Celebrity Politicians and Publicity Rights in the Age of Obama

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Celebrity Politicians and Publicity Rights in the Age of Obama

by MICHAEL G. BENNETT*

Abstract
The right of publicity is a relatively marginalized yet increasingly radical form of intellectual property. Typically, celebrities use it to prevent freeloaders from profiting on their fame by making unauthorized use of their image, likeness or signature to make goods or services more attractive to consumers. The right of publicity allows famous individuals to stop this type of behavior by providing a property right in identity or persona. Brandished by celebrities who are also political figures, though, the doctrine can become a powerful means of chilling political speech, and therefore a direct threat to First Amendment free speech rights.

The descriptive goal of this article is to explain how publicity rights can cause problems in the context of political figures that also have celebrity status. This article extends the existing literature on the tension between publicity rights and free speech rights, and uses the spectacle of Barack Obama’s initial presidential bid to theorize how a publicity right suit can be used to undermine the political speech of an individual whose public persona is similar to that of a celebrity. This is a new form of strategic intellectual property litigation that could have crippled the first Obama campaign, and a strategy that is likely to be used against future candidates. The normative section of this article argues that individuals who gain a nontrivial measure of pop cultural fame and then go on to become political figures should have no publicity rights, and that denying such figures the power to stop unauthorized commercial use of their likenesses is the only way to avoid societally detrimental chilling of political speech.

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I. Introduction ......................................................................................................................... 340
II. The Right of Publicity’s Problematic Nexus with Politics ................................................... 347
III. The Presidential Right of Publicity Read Profitably as a Critical Alternative History of Publicity Rights Law ....................................................................................................... 352
IV. On the Political Fallout of a Right of Publicity Suit Against Senator Obama ...................... 371
   A. Obama’s Use of Haysbert’s Identity ............................................................................. 373
   B. Appropriation of Haysbert’s Identity to Obama’s Advantage ...................................... 375
   C. Lack of Consent ........................................................................................................... 376
   D. Resulting Injury ............................................................................................................ 376
V. Conclusion ........................................................................................................................... 378

“Are you genuine? Or merely an actor? A representative? Or that which is represented? In the end, perhaps you are merely a copy of an actor. Second question of conscience.”

– Friedrich Nietzsche

I. Introduction

By happenstance and design, the political persona of Arnold Schwarzenegger has always been science fictionally charged. For all his precedent, coincident and subsequent fame-generating exploits, it is *The Terminator* franchise, and the iconic roles he performed as a time-traveling cybernetic soldier fighting in a war between a genocidal artificial intelligence and the rebellious remnants of its thermonuclear assault on humankind in the franchise’s film installments, particularly the first two of four, that have contributed most to the overall characterization of his fame. That James Cameron, director of *The Terminator* (1984) and *The Terminator 2: Judgment Day* (1991), saw Schwarzenegger as a “machine,” a perfect embodiment of the killer cyborg that is the films’ main character and titular inspiration, was fortune, but it was a strategic choice on the part of Schwarzenegger’s campaign to embrace, cultivate and leverage his branding as “The Governator,” a pun on his cyborg character’s name, at once silly and politically savvy. In what must be considered a

3. *Id.* at 142; see also ARNOLD SCHWARZENEGGER & PETER PETRE, TOTAL RECALL: MY UNBELIEVABLY TRUE LIFE STORY 515–35 (2012) (discussing Schwarzenegger’s lionization as the “Governator”). The autobiography’s title is an extension of the title of the 1990 science film TOTAL RECALL. *Id.* The autobiography’s book flap uses an iconic image made famous as the theatrical release poster for THE TERMINATOR. *Id.; see also* William T. Gallagher, Strategic Intellectual
masterstroke of celebrity political advertising, Schwarzenegger announced his gubernatorial candidacy on *The Tonight Show With Jay Leno* a month before the theatrical release of *The Terminator 3: Rise of the Machines*. The movie billboard advertisements effectively doubled as political advertisements for his campaign, as the science fictional themes of his signature film roles intermingled, to great effect, with “The People’s Governor” theme. Governor Schwarzenegger was, and arguably remains, the ultimate American celebrity politician.

In 2004, when then California Governor Schwarzenegger used a right of publicity lawsuit to stop an Ohio-based manufacturer from producing an assault rifle-toting, bandolier-draped bobblehead doll based on his likeness, all of the other action films in which he had starred to date—*Commando* (1985), *Predator* (1987), *Total Recall* (1990), *True Lies* (1994), *Eraser* (1996), and *Collateral Damage* (2002)—were implicated in the satirical toy’s capacity for political commentary. The *Terminator* films, however, would likely have come to the fore of public imagination had the figurine not been edited so as not to include the gun. This change presumably was a result of the parties’ settlement. The *Terminator* and *The Terminator 2: Judgment Day* are widely considered science fiction cinema classics largely responsible for Schwarzenegger’s enduring fame, and in which he delivers his best theatrical performances. In other words, whatever

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6. See John Street, *Celebrity Politicians: Popular Culture and Political Representation*, 6 BRIT. J. POL. & INT’L REL. 435, 437–39 (2004). John Street provides a useful taxonomy of celebrity politicians. Id. One category includes actual or would-be office-holders who interact with “the world of popular culture in order to enhance or advance their pre-established political functions and goals,” and includes Schwarzenegger-like figures with backgrounds in the entertainment industry. Id. The second category contains “entertainer[s] who pronounce[] on politics and claim[] the right to represent peoples and causes, but who do[] so without seeking or acquiring elected office.” Id. Examples of this type include U2’s Bono, who has spoken out on various global justice issues, and arguably Bill Cosby, who has interjected himself into debates concerning the politics of poverty. Id.
7. Id.
9. Id. at 547; Gallagher, supra note 3, at 611.
politically satirizing effect the unedited bobblehead doll would have induced had its would-be manufacturer, defendant Ohio Discount Merchandising, Inc. ("ODM"), been successful at trial, that effect would likely have turned largely on Schwarzenegger’s association with The Terminator franchise.12

The Terminator films became all the more salient in the context of this settled lawsuit by virtue of the science fictional charge already accumulated about the right of publicity. Twenty years before the Governor’s suit, David Deutsch Associates, Inc. created a print advertisement for Samsung Electronics America, Inc. that depicted a robot wearing a wig, sparkling necklace, bracelet and gown, and positioned in close proximity to a large game board, intentionally and without authorization evoking the identity of Vanna White, the longtime Wheel of Fortune hostess.13 The agency sought to humorously express the staying power of Samsung goods by projecting them into a speculative future, underlining that intent with the advertisement’s caption: “Longest-running game show. 2012 A.D.”14 Vanna White took issue; she sued under California publicity rights law and ultimately won an appellate decision and a $403,000 damage award.15

The doctrinal import of the U.S. Court of Appeals for the Ninth Circuit’s reversal of a grant of summary judgment for defendants in White v. Samsung Electronics America, Inc., indicating that the robotic spoof of an advertisement was a violation of Vanna White’s right of publicity amounted to a rendering apparent of the right of publicity’s expansive breadth.16 White represents the right of publicity doctrine’s fullest flexing, its most muscular interpretation and application. But the case simultaneously contributed a science fictional charge to the right of publicity. Robots and futurity have been tropes of science fiction texts since at least the early twentieth century.17 White would probably have

14. Id. at 1396.
been useful to Schwarzenegger had the case against ODM gone forward.\(^{18}\) But regardless of how the case might have been decided, its unfolding (even though suspended) against the precedential backdrop of \textit{White} served to mingle a gaggle of generic figures—robots, cyborgs, futurity, time travel, strong artificial intelligence systems\(^{19}\)—within the context of publicity rights doctrine to an amplifying effect. Whereas post-\textit{White} it was merely difficult to think of the doctrine of publicity rights in the context of celebrity politicians \textit{without} thinking of science fiction, post-\textit{Oakland Productions} it is a virtual impossibility.\(^{20}\)

Registering this impossibility, publicity rights law has cohabitated with science fiction at the level of scholarly discourse. Jean Baudrillard, the social theorist to whom both right of publicity scholars and science fiction scholars turn to fortify their theoretical armamentarium, said that classic “good old SF” was dead in the wake of postindustrial modes of production, and that “some other sort of thing” replaces it in the subsequent era of simulation and models.\(^{21}\) For intellectual property scholars, and particularly doctrinal minimalists, Baudrillard is an ideal theoretical companion in a world super-saturated with goods and services, the primary socioeconomic value of which flows from their trademarks and associations with celebrity figures. In such a milieu, legal theorists must attend to the “nature of the cultural symbols ‘we’ ‘share’ . . . [.],” the recognition the law affords them,\(^{22}\) and the cultural consequences of those affordances.\(^{23}\) Meanwhile, sensing that in such a


\(^{20}\) A search for law review articles citing the Ninth Circuit’s decision generates 364 returns. A search for “Arnold Schwarzenegger” and “bobblehead” produced twenty-five. Thirty-seven hits return from a search for “Arnold Schwarzenegger,” “Vanna White,” and “right of publicity.”


techno-social setting simulacra have begun to obsolesce the "real,"\textsuperscript{24} theorists of science fiction have embraced Baudrillard. Csicsery-Ronay, Jr., for example, assesses Baudrillard's equivalency of "SF" and "theory" as a crucial contribution to our engagement with science fiction as something more than a paraliterary genre, and, in its capacity to map the desires, anxieties and manifest strangeness of contemporary life, something akin to a type of diagnostic device.\textsuperscript{25}

The seemingly ever-proliferating, ever-advancing technological developments that have reciprocally enabled and sprung from the post-World War II shift to globalized, postindustrial capitalism, particularly the commercial preeminence of \textit{intangible} products—"images, advertising, information, memories, styles, simulated experiences, and copies of original experiences"\textsuperscript{26}—have served to privilege Baudrillard's theories in both scholarly camps.\textsuperscript{27} \textit{White} branded the publicity rights doctrine with a "SF," a complex monogram indicative of the contested commercial's parodic sampling of classical extrapolative science fiction, yes, but the "SF" insignia also signaled \textit{White}'s reiteration of the connection between science fiction tropes and high order simulacra. In a related fashion, \textit{Oakland Productions} put on display the volatile potential of modern political strategy based in science fictional, cinematic simulacra mixed with aggressive use of the doctrine. Vanna White, Arnold Schwarzenegger, and Jean Baudrillard collectively represent the Holy Trinity of this mash-up of publicity rights and science fiction.

Tracking the infrequency of lawsuits brought by public officials attempting to enforce their right of publicity, scholarly discourse focused (crediting Baudrillard with particular "prescien[ce]" with respect to linkages between advertising and intellectual property law).


