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## The Law of Reputation and the Interest of the Audience

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# THE LAW OF REPUTATION AND THE INTEREST OF THE AUDIENCE

LAURA A. HEYMANN\*

**Abstract:** Although an individual has control over many of the statements, acts, and other biographical data points that are used to construct her reputation, she does not ultimately have control over the result of that reputational assessment, the pronouncement of which is a task reserved to others. Reputation is fundamentally a social concept; it does not exist until a community collectively forms a judgment about an individual or firm that has the potential to guide the community's future interactions. Despite reputation's relational nature, discussions of the law's interest in reputation tend to focus on one of two parties: the individual or firm holding the reputation and the defendant accused of having unlawfully harmed that reputation. This framework leads to particular conceptions of the reputational interests, such as from a property or dignity perspective, and of the countervailing, often First Amendment-related, interests of the defendant. But the community that constructs one's reputation also has an interest in the soundness of a reputation's foundation so that future uses of others' reputations will be effective. A more complete conception of reputation, therefore, should take such community interests into account.

## INTRODUCTION

When Shakespeare wrote in *Othello*, “Who steals my purse steals trash; 'tis something, nothing;/'Twas mine, 'tis his, and has been slave to thousands;/But he that filches from me my good name/Robs me of that which not enriches him,/And makes me poor indeed,” he was ex-

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\* © 2011, Laura A. Heymann, Class of 2014 Professor of Law, College of William & Mary—Marshall-Wythe School of Law. Many thanks to Mark Badger, Margo Bagley, John Duffy, Brett Frischmann, H. Tomás Gómez-Arostegui, Trotter Hardy, Allison Orr Larsen, Lyrisa Barnett Lidsky, Joseph Liu, Paul Marcus, William McGeeveran, Mark McKenna, Lisa Ramsey, Jessica Silbey, Talha Syed, William Van Alstyne, and Felix Wu, as well as the participants at workshops at William & Mary, the Cardozo School of Law, and the University of Virginia, the 2010 Intellectual Property Scholars Conference, and the 2011 Works in Progress Intellectual Property Conference for comments and suggestions. Thanks as well to Tyler Akagi, Brad Bartels, Kristen Brown, Mitchel Feffer, and William Versfelt for research assistance and to the staff of the *Boston College Law Review* for their hard work.

pressing a universal sentiment: the importance of reputation.<sup>1</sup> Shakespeare's equation of reputation to monetary wealth suggests a simple, property-based interest in reputation: it is something that is owned, can be stolen, and has a calculable value. Many legal and cultural discussions of reputation reinforce this view, suggesting that one's reputation is a matter predominantly of individual or corporate interest and therefore is something over which one can and should have control.<sup>2</sup>

But reputation is not property in a Lockean sense; rather, reputation is a social creation dependent on intergroup communication. Although an individual or firm may have control over many of the statements, acts, and other data points that form the basis of reputation, neither one ultimately has control over the result of that assessment, the pronouncement of which is a task reserved to others. At its core, then, reputation is the result of the collective act of judging another and the potential use of that result to direct future engagements.<sup>3</sup> Although an individual may suffer emotional harm and a corporation may lose profits as a result of reputational injury, these harms are derivative. Injury to an individual's or firm's reputation causes harm primarily because of the effect of that injury on such collective judgments, which may then result in other harms.

Various areas of the law are either designed to vindicate reputational harm or have been used by plaintiffs to do so. Defamation and product disparagement claims often involve the publication of false facts that are alleged to have injured the plaintiff's reputation. Privacy law (such as the false light and misappropriation torts) and the right of publicity can involve misimpressions created as to another's associations or affiliations, which can have reputational effects. False endorsement claims seek remedies for the unauthorized implication that

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<sup>1</sup> WILLIAM SHAKESPEARE, *OTHELLO*, act 3, sc. 3; see also Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CALIF. L. REV. 691, 692 (1986) (noting the "obligatory reference to Shakespeare[]" that typically accompanies discussions of reputation).

<sup>2</sup> See, e.g., Richard A. Epstein, *Was New York Times v. Sullivan Wrong?*, 53 U. CHI. L. REV. 782, 801 (1986) (characterizing reputation as "one of the bundle of property rights and liberty that all individuals enjoy").

<sup>3</sup> See, e.g., 50 AM. JUR. 2D *Libel and Slander* § 2 (2011) ("Defamation is an impairment of a relational interest; it denigrates the opinion which others in the community have of the plaintiff and invades the plaintiff's interest in his or her reputation and good name."); David S. Ardia, *Reputation in a Networked World: Revisiting the Social Foundations of Defamation Law*, 45 HARV. C.R.-C.L. L. REV. 261, 267-68 (2010) (encouraging greater attention to community and context in online defamation cases); Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 551 (2006) ("[O]ne's reputation is the product of the judgment of other people in society.").

one supports a product or service when one does not desire such association. Various aspects of trademark law target uses of a trademark that are said to have negative effects on a firm's or brand's reputation. Copyright lawsuits can seek to redress not only economic harms but also the use of one's creative material in a way that casts a shadow on the artist's intent or affiliations. The common thread among all these various causes of action, from the plaintiff's view, is that the defendant has made an express or implied false statement that causes disruption to the plaintiff's sense of identity or autonomy. But this interest is not equally reflected in each of these causes of action. As a result, we have areas of the law that have reputational harms as a core concern and largely focus on that interest (defamation and trademark infringement); areas of the law that are not designed to vindicate reputational harms but often are used in service of that goal (copyright law, right of publicity, and privacy law); and areas of the law that are supposed to be about reputation but upon closer inspection do not truly address reputational interests (trademark dilution).

This state of affairs has resulted, in part, from a focus on the plaintiff's interests. Scholars have offered various justifications for the law's protection of reputation, including that it should be protected as a property interest; that it should be protected in order to preserve human dignity; and that it should be protected to vindicate society's interest in a hierarchal system of honor and prestige.<sup>4</sup> While these explanations are illuminating, each of them focuses on the law's interest in reputation from the perspective of the holder of reputation, consistent with a civil litigation structure that assumes that plaintiffs are acting in their own interests. It might therefore not be surprising that plaintiffs who feel that they have suffered a reputational injury would seek to vindicate that harm through any available cause of action, whether or not that tort is meant to redress reputational harms. But reputation is of interest not only to the holder of reputation, for whatever economic or psychic benefits it can provide, but also, in a more limited way, to those who interact with the reputation holder, either for use as a form of warranty, to reduce search costs, or as a signaling device. Both reputation holders and audiences have an interest in ensuring that one's reputation—whether that of an individual or that of a firm or product—is based on accurate information. To the extent, then, that we believe that the law provides too many avenues to redress reputational concerns, a more consistent incorporation of the social nature of repu-

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<sup>4</sup> See *infra* notes 83–119 and accompanying text.

tation would help to cabin the expansiveness of plaintiffs' efforts to vindicate reputational interests, limiting such claims to those in which the ability of the relevant social group to make accurate judgments about the plaintiff is likely to be hampered.<sup>5</sup>

Consideration of some of the various causes of action used to vindicate reputation allows us to see where the interests of plaintiff and audience might conflict. For example, where the defendant's activity consists of conveying a falsehood by impersonating or speaking on behalf of the plaintiff, the audience's interest in accurate information is largely aligned with the plaintiff's interest in stopping such activity.<sup>6</sup> A truthful communication that affects the plaintiff's reputation, by contrast, may well cause an audience to think differently of the plaintiff, but it does not implicate audience interests to the same extent; indeed, it may well be consistent with audience autonomy, even if it frustrates the plaintiff's autonomy by depriving the plaintiff of control over the timing or form of disclosure. Courts might therefore be more skeptical of claims by plaintiffs that seek to limit the dissemination of truthful information on the grounds that such information will cause reputational injury. Additionally, a focus on audience interests may influence the appropriate form of remedy, even if it does not limit the kinds of claims a plaintiff might bring. For example, a reputational injury might be ameliorated sufficiently through a disclaimer or retraction that corrects the informational imbalance as opposed to an injunction or a significant monetary award to the plaintiff.<sup>7</sup>

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<sup>5</sup> Similar questions about the proper focus as between the rightholder's interest and the audience's interest can be seen in the trademark literature, which has considered whether trademark law should be primarily concerned with producers' interests in marks as property or consumers' interests in marks as signals. See Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839, 1840–41 (2007).

<sup>6</sup> For a discussion of impersonation issues in social networks, see generally Lisa P. Ramsey, *Brandjacking on Social Networks: Trademark Infringement by Impersonation of Markholders*, 58 BUFF. L. REV. 851 (2010).

<sup>7</sup> Other considerations of overlaps in these areas of law include Ralph S. Brown, *Copyright and Its Upstart Cousins: Privacy, Publicity, Unfair Competition*, 33 J. COPYRIGHT SOC'Y 301 (1986); Pamela Samuelson, *Reviving Zacchini: Analyzing First Amendment Defenses in Right of Publicity and Copyright Cases*, 57 TUL. L. REV. 836, 848–49 (1983) (contending that publicity rights should be treated like other intellectual property rights); Nat Stern, *Creating a New Tort for Wrongful Misrepresentation of Character*, 53 U. KAN. L. REV. 81, 93–95 (2004) (proposing that plaintiffs be prohibited from bringing both defamation and false light claims based on the same communication and proposing an alternative claim of wrongful misrepresentation of character); Diane Leenheer Zimmerman, *Fitting Publicity Rights into Intellectual Property and Free Speech Theory: Sam, You Made the Pants Too Long!*, 10 DEPAUL-LCA J. ART & ENT. L. & POL'Y 283, 292–93 (2000) (arguing that "any form of property right in informational material that is not provided for under the copyright clause should be re-

The Article proceeds as follows. Part I provides an overview of the nature of reputation from a sociological perspective, describing its fundamentally social nature and its continuing importance in an Internet age.<sup>8</sup> Part II moves to a consideration of the justifications that have been proposed to support the law's interest in reputation and suggests that a more complete justification would take account of audience interests.<sup>9</sup> Part III discusses the various causes of action that might be used to vindicate individuals' or firms' reputational interests and notes the ways in which each such cause of action addresses, or fails to address, the reputational interest at stake from the perspective of audiences.<sup>10</sup> Part IV then offers some proposals for how the law of reputation might take such audience interests into account, ranging from the less modest to the more so.<sup>11</sup>

## I. THE CREATION AND USE OF REPUTATION

### A. *The Creation of Reputation*

Reputation has long been cited in the common law and in various state constitutions as an interest justifying legal protection.<sup>12</sup> Yet despite its central importance to the lives of individuals and the formation and maintenance of social and economic interactions, the concept of reputation has also long been characterized as relatively under-theorized, both in terms of its scope and in terms of the law's appropriate response to the interest at stake.<sup>13</sup> One might easily characterize an indi-

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quired to meet the same tests for validity that are applied to other forms of government regulation of speech").

<sup>8</sup> See *infra* notes 12–82 and accompanying text.

<sup>9</sup> See *infra* notes 83–119 and accompanying text.

<sup>10</sup> See *infra* notes 120–298 and accompanying text.

<sup>11</sup> See *infra* notes 299–369 and accompanying text.

<sup>12</sup> See, e.g., IND. CONST. art. I, § 12 ("All courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law."); Ronald J. Krotoszynski, Jr., *Fundamental Property Rights*, 85 GEO. L.J. 555, 592–93 & n.241 (1997) (providing citations).

<sup>13</sup> See, e.g., D.B. BROMLEY, REPUTATION, IMAGE AND IMPRESSION MANAGEMENT 8 (1993) ("Reputation is a phenomenon of considerable social and scientific importance, but the interest shown in it by writers and by ordinary people has not been paralleled by an equivalent degree of interest shown by social and behavioural scientists."); LAWRENCE MCNAMARA, REPUTATION AND DEFAMATION 19 (2007) (asserting that although much literature touches on reputation-related matters, "only a few works are concerned with the nature of reputation"); Post, *supra* note 1, at 692 ("It is all too easy to assume that everyone knows the value of reputation, and to let the matter drop with the obligatory reference to [Shakespeare] . . ."); David Rolph, *Dirty Pictures: Defamation, Reputation, and Nudity*, 10 L. TEXT CULTURE 101, 102 (2006); Van Vechten Veeder, *The History and Theory of the Law of Defama-*

vidual or a firm as having a good reputation or an unfavorable reputation, but it is more difficult to pinpoint the basis for such reputations, the existence of any accord about the subject, and the reason why reputation should matter.

It is, perhaps, easier to identify the benefits of reputation to others than the genesis or scope of reputation itself. First, a good reputation facilitates economic interactions by reducing search costs. One typically chooses a doctor, for example, not by interviewing several professionals until one finds a good fit, or scheduling initial appointments with several before committing to one, but by reputational signals: word of mouth, based on others' experiences; the universities the doctor attended; or a rating offered on a website or in a magazine. Some rankings of law schools and other educational institutions that have come to capture the attention of applicants, such as those provided by *U.S. News and World Report*,<sup>14</sup> specifically build reputational assessments into their overall scores; these rankings (supplied by, in the case of law schools, faculty at other institutions as well as judges and lawyers) may, in some instances, be based on still other reputational signals, such as the titles of the journals in which faculty have published articles.<sup>15</sup> One might choose to buy a car based not only on a test drive but also on the reputation of its manufacturer for quality, a metric that, as with other experience goods, is difficult to evaluate prior to purchase. In each instance, the consumer uses reputation to make a decision about an economic transaction. If the interaction turns out not to match the reputational signal, the individual may well not only decline future interactions but may communicate that disappointment to others, thus contributing to modifications of the reputation at issue.

Reputation is also of value in making choices that, while still economic, relate more closely to identity creation or self-fulfillment. In 1968, Robert Merton noted that the amount of research published in the sciences was so extensive that scientists hoping to keep up with developments in their field tended to rely on the professional reputation of the articles' authors as a way of identifying which articles to read,

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tion, 4 COLUM. L. REV. 33, 34 (1904) (characterizing the state of the law regarding reputation as "a confused one").

<sup>14</sup> *Rankings*, U.S. NEWS AND WORLD REPORT, <http://www.usnews.com/rankings> (last visited June 19, 2011).

<sup>15</sup> Malcolm Gladwell, *The Order of Things*, NEW YORKER, Feb. 14 & 21, 2011, at 68, 73 ("[R]eputational ratings are simply inferences from broad, readily observable features of an institution's identity, such as its history, its prominence in the media, or the elegance of its architecture. They are prejudices.").

thereby reinforcing those authors' reputations.<sup>16</sup> Some scholars claim, in this vein, that the Gospels were disseminated under the names of Matthew, Mark, Luke, and John rather than by their true authors for precisely this reason: the four were better known names and thus more likely to be viewed as authoritative.<sup>17</sup> Celebrity endorsements, to take another example, are a way of making purchasing decisions based on a transfer of reputation from the celebrity to the product, the goal being to inspire consumers who admire the celebrity to assign those same associations to the product.<sup>18</sup> When such endorsements involve a testimonial—the celebrity directly extolling the virtues of the product—one can assume that they are based on the celebrity's presumed professional expertise, such as when a famous chef endorses a line of cookware or a professional model endorses a line of cosmetics, or on the reputation of the celebrity as a generally trustworthy individual whose opinion is to be given credence. Celebrity endorsements that merely feature the celebrity using the product or appearing in the commercial or advertisement, however, may depend on the transmission of an implicit testimonial—that the celebrity would not have appeared in the advertisement if she did not recommend the product—or on a more general reputation transfer—from the celebrity to the advertised product or service.<sup>19</sup> Thus, after news broke in late 2009 that the profes-

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<sup>16</sup> The phenomenon, which Merton termed the "Matthew Effect," is no doubt more prevalent today. For the original article, see Robert K. Merton, *The Matthew Effect in Science*, 159 *SCIENCE* 56, 58 (1968). For the follow-up article, see generally Robert K. Merton, *The Matthew Effect in Science, II: Cumulative Advantage and the Symbolism of Intellectual Property*, 79 *ISIS* 606 (1988) [hereinafter Merton, *The Matthew Effect, II*], in particular, *id.* at 621 (discussing how attribution is "central to the incentive system and an underlying sense of distributive justice that [does] much to energize the advancement of knowledge"). The various scholarly works that have taken on Merton's thesis are too numerous to cite.

The effect occurs with other reputational ranking systems. See Gladwell, *supra* note 15, at 73 (noting that the *U.S. News* rankings of educational institutions are a "self-fulfilling prophecy" because respondents use past rankings to assess schools about which they know little).

<sup>17</sup> See, e.g., DAVID G. MEADE, PSEUDONYMITY AND CANON: AN INVESTIGATION INTO THE RELATIONSHIP OF AUTHORSHIP AND AUTHORITY IN JEWISH AND EARLIEST CHRISTIAN TRADITION 13, 207 (1986).

<sup>18</sup> Research by one industry group indicates, however, that advertisements featuring celebrities "do not perform any better than non-celebrity ads, and in some cases they perform much worse." See ACE METRIX, CELEBRITY ADVERTISEMENTS: EXPOSING A MYTH OF ADVERTISING EFFECTIVENESS 1 (2010), available at [http://mktg.acemetrix.com/acton/ct/563/p-001d/Bct/-/-/ct14\\_1/1](http://mktg.acemetrix.com/acton/ct/563/p-001d/Bct/-/-/ct14_1/1).

<sup>19</sup> See Lawrence Lessig, *The Regulation of Social Meaning*, 62 *U. CHI. L. REV.* 943, 1009 (1995) ("[Michael Jordan] endorses Nike shoes. Some of his social capital is transferred to the product endorsed, and the meaning of wearing Nike shoes changes."); Grant McCracken, *Who Is the Celebrity Endorser?: Cultural Foundations of the Endorsement Process*, in *CULTURE AND CONSUMPTION*

sional golfer Tiger Woods had been involved in several extramarital affairs, Woods was dropped from a number of lucrative endorsement deals.<sup>20</sup> This was not, presumably, because his reputation as a golfer had diminished—it was unlikely that anyone thought that Woods was a worse player as a result of the revelations—but rather because his reputation as a moral, upstanding individual was now in question. Firms using a reputation transfer model, one assumes, did not want Woods's revised reputation dominating the message of their advertisements.

Reputations also reduce search costs in interpersonal transactions. One might decide whether to form new friendships or romantic attachments based on the other individual's reputation in the community or based on the recommendation of a trusted third party. One might decide whether to share personal information with a colleague one does not know well based on her reputation for discretion among her peers or decide whether to let one's child associate with an unfamiliar classmate based on the classmate's reputation among other parents for maturity and friendliness. In all of these ways, reputations facilitate social and economic interaction. Moreover, to the extent that social or other networks reward positive reputations and punish negative reputations, such mechanisms “incentivize individuals to behave more coop-

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II: MARKETS, MEANING, AND BRAND MANAGEMENT 97, 97 (2005) (setting forth a “meaning-transfer” theory of the celebrity endorser); cf. Therese A. Louie, Robert L. Kilik & Robert Jacobson, *When Bad Things Happen to the Endorsers of Good Products*, 12 *MARKETING LETTERS* 13 (2001) (testing the effect on firm value of celebrity endorser blameworthiness). Social networks have attempted to use the reputations of its members in particular social circles to similar effect. See William McGeveran, *Disclosure, Endorsement, and Identity in Social Marketing*, 2009 *U. ILL. L. REV.* 1105, 1107 (describing marketing through online social networks as “a form of reputational piggybacking”).

<sup>20</sup> One study estimates that shareholders of companies endorsed by Woods lost between \$5 billion and \$12 billion in wealth as a result of the revelations. Christopher R. Knittel & Victor Stango, *Shareholder Value Destruction Following the Tiger Woods Scandal 1* (Jan. 5, 2010) (unpublished manuscript), available at <http://faculty.gsm.ucdavis.edu/~vstango/tiger004.pdf>. Corporations that are seen as bad actors in connection with a defining event can suffer the same economic harm. See Rob Cox, Richard Beales & Christopher Hughes, *Reputation's Price*, *N.Y. TIMES*, July 19, 2010, at B2 (positing that at least part of the decrease in BP's and Goldman Sachs's market capitalization in 2010 was due to reputational harms after an oil leak in the Gulf of Mexico and an SEC investigation, respectively). At least one manufacturer appears to be using this effect strategically. See Simon Doonan, *How Snooki Got Her Gucci: The Dirt on Purses*, *N.Y. OBSERVER* (Aug. 17, 2010), <http://www.observer.com/2010/culture/pricy-landscaping> (reporting that manufacturers of luxury handbags were sending competitors' bags to a reality television star in the hope that she would be seen publicly with the bags, causing their cachet to diminish).

eratively” and, concomitantly, encourage the transmission of information that helps to form reputation.<sup>21</sup>

This does not mean, however, that reputation is a matter of mere personal or corporate effort. Social theorists who write about reputation and impression management consistently discuss reputation as a social phenomenon, as something that is created and altered by the judgments of others rather than something that exists inherently or develops organically as a result of efforts by the reputation holder.<sup>22</sup> Commentators as early as Aristotle have acknowledged reputation’s social nature, noting that a good reputation “consists in being *considered* a man of worth” or is “what *other* people prefer and value.”<sup>23</sup> More recently, scholars have discussed reputation in terms of information processing and assessment, describing it as “a social judgment of the person based upon facts which are considered relevant by a community.”<sup>24</sup> The nature and scope of reputation thus depend on the nature and scope of the community; as a result, an individual or firm may have as many different reputations as there are relevant communities, and such reputations may change over time as the relevant communities expand, change, and contract.<sup>25</sup>

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<sup>21</sup> Cameron Anderson & Aiwa Shirako, *Are Individuals’ Reputations Related to Their History of Behavior?*, 94 J. PERSONALITY & SOC. PSYCHOL. 320, 320 (2008); *see also id.* at 329 (concluding that the effectiveness of reputation in serving social functions may depend on how socially connected the individual in question is); F.G. Bailey, *Gifts and Poison*, in GIFTS AND POISON: THE POLITICS OF REPUTATION 1, 4 (F.G. Bailey ed., 1971) (noting that the importance of one’s reputation depends on one’s degree of interaction with others).

<sup>22</sup> *See* BROMLEY, *supra* note 13, at 8; KENNETH H. CRAIK, REPUTATION: A NETWORK INTERPRETATION at xvii (2009).

<sup>23</sup> JOHN RODDEN, THE POLITICS OF LITERARY REPUTATION: THE MAKING AND CLAIMING OF “ST. GEORGE” ORWELL 55 (1989) (emphasis added) (citing ARISTOTLE, THE RHETORIC 12 (John Henry Freese trans., 1982)); 3 HENRY JOHN STEPHEN, COMMENTARIES ON THE LAWS OF ENGLAND (PARTLY FOUNDED ON BLACKSTONE) 395 (1908) (“A person’s reputation is what other people think of him; and not what he thinks of himself.”); Theodore Tilton, *The Problem of Life*, in 3 SCRAP-BOOK RECITATION SERIES 36, 37 (H.M. Soper ed., 1882) (“A man’s character is what he is; a man’s reputation is what other people may imagine him to be.”).

<sup>24</sup> McNAMARA, *supra* note 13, at 21. Although McNamara’s definition is, on its face, restricted to individuals, there seems to be no reason why this definition would not be equally applicable to corporations. *See also* CRAIK, *supra* note 22, at xvii (“Reputation is a dispersed phenomenon that is to be found in the beliefs and assertions of an extensive number of other individuals.”); RODDEN, *supra* note 23, at 55 (noting that “[o]thers *confer* repute” and that “the attribution of reputation is an act of perception about a property which may or may not inhere in the object”).

<sup>25</sup> *See* RODDEN, *supra* note 23, at 66 (characterizing reputation as “the cumulative, ultimate *consequence* of innumerable acts of receiving and approving (or disapproving)”).

In this way, although the facts upon which a reputation is based may be true or false, reputation itself, as simply a collective judgment or opinion, is not so categorical. It is entirely possible for a restaurant that serves simple food at inexpensive prices to be thought of by some as a venue representing good value for money and by others as an unsavory dive. Thus, one can attempt to influence reputation, whether one's own or another's, by adding to the mix of judgments to shift the collective wisdom in a particular direction or by controlling dissemination of the underlying facts that others use to make such judgments. One cannot, however, directly control the outcome itself. A speaker can, for example, attempt to defame another by communicating false facts about the individual, but a speaker cannot ensure that others will receive or perceive such statements in a particular way. One has been defamed as a legal matter only when a judicial body interprets a statement as likely to have a deleterious effect on the relevant community's collective judgment about the individual.<sup>26</sup>

This is not to say, of course, that the social nature of reputation yields no benefits for the reputation holder. Indeed, the way in which we are perceived by others is a significant part of how many of us perceive ourselves, and both individuals and firms often modify their future activities (or choose not to do so) in response to the judgments of others.<sup>27</sup> More particularly, the fact that reputation is often used as a heuristic can yield significant social and economic benefits,<sup>28</sup> particularly for those individuals or businesses that are fortunate enough to acquire a good reputation early in the game. Because of what Robert Merton has termed the "Matthew Effect" (or, as one scholar has put it,

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<sup>26</sup> Cf. J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* 30 (2d ed. 1975) (noting that while saying "you were cowardly" may insult someone, the statement "I insult you" cannot do so).

<sup>27</sup> CRAIK, *supra* note 22, at 98.

It is reasonable for [a] person to treat reputation as a central epistemological resource. In everyday social life, the person is surrounded by others who participate in and manifest their common knowledge of the person. In that way, reputation content claims come to influence a person's own understanding of the kind of individual he or she is.

*Id.*

<sup>28</sup> RICHARD E. PETTY & JOHN T. CACIOPPO, *ATTITUDES AND PERSUASION: CLASSIC AND CONTEMPORARY APPROACHES* 152 (1981) ("Most analyses of impression management assume that a primary goal in presenting oneself to others is the attainment of social approval."); *id.* at 155 (noting how "in impression management theory, people want to convey, given social constraints, as positive and consistent a public image as possible in order to obtain social rewards").

the fact that reputation “typically makes for more reputation”),<sup>29</sup> the well-regarded writer, for example, is likely to have a leg up when his next submission goes to the publisher, and a new product released by an established company is likely to attract more initial attention in the marketplace than a product from an unknown entity.

But reputations are neither formed in a vacuum nor the result of a single interaction with an individual or firm. One may develop an assessment of an individual, firm, or product based on one’s own experience and interactions, but such assessment is not typically referred to as “reputation.” We wouldn’t tend to think to ourselves, for example, “I’ve been to that restaurant three times and had a bad experience each time. It now has a terrible reputation.” One who asks a friend about the reputation of a carpenter she is thinking of hiring is not seeking merely the friend’s experience with the carpenter’s work; indeed, the friend need not have hired the carpenter previously in order to respond. Rather, an inquiry about the reputation of another is seeking a collective judgment formed via communications among a relevant community.<sup>30</sup> Communicating one’s opinion about another is thus necessary to the formation of reputation and to the acquisition of its benefits both by the holder of reputation and by the relevant community. Because our individual experiences with others, and thus our ability to contribute underlying facts to the formation of reputation directly, is necessarily limited, however, facilitation of this communication often depends on an intermediary. The more an intermediary is trusted, the greater the influence he or she can have on one’s reputation.<sup>31</sup> One might place a great amount of trust in a single reputation influencer, such as the restaurant critic for a major newspaper, or place a greater

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<sup>29</sup> RODDEN, *supra* note 23, at 57; *see also* Merton, *The Matthew Effect II*, *supra* note 16, at 621.

<sup>30</sup> *See* McNAMARA, *supra* note 13, at 33 (noting that reputation involves a moral judgment based on particular facts evaluated in light of prevailing mores of the community); Thomas Gibbons, *Defamation Reconsidered*, 16 OXFORD J. LEGAL STUD. 587, 592 (1996) (noting that a reputation is “socially contingent”); Anderson & Shirako, *supra* note 21, at 321 (noting that not all perceptions are deemed interesting enough to pass on to others).

