becomes ingrained in the social fabric, courts must undertake the daunting task of protecting the rights of their respective constituents while minimizing any infringement of other rights. This Note will focus exclusively on the potential infringement of public figures' and officials' privacy and the larger societal consequences that may arise; this Note will not focus on revenge pornography or the possibility of creating incriminating evidence with fakes and deepfakes, although these issues are equally concerning.

Deepfakes are a form of synthetic media in which a person in an existing image or video is replaced with someone else's likeness.[2] Fakes, on the other hand, are altered pieces of video or other media that may either change what the public figure or official says or how they say it. These videos include edited media, staged media, and media taken out of context.[3]

Fakes and deepfakes have far-reaching effects and consequences on those in the public eye. For public figures, the counterfeit media presents a danger to their reputations as well as an infringement upon their exploitative commercial value. The privacy concerns extend not only to their names and images but every facial movement and behavioral tick; the fakes call into question the authenticity of the public figure's being. For public officials, the concerns are less commercial or personal and more political or societal. Disinformation campaigns already impact elections around the world; fakes and deepfakes will

1. *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964); Masson v. New Yorker Mag., Inc., 501 U.S. 496 (1991).

2. Penelope Thornton et al., *Deepfakes: An EU and U.S. Perspective*, HOGAN LOVELLS: GLOB. MEDIA TECH. & COMMC'NS Q., Spring/Summer 2020, at 1, 30.

3. Ian Sample, *What Are Deepfakes—and How Can You Spot Them?*, GUARDIAN (Jan. 13, 2020, 5:00 AM), https://www.theguardian.com/technology/2020/jan/13/what-are-deepfakes-and-how-can-you-spot-them.

only add more sophistication to the troubling trend. For example, during the 2016 United States presidential campaign, a "fake news" article arose claiming that Pope Francis endorsed Donald Trump;[4] in the foreseeable future, an AI-assisted video of Pope Francis announcing his endorsement for the former President, if circulated on various social media platforms, may cause significant social and political unrest.

Part I discusses the current state of United States jurisprudence regarding the privacy rights of public figures and officials. The discussion will outline the evolution of case law on this issue and examine how federal courts balance perceived notions of privacy with concrete First Amendment protections. It will also address the regulation, or lack thereof, of fakes and deepfakes. Part II examines the European Court of Human Rights's ("ECHR") prioritization of enumerated privacy rights in the face of an individual's freedom of expression. It will also explore two privacy interests developed by case law: the right to the protection of one's image and the right to the protection of reputation. It will then look at the current regulatory framework in the European Union. Part III explores the cultural and societal differences that shed light on why the legal divergences exist in the first place. It analyzes Robert Post and Jennifer Rothman's four rights of publicity in the context of fakes and deepfakes. It will also propose a solution for the United States and the ECHR in their adoption of a standard to govern fakes and deepfakes. Finally, the Note concludes with a brief overview.

I. THE UNITED STATES'S APPROACH TO FAKES AND DEEPFAKES

This Part addresses the United States's approach to privacy rights of public figures and officials and the impact past judicial opinions have on potential deepfake regulation. Since the country's inception, the United States lays claim to some of the most revered, despised, and discussed people in the world. Technology advancement brings with it legal challenges surrounding the privacy of these public figures and officials. Any true right of publicity or privacy is jurisdiction-dependent,[5] as the United States has taken different approaches at both the federal and state levels to address this ongoing issue. Fakes and deepfakes have the potential to exploit others' commercial value, manipulate elections, and distort democratic discourse.[6]

4. Yasmeen Serhan, *Italy Scrambles to Fight Misinformation Ahead of Its Elections*, ATLANTIC (Feb. 24, 2018), https://www.theatlantic.com/international/archive/2018/02/europe-fake-news/551972/.

5. *See State Law: Right of Publicity*, DIGIT. MEDIA L. PROJECT (Sept. 10, 2022), https://www.dmlp.org/legal-guide/state-law-right-publicity (showing different states' definitions of a right of publicity).

6. *See* Bobby Chesney & Danielle Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CALIF. L. REV. 1753, 1772–77 (2019) (discussing the negative consequences that may come from deepfakes).

A. Use of a Public Figure's Image and the Supreme Court's Line Drawing

Digital technology has advanced to a point where an advertiser can use a celebrity's likeness through fakes and deepfakes without having to hire them; legal responses are therefore inevitable. At the federal level, a true "right of publicity" does not exist. Copyright law will likely prohibit a fake directly derived from a public figure's performance, whether it be a comedian performing stand-up or a magician performing their act. Most deepfakes, however, are custom-made and, as such, do not pull large swaths of an entertainer's performance.

Intellectual property laws protect certain published works, but these laws do not address the protection of one's persona.[7] A plaintiff performer may still argue that a deepfake of themselves, while they have a new movie or album out, affects their proprietary interest in their performance, but anything short of pulling directly from a commercial performance lies in a murky gray area.

The Supreme Court recognizes a "legitimate public interest" threshold for First Amendment protection for creators using public figures' identities in their content.[8] In Justice William Brennan's plurality opinion in *Rosenbloom v. Metromedia, Inc.*, he wrote that "[v]oluntarily or not, we are all 'public' men to some degree. Conversely, some aspects of the lives of even the most public men fall outside the area of matters of public or general concern."[9]

Justice Brennan, although acknowledging the plaintiff's reputational and privacy interests, raised the applicable standard for defamatory speech related to matters of public concern, which includes speech related to government, science, morality, and the arts, from the comparatively low standard of reasonable care.[10] While the Court's holding in *Gertz v. Robert Welch, Inc.* no longer bound public figures to the "matters of public concern" standard, the standard resurfaced in subsequent cases after *Gertz*.[11]

The Supreme Court's jurisprudence provides minimal hope for deepfake victims. The actual malice standard in *New York Times v. Sullivan* informs the approach to false speech directed at public officials, but the Court has expanded on the *Sullivan* ruling.[12] In *Zacchini v. Scripps-Howard Broadcasting Co.*, the only right of publicity claim explicitly considered by the Supreme Court, the Court

7. Dori Ann Hanswirth & Kyle Schneider, *Using One's Image and Personality, Part I: Free Speech or Right of Publicity Violation?*, INT'L TRADEMARK ASS'N (Sept. 30, 2020), https://www.inta.org/perspectives/using-ones-image-and-personality-part-i-free-speech-or-right-of-publicity-violation/.

8. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 58 (1971), *abrogated by* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (White, J., concurring).

9. *Id.* at 48 (citation omitted).

10. *See id.* at 48–51.

11. *Gertz*, 418 U.S. at 345–46. *See generally* Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 50–57 (1988); Snyder v. Phelps, 562 U.S. 443, 458–59 (2011) (applying the matters of public concern standard).

12. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 280 (1964). *See generally* Curtis Publ'g Co. v. Butts, 388 U.S. 130, 154–55 (1967) (plurality opinion) (extending the actual malice standard to public figures outside the government).

found that "if the public can see the act free on television, it will be less willing to pay to see it at the fair."[13] A plaintiff entertainer may use *Zacchini* to argue that a deepfake using their look, personality, and mannerisms, which entertainers heavily rely on in their performances, dilutes their value. Given the Court's subsequent holdings regarding tort recovery for harmful speech,[14] however, public figures may have to bear the brunt of the social cost these videos produce. This sentiment is especially likely given that public figures have diminished rights of privacy, and they must meet higher standards of proof to be able to recover damages.[15]

In *Masson v. New Yorker Magazine Inc.*, the Court analyzed whether alterations of verbatim quotes, including fake quotes that had Jefferey Masson describing himself as an "intellectual gigolo," fell under the actual malice standard.[16] The Court found that "[i]f an author alters a speaker's words but effects no material change in meaning, including any meaning conveyed by the manner or fact of expression, the speaker suffers no injury to reputation that is compensable as a defamation."[17] The Court afforded breathing room to the author because he did not materially change the meaning of Masson's interviews; after all, "[m]eaning is the life of language."[18] Applying this idea to deepfakes, altering the meaning of a public figure's words may lead a court to find actual malice, but if the deepfake is consistent with what the figure has said in the past, courts may afford First Amendment protections to creators.

The Court does not interpret the First Amendment to provide equal protection for all speech. In *Snyder v. Phelps*, the Court found that "'[n]ot all speech is of equal First Amendment importance,' . . . and where matters of purely private significance are at issue, First Amendment protections are often less rigorous."[19] Speech on "matters of purely private significance" is contrasted with "speech on 'matters of public concern,'" and the federal courts examine speech through the "content, form, and context . . . as revealed by the whole record."[20] Matters of purely private significance may include highly degrading sexual videos.[21] In a deepfake context, the tight First Amendment protections may loosen when a deepfake is shown to intentionally deceive its audience into believing a public figure either engaged in or commented on their sexual activity

13. Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 575 (1977).

14. *See Falwell*, 485 U.S. at 50–57; *Snyder*, 562 U.S. at 451–59.

15. Time, Inc. v. Hill, 385 U.S. 374, 390–91 (1967).

16. Masson v. New Yorker Mag., Inc., 501 U.S. 496, 522 (1991).

17. *Id.* at 516.

18. *Id.* at 517.

19. *Snyder*, 562 U.S. at 452 (quoting *Falwell*, 485 U.S. at 56).

20. Robert C. Post & Jennifer E. Rothman, *The First Amendment and the Right(s) of Publicity*, 130 YALE L.J. 86, 167–68 (2020) (first quoting *Snyder*, 562 U.S. at 452; then quoting Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758 (1985); and then quoting *Snyder*, 562 U.S. at 453).

21. City of San Diego v. Roe, 543 U.S. 77, 84 (2004) (per curiam) ("Roe's [sexually explicit videotape] does not qualify as a matter of public concern under any view of the public concern test.").

when no such engagement took place or no such statements were made. Still, a fake or deepfake that deviates at all from matters of purely private significance will retighten the First Amendment restrictions placed upon them.

Snyder and other Supreme Court precedents provide little clarity as to what the "matters of purely private significance" standard encompasses outside of sexual activity. Thus, it remains unclear what type of fakes and deepfakes may fall under the umbrella of such a standard. *Snyder*'s finding that non-obscene speech concerning a public figure may lose its protections based on the character of the speech is inconsistent with previous Court precedent.[22] Ultimately, the line drawn between matters of public concern and purely private significance is too murky to draw a conclusive understanding about how the Court would treat fakes and deepfakes.

Recent lower-court case law concerning the right to the commercial use of one's identity will inform courts in developing a proper modern approach.[23] These cases preceded the modern approach taken by states with active case law regarding publicity rights—the transformative use test.

B. Transformative Use

The California Supreme Court laid out the "transformative use" test, which is essentially a balancing test of publicity interests and First Amendment protections. The test requires an artist using a celebrity's likeness to show new artistic expression rather than provide a re-creation of the celebrity's likeness to receive First Amendment protections.[24] Complete reproductions of a celebrity's image can transform into expressive works based on the context into which the celebrity's image is placed.[25] Federal courts have adopted the test since its creation.[26] The United States Court of Appeals for the Sixth Circuit subsequently found that a literal reproduction of Tiger Woods's likeness in a painting sufficiently added significant artistic expressions through the other aspects of the painting.[27] Thus, when the context of a literal reproduction of a

22. Post & Rothman, *supra* note 20, at 169; *see* Cohen v. California, 403 U.S. 15, 19–20 (1971); Texas v. Johnson, 491 U.S. 397, 414 (1989).

23. Since Crispin Glover brought suit over *Back to the Future II* using a face mold to mimic him, a line of cases followed surrounding the use of a celebrity's likeness. Eriq Gardner, *"Back to the Future II" from a Legal Perspective: Unintentionally Visionary*, HOLLYWOOD REP. (Oct. 21, 2015, 3:51 PM), https://www.hollywoodreporter.com/business/business-news/back-future-ii-a-legal-833705/. Vanna White, the former host of *Wheel of Fortune*, sued when an ad depicted a robot that resembled her; the United States Court of Appeals for the Ninth Circuit ruled that a celebrity has the sole right to exploit their identity for value, but a parody defense will succeed if the primary message is comical instead of commercial. White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1401 (9th Cir. 1992).

24. Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 810 (Cal. 2001).

25. *Id.* at 811.

26. *See* ETW Corp. v. Jireh Publ'g, Inc., 332 F.3d 915, 936 (6th Cir. 2003); Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1264–69 (11th Cir. 2001).

27. *ETW Corp.*, 332 F.3d at 938 (holding that a painting of Woods's victory at the 1997 Masters Tournament, with all of the trappings of that tournament in full view, including the Augusta clubhouse, the leader

celebrity's likeness creates "'something new, with a further purpose or different character, altering the first [likeness] with new expression, meaning, or message,' the depiction is protected by the First Amendment."[28]

In their balancing tests of publicity and First Amendment rights, courts identify transformation in meaning and purpose rather than transformation in physical or visual presentation.[29] In a case adjacent to the idea of fakes and deepfakes, a California appellate court found that the context of a video game using a literal reproduction of Gwen Stefani and her band as avatars did not pass the transformative use test.[30] Users' ability to manipulate the avatars to perform at outer space venues in a video game context did not transform the avatars into anything other than exact depictions of the activities that made these band members famous—performing rock songs.[31] The concern with fakes and deepfakes is less about the replication of imagery and more about whether their purpose is to exaggerate for critical effect. Fakes and deepfakes must exaggerate for critical effect, and thus rise to the level of a "caricature," to be transformative.[32]

The transformative use test still lacks a proper differentiation in analysis between a work of art and a celebrity's persona.[33] Protecting content that transforms the meaning and purpose of a public figure's words is also inconsistent with the Supreme Court's opinion in *Masson* that protects content so long as the creator does not materially change the meaning of the person's words.[34] Consequently, statutory schemes may be what courts look to when balancing privacy and First Amendment rights. Looking to pre-deepfake laws and judicial decisions will prove fruitful. States differ in their approaches to prohibiting the use of another's image for commercial purposes. Most states have statutory right-of-publicity protections yet still recognize First Amendment defenses.[35] New York and California are two appropriate jurisdictions to analyze, given that the majority of public figures live in these two states.