25. Istvan Csicsery-Ronay, Jr., \textit{The SF of Theory: Baudrillard and Haraway}, 18 SCI. FICTION STUD. 387, 389 (1991); see also \textit{HANNAH ARENDT, THE HUMAN CONDITION} 1–2 (1958) (lamenting the neglect of science fiction and its function as conveyor of mass sentiment); \textit{PETER Y. PAIK, FROM UTOPIA TO APOCALYPSE: SCIENCE FICTION AND THE POLITICS OF CATASTROPHE} 10 (2010). Due in large part to its generic legacy of philosophical speculation, science fiction can be a useful aid in exploring critical problems of contemporary political life. Through its provisions of visions in which the familiar arrangements of extant laws, mores, technical artifacts and social forces constituting our actually lived lives do not hold, SF helps us to imagine those lives dynamically, as capable of change, as perishable. In this sense, by encouraging investigations of societal contingency, SF is understandable as a diagnostic tool.


specifically on celebrity politicians and publicity rights is rare. Within that under-analyzed discursive zone, Sean T. Masson’s The Presidential Right of Publicity arguably represents the most complementary, and sympathetic contribution to post-White scholarship, in that it lends itself to a science fictional reading. In its descriptive mode, by posing the question of whether President Obama has a protectable right of publicity, the article addresses a question that has long been a settled matter. In 1982, the Georgia Supreme Court ruled that the unauthorized manufacture and sale of busts depicting Reverend Dr. Martin Luther King, Jr. violated his right of publicity, thereby acknowledging that entering the political arena does not nullify one’s publicity rights. Leading commentary has acknowledged that individuals active in political processes—"includ[ing] judges, legislators, holders of executive office and even non-officeholders who become, voluntarily or involuntarily, part of the political process" enjoy a right of publicity. Applying a generous and constructive interpretation principle to the article’s disinclination to acknowledge the indicators of celebrity politicians’ rights of publicity, and given the speculative charge of the post-White, post-Oakland Producers, Baudrillard-
inflected right of publicity discourse, as well as, I hope to show, President Barack Obama's science fictional markers, I propose that the best reading of The Presidential Right of Publicity is arguably as science fiction.\(^3\)

Part I of this article briefly describes the right of publicity and moves on to outline two types of problems the doctrine can generate in the context of politics and political figures. The first concerns the issue of celebrity as a socially cohesive force, and the historical, unauthorized uses, arguably amounting to political speech, that marginal communities have made of celebrity personae. This problem suggests that when such communities are legally barred from these types of appropriations, their cohesiveness, their very ability to effectively come into being, is fundamentally threatened. The second notes that by effectively lowering the hurdles that a celebrity politician plaintiff must cross in order to win at trial against a defendant who has made what in the plaintiff's opinion is an untoward use of their persona, the right of publicity for this class of figures seems to offer an attractive alternative to defamation suits, thereby increasing the likelihood of chilled political speech.

Part II turns to a piece of recent scholarship focused on political figures and the right of publicity, and assesses the possibility that it is amenable to interpretation as science fictional criticism of the doctrine. This part argues that, given some of the basic functional descriptions of science fiction offered up by several of the genre's most respected critics, both in its descriptive and normative modes, The Presidential Right of Publicity's discussion of President Obama is more coherent, and critically valuable, when read as a counterfactual work, a work of alternative history. On its surface, The Presidential Right of Publicity exhibits signs of being a "nugget[ ] of wisdom exist[ing] among the alien corn,"\(^3\) a formally radical counterpoint to the pragmatists' critique of legal scholarship as impractical.\(^3\) Read as alternative history—as much a descendant of E.A.

\(^{35}\) More precisely, the best reading of The Presidential Right of Publicity is as a form of allohistorical commentary, or alternative history.


In Part III, this article outlines a doctrinal problem that *The Presidential Right of Publicity’s* read as counterfactual analysis rather provocatively, yet subtly, suggests: Namely, the possibility that a nonfrivolous right of publicity suit could have been brought against Senator Barack Obama during his first presidential campaign. This scenario is largely a fusion of the strategic litigation and marginal appropriation problems discussed in Parts I and II. This part closes by describing this form of litigation as largely consistent with the irradiated state of American politics, predicts that this type of suit will be deployed in the future, and argues that the right of publicity applied to political figures is largely at odds with the enrichment and deepening of American democracy. Part III presents a simply stated normative program: Individuals who gain a non-trivial measure of pop cultural fame and then go on to become political figures should have no publicity rights, and that denying such figures the power to stop unauthorized commercial use of their likenesses is the only way to avoid societally detrimental chilling of political speech.

II. The Right of Publicity’s Problematic Nexus with Politics

Persona is property.44 The right of publicity prevents unauthorized commercial exploitation of a person’s identity via appropriation of their “name, likeness, or other indicia of identity for purposes of trade.45 The modest origins of the doctrine are typically traced to privacy law’s failure to protect celebrities’ commercial interests in their identity.46 Given that it

38. EDWIN ABBOTT ABBOTT, FLATLAND: A ROMANCE OF MANY DIMENSIONS (1884).
41. Rielly, supra note 28.
42. Ghosh, supra note 28.
43. Welkowitz & Ochoa, supra note 28.
45. Id. at § 46.
sprang forth only slightly more than a handful of decades ago, and considering its present state of doctrinal muscularity, the rate of growth of publicity rights law can be fairly described as savage. But commentary makes clear that the doctrine's growth is grossly consistent with that of the other main forms of intellectual property: Patents, copyrights, trademarks, and to a lesser extent, trade secrets. The contemporary commentariat debates concerning publicity rights take as their axial moments questions of justifiability and theoretical capacities for control of expansion. About the first axis spin arguments about whether utilitarian, Lockean, Hegelian or some other type of theory offers the most (or any) coherent foundation for publicity rights. Round the second, staging the minimalist versus maximalist feuds common to other areas of intellectual property, scholars fight over whether to reduce the doctrine's expansive scope, or to accept its development as


49. See Abraham Drassinower, Copyright Is Not About Copying, 125 HARV. L. REV. F. 108, 119 (2012) (critiquing the copyright expansion debate as one overly focused on a critical theory, as opposed to a "critical theory of copyright").


54. See, e.g., Diane Leenheer Zimmerman, Money as a Thumb on the Constitutional Scale: Weighing Speech Against Publicity Rights, 50 B.C. L. REV. 1503, 1505 (2009) [hereinafter Zimmerman, Money as a Thumb] (arguing that First Amendment speech rights should not be balanced against right of publicity protection, as the latter lacks a constitutional basis); Tyler Cowen,
"commonsensical" and unproblematically consistent with American culture and law.56

Rarely have political figures57 initiated right of publicity suits.58 Preoccupation,59 lack of knowledge,60 fear of appearing thin-skinned,61 avoidance of perceptions of dourness;62 several speculative rationales are available, but the cash value of the relative infrequency with which this subcategory of suit occurs is the correspondingly relatively infrequent treatment of the implications of publicity rights in political contexts. Concern with the chilling effect that the right of publicity can have on constitutionally protected speech is discursively de rigueur.63 The single Supreme Court case concerning the doctrine, Zacchini v. Scripps-Howard Broadcasting Co.,64 gave little aid to commentators searching for a proper

Right of Publicity vs. the First Amendment, THE VOLOKH CONSPIRACY (Apr. 30, 2004), available at http://www.volokh.com/2004/04/30/right-of-publicity-vs-the-first-amendment/ [hereinafter Cowen, Right of Publicity], (arguing that ODM should have prevailed on First Amendment grounds against Schwarzenegger, but probably would not have, had the trial gone to a decision) (last visited July 24, 2012); Eugene Volokh, Freedom of Speech and the Right of Publicity, 40 HOUS. L. REV. 903, 930 (2003) [hereinafter Volokh, Freedom of Speech] (arguing that publicity rights are probably unconstitutional when applied to noncommercial speech and, possibly, to commercial advertisements).

55. See MCCARTHY, supra note 32, at § 1:40 ("The right of publicity," Professor McCarthy assures us in his great treatise, is "a very modest and commonsensical legal right" undeserving of "intense law review interest and judicial agonies.").

56. See Kwall, supra note 47, at 10-11.

57. Following MCCARTHY, supra note 32, at § 4:23, I use the term "political figure" to denote individuals "actively involved in the 'political' process, as broadly defined," and intend to include within its scope "judges, legislators, holders of executive office and even nonofficeholders [sic] who become, voluntarily or involuntarily, part of the political process." My use is also similar to that of Rielly (supra note 28, at 1161 n.3), but is broader in scope due to its explicit indifference to any volition on the part of the political figure. Cf. Ghosh, supra note 28, at 636 (distinguishing "public officials" from "public figures" in the context of publicity rights and politics).

58. See Arlen W. Langvardt, The Troubling Implications of a Right of Publicity "Wheel" Spun Out of Control, 45 U. KAN. L. REV. 329, 340 (1997) (noting the paucity of relevant case law addressing whether a political figure has a right of publicity); Gallagher, supra note 3, at 582 (indicating the abnormality of Governor Schwarzenegger's claim of publicity rights violation); see also Masson, supra note 28 (positing possible explanations for the infrequency of right of publicity suits brought by politicians).

59. See Langvardt, supra note 58, at 340 n.67.

60. Id.

61. See Masson, supra note 28.


63. See Gallagher, supra note 3, at 581 (noting the difficulty in balancing First Amendment free speech rights and the right of publicity in many jurisdictions).

balance between the First Amendment and the right of publicity. But, all the more salient for this scant attention and lack of guidance from the appellate, two particularly problematic issues have emerged in recent doctrinal debates: The first takes on the perspective of publicity rights violators and concerns the significance of cultural icons to group identity formation and political speech; the second focuses on the strategic litigation potential that publicity rights grant political figures.

Spectacular celebrity serves as a form of social adhesive. Like the gluons that bind together subatomic particles, celebrities exert a binding force on a fragmented society. In our fractured world, cultural theorists note, celebrity "serves to pull ... separate entities together and to do its bit towards maintaining social cohesion and common values." But as this force works to gird and fuel "the structure and the strength with which to hold things in their proper place," it does so at the pleasure of its legal owners, in large part. In a society so permeated with commercialized images and narratives that it becomes difficult to act and speak publicly without accessing richly connotative cultural symbols and icons, publicity rights are susceptible to critiques that they inhibit basic expressive activity. And in the context of celebrities, strong publicity rights can deny individuals "access to our collective cultural heritage and the ability to reflect upon the historical significance of the celebrity aura."

Historically, marginalized communities, in particular, have made use of celebrity personae for political ends. The formation of a marginalized group identity and articulation of its views can be understood as political speech. Drawing upon the work of Richard Dyer and other students of celebrity and stardom, some legal scholars have come to embrace the notion that marginalized groups—"the working class, women, blacks, gays, [groups] who have been excluded from the culture's system of representations in all but marginal and demeaning forms"—are able to...
“appropriate power for themselves in a democracy”\textsuperscript{72} by using celebrity personae to create alternative identities and critique extant social arrangements symbolized by those personae. But when even the evocation of celebrity persona is enough to violate the right of publicity, marginalized groups are threatened\textsuperscript{73} with denial of access to the politically charged and/or chargeable dimensions of celebrity. As commodified and commercial symbols occupy more and more terrain in public imaginaries, according to this position, the “recoding”\textsuperscript{74} and critical appropriation of these celebrity persona should be recognized as privileged forms of political activity.