<sup>31</sup> One commentator has set forth four relevant “layers of source credibility” that may influence reputations: (1) the credibility of the publication containing the statement at issue, (2) the credibility of the conveyer of the statement, (3) the credibility of the speaker of the statement (in other words, the person to whom the statement is attributed), and (4) the credibility of any group or organization with whom the speaker is associated. Clay Calvert, *Harm to Reputation: An Interdisciplinary Approach to the Impact of Denial of Defamatory Allegations*, 26 PAC. L.J. 933, 946 (1995). Of course, this exercise can become endlessly recursive, as “credibility” is just another way of describing reputation (here, a reputation for truth).

value on the collective opinions of many consumers, such as the restaurant ratings that appear on a website like Yelp.

The latter form of reputation development has, it goes without saying, been enhanced by the Internet. In earlier eras, reputations were developed and disseminated in defined communities. The personal reputation of many individuals would develop and have meaning within family, acquaintance, and professional circles but would likely not be of much interest beyond those communities. Gossip functioned as a fairly effective private enforcement mechanism in that information could be shared directly and easily in the relevant community.<sup>32</sup> The reputations of producers of goods were similarly cabined, with consumers purchasing directly from producers and returning to the physical market if they were in need of additional goods.<sup>33</sup> Although the interest in either individual or corporate reputation is probably not substantively different from previous eras, the modern age has rendered reputation vulnerable in particular ways. The ability to engage in communications with others around the world via the Internet, with no requirement in many fora that such communications be conducted using one's true name, both enables the construction of multiple identities to which a reputation can be attached and allows others to more easily disseminate information or opinions, sometimes pseudonymously,<sup>34</sup> that shape the reputations both of individuals and of companies and their products. What was formerly communicated via in-person word of mouth or through letters to com-

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<sup>32</sup> Cf. CRAIK, *supra* note 22, at 147 (noting that communication about individuals (i.e., gossip) "generates an efficient pooling and summarizing of the community's observations and opinions concerning the person"); Clayton P. Gillette, *Reputation and Intermediaries in Electronic Commerce*, 62 LA. L. REV. 1165, 1166 (2002) (noting that "private enforcement mechanisms such as gossip are unlikely to be suitable for geographically distant transactions if the parties are not members of the same enforcement regime, such as a local trade association").

<sup>33</sup> See Benjamin G. Paster, *Trademarks—Their Early History*, 59 TRADEMARK REP. 551, 551–52 (1969); see also, e.g., Sidney A. Diamond, *The Historical Development of Trademarks*, 65 TRADEMARK REP. 265, 289–90 (1975); cf. RICHARD A. POSNER, *THE LITTLE BOOK OF PLAGIARISM* 69 (2007) ("The resemblance of plagiarism to trademark infringement . . . is not an accident. . . . Trademarks and author 'branding' (by naming) coevolved as ways of protecting sellers and consumers as markets expanded and became impersonal."). See generally Daniel M. McClure, *Trademarks and Unfair Competition: A Critical History of Legal Thought*, 69 TRADEMARK REP. 305 (1979) (exploring the historical legal development of unfair competition and trademarks).

<sup>34</sup> Chrysanthos Dellarocas, *The Digitization of Word of Mouth: Promise and Challenges of Online Feedback Mechanisms*, 49 MGMT. SCI. 1407, 1410–11 (2003) (describing challenges of pseudonymity to online feedback communities); MARY MADDEN & AARON SMITH, PEW INTERNET & AMERICAN LIFE PROJECT, *REPUTATION MANAGEMENT AND SOCIAL MEDIA* 11–12 (May 26, 2010), available at <http://pewinternet.org/Reports/2010/Reputation-Management.aspx> (describing widespread use of pseudonyms to post material online).

pany executives can now be broadcast to a worldwide audience, retransmitted, and discussed.<sup>35</sup> Additionally, given the relative permanence and accessibility of information preserved electronically, one's reputation is likely to be based on a more comprehensive set of data (both true and false) and, for this reason, may be more difficult for the individual or firm in question to alter. Whether this is progress or not may depend on whether one is in the position of the investigator or the investigated.<sup>36</sup>

The sometimes fluid relationship between reference and referent means that reputation is typically attached to a name rather than to an identity. In other words, unless the community is aware of an individual's or company's use of different names for different endeavors, each name will develop a separate reputation. For example, an actor who has a reputation for theatrical skill under a stage name will not benefit from that reputation if he pens a newspaper opinion piece under his birth name, unless information in the opinion piece makes that connection clear. Indeed, in some instances, writers will make deliberate choices to pursue endeavors in various creative fields under different names to avoid reputation spillovers.<sup>37</sup> Likewise, it is not an uncommon practice for corporations to change their names (sometimes after an unfavorable public relations experience) or to rebrand products in order to start fresh with a new reputation or, conversely, to keep the same corporate name even though the individuals to whom the firm's reputation is owed are no longer with the firm.<sup>38</sup> Individuals can do the

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<sup>35</sup> See, e.g., Eric Goldman, *Online Word of Mouth and Its Implications for Trademark Law*, in TRADEMARK LAW AND THEORY: A HANDBOOK OF CONTEMPORARY RESEARCH 404, 404–05 (Graeme B. Dinwoodie & Mark D. Janis eds., 2008); Dellarocas, *supra* note 34, at 1407.

<sup>36</sup> See, e.g., MADDEN & SMITH, *supra* note 34; DANIEL J. SOLOVE, THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET 4 (2007) (noting how the Internet makes “[i]nformation that was once scattered, forgettable, and localized . . . permanent and searchable”); Jeffrey Rosen, *The Web Means the End of Forgetting*, N.Y. TIMES, July 25, 2010 (Magazine), at 30; Lior Jacob Strahilevitz, *Reputation Nation: Law in an Era of Ubiquitous Personal Information*, 102 NW. U. L. REV. 1667, 1693–94 (2008) (proposing greater disclosure of some types of information about individuals in order to reduce reliance on other types); Eric Goldman, *Reputational Information: A Research Agenda 2–3* (May 1, 2009) (unpublished manuscript) (on file with author) (considering the way in which reputational systems aid decision making).

<sup>37</sup> See, e.g., Laura A. Heymann, *The Birth of the Authornym: Authorship, Pseudonymity, and Trademark Law*, 80 NOTRE DAME L. REV. 1377, 1404–05 (2005).

<sup>38</sup> CHARLES J. FOMBRUN, REPUTATION: REALIZING VALUE FROM THE CORPORATE IMAGE 51 (1996) (describing how Disney released its R-rated films under the Touchstone Pictures brand “[t]o avoid diluting the Disney name”); Steven Tadelis, *Firm Reputation with Hidden Information*, 21 ECON. THEORY 635, 635 (2003). See generally Laura A. Heymann, *Naming, Identity, and Trademark Law*, 86 IND. L.J. 381 (2011).

same in their nonprofessional lives, although presumably the social and transaction costs of doing so are higher. In the online world, however, name changing is much easier: The availability of pseudonymity in various online fora “turns the transfer of reputation information into a strategic variable, controlled by each player” in an interaction.<sup>39</sup>

Indeed, reputation is often not merely a strategic tool but the subject of transactions, both by firms and by individuals. In some instances, a reputation may be borrowed, such as in the case of a celebrity endorsement or in a letter of recommendation or introduction. Trademark licensing is a well-known example of this borrowing. A restaurant that enters into a franchise agreement with a trademark holder to open a restaurant under the trademark is seeking to use the trademark holder’s reputation to avoid the costs associated with developing a reputation associated with a new trademark; in the same way, a trademark holder can reap the benefits of extending a well-known mark to additional product lines.<sup>40</sup> Researchers have also discussed the ability of a firm to signal product quality by “renting” the reputation of another entity, such as a retailer, such that consumers will transfer the reputation of the retailer to the as-yet unfamiliar product.<sup>41</sup> Indeed, as some economists have suggested, it is preferable to allow a well-functioning market in names (as repositories for reputations) so as to incentivize employees throughout their working careers.<sup>42</sup> If a manager expects to be able to sell the company name and its associated reputation upon exit from the industry, he or she has an incentive to maintain the level of that reputation until the sale occurs.<sup>43</sup> Such benefits may come, however, at a transparency cost to the public, who may not be aware of the transfer and who are at risk of relying on what will turn out to be an

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<sup>39</sup> Eric J. Friedman & Paul Resnick, *The Social Cost of Cheap Pseudonyms*, 10 J. ECON. & MGMT. STRATEGY 173, 174 (2001).

<sup>40</sup> See Julie Manning Magid, Anthony D. Cox & Dena S. Cox, *Quantifying Brand Image: Empirical Evidence of Trademark Dilution*, 43 AM. BUS. L.J. 1, 30–32 (2006) (describing the marketing benefits of strong brands).

<sup>41</sup> Wujin Chu & Woosik Chu, *Signaling Quality by Selling Through a Reputable Retailer: An Example of Renting the Reputation of Another Agent*, 13 MARKETING SCI. 177, 177–78 (1994); see also Jonathan Macey, *The Value of Reputation in Corporate Finance and Investment Banking (and the Related Roles of Regulation and Market Efficiency)*, 22 J. APPLIED CORP. FIN. 18, 19 (2010) (defining a “reputational intermediary” as a firm “whose business is to ‘rent’ its own reputation to client companies that are not large or established enough to have their own, or that obtain added value from burnishing their reputations by associating with a reputable intermediary”).

<sup>42</sup> Steven Tadelis, *The Market for Reputations as an Incentive Mechanism*, 110 J. POL. ECON. 854, 875 (2002) (discussing the benefits of a well-functioning market for names and noting that making information about name transfers public can cause this market to collapse).

<sup>43</sup> *Id.*

untrustworthy reputational signal. A bad actor (an incompetent franchisee, for example) who borrows the good reputation of another and runs the business poorly is likely to affect the reputation of the parent firm with which the name is associated, rather than his own.<sup>44</sup>

While both individuals and firms can allow others to borrow their reputations, the outright assignment of reputation is the province of firms.<sup>45</sup> In the corporate setting, reputation is often equated to the concept of “goodwill,” although commentators are not agreed on whether this is a precise overlap. Some commentators equate goodwill to a firm’s reputation, characterizing the former term as deriving from law and accountancy and the latter term deriving from economics or other fields,<sup>46</sup> while others define goodwill as a term that comprises an entire class of intangible assets, including reputation and intellectual property.<sup>47</sup> Accountants will typically describe goodwill by what it is not rather than by what it is: as the excess of a company’s worth over the value of its tangible assets or, put differently, what is left on the balance sheet once the value of those assets has been subtracted.<sup>48</sup> (This description may help to value goodwill, but it does not prove very helpful in defining it.) Legal commentators, by contrast, often tie goodwill to consumer activity, characterizing it as the probability of repeat business.<sup>49</sup> Although the possibility of repeat business may have a relation-

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<sup>44</sup> George J. Mailath & Larry Samuelson, *Who Wants a Good Reputation?*, 68 REV. ECON. STUD. 415, 429 (2001) (concluding that names of firms with good reputations are particularly attractive to inept entrants); Steven Tadelis, *What’s in a Name? Reputation as a Tradeable Asset*, 89 AM. ECON. REV. 548, 559 (1999) (“Good types value good names because of their future prospects to maintain it, whereas bad types value good names because they lack the ability to build one themselves.”).

[I]f we believed that good names were always bought by good types, then a short period of bad performance would not cause a loss in reputation. The fact that this cannot be an equilibrium causes clients to update their beliefs downwards after bad performance, anticipating that downward shifts in performance are a signal of some permanent change . . . .

Tadelis, *supra*, at 559.

<sup>45</sup> See Tadelis, *supra* note 42, at 855.

<sup>46</sup> Odek Shenkar & Ephraim Yuchtman-Yaar, *Reputation, Image, Prestige, and Goodwill: An Interdisciplinary Approach to Organizational Standing*, 50 HUM. REL. 1361, 1361 (1997) (using “standing” as a substitute, equally, for “prestige” (from sociology), “reputation” (from economics), “image” (from marketing), and “goodwill” (from law and accountancy)).

<sup>47</sup> Tadelis, *supra* note 44, at 548 n.2 (suggesting that goodwill includes reputation).

<sup>48</sup> FOMBRUN, *supra* note 38, at 86; Tadelis, *supra* note 44, at 548 n.2.

<sup>49</sup> See, e.g., *Newark Morning Ledger Co. v. United States*, 507 U.S. 546, 555–556 (1993) (“Although the definition of goodwill has taken different forms over the years, the shorthand description of goodwill as ‘the expectancy of continued patronage,’ provides a useful label with which to identify the total of all the imponderable qualities that attract custom-

ship to reputation, it is not coextensive. The continued flow of consumers to a firm or a product may depend on their own experiences or inertia, rather than their awareness of reputation, or it may be based on more prosaic considerations, such as the convenience of a company's retail outlets. Relatedly, reputation need not be tied to particular consumer experiences with the company's goods or services. The extension of a brand name into a widely divergent area of business might not cause consumer defection from the original line of business,<sup>50</sup> but it may cause consumers to have a different perception of the company as a whole. Likewise, a company's labor practices, philanthropic efforts, statements on public issues, and the like may cause others to change their opinion of the company, even if many members of the public have no plans for any type of consumer interaction with the firm.<sup>51</sup> Goodwill is thus better described as evidence of reputation, rather than its equivalent.

The relationship of goodwill to reputation, and the difficulty of defining the former term, arises particularly when a trademark is transferred to another entity. Trademark doctrine provides that when a trademark is sold, the goodwill associated with the mark must be transferred, which is typically interpreted as encompassing a transfer of assets or technical know-how of the business.<sup>52</sup> But because a company

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ers to the business.") (citation omitted); *Crutwell v. Lye*, (1810) 34 Eng. Rep. 129, 134 (opinion of Lord Eldon) (goodwill is "nothing more than the probability, that the old customers will resort to the old place"); 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 2:18 (4th ed. 2003) (providing one set of definitions of "good will" as "the lure to return," "buyer momentum," and the "expectancy of continued patronage"); 2 JUDICIAL AND STATUTORY DEFINITIONS OF WORDS AND PHRASES 762-65 (West Publishing 1914) (collecting similar definitions from cases). See generally Robert G. Bone, *Hunting Goodwill: A History of the Concept of Goodwill in Trademark Law*, 86 B.U. L. REV. 547 (2006) (providing a thorough discussion of the various conceptions of goodwill).

<sup>50</sup> See Mark A. Lemley & Mark McKenna, *Irrelevant Confusion*, 62 STAN. L. REV. 413, 430-33 (2010).

<sup>51</sup> See, e.g., Josh Marshall, *Not as Simple as It Seems*, TPM (Aug. 5, 2010, 3:11 PM) [http://www.talkingpointsmemo.com/archives/2010/08/not\\_as\\_simple\\_as\\_it\\_seems.php](http://www.talkingpointsmemo.com/archives/2010/08/not_as_simple_as_it_seems.php) (discussing public response to a political donation by Target and subsequent apology issued by Target's CEO).

<sup>52</sup> 15 U.S.C. § 1060 (2000) (assignments of registered marks); 3 MCCARTHY, *supra* note 49, § 18:2 ("Good will can no more be separated from a business than reputation from a person."); *id.* § 18:23 (stating that courts typically equate transfer of tangible assets with transfer of goodwill, although noting that "transfer of technical information and know-how together with customer lists" may suffice). The question of what constitutes the goodwill that must be transferred has been a matter of frequent analysis. See, e.g., Irene Calboli, *Trademark Assignment "With Goodwill": A Concept Whose Time Has Gone*, 57 FLA. L. REV. 771 (2005); Walter J. Halliday, *Assignments Under the Lanham Act*, 38 TRADEMARK REP. 970, 971-73 (1948).

could fire all of its key employees and start again the next day with a new staff—indeed, the company that purchases another’s trademark along with its associated goodwill could presumably do the same the day after the sale—it is unclear precisely what is being transferred as “goodwill.”<sup>53</sup> Consumers are unlikely to discover (or to have the incentive to discover) whether the same individuals are responsible for the product or service from day to day,<sup>54</sup> and thus presumably expect only that the goods they are buying from the company today are more or less of the same quality as the goods they bought yesterday. But as commentators have noted, the assumption that trademarks incentivize companies to maintain consistent quality<sup>55</sup> is true only on a macro level.<sup>56</sup> In this sense, then, reputation is an inherently consumer-based concept, in that goodwill is deemed to have been transferred along with a trademark only if consumers have the same general perceptions about the offerings and level of quality associated with the mark after the assignment as before.<sup>57</sup>

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<sup>53</sup> 3 MCCARTHY, *supra* note 49, § 18:10 (suggesting that the rule against assignment of a trademark in gross “does not guarantee continuity, but only facilitates it”); Calboli, *supra* note 52, at 830 (noting that “trademark owners have always been free to modify the quality or kind of their products as long as they used the mark in ways that were not misleading or deceptive to the public”) (citation omitted); *id.* at 836–37 (highlighting the importance of labels and disclaimers in notifying consumers of changes). As one example of a change in personnel, see *Marshak v. Green*, 505 F. Supp. 1054, 1061 (S.D.N.Y. 1981) (holding that the transfer of “The Drifters” for the singing group was accompanied by goodwill, even though one of the original members left the group, because “the singing in The Drifters style . . . remained unchanged in the public eye”).

<sup>54</sup> See Tadelis, *supra* note 44, at 551–52 (assuming that it is “not true that shifts of ownership are readily observable by all clients” and that to most clients, “the firm is represented only by its name, and the actual agent or group of agents who produce the good and own the firm are unknown”).

<sup>55</sup> See, e.g., William M. Landes & Richard A. Posner, *The Economics of Trademark Law*, 78 TRADEMARK REP. 267, 271–72 (1988).

<sup>56</sup> 3 MCCARTHY, *supra* note 49, § 17:24 (noting that while “a substantial change in the nature or quality of the goods sold under a mark may so change the nature of the thing symbolized that the mark becomes fraudulent and/or that the original rights are abandoned,” consumers expect minor changes). What constitutes a significant or minor change, however, may be in the eye of the beholder. See, e.g., *E.I. du Pont de Nemours & Co. v. G.C. Murphy Co.*, 199 U.S.P.Q. 807, 813 (T.T.A.B. 1978) (finding no abandonment of trademark when product was changed from premium wall paint to budget paint, given “substantially similar chemical ingredients”).

<sup>57</sup> See, e.g., *Topps Co., Inc. v. Cadbury Stani S.A.I.C.*, 526 F.3d 63, 70 (2d Cir. 2008) (stating that the goodwill requirement requires only that the assignee’s products be “substantially similar [to those of the assignor] such that consumers would not be deceived or harmed” rather than requiring identical products) (internal quotation marks omitted); 3 MCCARTHY, *supra* note 49, § 18:27 (noting that the test is “whether the assignee’s new product is so different from the assignor’s product that it would be a fraud on the public to allow the assignee’s continued use”).

The possibility of licensing or assigning reputation thus raises issues of control. In general, most of us want to control our reputations and thereby control the outcomes of decisions based on those reputations; the person who professes not to care what others think about him is seen as unusual. This desire for control “is an assertion of autonomy,”<sup>58</sup> an attempt to engage in self-identity creation, whether by individuals or by firms, and a resistance to definition by others.<sup>59</sup> For example, an individual might well decide to lend her name to a particular commercial enterprise that others find questionable even though she would have objected to the use of her name by that same enterprise without authorization. Likewise, a corporation may object to the use of one of its trademarks in a completely unrelated field by another corporate entity on the grounds that such use would dilute the value of its mark even though corporations are free to, and often do, deploy a single trademark in many unrelated fields.<sup>60</sup>

This desire for control rests in tension, however, with the socially constructed nature of reputation. While individuals and firms may want to control the information about them that is disseminated to others, they cannot ultimately control the judgments and assessments that are made in response to that information once released. At best, they can attempt to influence that assessment through a number of avenues. They can engage in self-help measures, such as disseminating counter messages or releasing information that attempts to discredit the source of the original information.<sup>61</sup> They can also, in extreme cases, abandon ship by changing their name or brand and starting again under a new moniker, free from the reputational associations of the past. Or they can seek a legal remedy and the official imprimatur that legal proceedings

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<sup>58</sup> Gibbons, *supra* note 30, at 589.

<sup>59</sup> See *James Burrough, Ltd. v. Sign of Beefeater, Inc.*, 540 F.2d 266, 276 (7th Cir. 1976) (“Though economic harm per se is not required, this court has pointed out that the owner of a mark is damaged by a later use of a similar mark which places the owner’s reputation beyond its control, though no loss in business is shown.”); Diane Leenheer Zimmerman, *False Light Invasion of Privacy: The Light That Failed*, 64 N.Y.U. L. REV. 364, 365 (1989) (describing the Warren and Brandeis view of privacy as one of “selective anonymity”).

<sup>60</sup> See generally Sara Stadler Nelson, *The Wages of Ubiquity in Trademark Law*, 88 IOWA L. REV. 731 (2003).

<sup>61</sup> See R.I.M. Dunbar, *Gossip in Evolutionary Perspective*, 8 REV. GEN. PSYCH. 100, 106 (2004) (describing the “free rider problem” of those who “take the benefits of sociality but decline to pay all of the costs” and suggesting that individuals are predisposed to exchange information about free riders through gossip because “free riders are extremely destructive for societies based on a social compact”); Strahilevitz, *supra* note 36, at 1721 (“In perhaps the majority of instances, the most appropriate role that the state can play in facilitating the development of a robust reputational market is to get out of the way.”).

confer, both through a legal judgment that one's reputation has been unjustly harmed and the restoration (at best, incomplete) of one's former position through the payment of damages and through retractions or disclaimers, which allow the defendant to correct the record. All of these remedies, whether legal or extralegal, may have the salutary benefit of inspiring feelings of vindication on the part of the individual or firm whose reputation has been altered and, in the case of firms, providing compensation for loss of business due to the reputational harm. But the ultimate goal—and, presumably, the primary goal in many cases—looks to the future rather than to the past: it is to influence, through official or unofficial signals, the collective judgment of the relevant community going forward by adjusting distortions in the flow of information.

### B. *The Use of Reputation*

Recognizing the collective nature of reputation and the way in which others are instrumental in creating, defining, and changing an individual's or firm's reputation suggests that we might take a more expansive view of the benefits of vindicating reputational interests. It is not surprising that legal justifications for the protection of reputation focus on the reputation's importance for the plaintiff; the individual or the firm is, after all, the party who is seeking vindication of legal rights.<sup>62</sup> But, as in trademark law, we might consider that the plaintiff is in some way acting on behalf of an audience who is not before the court, an audience who relies on the accurate transmission of information about the plaintiff to form judgments and opinions and to make choices about future economic, social, and identity-based interactions. Thus, to describe protection of reputation as a right owned by the individual or entity with which the reputation is associated does not fully reflect the scope and nature of the interests at issue. Indeed, one might suggest, analogous to Rochelle Cooper Dreyfuss's assessment of trademark value, that the very fact of the public's input into the creation of reputation gives the public a claim to at least a portion of the value that is thereby created.<sup>63</sup>

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<sup>62</sup> See Zimmerman, *supra* note 59, at 424 (noting that the false light tort does not require detrimental reliance and that “[t]he subject of the falsehood, not the hearer to whom it is communicated, is deemed to be the party who has been injured”).

<sup>63</sup> Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 NOTRE DAME L. REV. 397, 402–10 (1990); cf. Gladys Engel Lang & Kurt Lang, *Recognition and Renown: The Survival of Artistic Reputation*, 94 AM. J. SOC. 79, 80 (1988) (discussing collective memory as a form of “collective property, a form of folk knowledge, more or less”);

The interests of communities or audiences in others' reputations overlap, but are not always coextensive with, the interests of reputation owners. A reputation owner may want another to use his reputation as a way to reduce search costs or as a form of warranty or predictor of future conduct, but presumably only if his reputation is a good one. The owner of a bad reputation, by contrast, is likely to encourage others to rely on other enticements, such as price, proximity, or appearance, rather than reputational signals, as a guide to future interactions. Likewise, a reputation owner may acquiesce, explicitly or implicitly, to the use of its reputation by others as a signaling device but only so long as the borrower does not do anything to reduce the strength or value of those reputational signals. But the reputation owner's desires quite obviously have little bearing on whether his reputation is used by others; in this sense, it seems inaccurate to talk of a reputation "owner" at all. Rather, as I now discuss, reputation is a form of social signal that conveys the probable course of future transactions based on past experience.

### 1. Reputation as Warranty

Reputations have value to their owners because of their use by others. It does an individual or firm no good to have a reputation for honesty, talent, quality, or skill unless others are both aware of that reputation and use it to make further judgments or to take a particular action. Thus, reputations are often used by others as a form of warranty or guarantee in situations in which experience with performance is limited.<sup>64</sup> One might, for example, buy a book by an author one hasn't read before based on an awareness of the author's reputation for thoughtful writing or vote for a politician based on his or her reputation for honesty; one might also visit a restaurant or buy a particular good that one hasn't tried before based on its reputation for quality.<sup>65</sup> Reliance on reputation is rational because, we can assume, the reputation holder has an interest in acting consistently with a good reputation or

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Rolph, *supra* note 13, at 123 (suggesting that celebrities' reputations are "public 'property' beyond [their] control").

<sup>64</sup> FOMBRUN, *supra* note 38, at 3 (noting that a contractor's reputation "signals the likelihood that our dealings with them will be up to snuff—that they will meet our expectations"); Shenkar & Yuchtman-Yaar, *supra* note 46, at 1365 (discussing an economic view of reputation "as an imperfect substitute for direct knowledge, particularly in uncertain situations where it is difficult to ascertain quality").

<sup>65</sup> Gillette, *supra* note 32, at 1170 (noting that "brand names constitute reputational signals that allow users of one of a firm's products to predict the performance level of another product sold by the same firm").

will have an incentive to improve a bad reputation.<sup>66</sup> (Of course, what constitutes a “good” or “bad” reputation depends on the community in which the reputation holder operates.) Attribution is a significant component of this exchange, as names are used by others as hooks for reputational assessments. One who donates funds to charity anonymously will not see those activities having any effect on her reputation because they will go unrecognized by society. Likewise, a firm that sells an unbranded product in the market, such as unpackaged produce, will have no way of enticing future purchases by consumers who hear about the quality of the product from others; such consumers will have to rely on the reputation associated with the retail outlet at which such products are purchased.

Indeed, in many instances, decision-making opportunities are structured precisely to avoid using reputation as a heuristic, both within and outside the law. Federal evidence law, for example, generally limits the use of character evidence to prove action in conformity with that character,<sup>67</sup> thus disallowing the use of reputation as a predictor of some types of conduct. Many activities involving selection or judgment are conducted by imposing or encouraging anonymity in part to avoid the effect of reputation on the outcome. Law school examinations, for example, are often graded anonymously not only to discourage positive or negative bias on the part of the grader based on the instructor’s own experience, but also to avoid the possibility that the instructor will assign the examination a higher grade than it warrants because the student is “known” to be a good student at the school. Orchestra auditions, to take another of many such examples, might be conducted behind a screen to eliminate the possibility that a position will be awarded based on the renown of the performer, and some publications maintain a “blind” submissions policy, in which the submission is evaluated without knowledge of the identity of its author, in an attempt to avoid Robert Merton’s Matthew Effect.<sup>68</sup> The failure to construct such an environment can have significant results. For example, a 2005 study concluded that the likelihood of a college basketball team’s being invited to participate in the NCAA postseason tournament was signifi-

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<sup>66</sup> *But see* Jeffrey C. Ely & Juuso Välimäki, *Bad Reputation*, 118 Q.J. ECON. 785, 785 (2003) (constructing a model in which reputation holders take suboptimal actions in an attempt to distinguish themselves from bad actors).

<sup>67</sup> FED. R. EVID. 404, 405, 607–609 (all noting exceptions to the general ban of character evidence).