Section 51 of New York's Civil Rights statute protects against the use of one's "name, portrait, picture or voice . . . for advertising purposes" without consent, but it does not give blanket protection to every use of a name, portrait,

---

board, images of Woods's caddy, and crafted images of previous winners of the tournament was a sufficient addition of artistic expression).

28. No Doubt v. Activision Publ'g, Inc., 122 Cal. Rptr. 3d 397, 410 (Ct. App. 2011) (quoting *Comedy III*, 21 P.3d at 808).

29. Rebecca Tushnet, *A Mask That Eats into the Face: Images and the Right of Publicity*, 38 COLUM. J.L. & ARTS 157, 173 (2015).

30. *No Doubt*, 122 Cal. Rptr. 3d at 409–12.

31. *Id.* at 411.

32. Tushnet, *supra* note 29, at 174.

33. *Id.*

34. Masson v. New Yorker Mag., Inc., 501 U.S. 496, 514–15 (1991).

35. *See* Hanswirth & Schneider, *supra* note 7.

picture, or voice.[36] New York recognizes a "newsworthy" defense that is available for content that covers newsworthy events and matters of public concern.[37] If a court deems a fake or deepfake newsworthy, then this defense may protect a commercial use of a public figure's image. If a court subjectively determines that the video contains too many fictitious elements, however, it will not qualify for the newsworthy exemption.[38]

Courts find newsworthiness where the content informs the public about an important matter, relates to the public figure or official's status, or otherwise enhances the public's understanding of that person's public role.[39] For example, a deepfake creator portraying Donald Trump as impulsive and distrusting may argue the video informs the public's understanding of his role as President when there are cabinet members who will attest to these qualities. Trump would argue that the video uses his image, likeness, voice, and mannerisms against him in violation of statutes. But if it was a comedian or other established performer, courts sometimes give leeway to those who are creatively expressing.[40] The newsworthy defense also covers material taken exclusively from the public record; a privacy cause of action based on such material will struggle in jurisdictions that recognize the defense.[41] Artificial Intelligence ("AI") usually pulls multiple public images to create the fake videos,[42] so the newsworthy defense is a barrier to public figures who seek to preserve the commercial value of their identity.

California recognizes both a statutory and common law right of publicity that protects the unauthorized use of a person's image.[43] California common law prohibits any sort of appropriation of another's identity "to [the] defendant's advantage, commercially or otherwise."[44] At the same time, California case law, following precedent from the United States Court of Appeals for the Ninth Circuit, shows that defendants taking "the raw materials of life" and "transform[ing] them into art" are protected under the First Amendment.[45] The inconsistency provides more questions than answers concerning the state's approach.

---

36. N.Y. CIV. RIGHTS LAW § 51 (McKinney 2003).

37. *See* Hanswirth & Schneider, *supra* note 7. In *Foster v. Svenson*, a New York court found that the newsworthy defense shielded a photograph that accompanied a newsworthy story from right-of-privacy claims. Foster v. Svenson, 7 N.Y.S.3d 96, 100 (App. Div. 2015).

38. Porco v. Lifetime Ent. Servs., LLC, 47 N.Y.S.3d 769, 771–72 (App. Div. 2017).

39. *Privacy: Newsworthiness is a Strong Defense*, FIRST AMEND. WATCH N.Y.U. (June 20, 2017), https://firstamendmentwatch.org/what-is-privacy/.

40. *See* De Havilland v. FX Networks, LLC, 230 Cal. Rptr. 3d 625, 638 (Ct. App. 2018).

41. Don R. Pember, *Privacy and the Press: The Defense of Newsworthiness*, 45 JOURNALISM & MASS COMMC'N Q. 14, 17–18 (1968).

42. Thornton et al., *supra* note 2.

43. *See* Hanswirth & Schneider, *supra* note 7.

44. *Id.* (quoting Newcombe v. Adolf Coors Co., 157 F.3d 686, 692 (9th Cir. 1998)).

45. *De Havilland*, 230 Cal. Rptr. at 638 (quoting Sarver v. Chartier, 813 F.3d 891, 905 (9th Cir. 2016)).

Satire and parody are other potential defenses for fakes and deepfakes. Supreme Court precedent shows that the Court will protect published content labeled as false;[46] fakes and deepfakes will likely fall under this protection if they are labeled appropriately. Without a label, the parody defense is still available. To combat the subjective nature of what makes a piece of content humorous or comedic, courts grapple with parody judgments.[47] The United States Court of Appeals for the Eleventh Circuit, in a case concerning *The Wind Done Gone*, a biting racial satire of *Gone with the Wind*, found clear parodic character in the reimagined work.[48] The Court used the transformative use test and set new parameters for inherently subjective decisions. The Eleventh Circuit based its finding on applying a certain type of subjectivity, questioning the existence of criticism or commentary rather than comedic success.[49] Thus, whether a fake or deepfake is humorous is likely less important than the criticism or commentary it brings forth.

II. THE EUROPEAN APPROACH TO FAKES AND DEEPFAKES

This Part considers the jurisprudence of the ECHR on public figures and officials' privacy rights and their relation to inevitable future fake and deepfake issues. Like the United States, the ECHR balances privacy and speech interests when assessing the privacy of members in the public eye.[50] The advent of new technology will not shift this balancing test. Unlike the United States, when analyzing fakes and deepfakes, the ECHR will balance two rights included in its Convention articles: the right to respect for private and family life laid out in Section 1 Article 8[51] and the freedom of expression in Article 10.[52] Due to the novelty of deepfake technology, the ECHR's case law shows that privacy claims concerning deepfake technology will be a matter of first impression, but past decisions reveal a pattern of the ECHR's attitude towards matters adjacent to the issue at hand. Current regulatory schemes also shed light on the viability of these privacy claims.

46. Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 57 (1988).

47. *See Copyright Law – Fair Use Doctrine – Eleventh Circuit Allows Publication of Novel Parodying* Gone with the Wind. – Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir.),* Reh'g En Banc Denied, *275 F.3d 58 (Table) (11th Cir. 2001)*, 115 HARV. L. REV. 2364, 2370 (2002).

48. *Id.* at 2371.

49. *Id.*

50. ERIC BARENDT ET AL., NEW DIMENSIONS IN PRIVACY LAW: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 24–25 (Andrew T. Kenyon & Megan Richardson eds., 2006).

51. Convention for the Protection of Human Rights and Fundamental Freedoms, § 1, art. VIII, Nov. 4, 1950, E.T.S. No. 5 [hereinafter Convention for the Protection of Human Rights].

52. *Id.* at 9 (citing Article 10 of the Convention).

A. The Right to Protection of One's Image

The most directly applicable line of cases to the pressing matter of fakes and deepfakes is what the ECHR refers to as the right to the protection of one's image.[53] According to the ECHR, a person's image "constitutes one of the chief attributes of their personality, as it reveals the person's unique characteristics and distinguishes the person from their peers."[54] "Image" here is literal; this right focuses on one's likeness rather than a reputational image.[55] Fakes distort one's image, and deepfakes use AI to compress thousands of images to perfect the deepfake.