A strategic litigation problem also troubles critics of the publicity rights doctrine. Their concern is that, when faced with unappealing critical depictions of themselves, political figures can turn to publicity rights as an alternative to defamation suits. Whereas a public figure plaintiff attempting to win a defamation suit needs to satisfy the clear and convincing “actual malice” standard set forth in \textit{New York Times Co. v. Sullivan},\textsuperscript{75} if she brings a publicity rights suit instead, her prima facie case is made relatively easily: She must show that the defendant used her identity, that the appropriation advantaged the defendant, an absence of her consent and resulting injury.\textsuperscript{76} Critics argue that this potential method of end-running the First Amendment’s limiting effect on defamation claims is troubling because the basic end of publicity rights—protection of one’s likeness from unauthorized commercial use—is simply inappropriate in the context of many political figures, particularly public office holders.\textsuperscript{77} Even when a public office holder has invested time and effort and money in creating a persona, the long-held belief that this class of individuals must

\textit{Cyberspace: Information Technology in the Black Diaspora}, 10 \textit{Science as Culture} 353 (2001) (discussing the importance of Nichelle Nichols role as Uhura in the original \textit{Star Trek} television series to Dr. Martin Luther King, Jr.).


74. See Coombe, \textit{supra} note 22, at 1863–64 (describing “recoding” as political “meaning making” generated by the appropriation and adaptation of cultural forms to the end of identity formation).


76. See \textit{McCarthy}, \textit{supra} note 32, at § 6:21. Under California common law, the advantage need not even be economic. See \textit{White v. Samsung Elecs. Am., Inc.}, 971 F.2d 1395, 1397 (9th Cir. 1992); see also Dogan & Lemley, \textit{supra} note 52, at 1162 n.1 (noting the expansive breadth of the publicity rights doctrine).

77. See Ghosh, \textit{supra} note 28.
be open to the privacy-piercing beams of public scrutiny mandates that its members' personae are inappropriately equated with those of celebrities. Accordingly, the celebrity politician wielding publicity rights represents a singular problem: Their fame renders their persona a potentially important source of political speech, and, simultaneously, a financially valuable sign that can be effectively shielded from numerous forms of unauthorized use, including those that should be constitutionally protected.

Despite the analytically under-attended state of celebrity politicians' publicity rights, these two problems have received consideration in law review articles over the last decade or so. This article's aim is not so much to rehearse their arguments, although the implications of a hyper-muscular publicity rights doctrine would certainly bear such restatement, as to italicize them by rendering them present, albeit somewhat spectrally, in *The Presidential Right of Publicity*. The next part attempts to impress upon the reader how much richer, relevant, and simply better read *The Presidential Right of Publicity* is when taken as a science fictional text. The reasons for this assessment are three in number. For one, the text lends itself to a reading as *alternative history*, a subcategory of literary science fiction. Second, it focuses on a political figure, President Obama, who bears a significant science fictional charge of his own. And lastly, read as science fiction, *The Presidential Right of Publicity* points to a speculative doctrinal problem, a hybridization of the marginalized community access and strategic litigation problems discussed above. There is much to be said for those that wonder "[I]s there really anything left to say about the [right of publicity]?" My periodic doubts paralleling those of such critics notwithstanding, this form of reading suggests that there may indeed exist one or two as yet unuttered things.

III. The Presidential Right of Publicity Read Profitably as a Critical Alternative History of Publicity Rights Law

Here let us consider the case for a kind of creative *misreading*—what some literary scholars term a "misprision"—of a recent addition to right of publicity scholarship. "Misreading" in the sense that the term is deployed here is intended to mean an (ideally) innovative interpretive refashioning of

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78. Id. at 620.

79. See Volokh, *Freedom of Speech*, supra note 54, at 930 (arguing that publicity rights may be unconstitutional when applied in the context of noncommercial speech and commercial advertising).

80. See supra Part I.

a text that gives it meaning independent of what its author intended. My reading is not merely independent, however. A basic premise of this article is that the discursive space of the right of publicity crossed with politics is science fictionally charged, that the texts concerned with this nexus of politics, persona and intellectual property became associated with science fiction post-White, and that after Governor Schwarzenegger's suit against ODM—a case in which the Governor's celebrity politician status could not be disentangled from the Terminator franchise—that nexus is simply poorly attended to without consideration of the science fictional overtones resonating within it. White marks the extreme edge of the doctrine of publicity rights (mere evocation as violation), science fictionally (a wigged, gowned and bejeweled robot animates the case), Schwarzenegger's lawsuit reveals the power of a form of strategic litigation the doctrine offers political figures (right of publicity law as a preferable alternative to defamation law) against the backdrop of a canonical science fictional story arc (strong artificial intelligence, time travel, cyborg soldiers) fueling much of the fame and political success of the plaintiff. And Baudrillard's theories of simulacra and postindustrial consumer society, with all of their allegiance to, traffic in, and tropic similarities to science fiction, indelibly mark the minimalist wing of doctrinal discourse. This overall science fictional charge invites science fictional interpretation. And, in this part, I hope to show that The Presidential Right of Publicity (which, in the remainder of this article, will be referred to as "PRoP") lends itself to such reading. To the extent that PRoP welcomes such an

82. See HAROLD BLOOM, THE ANXIETY OF INFLUENCE: A THEORY OF INFLUENCE (2d ed. 1997) for the theory of strongly distortive poetic readings of precursors that I wish to grossly invoke here.

83. See White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1399 (9th Cir. 1992); see also Dogan, supra note 16 (discussing the problematic fallout of recognition of a right to evoke); cf. David Tan, Much Ado About Evocation: A Cultural Analysis of "Well-Knownness" and the Right of Publicity, 28 CARDOZO ARTS & ENT. L.J. 317, 318 (2010) (justifying the evocation right and discussing the significance of cultural studies to right of publicity jurisprudence).

84. See White v. Samsung Elecs. Am., Inc. 989 F.2d 1512, 1514 (9th Cir. 1993) (denial of motion for rehearing) (Kozinski, J., dissenting) ("The ad that spawned this litigation starred a robot dressed in a wig, gown and jewelry reminiscent of Vanna White's hair and dress . . ..").

85. See Welkowitz & Ochoa, supra note 28 (describing the strategic litigation potential for public figures of right of publicity suits in comparison to defamation suits).

86. See SEAN FRENCH, THE TERMINATOR (British Film Inst. 1996).

87. See Boyle, supra note 2.

88. Since my use of Masson's article is very likely quite far removed from his intentions for it, it seems only fair to displace the text's title with this suggested abbreviation. My interest, after all, is primarily with what the text knows, as distinguished from its author's knowledge. For a useful and lucid discussion of this distinction in the context of literary art, see Guy Davenport, The Critic as Artist, in EVERY FORCE EVOLVES A FORM, 99–111 (1987).
approach, it is not improper in the least to describe it as a work of apocalypse.89

Science fiction and jurisprudence share a lineage going back at least as far as the mid-twentieth century, a time during which the contributions of Golden Age science fiction90 largely enabled American legal discourse in the area of space law.91 Legal scholars have noted the capacity of science fictional texts to serve as sociocultural probes of considerable value to legal thought and analysis.92 Although the genre has received harsh criticism for its large quantities of “inferior material,” and for its failure to arrive at the state of “serious literature,”93 more intellectually satisfying chastisement takes science fiction to task for its power to induce a Boy-Who-Cried-Wolf effect in the context of catastrophic risk assessments,94 and, in its moments of deepest impact, for its ability to constrain policymaking more generally.95 But legal discourse is not without example of science fiction’s adoption as an analytical mode.96 And “the potential for . . . using [s]cience [f]iction,” including the subcategory of “counter-histories and parallel universes,” to analyze legal concepts, practices and problems was recognized in the germinal work of law and science fiction, Bruce Rockwood’s New Possibilities.97


90. This phase of science fiction is typically characterized by its modernist bent, emphasis on science and technology as progressive forces—as exemplified in many of the works of authors such as Isaac Asimov, Alfred Bester, Ray Bradbury, Arthur C. Clarke, Robert Heinlein, Fritz Lieber, Frederik Pohl, Theodore Sturgeon, and A. E. van Vogt—John W. Campbell’s editorial tenure at Astounding Science Fiction, freedom, grossly speaking, from anything but traces of the criticisms of technocracy and scientific expertise that erupted in the 1960s and, in terms of material production, a transition from science fiction stories largely consumed in pulp periodical form to the genre’s increasing availability in paperback.

91. Post-Sputnik space law was so entangled with science fictional language, concepts and tropes that the jurisprudential subfield was largely indistinguishable from the paraliterary form. See Kieran Tranter, Terror in the Texts: Technology—Law—Future, 13 LAW AND CRITIQUE 75 (2002); Barton Beebe, Law’s Empire and the Final Frontier: Legalizing the Future in the Early Corpus Juris Spatialis, 108 YALE L.J. 1737 (1999).


97. Rockwood, supra note 92, at 272; see also DAVID CAUDILL, STORIES ABOUT SCIENCE IN LAW: LITERARY AND HISTORICAL IMAGES OF ACQUIRED EXPERTISE 8–9 (2011).
Recent science fiction scholarship has theorized its object of concern as "modal" and "ethically hesitant," by which we can understand that "science fiction" should not be taken to signify only a literary genre, but, as well, a "mode of awareness" that predominantly colors our Weltanschauung, by which we can understand that "worldview" should not be taken to signify only a philosophical mechanism, but, as well, a "mode of awareness" that predominantly colors our Weltanschauung, that predominates over "the quotidian consciousness of people living in the post-industrial world," struggling to grasp its regular manifestations of societal flux—predominantly technoscientific, always imbued with ethical implications—that are largely "beyond their conceptual threshold." This expanded concept of science fiction—call it "SF"—is ethically hesitant as a result of its penchant for reflection, for axiological assessments of the flux. It is the capacity of science fiction for effectively expressing changes, specifically jurisprudential changes, in excess of our available conceptual devices, and for ethical hesitancy in the presence of such changes, that I wish to harness here. My reading of it argues that PRoP accumulates its science fictional charge by simply contributing to the scholarly discourse on political figures and publicity rights, and by centering President Obama in that contribution. But, this treatment of PRoP is also consistent with a functional description of SF in terms of modality and ethical perspective. Although in its particulars, my use of science fiction in this broader sense draws heavily on contemporary literary theory, it is largely aligned with the most recent contributions to legal

100. For a discussion of "technoscience" in the context of nanoscale research and development, and its use over that of "science and technology," see Matthias Wienroth, Disciplinarity and Research Identity in Nanoscale Science and Technologies, in SIZE MATTERS: ETHICAL, LEGAL AND SOCIAL ASPECTS OF NANOBIO TECHNOLOGY AND NANO-MEDICINE 159 (Johann S. Ach & Christian Weidemann eds., 2009); see also Michael Bennett, Does Existing Law Fail to Address Nanotechnoscience?, IEEE TECH. & SOCIETY MAGAZINE (Winter 2004), at 27; Alfred Nordmann, MolecularDisjunctions:Staking Claims at the Nanoscale, in DISCOVERING THE NANOSCALE (Davis Baird, Alfred Nordmann & Joachim Schummer, eds., 2004). For earlier discussions of technoscience, see BRUNO LATOUR, SCIENCE IN ACTION (1987); DONNA HARA WAY, MODEST_WITNESS@SECOND_MILLENIUM.FEMALEMAN_MEETS_ONCO MOUSE (1997).
101. Csicsery-Ronay, supra note 25, at 389. "Science fiction does have one superiority over all other forms of literature," the influential science fiction author Robert Heinlein noted. See Robert A. Heinlein, Channel Markers, ANALOG SCI. FICTION AND FACT (Jan. 1974), at 170–71. "It is the only branch of literature which even attempts to cope with the real problems of this fast and dangerous world." Id.
102. See Csicsery-Ronay, supra note 25, at 402 n.4 (discussing a useful taxonomic distinction between "science fiction" and "SF" adopted in this article); see also SAMUEL R. DELANY, THE JEWEL-HINGED JAW: NOTES ON THE LANGUAGE OF SCIENCE FICTION ix–xiii (2009) (discussing the significance of "science fiction," "speculative fiction," and "SF").
103. Csicsery-Ronay, supra note 25, at 387.
104. A regularly cited failure of the right of publicity is its resistance to explanation by means of widely accepted foundational theories of intellectual property. See Dogan and Lemley, supra note 52.
scholarship considering science fiction and its potential jurisprudential melding. In the next section, I will extend my treatment of PRoP as a science fictional alternative history by considering a more extreme issue provoked by my misreading of it.