<sup>68</sup> *See supra* note 16 and accompanying text.

cantly affected by organizers' perception of the team's status and not simply by the team's performance that season.<sup>69</sup>

The interests of the reputation owner and the community diverge, however, at the point of dissemination of reputational information. The community or audience presumably has the same interest in the heuristic value of reputational signals whether they point in a favorable or unfavorable direction, as long as they are based on accurate inputs. By contrast, the reputation owner may have an incentive to impede unfavorable (but truthful) reputational signals by, for example, seeking to have communications about those signals removed from public view or to muddy the waters by adding untruthful inputs to the mix. The law, as I will discuss, tends to favor the reputation holder in this regard, allowing a plaintiff to bring reputation-based claims either for the dissemination of false facts (as a defamation claim)<sup>70</sup> or for the dissemination of true facts (as a privacy claim).<sup>71</sup> The audience interest, however, is in having truthful information as the foundation of the reputational assessment; hence, its interests are much less accommodated in the privacy tort than in the defamation tort.

## 2. Reputation as User Signal

Reputations are often traded or borrowed based on economically motivated transactions in which the transfer of reputational value is, in large part, the point of the agreement, such as a franchise or licensing arrangement. Reputations are also borrowed for a price in instances where the borrowing is not the focus of the transaction.<sup>72</sup> Luxury goods, for example, are typically purchased not simply because of the higher quality of those goods but also to indicate to others that the purchaser is a person of means who can afford high-quality or high-status goods, and consumers pay extra for this effect.<sup>73</sup> Likewise, a stu-

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<sup>69</sup> Marvin Washington & Edward J. Zajac, *Status Evolution and Competition: Theory and Evidence*, 48 ACAD. MGMT. J. 282, 292 (2005).

<sup>70</sup> See *infra* notes 120–157 and accompanying text.

<sup>71</sup> See *infra* notes 268–290 and accompanying text.

<sup>72</sup> The use of the term “borrowed” obscures, of course, the fact that a reputation in such circumstances cannot be “returned.”

<sup>73</sup> The seminal work is THORSTEIN VEBLEN, *THE THEORY OF THE LEISURE CLASS* 43–63 (Dover ed. 1994) (1899), which introduced the idea of “conspicuous consumption.” See also Landes & Posner, *supra* note 55, at 305; Barton Beebe, *Intellectual Property Law and the Sumptuary Code*, 123 HARV. L. REV. 809, 886 (2010) (asserting that the challenge of intellectual property law “will be to design rules that will facilitate attribution and thus the system of reputation-based distinction that is arguably one of the primary drivers of commons-based production, but that will not at the same time facilitate the commodification and

dent at an elite university pays tuition not only for the quality of the educational and other offerings but also for the prestige of the school's name, which the student then borrows to use as a signal of her own reputation when she lists the institution on her resume, or for access to well-known professors who can later be asked to lend their reputation to letters of recommendation. (Of course, another's reputation may function as a signal only to particular or specialized communities, and part of the law's task is to determine which communities count.<sup>74</sup>) In some instances, an employee is paid not simply to perform work for the employer but, in so doing, to burnish the employer's reputation, from which the employee then benefits. The work lawyers perform for a law firm, for example, ultimately bears the name of the firm and so contributes to the firm's reputation, which each of its lawyers can then use to his or her benefit in various types of transactions in a way that a lawyer maintaining a solo practice cannot.<sup>75</sup>

Of course, these are all two-way transactions, regardless of any express employment agreement. As with a franchise, the activity of the reputation's bailee can redound either to the benefit or to the detriment of the reputation's owners. A graduate of a particular college who later wins a Nobel Prize may bring renown to the school; likewise, the graduate who is the subject of a federal indictment may cause his alma

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consumption of attribution as a sign of social distinction"). A recent study discusses "conspicuous conservation": the payment of a premium for a hybrid car, which requires foregoing performance and comfort, so as to signal both wealth and altruism. Vlas Griskevicius, Joshua M. Tybur & Bram Van den Bergh, *Going Green to Be Seen: Status, Reputation and Conspicuous Conservation*, 98 J. PERSONALITY & SOC. PSYCH. 392 (2010); see also Jonah Berger & Morgan Ward, *Subtle Signals of Inconspicuous Consumption*, 37 J. CONSUMER RES. 555, 555 (2010) (asserting that insiders prefer luxury goods with signals that are visible only to those "in the know").

<sup>74</sup> See Post, *supra* note 1, at 714 ("The common law [of defamation] takes its function of maintaining community identity so seriously that it will refuse to protect individual dignity if it determines that a particular community is not worthy of legal support."). Post gives as an example the opinion of *Connelly v. McKay*, 28 N.Y.S.2d 327 (Sup. Ct. 1941) in which the court held that a plaintiff's claim that he had been defamed by a false statement that he was a government informant was not cognizable as defamation. *Id.* at 714; see *Connelly*, 28 N.Y.S.2d at 329 (noting that to recognize the plaintiff's claim "would impede law enforcement for the benefit of the anti-social"); see also Lyrrisa Barnett Lidsky, *Defamation, Reputation, and the Myth of Community*, 71 WASH. L. REV. 1, 24 (1996) (noting that the *Connelly* court "ignore[d] the actual community in favor of an idealized community created by its own decision").

<sup>75</sup> Cf. LOUIS MENAND, *THE MARKETPLACE OF IDEAS: REFORM AND RESISTANCE IN THE AMERICAN UNIVERSITY* 106 (2010) (noting that a member of a university faculty has an advantage over an independent scholar because "the non-professional must build a reputation by his or her own toil, while the professional's credibility is given by the institution").

mater's reputation to fall in the public's esteem. In this respect, an institution's reputation presents a variation on the "tragedy of the commons" problem, in that employees or associates of the institution can exploit its value without having to account to any other user, with the result that any such exploiters can deplete the value of the institution's reputation if they take too individualistic a view of the scope of its uses.<sup>76</sup> Here, however, the problem cannot be solved by according one party a property right: The institution presumably has no interest in preventing its alumni, for example, from using the institution's name for its reputational benefits, and there is no way of predicting *ex ante* which users will be harmful and which will be beneficial, such that some users could be charged a higher "fee" for their use. Instead, the stability of the reputational signal depends on the cooperative efforts of those who benefit from it and the assumption that each such party has a mutually reinforced interest in obtaining a return on its investment.

Although such borrowings are often said to involve the "reputation" of the loaning entity, an insight from Marvin Washington & Edward J. Zajac provides some useful nuance. Washington and Zajac highlight that such uses actually involve "status" rather than reputation, noting that status is "fundamentally a sociological concept that captures differences in social rank that generate privilege or discrimination," while reputation is "fundamentally an economic concept that captures differences in perceived or actual quality or merit that generate earned, performance-based rewards."<sup>77</sup> For example, as they note, a luxury car can connote high social status, despite its poor track record in terms of reliability; likewise, a politician from a well-known family might win an election based on public affinity for his ancestry as opposed to his performance in public office.<sup>78</sup> At some point, then, we might say that one's reputation ceases to be based on interactions or experience with others and becomes instead a matter of ossification of status—the point at which one becomes able to "rest on one's laurels." This insight may provide further justification for an alternative to a plaintiff-focused view of reputation, but it does not eliminate the audience interest in the flow of information. Indeed, to the extent that the community wishes to

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<sup>76</sup> Geoffrey C. Hazard, Jr. & Ted Schneyer, *Regulatory Controls on Large Law Firms: A Comparative Perspective*, 44 ARIZ. L. REV. 593, 604–05 (2002) (discussing the "commons" of a law firm's reputation and the risk of its devaluation by individual lawyers acting in accordance with their own interests); I.P.L. Png & David Reitman, *Why Are Some Products Branded and Others Not?*, 38 J.L. & ECON. 207, 210 (1995) (discussing franchises).

<sup>77</sup> Washington & Zajac, *supra* note 69, at 283.

<sup>78</sup> *Id.* at 284.

“bask in the reflected glory” of the reputation of another,<sup>79</sup> it becomes ever more important to consider the factual basis for that reputation.

Although the Supreme Court has long noted society’s “pervasive and strong interest in preventing and redressing attacks upon reputation,”<sup>80</sup> courts have been less clear about the nature of the interest. For example, at least some of the Court’s jurisprudence suggests that an individual’s interest in his reputation does not rise to the level of a liberty or property interest subject to due process under the U.S. Constitution,<sup>81</sup> although state constitutions may provide broader protection.<sup>82</sup> This is not to say that the law should therefore take no interest in individual or firm reputation, but it does give rise to a consideration of what it is about reputation that makes it a worthy subject of legal interest.

## II. THEORIES OF REPUTATION

An influential attempt to outline a theory of reputation was provided by Robert Post in a 1986 article in the *California Law Review*.<sup>83</sup> Writing in the context of defamation law, Post offered three conceptions of defamation from the psychological and sociological literature: repu-

<sup>79</sup> See Robert B. Cialdini et al., *Basking in Reflected Glory: Three (Football) Field Studies*, 34 J. PERSONALITY & SOC. PSYCH. 366, 366 (1976) (describing the human tendency to try to bolster one’s own status by association with another with high status).

<sup>80</sup> *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966).

<sup>81</sup> Compare *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971) (“Where a person’s good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.”) (regarding identification of the plaintiff as someone to whom sale of alcohol was forbidden), with *Paul v. Davis*, 424 U.S. 693, 708–09 (1976) (interpreting *Constantineau* as holding that procedural due process applied because the government’s action deprived the plaintiff of a preexisting right under state law to purchase alcohol but that due process would not apply to reputational injury alone). This result has been the subject of some criticism. See, e.g., Krotoszynski, *supra* note 12, at 556–57 (suggesting that one’s interest in one’s reputation is as fundamental a right as his interest in free speech but that the Supreme Court does not accord reputation the same level of protection as speech); Henry Paul Monaghan, *Of “Liberty” and “Property,”* 62 CORNELL L. REV. 405, 426 (1977) (criticizing the result in *Paul* by noting that “it is an unsettling conception of ‘liberty’ that protects an individual against state interference with his access to liquor but not with his reputation in the community”); *id.* at 427 (“[T]he Court’s conclusion that such an assault [upon an individual’s sense of identity] implicates no constitutionally protected interest stands wholly at odds with our ethical, political, and constitutional assumption about the worth of each individual.”).

<sup>82</sup> See, e.g., *Matter of E. Park High Sch.*, 714 A.2d 339, 345 (N.J. Super. Ct. App. Div. 1998) (noting that while the cases interpreting the Fourteenth Amendment to the U.S. Constitution require “stigma plus,” the New Jersey state constitution gives individuals “a protectable interest in reputation warranting due process protections without requiring any other tangible loss”) (internal quotation marks omitted).

<sup>83</sup> Post, *supra* note 1, at 693.

tation as property, reputation as dignity, and reputation as honor. While each of these explanations resonates in some fashion with the sociological theories just described, they cannot, as Post acknowledges,<sup>84</sup> fully account for the law's interest in reputation.

#### A. *Reputation as Property*

One way of conceiving reputation is as the property of the individual or firm, a view that has found favor with both courts and commentators.<sup>85</sup> This view accords with many of the metaphors we use to talk about reputation: reputation can be gained, possessed, and lost; it is valuable or priceless; it can be borrowed or lent.<sup>86</sup> The concept of reputation as property has, not surprisingly, particular resonance in trademark cases, in which courts have often justified trademark law in property-based terms.<sup>87</sup> In this view, the conception of reputation is a Lockean one. Reputation is something that is created by an individual or firm from the fruits of one's labor, and so it is the individual or firm that is entitled to whatever ownership rights and value result.<sup>88</sup> One who causes harm to another's reputation has thus deprived him of a valuable asset in the same way as if he had stolen the other's car.

The conception of reputation as property is satisfying in part because reputation shares a variety of characteristics with other things

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<sup>84</sup> *Id.* (suggesting that "an evaluation of the state's interest in reputation can have no single outcome, for the meaning and significance of reputation will depend upon the kinds of social relationships that defamation law is designed to uphold").

<sup>85</sup> See, e.g., Joseph Blocher, *Reputation as Property in Virtual Economies*, 118 YALE L.J. POCKET PART 120, 120 (2009), <http://thepocketpart.org/2009/01/19/blocher.html>; Epstein, *supra* note 2, at 801; Krotoszynski, *supra* note 12, at 591; Veeder, *supra* note 13, at 33 (noting that "[o]ne's good name is . . . as truly the product of one's efforts as any physical possession").

<sup>86</sup> See, e.g., W. Bentley MacLeod, *Reputations, Relationships, and Contract Enforcement*, 45 J. ECON. LITERATURE 595, 616 (2007) (characterizing reputational capital as "rent that a party receives for being trustworthy").

<sup>87</sup> See, e.g., *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 413 (1916).

Common-law trade-marks, and the right to their exclusive use, are of course to be classed among property rights, but only in the sense that a man's right to the continued enjoyment of his trade reputation and the good-will that flows from it, free from unwarranted interference by others, is a property right, for the protection of which a trade-mark is an instrumentality.

*Id.* (citation omitted); see also Bone, *supra* note 49, at 560 (discussing how "the idea that trademark law protects goodwill as property" became "a central organizing principle" of trademark law).

<sup>88</sup> Post, *supra* note 1, at 695 (describing a view of reputation under which "[u]njustified aspersions on character can thus deprive individuals of the results of their labors of self-creation, and the ensuing injury can be monetarily assessed").

that we consider to be property. For example, it is often capable of having an economic value, derived from the market, rendering it both the subject of trade and the basis of compensation resulting from harm. The value of a celebrity's reputation, for example, can be assessed by determining the amount that the celebrity has been paid (or would be paid in the future) to appear in an advertisement—subtracting, perhaps, the fee that would be paid to a non-celebrity simply for reciting the ad copy. Economic value also manifests itself in the many ways in which an individual with an enhanced reputation is able to command a higher fee for her services than an individual with a lesser perceived reputation and in which a company is able to command more for its products or services than others in its field. For example, a scientist with a reputation as a careful and productive researcher will presumably, all else being equal, receive a higher salary from laboratories than a recent graduate, and a lawyer or doctor with a good reputation can typically, absent regulatory controls, charge a higher fee for her services than a professional with a poor reputation. Likewise, a pharmaceutical company can continue to command higher prices for its branded drugs vis-à-vis generic versions even once an applicable patent expires, and designer handbags and other luxury goods fetch a considerably higher price than products similar in appearance.<sup>89</sup>

The appeal, then, of treating reputation as property is that damages can be calculated by reference to standard methods of evaluating harm to property rights, such as a decline in market value or the excess of firm value over tangible assets.<sup>90</sup> The risk is that the ease of administrability on the damages side will spill over into the determination of liability, such that courts or juries will be more likely to see harm to reputation when the plaintiff is involved in commercial activity.<sup>91</sup> It is

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<sup>89</sup> See Charles Fombrun & Mark Shanley, *What's in a Name?: Reputation Building and Corporate Strategy*, 33 ACAD. MGMT. J. 233, 233 (1990); Mark P. McKenna, *An Alternate Approach to Channeling?*, 51 WM. & MARY L. REV. 873, 878–81 (2009). Commentators dispute whether the law should protect this value. See Laura R. Bradford, *Emotion, Dilution, and the Trademark Consumer*, 23 BERKELEY TECH. L.J. 1227, 1251–59 (2008) (describing the debate); Ralph S. Brown, Jr., *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 57 YALE L.J. 1165, 1205–06 (1948) (criticizing protectionism); Landes & Posner, *supra* note 55, at 277 (contending that a rational consumer might be willing to pay a premium for the signal of quality control represented by the trademark).

<sup>90</sup> Post, *supra* note 1, at 694–95.

<sup>91</sup> Cf. Diane Leenheer Zimmerman, *Curbing the High Price of Loose Talk*, 18 U.C. DAVIS L. REV. 359, 388 (1985) (suggesting that because the connection between “disparagement of the plaintiff in her trade, business profession, or office” (a type of slander per se) and “harm to economic well-being seems so concrete, the law has been especially ready to offer a remedy for untruths of this kind”).

therefore not surprising that in cases involving firms, as opposed to individuals, the discussion of reputation has a decidedly property-like focus, even when economic harm has not been demonstrated.<sup>92</sup> On the other hand, although the scope of any property interest can vary, reputation seems particularly difficult to limn with cognizable boundaries. The nature of one's reputation can change from day to day. A corporation can be disgraced in one week and then redeem itself years down the road;<sup>93</sup> an individual can have one reputation in the workplace, another on the golf course, and a third in his house of worship. In contrast to concepts such as fixation in copyright law, which is said to have the benefit of delineating the "metes and bounds" of the property interest,<sup>94</sup> there is nothing particular about the way reputation is presented to the public that suggests its limits, apart from the fact that reputation is anchored to a name.<sup>95</sup>

### B. *Reputation as Dignity*

The second characterization of reputation that Post describes is the conception of reputation as dignity—the idea that "every man has a right to his good name, unimpaired"<sup>96</sup> as a result of "the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty."<sup>97</sup> Under this conception, a person's

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<sup>92</sup> James Burrough, Ltd. v. Sign of Beefeater, Inc., 540 F.2d 266, 276 (7th Cir. 1976) ("Though economic harm per se is not required, this court has pointed out that the owner of a mark is damaged by a later use of a similar mark which places the owner's reputation beyond its control, though no loss in business is shown.")

<sup>93</sup> David A. Anderson, *Reputation, Compensation, and Proof*, 25 WM. & MARY L. REV. 747, 777–78 (1984) ("In today's pluralistic society, much is tolerated and little is universally condemned. . . . Even if one's reputation is harmed, the victim is not condemned automatically to live out his life in disgrace. The mobility and anonymity of modern society make rehabilitation much easier."); Post, *supra* note 1, at 701 (noting that the conception of reputation as property "presupposes that individual identity is distinct from reputation, in the sense that an individual can always construct a new reputation"). In this vein, some commentators have advocated for a short statute of limitations for defamation claims. See, e.g., David A. Barrett, *Declaratory Judgments for Libel: A Better Alternative*, 74 CALIF. L. REV. 847, 850 n.16 (1986) ("If plaintiffs are genuinely interested in vindicating injury to reputation, it makes no sense to allow the wound to fester for years after the offense.")

<sup>94</sup> See Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 STAN. L. REV. 1343, 1380–84 (1989) (describing how the fixation requirement in copyright law substitutes for physical boundaries).

<sup>95</sup> Cf. Bone, *supra* note 49, at 584–85 (describing the amorphous nature of goodwill, particularly in the view of early-twentieth-century formalists).

<sup>96</sup> *Senna v. Florimont*, 958 A.2d 427, 433 (N.J. 2008) (citations omitted) (internal quotation marks omitted).

<sup>97</sup> *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring); see also Post, *supra* note 1, at 707–19.

reputation is not the result of effort or ingenuity but inheres in the individual by virtue of her existence; as such, it is fundamentally connected to her identity and to concepts of self-representation.<sup>98</sup> This view of reputation was, courts have noted, what underlay the common law rule that a defendant could be liable for a defamatory statement regardless of fault,<sup>99</sup> since every individual is presumed to have a good reputation *ab initio*.

A conception of reputation as dignity is appealing precisely for the reason that adherents of this view would reject a conception of reputation as property. To view reputation as property is to commercialize ever-increasing aspects of our daily lives and to view individuals merely as subjects for others transactions.<sup>100</sup> A damage award under a property theory of reputation is merely a licensing fee; it does not take full account of the frustration of autonomy caused by harm to reputation, but instead treats individuals as economic units to be bought and sold. By contrast, a conception of reputation as dignity accords each individual the same intrinsic worth by validating the individual's "full membership in society" while at the same time enforcing "society's interest in its rules of civility."<sup>101</sup> Such an interest, however, is unlikely to ever be fully addressed by legal means; indeed, the turn to legal process itself might, in some way, devalue the dignity interest by reducing it to a subject of adjudication and debate.

### C. *Reputation as Honor*

Finally, Post discusses the conception of reputation as honor—the theory that one's reputation comes from one's assigned or acquired social status.<sup>102</sup> In this conception, reputation is neither earned nor intrinsic.

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<sup>98</sup> Eric J. Mitnick, *Procedural Due Process and Reputational Harm: Liberty as Self-Invention*, 43 U.C. DAVIS L. REV. 79, 110 (2009) (summarizing conceptions of reputation as property, honor, privacy, and dignity and concluding that "[a]n essential commonality across the varied conceptions is the idea that an individual's identity is, at least partially, constituted by her reputation").

<sup>99</sup> *Senna*, 958 A.2d at 433.

<sup>100</sup> Cf. Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1377 (2000) ("Our conceptions of property, choice, and information reinforce one another; under all of them, individuals are treated as the natural and appropriate objects of others' trades, others' choices, others' taxonomies, and others' speech.").

<sup>101</sup> Post, *supra* note 1, at 711.

<sup>102</sup> *Id.* at 699–700 (describing a form of reputation "in which an individual personally identifies with the normative characteristics of a particular social role and in return personally receives from others the regard and estimation that society accords to that role"). See generally Nathan B. Oman, *The Honor of Private Law*, 80 FORDHAM L. REV. (forthcoming 2011) (discussing the legal vindication of honor).

sic but rather is conferred as a result of one's position relative to others. One might accord the president of the United States a certain amount of respect, for example, despite disagreeing with his policies, because one is "respecting the office" rather than the individual. Social titles and other forms of etiquette also reflect the sense of reputation as honor. For example, it is customary to address physicians as "Doctor" and university educators as "Professor," regardless of the abilities or personality of the individuals who occupy those positions; as a result, certain social benefits derive from that recognition that are not available to individuals elsewhere in the hierarchy. The hierarchy communicates to its participants the expectations of interaction, thus facilitating social and economic transactions. Those who transgress the hierarchy's boundaries by falsely calling another's honor into question cause an overall societal harm by disrupting the expected flow of interaction.

Because individuals have an interest in preserving their position in the hierarchy, in that their position contributes to their sense of identity and self-worth,<sup>103</sup> the ability to vindicate reputation through legal proceedings minimizes the risk that individuals will turn to self-help measures.<sup>104</sup> Its reliance on a shared understanding of social structure, however, renders a theory of reputation as honor conceptually easier to navigate for those familiar with the structure and, concomitantly, more difficult for others. (Consider, for example, the likely ramifications for a courtroom participant who unwittingly calls the judge by her first name.) Thus, this description of reputation takes some account of the social aspect of reputation—the importance of an individual or entity's reputation to the preservation of social order and engagement—but it instantiates it in an ossified hierarchy of privilege, requiring the law, as Post puts it, to "define and enforce the ascribed status of social roles."<sup>105</sup>

#### D. *The Limits of Existing Theories*

Each of the proposed theories of reputation holds a certain appeal. The property theory of reputation responds to the entrenched sense that one's reputation has value and that transgressions that harm

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<sup>103</sup> See Mitnick, *supra* note 98, at 111 (discussing how "legally constructed labels, stamped upon individuals, may serve as social markers constituting aspects of individuals' social identities").

<sup>104</sup> See *Senna*, 958 A.2d at 433 n.4; McNAMARA, *supra* note 13, at 79 (describing the view that defamation laws "maintained peace and order"); SOLOVE, *supra* note 36, at 114–17 (describing the theory that legal vindication of reputation was a substitute for dueling).

<sup>105</sup> Post, *supra* note 1, at 702.

reputation should be remedied through financial compensation that not only attempts to make the plaintiff whole but serves as a signal to the community of the magnitude of the defendant's misdeeds. Indeed, assuming media coverage of the suit, the availability of monetary compensation allows plaintiffs to create their own signals through the amount of the *ad damnum* request in the complaint. The dignity theory of reputation, conversely, reflects our sense that reputation is valueless—that a damages award is but a substitute for the restoration of one's self-worth and the rehabilitation of one's identity. The dignity theory thus should favor attention to statements of rehabilitation and confession, such as retractions and disclaimers, in addition to judicial pronouncements that return the individual to his prior state of personhood.<sup>106</sup> Finally, the honor theory of reputation provides a justification that reflects the function of reputation in society. Whereas the property and dignity theories do not require participation by any individuals other than the plaintiff and defendant for legal resolution, the honor theory incorporates the interests of other members of society by preserving one individual's social role so that the roles of others can be equally maintained in relation.<sup>107</sup>

No one of these theories can offer a complete picture of the ways in which the law responds to reputational interests. For example, while the dignity and honor theories comfortably incorporate attention to retractions or disclaimers in determining the scope of an appropriate remedy, a property theory of reputation would not have much need for such remedies. If harm to one's reputation were purely economic, a rational actor would presumably be made whole with a damages payment when his reputation was harmed; there would be no need for a judicial restoration of reputation or a public statement by the defendant that he had erred. (One does not, for example, seek first and foremost a public statement of fault from the miscreant who steals one's car; financial compensation is the primary consideration.) The fact that such statements are sought—indeed, some suggest that they are the entire point

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<sup>106</sup> See, e.g., CRAIK, *supra* note 22, at 164 (“In village life in sixteenth-century England, the remedy was straightforward. At Sunday morning church service, for example, the defendant would stand before the congregation, announce that he or she had sinned against the plaintiff, perhaps acknowledge the falsity of the assertions, publicly apologize, and seek forgiveness.”).

<sup>107</sup> Zimmerman, *supra* note 91, at 376 (discussing the Supreme Court's defamation opinions as evidencing “an assumption that defamation was a vehicle designed not to deal with the irritating untruth but with those injuries that segregated their victims from the normal benefits of social intercourse or threatened the stability of the public order”).

of bringing a defamation suit<sup>108</sup>—suggests that something other than a pure economic interest is at stake. More particularly, as Post and other commentators have noted, a property theory of reputation does not explain certain restrictions on recovery for reputational harm, such as the requirement in defamation law that the communication be defamatory, as opposed to merely false, or the historical presumption of damages for certain kinds of communications.<sup>109</sup>

The dignity and honor theories, likewise, do not fully account for the fact that corporations can vindicate reputational interests under several causes of action, including defamation, trade libel, and trademark infringement. Although corporations may share the speech interests of natural persons<sup>110</sup> and may suffer reputational harm as a result of activities other than the production of goods and services, such as philanthropic efforts or community-based activities,<sup>111</sup> it is difficult to characterize corporate entities as having interests in dignity or honor. As Jerome Skolnick has noted, “[a] corporation falsely accused of bankruptcy might lose property, but it cannot lose dignity, a distinction that judges do not always appreciate.”<sup>112</sup> The dignity theory in particular also does not seem to explain various requirements in the doctrine, such as the requirement in defamation law that the statement at issue be published to a third party; under a dignity theory, making the false statement solely to the plaintiff would seem to be enough.<sup>113</sup> In addition, as suggested earlier, neither the dignity theory nor the honor theory of reputation provides as strong support as does the property theory for monetary damage awards. It is true that monetary damage awards are often used as a measure of physical or emotional harm in tort law, even though financial compensation cannot restore an injured individual to her state before the accident; and it is likely that no plaintiff in a wrongful death suit, for example, would attest that he was ambivalent between financial compensation and the death of his loved one. But in such cases, we understand the damage award to be representational of the

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<sup>108</sup> See, e.g., Randall P. Bezanson, *The Libel Suit in Retrospect: What Plaintiffs Want and What Plaintiffs Get*, 74 CALIF. L. REV. 789, 791–93 (1986) (contending that plaintiffs pursue libel actions not for monetary relief but rather for “restoring reputation, correcting what plaintiffs view as falsity, and vengeance” and that plaintiffs view libel lawsuits “as a form of public vindication”).

<sup>109</sup> See, e.g., MCNAMARA, *supra* note 13, at 38; Post, *supra* note 1, at 697–99.

<sup>110</sup> See *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 886 (2010).

<sup>111</sup> See Marshall, *supra* note 51.

<sup>112</sup> Jerome H. Skolnick, *Foreword: The Sociological Tort of Defamation*, 74 CALIF. L. REV. 677, 678 (1986).