The landmark decision of *Von Hannover v. Germany*[56] has guided the ECHR in subsequent cases concerning public figures and officials and the right to privacy while in the public eye. As explained in *Von Hannover No. 2*, "[t]he right to the protection of one's image is . . . one of the essential components of personal development. It mainly presupposes the individual's right to control the use of that image, including the right to refuse publication thereof."[57] The *Von Hannover* court found that publishing photographs of Princess Caroline of Monaco, a "figure of contemporary society '*par excellence*,'" violated her Article 8 right to respect for private life.[58]

The *Von Hannover* court drew a line between public figures in their official duties versus non-official duties when determining what images publication companies may print.[59] Privacy rights will trump any commercial or public interest when the piece of media discusses private life matters for which the plaintiff may have a "legitimate expectation" of protection.[60] This line drawing will extend to future decisions on what media can and cannot be created. *Von Hannover* makes one notion unquestionably clear—the ECHR is willing to afford public figures privacy while in public.

To exemplify the effect of *Von Hannover*'s holding on fakes and deepfakes, consider the following two examples. The ECHR may find that a lesser offense,

---

53. *See* Von Hannover v. Germany (No. 2), App. Nos. 40660/08 and 60641/08, ¶ 96 (Feb. 7, 2012), https://hudoc.echr.coe.int/fre?i=002-98. *See generally* Flinkkilä v. Finland, App. No. 25576/04 (Apr. 6, 2010), https://hudoc.echr.coe.int/fre?i=001-98064; Sapan v. Turkey, App. No. 44102/04 (June 8, 2010).

54. *Von Hannover (No. 2)*, App. Nos. 40660/08 and 60641/08, ¶ 96.

55. *See id.*; *see also* EUR. CT. H.R., PRESS UNIT, FACTSHEET - RIGHT TO PROTECTION OF ONE'S IMAGE 1 (2022), https://www.echr.coe.int/documents/fs_own_image_eng.pdf [hereinafter RIGHT TO PROTECTION OF ONE'S IMAGE].

56. Von Hannover v. Germany, App. No. 59320/00 (June 24, 2004), https://hudoc.echr.coe.int/fre?i=001-61853.

57. *Von Hannover (No. 2)*, App. Nos. 40660/08 and 60641/08, ¶ 96 (citation omitted).

58. *Von Hannover*, App. No. 59320/00, ¶ 75.

59. *See id.* ¶ 63.

60. *See id.* ¶ 72. For public officials, this line is more clear; non-official duties likely include activities like grocery shopping and recreational outings that have no relation to their official capacity. Non-official duties for celebrity public figures, on the other hand, may include any outings that have no promotional purposes. *See id.* ¶¶ 50–58.

like a fake of a public figure discussing her children, still violates Article 8 privacy rights; after all, the photographs of Princess Caroline and her children were mundane shots of them engaged in normal activities.[61] If the video involves a fake of French President Emmanuel Macron pushing policies adverse to his administration's goals, however, *Von Hannover* is no longer applicable because it does not examine any aspect of his private life.

Article 8 will likely protect fakes and deepfakes that concern the private life of public figures[62] while Article 10 is more likely to afford protection to fakes that concern professional duties.[63] This balance collapses when content creators use videos of public figures and officials in public; but, precisely when a person in public enters their professional capacity is nearly impossible to establish conclusively. A person who walks down the street is visible to any member of the public who is also present, so they are knowingly involving themselves in activities of a public manner.[64] The ECHR considers this visibility of the same public scene through technological means to yield a similar outcome.[65] Privacy considerations arise when "any systematic or permanent record comes into existence of such material from the public domain."[66]

In *Peck v. United Kingdom*, the ECHR sustained the Brentwood Borough Council's use of public street monitoring.[67] It found, however, that the disclosures by the CCTV News Council to various news outlets were not accompanied by sufficient safeguards to protect against Article 8 infringement.[68] The ECHR may build on this logic to find that an altered version of a public official's video distributed via social media must include sufficient safeguards to ensure no private information is revealed. Currently, creators of fakes and deepfakes almost uniformly do not offer any safeguards of privacy or dignity, let alone a safeguard that the ECHR would find "sufficient."

A fake or deepfake victim would take advantage of the ECHR's broad reading of Article 8 in past cases to argue for their privacy rights. The ECHR revealed that "'private life' is a broad term not susceptible to exhaustive definition, which covers the physical and psychological integrity of a person and can therefore embrace multiple aspects of a person's identity, such

61. BARENDT ET AL., *supra* note 50, at 187.

62. Convention for the Protection of Human Rights, *supra* note 51, at 5 (citing Article 8 of the Convention).

63. *Id.* at 9 (citing Article 10 of the Convention).

64. EUR. CT. H.R., GUIDE ON ARTICLE 8 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 48 (2022) [hereinafter GUIDE ON ARTICLE 8].

65. *Id.* (providing an example of a security guard viewing through a closed-circuit television).

66. *Id.*

67. Peck v. United Kingdom, App. No. 44647/98, ¶ 79 (Jan. 28, 2003), https://hudoc.echr.coe.int/eng?i=001-60898.

68. *Id.* ¶ 87.

as . . . elements relating to a person's right to their image."[69] Given this definition, a plaintiff who is a figure of contemporary society *par excellence* may successfully argue that distorted and manufactured videos harm their physical integrity. Deepfakes pull from many different angles and aspects of one's identity and image, including one's facial features, mannerisms, and speech patterns. Because the ECHR provides a right to the protection of one's image, distortion of the image in such a public manner does not bode well for the survival of fakes and deepfakes when analyzed under Article 8.

Despite its much-discussed privacy priorities, prior cases show the extent to which the ECHR also values the Article 10 freedom of expression. Article 10 still applies to those that make content that may "offend, shock or disturb."[70] Particularly for public officials, the ECHR considers the necessity of criticism of a public official for an effective democratic society, and it rejects the concept of laws requiring proof of truth in the opinions put forth concerning political figures.[71]

In *Flinkkilä v. Finland*, the ECHR protected an image that showed a public official's confrontation outside with his wife and girlfriend.[72] The ECHR interpreted Article 10's assertion that "[t]he exercise of these freedoms . . . are necessary in a democratic society" to imply the existence of a "pressing social need."[73] The matter of public concern at issue was the ability of the high-level public official to continue to serve in his post;[74] this matter of public concern was enough in this case to tip the scales in favor of protecting free expression.

Sapan v. Turkey shows that the ECHR is more likely to provide protection under Article 10 when the piece of media rises above low-level gossip about celebrities' private lives.[75] In *Sapan*, a publishing house published a book analyzing the phenomenon of stardom in Turkey by studying the case of a famous singer.[76] The singer requested a seizure order, arguing the book infringed on his right to the protection of his image and his personality rights because it contained photographs of him.[77] The book, unlike the tabloid press

69. Axel Springer AG v. Germany, App. No. 39954/08, ¶ 83 (Feb. 7, 2012), https://hudoc.echr.coe.int/eng?i=001-109034 (citation omitted).

70. Hertel v. Switzerland, App. No. 25181/94, ¶ 46 (Aug. 25, 1998), https://hudoc.echr.coe.int/eng?i=001-59366.

71. Lingens v. Austria, App. No. 9815/82, ¶¶ 41–42 (July 8, 1986), https://hudoc.echr.coe.int/eng?i=001-57523.

72. *See* Flinkkilä v. Finland, App. No. 25576/04, ¶¶ 7, 69–93 (Apr. 6, 2010), https://hudoc.echr.coe.int/eng?i=001-98064.