If PRoP were reduced to a topographic mapping of science fictional moments, two massive features would predominantly characterize its image, one dominating its descriptive register, the other residing in its normative program. The first feature would be PRoP's decidedly antiempirical approach to the question of whether a political figure has a right of publicity. Such a deviation from readers' reality is so typical of science fictional works that it has come to designate something like a generic signature of the genre, and even has its own technical designation: Novum. And due to his significant associations with the genre, PRoP's second science fictional feature would be President Obama himself. Though it has gone largely unacknowledged, the president's affinity with science fiction is both multifaceted and relevant to political affairs.

Descriptively, PRoP proceeds as if politicians have no right of publicity. Seemingly equating "nontraditional celebrities" with celebrity politicians, in its opening PRoP wonders whether celebrity politicians "deserve the same rights," and determines that "the time is ripe for this issue to be decided in favor of a celebrity politician having an explicit right of publicity." PRoP goes on to note that First Amendment concerns about potentially chilled political speech should not shield unauthorized uses of a celebrity politician's—in this case, the president's—persona, and that the president should exercise his publicity rights, if he so chooses.


106. See WILLIAM SIMS BAINBRIDGE, DIMENSIONS OF SCIENCE FICTION 204 (1986) (discussing science fiction's capacity for proposing solutions and "provok[ing] the revelation of as yet unconsidered" and unattended to problems).

107. "A novum ... is a totalizing phenomenon or relationship deviating from the author's and implied readers' norm of reality," a classic work of formalist science fiction theorization tells us, continuing on to note that the novum is "'totalizing' in the sense that it entails of a change of the whole universe of the tale, or at least of crucially important aspects thereof ..." See DARKO SUVIN, METAMORPHOSES OF SCIENCE FICTION 64 (1979). For a discussion of the significance of science fiction nova in the context of the emergence of nanotechnoscience, see COLIN MILBURN, NANOVISION 24 (2008). My use of the phrase "science fictional charge" should be read as roughly equivalent to Milburn's use of "semiotic residue." It may not be unfair to argue that the science fictionalization of candidate Obama was analogous to that of nanotechnoscience, in that in both cases the effect was largely one of hyperbolic endorsement, the imbuing of the sense of a thing that is actual despite its being, at the time, extra- or, to use a Suvin concept, meta-empirical. On the meta-empirical quality of science fiction, see Suvin, supra note 19.

108. See Masson, supra note 28.
through private counsel, so as not to burden taxpayers with his personal litigation costs.\textsuperscript{109}

This line of argumentation is strikingly curious.

Authoritative commentators have regularly noted that political figures have publicity rights.\textsuperscript{110} The use of their images in an unauthorized context can lead to debate about whether publicity rights should be restricted by the First Amendment.\textsuperscript{111} But the question of whether the right of publicity extends to political figures—including politicians—has not been an actual question for some time now. The publicity rights of political figures were recognized in the case of Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Products.\textsuperscript{112} There the plaintiff attempted to stop the defendant's production and sale of plastic busts of Dr. King.\textsuperscript{113} The case is perhaps more important for recognizing that Georgia's right of publicity's descendibility is not contingent upon the owner's commercial exploitation, but the greater significance for this analysis is that the ruling clearly held that political figures have publicity rights.\textsuperscript{114}

In the famous case of Pat Paulsen, the notorious comedian contrived a performance-art-like presidential campaign by satirically entering the 1968 presidential election as the "Put-On Presidential Candidate" and running as the nominee of the "Stag party."\textsuperscript{115} The court determined that Paulsen became a "public figure," and his comedic campaign a matter of public interest; accordingly, any publicity rights he held in his image were superseded by First Amendment protection afforded "political expression."\textsuperscript{116} Paulsen was a "political figure" as I use the term here, and he had a right of publicity, albeit of a constitutionally "limited" nature.\textsuperscript{117}

\begin{itemize}
  \item \textsuperscript{109} Id.
  \item \textsuperscript{110} See McCarthy, supra note 32; Cowen, Right of Publicity, supra note 54 (noting that Schwarzenegger would probably have won his case if it has gone to a decision, even though he should have lost on First Amendment grounds); Gallagher, supra note 3, at 583.
  \item \textsuperscript{111} See Volokh, Freedom of Speech, supra note 54, at 930 (proposing a new framework under which First Amendment commercial speech should be analyzed in the context of right of publicity suits); Zimmerman, Money as a Thumb, supra note 54.
  \item \textsuperscript{112} Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prod. Inc., 694 F.2d 674, 683 (11th Cir. 1983).
  \item \textsuperscript{113} Id.
  \item \textsuperscript{114} The ruling did not extend to "public officials," but considering Dr. King's overtly political activities during the 1950s and 1960s, it is difficult to argue that he was not a political figure. See Rielly, supra note 28, at 1163 (noting that, despite its limitation, King holds that political figures have publicity rights).
  \item \textsuperscript{115} Paulsen v. Personality Posters, Inc., 299 N.Y.S. 2d 501 (1968).
  \item \textsuperscript{116} Id. at 449–51.
  \item \textsuperscript{117} Id. at 451; see also Browne v. McCain, 611 F. Supp. 2d 1062, 1072 (C.D. Cal. 2009) ("[T]he plaintiff in Paulsen actually injected himself into the 1968 Presidential election through his comedy routine based on his candidacy as the 'Put-On Presidential Candidate of 1968,' which
And in the case of Schwarzenegger suit against ODM, the issue was not whether the Governor possessed valid publicity rights, but whether his rights were *trumped* by the nature of the defendant’s unauthorized use.\(^{118}\) Against the backdrop of empirically verifiable agreement across opinions and commentary as to its existence, \(^1\) \(ProP\)'s contention that the “time is ripe for this issue to be decided in favor of a celebrity-politician having an explicit right of publicity” requires explanation. And given the science fictional charge of the publicity rights discourse, it seems that a generous\(^{119}\) reading of this descriptive plank of \(ProP\), and arguably the best reading of it, is *as* science fiction. To read \(ProP\) science fictional turns its descriptive deviation from contemporary right of publicity discourse less into a mark of oversight or error, and more into an indicator of its offering itself up as an *allohistorical* text, or what science fiction scholars term an “alternative history.”

Alternative histories are parallel world stories. They represent that subcategory of science fiction depicting “[e]vents that have not happened in the past,” as well as the sub-subcategory of events that *might* have happened, but didn’t.\(^{120}\) As a literary form, alternative history has been used to pose “possible solutions” to societal problems of considerable import.\(^{121}\) So, not only does reading \(ProP\) in this fashion resonate with the

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\(^{118}\) See Ochoa, *supra* note 8.

\(^{119}\) I use the term “generous” in a technical sense to mean a reading that “works to find a coherent defensible new argument/concept within the text,” even if that new argument/concept “goes beyond the ‘author’s intention’ but could be demonstrated to be nascent or latent within it . . . .” See Joseph Dumit, How I Read (Sept. 27, 2012) (unpublished manuscript) (on file with author) (describing generous and other modes of reading).

\(^{120}\) Samuel R. Delany, *About Five Thousand One Hundred and Seventy-Five Words*, in 10 EXTRAPOLATION 52, 62–63 (Thomas D. Clareson ed., 1970); cf. Marie-Laure Ryan, *From Parallel Universes to Possible Worlds: Ontological Pluralism in Physics, Narratology, and Narrative*, 27 (4) POETICS TODAY 633, 657 (2006) (“Alternative—(or counterfactual—) history fiction creates a world whose evolution, following a certain event, diverges from what we regard as actual history.”). From this perspective, *The ProP* can be interpreted as describing a legal world in which celebrity political figures have no right of publicity and then proceeding to make normative arguments for why they should. The author takes this interpretation as a radical, and radically subtle, critique of the actually existing doctrine, resonant with the most extreme critics. See Ghosh, *supra* note 28, at 617–18 (arguing against publicity rights for public officials); cf. MCCARTHY, *supra* note 32.

extant shards of science fiction in the doctrine, it also subtly suggests a need for criticism, provoking us to critique. As it delivers a depiction of the doctrine that contemporary discourse recognizes as not having existed for nearly thirty years, PRoP opens a radical critique by introducing the reader into a world in which politicians actually don’t have publicity rights.

In its normative register, PRoP might initially appear conventional, even if arguably indifferent to political forces impinging on President Obama. The text argues that President Obama is a “nontraditional” celebrity figure whose fame is potentially quite valuable to merchandisers and advertisers, and that, despite his holding the office of the chief executive of the United States, the president should exercise his right of publicity to prevent the unauthorized commercial exploitation of his likeness. The familiar Lockean labor theory is offered as a justification for the president’s publicity right: Because he has “invested a lot of time, money, and effort in building his image,” an image “no less deserving of protection” than any other celebrity’s, the president should be granted exclusive right to commercially exploit his persona. This argument is consistent with actions taken by the Obamas, and its indifference to the disciplinary forces at work in electoral politics aside, PRoP’s prescription is mundane.

The normative beneficiary of this argument, however, is another story. President Obama is riddled with science fictional markers, many of them sourced from political commentators, but also, occasionally, coming from other political figures. For example, when the debt limit negotiations between Congress and the White House failed to reach a mutually acceptable resolution in 2011, House Speaker John Boehner described the negotiating parties as being relatively alien, noting that they were akin to “two groups of people from two different planets who barely understand

122. Just as some of the President’s critics exercise insufficient “attentiveness to the discipline of electoral politics,” so, too, does PRoP, unless it is read science fictionally. See RANDALL KENNEDY, THE PERSISTENCE OF THE COLOR LINE: RACIAL POLITICS AND THE OBAMA PRESIDENCY 103 (2011).