<sup>113</sup> Cf. CRAIK, *supra* note 22, at 168.

nature and magnitude of the harm inflicted while acknowledging that true restoration is impossible. By contrast, financial compensation seems fundamentally inconsistent with reputational harm described by a dignity or honor theory, such that to even conceive of compensating such harm by reference to economics risks further dignity-based harm.<sup>114</sup> Finally, to the extent the honor theory relies on the preservation of social structure for its justification, it might be better characterized as a theory of status, rather than of reputation.

This is not to say, however, that a theory of reputation requires any of these proposed explanations to be jettisoned. One could propose that corporate reputational interests, for example, be justified solely by reference to property interests while defending individual reputational interests on all three theories, or justify monetary damage awards on a property theory while justifying disclaimer and retraction remedies on a dignity or honor theory. Indeed, the inability of any one theory to explain the breadth of reputational interests that exist suggests a need for any satisfying theory of reputation to be multidimensional. The existing theories, taken collectively, provide such a multidimensional account of reputation, but they do so primarily from the perspective of the reputation holder. The audience is recognized in the property and honor theories but primarily as a way of providing or assessing the value of the reputational interest to the reputation holder. But such a view does not fully incorporate the way in which reputation formation and usage is part of a cyclical exchange on the part of the audience: The audience both provides the inputs that are the basis of reputation and benefits from the outputs that are the result of the community's collective judgment. It is the recognition of this interest that, this Article proposes, provides a more complete justification for the law's interest in reputation.

For example, the property theory of reputation suggests that reputation should be protected because its value derives from the efforts of the reputation holder. But the threshold question is not the value of reputation; it is how it comes to be considered property at all. Unlike physical property or even some forms of intangible property, such as works protected by copyright law, reputation's ontological status as property is not created until it reaches the economic or intellectual marketplace. Even a sculpture that no one wishes to acquire is still con-

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<sup>114</sup> Cf., e.g., David A. Anderson, *Rethinking Defamation*, 48 ARIZ. L. REV. 1047, 1049 (2006) ("Reducing defamation to a remedy for economic loss would exalt commercial values over the more important social and cultural values that the law serves, not only in defamation but in tort law generally.").

sidered the property of the sculptor; were that sculpture to be stolen from the artist's studio, a court would hold that a conversion had occurred and that the sculptor was entitled to a remedy under tort law, if only minimal monetary damages. But unlike the efforts of the sculptor that turn raw materials into art, one's deeds do not automatically create reputation, contrary to what Lockean labor theory might suggest. Reputation cannot exist without the judgments of others. The deeds that one does that lead to the formation of reputation are within an individual's control, but the reactions and judgments of others are not.<sup>115</sup> Granted, the property theory has a relational aspect to it, in that the propertization of reputation can contribute to a well-functioning market. Without a conception of reputation as property, firms would have to make different choices about the structure of their businesses,<sup>116</sup> and individuals would find that the search for products, employers, and other experience goods would become costly. But these scenarios reflect the treatment of reputation as property *after* its creation, not the commercialization of reputation *because* it is property.

Trademark law, in fact, illustrates the importance of audience interest. By its very nature, a trademark exists only when the relevant consuming public both recognizes the mark as an indication of the source of a good or service and accords that symbol some relevant reputation-related characteristics that allow the mark to serve as a shorthand for the brand. As courts have noted, it matters not how much money a company spends attempting to establish trademark rights in a word, symbol, or trade dress; if consumers fail to recognize the putative mark as distinguishing among producers, there are few, if any, legal rights for the firm to enforce.<sup>117</sup> Thus, a company can spend millions of dollars

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<sup>115</sup> See BROMLEY, *supra* note 13, at 15 (characterizing reputation as “essentially a collective system of subjective beliefs among members of a social group”); Robert N. Bellah, *The Meaning of Reputation in American Society*, 74 CALIF. L. REV. 743, 743 (1986) (“[A]lthough we think of a person as ‘having’ a reputation, reputation is not a property or possession of individuals—it is a relation between persons.”); Nicholas Emler, *A Social Psychology of Reputation*, 1 EUR. REV. SOC. PSYCHOL. 171, 171 (1990) (describing reputation as “a collective phenomenon and a product of social processes”); *id.* at 178 (noting that reputations are “judgments, about vices and virtues, strengths and weaknesses, based on accumulating patterns of evidence which societies constantly process and reprocess”).

<sup>116</sup> See Dan L. Burk & Brett H. McDonnell, *Trademarks and the Boundaries of the Firm*, 51 WM. & MARY L. REV. 345, 346 (2009) (noting that a recognized trademark is often a firm’s “most valuable asset”).

<sup>117</sup> See, e.g., *Co-Rect Prods., Inc. v. Marvy! Adver. Photography, Inc.*, 780 F.2d 1324, 1332 (8th Cir. 1985) (“The desires or intentions of the creator . . . are irrelevant. Instead, it is the attitude of the consumer that is important.”); *Dupont Cellophane Co. v. Waxed Prods. Co.*, 85 F.2d 75, 81 (2d Cir. 1936) (“It, therefore, makes no difference what efforts or money the DuPont Company expended in order to persuade the public that ‘cellophane’

attempting to get consumers to recognize “SPEEDY” as the trademark for a new line of athletic shoes, but the trademark will have no existence as such unless consumers are willing to engage in the cognitive effort required to associate the word with the product’s qualities.<sup>118</sup> And while the financial benefits of the reputation attached to the mark redound to the trademark holder, such benefits can accrue only if consumers *use* the reputational signals associated with the mark to make decisions about quality in the marketplace. If those decisions are based on muddy reputational signals, the cost of decision making increases.

The dignity and honor theories of reputation likewise focus on the interests of the reputation holder over the interests of the audience, suggesting, respectively, that reputation should be protected because such protection demonstrates respect for the intrinsic worth of the individual and because it helps to maintain the individual’s place in the social hierarchy. The former theory, like the property theory, presupposes reputation’s existence, akin to individual autonomy. But one is not born with reputation; rather, it develops only through social and economic actions with others. Neither the newborn child nor the nascent corporation has any reputational interest at the time of birth, even though the child, at least, could be said to have dignity from its first breath, simply by virtue of her existence as a human being. The honor theory of reputation, likewise, incorporates relational aspects in that the theory justifies the law’s vindication of reputational interests on the grounds that the preservation of social roles is important to individual interaction.<sup>119</sup> But, as with the dignity theory, the honor theory neces-

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means an article of DuPont manufacture. So far as it did not succeed in actually converting the world to its gospel it can have no relief.”)

<sup>118</sup> Under the *Abercrombie* hierarchy used to assess trademark strength a fanciful (invented), arbitrary, or suggestive word mark can be a valid trademark without the need for the putative owner to show secondary meaning in the marketplace. *See Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 10 (2d Cir. 1976). But the fact that the word qualifies as a trademark in theory does not mean that it actually serves as a mark in practice—in other words, that the purported mark bears any acquired (as opposed to inherent) distinctiveness.

<sup>119</sup> Because of the social nature of individuals, the dignity and honor theories have some degree of overlap. *See Post, supra* note 1, at 711.

Implicit in the concept of reputation as dignity, therefore, is the potential for a dual function for defamation law: the protection of an individual’s interest in dignity, which is to say his interest in being included within the forms of social respect; and the enforcement of society’s interest in its rules of civility, which is to say its interest in defining and maintaining the contours of its own social constitution.

*Id.*

sarily depends on a community to give meaning to those social roles; without that meaning, the law has nothing to protect.

Thus, while not discounting the utility of these existing theories for justifying the law's interest in reputation from the reputation owner's perspective, a more complete theory of reputation would take into account not only the importance of reputation for the reputation holder but also the interests of communities in forming and using the reputations of others, whether individual or corporate. As I will now discuss, given the variety of legal theories individuals and corporations can use to vindicate reputational interests, such interests may too easily fall by the wayside.

### III. REPUTATION AND THE LAW

Various doctrines in the law are either designed to vindicate reputational interests (although, perhaps, not solely reputational interests) or have been employed by resourceful plaintiffs to vindicate such interests. A consideration of these doctrines reveals varying conceptions about the nature of reputation and the justification for its legal protection. In particular, some doctrines reveal themselves to be grounded in the relationship between the plaintiff and others, while other doctrines have a more tenuous connection to this interest.

#### A. *Defamation and Trade Libel*

The torts of defamation and trade libel are the natural arena for claims attempting to address harms to one's reputation.<sup>120</sup> As the Supreme Court has noted, "[d]efamation law developed not only as a means of allowing an individual to vindicate his good name, but also for the purpose of obtaining redress for harm caused by such statements."<sup>121</sup> The tort is predicated on a false and defamatory statement about the plaintiff communicated to a third party,<sup>122</sup> with "defamatory

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<sup>120</sup> Commentators have suggested that the number of libel cases filed against media defendants is on the wane. John Koblin, *The End of Libel?*, N.Y. OBSERVER (June 9, 2010), <http://www.observer.com/2010/media/end-libel?> (citing commentators suggesting that the decrease may be due to past defendant victories, the ability to post corrections and responses on the Internet quickly, or a decrease in the amount of investigative journalism being published). The trend may be explained, however, by a shift to claims filed against individuals for allegedly defamatory material on the Internet, which claims would likely not be available against service providers due to the safe harbor of 47 U.S.C. § 230 (2006).

<sup>121</sup> *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 12 (1990).

<sup>122</sup> RESTATEMENT (SECOND) OF TORTS § 558 (1977). The tort also requires that the publication to the third party be unprivileged; that the defendant have acted with fault at

statement” typically characterized as a communication that “tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.”<sup>123</sup> A statement can have a defamatory effect even if it resonates only with “a substantial and respectable minority,” assuming that the audience is a creditable one.<sup>124</sup> The Restatement further suggests that a defamatory communication may harm one’s reputation if it “expose[s] [that person] to hatred, ridicule, or contempt” or “reflect[s] unfavorably upon [the plaintiff’s] personal morality.”<sup>125</sup> The defamatory nature of the statement at issue is typically a jury question, based on a reasonable person standard; as the Restatement explains, “[t]he question to be determined is whether the communication is reasonably understood in a defamatory sense by the recipient.”<sup>126</sup> Thus, defamation cases at least attempt to judge reputational harm by reference to a community judgment, although, as commentators have noted, this is not always a straightforward task.<sup>127</sup>

Defamation’s notion of reputation is fundamentally social in nature. One cannot sue for defamation unless the statement at issue has been communicated to a third party and has some effect on how others perceive or engage with the plaintiff.<sup>128</sup> In this way, an audience member’s positional involvement is required in receiving the communication; his or her cognitive involvement is required in responding to that communication in a way that is unfavorable to the plaintiff. A statement that is communicated only to the plaintiff may cause hurt feelings and a decrease in self-worth; it may also reflect an intent on the part of the speaker to refrain from future dealings with the plaintiff. But, as with a

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least at the level of negligence; and “either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.” *Id.*

<sup>123</sup> *Id.* § 559.

<sup>124</sup> *Id.* § 559 cmt. e.

<sup>125</sup> *Id.* § 559 cmt. b.

<sup>126</sup> *Id.* § 563 cmt. c.

<sup>127</sup> See, e.g., Lidsky, *supra* note 74, at 43 (“[C]ommunity in modern life bears little resemblance to the ‘myth of community’ constructed by defamation law.”).

<sup>128</sup> RESTATEMENT (SECOND) OF TORTS § 577 cmt. b (1977).

The law of defamation primarily protects only the interest in reputation. Therefore, unless the defamatory matter is communicated to a third person there has been no loss of reputation, since reputation is the estimation in which one’s character is held by his neighbors or associates. The communication of disparaging matter only to the person to whom it refers is not actionable defamation, irrespective of the vile or scandalous character of the communication and its effects upon the feelings of that person.

*Id.*

corporation's goodwill, the decisions of others not to engage further with an individual based only on their own experiences with that individual is not a decision sounding in reputational interests. Reputation is affected only when those experiences or opinions are communicated to others, causing those recipients to change their behavior toward the plaintiff. In this way, as Peter Tiersma has noted, using the language of speech act theory, defamation is based on the perlocutionary effect of the defamatory statement.<sup>129</sup>

Despite its focus on the plaintiff's relationship to the community, the defamation tort cannot remedy all reputational harms resulting from a disruption of this relationship. On occasion, the plaintiff's interest must give way to the countervailing interest of the defendant in exercising her First Amendment-related rights. True statements,<sup>130</sup> statements of "pure" opinion (that is, statements not based on undisclosed, potentially defamatory facts),<sup>131</sup> statements that could not reasonably be understood to be asserting a false fact (such as a parody),<sup>132</sup> and statements made without fault on the part of the person making the statement<sup>133</sup> all may have the potential to harm one's reputation but are not actionable as defamation. For example, the statement "Bob embezzled money from his former employer" may well change others' view of Bob if they were previously unaware of the incident, but Bob has no cause of action under defamation law if the statement is true.

Many of these exclusions from the reach of defamation are rooted in the First Amendment-based conclusion that the type of speech at

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<sup>129</sup> Peter Meijes Tiersma, *The Language of Defamation*, 66 TEX. L. REV. 303, 307 (1987) ("[R]ather than look to the force of the speaker's utterance, this view of defamation looks to the impact that the utterance or writing may have on the hearer and, as a consequence, on the victim's reputation.").

<sup>130</sup> RESTATEMENT (SECOND) OF TORTS § 581A (1977).

<sup>131</sup> *Milkovich*, 497 U.S. at 19–20 (1990) (holding that "a statement on matters of public concern must be provable as false before there can be liability under state defamation law, at least in situations, like the present, where a media defendant is involved"); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–40 (1974) ("Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."); RESTATEMENT (SECOND) OF TORTS § 566 (1977).

<sup>132</sup> *Cf. McNAMARA*, *supra* note 13, at 185 (noting that satire can damage reputation "because it conveys factual imputations that would tend to diminish the standing in which the plaintiff is held and expresses an opinion that encourages others to view the plaintiff in a negative light").

<sup>133</sup> *See Gertz*, 418 U.S. at 347 ("We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."); RESTATEMENT (SECOND) OF TORTS § 580B (1977).

issue or the interest in limiting the chilling effect of potential liability for speech outweighs the reputational harm to the plaintiff. For example, although under the common law, an individual was presumed to have a good reputation, such that “[s]tatements defaming that person [were] therefore presumptively false,”<sup>134</sup> a plaintiff filing suit against a media defendant with regard to a matter of public concern now bears the burden of showing that the statement at issue is false.<sup>135</sup> Thus, a plaintiff who believes that a statement that has caused harm to her reputation is false, but who cannot make that showing in court, will not prevail. Likewise, under Supreme Court doctrine, a public official or public figure cannot prevail in a defamation suit unless she proves that the statement was made with actual malice—in other words, “with knowledge that it was false or with reckless disregard of whether it was false or not.”<sup>136</sup> Thus, even if the statement at issue was false, and harmed the plaintiff’s reputation in a substantial way, the defendant’s state of mind will determine whether the plaintiff has a legal remedy.<sup>137</sup> Finally, actual malice must be shown in order to recover presumed or punitive damages in a public concern case, even for a private-figure

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<sup>134</sup> *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 770 (1986).

<sup>135</sup> *Id.* at 776.

<sup>136</sup> *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 155 (1967) (plurality opinion) (holding that a public figure may recover for defamation only upon a showing of “highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers”); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964).

<sup>137</sup> *Gertz*, 418 U.S. at 339, 342 (noting that the *New York Times* standard “exact[s] a . . . high price from the victims of defamatory falsehood,” since “many deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the *New York Times* test”); Frederick Schauer, *Public Figures*, 25 WM. & MARY L. REV. 905, 910 (1984) (“Implicit in the strategic protection of *New York Times*, therefore, is the strategic sacrifice of some deserving plaintiffs to the more important, at least to society as a whole, goals of the first amendment.”); Martin M. Shapiro, *Libel Regulatory Analysis*, 74 CALIF. L. REV. 883, 885 (1986) (contending that this standard is inappropriate “because it tends to obscure the truth/falsehood issue and is ill tailored to achieve one important regulatory goal, preventing injury to individuals through falsehoods”).

Although the *New York Times* standard is typically raised when the defendant is a media institution, the defendants in the case included not only the newspaper that published the advertisement at issue but four individual signatories; the Court, in its holding, referred to libel actions brought by public officials against “critics of their official conduct.” *Times v. Sullivan*, 376 U.S. at 283; *id.* at 286 (holding that judgment against individual defendants was “without constitutional support” under *New York Times* standard); see also *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 773 n.4 (1985) (White, J., concurring in the judgment) (noting that the Court has, “[f]rom its inception, without discussing the issue, . . . applied the rule of *New York Times* to nonmedia defendants”).

plaintiff,<sup>138</sup> although a private plaintiff in a private concern case may well be entitled to presumed and punitive damages without a showing of actual malice under the common law standard.

Thus, the constitutionalization of defamation law in the United States limits the ability of the courts to provide a reputation-correcting function. Some plaintiffs who are unable to prove fault on the part of the defendant or falsity with respect to a matter of public concern are not entitled to judgment, even if the goal is simply to achieve a declaration of falsity that corrects the record.<sup>139</sup> More precisely, even when such a plaintiff can prove intent to harm the plaintiff's reputation on the part of the defendant, but the statement at issue is not susceptible of being proved true or false, the plaintiff cannot obtain relief under defamation law.<sup>140</sup> Each of these exclusions tips the balance not in favor of the defendant at issue in any particular case—the types of defendants in defamation cases, while perhaps largely members of the media, are too diverse to categorize as having any particular shared interest beyond speech—but in favor of facilitating the sharing of information and opinions about others. Truthful statements, statements of opinion, and critical commentary about others all help the community to form judgments and determine the scope of future interactions; false statements about public officials and public figures, in the Court's view, are not discouraged unless they are intended to create a disruption to the information flow or are disseminated without regard to this disruption.<sup>141</sup> One might be concerned that the Court permits falsehoods to be disseminated about public figures without risk of liability, as these

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<sup>138</sup> *Gertz*, 418 U.S. at 349 (holding that “the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth”).

<sup>139</sup> *Id.* at 376 (White, J., dissenting) (“Plainly, with the additional burden on the plaintiff of proving negligence or other fault, it will be exceedingly difficult, perhaps impossible, for him to vindicate his reputation interest by securing a judgment for nominal damages, the practical effect of such a judgment being a judicial declaration that the publication was indeed false.”).

<sup>140</sup> *Hepbs*, 475 U.S. at 785 (Stevens, J., dissenting).

<sup>141</sup> *Id.* at 778 (noting that “requiring the plaintiff to show falsity [with respect to matters of public concern] will insulate from liability some speech that is false but unprovably so” but that this standard is justified by “the restrictions that the First Amendment places upon the common law of defamation”); *Gertz*, 418 U.S. at 341 (“The First Amendment requires that we protect some falsehood in order to protect speech that matters.”); *Times v. Sullivan*, 376 U.S. at 271–72 (noting that an “erroneous statement is inevitable in free debate” and that “it must be protected if the freedoms of expression are to have the breathing space that they need to survive”) (internal quotation marks omitted) (alteration omitted); *id.* at 272 (“Injury to official reputation affords no more warrant for repressing speech that would otherwise be free than does factual error.”).

are individuals about whom the public has a significant collective interest in evaluating. But the Court's jurisprudence seems to suggest that a public official or public figure has a reputation that crosses the boundaries of many communities, and so it is more important to facilitate communication among as well as within communities to improve the outcome of the collective decision-making process that results from information exchanges than it is to more stringently regulate the precise inputs to that conversation.<sup>142</sup> In other words, the assumption is that because of the public figure's presence in and access to the media, it is more likely that false statements will inspire a true response, thus correcting the record more cheaply and efficiently than litigation.<sup>143</sup> It is thus not particularly the act of speaking in any one instance that is furthered but the ultimate result of the collective act of exchanging information about an individual or firm.

These limitations reinforce the idea that defamation's reputational interest is social as well as economic. If a plaintiff's interest in a defamation case were purely economic, plaintiffs might not seek (as they often do) to "correct the record" by obtaining a jury verdict in their favor, seeking a retraction, or, indeed, filing the case in the first place; rather, at least some plaintiffs would be indifferent to an unharmed reputation versus a harmed reputation with a monetary payment to compensate for the harm. The social nature of the tort is also reflected in the categories of plaintiffs who are permitted to seek a remedy. A corporation can bring a defamation suit for harm to its business reputation,<sup>144</sup> which, on its face suggests an economic focus to the tort, but defamation suits cannot be brought on behalf of deceased individuals, even if their descendants suffer dignitary harm by virtue of the decedent's injured reputation.<sup>145</sup> (One might, for example, suffer emotional harm from

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<sup>142</sup> *U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia*, 898 F.2d 914, 937 (3d Cir. 1990) (noting that "the state has only a 'limited' interest in compensating public persons for injury to reputation but has a 'strong and legitimate' interest in compensating private persons for the same injury").

<sup>143</sup> *Cf. Lyriisa Barnett Lidsky & Thomas F. Cotter, Authorship, Audiences, and Anonymous Speech*, 82 NOTRE DAME L. REV. 1537, 1585 (2007) (concluding that *New York Times v. Sullivan* rests on an assumption that citizens "are capable of exercising their critical faculties to ferret out valuable information").

<sup>144</sup> *Brown & Williamson Tobacco Corp. v. Jacobson*, 713 F.2d 262, 269 (7th Cir. 1983) (noting that a corporation "cannot have a reputation for chastity but it can have a reputation for adhering to the moral standards of the community in which it sells its products and if that reputation is assailed in a fashion likely to harm the corporation seriously the corporation has been libeled") (interpreting Illinois law); RESTATEMENT (SECOND) OF TORTS § 561 (1977).

<sup>145</sup> RESTATEMENT (SECOND) OF TORTS § 560 (1977).

the knowledge that the memory of one's mother has been desecrated by the dissemination of a false statement about her.) These limitations can be reconciled by emphasizing that reputational injury requires a change in behavior by others based on a judgment as to the plaintiff that has the potential of guiding future interactions with the plaintiff. Defamation's differing treatment of corporations and deceased individuals thus reflects the importance of a continuing relationship in which the plaintiff can modify his or her behavior in response to the community's view. Corporations can have continuing relationships with their business partners and customers, but deceased individuals cannot have continuing relationships with anyone; the emotional harm suffered by their decedents, while compelling, does not result from an evaluation by others of them.

Trade libel is another way in which reputational interests are vindicated, although perhaps a bit more obliquely than in individual defamation cases. Although the tort in practice may be used to cover a broad range of uncompetitive practices, including tortious interference with prospective economic advantage,<sup>146</sup> at its heart are concepts of commercial or product disparagement. As such, a claim of trade libel must allege (1) that a false and disparaging statement was communicated to a third party with a degree of fault greater than negligence; (2) that the defendant had no privilege to make the statement; and (3) that the plaintiff suffered a direct economic loss as the result of the disparagement.<sup>147</sup> Thus, similar to defamation law, trade libel claims are a subset of a larger category of claims constituting injurious falsehood, many of which are not directly related to reputational harms.<sup>148</sup>

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<sup>146</sup> See, e.g., *Patel v. Soriano*, 848 A.2d 803, 834 (N.J. Super. Ct. App. Div. 2004).

<sup>147</sup> *U.S. Healthcare*, 898 F.2d at 924; *Patel*, 848 A.2d at 835. The *Restatement (Second) of Torts* is equivocal on whether defamation law's exclusion of statements of "pure opinion" applies to injurious falsehood claims. RESTATEMENT (SECOND) OF TORTS § 623A cmt. e (1977).

<sup>148</sup> See, e.g., *Annbar Assocs. v. Am. Express Co.*, 565 S.W.2d 701, 702–03 (Mo. Ct. App. 1978) (reviewing the trial of an injurious falsehood claim involving a false statement by a hotel reservation system that plaintiff hotel had no availability); RESTATEMENT (SECOND) OF TORTS § 623A cmt. a., illus. 2 (1977) (giving as an example of injurious falsehood an employer's report to tax authorities that he paid more in income to an employee than he actually paid, which caused the employee to be prosecuted for tax evasion). Because of this relationship, not every jurisdiction recognizes a separate tort of business disparagement. *City Ambulance of Ala., Inc. v. Haynes Ambulance of Ala., Inc.*, 431 So. 2d 537, 539 (Ala. 1983) (holding that the tort of disparagement is subsumed within the tort of interference with business relations). False claims about another's product can also, in some circumstances, be redressed by a false advertising suit pursuant to section 43 of the Lanham Act. See 15 U.S.C. § 1125(a)(1)(B) (2006).

As courts and commentators have noted, trade libel differs from defamation in some important ways: the requirement of proof of damages and the fault required on the part of the defendant, to take just two.<sup>149</sup> But, at least in some cases, there is less difference in the nature of the interest at stake. Although courts have distinguished trade libel actions from defamation actions on the grounds that the latter redress harm to reputation while the former provide recompense for economic loss suffered due to lost sales,<sup>150</sup> or on the grounds that defamation claims concern the plaintiff while trade libel claims concern the plaintiff's business,<sup>151</sup> such distinctions may not often easily be made in practice. Thus, in 2004, in *Patel v. Soriano*, the Appellate Division of the Superior Court of New Jersey held that false statements made about the plaintiff surgeon constituted trade libel rather than defamation because the statements "pertained solely to the character of the medical services provided by plaintiff and essentially charged plaintiff with negligence"; the statements did not imply that the plaintiff was "personally dishonest, reprehensible, or lacking integrity."<sup>152</sup> But if defamation merely requires that the statement "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him,"<sup>153</sup> then it is difficult to understand why false statements about a surgeon's medical services would not also have such an effect. So too with firms: In both kinds of cases, the firm is alleging economic harm due to a change in attitude from a particular community with which it engages. For defamation claims, the community may be its creditors or suppliers, while for a trade libel claim, the community may be its customers. As one commentator has noted, the effect of one harm may not spill over to

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<sup>149</sup> See, e.g., *Ramada Inns, Inc. v. Dow Jones & Co.*, 543 A.2d 313, 329 (Del. Super. Ct. 1987); *Dairy Stores, Inc. v. Sentinel Publ'g Co.*, 516 A.2d 220, 224–25 (N.J. 1986); RESTATEMENT (SECOND) OF TORTS § 626 cmt. b (1977); Fred T. Magaziner, Note, *Corporate Defamation and Product Disparagement: Narrowing the Analogy to Personal Defamation*, 75 COLUM. L. REV. 963, 969 (1975).

<sup>150</sup> *Dairy Stores*, 516 A.2d at 224–25.

<sup>151</sup> See, e.g., *Patel*, 848 A.2d at 835 ("For example, if the statement charges plaintiff with personal misconduct, or imputes to plaintiff reprehensible personal characteristics, it is regarded as libel or slander. If, however, the aspersion reflects only on the quality of plaintiff's product, or on the character of plaintiff's business as such, it is disparagement.") (citation omitted); RESTATEMENT (SECOND) OF TORTS § 623A cmt. g (1977) (distinguishing between defamation and injurious falsehood on the grounds that, *inter alia*, the former concerns personal reputation and the latter concerns economic interests).

<sup>152</sup> *Patel*, 848 A.2d at 836; see also RESTATEMENT (SECOND) OF TORTS § 626 cmt. d (1977) (distinguishing statements about "the quality of the thing in question" from statements that "attack the personal character of its owner as vendor or lessor").

<sup>153</sup> RESTATEMENT (SECOND) OF TORTS § 559 (1977).

the other community, such that a false allegation that a company is in debt may not cause consumers to stop buying its products.<sup>154</sup> But in other cases, the line may not be so clear.<sup>155</sup> An allegation about the nature of a firm's products, the core of a trade libel claim, may well call into question the company's reputation for quality or service and thus may not be all that distinguishable from a defamation claim, particularly since defamation doctrine has historically provided that false statements regarding the plaintiff's business conduct can constitute slander per se.<sup>156</sup> Moreover, as various consumer boycotts have demonstrated, the line between criticism of a corporation and a diminution in product sales may well be connected.