73. Convention for the Protection of Human Rights, *supra* note 51, at 9 (citing Article 10 of the Convention); *Flinkkilä*, App. No. 25576/04, ¶ 70. In its balancing of Article 10 and Article 8, the ECHR highlighted the essential function of the press in a democratic society. *Id.* ¶ 73.

74. *Flinkkilä*, App. No. 25576/04, ¶ 85.

75. *See* RIGHT TO PROTECTION OF ONE'S IMAGE, *supra* note 55, at 3–4 (outlining the facts, holding, and reasoning of *Sapan v. Turkey*).

76. *Id.*

77. *Id.* at 4.

who reveal private details of celebrities' lives, had an elevated societal worth in the eyes of the ECHR; this rationale led to a finding of an Article 10 violation.[78] *Sapan* shows that a fake or deepfake must have a certain amount of educational value or, at the very least, public interest above mere tabloid fodder.

In sum, the ECHR's protection of one's image remains a concrete interest that will allow a plaintiff to most likely protect their dignity from malicious uses of said image.

B. The Right to Protection of Reputation

The right to protect one's reputation is another privacy interest that the ECHR recognizes as central to a public figure's Article 8 interests. The risk of reputational damage is a longstanding concern for those in the public eye, but the technology's deceiving credibility accentuates the issue. This right is less relevant as to whether the technology's use of one's image infringes on privacy rights; instead, the interest pertains more to the consequences deepfakes may have on those in the public eye. Despite Europe's privacy prioritization, public figures must still tolerate higher public scrutiny and criticism than private citizens.[79] Article 10 of the Convention enumerates the right to protection of reputation:

> The exercise of [the freedoms of expression, to hold opinions, to receive and impart information], since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, . . . for the protection of the reputation or rights of others . . . .[80]

ECHR case law fleshes out the Article 8 privacy protections that the right of reputation provides. *Axel Springer AG v. Germany* requires an attack on a person's reputation to "attain a certain level of seriousness and in a manner causing prejudice to personal enjoyment of the right to respect for private life" for Article 8 infringement.[81] Public figures asserting a tarnishing of their reputation alone will not recover; the attack must undermine the public figure's personal integrity through damage to their private life.[82] Additionally, public figures may recover for an infringement of their right to reputation only if the

78. *Id.*

79. *See* Petrenco v. Moldova, App. No. 20928/05, ¶ 55 (Mar. 30, 2010), https://hudoc.echr.coe.int/eng?i=001-97991.

80. EUR. CT. H.R., PRESS UNIT, FACTSHEET - PROTECTION OF REPUTATION 1 (2021) (quoting Convention for the Protection of Human Rights and Fundamental Freedoms, art. X, § 2, Nov. 4, 1950, E.T.S. No. 5, 9).

81. Axel Springer AG v. Germany, App. No. 39954/08, ¶ 83 (Feb. 7, 2012), https://hudoc.echr.coe.int/eng?i=001-109034 (citation omitted).

82. Karakó v. Hungary, App. No. 39311/05, ¶ 23 (Apr. 28, 2009), https://hudoc.echr.coe.int/eng?i=001-92500.

result is an unforeseeable consequence of their actions. In *Gillberg v. Sweden*, the ECHR refused to accept the applicant's argument that a criminal conviction affected his reputation.[83] Therefore, a fake or deepfake using the identity of a public-figure plaintiff must involve an unforeseeable attack for the plaintiff to fall under the protection of Article 8.

The inquiry into the level of seriousness is particularly important in the context of the Internet.[84] In *Einarsson v. Iceland*, the ECHR found a violation of Article 8 where television personality Egill Einarsson was called a "rapist" on Instagram alongside a photograph of Einarsson.[85] Because this one-off Instagram post reached the level of seriousness to infringe on Article 8 privacy rights, the ECHR will also likely find that digitally altered Internet videos that attempt to incriminate a public figure meet the seriousness requirement.

The ECHR takes into account how well-known the public figure is at the time of the alleged reputational attack.[86] Putting oneself in the public eye creates an expectation that others will comment or criticize, particularly for public officials whose publicity is inherent in their occupation. The ECHR assesses a reputational attack against a university professor differently than it would an attack on a politician; a politician must "display a greater degree of tolerance."[87] Therefore, if a plaintiff politician can foresee that fake and deepfake creators will use the technology to critique their political failures, their claim may not hold merit.

The ECHR will afford more protection to a fake or deepfake if it is published in the context of a lively debate of significant public interest. *Jersild v. Denmark* lays out the standard:

> Whilst the press must not overstep the bounds set . . . in the interest of "the protection of the reputation or rights of others[,"] it is nevertheless incumbent on it to impart information and ideas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog."[88]

83. Gillberg v. Sweden, App. No. 41723/06, ¶ 68 (Apr. 3, 2012), https://hudoc.echr.coe.int/eng?i=001-110144.

84. Tamiz v. United Kingdom, App. No. 3877/14, ¶ 80 (Sept. 19, 2017), https://hudoc.echr.coe.int/eng?i=001-178106.

85. Einarsson v. Iceland, App. No. 24703/15, ¶¶ 8, 43, 52 (Nov. 7, 2017), https://hudoc.echr.coe.int/eng?i=001-178362.

86. Jishkariani v. Georgia, App. No. 18925/09, ¶ 49 (Sept. 20, 2018), https://hudoc.echr.coe.int/eng?i=001-186116.

87. Kaboğlu & Oran v. Turkey, App. Nos. 1759/08, 50766/10 and 50782/10, ¶ 74 (Oct. 30, 2018), ttps://hudoc.echr.coe.int/eng?i=001-187565 (citation omitted).

88. Jersild v. Denmark, App. No. 15890/89, ¶ 31 (Sept. 23, 1994), https://hudoc.echr.coe.int/eng?i=001-57891 (citation omitted).

"Public interest" does not encompass a public figure's private life because of their elevated social status alone.[89] But legislatures and courts, not the press, will define the scope of public interest; consequently, it may be difficult for digitally altered videos to survive the public-interest standard. Similar to the privacy interest in one's image, the ECHR distinguishes between reputational attacks made concerning the professional capacity and the personal capacity of a public official.[90] Thus, the protection of fakes and deepfakes may depend on whether the content disparages personal qualities of the figure or official.

Creators can present fakes and deepfakes in a manner that provides credibility in their content to audiences. While imitation and cartoons have an intrinsic parodic quality to them, digitally distorted media appears sincere on its face. Thus, *Flinkkilä*'s emphasis on the importance of the press's role in a democratic society holds less weight.[91] Consequently, the balance between Article 10 and Article 8 tips more towards Article 8's favor when assessing fakes and deepfakes that maliciously deceive the public. Still, if a fake or deepfake is contextually shown to be a satirical take on a public figure or if the creator labels the video as "manipulated," the deception is lost and an inquiry into the balancing test is required.[92]

Importantly, published content based on a whim but presented as a concrete fact may become more salient with the development of this technology. The ECHR discards the public interest threshold when a creator bases content on mere speculation while promoting said content as established fact.[93] Currently, creators use fakes and deepfakes to the point that audiences

89. Press Release, Registrar of the Court, Eur. Ct. H.R., Article 8 of the Convention Protects Certain Events of Private and Family Life, Obliging Journalists to Show Prudence and Precaution in Reporting Them 2 (Feb. 21, 2017), http://hudoc.echr.coe.int/app/conversion/pdf?library=ECHR&id=003-5634756-7131770&filename=Judgment+Rubio+Dosamantes+v.+Spain+-+right+of+a+person+to+effective+protection+of+their+private+life.pdf ("The fact that she was a well-known public figure as a singer did not mean that her activities or conduct in her private life should be regarded as necessarily falling within the public interest.").