123. See Masson, supra note 28.

124. Id. This article is not directly concerned with pointing out the theoretical shortcomings of publicity rights. For extensive discussion of the doctrine’s problems in those regards, see Doga & Lemley, supra note 52, at 1180–90.

each other.” The House Speaker later characterized his personal relation with the president in similar terms by stating: “We have a good relationship,” “[w]e just come from two different planets.” Commentators have followed suit, comparing President Obama to an extraterrestrial invader of Earth. On at least one occasion, in a comical, jujitsu-like move, the president embraced this science fictional slander, stating that he “was actually born on Krypton” and “was sent here by [his] father Jor-El to save the planet Earth.”

The political comedian Jon Stewart has spoken of the president as a Terminator-like cyborg, and wondered whether he was technologically augmented. This allusion to Schwarzenegger’s signature role in The Terminator effectively couples with the president’s own indirect, and certainly unintentional, allusion to the Vanna White evoking robot in the Samsung advertisement: “You might not know this,” President Obama told an audience during his visit to Carnegie Mellon University’s National Robotics Engineering Center, “but one of my responsibilities as Commander-in-Chief is to keep an eye on robots .... And I’m pleased to report that the robots you manufacture here seem peaceful ... at least for now.”


131. See supra Part I.

But by far the most frequently deployed science fictional reference used to discuss President Obama has been Commander Spock, the iconic Vulcan science officer in the 1960s television show Star Trek. The president’s notorious intelligence, aloofness, and coolness have been regularly compared to Spock’s signature rational, emotionless demeanor with statements such as “he’s too intellectual, too Mr. Spock.” Critics have noted that his dispassionate, Vulcánnesque behavior makes him a poor “Feeler in Chief.” More admirable commentary has approvingly pointed out that “[t]he Vulcan side of Obama, the core of his character, hasn’t changed [since the election],” that the president is capable of “mind melds,” a Vulcan technique of directly linking their mind to that of another being, and that his administration’s “diversity” is an illustrative application of his “Vulcan philosophy of ‘infinite diversity in infinite combinations.’” Candidate Obama received a $2,300 campaign donation from Leonard Nimoy, the actor who portrayed Spock in the original series and several subsequent films, while President Obama made a Vulcan hand sign while standing alongside Nichelle Nichols, the actress behind the Lieutenant Uhura character in the original Star Trek television show. These actions deepened the president’s links to the cult show, and further

133. Notably, Obama was not widely associated with Tuvok, the black Vulcan character of Star Trek: Voyager (UPN television broadcast 1995–2006).

134. See INA RAE HARK, STAR TREK 26–27 (2008) (describing Spock as an empirically minded thinker who tends to “see all sides of a question” while not being “swayed by ideology”).


140. See Dan Koller, Offers They Couldn’t Refuse, DALLAS MORNING NEWS, Aug. 26, 2007, at 3A (discussing the political campaign donations of celebrities).

entrenched his political persona in one of the most intensely active sectors of science fiction fandom.\footnote{See Henry Jenkins III, Star Trek Rerun, Reread, Rewritten: Fan Writing as Textual Poaching, 5 CRITICAL STUD. IN MASS COMM'CNS 85 (1988); Michael Jindra, Star Trek Fandom as a Religious Phenomenon, 55 SOC. OF REL. 27 (1994); LINCOLN GERAGHTY, LIVING WITH STAR TREK: AMERICAN CULTURE AND THE STAR TREK UNIVERSE (2007).}

Complementing this marshaling of science fictional tropes—alien civilizations, robots, cyborgs, space travel—used metaphorically and in similes to describe qualities of the president’s politics or emotional disposition, even more ambitious treatments have effectively contextualized the president within an extended science fictional narrative form. For example, in the late phase of his presidential candidacy in August 2008, and one of the earliest and most involved examples of such formal treatment, the soon-to-be-president Obama was portrayed in satirical and futuristic fashion when he was effectively cast as the central character in a rather apocalyptic futuristic short story.\footnote{Roy Edroso, The Harrowing Adventures of President Obama: Looking Back on His First Term, VILLAGE VOICE (Aug. 19, 2008), http://www.villagevoice.com/2008-08-19/news/the-harrowing-adventures-of-president-obama?src=newsletter.} And as the 2010 mid-term election approached, New York Times columnist David Brooks published an alternative history of the then concluding first half of the president’s first term, starting in December 2008 and describing a course of actions that could have followed, but didn’t.\footnote{See David Brooks, Op-Ed., The Alternative History, N.Y. TIMES (Sept. 2, 2010), http://www.nytimes.com/2010/09/03/opinion/03brooks.html.}

Even a crucial element of the president’s reelection strategy came to sound a science fictional ring. When the Romney campaign effectively reanimated the question that Governor Ronald Reagan put to the American public at the close of his second debate with President Jimmy Carter one week before the presidential election of 1980—Are you better off now than you were four years ago?—the Obama team opted to refashion the aphorism and present voters with a slightly, yet critically, modified question: “[I]s the country better off than it would have been if Republicans had been in charge for the past three and a half years[?]”\footnote{See Michael D. Shear, G.O.P. Seizes on a Question: Are You Better Off Than You Were 4 Years Ago?, THE CAUCUS BLOG (Sept. 3, 2012, 1:12 PM), http://thecaucusblogs.nytimes.com/2012/09/03/g-o-p-seizes-on-a-question-are-you-better-off-than-you-were-4-years-ago (emphasis added).} Considering Reagan’s own penchant for SF films, perhaps this should be taken as a


\footnote{144. See Peter Beinart, THE ICARUS SYNDROME: A HISTORY OF AMERICAN HUBRIS 231-39 (2010) (discussing Reagan’s love of science fiction and how it influenced his administration’s policies, particularly in the context of national defense and nuclear weapons negotiations with the Soviets).}
deliciously appropriate gesture on the part of President Obama’s reelection campaign, a neo-Reaganesque invitation to the American electorate to imagine an alternative history, a set of “[e]vents that have not happened in the past,” as it determined how it would vote in November 2012.

PRoP opens itself to a constructive science-fictional interpretation not only by exhibiting formal congruence with a narrative mode common to the genre, but as well as by taking as its normative object of concern President Obama, a political actor who bears a large number of markers that are meaningless outside of direct references to science fictional works and figures. But it is what Baudrillard might have described as Obama’s “hyperreality,” his susceptibility to being described as a real figure “derive[d] from a model” originating in American cinema and television, that renders him susceptible to a claim of publicity rights infringement in a past that did not happen, but could have. Candidate Obama’s celebrity begat a potentially devastating angle of criticism for his opponents, particularly McCain during the late phase of the 2008 election cycle. What if an actor, particularly a black actor, had initiated a nonfrivolous right of publicity suit against candidate Obama in 2007 or 2008? As fantastic as the scenario may seem, I propose that it was possible, and that, had it happened, the candidate would likely have suffered considerable political fallout.

As a matter of historical fact, Barack Obama is the first black president of the United States. But, in cinema and television, the two main windows onto the landscape of “virtual America,” popular culture has presented us with a series of black (and male) presidents. Several of the most recent, and most popular, depictions have been characters in science fictional narratives. In Deep Impact, theatrically released in 1998, Morgan Freeman played the role of President Tom Beck against the backdrop of an impending, potentially life extinguishing comet on a collision course with Earth. Terry Crews acted as the chief executive in 2006’s Idiocracy, the plot of which involved a satirically rendered twenty-sixth century America populated by cognitively degraded citizens living on

148. See Delany, supra note 120, at 62.
149. See Csicsery-Ronay, supra note 25, at 390.
150. The issue of Barack Obama’s race, whether he was black enough, or black at all, was intensely debated during his campaign, especially among his African-American critics. See Kennedy, supra note 122, at 76–79.
152. Id. As the adaptor of Irving Wallace’s 1964 novel The Man into a movie script, Rod Serling, creator of The Twilight Zone, contributed a subtle science fictional association to the notion of a black president two decades before the first feature length science fiction film included such a character.
153. Id.
more or less constant streams of junk culture and junk food.\textsuperscript{154} And from 2001 to 2006, in the television show 24, a political techno-thriller with hints of parallel or future\textsuperscript{155} world narration, President David Palmer was played by Dennis Haysbert.\textsuperscript{156} Several cultural critics have proposed that these characters, in addition to holding memberships in this imaginary black executive fraternity, have contributed to a transformation of the national political imaginary. The characters have created a "David Palmer Effect on politics,"\textsuperscript{157} thereby helping the American electorate become comfortable with an actual black president by enabling it to "imagine Mr. Obama’s transformative breakthrough before it occurred,"\textsuperscript{158} and perhaps even accelerating the occurrence.

From among this ersatz fraternity's members, the remainder of this article focuses on Dennis Haysbert’s character for two main reasons. First, in addition to race, there are various similarities that the fictional David Palmer shares with the actual Barack Obama: Both are noted basketball players; both were senators; both ran for the presidency as a forty-something year old; and both are noted for exuding a cool executive demeanor.\textsuperscript{159}

Second, Palmer and Obama both faced daunting, arguably quasi-apocalyptic political conditions as they governed. For Palmer, political apocalypse took the form of a partially thwarted nuclear attack in California;\textsuperscript{160} a barely survived attempt on his life by way of a biological weapon;\textsuperscript{161} an attempt by his vice president to remove him from office using the Twenty-Fifth Amendment;\textsuperscript{162} and ultimately an assassination strikingly reminiscent of Dr. King's.\textsuperscript{163} The apocalypse of President Obama is more sociopolitically complex and multidimensional. For example, some commentators find that President Obama operates in the public imaginary as an apocalyptic indicator. Professor Sutton has noted

\textsuperscript{154} Id.
\textsuperscript{156} Id.
\textsuperscript{157} Id.
\textsuperscript{160} 24: Day 2: 10:00 PM–11:00 PM (Fox television broadcast Mar. 4, 2003).
\textsuperscript{161} 24: Day 2: 7:00 AM–8:00 AM (Fox television broadcast May 20, 2003).
\textsuperscript{162} Id.; 24: Day 2: 4:00 AM–5:00 AM (Fox television broadcast Apr. 29, 2003).
\textsuperscript{163} 24: Day 5: 7:00 AM–8:00 AM (Fox television broadcast Jan. 15, 2006).
the way Obama’s “charisma and global popularity” fitted him neatly into the central role of the Antichrist figure in an Americanized vision of apocalyptic political thought and activism.\textsuperscript{164} Even sympathetic commentators have described President Obama’s first term as apocalyptic in a secular sense.\textsuperscript{165} But President Obama is arguably also symbolically apocalyptic through association with fictional black presidents, figures that can be read as signs of the end, “inadvertently affirm[ing] ‘doomsday’ predictions of a black presidency.”\textsuperscript{166} Citing Wagner’s \textit{Götterdämmerung} and reminding the reader of the etymological meaning of “apocalypse” as a “dis-covery” or “un-veiling” of a phenomenon or state of affairs that “will

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Could it be that a nation that senses itself to be in trouble economically and politically, as weak in war, and as ill regarded and denounced by the outside world, might also seek a corporate savior? America experienced the massive decline of its currency, an enormous economic deficit, a creeping loss of jobs to cheaper countries, and a poor performance in the Iraq war and in its war on terrorism, during the Bush years. It experienced severe direct attacks on its self-esteem and symbolic status from the rest of the world—America appeared to have the worst image in the world ever . . . . It also suffers from a generally slow, and periodically rapid, transformation of the geopolitical situation—the economic and political rise of emerging nations like China and India, and the economic consolidation of Europe are examples. This more latent, long-term, geopolitical change cannot be blamed on Bush, and it will not be halted by future presidents—though it might be delayed, and the transition to a lesser world power might [ ] become more orderly and less felt if it were guided by a wiser administration. To top it all off, America was afflicted by an acute financial breakdown, the worst since the Great Depression, with heinous consequences for the population, six weeks before the election. America has reason to seek a corporate savior, someone who can articulate a vision that promises to address the acute and the long-term geopolitical decline of a dominant nation.
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be seen to need interpretation,\textsuperscript{167} comments from the author and literary critic Samuel R. Delany resonate with some of the more strikingly revealing findings of political scientists studying President Obama’s racially polarizing effects on public opinion.\textsuperscript{168} It is as if his occupation of the most prominent and powerful political position in America pulled back the scrim on and exacerbated some of the deepest and most politically volatile problems in American. This state of affairs has yet to be adequately interpreted.