Thus, while the requirement of proof of economic harm may functionally distinguish the tort of trade libel from the tort of defamation, it does not fundamentally change the nature of the reputational interest. A loss of customers is, in many cases, directly related to the change in perception that those customers have about the plaintiff. More particularly, the damages requirement focuses attention on the reputational harm, as opposed to any emotional harm that an individual plaintiff or its employees might have suffered due to the false statements at issue. As with trademark infringement suits, the subject of the next section, the pecuniary harm asserted in a trade libel suit reflects the reliance by consumers on what turns out to be a false statement relating to the plaintiff's reputation. In many instances, then, the tort is concerned with accurate information flow to communities that are in a position to make a

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<sup>154</sup> Magaziner, *supra* note 149, at 970. Magaziner suggests that the ability of companies to market products under brand names that bear no resemblance to their corporate names (such as when the Kimberly-Clark Corporation sells disposable diapers under the brand name "Huggies") helps to segregate product disparagement claims from corporate defamation claims. *Id.* But this could well have precisely the opposite effect: if consumers tend to think of the trademark as the company (in other words, that "Huggies" are made by "whichever company makes Huggies"), then there may be no real difference in consumers' minds between a statement that disparages the product and a statement that disparages the company. *Cf.* Lynn M. LoPucki, *Toward a Trademark-Based Liability System*, 49 UCLA L. REV. 1099, 1099 (2002) (arguing that because consumers associate franchisees with their trademarks, trademark holders should bear liability for malfeasance).

<sup>155</sup> *See* Magaziner, *supra* note 149, at 970–72 (discussing cases in which courts distinguished disparagement of a product from defamation of a firm and cases in which courts made no distinction).

<sup>156</sup> *But see id.* at 981 (suggesting that the rules of per se actionability "served as a protective device against psychic suffering, and were justified only to the extent they served that function").

collective judgment about the plaintiff and then take action based on that judgment.<sup>157</sup>

### B. *Trademark and Unfair Competition*

Trademark law's reputational interests are bound up in the nature of the trademark. A trademark works as a symbolic handshake: it substitutes for the personal guarantee previously available in face-to-face, closed network transactions. Whereas in earlier market-based transactions the consumer could simply deal with the producer of the product or service directly and learn of that producer's reputation for quality via in-person word of mouth, the fact that most transactions take place at some temporal and geographical distance from the place of manufacture now means that the individual producer (often now a conglomerate) typically does not sell directly to its customers.<sup>158</sup> The trademark is the symbol that embodies that reputation: it serves as a repository for the relevant consuming public's beliefs about and reactions to the producer's products and activities.

The traditional explanation of a trademark's function is that it is a source identifier—that is, it tells consumers who is responsible for the quality, if not the direct manufacture, of the product at issue.<sup>159</sup> Trademarks are, as I have discussed elsewhere,<sup>160</sup> akin to proper names in this sense, in that they denote a particular brand in the same way that proper names denote a particular individual. As such, trademarks reduce the costs of finding products or services with which consumers have had a favorable experience; locating those products or services with which they have no experience but that they would like to try; and avoiding those products or services with which they wish no engagement. Although all of these functions could be viewed as reputation related, only some of these functions relate to the collective judgment of a relevant community about the brand or producer. For example, imagine a soft drink named "Blaze" that has recently come on the market. A consumer who was served a Blaze soda at a party, enjoyed it, and now wishes to purchase additional cans of the soft drink is not using the Blaze trademark as a shorthand for reputation; she is using it simply as

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<sup>157</sup> Gillette, *supra* note 32, at 1194–95 (noting that business defamation law "serves the social function of ensuring robust economic markets through competition based on price and quality rather than on denigration of a trader's conduct" and thereby "create[s] incentives for the creation of accurate reputation").

<sup>158</sup> See Bone, *supra* note 49, at 575–77.

<sup>159</sup> See Lemley & McKenna, *supra* note 50, at 415.

<sup>160</sup> See generally Heymann, *supra* note 37.

a way of ensuring that the cans she retrieves from the shelf at the supermarket contain Blaze and not Coca-Cola. Her favorable response to the drink at the party is the motivating factor for her purchase, not what she might have heard about the drink or its producer from advertisements, media sources, or other consumers. By contrast, a consumer who is in the market for a new car may be inclined toward a Volvo because of its reported reputation for safety, a reputation that accumulated as the result of information exchanged about the brand by others, using the trademark as a repository for judgments about the brand. Thus, in contrast to the Volvo purchaser, although the Blaze soda purchaser may well contribute to the reputation associated with the Blaze trademark in the future, her initial purchase reflects a use of the trademark merely as a source identifier and not as a repository for reputation. Reputation, in other words, often reflects information that the consumer has not been able to assess based on her past experience with the product or service. A consumer may decide to shop for the first time at a particular organic supermarket because she has heard of its reputation for high-quality produce and for commendable philanthropic efforts. If she continues to shop there, she may no longer be relying on reputational signals as to the produce, as she can now determine that quality for herself,<sup>161</sup> but she may still rely on reputation as to the philanthropy, which is more difficult for her to assess.

Trademarks often do, of course, function as a repository for reputation, a function that is reflected in the rules regarding the licensing or assignment of marks. Trademark doctrine attempts to ensure that a trademark continues to have the same associations to consumers after a transfer as before by requiring that the trademark licensor monitor the quality of the goods produced by the licensee or else risk a finding that the trademark has been abandoned; likewise, it requires that alienation of the mark must also entail the transfer of goodwill.<sup>162</sup> In both cases, the license or purchase is presumably motivated by a desire to reap the benefits of lower start-up costs associated with using a trademark with which the public is already familiar rather than having to enter the marketplace under a new name and thus incur the investment of time and resources to acquire name recognition. The requirements of monitoring and goodwill transfer are concerned with consumers' ability to rely on the trademark both as a way of limiting search costs, such that

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<sup>161</sup> Of course, the reputational signal as to the produce may still be valuable if the consumer has a bad initial experience but decides to continue patronizing the store—in other words, if she believes that her experience was an anomaly.

<sup>162</sup> Landes & Posner, *supra* note 55, at 283–84.

the McDonald's experience in West Bend is about the same as the McDonald's experience in Phoenix,<sup>163</sup> and as a repository for reputation. (Such a rule is not needed to protect the economic interests of the trademark owner, who presumably can address the risk that the franchisee will perform suboptimally in the franchise agreement.) If trademarks were solely about source identification, it would cause few problems if a trademark were transferred to a new owner, with or without goodwill, so long as that transfer were accompanied by sufficient efforts at consumer education to mitigate any confusion as to the new producer. Indeed, restaurants and other retail outlets do this fairly frequently when they advertise that they are "under new management" while retaining the same name of the business.

Because of this dual function of trademarks, trademark law's bases for liability do not always reflect reputational concerns. The historical view of trademark law was that infringement concerned only the diversion of sales from the plaintiff to the defendant; in other words, the plaintiff contended that the defendant's use of the plaintiff's trademark on identical goods caused the consumer to purchase from the defendant rather than from the plaintiff.<sup>164</sup> This diversion may have resulted in an economic loss to the plaintiff, but that harm can be characterized as reputational only in some circumstances. If the consumer purchases the defendant's product believing it to be the plaintiff's and then realizes that she has been duped, she may not attribute her misfortune to the plaintiff. In this regard, the harm is akin to the loss of sales a business might suffer from any sort of unlawful diversionary tactic employed by a competitor, such as a tortious interference with contract. On the other hand, if the consumer, having been duped into purchasing a good of lesser quality sold under the plaintiff's trademark, holds her dissatisfaction against the plaintiff, believing it to have changed the quality of its product without notice, this may well constitute a reputational harm if the consumer conveys her feelings to others, leading them also to forego future purchases of the product.<sup>165</sup>

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<sup>163</sup> See Lemley & McKenna, *supra* note 50, at 434.

<sup>164</sup> See McKenna, *supra* note 5, at 1840–41. The case often cited to illustrate this early doctrine is *Borden Ice Cream Co. v. Borden's Condensed Milk Co.*, in which the court held that the defendant's use of the Borden mark for ice cream did not infringe the plaintiff's Borden mark for milk, given that the plaintiff did not sell ice cream under the Borden mark and so suffered no diversion of sales. 201 F. 510, 515 (7th Cir. 1912).

<sup>165</sup> The trademark holder might argue that it has suffered a reputation-related harm merely because of the use of the reputational value of its mark without payment for the use. But if this theory sufficed to show reputational harm, it would be difficult to distinguish this use of the reputation associated with a trademark from other types of free-riding that are

The relatively modern move to extending trademark infringement beyond diversion of sales—both to unrelated goods bearing the same or a similar mark as the plaintiff's and to uses that are likely to confuse consumers as to sponsorship by or association with the trademark holder<sup>166</sup>—provides additional venues for reputation-related injury. For example, in one of the first cases to extend infringement doctrine to unrelated goods, *Aunt Jemima Mills Co. v. Rigney & Co.*,<sup>167</sup> decided by the U.S. Court of Appeals for the Second Circuit in 1917, the plaintiff, who at the time used the “Aunt Jemima” trademark for self-rising flour, brought suit against the defendants, who used the same mark for syrups and “sugar creams.” The plaintiff could not prevail on the grounds that the defendants’ use of the mark to sell syrup diverted sales from the plaintiff that it would otherwise have made, because the plaintiff did not sell syrup. Rather, the plaintiff prevailed on the assumption that consumers might purchase the defendants’ product on the strength of the “Aunt Jemima” name, be disappointed with the result, and reconsider its loyalty to products sold under the “Aunt Jemima” brand.<sup>168</sup>

Here, too, it would seem as if the plaintiff's harm could be characterized as truly reputation-related only if the hypothetical consumer's experience was part of a collective judgment about the quality of Aunt Jemima products. In other words, a consumer who was unhappy with her purchase of the defendants' syrup and who believed it to have been manufactured by the plaintiff has no way of knowing if her experience is

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widely viewed as permissible. For example, under such a theory, it would be trademark infringement to lease the building next door to a well-known merchant in the hopes of picking up some of the merchant's foot traffic. Similarly, if free-riding were the limit of the harm, a trademark owner would be satisfied with monetary compensation and not seek an injunction, the harm being only the use of the plaintiff's property without paying.

<sup>166</sup> See, e.g., 15 U.S.C. § 1125(a)(1)(A) (2006) (providing a cause of action for uses that are likely to “cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of [the plaintiff] with another person, or as to the origin, sponsorship, or approval of his or her goods, services or commercial activities by another person”).

<sup>167</sup> 247 F. 407 (2d Cir. 1917).

<sup>168</sup> *Id.* at 410. Some recent marketing studies have suggested that the harm at the center of this theory is more theoretical than real, concluding that failed brand extensions do not tend to drastically change consumers' impressions of the parent brand. See Lemley & McKenna, *supra* note 50, at 430–33 (citing studies). But see Luis M.B. Cabral, *Stretching Firm and Brand Reputation*, 31 RAND J. ECON. 658, 658–59 (2000) (suggesting that that success of brand extensions depends on the level of firm reputation); Birger Wernerfelt, *Umbrella Branding as a Signal of New Product Quality: An Example of Signalling by Posting a Bond*, 19 RAND J. ECON. 458, 458–59 (1988) (suggesting an effect on perceptions of the old product when the new product is of poor quality). And even if consumers continue to purchase Pepsi cola, for example, after a failed experiment with Pepsi perfume, their sense of Pepsi as a well-run corporation may change, which is a type of reputational harm. See Wernerfelt, *supra*, at 458–59.

simply an anomaly or is representative of a decline in the plaintiff's quality control (and thus reflective of a change in the plaintiff's reputation in the marketplace) until she learns of others' experiences.<sup>169</sup> But the court did not explicitly note the social nature of the reputational harm, characterizing it instead as an issue of impersonation, control, and free-riding: "In this way," the court noted, "the complainant's reputation [was] put in the hands of the defendants" such that the defendants were able "to get the benefit of the complainant's reputation and advertisement."<sup>170</sup> Some years later, Judge Learned Hand of the Second Circuit spoke of a trademark in similar terms, writing in *Yale Electric Corp. v. Robertson* in 1928 that a merchant's trademark

is his authentic seal; by it he vouches for the goods which bear it; it carries his name for good or ill. If another uses it, he borrows the owner's reputation, whose quality no longer lies within his own control. This is an injury, even though the borrower does not tarnish it, or divert any sales by its use; for a reputation, like a face, is the symbol of its possessor and creator, and another can use it only as a mask.<sup>171</sup>

Although Judge Hand's description implies the necessity of an audience—a mask is useful only if it is shown to others—it, too, does not fully describe the social nature of reputation, characterizing trademark law's interest in reputation largely as the act of misappropriation rather than as a change in consumer reaction.<sup>172</sup>

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<sup>169</sup> *Cf.*, e.g., *Virgin Enters. Ltd. v. Nawab*, 335 F.3d 141, 152 (2d Cir. 2003) (noting that consideration of the quality of the defendant's goods as one factor in a likelihood of confusion analysis "goes more to the harm that confusion can cause the plaintiff's mark and reputation than to the likelihood of confusion"); Bone, *supra* note 49, at 594 ("Confusion of this sort can harm the consumer if his experience with plaintiff's flour leads him to expect high quality, and defendant's syrup does not measure up. It can also harm the seller by impairing its ability to communicate quality information to consumers and build a favorable reputation.").

<sup>170</sup> *Aunt Jemima*, 247 F. at 410. The court analogized the defendants' misdeed to a misappropriation of authorship, suggesting that the same result would obtain if "one were to publish a book on banking under the name of a firm of bankers," even if "the book was a good book." *Id.* (noting that the hypothetical bankers would be entitled to an injunction under these facts).

<sup>171</sup> *Yale Electric Corp. v. Robertson*, 26 F.2d 972, 974 (2d Cir. 1928); see also Bone, *supra* note 49, at 595 (noting that Judge Hand's language reflects, to some degree, a personhood theory, in that it equates corporate reputation with personal identity).

<sup>172</sup> One modern court has characterized Judge Hand's language as "the classic description of harm" in a trademark infringement case. *Gen. Cigar Co. v. G.D.M. Inc.*, 988 F. Supp. 647, 665 (S.D.N.Y. 1997).

The same definitional concern arises when a plaintiff uses federal trademark or unfair competition law to challenge uses of its mark that imply sponsorship or authorization of the defendant's activities.<sup>173</sup> For example, the owner of the Insinkerator brand of garbage disposals brought suit against NBC based on a scene in the television show *Heroes* in which a character mangled her hand by inserting it into a sink's disposal unit; the Insinkerator trademark was apparently briefly visible during the scene.<sup>174</sup> The complaint alleged that the depiction of the garbage disposal in the scene caused damage to the plaintiff's reputation and goodwill because it implied that the disposal would cause "debilitating and severe injuries, including the loss of fingers, in the event consumers were to accidentally insert their hand in one" and was likely to cause consumers to think that the plaintiff was associated with such a use.<sup>175</sup> Likewise, a celebrity may use trademark law or unfair competition law to challenge a use of her name in marketing or advertising that falsely suggests that the celebrity has endorsed the advertised product or service, on the grounds that celebrities "possess an economic interest in their identities akin to that of a traditional trademark holder."<sup>176</sup> In these cases, as with the cases discussed earlier, the plaintiff may be attempting to vindicate an autonomy-related harm: the use of a trademark in a way that the plaintiff cannot control. But to be a true reputational injury, as opposed to simply a dignity-based harm, that use must change the way that the relevant community views or judges the plain-

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<sup>173</sup> See, e.g., *Gilliam v. Am. Broad. Cos., Inc.*, 538 F.2d 14, 24–25 (2d Cir. 1976) (reviewing a suit alleging that a television network's editing of plaintiffs' comedy program misrepresented that plaintiffs were the source of the resulting broadcast); *Caterpillar Inc. v. Walt Disney Co.*, 287 F. Supp. 2d 913, 915 (C.D. Ill. 2003) (reviewing a suit targeting the use of Caterpillar tractors by villains in children's film as suggesting sponsorship or endorsement); Lemley & McKenna, *supra* note 50, at 417 (describing the cases).

<sup>174</sup> First Amended Complaint and Jury Demand at 10, *Emerson Elec. Co. v. NBC Universal, Inc.*, No. 4:06-cv-01454-TCM (E.D. Mo. Oct. 13, 2006), available at [http://www.deanesmay.com/files/Emerson\\_Lawsuit\\_likelihoodofconfusion.com.pdf](http://www.deanesmay.com/files/Emerson_Lawsuit_likelihoodofconfusion.com.pdf). The plaintiff also asserted claims for federal unfair competition, federal and state trademark dilution, trade libel, defamation, and tortious interference with business relations. *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Parks v. LaFace Records*, 329 F.3d 437, 445 (6th Cir. 2003); see also *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1110 (9th Cir. 1992).

A false endorsement claim based on the unauthorized use of a celebrity's identity is a type of false association claim, for it alleges the misuse of a trademark, i.e., a symbol or device such as a visual likeness, vocal imitation, or other uniquely distinguishing characteristic, which is likely to confuse consumers as to the plaintiff's sponsorship or approval of the product.

*Waits*, 978 F.2d at 1110.

tiff that leads to some change in the ongoing relationship between the plaintiff and that community.<sup>177</sup> It was not at all self-evident, for example, that viewers would think any differently about the manufacturer of Insinkerator disposals after seeing the *Heroes* scene, even if they believed the manufacturer to have paid for or otherwise authorized the depiction.<sup>178</sup>

Even after consideration of the facts at hand, courts in trademark and unfair competition cases are not always clear about whether a reputational effect has occurred. In *Waits v. Frito-Lay*, a 1992 opinion from the U.S. Court of Appeals for the Ninth Circuit, reputational harm seems to have been the plaintiff's motivation for bringing suit, but the court curiously did not focus its attention on this injury.<sup>179</sup> The singer Tom Waits, who has a particularly distinctive voice, took a public stand against commercial endorsements of any kind, believing that they compromised his artistic integrity.<sup>180</sup> Frito-Lay wanted to hire Waits for a radio commercial for a new brand of Doritos chips, but Waits refused, leading Frito-Lay to hire someone who sounded like Waits to record the commercial instead.<sup>181</sup> Waits brought suit under section 43(a) of the Lanham Act, alleging that the sound of his voice was particularly distinctive and that the defendant's use of a similar voice would thereby confuse consumers into thinking that Waits had recorded the commercial and was thereby endorsing the chips.<sup>182</sup> Waits had also asserted a

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<sup>177</sup> One might also characterize this argument as requiring a change that consumers find material to their purchasing decisions. See generally Lemley & McKenna, *supra* note 50.

<sup>178</sup> Cf. *id.* at 427 (proposing to eliminate "sponsorship or affiliation" confusion and to reframe the trademark infringement question as dealing with issues of quality of goods or services, leaving other claims to false advertising law or equivalents).

<sup>179</sup> See 978 F.2d at 1096.

<sup>180</sup> *Id.* at 1097.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 1098. As the court noted, Waits's policy against commercial endorsement had been widely communicated: "[I]n magazine, radio, and newspaper interviews he has expressed his philosophy that musical artists should not do commercials because it detracts from their artistic integrity." *Id.* at 1097. The case thus differs from *Oliveira v. Frito-Lay, Inc.*, in which the court rejected the plaintiff's trademark claim based on the use of her "signature song" as background music in a television commercial, in that the Waits radio advertisement featured the Waits-sounding voice extolling the virtues of the new Doritos chip. See 251 F.3d 56, 60 (2d Cir. 2001). Hence, the likelihood that consumers would believe that Waits was endorsing the product was much greater than for the *Oliveira* commercial. Cf. *Sinatra v. Goodyear Tire & Rubber Co.*, 435 F.2d 711, 718 (9th Cir. 1970) (affirming the dismissal of an unfair competition complaint targeting commercial use of the song for which plaintiff had become famous); *Henley v. DeVore*, 733 F. Supp. 2d 1144, 1152-56 (C.D. Cal. 2010) (distinguishing cases). Not every court has concluded that unauthorized endorsements tend to result in reputational harm. See *Booth v. Colgate-Palmolive Co.*, 362 F. Supp. 343, 349 (S.D.N.Y. 1973) ("A star performer's endorsement of a commercial

cause of action for misappropriation of his voice under California law, for which the jury awarded him \$100,000 for the fair market value of his services; \$200,000 for injury to his “peace, happiness, and feelings”; and \$75,000 for injury to goodwill.<sup>183</sup> The court, citing right of publicity cases, rejected Frito-Lay’s argument that only compensation for economic injury was available in a misappropriation case; it noted in particular that the reputational damages were based on “the public impression that Waits was a hypocrite for endorsing Doritos.”<sup>184</sup> Strangely, however, although the court affirmed the jury’s \$100,000 verdict on Waits’s Lanham Act claim,<sup>185</sup> finding there to be sufficient evidence of consumer confusion regarding Waits’s endorsement of Doritos, it held that the award was duplicative of the damages representing the fair market value of Waits’s services, not the damages representing the harm to Waits’s reputation.<sup>186</sup> This interpretation suggests that the court viewed Waits’s Lanham Act claim not in reputational terms but in property terms, such that Waits could be made whole on the claim by the payment of what amounted to a licensing fee.

A similar inattention to the nature of the reputational harm occurred in the 2003 case of *Parks v. LaFace Records*,<sup>187</sup> decided by the U.S. Court of Appeals for the Sixth Circuit, in which the civil rights icon Rosa Parks alleged that the use of her name as the title of a song by the rap duo OutKast violated her Lanham Act rights. While noting that the prima facie case under section 43(a) requires consumer confusion as to sponsorship or approval, the court failed to determine whether such confusion existed, focusing entirely on the defendants’ claim that their First Amendment rights allowed them to use Ms. Parks’s name as the title of a song that included the lyrics “move to the back of the bus.”<sup>188</sup>

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product is a common occurrence and does not indicate either a diminution of professional reputation nor a loss of professional talent, though plaintiff herself might prefer to avoid such engagements.”) (rejecting a defamation cause of action).

<sup>183</sup> *Waits*, 978 F.2d at 1103.

<sup>184</sup> *Id.* at 1104.

<sup>185</sup> *Id.* at 1111.

<sup>186</sup> *Id.* To be fair, it is unlikely that the court paid much attention to the distinction; the trial court had apparently instructed the jury that it could award damages on the Lanham Act claim for the fair market value of Waits’s services, and Waits did not challenge the defendant’s argument as to the duplicative nature of the damages on appeal. *See id.*

<sup>187</sup> 329 F.3d 437, 441 (6th Cir. 2003).

<sup>188</sup> *Id.* at 446 (noting that Parks had submitted affidavits from consumers stating “that they either believed Defendants’ song was about Parks or was connected to the *Tribute* album authorized by her”). Only the latter belief was relevant, if at all, to Parks’s Lanham Act claim. Indeed, the district court had concluded that there was no likelihood of confusion; despite this, the appellate court remanded, advising that if the defendants’ First Amendment defense failed, judgment should be entered for Parks. *See id.* at 444, 459.

This lack of rigor suggests that the mere association of the celebrity's name with a product or service is enough to lead to reputational injury, similar to Judge Hand's concern about unauthorized borrowing of the plaintiff's "face." But more must be shown if reputation is at issue: The consumer must think that the celebrity has, in fact, endorsed the product, and such endorsement must cause consumers to judge the celebrity differently, whether due to the nature of the endorsement itself or because the community's experience with the product or service at issue causes the community to penalize the celebrity for having "recommended" the product.<sup>189</sup>

Although reputation-based harm is often at the heart of a typical trademark infringement claim, not every judicial extension of such claims involves reputational interests to the same extent. The doctrine of post-sale confusion, while open to criticism on other grounds, does tend to involve reputational concerns. In a post-sale confusion case, the consumer knows with whom she is dealing at all times, but the similarity between the defendant's mark and the plaintiff's mark (often in the form of trade dress) may confuse third parties after the sale has been transacted. For example, in the 1991 case *Ferrari S.P.A. Esercizio v. Roberts*, decided by the U.S. Court of Appeals for the Sixth Circuit, the defendant sold one-piece shells modeled to look like the body of an expensive sports car that could be bolted onto the chassis of a less expensive car.<sup>190</sup> The consumer who purchased the defendant's product was well aware of its provenance; he knew that the car in which he was subsequently driving around town was not a Ferrari.<sup>191</sup> Nevertheless, the court held, the defendant was liable for trademark infringement because third parties who saw the consumer's car might be con-

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<sup>189</sup> In *Henley v. Devore*, the recording artist Don Henley brought suit, including a Lanham Act claim, against a Republican candidate for one of California's U.S. senate seats and a member of his staff who posted two videos on YouTube making fun of Democratic politicians; the videos set humorous words to the music of two of Henley's songs. In granting summary judgment to the defendants on the Lanham Act claim, the court held that there was no reasonable likelihood of confusion given the "less-than-angelic" voice of the staff member singing on the video. *Henley*, 733 F. Supp. 2d at 1168. The court was not persuaded by a survey indicating that forty-eight percent of the respondents thought that Henley either endorsed the video or authorized the use of his music in the video, holding that the relevant question under *Waits* was whether consumers would think that Henley actually performed the songs in the videos. *Id.* This conclusion gives short shrift to the reputational harm at issue. In the context of a political campaign, in which endorsements are a frequent occurrence, the question of whether viewers of the video believed that Henley endorsed the campaign's efforts to criticize members of the opposing party should probably not have been resolved on summary judgment.

<sup>190</sup> 944 F.2d 1235, 1237-38 (6th Cir. 1991).

<sup>191</sup> *Id.* at 1244.

fused into thinking that that the underperforming car was, indeed, a Ferrari.<sup>192</sup> Thus, in a post-sale confusion case, the consumer has purchased precisely the product she wants to purchase; the only confused consumer is one who has not yet sought to purchase the plaintiff's product (although such a consumer may now be dissuaded from doing so). Assuming the validity of the assumption underlying the doctrine—that the observer both attributes the product's faults to the mark owner and thereby changes her opinion of the brand—post-sale confusion involves a fairly strong reputational interest. The doctrine assumes some type of shared perception among the community as to the nature of the plaintiff's goods that in some cases may be reputational. If the post-sale confusion emanates from an act of impersonation relating to the markholder's characteristics, actions, or qualities ("I guess Ferraris aren't that well made after all—that one just lost its muffler"), the doctrine more strongly reflects reputational concerns. If, by contrast, the confusion reflects a change in status of the mark ("Ferraris must not be that special—everyone seems to have one now"), the harm is less connected to reputation and more related to status.<sup>193</sup>

By contrast, the doctrine of initial interest confusion involves far less robust reputational concerns. In an initial interest confusion case, the consumer is initially confused by the defendant's use of the plaintiff's mark into thinking that the defendant and the plaintiff are related, but this confusion is dispelled before any sale occurs, such that the consumer ultimately knows with whom she is dealing at the time of sale. For example, in the 1987 case *Mobil Oil Corp. v. Pegasus Petroleum Corp.*, the Second Circuit held that the defendant's use of the name "Pegasus Petroleum," when the plaintiff's mark consisted of a flying horse, constituted infringement even though the defendant's customers were often sophisticated purchasers.<sup>194</sup> The harm was not, the court noted, "that a third party would do business with Pegasus Petroleum

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<sup>192</sup> *Id.* at 1244–45.

<sup>193</sup> See Washington & Zajac, *supra* note 69, at 284 ("[T]he Jaguar automobile has long suffered from a reputation for poor quality, while at the same time benefiting from the privilege of high social status. In the last decade, the Jaguar's reputation has improved, owing to increases in perceived and actual quality, while its status has remained unchanged . . ."); cf. Beebe, *supra* note 73, at 851–52 (describing that post-sale confusion, "even in the minds of those who would never purchase Gucci shoes, is actionable, if only because the brand's reputation for exclusiveness is damaged"). Although the community, by definition here, comprises those who have not yet purchased the product, this is not, in itself, problematic, given that trademark infringement requires proof only of a likelihood of confusion, not of actual confusion among past consumers.