90. *See* Petrina v. Romania, App. No. 78060/01 (Oct. 14, 2008), https://hudoc.echr.coe.int/eng?i=002-1896 ("The impugned remarks made accusations that directly concerned the applicant in his personal, not professional, capacity. Accordingly, this was not a case of journalists indulging in the measure of exaggeration or provocation they were allowed in the context of press freedom. Reality had been misrepresented, without any factual basis."); Haupt v. Austria, App. No. 55537/10, ¶ 15 (May 2, 2017), https://hudoc.echr.coe.int/eng?i=001-174212.

91. *See* Flinkkilä v. Finland, App. No. 25576/04, ¶ 73 (April 6, 2010), https://hudoc.echr.coe.int/eng?i=001-98064.

92. The balancing test for freedom of expression in Article 10 and right to private life in Article 8 includes many of the criteria discussed in Subpart II.B. *See* GUIDE ON ARTICLE 8, *supra* note 64, at 52 ("When balancing freedom of expression protected by Article 10 and the right to respect for private life enshrined in Article 8, the Court has applied several criteria. They include the contribution to a debate of general [public] interest; how well known is the person concerned and what is the subject of the report; their prior conduct; the method of obtaining the information and its veracity; the content, form and consequences of the publication; and the severity of the sanction imposed. These criteria are not exhaustive and should be transposed and adapted in the light of the particular circumstances of the case." (citations omitted)).

93. Petrenco v. Moldova, App. No. 20928/05 ¶ 66 (Mar. 30, 2010), https://hudoc.echr.coe.int/eng?i=001-144502.

cannot decipher their fallacy, so speculative videos will likely not be protected in Europe.

In addition to an interest in one's image, public figures and officials are also shielded from reputational attacks. Whether a fake or deepfake damages a reputation to the level of Article 8 infringement depends on a variety of factors, including but not limited to the existence of a public interest, how well-known the figure is, the subject matter of the video, and the seriousness of the attack.[94]

III. COMPARATIVE LEGAL ANALYSIS BETWEEN UNITED STATES AND EUROPEAN APPROACHES

This Part will explore the underlying reasons for the legal discrepancies between the United States and ECHR's approaches to public figure privacy and why their responses to fakes and deepfakes may differ. It will also analyze Robert Post and Jennifer Rothman's proposed rights of publicity in the context of these United States and European approaches. Finally, it will propose a solution for the United States given the uncertainty regarding how the country will respond to this technological threat.

Historically, United States privacy concerns arise irregularly in response to proposed government programs.[95] Europe, on the other hand, has been privacy-conscious since its fights against fascism and Nazism.[96] United States citizens and legislators are also less wary of big business and private actors compared to some European countries.[97] Thus, a combination of different perspectives on how essential sectors of society, like government and business, should work lead to a divergence of legal thought and development. These historical differences percolate into cultural norms in today's society.

A. The Effects of Cultural and Societal Norms on Fake and Deepfake Laws

American law gives the public massive political responsibilities; thus, the American public should be comprehensively informed when acting in its role as an electorate. Restricting the news simultaneously restricts the public,[98] and what Americans consider news today is broader than ever before. In a landscape where celebrities run for public office and public officials can broadcast every moment of their day, any sort of content put out to the world can be justified

94. *See* GUIDE ON ARTICLE 8, *supra* note 64, at 47.

95. Solveig Singleton, *Privacy and Human Rights: Comparing the United States to Europe*, CATO INST. (Dec. 1, 1999), https://www.cato.org/sites/cato.org/files/pubs/pdf/privacy-and-human-rights.pdf.

96. James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1165 (2004).

97. Singleton, *supra* note 95, at 5.

98. Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CALIF. L. REV. 957, 998 (1989).

as news. Thus, what defines a legitimate public interest has become murkier than ever when everything has the potential to affect worldwide culture.[99] Because Americans tend to view privacy more in terms of liberty, they are more concerned with the growth of government power and its level of involvement in their lives.[100] Consequently, an American public figure voluntarily displaying their image and likeness in an interconnected society should reasonably expect the image to be repurposed in ways that he or she might not like.

In a reflection of their culture and history, Europeans view privacy as a right to dignity.[101] Privacy anxieties stem from the importance placed on respect and honor, which has led to unwritten (and sometimes even written) etiquette rules surrounding privacy law.[102] Therefore, Europeans are more concerned with protecting the face they put out to the public. Fakes and deepfakes maliciously distort the public's view of the victim; thus, the law will likely provide privacy protections despite the voluntary nature of publicizing oneself.

Patrick Devlin argued that countries should use the law to administer the norms of the society's culture.[103] When United States courts balance privacy and speech interests, they are self-consciously applying cultural norms to the law. The public sphere represents Europeans' greatest expectation of privacy; in contrast, the pinnacle of American privacy expectations lies in one's home.[104] Privacy decreases the further one strays from home. Americans recoil at the concept of public nude beaches; Europeans likewise react with similar disdain to the invasion of Bill Clinton and Monica Lewinsky's private lives.

The United States and European privacy approaches extend to fakes and deepfakes. Fakes and deepfakes alter preexisting videos. When a public figure or official releases a video to the public, Europeans expect him or her to retain their dignity; no such expectation exists for Americans. Therefore, under the Devlin model of the relationship between law and culture,[105] the United States adopting strict laws that prohibit all fakes and deepfakes of public figures would restrain liberty in the name of enforcing societal privacy norms that currently

---

99. Sadykova Raikhan et al., *The Interaction of Globalization and Culture in the Modern World*, 122 PROCEDIA - SOC. & BEHAV. SCIS. 8, 9 (2014) ("Globalization of culture - is accelerating the integration of the nations in the world system with the development of modern means of transport and economic relations, and the formation of transnational corporations and the global market, thanks to the people of the media.").

100. Whitman, *supra* note 96, at 1161; Singleton, *supra* note 95.

101. Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1, 9 ("Human dignity is inviolable. It must be respected and protected.").

102. *See* Whitman, *supra* note 96, at 1168–69 (discussing the importance Europeans place on honor, dignity, respect, and etiquette to the point where a leading German newspaper even published an etiquette book of press law).

103. Robert C. Post, *Law and Cultural Conflict*, 78 CHI.-KENT L. REV. 485, 485–86 (2003) (citing PATRICK DEVLIN, THE ENFORCEMENT OF MORALS 10 (Oxford Univ. Press reprt. 1965) (1959)).