Alone, PRoP’s re-reading of the publicity rights doctrine as if it had never included Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Products, Inc., might have warranted an interpretation as merely ambiguous writing. Similarly, had PRoP chosen a celebrity politician other than President Obama to center its prescription, a reader might have been absolved of any duty of acknowledging its introductory descriptive claim as generically suggestive. But combined, these features render a standard reading of PRoP more or less wasteful. To read it as anything other than science fiction is akin to steeping a fine black tea in cold water. The maximal possible yield of such an exercise is simply foregone; its potential dividend, overlooked.

But why? the reader might understandably wonder, why would an actor have even considered initiating a right of publicity suit against a presidential candidate, claiming that the politician had, without authority, appropriated the actor’s persona by evocation, and benefited, financially or politically, as a result? Strategic intellectual property litigation’s end tends to be cessation of use,\textsuperscript{169} but in the context of political campaigns, especially those as dramatic and fiercely fought as a modern-day American presidential election, the strategic value of such a suit would be its yield in a political register. The patently false accusation that Barack Obama was not born in the United States, and was therefore constitutionally ineligible to become the nation’s president, was born in a lawsuit filed in Pennsylvania district court.\textsuperscript{170}

The absurdity of the “birther” position was an obstacle to neither its central role in legal argument launched for political purposes, nor its
attractiveness to the presidents’ enemies, once acknowledged by the official trapping of the legal process. By comparison, a publicity rights suit would have been significantly less ridiculous on its face. When we recall the magnitude of opposition that Obama’s ascendency ignited, it quickly becomes apparent that any surreal qualities of such a suit would have actually been consistent with the “Obama Derangement Syndrome” that seems to have governed much of the opposition to his candidacy and his subsequent administrations. “The eruption of such hostility and discontent so shortly after the election of a black president,” one particularly apt assessment notes, “marks an open renewal of white male backlash, ‘Dixiecrat’ racism and anti-multiculturalism, which can be read as a collective response to a perceived political and economic nightmare,” a so-called “Obamanation.” If one imagines life as apocalyptic, apocalyptic political strategies, deployed through any means—including the legal system—become not only imaginable, but also appropriate and even arguably necessary.

Paradoxically, a prerequisite for perceiving just how such a suit might have been of use to his opponents demands that we consider the crucial role that fame has played throughout the entire professional life of Barack Obama, and how his fame was tactically appropriated by his critics and his main opponent leading up to the 2008 presidential election.

Fame has accreted about Barack Obama since his days as a law student at Harvard. Alone, his ascent to the presidency of the Harvard Law Review, the first by an African-American, earned him a place in history books. Fourteen years later, his electrifying keynote address at the 2004 Democratic National Convention rocketed him to national stardom. Political culture commentators struggled to explain the magnitude of his fame. For Naomi Klein, its basis lay in candidate Obama’s “natural feel for branding” and his skilled “team of top-flight marketers”:

Together, the team...marshaled every tool in the modern marketing arsenal to create and sustain the Obama brand: The perfectly calibrated logo (sunrise over stars and stripes); expert viral

171. ALTER, supra note 170, at xi.
172. See Brayton, supra note 166, at 66.
marketing (Obama ringtones); product placement (Obama ads in sports video games); user-generated content (Obama-girl? Genius!); a thirty-minute infomercial (which could have been cheesy but was universally heralded as “authentic”); and the choice of strategic brand alliances (Oprah for maximum reach, the Kennedy family for gravitas, and no end of hip-hop stars for street cred).¹⁷⁶

In a mash-up of classical Weberian sociological theorization and post-modernist business management analysis, Karin Knorr-Cetina points to irresistible charisma as the ultimate explanation for Obama’s celebrity, describing him as a Pied-Piper-esque “corporate savior” figure, not unlike a troubled corporation’s “star storyteller;”¹⁷⁷ “the outside CEO hired by a beleaguered board of directors to save a troubled company”,¹⁷⁸ and a chief executive able to deliver a convincing “vision that promises to address the acute and the long-term geopolitical decline of a dominant nation.”¹⁷⁹

Regardless of the correctness of these possible explanations, however, candidate Obama’s fame was rather paradoxical. For, at the same time that it provided the highly energetic fuel for the 2008 Obama campaign, it also became one of the campaign’s most potentially damaging vulnerabilities.

Picking up and revitalizing a criticism of Obama born during his law school days, that he was a star far beyond other merely mortal students, the campaign of Senator John McCain, Obama’s Republican opponent in the 2008 presidential election, effectively labeled the Democratic nominee as a “self-consumed star” who suffered from a messianic complex.¹⁸⁰ The McCain campaign generated considerable media attention with a television advertisement that compared Obama’s fame to that of Britney Spears and Paris Hilton, branding him as “the biggest celebrity in the world” and questioning his capacity to lead.¹⁸¹ McCain’s criticism was also grossly

¹⁷⁶. NAOMI KLEIN, NO LOGO: TAKING AIM AT THE BRAND BULLIES xxiv (2009). Randall Kennedy, the legal scholar of race relations and legal institutions, also points to the “manicured” nature of candidate Obama’s persona, particularly his blackness. See KENNEDY, supra note 122, at 84. But Kennedy also notes the black candidate’s raw effectiveness as a politician on the national stage, his “having best[ed] along the way scores of people who were seemingly better positioned then he to win the presidency,” as a source of the intense adoration leading up to candidate Obama’s first presidential election victory. Id. at 30.

¹⁷⁷. Knorr Cetina, supra note 164, at 133 (quoting RAKESH KHURANA, SEARCHING FOR A CORPORATE SAVIOR: THE IRRATIONAL QUEST FOR CHARISMATIC CEOs 169 (2002)).

¹⁷⁸. Id.

¹⁷⁹. Id. at 133.


¹⁸¹. See KENNEDY, supra note 122, at 152–54 (describing the various interpretations, ranging from a smear turning on American anxieties about miscegenation to commentary on the candidate’s all-too-close association with “the pathology of American celebrity culture,” to which “The Celebrity” advertisement lends itself). At a relatively early juncture, David Ehrenstein predicted that these celebrity qualities of candidate Obama, whom he described as a “Magic
aligned, albeit to different ends, with some of the structural critiques that came from commentators on the political left. Pointing to inadequate voting incentives, corporate agenda capture, and congressional obstructionism exercised through filibusters, such commentary effectively characterized President Obama as an actor occupying the center of an elaborate show of government theater in a system that, then, offered no real possibility of progressive developments.\textsuperscript{182} The result from this perspective was that “even with supermajorities in both houses of Congress behind [him]” President Obama would not have been able to “pass the kind of transformative progressive legislation that [he] promised in his 2008 presidential campaign.”\textsuperscript{183} The candidate, in other words, was a star performer, an actor in a political theater, emotionally affective but without substantial political effect.

And Knorr-Cetina, too, essentially theorized President Obama as primarily a gifted, yet likely only largely rhetorically effective, performer. The president’s primary objective is to mollify an American populace—perhaps even a world audience—presented with the spectacular demise of the United States. Knorr-Cetina’s organizing metaphor in \textit{What is a Pipe}?—Obama as Pied Piper suggests a spectacular form of political mesmerization. Her essay doubles down on its political ineffectiveness critique through a nominal allusion to René Magritte’s 1928–29 painting \textit{La Trahison des Images}, often referred to as \textit{The Treachery of Images}, or \textit{The Treason of Images}, among English speakers. The famous surrealist art work explicitly warns against confusion of the genuine” and “simulated.” This admonition translates, in the context of contemporary political analyses, into a suggestion that, no matter the measure of the actor’s mesmerizing fame, we not confuse a genuinely effective presidency with a merely simulated one.\textsuperscript{184}

\textit{Negro}” would increase his desirability in the estimation of white Americans, “[f]or as with all Magic Negroes, the less real he seems, the more desirable he becomes. If he were real, white America couldn’t project all its fantasies of curative black benevolence on him.” David Ehrenstein, Editorial, \textit{Obama the “Magic Negro,”} \textit{L.A. TIMES} (Mar. 19, 2007), http://www.latimes.com/news/opinion/commentary/ la-oeehrenstein19mar19,0,3391015.story.


\textsuperscript{183}. \textit{See} \textit{ERIC ALTERMAN, KABUKI DEMOCRACY: THE SYSTEM VS. BARACK OBAMA} 5 (2011).

\textsuperscript{184}. \textit{See Knorr-Cetina, supra note} 164. In \textit{The Simulacra}, one of his dark, futuristic science fiction novels, Philip K. Dick presents a literary version of the critique, bridging Magritte’s image and Knorr-Cetina’s analysis. The novel depicts a world in which the president of “The United States of Europe and America” is a simulacrum. \textit{See PHILIP K. DICK, THE SIMULACRA} (2002). Baudrillard apparently read Dick’s works as exemplars of, perhaps symptomological indicators of, the western imagination’s “reversion” into hyperreality. \textit{See} Baudrillard, \textit{supra} note 21.
If a nonfrivolous right of publicity suit had been initiated against candidate Obama, not only would the two problems discussed above—publicity rights’ capacity for blocking the use of celebrity persona by marginalized groups for political ends, and political-speech-chilling strategic intellectual property litigation—have been merged into a possibly devastating legal claim, but, more importantly for this article’s position, the candidate would likely have been compelled to defend himself against the political claim that he was even less substantial than a celebrity actor—that he was an imitation of an actor, an actor’s simulacrum. Such a suit would have simply been an extension of the superstar critique of Barack Obama that has followed him about since he was a first year student. Again the goal of such strategic litigation would not have been a legal victory, but rather a political one. The McCain campaign’s efforts to frame Obama as a foppish celebrity seem to have been effective in narrowing their opponent’s lead in the polls. The Obama campaign’s deputy manager, Steve Hildebrand, recalled a “freak out” moment upon the release of McCain’s “Celebrity” advertisement: “I thought if they can brand him as a celebrity rather than as a serious leader we’re going to be in serious trouble.” That freak out was appropriate, as the critique had traction, exposing a kind of Achilles’ heel in the Obama campaign. And by initiating a non-frivolous publicity rights suit at whose base sat, in effect, an echoing restatement of the “Celebrity” advertisement and the old superstar critique of Obama, Hilderbrand’s fears might well have been realized, and to considerable negative effect on the odds of an Obama win. What follows is an illustration of how a political victory could have been scored, in large part, due to the expansive scope of publicity rights law.