<sup>194</sup> 818 F.2d 254, 260 (2d Cir. 1987).

believing it related to Mobil,” but rather that “Pegasus Petroleum would gain crucial credibility during the initial phases of a deal,” such as a cold phone call.<sup>195</sup> Thus, in an initial interest confusion case, the consumer has either purchased the product knowing that it is produced by the defendant or declined to purchase the product at all; her harm lies only in the time expended, if any, rerouting herself to find the trademark holder’s product.<sup>196</sup> The reputational interest in such cases is therefore fairly weak. The injury is more akin to an emotional harm on the part of consumers—frustration resulting from the time spent in searching for the plaintiff’s product—than a true reputation-related harm on the part of the trademark holder.<sup>197</sup>

The reputational claim is more difficult to make when the argument is that the defendant’s actions have *denied* the plaintiff the ability to maintain its reputation by failing to attribute a good or service to the plaintiff—the gravamen of a reverse passing-off claim. In the 2003 U.S. Supreme Court case *Dastar Corp. v. Twentieth Century Fox Film Corp.*, the production company Twentieth Century Fox brought suit against Dastar, a seller of CDs and videos, claiming that Dastar had repackaged and slightly reedited a video on World War II to which Fox had once owned the copyright.<sup>198</sup> (The work had passed into the public domain when its copyright was not renewed, as was then required under federal copyright law.<sup>199</sup>) Fox’s claim was brought under section 43(a) of the Lanham Act as a reverse passing-off claim, in which Fox contended that Dastar was passing off Fox’s material as its own.<sup>200</sup> In rejecting Fox’s claim by holding that the work’s public domain status allowed Dastar to make whatever use of the work it wished, the court also implicitly rejected the attempt to use trademark law to vindicate this type of reputa-

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<sup>195</sup> *Id.* at 259.

<sup>196</sup> Whether this is a significant burden depends on the circumstances of the search. A search involving a physical trip to a brick-and-mortar store, for example, may involve more resources than an Internet search.

<sup>197</sup> It is possible that consumers may attribute their frustration to the mark holder, causing a risk of reputational injury despite the lack of confusion at the point of sale. For example, a consumer who sees a sign on a highway indicating that a well-known restaurant is located at the next exit but discovers only the competitor after exiting may be frustrated with the mark holder if she believes that the mark holder was once located at that exit but neglected to take down its sign.

<sup>198</sup> 539 U.S. 23, 27–28 (2003).

<sup>199</sup> *Id.* at 34.

<sup>200</sup> *Id.* at 27. The real motivation for Fox’s suit may well have been an attempt to capture via trademark law what it could no longer capture via copyright—control over the work outright—but for this analysis, I take the claim on its face.

tional interest.<sup>201</sup> The Court first held, interpreting the term “origin” in section 43(a), that the source-identifying function of a trademark under the Lanham Act applied only to the source of the physical goods that served as the vehicle for a communicative work, not to the source of the communicative work itself.<sup>202</sup> It then held that even if the latter source was of interest to consumers, requiring correct identification of that source would both be unduly difficult and present a conflict with copyright law, which gives the public “[t]he right to copy, and to copy without attribution, once a copyright has expired.”<sup>203</sup>

This blurring of the interest at the heart of copyright law—the use of the work—and the interest at the heart of trademark law—the identification of the source of the product—led the Court to discount the importance to audiences of having accurate information on which to base reputational assessments, in part because the plaintiff’s lost opportunity to bolster its reputation is not as compelling a harm as injury to an existing reputation.<sup>204</sup> Nevertheless, it is at least debatable whether consumers of communicative products share with consumers of more tangible goods an interest in forming judgments about the sources of communicative products and, thus, whether a space can be made for trademark-related concepts even in realms largely governed by copyright law. Indeed, the style and signature of a visual artist, for example, have been recognized by both courts and commentators as having a source-identifying function, such that the attempt to pass off an original work as the creation of the artist should raise legitimate trademark-based concerns.<sup>205</sup>

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<sup>201</sup> *Id.* at 34–35.

<sup>202</sup> *Id.* at 31–33.

<sup>203</sup> *Id.* at 33–35.

<sup>204</sup> See *Dastar*, 539 U.S. at 34–35.

<sup>205</sup> See, e.g., WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 259 (2003) (suggesting that because the value of art is tied to the artist’s identity, “confusingly similar copies of original works, unless they carry a clear disclaimer of authenticity, violate the original artist’s trademark in his instantly recognizable style”); Lang & Lang, *supra* note 63, at 105 (noting that “the name attached to a work of art functions much like a brand label”); Geoffrey Scarre, *On Caring About One’s Posthumous Reputation*, 38 AM. PHIL. Q. 209, 209–10 (2001) (discussing the importance of reputation after death). Thus, as broad as *Dastar*’s language is, it should not be read to suggest that the use of the Lanham Act for traditional false endorsement claims (as opposed to a reverse passing-off claim) has now been completely foreclosed in the creative arena. See Laura A. Heymann, *The Trademark/Copyright Divide*, 60 SMU L. REV. 55, 58–59 (2007); see also Beebe, *supra* note 73, at 887 (contending that the *Dastar* Court “missed the opportunity to establish a principle of crucial importance to the attribution system that underlies the commons-based model of innovation: that the exclusive right to claim attri-

Finally, anti-dilution law, which purports to vindicate reputational interests, is in fact the trademark doctrine least apt to do so. Under federal law, an owner of a famous and distinctive trademark may seek an injunction against a use of the mark that is “likely to cause dilution by blurring or dilution by tarnishment” of the famous mark.<sup>206</sup> In the prototypical dilution case, the customer is not confused about the relationship between the parties; she knows that there is none and is not deterred from acquiring the goods or services that she desires. Nevertheless, the plaintiff alleges in such a case that the association of the defendant with the plaintiff due to the use of the same or a similar trademark will cause a reputational harm to the plaintiff, much as the use of the name of a real individual in a work of fiction may cause readers to think of the individual differently despite readers’ unequivocal knowledge that they are reading a work of fiction.<sup>207</sup>

To the extent that anti-dilution law is intended to address the reputation of the mark—whether for linguistic exclusivity or for quality—its function does not map well onto reputational harms. First, as with defamation law, anti-dilution law is underinclusive. The federal statute excludes from its scope various categories of uses that are likely to have a similar effect on the plaintiff’s mark as uses by commercial speakers, such as fair use (including comparative advertising and parody), news reporting and news commentary, and noncommercial uses of a mark.<sup>208</sup> In addition, the federal statute preempts state law or common law dilution claims against the holder of a federally registered mark

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bution does not necessarily carry with it the exclusive right to control the uses of the good to which that attribution is affixed”). See generally Heymann, *supra* note 37.

<sup>206</sup> 15 U.S.C. § 1125(c)(1) (2006). The mark owner can also seek damages and destruction of goods if the defendant’s use of the plaintiff’s mark first occurred after the date of enactment of the Trademark Dilution Revision Act of 2006 (Oct. 6, 2006) and if the defendant “willfully intended to trade on the recognition of the famous mark” in a dilution by blurring action or “willfully intended to harm the reputation of the famous mark” in a dilution by tarnishment action. *Id.* at § 1125(c)(5)(B).

<sup>207</sup> Cf. Rodney A. Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1, 87–88 (1983) (“As long as the ordinary reasonable reader is not led into believing that what is packaged as fiction is meant to be taken as fact, conventional first amendment and common law doctrine should make the work nonactionable.”) (analyzing “libel by fiction” claims).

<sup>208</sup> 15 U.S.C. § 1125(c)(3); see also Laura A. Heymann, *Metabranding and Intermediation: A Response to Professor Fleischer*, 12 HARV. NEGOT. L. REV. 201, 221–22 (2007) (noting the reputational effect of media reports); Rebecca Tushnet, *Gone in Sixty Milliseconds: Trademark Law and Cognitive Science*, 86 TEX. L. REV. 507, 540 (2008) (“There is nothing (as yet) that Coca-Cola can do to erase my memory of the time I spilled a Diet Coke into my keyboard.”).

with respect to the use of that mark.<sup>209</sup> In each of these ways, anti-dilution law excludes from its reach, largely on First Amendment-related grounds, activities that may have the same effect on the plaintiff as the conduct that falls within the scope of the statute.

Anti-dilution law is also, however, overinclusive to the extent that it purports to target reputational harms. Both types of dilution involve a change in consumers' perception of the trademark in question, either that the mark is no longer distinctive<sup>210</sup> or that negative as well as positive associations with the mark are evoked.<sup>211</sup> But neither type of dilution is actually concerned with the *reputation* of the mark, its owner, or the products or services with which it is associated—in other words, with a change in the collective judgment of the relevant community based on beliefs about the mark holder's activity. Rather, dilution actions involve a change in or addition to the *associations* with the word or image that constitutes the mark (or, to use terminology discussed earlier, a change in the perceived status of the mark). For example, it is unlikely that the use of the "R Us" phrase in the name of the website "Guns R Us" will cause consumers to think that the chain of toy stores operating under the name "Toys R Us" is a worse actor or that the toys it sells are now unsafe.<sup>212</sup> Likewise, it is unlikely that the use of the name "Victor's Little Secret" for a sex toys vendor in Kentucky will cause consumers to judge the chain of lingerie stores operating under

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<sup>209</sup> 15 U.S.C. § 1125(c)(6)(A). The language of this section also purports to preempt dilution claims generally against federally registered marks, but this would appear to be a drafting error. *See id.* § 1125(c)(6)(B) (providing that the ownership of a federal registration is a bar to an action that "asserts any claim of actual or likely damage or harm to the distinctiveness or reputation of a mark, label, or form of advertisement"); Stacey L. Dogan & Mark A. Lemley, *The Trademark Use Requirement in Dilution Cases*, 24 SANTA CLARA COMPUTER & HIGH TECH. L.J. 541, 549 n.42 (2008).

<sup>210</sup> 15 U.S.C. § 1125(c)(2)(B) (defining "dilution by blurring" as an "association arising from the similarity between a mark or trade name and a famous mark that impairs the distinctiveness of the famous mark"); *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 507 F.3d 252, 265 (4th Cir. 2007) (noting that "[i]n the context of blurring, distinctiveness refers to the ability of the famous mark uniquely to identify a single source and thus maintain its selling power"). This reputational effect is similar to the reputational effect caused by post-sale confusion, described above, which suggests that courts may be motivated by an anti-dilution rationale in those cases.

<sup>211</sup> 15 U.S.C. § 1125(c)(2)(C) (defining "dilution by tarnishment" as an "association arising from the similarity between a mark or trade name and a famous mark that harms the reputation of the famous mark"); *see also* Beebe, *supra* note 73, at 858 (noting that "[l]atent within the concept of tarnishment, as within these statutory definitions, has always been an extraordinarily capacious notion of harm to the 'reputation' or 'repute' of the trademark").

<sup>212</sup> *See Toys R Us, Inc. v. Feinberg*, 26 F. Supp. 2d 639 (S.D.N.Y. 1998), *vacated on other grounds*, 201 F.3d 432 (2d Cir. 1999).

the name “Victoria’s Secret” any differently.<sup>213</sup> The secondary uses in these cases may evoke different associations or emotions in consumers, such that a mark that formerly aroused feelings of wholesomeness might now evoke contrary feelings or, more broadly, an insensitivity to the drawing power of the brand.<sup>214</sup> But this is a different effect from causing a harm to the *reputation* of the trademark owner, as embodied in the symbol of the mark, particularly given that in an anti-dilution case, the defendant is, by definition, not purporting to speak about or on behalf of the plaintiff at all and so cannot be providing consumers with false information about the plaintiff.<sup>215</sup>

This failure to distinguish between association and reputation may be the reason that courts have not been particularly clear about describing the nature of the reputation-related harm in dilution cases. For example, when the defendant has used the plaintiff’s mark in connection with sexually explicit material, some courts have contrasted the sexually themed nature of the defendant’s activities with the wholesome nature of the plaintiff’s business and then concluded that the defendant’s use of the plaintiff’s mark has had a deleterious effect on the plaintiff’s reputation.<sup>216</sup> In other instances, the court will simply con-

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<sup>213</sup> *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418, 423 (2003). Indeed, the Army colonel who alerted the Victoria’s Secret chain about what was then called the “Victor’s Secret” store focused his judgment solely on the latter; the Court noted that he was “offended by what he perceived to be an attempt to use a reputable company’s trademark to promote the sale of ‘unwholesome, tawdry merchandise.’” *Id.*

<sup>214</sup> Bradford, *supra* note 89 at 1234 (describing the harm caused by blurring as emotionally unsettling the positive feelings consumers have for famous trademarks); *id.* at 1279 (suggesting that “blurring is a subset of the ways in which a mark may be tarnished” by causing consumers “to feel worse about the senior brand” through overexposure or inconsistent associations); Magid et al., *supra* note 40, at 35–37 (proposing an experiment to measure actual dilution through a change in brand image, which comprises differentiation from other brands, relevance of the brand name to consumers, esteem of the brand with respect to other brands in the same category, and knowledge of what the brand name stands for).

<sup>215</sup> *Starbucks Corp. v. Wolfe’s Borough Coffee, Inc.*, 588 F.3d 97, 110 (2d Cir. 2009) (“That a consumer may associate a negative-sounding junior mark with a famous mark says little of whether the consumer views the junior mark as harming the reputation of the famous mark.”).

<sup>216</sup> *V Secret Catalogue, Inc. v. Moseley*, 605 F.3d 382, 385 (6th Cir. 2010) (holding that the TDRA provides for a “rebuttable presumption, or at least a very strong inference, that a new mark used to sell sex-related products is likely to tarnish a famous mark if there is a clear semantic association between the two,” even despite any evidence of tarnishment); *Pfizer Inc. v. Sachs*, 652 F. Supp. 2d 512, 525 (S.D.N.Y. 2009) (concluding that the defendant’s use of the plaintiff’s mark in connection with adult entertainment “would likely harm [plaintiff’s] reputation”); *Kraft Foods Holdings, Inc. v. Helm*, 205 F. Supp. 2d 942, 949–950 (N.D. Ill. 2002) (“The content of Mr. Helm’s website . . . is of an admittedly adult nature. It depicts graphic sexuality and nudity, as well as illustrations of drug use and drug

clude that the defendant's bad activities accrued to the detriment of the plaintiff's reputation, despite the lack of evidence of any relationship between the two parties or their activities.<sup>217</sup> Even allowing for the law's need to limit administrative costs by incorporating assumptions about consumer behavior rather than requiring empirical evidence in all instances,<sup>218</sup> such assumptions do not reflect a concern with reputational effects. To draw an analogy in the personal naming context, the follies of a celebrity or other famous person with a distinctive name may cause anguish to non-celebrities who also happen to bear that name, but we would not say that the celebrity's actions have harmed the reputation of the non-celebrity—they have merely caused salient and distasteful associations with the name.

In sum, trademark law's relationship with reputational concerns is strong but not robust. To the extent it provides a remedy for what amounts to the use of a mark by another entity without regard to the effect of that mark on consumers' perception of the trademark holder—as in the dilution cases and some infringement cases—the doctrine sounds more like a property right or right against misappropriation or free-riding. And to the extent it provides a remedy in instances where consumers have been frustrated in acquiring the goods they want, the doctrine, while consumer focused, does not directly address reputational harms. But where the doctrine is concerned with the effect of the defendant's activity on the relevant market's perception of the plaintiff or its goods, reputational harms are at its core.

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paraphernalia. These images conflict with the image that Kraft has successfully cultivated for more than 79 years as a wholesome, family-oriented product. . . . Mr. Helm's use of 'VelVeeda' corrodes Kraft's mark, because the association of Velveeta® with 'VelVeeda' likely causes the former to lose the reputation and goodwill that it once had.") (issuing a preliminary injunction); *cf.* *Eli Lilly & Co. v. Natural Answers, Inc.*, 233 F.3d 456, 468 (7th Cir. 2000) (interpreting precedent as "strongly urg[ing] courts to think for themselves about what considerations they believe are relevant to dilution").

<sup>217</sup> *See, e.g.*, *Dallas Cowboys Football Club, Ltd. v. Am.'s Team Props.*, 616 F. Supp. 2d 622, 643 (N.D. Tex. 2009) ("Plaintiffs also complain of the inferior quality of Defendant's products and website, which they allege tarnish the Cowboys' trademark. Plaintiffs' evidence shows Defendant in 2006 distributed thousands of 'America's Team' wristbands with the word 'basketball' misspelled. Certainly such shoddy goods can harm 'the reputation of the famous mark.'").

<sup>218</sup> *See* Graeme B. Dinwoodie, *What Linguistics Can Do for Trademark Law*, in *TRADE MARKS AND BRANDS: AN INTERDISCIPLINARY CRITIQUE* 140, 148 (Lionel Bently et al. eds., 2008) (noting that the reasonable consumer in trademark law must be "in large part a legal fiction that implements a vision of the degree of consumer protection regulation that Congress and the courts think appropriate without rendering commerce inefficient").

### C. Copyright

U.S. copyright law focuses largely on an author's economic rights. Unlike the moral rights regime of Continental copyright law, in which the author's interests in attribution and the integrity of the work are directly protected, U.S. copyright law centers on allowing the author control over certain uses of the work in order to incentivize creation of the work in the first place.<sup>219</sup> Nevertheless, authors have used U.S. copyright law to vindicate reputational rights when certain uses or modifications of the author's work are likely to cause audiences to form a particular judgment about the author.<sup>220</sup> Because the author's control over a work protected under U.S. copyright law is fairly broad, copyright owners can use their rights to control uses of their work whether or not such uses implicate the author's economic interests, assuming that such uses cannot be characterized as fair.<sup>221</sup> Indeed, one might consider the fact that U.S. copyright law grants the author control over derivative works<sup>222</sup> to be a powerful tool in this regard, in that an author can prohibit the creation of derivative works by others not only to ensure that he or she has control over the economic benefits that come from such works but also

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<sup>219</sup> See, e.g., *Arnstein v. Porter*, 154 F.2d 464, 473 (2d Cir. 1946) ("The plaintiff's legally protected interest is not, as such, his reputation as a musician but his interest in the potential financial returns from his compositions which derive from the lay public's approbation of his efforts."); Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873, 902 (1997) (describing intellectual property as "a restriction on the free flow of information to the minimum extent necessary to encourage needed investment in innovation") (reviewing JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY (1996)). Moral rights regimes typically comprise three rights: the right of integrity, the right of attribution, and the right of disclosure. Roberta Rosenthal Kwall, *Preserving Personality and Reputational Interests of Constructed Personas through Moral Rights: A Blueprint for the Twenty-First Century*, 2001 U. ILL. L. REV. 151, 152.

<sup>220</sup> See *Harolds Stores, Inc. v. Dillard Dep't Stores, Inc.*, 82 F.3d 1533, 1547 (10th Cir. 1996); *Engel v. Wild Oats, Inc.* 644 F. Supp. 1089, 1092 (S.D.N.Y. 1986).

<sup>221</sup> See, e.g., ROBERTA ROSENTHAL KWALL, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* 27 (2010) (noting that copyright owners can use their derivative work right under copyright law to address integrity and attribution concerns); Note, *An Author's Artistic Reputation Under the Copyright Act of 1976*, 92 HARV. L. REV. 1490, 1491 (1979) (noting that the Copyright Act's "protection of an author's rights of economic exploitation may permit an author to employ a copyright's economic safeguards to protect the integrity of his work, thus protecting artistic reputation"). Catherine Fisk has described the efforts of James Joyce to enjoin the publication of an unauthorized version of *Ulysses* in the United States using state unfair competition law, as the book was not protected under U.S. copyright law. See Catherine L. Fisk, *The Modern Author at Work on Madison Avenue*, in MODERNISM AND COPYRIGHT 173, 181 n.18 (Paul K. Saint-Amour ed., 2011) ("[A]tribution did for Joyce what copyright could not.") (citing Robert Spoo, Note, *Copyright Protectionism and Its Discontents: The Case of James Joyce's Ulysses in America*, 108 YALE L.J. 633, 640 (1998)).

<sup>222</sup> 17. U.S.C. § 106(2) (2006).

to control the reputational interest that comes from having a consistent canon. The author of a children's book series featuring a beloved lead character, for example, may not want others to create a television series based on the books that depicts the character engaging in unsavory or unsafe activities; similarly, the resistance on the part of some authors to fan fiction may be motivated by the nature of the narratives, such as a focus on gay and lesbian themes, rather than on the loss of a potential derivative market.<sup>223</sup> Authors' amenability or resistance to potential reputational harms may be related to the strength of the "brand": a strong brand such as the Star Wars or Star Trek series can arguably withstand more retellings than a brand that is still coming into full existence.<sup>224</sup>

Artists may, therefore, use copyright law to assert what is essentially a trademark-related claim—in other words, they use their ability to control the exploitation of the work to challenge uses that suggest an authorization or sponsorship of the message conveyed by the defendant's use.<sup>225</sup> For example, David Byrne, lead singer of the musical group Talking Heads, filed suit in 2010 against Florida governor Charlie Crist for the use of the group's song "Road to Nowhere" in a video supporting Crist's campaign for U.S. Senate.<sup>226</sup> As Byrne stated in an interview, "It's not about politics, it's about copyright and about the fact that it does imply that I would have licensed it and endorsed him and whatever he stands for."<sup>227</sup> Indeed, such a copyright plaintiff may be able to argue that such uses are not fair uses under the law by relying on the fourth statutory fair use factor, in which the court is asked to consider

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<sup>223</sup> For a discussion of the motivations behind the creation of fan fiction, see Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513, 527–36, 542 (2009) (stating that many copyright owners "won't license homoerotic or sexually explicit versions of their works").

<sup>224</sup> Anti-dilution law, as noted, works in the opposite direction, granting protection only to brands that are famous and distinctive. Cf. *Haute Diggity Dog*, 507 F.3d at 267 ("[B]y making the famous mark an object of the parody, a successful parody might actually enhance the famous mark's distinctiveness by making it an icon. The brunt of the joke becomes yet more famous.").

<sup>225</sup> See generally Heymann, *supra* note 205. One recent study indicates that authors who maintain a creative attachment to their work are likely to resist valuation of that work according to the market. Christopher Buccafusco & Christopher Jon Sprigman, *The Creativity Effect*, 78 U. CHI. L. REV. 31, 31 (2011).

<sup>226</sup> See *David Byrne Suing Florida Governor for Copyright Infringement*, RTT NEWS (May 26, 2010) <http://www.rttnews.com/Content/EntertainmentNews.aspx?Section=2&Id=1316846&SM=1>.

<sup>227</sup> *Id.* In connection with the settlement of the dispute, Crist posted a video on YouTube apologizing for the use of the song and noting Byrne's aversion to the use of his music in advertising. David Itzkoff, *Ex-Governor Apologizes for Using Song in Ad*, N.Y. TIMES, Apr. 12, 2011, at A15.

“the effect of the use upon the potential market for or value of the copyrighted work,”<sup>228</sup> to argue that uses that are inconsistent with the plaintiff’s current reputational status will have an economic effect on the plaintiff’s ability to license or sell copies of the work in the future.<sup>229</sup> Alternatively, copyright plaintiffs may attempt to vindicate reputational interests by seeking a high statutory damage award for infringement that, the plaintiff believes, has had reputational harms.<sup>230</sup> And although an individual who makes his or her full-time living as a writer, artist, or musician might be most likely to attempt to use copyright law to vindicate reputational interests, there is no reason for such attempts to be so limited. Given the law’s abandonment of formalities such as registration,<sup>231</sup> and the relatively low requirements for copyrightability, any work that is original to its author, exhibits a modicum of creativity, and is fixed in a tangible medium of expression qualifies for copyright protection,<sup>232</sup> and an author need register such works only before bringing suit.<sup>233</sup> Thus, the writer of a diary or letter not intended for publication that ends up being distributed to the public, causing harm to the author’s reputation, might well decide to use copyright law to attempt to vindicate those reputational interests, at least to the point of issuing a cease-and-desist letter.<sup>234</sup> Importantly, however,

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<sup>228</sup> 17 U.S.C. § 107(4) (2006).

<sup>229</sup> Cf. *Harolds Stores*, 82 F.3d at 1547 (affirming the verdict in favor of the plaintiff on a claim that the defendant’s infringement of plaintiff’s copyrighted print skirts damaged plaintiff’s goodwill; survey revealed that respondents who saw skirts in both stores were “somewhat unlikely to purchase clothes from Harold’s within the next year”).

<sup>230</sup> See *Wild Oats*, 644 F. Supp. at 1092 (noting that “[t]he harm of the infringement to the late Ms. Engel’s artistic reputation, in the form of lost revenues from her works, may become evident only over the years to come”); see also Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 506 (2009) (urging courts not to award statutory damages “to compensate the plaintiff for injuries that are not cognizable by U.S. copyright law,” including reputational harm).

<sup>231</sup> See generally James Gibson, *Once and Future Copyright*, 81 NOTRE DAME L. REV. 167 (2005); Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485 (2004).

<sup>232</sup> See 17 U.S.C. § 102(a) (“Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”); *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991) (noting that “originality requires independent creation plus a modicum of creativity”).

<sup>233</sup> 17 U.S.C. § 411(a) (2006).

<sup>234</sup> Cf., e.g., *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303, 313 (2d Cir. 1966) (Lumbard, C.J., concurring) (criticizing the use of copyright law to “restrict the dissemination of information about persons in the public eye even though those concerned may not welcome the resulting publicity”); *Online Policy Grp. v. Diebold, Inc.*, 337 F. Supp. 2d 1195, 1203 (N.D. Cal. 2004) (rejecting an attempt to use copyright law to

because copyright law focuses on economic harms related to the use of the work, rather than the moral rights of the author, and because of the availability of statutory damages,<sup>235</sup> courts have no need or incentive to focus on community reactions to or judgments of the work as opposed to evidence of lost sales or profits.

In one fairly minor respect, U.S. copyright law directly addresses reputational interests through the Visual Artists Rights Act (VARA).<sup>236</sup> Enacted in 1990, VARA creates a right on the part of the author of a work of visual art,<sup>237</sup> whether or not the author is also the copyright holder, to “claim authorship of [the] work”; to “prevent the use of his or her name as the author of any work of visual art which he or she did

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squelch public discussion of plaintiff’s voting machines); Heymann, *supra* note 205, at 59–60 (proposing that the use of copyright law to address trademark-related concerns be deemed copyright misuse).

A public figure may suffer irreparable injury to his reputation if publication of extracts from his private papers reveals him to be dishonest, cruel, or greedy. An individual suffers irreparable harm by the revelation of facts he would prefer to keep secret. But those are not the types of harms against which the copyright law protects; despite irreparability, they should not justify an injunction based on copyright infringement. Only injuries to the interest in authorship are the copyright’s legitimate concern.

Pierre N. Leval, Commentary, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1134 (1990). One organization that assists physicians with malpractice suits advises its members to require patients to assign their copyright in any comments they post online after their visit; the physicians can then request that the hosting websites take down any unfavorable comments pursuant to section 512 of the Digital Millennium Copyright Act (DMCA), 17 U.S.C. § 512 (2006). See Dan Frosch, *Venting Online, Consumers Can Land in Court*, N.Y. TIMES, June 1, 2010, at A1. Relatedly, some individuals and entities seeking to have reputation-related material (such as negative reviews) removed from online fora will attempt to characterize the material as infringing and thus subject to the notice-and-takedown provisions of the DMCA. See generally Joyce E. Cutler, *Counsel at Leading Social Sites Describe Crush of User Content Takedown Requests*, 16 ELECTRONIC COMM. & L. REP. (BNA) 368 (Mar. 9, 2011) (reporting on conference proceedings).

<sup>235</sup> 17 U.S.C. § 504(c) (2006).