104. Andreas Kluth, *Privacy Law: US "Liberty" vs European "Dignity,"* HANNIBAL & ME: LIFE LESSONS FROM HIST. (Mar. 5, 2010), https://andreaskluth.org/2010/03/05/privacy-law-us-liberty-vs-european-dignity/.

105. *See* Post, *supra* note 103, at 486.

do not exist. But, narrowly tailored laws akin to Texas and California's election interference laws administer societal norms because they protect separate democratic liberties.[106]

Robert Post contends that the Devlin model oversimplifies matters when it assumes culture is a singular vehicle.[107] Laws can reflect and reshape culture. Although the United States has historically reshaped its culture at times through legislation, the law has more recently been a reflection of cultural priorities.[108] The commonplace notion that the United States is a "melting pot" where cultures collide becomes more outdated the more tribal and siloed certain sectors of the country become. American culture today relies on the social media and news media that one consumes. Some highly consumed news content consists of criticism from late-night hosts like John Oliver and Stephen Colbert displaying videos of public officials and celebrities, sometimes either edited or shown out of context. Thus, if the United States intends to create deepfake legislation in consideration of the modern cultural landscape, it must be wary of discouraging deepfake creation for positive uses protected by the First Amendment, like satire or entertainment.[109]

Although a satirical context is likely to demonstrate a digitally distorted video's inauthenticity, satirists in Europe must sometimes tread more lightly than their United States counterparts. Satirists can and do flourish in some European countries, but checking power through satire and parody can also be more dangerous.[110] Thus, it seems likely that the use of deepfakes, even if the context is a satirist poking fun or bringing up matters of public concern, infringes on a public figure's dignity and will therefore not be tolerated.

---

106. *See* Matthew Feeney, *Deepfake Laws Risk Creating More Problems Than They Solve*, REGUL. TRANSPARENCY PROJECT: FEDERALIST SOC'Y (Mar. 1, 2021), https://regproject.org/wp-content/uploads/Paper-Deepfake-Laws-Risk-Creating-More-Problems-Than-They-Solve.pdf.

107. *See* Post, *supra* note 103, at 487.

108. *See* U.S. CONST. amends. XIII–XV (showing three constitutional amendments that abolished slavery and guaranteed equal protection of the laws and the right to vote, thereby assimilating Black Americans into society); Civil Rights Act of 1964, 42 U.S.C. §§ 2000d–2000d-7 (1964) (reshaping norms and behaviors in the American workplace); *see also* Atkins v. Virginia, 536 U.S. 304, 311–12 (2002) (seeking to implement "the evolving standards of decency that mark the progress of a maturing society" (quoting Trop v. Dulles, 356 U.S. 86, 100–01 (1958))).

109. Thornton et al., *supra* note 2.

110. *See* Remi Piet, Opinion, *Why Satire is Holy to the French*, ALJAZEERA (Jan. 14, 2015), https://www.aljazeera.com/opinions/2015/1/14/why-satire-is-holy-to-the-french; *13 German Comedians Who Show Off German Humor*, REVERBERATIONS (Apr. 27, 2020), https://www.reverberations.net/german-comedians/; *see also* Lillo Montalto Monella, *Cartoon Contest Hopes to Highlight the Perils of Political Satire in Europe*, EURONEWS (Sept. 24, 2020), https://www.euronews.com/2020/09/24/cartoon-contest-hopes-to-highlight-the-perils-of-political-satire-in-europe (showing several European satirists facing threats from different governments, including one satirist facing a threat of denunciation from Hungarian Prime Minister Viktor Orban's ruling party Fidesz). Even a democratic government like Chancellor Angela Merkel's Germany accepted a request from Turkey to seek prosecution of a German comedian who made fun of Turkish President Recep Tayyip Erdoğan on German television. *Germany Accepts Turkey's Request to Prosecute Comedian Who Mocked Erdogan*, HUFFPOST (Apr. 15, 2016, 9:48 AM), https://www.huffpost.com/entry/germany-prosecute-jan-boehmermann-turkey_n_5710e8c0e4b06f35cb6f426f.

B. Post and Rothman's Rights of Publicity

Robert Post and Jennifer Rothman proposed four new types of right of publicity claims.[111] These proposals outline the substantive legal differences in United States and European privacy approaches.

First, the right of performance aims to protect against misappropriation of a public figure's performance, but its overlap with copyright law concerns may cause issues for those attempting to recover damages.[112] The commercial use of one's image is discussed in Part I; because the United States places value in free-market principles and the Supreme Court protected this right in *Zacchini*, United States courts would likely recognize this claim. Because this tort arises from unjust enrichment concerns rather than dignitary concerns, the ECHR may not be as welcoming to a shift in its individual performance protections.

The ECHR is more likely to adopt a right of commercial value. This right protects the commercial value of one's identity, as opposed to the value of a particular performance.[113] Rather than taking from a public performance, one's identity is more personal rather than business related. Obviously, this distinction becomes murkier with those who are in the public eye constantly, but the ECHR will be more willing to recognize this right due to the personal privacy it seeks to protect.

The right of publicity provides individuals with the right to control how others use their identity, an ideal tort that Post and Rothman refer to as the "right of control."[114] Without a right of control, a person can seize "at least partial control over the meaning associated with" a public figure's identity.[115] The right is similar to Europe's "right to be forgotten" because the right of control allows the person to regain authority over their identity by repressing private information.[116] The enforcement of such a right can curb the monetary incentive inherent in seizing control over a public figure's identity, thereby exploiting a public figure's privacy and personality for individual gain.

Despite these apparent positives, the right of control is antagonistic to the American public's freedom to form their judgments based on publicly available information.[117] The United States engages in a trade-off by sanctioning unwanted public attention in exchange for a laissez-faire approach to monitoring public discourse.[118] Courts may, however, protect a public figure's

111. Post & Rothman, *supra* note 20, at 93.

112. *See id.* at 146–47.

113. *Id.* at 107.

114. *Id.* at 116.

115. *Id.* at 163 (quoting Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225, 282 (2005)).

116. *See id.* (quoting Robert C. Post, *Data Privacy and Dignitary Privacy:* Google Spain, *the Right To Be Forgotten, and the Construction of the Public Sphere*, 67 DUKE L.J. 981, 1047–54 (2018)).

117. *Id.*

118. *See id.*

liberties if it appears that there is serious confusion concerning the participation of the public figure.[119]

Any law that prohibits fakes and deepfakes overlaps in its regulation of public discourse and its protection of personal data. The GDPR reflects Europe's value of dignity by providing sweeping data and privacy protections.[120] Europeans believe in a right to be shielded against unwanted public attention, a right furthered by data-privacy laws that make it difficult for a fake or deepfake to pass muster.

Although the right of control appears ineffectual when pitted against the constitutional value of public discourse, the United States also provides protections for personal data via regulation.[121] Although these regulations likely set the outer boundaries for what a fake or deepfake may be based on, they do not protect personal data that AI may use in its manipulation of public-figure imagery. Without advanced data privacy laws on the books, United States courts will not provide public figures with a right of control—a right that Europeans to an extent already have.