185. See supra Part I.
186. Another authenticity attack, this time leveled against late nineteenth-century German culture by Nietzsche, seems also an untimely aphoristic rhetorical question for Barack Obama: “Are you genuine? Or merely an actor? A representative? Or that which is represented? In the end, perhaps you are merely a copy of an actor. Second question of conscience.” See Twilight of The Idols, Maxims and Arrows #38, in THE PORTABLE NIETZSCHE 472 (Walter Kaufman, ed. and trans., 1954).
188. Id.
IV. On the Political Fallout of a Right of Publicity Suit Against Senator Obama

Since he is domiciled there and its law clearly grants him a right of publicity, Dennis Haysbert could have initiated his suit under California common law. Haysbert might have alleged that during the book tour for The Audacity of Hope, in October of 2006, Senator Obama evoked the persona of Dennis Haysbert by effectively simulating Haysbert in his role as David Palmer in the television series 24. The statute of limitation for a right of publicity claim is two years in California, and so Haysbert would have been safe had he filed a complaint before the middle of October 2008. The suit could have been timed to coincide with Senator Obama’s announcement of his intention to seek the Democratic nomination for presidency on February 10, 2007, or it might have been timed to coincide with the release of the McCain “Celebrity” advertisement.

Considering the timing of the suit in relation to the presidential election cycle, and the claim’s direct connection to creative expressions and political activities, Senator Obama would probably have attempted to have the suit dismissed as quickly as possible. Recognizing the claim as a move to curtail his validly exercised free speech, a classic end of a strategic lawsuit against public participation (“SLAPP”), Obama would likely have made a special motion to strike under California’s Anti-SLAPP statute, as the latter was designed specifically to provide a “quick, inexpensive method of dismissing SLAPP suits.” Right of publicity suits may not be among the typical causes associated with SLAPP suits, but the California Supreme Court has explicitly noted that “[n]othing in the statute itself categorically excludes any particular type of action from its operation,” and that its “definitional focus is not the form of the plaintiff’s

191. See Cusano v. Klein, 264 F.3d 936, 950 (9th Cir. 2001) (dismissing a right of publicity claim because plaintiff failed to file before two years had passed since the alleged infringement); see also McCarthy, supra note 32, at § 11:41.
cause of action, but, rather, the defendant’s activity that gives rise to his or her asserted liability . . .

In order to meet his initial burden on the Anti-SLAPP motion, Obama would have had to show that Haysbert’s right of publicity claim stemmed from a protected activity as contemplated in the California Anti-SLAPP statute.\(^{197}\) Protected activities under the statute are acts “made in furtherance of the person’s right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue.”\(^{198}\) The Audacity of Hope book tour would most certainly have qualified.\(^{199}\) As the court must construe the statute broadly,\(^{200}\) it is likely that Senator Obama would have met his burden, and, accordingly, the burden would have then shifted to Haysbert to establish a probability of success on the right of publicity claim.\(^{201}\)

In order to prevail, Haysbert would have needed to satisfy the common law’s four elements for a cause of action: “(1) [T]he defendant’s use of the plaintiff’s identity; (2) the appropriation of plaintiff’s name or likeness to defendant’s advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury.”\(^{202}\) Under the California common law doctrine, it is worth noting, the appropriation of a person’s identity does not have to be intentional in order to be a violation of the right of publicity.\(^{203}\)

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197. See CAL. CIV. PROC. CODE § 425.16 (1992) (describing the applicability of California’s Anti-SLAPP statute).
198. See id. § 425.16(b)(1).
199. Id. § 425.16(e). This section includes among its illustrative list of “acts in furtherance of a person’s right of petition or free speech . . .”:

(3) [A]ny written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance or the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

Id. Senator Obama read from his book in a public forum; this activity would seem to satisfy either of these two protected categories. See id.
200. Id. § 425.16(a).
203. Id.
A. Obama’s Use of Haysbert’s Identity

Under this first element, Haysbert might have argued that Senator Obama *evoked* Haysbert’s persona as depicted in the character of David Palmer in the *24* television program. Haysbert would have needed to prove that, to a de minimis number of individuals, he was identified by Senator Obama’s “use.” Since Barack Obama would go on to derive significant income from book sales, his “use” might have been described as comparable to an advertiser’s: By evocatively associating Dennis Haysbert’s distinctive performance as David Palmer with Senator Obama’s books, even if unknowingly and unintentionally, Obama used Haysbert’s persona to advertise the book. The proto-apocalyptic conditions that swirled about Senator Obama, and, in part, that his presidential campaign ignited; his Spock-like emotional coolness, his having

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206. See Jesse Lee, *Release of the President and Vice President’s Tax Returns*, THE WHITE HOUSE BLOG (Apr. 15, 2009), http://www.whitehouse.gov/blog/09/04/15/Release-of-the-President-and-Vice-Presidents-Tax-Returns (“[The President] and First Lady filed their income tax returns jointly and reported an adjusted gross income of $2,656,902. The vast majority of the family’s 2008 income is the proceeds from the sale of the President’s books.”); see also Norm Eisen, *President Obama and Vice President Biden’s Tax Returns*, THE WHITE HOUSE BLOG (Apr. 15, 2010), http://www.whitehouse.gov/blog/2010/04/15/president-obama-and-vice-president-bidens-tax-returns (noting that the Obamas reported earnings of $5,505,409 in 2009, the vast bulk of which was income from book sales).

207. See White v. Samsung Elecs. Am., Inc. 989 F.2d 1512, 1513 (9th Cir. 1993) (denial of motion for rehearing) (Kozinski, J., dissenting); see also Dogan, *supra* note 16.

208. See MCCARTHY, *supra* note 32, at § 3:34 (noting that courts have tended not to accept a lack of intent to infringe as a defense).

209. I use the term “proto-apocalyptic” because signs of the impending economic depression would not become widely known until practically the eve of the presidential election. As Senator Gary Hart, one-time presidential candidate himself, noted, President Obama’s first term’s troubles predated it’s beginning: “You have a president who in the last days of his campaign began to understand that he was going to have to make fundamental adjustments in everything he had intended. We’ll never know what an Obama presidency absent the economic catastrophe would have looked like.” See James Fallows, *Obama, Explained*, THE ATLANTIC (Mar. 2012), http://www.theatlantic.com/magazine/archive/2012/03/obama-explained/308874/. On the possibility that Senator Obama’s campaign may have ignited a racially charged backlash, see Tesler, *supra* note 168, at 701. And on the relationship between anti-black racism and apocalyptic political thought, see Sutton, *supra* note 164. See also THE SOUTHERN POVERTY LAW CTR., THE SECOND WAVE: RETURN OF THE MILITIAS (2009), http://cdna.splcenter.org/sites/default/files/downloads/The_Second_Wave.pdf (describing the role of President Obama’s race in the post-2008-presidential-election revitalization of American militias).

210. Humanities Professor Henry Jenkins makes one of the earliest public comparisons of Barack Obama’s and Spock’s emotional mutedness. See Ticking Each and Every Box, IR. TIMES, June 7, 2008, at 16; Keslowitz, *supra* note 159, at 2799 n.67 (discussing the age and emotional restraint of David Palmer).
successfully run for Senate in his forties, and his vying to become the first black president of the United States of America, could be argued to add up to actionable evocation of Haysbert’s persona.

This first element actually involves two prongs. Haysbert would have needed to first show that Senator Obama evoked his persona in his role as David Palmer. In other words, Haysbert would have had to show that Senator Obama’s use identified Haysbert. “Identifiability” is a fundamental question in publicity rights cases. Haysbert could likely have presented affidavits attesting to at least a small number of Americans having approached him in 2008, roughly a year after Senator Obama announced his candidacy, and apparently confusing him with the actual senator. Haysbert publicly noted on at least one occasion that people regularly approached him in public and asked him to run for president during this period. Considering that Haysbert would likely have needed to show a “mere possibility of success,” and that only if his suit lacked “even minimal merit” would it not survive the Anti-SLAPP motion, it seems reasonable to imagine that such affidavits would have satisfied this prong of the first element.

The second prong of this first element would have been tougher for Haysbert. Since his role as Senator-turned-President Palmer is arguably a type or a trope, he would likely have needed to satisfy the indelibly linked identification standard of *Lugosi v. Universal Pictures*. The *Lugosi* decision teaches that in order for an actor to successfully claim that her persona has been misappropriated by another's use of a character that she has played, that actor must show that she has become exclusively linked to that character. Even though *Lugosi* represented a “hard case” for the California Supreme Court, following leading commentary, we can articulate its rule more precisely as follows: “[A]n actor [can] play a role so distinctively and uniquely that that particular characterization is indelibly

211. See Keslowitz, supra note 159.
212. See McCarthy, supra note 32, at § 3:18 (discussing tests of identification).
214. Such affidavits could have been instrumental in satisfying at least one of the four tests McCarthy lists as adequate methods of showing more than de minimus identifiability: “... (3) Evidence of unsolicited identification by reasonable persons, who made comments to plaintiff about the similarity ...” McCarthy, supra note 32, at § 3:18.
217. Id.
218. See Patterson, supra note 151.
220. See McCarthy, supra note 32, at § 4:72 (describing “hard” right publicity cases as those in which an actor has not created the allegedly appropriated character and may or may not be exclusively identified with it).
linked with that actor.\textsuperscript{221} Haysbert would have needed to produce evidence that his characterization of David Palmer made him publicly identifiable in Senator Obama's use. At trial, this question would have been an issue of fact.\textsuperscript{222} Haysbert might possibly have been able to draw upon the same affidavits that pointed to his identifiability in Obama's use to satisfy this prong.\textsuperscript{223} Presuming that such evidence would have been forthcoming, again, due to his very low burden, Haysbert would have had a good chance of satisfying the use element of his prima facie case.\textsuperscript{224}

B. Appropriation of Haysbert's Identity to Obama's Advantage

This second element of the prima facie case would have required that Haysbert provide evidence that Senator Obama benefited from using Haysbert's identity.\textsuperscript{225} Had Haysbert been able to satisfy the first element of his claim, the same evidence would likely have been effective in showing that Senator Obama had appropriated Haysbert's identity.\textsuperscript{226} Haysbert would have had little trouble generating evidence that the appropriation might have benefitted Senator Obama, both commercially and politically. In terms of commercial benefit, Haysbert might have pointed to the uptick in Senator Obama's book sales in 2007. The Obamas' jointly filed 2006 federal tax return lists adjusted gross income of $983,826,\textsuperscript{227} while their 2007 tax return states that their income was approximately $4.1 million.\textsuperscript{228} In both cases, the couple's income was largely a result of book sales.\textsuperscript{229} This evidence would likely have been sufficient to show that Senator Obama might have benefited from use of Haysbert's identity, and, therefore, sufficient to satisfy the mere possibility standard.