<sup>236</sup> *Id.* § 106A.

<sup>237</sup> The Copyright Act defines a “work of visual art” as

a painting, drawing, print, or sculpture existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.

*Id.* § 101. The Act also excludes certain works from this definition, including a work made for hire. *Id.*

not create,” including if the work is modified in a way that “would be prejudicial to his or her honor or reputation”; and to prevent certain such modifications.<sup>238</sup> Thus, VARA directly reflects a recognition of the fact that the use of an artistic work can affect an artist’s reputation, particularly by falsely conveying the artist’s authorization of the contested use. The application of VARA only to works existing in a single copy or in limited, signed copies makes the possibility that audiences will interpret a subsequent use as authorization much more likely, in that such works quite literally bear the touch of the artist’s hand.<sup>239</sup>

The scope of VARA’s provisions also reflects, at least to some degree, the social nature of reputation. For example, as with defamation law, an author’s rights under VARA last only for the life of the author,<sup>240</sup> which suggests a concern not with economic interests but with the ability to engage in an ongoing dialogue with one’s audience. Additionally, although some courts and commentators suggest that the interest at stake is the “personality and creative energy that an artist contributes to his or her work,”<sup>241</sup> the statute’s consistent reference to the artist’s interests in “honor” and “reputation,” even in describing the extent of permissible modifications, suggests an interest that depends on community judgment and assessment, rather than an internal, spiritual motivation.

In particular, VARA, like defamation law and trademark law, reflects reputational interest to the extent that courts determine that a finding of prejudice to reputation requires an inquiry into whether the relevant community has been inspired to modify its assessment of the artist based on the defendant’s actions.<sup>242</sup> This is not true of all of VA-

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<sup>238</sup> *Id.* § 106A(a)(1), (2), (3)(A). The statute provides that modifications that are a result of “the passage of time or the inherent nature of the materials” or the result of “conservation, or of the public presentation, including lighting and placement, of the work” is not a modification unless the modification results from gross negligence. *Id.* § 106A(c). VARA also provides a right to prevent the destruction of a “work of recognized stature.” *Id.* § 106A(a)(3)(B).

<sup>239</sup> *Cf.* Lang & Lang, *supra* note 63, at 102 (“[T]here is in the visual arts no substitute for the original. Pictures are valued not just for what they portray but for the authentic touch of the artist.”).

<sup>240</sup> 17 U.S.C. § 106A(d).

<sup>241</sup> *Mass. Museum of Contemporary Art Found., Inc. v. Buchel*, 593 F.3d 38, 51 (1st Cir. 2010); *see also* *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 81 (2d Cir. 1995) (stating that moral rights “spring from a belief that an artist in the process of creation injects his spirit into the work and that the artist’s personality, as well as the integrity of the work, should therefore be protected and preserved”); *Kwall*, *supra* note 219, at 152 (“Fundamentally, moral-rights laws seek to vindicate damage to the human spirit, an interest that transcends the artist’s concern for property or even reputation.”).

<sup>242</sup> *See Buchel*, 593 F.3d at 54.

RA's provisions; for example, VARA accords the artist the right both to "claim authorship of the work" and to "prevent the use of his or her name as the author of any work of visual art which he or she did not create" without regard to the effect of such attribution on the relevant audience.<sup>243</sup> (One might argue that in such cases, the reputational effect can be presumed, because an artist's reputation is formed through the assessment of an accurate catalog of her work.) But VARA's prohibition against modifications that "would be prejudicial to the artist's honor or reputation" does, courts have held, require consideration of the community's judgment, at least with respect to the work at issue.<sup>244</sup> For example, in *Massachusetts Museum of Contemporary Art Foundation, Inc. v. Buchel*, a 2010 case involving a dispute between a visual artist and a museum that sought to display certain of his unfinished works, the U.S. Court of Appeals for the First Circuit looked to media reports to determine whether there was a triable factual issue as to the effect of the display on the artist's reputation, noting that the record demonstrated "that some viewers of the installation reacted unfavorably to the work in its allegedly modified and distorted form."<sup>245</sup> The court thus left it to the jury to determine whether this reaction stemmed from the concept underlying the work itself or from the museum's unauthorized modifications, which a jury could conclude "diminish[ed] the quality of the work and thereby harm[ed] Buchel's professional honor or reputation as a visual artist."<sup>246</sup> Thus, to the extent that VARA focuses directly on reputational interests, it appears that at least one court has approached the question with the appropriate focus: whether the defendant's actions in fact inspired a change in assessment or judgment from the relevant community. This is not, however, the focus of copyright suits more generally, even where reputational harms are at issue, and thus broad injunctions may result against the use of creative work to vindicate what are more circumscribed reputational interests.

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<sup>243</sup> 17 U.S.C. § 106A(a) (2006).

<sup>244</sup> *Buchel*, 593 F.3d at 54 (noting that "the focus is on the artist's reputation in relation to the altered work of art; the artist need not have public stature beyond the context of the creation at issue"); see also Laura Flahive Wu, Note, *Massachusetts Museum of Contemporary Art v. Buchel: Construing Artists' Rights in the Context of Institutional Commissions*, 32 *COLUM. J.L. & ARTS* 151, 173 (2008) (contending that the question of prejudice to the artist's honor or reputation is "[b]y its terms . . . an objective test, requiring a showing that the purported distortion would actually cause prejudice to the artist's 'honor or reputation'" and that the artist's assertion of displeasure alone is insufficient).

<sup>245</sup> *Buchel*, 593 F.3d at 60–61 (citing media reports on the installation, including one critic who observed that "many people are going to judge [Buchel] and his work on the basis of this experience") (internal quotation marks omitted).

<sup>246</sup> *Id.* at 60.

#### D. *Right of Publicity, Privacy, and Other Causes of Action*

A variety of other torts do not necessarily have reputation-related interests at their core but can be used to vindicate harms to reputation. In some of these cases, courts make specific reference to audience perception; in others, reputation is viewed through a property or autonomy lens. I discuss certain of these torts below.

##### 1. Right of Publicity

The right of publicity provides an individual with the right to control use of her persona, including her name, image, voice, or some other distinguishing factor. A creature of state law, the right's genealogy consists of two different doctrinal strands: the right to privacy and the right against misappropriation. The right of publicity was originally proposed by Samuel D. Warren and Louis D. Brandeis in their landmark article as one of four variations of the privacy tort, conceptualized as the right to avoid intrusion and preserve the inviolate sphere of the individual.<sup>247</sup> In particular, Warren and Brandeis encouraged the development of a separate tort action that would vindicate dignitary, rather than economic, harms from personal intrusions, which would obviate the need to shape the perceived harm to match the elements of an existing cause of action, as courts had done to that point.<sup>248</sup> Their proposal borrowed from both defamation law and common-law copyright doctrine; indeed, as Robert Post has noted, the article is largely concerned with "the legal rights of unpublished authors and artists."<sup>249</sup> Dean Prosser's influential article seventy years later likewise characterized "appropriation of name or likeness" as one aspect of the general interest of the plaintiff "to be let alone."<sup>250</sup> Thus, the right of publicity was viewed as unconnected from the audience; the intrusion, not its effects, was what mattered.

But as the tort began to be invoked by celebrities who, presumably, sought publicity rather than anonymity, the right to privacy developed along the lines of a misappropriation tort, in which the harm was the failure to compensate the plaintiff for the use of his or her persona,

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<sup>247</sup> Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195–97 (1890).

<sup>248</sup> *Id.* at 207–13.

<sup>249</sup> Robert C. Post, *Rereading Warren and Brandeis: Privacy, Property, and Appropriation*, 41 CASE W. RES. L. REV. 647, 647–48 (1991).

<sup>250</sup> William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960).

rather than the fact of the use at all.<sup>251</sup> Although the tort is not limited to commercial uses, such that an impersonation of the plaintiff in order to obtain information or other benefits might well be found unlawful,<sup>252</sup> commercial advantage has become an assumed element of the tort, and the defendant's malfeasance is often seen as unlawful free-riding rather than as a failure to respect the boundaries that the dignity of individuals requires. The touchstone, according to the Restatement, is that "the defendant must have appropriated to his own use or benefit the reputation, prestige, social or commercial standing, public interest or other values of the plaintiff's name or likeness."<sup>253</sup>

To the extent, then, that the tort simply involves the question of the proper owner of the benefits of the use of one's persona, the tort is only loosely tied to a reputational interest. The value of the use may well depend on the reputation of the individual, but the fact that an individual or entity other than the plaintiff has benefited from that value does not, of itself, cause a reputational harm. *Zacchini v. Scripps-Howard Broadcasting Co.*, in which the Supreme Court in 1977 held that the plaintiff, whose live performance was shown in its entirety on a local television news broadcast, could bring suit for a violation of his right of publicity, is an example of a case that treats the right of publicity largely as a property interest.<sup>254</sup> As the *Zacchini* Court characterized it, the interest in a right of publicity case is an economic one in which "the only question is who gets to do the publishing" and thus reap the attendant commercial benefits.<sup>255</sup> Reputational interests were present in the case, to be sure, but only as a source of value as opposed to a source of information. Thus, as the Court noted, while the right of publicity may typically involve the "appropriation of an entertainer's reputation to enhance the attractiveness of a commercial product," in the case at hand, the right involved "appropriation of the very activity by which the

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<sup>251</sup> The case typically cited as representing the turning point is *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953). See also, e.g., Philip Auslander, *Legally Live: Performance in/of the Law*, 41 DRAMA REV. 9, 15 (1997) (noting that a performer "must be sufficiently famous so that someone else would seek to purchase her identity to enjoy protection of her performance under the right of publicity paradigm").

<sup>252</sup> RESTATEMENT (SECOND) OF TORTS § 652C cmt. b (1977) (describing privacy tort of "appropriation of name or likeness" and noting that the rule is not necessarily limited to commercial uses). But see J. Thomas McCarthy, *Two Sets of Events That Changed Right of Publicity Law*, 19 COLUM.-VLA J.L. & ARTS 129, 130 (1995) ("The right of publicity is simply the right of every person to control the commercial use of his or her identity.").

<sup>253</sup> RESTATEMENT (SECOND) OF TORTS § 652C cmt. c (1977).

<sup>254</sup> 433 U.S. 562, 564-66 (1977).

<sup>255</sup> *Id.* at 573.

entertainer acquired his reputation in the first place,”<sup>256</sup> a claim sounding very much like unlawful free-riding or other economic harm rather than harm to the nature of Zacchini’s reputation itself. In other words, as the dissent suggested, even if the television station received no additional revenue from the airing of the plaintiff’s act, it could still be liable in damages for the lost revenue to the plaintiff from those who now would not pay to see the act in person, a rationale that has echoes in the economic incentives provided by U.S. copyright law rather than in defamation.<sup>257</sup>

To the extent, however, that the tort retains an interest in preserving the plaintiff’s interests in autonomy and self-definition, as some commentators have suggested,<sup>258</sup> the reputational harm is clearer. By purporting to speak or act on behalf of the plaintiff (by, for example, associating her with a particular product or service against her wishes), the defendant in a right of publicity case provides information to the plaintiff’s audience that can shape its perception of the plaintiff. In *Pa-vesich v. New England Life Insurance Company*,<sup>259</sup> an early right of publicity case from 1905, the defendant used a photograph of the plaintiff without his permission to advertise life insurance, attributing an invented quote to the plaintiff about his satisfaction with the defendant’s

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<sup>256</sup> *Id.* at 576.

<sup>257</sup> *Id.* at 580 n.2 (Powell, J., dissenting). Indeed, the Court based its rationale in part on a parallel to the incentives provided by patent and copyright law. *Id.* at 576; see also Rochelle Cooper Dreyfuss, *We Are Symbols and Inhabit Symbols, So Should We Be Paying Rent? Deconstructing the Lanham Act and Rights of Publicity*, 20 COLUM.-VLA J.L. & ARTS 123, 127 (1996) (noting that, under facts such as those in *Zacchini*, “the right of publicity serves as a useful adjunct to the Copyright Clause and to the federal statutes enacted under its authority, for its promise of exclusivity stimulates creativity in spheres that patents and copyrights do not reach”) (footnote omitted). But see Alice Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383, 402 (1999) (noting that the Court’s analogy to patent law “lost sight of the essence of the claim, namely the sustained unconsented use of the performer’s identity”).

<sup>258</sup> J. Thomas McCarthy, *Public Personas and Private Property: The Commercialization of Human Identity*, 79 TRADEMARK REP. 681, 685 (1989) (“Perhaps nothing is so strongly intuited as the notion that my identity is mine—it is my property, to control as I see fit.”); Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225, 285–93 (2005) (conceptualizing the right of privacy as a right of self-definition); Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 548 (2006) (describing the publicity right as concerned with “control of the way one presents oneself to society”). Robert Post has proposed bifurcating the existing tort into two separate causes of action, one that vindicates property interests and one that vindicates dignity interests, with the latter requiring, as part of the prima facie case, that the appropriation be “highly offensive to the reasonable person.” Post, *supra* note 249, at 675.

<sup>259</sup> 50 S.E. 68, 69 (Ga. 1905).

product.<sup>260</sup> The plaintiff brought suit both for invasion of privacy and for defamation; the lower court sustained the defendant's demurrer, and the Georgia Supreme Court reversed.<sup>261</sup> The court did not characterize the harm to the plaintiff as the lack of payment for the advertisement— not surprisingly, as the plaintiff was not in the business of endorsing products or services. Rather, the court saw the harm to the plaintiff— both as to the right of publicity and as to the defamation claim—as a loss of autonomy and a harm to reputation caused by the defendant's having falsely suggested the plaintiff's endorsement.<sup>262</sup> Similarly, in a right-of-publicity case reminiscent of the *Waits* case discussed earlier, Jacqueline Kennedy Onassis successfully obtained a preliminary injunction based on the appearance of a celebrity impersonator in an advertisement for the clothing designer Christian Dior.<sup>263</sup> The harm, the court suggested, was the inference that Onassis had consented to appear in a commercial advertisement; by speaking on her behalf in this regard, the defendant contributed to the formation of adverse judgments about Onassis by those who saw the advertisement.<sup>264</sup>

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<sup>260</sup> The quotation was: "In my healthy and productive period of life I bought insurance in the New England Mutual Life Insurance Co., of Boston, Mass., and to-day my family is protected and I am drawing an annual dividend on my paid-up policies." *Id.* at 69.

<sup>261</sup> *Id.* at 81.

<sup>262</sup> *Id.* at 80 ("[A]s long as the advertiser uses [the plaintiff] for these purposes, he cannot be otherwise than conscious of the fact that he is for the time being under the control of another, that he is no longer free, and that he is in reality a slave, without hope of freedom, held to service by a merciless master . . .") (describing the privacy claim). Given the allegation that plaintiff's acquaintances knew he did not have a policy from the defendant, the advertisement made it seem as if he was telling an untruth; accordingly, "[i]f he lied gratuitously, he would receive and merit the contempt of all persons having a correct conception of moral principles. If he lied for a consideration, he would become odious to every decent individual." *Id.* at 81.

<sup>263</sup> *Onassis v. Christian Dior-New York, Inc.*, 472 N.Y.S.2d 254, 263 (Sup. Ct. 1984), *aff'd*, 488 N.Y.S.2d 943 (App. Div. 1985).

<sup>264</sup> *Id.* at 260. The court noted the parallel between counterfeit merchandise (of the type typically objected to by the defendant designer) and the celebrity impersonation at issue in the case:

It is somewhat ironic that the principal defendant, Christian Dior-New York Inc., should be advocating the permissibility of passing off the counterfeit as a legitimate marketing device, when it (or its predecessor) has itself vigorously policed the market to prevent persons by fraud and deception obtaining the fruits of another's labors and using them commercially. There plaintiff complained bitterly (and effectively) that there had been a misappropriation of its name and reputation. Now the shoe is on the other foot.

*Id.* at 263 (citations omitted); *see also* JANE M. GAINES, *CONTESTED CULTURE: THE IMAGE, THE VOICE, AND THE LAW* 96 (1991) (characterizing the *Onassis* case as asserting "that in

This is not to say that the reputational interest at the heart of the right of publicity is as strong as the interest at the center of a false endorsement claim under the Lanham Act, even though some courts and commentators have suggested that endorsement issues also underlie right of publicity claims,<sup>265</sup> including Dean Prosser, who analogized the interests protected by the tort to those addressed by trademark law.<sup>266</sup> The mere use of the plaintiff's image as a T-shirt decoration, for example, does not necessarily comment on the plaintiff's beliefs in the same way that featuring the plaintiff as a putative commercial spokesperson without authorization does. And, of course, not every use of a plaintiff's image, even in ways she would disavow, gives rise to a right of publicity claim; the exceptions that courts have carved out for First Amendment-related activities, as with other torts, serve as a limit on the extent to which the right of publicity can address reputational interests.<sup>267</sup> Thus, the reputational interest is stronger where there is an implied assertion of at least willful participation, if not endorsement, on the part of the plaintiff. But, as with copyright claims, because the right of publicity tort has come to be viewed largely through a property lens, courts need not, as in *Pavesich*, consider community reactions in determining the nature or scope of reputational harm.

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the contemporary world the face has come to stand for the honor and integrity of the individual").

<sup>265</sup> *Toney v. L'Oreal USA, Inc.*, 406 F.3d 905, 910 (7th Cir. 2005) ("The basis of a right of publicity claim concerns the message—whether the plaintiff endorses, or appears to endorse, the product in question."); *ETW Corp. v. Jireh Publ'g, Inc.* 332 F.3d 915, 924 (6th Cir. 2003) (suggesting that a false endorsement claim under the Lanham Act and an Ohio right of publicity claim were essentially equivalent); Dreyfuss, *supra* note 257, at 127 (noting that the right of publicity protects "the ability of those who do not want to hawk products, or to be seen as associated with or endorsing a particular manufacturer or product, to prevent others from putting words into their mouths"); Richard Masur, *Right of Publicity from the Performer's Point of View*, 10 DEPAUL-LCA J. ART & ENT. L. 253, 257–58 (2000) (describing instances in which an actor's film performance is scanned and used in a new film or in degrading uses, causing damage to the actor's reputation, and noting that the copyright holder of the original film would have little incentive to challenge such use on the actor's behalf).

<sup>266</sup> Prosser, *supra* note 250, at 423 (noting that the appropriation privacy tort creates "in effect, for every individual, a common law trade name, his own, and a common law trade mark in his likeness"); see also Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161, 1165 (2006) (contending that "[r]econceiving the right of publicity as a trademark-like right offers significant benefits in defining the right's scope and limitations").

<sup>267</sup> See, e.g., *Jireh Publ'g*, 332 F.3d at 931–36 (discussing the cases).

## 2. Privacy Claims

Many claims under the general invasion of privacy tort, such as the public disclosure of private facts and false light privacy, involve concerns about reputation, as Dean Prosser also indicated.<sup>268</sup> In such claims, the plaintiff is aggrieved not merely because he feels that a physical private sphere has been invaded or that he has been the unwilling subject of surveillance but because the unwanted release of true information about him will, he fears, be used by others in ways detrimental to his reputation.<sup>269</sup> The 1931 case of *Melvin v. Reid*,<sup>270</sup> decided by the California Court of Appeal for the Fourth District and often identified as one of the early public disclosure of private facts cases, falls into this category. The plaintiff, Gabrielle Darley Melvin, who had formerly worked as a prostitute, was acquitted in a widely reported murder trial.<sup>271</sup> She was subsequently able to start her life anew among acquaintances who were not aware of her history.<sup>272</sup> The defendant produced a film called “The Red Kimono,” based on Melvin’s life, which had the effect of revealing her past to her current acquaintances, who “scorn[ed] and abandon[ed] her” as a result.<sup>273</sup> The California court held that Melvin had stated a valid claim for invasion of privacy, noting that although the facts of Melvin’s former life were in the public record, and thus open to all, the use of Melvin’s name in advertising for the film, which identified the film as semi-biographical, was unnecessary.<sup>274</sup> The focus on the attribution of the past events to Melvin, as opposed to the revelation of the events itself, frames the harm as reputa-

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<sup>268</sup> Prosser, *supra* note 250, at 398–400 (contending that the interest at the core of public disclosure and false light privacy torts is reputational).

<sup>269</sup> *Doe v. United States*, 83 F. Supp. 2d 833, 842 (S.D. Tex. 2000) (noting that the tort of public disclosure of private facts “is designed to redress reputational injuries made all the more painful because the public revelations about deeply private and intimate matters are undeniably true”); *Doe v. Methodist Hosp.*, 690 N.E.2d 681, 686 (Ind. 1997) (although declining to recognize the tort, noting that the tort of public disclosure of private facts protects a person’s interest in reputation and a person’s interest in “avoiding the emotional distress that could result from disclosures”); M. Ryan Calo, *The Boundaries of Privacy Harm*, 86 IND. L.J. 1131, 1131 (2011) (distinguishing between the “subjective category” of privacy harm (unwanted observation) and the “objective category” of privacy harm (use of information)); Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis’s Privacy Tort*, 68 CORNELL L. REV. 291, 339 (1983) (noting that although the disclosure of private facts does not cause “classic reputational injury,” it causes harm because “such revelations may alter the way that others see them”).

<sup>270</sup> 297 P. 91 (Cal. Ct. App. 1931).

<sup>271</sup> *Id.* at 91.

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> *Id.* at 93.

tional: the change in how her current associates perceived Melvin based on this additional, and truthful, information about her past.<sup>275</sup> Thus, such a claim can largely be distinguished from a privacy action in which a privately taken photograph of the plaintiff is published without the plaintiff's permission; unless the circumstances of the publication (a nude photo published in a disreputable magazine, for example<sup>276</sup>) would suggest something disparaging about the plaintiff's beliefs or activities, the photographs themselves are unlikely to cause others to form a particular judgment about the plaintiff's character or qualities.

The false light privacy tort can also involve reputational concerns, although reputational injury need not be alleged. As described in the Restatement, the tort addresses the harm resulting from publicity given to a matter "concerning another that places the other before the public in a false light," if the false light "would be highly offensive to a reasonable person" and the defendant "had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed."<sup>277</sup> Dean Prosser has suggested, not without controversy,<sup>278</sup> that the English case of *Byron v. Johnson*<sup>279</sup> represents the use of false light in connection with reputational concerns.<sup>280</sup> A man named Johnson published a volume of poems entitled "A Pilgrimage to Jerusalem, a Tempest, and an Address to my Daughter" and

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<sup>275</sup> See *id.*

<sup>276</sup> *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128, 1138 (7th Cir. 1985) (holding that the plaintiff had a false light claim for the use of photographs but remanding for a new trial due to errors by the district court).

<sup>277</sup> RESTATEMENT (SECOND) OF TORTS § 652E (1977); see also *Meyerkord v. Zipatoni Co.*, 276 S.W.3d 319, 324 nn.1 & 2 (Mo. Ct. App. 2008) (listing jurisdictions that have recognized and jurisdictions that have refused to recognize the tort); Andrew Osorio, Note, *Twilight: The Fading of False Light Invasion of Privacy*, 66 N.Y.U. ANN. SURV. AM. L. 173, 174 (2010) (advocating for abolition of the tort); Zimmerman, *supra* note 59, at 374 (suggesting that a review of the case law indicates "the inherent vagueness of the concept" of what is "highly offensive to a reasonable person"). In *King v. Semi Valley Sound, LLC*, an Ohio appellate court held that a magazine publisher's inclusion of the plaintiff in a list of "Local Registered Sexual Offenders," when the plaintiff was no longer required to be registered, could form the basis of a false light claim but not a defamation claim. Inclusion in the list, the court held, could be "highly objectionable to a man in [the plaintiff's] position," but could not be defamatory, given that being falsely identified as a registered sex offender would cause no greater reputational injury "beyond what [plaintiff] would be subjected to simply by being identified as a sex offender." *King v. Semi Valley Sound, LLC*, No. CV-2010-07-4777, 2011 Ohio App. LEXIS 3014, at \*13, 15-16 (Ohio Ct. App. July 20, 2011).

<sup>278</sup> See J. Clark Kelso, *False Light Privacy: A Requiem*, 32 SANTA CLARA L. REV. 783, 792-94 (1992) (stating that subsequent English cases treated *Lord Byron* as a passing-off case).

<sup>279</sup> *Byron v. Johnston*, (1816) 35 Eng. Rep. 851.

<sup>280</sup> Prosser, *supra* note 250, at 398.

attributed certain of the poems therein to Byron in advertising.<sup>281</sup> Byron disavowed creation of the poems or their sale to Johnson—indeed, he claimed that he had never met the man—and brought suit.<sup>282</sup> In an exceedingly brief reported opinion, the Lord Chancellor issued an injunction on the grounds that the defendant could not show that the work was indeed Byron's.<sup>283</sup> Whether Prosser was correct in deeming *Byron* a false light case, given the presumably pedestrian nature of the poems, or whether the opinion is better characterized as a passing-off or right of publicity case,<sup>284</sup> Prosser's characterization of the case as privacy-related appears to be indicative of his view of the use of the tort to address reputation-related concerns more generally. Indeed, in 1977 the Supreme Court cited Prosser with approval in *Zacchini v. Scripps-Howard Broadcasting Company* when it stated that the interest protected in a false light case "is clearly that of reputation."<sup>285</sup>

Not every false light case, however, involves reputational injury. For example, in the 1967 U.S. Supreme Court case *Time v. Hill*, a family sought recovery under New York's privacy law when a *Life* magazine article suggested that a play about a family held hostage in their home was closely based on the plaintiffs' experience, when it was apparently only inspired by their circumstances.<sup>286</sup> In holding that the First Amendment standards of *New York Times v. Sullivan* applied to the claim,<sup>287</sup> the Court distinguished the injury at the heart of the case from that in a traditional defamation case, noting that although both torts involve false statements, in the privacy cases, "the primary damage is the mental distress from having been exposed to public view, although injury to reputation may be an element bearing upon such damage" and that "the

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<sup>281</sup> *Byron*, 35 Eng. Rep. at 851.

<sup>282</sup> See Kelso, *supra* note 278, at 791 n.25 (quoting a December 9, 1816, letter from Lord Byron to his publisher to this effect).

<sup>283</sup> *Byron*, 35 Eng. Rep. at 852.

<sup>284</sup> See John W. Wade, *Defamation and the Right of Privacy*, 15 VAND. L. REV. 1093, 1097–98 (1962).

<sup>285</sup> *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573 (1977). In one recent case, the U.S. District Court for the District of New Jersey permitted a plaintiff to plead reputational injury as a false light claim. *Savely v. MTV Music Television, Viacom*, No. 2:11-cv-01021-SDW-MCA, 2011 U.S. Dist. LEXIS 77621, at \*15 (D.N.J. July 18, 2011) (denying a motion to dismiss a false light claim alleging that unauthorized inclusion of footage of the plaintiff in a program about a rapper would associate the plaintiff with "artists and institutions that could tarnish his reputation").

<sup>286</sup> *Time, Inc. v. Hill*, 385 U.S. 374, 378–79 (1967); see also *Zacchini*, 433 U.S. at 571 (describing *Hill* as "hotly contested and decided by a divided Court").

<sup>287</sup> The comments to the *Restatement (Second) of Torts* note that the validity of *Hill* on this point is uncertain in light of *Gertz v. Robert Welch, Inc.* 418 U.S. 323 (1974). RESTATEMENT (SECOND) OF TORTS § 652E cmt. d (1977).

published matter need not be defamatory, on its face or otherwise, and might even be laudatory and still warrant recovery.”<sup>288</sup> But simply because a report can be characterized as nondefamatory does not mean that reputational interests are not at its core. Thus, for example, in the 1964 New York Supreme Court case of *Spahn v. Julian Messner*,<sup>289</sup> the defendant published a biography of the plaintiff that made the plaintiff seem more heroic during his wartime service than he actually was; the embarrassment this caused the plaintiff, the court held, formed the basis of a valid false light privacy claim.<sup>290</sup> The fact that the biography was laudatory rather than disparaging does not render it non-reputation-related. The report likely caused others to form an inaccurate positive judgment of the plaintiff, which may have resulted in detrimental repercussions if the plaintiff was held responsible for the mistruth once revealed. Thus, as with other causes of action, the reputational harm is closely tied to a perceived misattribution of statements or events to the plaintiff that are relevant to the community’s judgment of the plaintiff’s character.