The right of dignity focuses on the integrity of personality.[122] This right, while serving as the bedrock for many ECHR holdings, is incompatible with *Sullivan*. Thus, the Supreme Court has never permitted actions for dignitary torts like false light.[123] The ECHR likely would sustain an objection to a fake placing a public figure in a compromised sexual situation because it disregards the public figure's physical integrity.[124] The United States, on the other hand, unless it finds the video to be a "matter[] of purely private significance,"[125] will likely not sustain such an objection as a court would likely not find this edited media to fall under the seemingly impenetrable actual malice standard.

But deepfakes do not stand on the same First Amendment ground as fakes. According to Post and Rothman, "[a]n actual malice requirement in the context of the right of dignity would effectively require plaintiffs to establish that defendants have used their identities in ways that deliberately mislead the public about plaintiffs' participation in, or endorsement of, defendants' offending

119. *See id.* ("Insofar as a person's identity is a matter of public information, the state cannot create rules that constrain its use in public discourse, except for specific, narrow, and compelling reasons, like the possibility of serious confusion as to endorsement or participation.").

120. *See* Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), 2017 O.J. (L 119/1) 4(1). These protections further what the Germans call the "right to informational self-determination." Whitman, *supra* note 96, at 1161 (emphasis omitted).

121. *See* Thorin Klosowski, *The State of Consumer Data Privacy Laws in the US (And Why It Matters)*, N.Y. TIMES, (Sept. 6, 2021), http://www.nytimes.com/wirecutter/blog/state-of-privacy-laws-in-us/.

122. Post & Rothman, *supra* note 20, at 121.

123. *Id.* at 165.

124. *See supra* text accompanying note 78.

125. Snyder v. Phelps, 562 U.S. 443, 452 (2011).

uses."[126] Post and Rothman seem to describe precisely how some deepfakes operate:[127] the hyperrealism misleads the public as to the public figure's participation in the video through the use of the public figure's identity. Thus, malicious deepfakes, but not fakes, may fall under the actual malice standard in this described context. A court may also separately find malicious deepfakes to materially change the meaning of the public figure's statements in which case the deepfake would be defeated by *Masson*.

In sum, the ECHR indirectly provides public figures with a right of control over their public identity and a right of dignity, exhibiting core privacy values that reflect Article 8's enumerated privacy protection. The United States, on the other hand, will not recognize either of these rights but also may not protect malicious deepfakes.

C. Potential Solutions for the United States and the ECHR

Without the protection of Post and Rothman's rights of publicity, United States public figures and officials do not receive protection of their personality from the Supreme Court or Congress. As this Note has discussed, a public figure's personality and the public's view of it often have a massive impact on the figure's professional livelihood. More broadly, the perception of powerful public figures with significant responsibilities can sometimes shift the political and diplomatic landscape of the world. Therefore, the United States should adopt a standard that can contain the spread of false information while protecting the expressive freedoms that Americans hold dear.

Due to the well-established deference to First Amendment speech protections and *Sullivan*, the United States will likely shield most creators in their ability to create public-figure fakes and non-malicious deepfakes. Courts can develop a labeling obligation that follows *Falwell*, but this may instead impose an unnecessary burden on those creating First Amendment-protected media while failing to discourage motivated bad actors.[128] The transformative use test also has its share of problems due to the analytical difference between examining a work of art and assessing a public figure's personality. The best approach is likely one partially derived from the Supreme Court in *Masson*, partially derived from the Sixth Circuit in *ETW*, and the transformative use test: A fake or deepfake should be protected if it showcases statements consistent with what the public figure has said in the past and the context of the video shows its lack of authenticity.

126. Post & Rothman, *supra* note 20, at 165.

127. Not all deepfakes are used to maliciously deceive the public. *See Yes, Positive Deepfake Examples Exist*, THINKAUTOMATION, https://www.thinkautomation.com/bots-and-ai/yes-positive-deepfake-examples-exist/ (describing positive uses of deepfakes that include use for educational purposes, use in training exercises, and use in the medical industry).

128. Feeney, *supra* note 106.

Courts should additionally provide a safe harbor to creators who provide a visible disclaimer labeling the video as "manipulated" or "edited." Such a measure would ideally protect good-faith users of the technology while narrowing the scope of a designed law targeting manipulative content. Late-night shows and comedian Youtubers need only add a disclaimer to enjoy the fodder that will result from the widespread use of the technology. A safe harbor likely would have the same effect as a labeling requirement because it will open the door for those who seek to use fakes and deepfakes for commendable purposes while having the same minimal effect on deterring provocative internet manipulators.

The ECHR should prioritize members' developed individual interests in the protection of one's image and protection of one's reputation. For videos that critique a public figure's professional woes, protecting videos that involve a "significant public interest" is likely sufficient despite the aforementioned uncertainty as to what fails to meet a significant public interest in such an interconnected society. Politicians must display a higher degree of tolerance for reputational attacks than an ordinary public figure would. Ultimately, the ECHR must affirmatively prohibit all deepfakes of non-public officials; they should only protect videos of high-level public officials pulled from the public record as they will likely qualify as a significant interest to the public.

CONCLUSION

The inevitability of harsh political and societal consequences stemming from digital distortions demands legislative action around the globe. Distrust in government will only worsen if fabricated videos are distributed throughout society and dilute the public discourse. Regulatory relief is much more likely in Europe given the strength of Article 8 privacy rights validated by ECHR case law. A societal and cultural analysis shows that privacy protections are less likely in the United States.

Both jurisdictions recognize diminished privacy rights for public officials and figures, and the increasing anonymity of creators may render any sort of cognizable harm useless due to an inability to recover. In assessing a bright-line rule to help both governments in preventing the erosion of public discourse, courts should not discount the good that deepfakes can do through education, art, and medicine when formulating rules concerning fakes and deepfakes. Still, the negative consequences exist, so courts should formulate a rule that best represents their enumerated interests.

The United States, given its strong First Amendment speech interests, will likely uphold fakes and deepfakes that pertain to matters of public concern and that do not substantially change the meaning of the public figure's statements. *Sullivan* controls speech concerning public officials, but certain malicious deepfakes can arguably penetrate the actual malice standard. Other Supreme

Court precedent casts confusion over whether there is protection for fakes and less egregious deepfakes, but some federal and state common law and statutory law will require an edited video to pass the transformative use test. In a reflection of the United States' focus on liberty, current United States policy does not deal specifically with the privacy concerns that arise from fake and deepfake technology.

The ECHR, unlike the United States, provides its members with an enumerated right to privacy in Article 8 of its Convention. Still, the ECHR will balance Article 8 interests with Article 10 protections of free expression. Europe prioritizes dignitary concerns, so the ECHR will likely defer to an individual's privacy interest in protecting their image and reputation. In keeping in line with the Court's previous line drawing between one's professional and private life, there is likely an affirmative duty to regulate any fake or deepfake that delves into a public figure's private life. While the ECHR may treat political officials with less concern for their privacy, the Court will likely prohibit many of the fakes and deepfakes produced in their current form.

Philip Boyd[*]

[*] University of Alabama, J.D. Candidate 2023. I am grateful to the faculty and staff at the University of Alabama for their generosity and assistance. A special thank you to Professor Ronald J. Krotoszynski, Jr. for his guidance during my research for this Note. Thank you to the *Alabama Law Review* for their contributions and edits, and thanks to my family and friends for their support and encouragement.