\textsuperscript{221} Id.
\textsuperscript{222} Id.
\textsuperscript{223} See CHECK IT OUT!, supra note 215.
\textsuperscript{225} Id. at 1070.
\textsuperscript{226} See supra notes 212–21.
\textsuperscript{229} See Lee, supra note 206.
C. Lack of Consent

In this alternative history, this element's satisfaction would have been a given, as Haysbert would not have brought the suit otherwise.

D. Resulting Injury

Since Haysbert would not have been seeking to recover damages, but aiming instead for injunctive relief, he would not have been required to prove quantified commercial damages. This element would have been easily satisfied if Haysbert had cleared the hurdle of the first element, as courts regularly presume commercial damage to identity when plaintiff proves that the defendant has used persona indicia in "such a commercial context that one can state that such damage is likely." Senator Obama's The Audacity of Hope book tour would likely have been considered a commercial setting, as the senator advertised and sold his books during the tour, and, arguably more importantly, the entire two-week long, twelve-city tour was funded entirely by Crown Publishing Group, publisher of The Audacity of Hope.

At least three affirmative defenses would have been available to Senator Obama had Haysbert been able to meet his burden of showing a mere possibility of success on his right of publicity claim: The public interest defense; a defense based on First Amendment protection of political expression; and the Saderup transformative use defense. Under California law, Obama would have had to produce evidence barring Haysbert's claim as a matter of law on each of them.

Senator Obama's public interest defense would have turned on analogizing Dennis Haysbert's role as David Palmer to the satirical antics of the comedian, Pat Paulsen. Paulsen's right of publicity claim was unsuccessful because, even though he was "only kidding" when he satirized the 1968 presidential election by presenting himself as the "Put On Presidential Candidate of 1968," he was deemed to have entered the political arena and become "newsworthy." His performance became

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230. See McCarthy, supra note 32, at § 3:2.
231. Id.
234. See supra Part II.
236. Id.
237. Id.
"sufficiently relevant to a matter of public interest [as to have become] a form of expression which is constitutionally protected and ‘deserving of substantial freedom.’" 238 Senator Obama would have argued that Haysbert had "injected" himself into presidential politics by playing the role of a president on television.

The First Amendment would likely have offered Senator Obama his strongest line of defense. Political expression of the sort that he made during the book tour, arguably a campaign event, 239 receives broad First Amendment protection. 240 Even though the Supreme Court has clearly noted that the First Amendment is no absolute bar to publicity rights suits, in this context Senator Obama would have had a good chance of successfully defending against Haysbert’s claim. 241

Lastly, the senator could have argued that his use of Haysbert’s persona was so transformative that Haysbert’s likeness became Obama’s own, in which case, under the Saderup ruling, Haysbert’s infringement claim would have been barred on First Amendment grounds. 242

The discussion of each of these defenses here is purposefully cursory because they are not important when we keep the strategy of the suit in mind. The end is political. If Senator Obama had been compelled to turn to affirmative defenses, his Anti-SLAPP motion would probably have succeeded, but at a potentially high political cost. Senator Obama would have been effectively looking to excuse his use, as opposed to refuting it. Invoking the public interest defense, the First Amendment defense, and/or the transformative use defense would have implicitly acknowledged that Senator Obama had used Dennis Haysbert’s persona for commercial and political gain. Had this scenario unfolded as described, McCain’s "Celebrity" critique of Senator Obama—the one line of attack that seemed to threaten the Obama campaign and tantalize the McCain campaign with tightening polls in the fall of 2008—would have received the imprimatur of the law. Steve Hildebrand, the 2008 Obama deputy campaign manager, has candidly stated that the “Celebrity” advertisement, which equated candidate Obama to Britney Spears and Paris Hilton, worried him deeply. 243

238. Id. at 450 (quoting University of Notre Dame Du Lac v. Twentieth Century–Fox Film Corp., 256 N.Y.S. 2d 301, 306 (N.Y. App. Div. 1965)).
239. The tour ended on October 30, 2006, roughly three months before Senator Obama announced his intention to enter the 2008 presidential election.
241. See Volokh, Freedom of Speech, supra note 54, at 904 (describing the categories of protected and unprotected expressions).
243. See supra Part III.
A California district court acknowledging the validity of one or more of the affirmative defenses would have effectively equated to its saying *this is a non-trivial claim on the part of Haysbert, and, by extension, McCain's critique has some modicum of merit.* We should imagine that Senator Obama would have had a more difficult time rebutting the "Celebrity" critique had his motion to dismiss failed, as it could have, or if the motion had succeeded on the basis of his affirmative defenses, as is probably more likely. This analysis points to the problematic application of California's Anti-SLAPP legislation in right of publicity cases.  

**V. Conclusion**

"Criticism of science fiction," Joanna Russ wrote in her classic 1975 essay *Towards an Aesthetic of Science Fiction,* "cannot possibly look like criticism we are used to. . . . Science fiction criticism will discover themes and structures (like those of Olaf Stapleton's *Last and First Men*) that may seem recondite, extra-literary or plain ridiculous." In this article I have, among other things, attempted to contribute to a reignition of criticism brought to bear on the right of publicity at a time when the doctrine desperately needs it. Though they are persistent, our critiques are increasingly perfunctory, and have yet to show much impact on the doctrine's development. Legal scholarship has only barely begun to tap the energetic potential of science fiction and its rich criticism, hence this essay's turn to them. By linking a radical science fictional reading of scholarship consonant with some of the more lamentable aspects of the doctrine, by risking affixation of the adjectives Russ warned of, I hope to encourage both further analyses that are, in terms of energy and critical yield, commensurate with the problems they address, and reconsideration of "how publicity in the political sphere differs from that in the market place."

As is the case with its expansive scope, the right of publicity for political figures is regrettable law. By allowing the two democratic culture-dampening problems discussed above—denial of use of celebrity personas by marginalized social groups for political speech, and the lowering burdens for strategic litigation based on doctrinal claims that can

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244. "It has become clear, after Hilton, that California's anti-SLAPP statute is not the cure for the right of publicity doctrine's problems," Lindsay Hanifan notes. *See Hanifan, supra note 195, at 295-15* (discussing the application of California's anti-SLAPP statute to publicity rights cases).


247. *See supra Part I.*
deliver quick political dividends before affirmative defenses are able to defuse legal threats—to merge, the doctrine reveals itself as a political weapon-in-waiting.

The value of innovative pop cultural images to democratic praxis in this simulacra-dense era is evident: If the signature of such an era is the advent of simulations before any actual arrival of the phenomena they model, then the delivery of empowering, democracy-deepening visions capable of serving as gravitational centers of new forms of persona, or calling forth new forms of human arrangements, are also potential preemptive negations of their own actualizations. The avatar of the politically salutary event impedes the event itself: This is the political lesson of the most muscular forms of publicity rights law.

The arguments arrayed in this article seek to show that the doctrine’s science fictional qualities can be of value to those who seek to constrain democracy’s deepening, particularly in the context of formal politics. The generic associations of some of the doctrine’s most expansive cases; its conceptualization in terms of Baudrillard’s poetic, largely science fictional theoretical framing; its granting of rights to political figures like President Obama who are themselves science fictionally charged and preceded by their own simulacra: At a bare minimum, the various moments of the doctrine’s science fictional charge strung together foreground the links between the expanded extremities of the right of publicity (e.g. in White) and the availability of persona rights to powerful political figures (such as Governor Schwarzenegger). In order to avoid the chilling of political speech and action in ways I’ve described above, the doctrine must be changed: Celebrity political figures should have no publicity rights.

Hope of political caginess should not placate critics. Who can really imagine that, in a period marked by so degraded a state of political discourse that the president of the United States can be called a liar, by a senator, during a nationally televised address to Congress, a claim of persona-evoking misappropriation initiated by perhaps another senator (or a governor, or a mayor) will be foreclosed as an option because of that politician’s concern for a public relations fallout? Given the fact that political activists have used the legal system for great tactical value despite the frivolity of their central legal claim, why should we imagine that, in the absence of denying publicity rights to celebrity political figures, the latent political explosiveness of the doctrine will remain untapped?

248. Csicsery-Ronay, supra note 25, at 393.
250. Tesler, supra note 168.
And for those who are concerned about the future of American politics, particularly those who put store in the potential of mediatized imagery to inspire and summon up new political forms by way of exemplification, a science fictional perspective on the doctrine images a pernicious problem of the right of publicity's potential as a terminator of nascent political movements and figures. The writer, producer or director of a television show or film who aims to create a work in which characters represent new forms of political actors can find herself in the position of contributing to the disablement of the very images she helps create. The actor who portrays a would-be inspirational role with sufficient distinctiveness currently wields the legal power to effectively block, or at least seriously complicate, the appropriation of the new political form by the individuals or groups it calls forth. In fact, the more resonant the portrayal of the new type, the more affective the actor's presentation of it, odds are, the more likely it is that the role will be strongly identified with the actor's persona and, therefore, more likely to be protectable in many instances by publicity rights. 

The more technologically savvy cultural worker can counter this potential by foregoing live actors and using virtual humans in critical roles. And modifications of actors' contracts and compensation packages to include promises to forbear on legal action against perceived misappropriation of likeness through the use of roles they may have performed with great distinction in a film, television show or other dramatic performance represent possible legal methods of insuring against the problem. But the typical politically minded culture-worker who is likely more concerned with creating compelling forms of characters that represent novel political modes, novel perspectives or novel problems, rather than boning up on legal doctrines or finding (and affording the services of) sophisticated legal counsel, will possibly find herself in a position not terribly dissimilar from that in which the science fiction author J. G. Ballard found himself during Ronald Reagan's ascendancy. 

Appalled by what he considered to be then-Governor Reagan's "farright" politics, and the "complete discontinuity" that emerged from the


252. Contracts doctrine recognizes that a promise of forbearing to bring suit on a claim one has a legal right to initiate can serve as consideration sufficient to enable formation of a contract, although the doctrine's qualifications have shifted over time. See generally RESTATEMENT OF CONTRACTS §§ 76(b) & 78 (1932); A. Corbin, CONTRACTS § 139 (1963); S. Williston, A TREATISE ON THE LAW OF CONTRACTS § 135B (3d ed. 1957); RESTATEMENT (SECOND) OF CONTRACTS § 74(1)(a) (1981); Union Oil Co. of California v. Terrible Herbst, 331 F.3d 735, 741 (9th Cir. 2003).


254. Id.
ur-celebrity politician's ability “to exploit the fact that his TV audience
would not be listening too closely, if at all, to what he was saying,” Ballard wrote a notorious and obscene booklet designed to counter
Reagan's political powers. To his chagrin, and in a strikingly paradoxical fashion, the effort failed. “At the 1980 Republican Convention in San Francisco,” Ballard recounts in The Atrocity Exhibit, “a copy of my Reagan text... furnished with the seal of the Republican Party, was distributed to delegates. I’m told it was accepted for what it resembled, a psychological position paper on the candidate’s subliminal appeal, commissioned from some maverick think-tank.” The very forces Ballard sought to contest simply appropriated his efforts to their ends.

*Incipit trageodia. Incipit parodia.*

255. Id.
256. Id. at 165–70.
257. Id. at 170.