### 3. Other Causes of Action

Finally, plaintiffs have used a host of other causes of action to vindicate reputational interests, including malicious prosecution,<sup>291</sup> tortious

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<sup>288</sup> *Hill*, 385 U.S. at 384–85 n.9; see also William W. Van Alstyne, *First Amendment Limitations on Recovery from the Press—An Extended Comment on “The Anderson Solution,”* 25 WM. & MARY L. REV. 793, 810–11 (1984). The *Restatement (Second) of Torts* describes as actionable a hypothetical in which

A is a war hero, distinguished for bravery in a famous battle. B makes and exhibits a motion picture concerning A’s life, in which he inserts a detailed narrative of a fictitious private life attributed to A, including a nonexistent romance with a girl. B knows this matter to be false. Although A is not defamed by the motion picture, B is subject to liability to him for invasion of privacy.

RESTATEMENT (SECOND) OF TORTS § 652E cmt. b (1977).

<sup>289</sup> 250 N.Y.S.2d 529, 531 (Sup. Ct. 1964), *aff’d*, 260 N.Y.S.2d 451 (App. Div. 1965), *aff’d*, 221 N.E.2d 543 (N.Y. 1966).

<sup>290</sup> *Id.* at 538–39 (describing how defendant’s biography of plaintiff falsely stated that plaintiff had been awarded the Bronze Star in World War II and noting that “the heroics attributed to [the plaintiff] constituted a gross non-factual and embarrassing distortion”). After the U.S. Supreme Court ordered reconsideration of the case in light of *Hill*, the New York Court of Appeals affirmed. *Spahn v. Julian Messner, Inc.*, 233 N.E.2d 840, 841–42 (N.Y. 1967).

<sup>291</sup> RESTATEMENT (SECOND) OF TORTS § 670(a) (1977) (noting that a plaintiff in a malicious prosecution case may recover damages for “the harm to his reputation resulting from the accusation brought against him”).

interference with contract,<sup>292</sup> and general negligence claims.<sup>293</sup> For example, in the 1995 case *Cargill, Inc. v. Boag Cold Storage Warehouse, Inc.*,<sup>294</sup> decided by the U.S. Court of Appeals for the Sixth Circuit, the plaintiff successfully brought suit against a warehouse that negligently allowed food manufactured by the plaintiff to spoil while in storage but still shipped the food to local supermarkets; such negligence was alleged to have caused the plaintiff reputational injury when consumers (not unexpectedly) blamed the plaintiff manufacturer for the spoilage.<sup>295</sup> Other courts have suggested that the availability of such actions should turn on the foreseeability or identifiability of the reputational harm, which often implicates evidence of audience perception.<sup>296</sup> For example, in the 1988 case *Redgrave v. Boston Symphony Orchestra, Inc.*, decided by the U.S. Court of Appeals for the First Circuit, the defendant orchestra cancelled a performance featuring the actor Vanessa Redgrave after receiving threats and statements of protest relating to Redgrave's political support of the Palestine Liberation Organization.<sup>297</sup> Redgrave sought damages resulting from the loss of additional professional opportunities from employers who were skittish after the orchestra's actions; the court concluded that the identifiable nature of these reputational damages distinguished them from "nonspecific allegation[s] of damage to reputation" and so could be pursued in a breach of contract claim.<sup>298</sup>

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<sup>292</sup> For an analysis of cases from the United Kingdom, see generally Nelson Enonchong, *Contract Damages for Injury to Reputation*, 59 MOD. L. REV. 592 (1996).

<sup>293</sup> See Travis M. Wheeler, Note, *Negligent Injury to Reputation: Defamation Priority and the Economic Loss Rule*, 48 ARIZ. L. REV. 1103, 1107 (2006) (concluding that the economic loss rule lurks in the background of some courts' conclusions that stand-alone reputational damages must be sought only via defamation and not ordinary negligence); *id.* at 1127 (contending that "when reputational injury is a direct result of a defamatory communication about the plaintiff . . . courts have good reasons to refuse ordinary negligence as an alternative theory of recovery. Resolving these claims under defamation respects the limitations on defamation recovery and encourages the development of defamation-privilege law."). Some courts are not amenable to plaintiffs' attempts to use negligence claims to vindicate reputational injuries. See, e.g., *Hall v. United Parcel Serv., Inc.*, 555 N.E.2d 273, 276 (N.Y. 1990) ("Injuries to an individual's personal and professional reputation such as the injuries alleged here have long been compensated through the traditional remedies for defamation.") (discussing plaintiff's allegation of reputational injury from negligently administered polygraph test).

<sup>294</sup> 71 F.3d 545 (6th Cir. 1995).

<sup>295</sup> The plaintiff sought damages for costs associated with a product recall, lost sales, and advertising expenses, among other expenses. *Id.* at 554.

<sup>296</sup> *Jorgensen v. Mass. Port Auth.*, 905 F.2d 515, 522 (1st Cir. 1990) (discussing, in dicta, the possible result under Massachusetts law).

<sup>297</sup> 855 F.2d 888, 890 (1st Cir. 1988).

<sup>298</sup> *Id.* at 894.

### E. *Summary*

The law of reputation, as this overview suggests, is fairly diffuse, although there are some core elements. Both individuals and corporate entities can vindicate reputational interests through the law where the interest is conceived as economic, although only individuals can vindicate reputational interests that are seen as dignitary or privacy based. In most causes of action, the reputational harm is caused by a false statement by the defendant as to the plaintiff's qualities or an appropriation of the plaintiff's identity, voice, or creative work that suggests affiliation or authorization with the defendant's activities. And in some instances, but not uniformly, the scope and nature of the reputational interest is determined by reference to the community. It is this last characteristic to which this Article now turns.

## IV. REASSESSING REPUTATION

Taking the social nature of reputation and the associated audience interests into account, along with the other interests previously identified, helps us to think more broadly about whether and in what way the law should protect reputation. The interests at stake in controlling reputation do not all relate to the individual or firm to which the reputation belongs; they also relate to audience interests in the stability of reputations so as to ensure useful heuristics and consistent signals when those reputations are used by others. The law's interest is not an expansive interest "in having others think well of you and associate with you";<sup>299</sup> rather, an audience-based perspective reminds us that the law's interest in reputation is equally, if not more, concerned with the quality of information provided to one's audience—to those who are making judgments and taking actions based on those judgments. In this sense, the law is not vindicating reputation as such, but using harm to reputation as the measure of the quality of the information on which judgments leading to reputation are based.

An audience-focused view of reputation thus provides some additional grounding for the various doctrinal approaches to the interest. First, an audience-focused theory of reputation applies both to individual and corporate reputation because reputation is used by audiences similarly as to individuals and corporations as a way of reducing search costs and determining the direction and scope of future engagements. Thus, while different legal doctrines might favor the interests of par-

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<sup>299</sup> Gibbons, *supra* note 30, at 593.

ticular plaintiffs or defendants,<sup>300</sup> the audience's interest in sound foundational information tends to be much the same in each case.

Second, an audience-focused theory helps explain the importance of truth to the construction of reputation. To the extent that audiences are using the reputations of others as a way of forming judgments and opinions and subsequently taking action based on some of those judgments, there is a societal interest in ensuring that those judgments are based on accurate information.<sup>301</sup> Thus, even though true statements can have an effect on reputation, such statements do not undermine the factual foundation for the community's judgment. This helps to further justify the principle in both defamation and trade libel doctrine that the truth of the statement at issue is a defense to liability,<sup>302</sup> as well

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<sup>300</sup> Cf., e.g., *Senna v. Florimont*, 958 A.2d 427, 443 (N.J. 2008) (“We cannot find any significant public benefit in giving business rivals greater protection for the false and defamatory speech they use as an economic club to harm each other.”) (declining to apply *New York Times v. Sullivan* to commercial speech).

<sup>301</sup> Gibbons, *supra* note 30, at 593 (noting that it is reasonable for individuals “to expect that social judgments are based on an adequate factual foundation”); Neil M. Richards, *The Puzzle of Brandeis, Privacy, and Speech*, 63 VAND. L. REV. 1295, 1340 (2010) (characterizing Brandeis's later views as suggesting that “the First Amendment requires not only protection for outputs such as speeches and newspaper articles, but also attentiveness to inputs and the process by which opinions are formed and beliefs are transmitted”); see also, e.g., *SCO Grp., Inc. v. Novell, Inc.*, 692 F. Supp. 2d 1287, 1291 (D. Utah 2010) (“The public's interest in obtaining information [about the quality and characteristics of consumer products] . . . is perhaps even greater than the corresponding interest in personal defamation actions, the interest in obtaining information about other people.” (quoting *Bose Corp. v. Consumers Union of United States, Inc.*, 508 F. Supp. 1249, 1271 (D. Mass. 1981))) (holding that slander of title claims are subject to the First Amendment); *Dairy Stores, Inc. v. Sentinel Publ'g Co.*, 516 A.2d 220, 225 (N.J. 1986).

<sup>302</sup> See Gibbons, *supra* note 30, at 605 (suggesting that this exception reveals that defamation law “gives more weight to the factual foundation for reputation than the judgments derived from it”). The extent to which the law can proscribe noncommercial false statements of fact consistent with the Constitution is far from clear. See, e.g., *United States v. Alvarez*, 617 F.3d 1198, 1215 (9th Cir. 2010) (holding the Stolen Valor Act, which criminalizes false statements about the receipt of military honors, unconstitutional, noting that “the harm the Act identifies—damage to the reputation and meaning of military honors—is not the sort of harm we are convinced Congress has a legitimate right to prevent by means of restricting speech”); Lyriisa Barnett Lidsky, *Where's the Harm?: Free Speech and the Regulation of Lies*, 65 WASH. & LEE L. REV. 1091, 1091 n.2 (2008) (“The State may only punish deliberate falsehoods when they cause significant harms to individuals.”); Richards, *supra* note 301, at 1345 (“The hallmark of modern American First Amendment jurisprudence is that hurt feelings alone cannot justify the suppression of truthful information or opinion.”); Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. REV. 897, 917 (2010) (asserting that “[t]he First Amendment plainly does not permit restriction of non-commercial and nondefamatory factual falsity in the public sphere”); Rebecca Tushnet, *Fighting Freestyle: The First Amendment, Fairness, and Corporate Reputation*, 50 B.C. L. REV. 1457, 1476 (2009) (contending that “many of trademark law's core presumptions would disappear if the field were constitutionalized”).

as the fact that trademark infringement, false implied endorsement, and false light privacy torts all predicate liability on the falsity of an explicit or implicit statement of identity, association, or sponsorship. It may also help to explain the coexistence of doctrines such as false light privacy alongside the defamation tort, in that the former addresses false information flows that are not captured by the latter because, although their falsity leads to reputational effects, such statements are not considered defamatory.<sup>303</sup>

Not every doctrine, however, exhibits the same sensitivity to the importance of the factual foundation of social judgments. For example, the tort of public disclosure of private facts contemplates liability for the dissemination of truthful information about the plaintiff that causes, in many instances, reputational harm, even though facts have traditionally not been thought to be an appropriate subject of private ownership.<sup>304</sup> Additionally, the public figure doctrine in defamation law, for example, provides that even where a false assertion has been made about a public official or public figure, the individual cannot recover unless he or she can show that the defendant published the statement with actual malice.<sup>305</sup> Trademark anti-dilution law predicates liability on what is essentially a truthful statement—or, at least, not a false statement—as to the lack of relationship between the plaintiff and the defendant. And to the extent that copyright law and the right of publicity are used to vindicate reputational interests, their economic focus means that the plaintiff is not required to allege or prove that the defendant's use falsely implies authorization or licensing by the plaintiff, even when this appears to be the nature of the harm at issue.

Defamation law's tolerance for false statements in some cases is justified by the importance of "breathing room" in the sphere of public debate—the idea that fear of liability for defaming public officials will create a chilling effect that will cause speakers to stay far from the line of

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<sup>303</sup> Cf. Post, *supra* note 1, at 719 ("[T]o characterize a person incorrectly as a Republican is not defamatory, even though Democrats may well be deterred from dealing with him and as a result the person may lose credit or business opportunities.").

<sup>304</sup> Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1065–73 (2000); see also Cass R. Sunstein, *Hard Defamation Cases*, 25 WM. & MARY L. REV. 891, 901 (1984) (stating that a conclusion that a state "may not constitutionally treat as tortious statements that cannot be proved false" would "do away with a good deal of state tort law concerning rights of privacy").

<sup>305</sup> See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

liability. But, while critically important for vibrant public debate,<sup>306</sup> this tolerance places additional responsibility on the audience to sort out false statements from true statements. This is not to say the issue of interpretive burdens on audiences is unique to defamation law; trademark law, to take another example, may impose liability for statements that are confusing to some consumers but helpful to others or decline to impose liability for uses of marks that confuse a small number of consumers so long as those consumers do not represent a substantial proportion of the relevant market.<sup>307</sup> And, at least in the public figure realm, the access that public figures have to opportunities to correct the record helps to mitigate some of the burdens on audiences. In all of these instances, however, while truth plays an important role in ensuring a sound foundation for decision making by audiences, audiences must also contribute to the process by, as Jerome Skolnick has suggested, questioning the information they receive in some instances rather than accepting it on face value.<sup>308</sup>

Finally, an audience-focused theory of reputation highlights a related concern to that of truth: whether the defendant is speaking for the plaintiff or speaking only for himself. The distinction between reputation and status mentioned earlier highlights that reputation is a performance-based assessment; at root, it is based on activities or statements purportedly by the reputation holder. Impersonation or false attribution is therefore the harm underlying many reputational injuries, in that the defendant has made a statement or undertaken an activity that, implicitly or explicitly, is falsely attributed to the plaintiff and thus becomes the basis for the audience's judgment. The audience's interest in such cases is therefore not only that the foundation for its

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<sup>306</sup> See George C. Christie, *Injury to Reputation and the Constitution: Confusion Amid Conflicting Approaches*, 75 MICH. L. REV. 43, 66 (1976) (noting the conflict between "an individual's interest in freedom of speech" and "the expanding interest of another individual in the integrity of his reputation"); Van Alstyne, *supra* note 288, at 814–23 (discussing First Amendment limitations on tort actions).

<sup>307</sup> See generally Michael Grynberg, *Trademark Litigation as Consumer Conflict*, 83 N.Y.U. L. REV. 60 (2008) (advocating for courts to give more consideration to unconfused consumers who benefit from a defendant's product in traditional trademark infringement cases).

<sup>308</sup> Skolnick, *supra* note 112, at 687 ("The *New York Times* doctrine assumes that consumers of information are supposed to *question*, not necessarily to *believe*, what they read and hear."); cf. generally Lyrrisa Barnett Lidsky, *Nobody's Fools: The Rational Audience as First Amendment Ideal*, 2010 U. ILL. L. REV. 799 (discussing assumptions about audience's interpretive capabilities in First Amendment cases and proposing that courts assume rational audiences in order to respect autonomy interests).

judgments is sound but also that the source of such foundation is appropriately attributed.<sup>309</sup>

Various reputation-related doctrines concern acts of impersonation or false attribution. Trademark infringement is an example of impersonation in the commercial context, in which the defendant, by using the plaintiff's trademark, positions itself as the plaintiff in the marketplace and thus is able to provide false inputs toward the formation of the plaintiff's reputation. False implied endorsement and right of publicity claims have the same concern, in that the plaintiff's voice is used without authorization to speak on behalf of the product.<sup>310</sup> Defamation, although this is not immediately obvious, also involves an impersonation of sorts, in that the defendant, by asserting certain facts about the plaintiff as truth, is falsely constructing the plaintiff's identity. Indeed, in some cases, as when the defendant is alleged to have falsely attributed statements to the plaintiff in a way that causes reputational injury, libel is directly an act of impersonation, as the defendant's actions put words in the plaintiff's mouth.<sup>311</sup> (This may also help to ex-

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<sup>309</sup> See, e.g., Roberta Rosenthal Kwall, *A Perspective on Human Dignity, the First Amendment, and the Right of Publicity*, 50 B.C. L. REV. 1345, 1365 (2009) (encouraging courts to consider, "[i]n a conflict between the right of publicity and the First Amendment," whether the defendant's use of the plaintiff's persona "results in a type of compelled or forced speech" on the part of the plaintiff); Helen Norton, *The Measure of Government Speech: Identifying Expression's Source*, 88 B.U. L. REV. 587, 592–93, 595 (2008) (reviewing social science literature confirming that source matters to perceived credibility of claim but noting that knowledge of source may have positive or negative effects, depending on the source's credibility or popularity); Rebecca Tushnet, *Attention Must Be Paid: Commercial Speech, User-Generated Ads, and the Challenge of Regulation*, 58 BUFF. L. REV. 721, 747–48 (2010) (also reviewing social science literature confirming importance of source for perceived credibility).

<sup>310</sup> One court has used the privacy tort to accommodate the same concern. See *Good-year Tire and Rubber Co. v. Vandergriff*, 184 S.E. 452, 454–55 (Ga. Ct. App. 1936) (holding that impersonation of the plaintiff in telephone calls to the defendants' competitors to acquire confidential information violated the plaintiff's right to privacy); Recent Decisions, *Torts—Right of Privacy—Use of Concept as Substitute Means of Securing Relief—Impersonation of Non-Competitor as Invasion of Right of Privacy*, 36 COLUM. L. REV. 1373, 1375 (1936) (noting of *Vandergriff* that "[t]he high probability of actual commercial injury coupled with the great difficulties of proof, may indicate some reason for employing the right of privacy rationale in cases of commercial impression").

<sup>311</sup> See, e.g., *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510–11 (1991) (considering a defamation suit based on misquoting of the plaintiff in a magazine interview); cf. Geoffrey Nunberg, *Have It My Way*, in *THE WAY WE TALK NOW* 193, 193 (2001) (noting that utterances like a "Kick me" sign cause the bearer to be "implicit in the utterance" and concluding that "[t]his is about the most powerful magic you can work with writing, putting a first-person pronoun into somebody else's mouth"); Tiersma, *supra* note 129, at 314 (suggesting that defamatory language should require "that the speaker perform the illocutionary act of *accusing*," meaning that it "attribute[s] responsibility to a specific person for a discreditable or blameworthy act or state of affairs").

plain why statements about a group are generally not remediable under defamation law, because one cannot generally impersonate a group.<sup>312</sup>) And copyright infringement suits, when used to vindicate reputational interests, are an example of the appropriation of the author's voice through his or her work. By using a recording artist's song at a campaign appearance, for example, a political candidate is potentially suggesting the artist's endorsement of the candidate as much as if the artist were there performing the song herself.

By contrast, various doctrines recognize that statements that do not pose attributional difficulties are not appropriate targets of liability, even though such statements may cause reputational harms. For example, defamation law excludes statements of "pure opinion" from the scope of liability despite their potential effect—the opinion of a respected film critic that a famous director has no talent<sup>313</sup>—because it is clear that the source of the opinion is the defendant and not the plaintiff. Additionally, because the persona of a public figure is both created by and, in part, belongs to the public, a defendant must do more than simply make a false statement before he can be accused of wrongfully speaking on behalf of the public-figure plaintiff—as the Supreme Court's jurisprudence indicates, he must be speaking with actual malice (a state of mind which indicates, at least, a disregard of the consequences of impersonation and, in some cases, an intent to impersonate).<sup>314</sup> Likewise, parodies are generally protected speech under several doctrines, including defamation, copyright infringement, and trade-

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<sup>312</sup> Cf. Epstein, *supra* note 2, at 793 (noting that to denounce a group "is to refer to everyone and no one at the same time"); Lidsky, *supra* note 302, at 1094 ("Preserving the dignity of a group, as opposed to an individual, has not been deemed a sufficient harm to overcome constitutional objections to speech regulation.").

<sup>313</sup> Jeremy Cohen, Diana Mutz, Clifford Nass & Laurie Mason, *Experimental Test of Some Notions of the Fact/Opinion Distinction in Libel*, 66 JOURNALISM Q. 11, 247 (1989) (reporting research suggesting that "opinions may be quite capable of carrying a defamatory reputational sting at least as damaging as any factual statement").

<sup>314</sup> John C.P. Goldberg, *Judging Reputation: Realism and Common Law in Justice White's Defamation Jurisprudence*, 74 U. COLO. L. REV. 1471, 1513 (2003) ("[A] person eager for public attention cedes his autonomy—his ability to define himself."); Magaziner, *supra* note 149, at 991 ("Just as the public figure who has sought fame cannot be given the same protection against defamation as the private individual who has not relinquished his privacy, the manufacturer or seller which has sought commercial acceptance of its product cannot reasonably expect legal protection against occasional disparagement. Disparagement is an indication of a product's fame just as defamation is a reflection of personal fame."); Joan E. Schaffner, Note, *Protection of Reputation Versus Freedom of Expression: Striking a Manageable Compromise in the Tort of Defamation*, 63 S. CAL. L. REV. 433, 464 (1990) (noting that "general-purpose public figures are more vulnerable to injury by the very nature of their notoriety because they depend upon public endorsement for their livelihood").

mark infringement, in part because the impersonation concerns are minimized—in other words, parodies will typically be understood to be the defendant’s speech and not the plaintiff’s.<sup>315</sup>

In sum, taking audience interests into account in cases involving alleged reputational harms provides a more complete view of the issues at stake. Without a consideration of such interests, disputes concerning reputation are likely to be assessed as a conflict only between the autonomy or right to self-definition of the individual or corporate holder of the reputation and the speech rights of the defendant speaker who is at risk of being silenced.<sup>316</sup> When broader societal interests are mentioned, they are typically discussed as the collective result of enhanced speech rights of potential defendants—in other words, that society will be better off if there is a multiplicity of voices in the intellectual or commercial marketplace.<sup>317</sup> The audience-interest view provides additional justification for the law’s interest in reputation. The recognition that reputation is a result of collective community judgment, and that such judgments enable members of that community to engage in social and commercial interactions, highlights the importance of creditable information as an input into that process.<sup>318</sup>

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<sup>315</sup> See, e.g., *People for the Ethical Treatment of Animals v. Doughney*, 263 F.3d 359, 366 (4th Cir. 2001) (“A parody must convey two simultaneous—and contradictory—messages: that it is the original, but also that it is *not* the original and is instead a parody. To the extent that an alleged parody conveys only the first message, it is not only a poor parody but also vulnerable under trademark law, since the customer will be confused.”) (citation omitted) (internal quotation marks omitted); see also Ramsey, *supra* note 6, at 917–19 (discussing First Amendment–related defenses to impersonation claims). In some cases, courts may be able to assume that the relevant audience will recognize a parody or other use of the plaintiff’s work to be the defendant’s speech and not the plaintiff’s; in other cases, evidence will be required. As others have noted, this evidence may well be influenced by what courts communicate to the public regarding lawful uses of others’ work. See, e.g., NEIL WEINSTOCK NETANEL, COPYRIGHT’S PARADOX 51 (2008) (noting that if filmmakers “were generally free to use songs without the copyright holders’ permission and most film audiences knew that, few would regard [the use of another’s song in a film soundtrack] as saying one thing or another about [the recording artist’s] own beliefs”).

<sup>316</sup> Cf. e.g., *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 757 (1985) (plurality opinion) (characterizing judicial task in defamation cases as “balanc[ing] the State’s interest in compensating private individuals for injury to their reputation against the First Amendment interest in protecting . . . expression”).

<sup>317</sup> Gillette, *supra* note 32, at 1193 (“[T]he broad privileges that have been applied in areas involving public officials and public figures essentially recognize that net social benefits may be obtained by subordinating an individual’s interest in reputation, even though that requires tolerating certain falsehoods about the individual.”).

<sup>318</sup> Cf., e.g., Volokh, *supra* note 304, at 1093 (“[I]n a free speech regime, others’ definitions of me should primarily be molded by their own judgments, rather than by my using legal coercion to keep them in the dark.”).

How, then, should the law reflect an audience-focused interest in reputation? This Article considers two proposals below: greater attention to the reputational interest in cases in which harm to reputation appears to be at issue, and a greater accommodation of audience interests in the consideration of remedy. Each relates to the overall audience interest in a reliable information flow—the former relating to the information provided *by* the community, and the latter relating to the information provided *to* the community.

#### A. *Focusing on the Reputational Interest*

Reputational harm occurs when dissemination of information about an individual or entity causes others to form a collective judgment that has the potential to result in a change in relationship or attitude.<sup>319</sup> Although various types of information can result in reputational harm, the audience's interest in reputation is reflected most clearly when the law prohibits the dissemination of false information that frustrates the audience's ability to make reputation-related judgments.<sup>320</sup> True information, by contrast, does not pose the same risk to the community's decision-making process. Thus, while an individual or corporation may have an interest in restricting the publication of true but private information, the law's vindication of that interest cannot truly be justified in terms of protecting one's reputation. To the extent the law provides a remedy for the disclosure of true information, as in the public disclosure of private facts tort, that remedy should be justified on grounds other than redressing reputational harm. Courts that allow assertions of an individual plaintiff's emotional distress or general harm to a firm's business interests to serve as evidence of reputational harm risk confusing the side effects of reputational injury with the in-

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<sup>319</sup> Anderson, *supra* note 93, at 765–67 (identifying four types of reputational harms that involve relational injuries: disrupting the plaintiff's existing relationships with others, disrupting future relationships with others, harming the plaintiff's existing public image, and putting the plaintiff in the public eye unfavorably); Lidsky, *supra* note 74, at 6 (“[H]arm to reputation is socially constructed: it is defined more by its effect on the ‘others’ who make up the plaintiff’s ‘community’ than by its effect on the individual plaintiff.”). Anderson asserts that injury to public image “occurs despite the absence of any relationship,” but this is not wholly accurate, since one’s image is formed in the view of others. Anderson, *supra* note 93, at 765.

<sup>320</sup> Eric Goldman, *The Regulation of Reputational Information*, in *THE NEXT DIGITAL DECADE: ESSAYS ON THE FUTURE OF THE INTERNET* 293, 294 (Berin Szoka & Adam Marcus eds., 2010) (defining “reputational information” as “information about an actor’s past performance that helps predict the actor’s future ability to perform or to satisfy the decision-maker’s preferences”); *id.* at 299 (describing ways in which the accuracy of reputational information can be distorted, such as through the dissemination of false information).

jury itself. In this vein, courts would do well to heed the capacity of the word “reputation” to encompass a wide variety of interests—hurt feelings, frustration of autonomy, and the like—not all of which reflect a community-based assessment and many of which risk engendering a correspondingly broad and unfocused legal response. Claiming a general harm to “reputation” without clarifying the nature of that harm denies courts the opportunity to test that assertion by reference to the appropriate community.<sup>321</sup>

This increased attention to the scope of the claimed reputational harm could be accomplished through a variety of means. Courts could develop, in the tradition of Warren and Brandeis, a separate tort more specifically directed to reputational injury. As with the development of the privacy tort, a distinct reputation-related tort would attempt to weave together the strands threaded throughout the various existing tort doctrines, thereby allowing courts to more closely monitor the means-end relationship between harm and liability. For example, although defamation and false light privacy are often distinguished on the grounds that the communication at issue in a defamation case must be defamatory while the communication in a false light privacy case need be “highly offensive to a reasonable person,” many statements will satisfy both requirements,<sup>322</sup> and so one might question whether it is worthwhile to maintain what turns out to be an illusory difference.

It is not clear, however, that such a broad approach is required in order to ensure that audience interests in reputation are represented. Warren and Brandeis’s proposal was inspired by a sense that no body of law at the time allowed individuals to vindicate what they believed was an important core interest—the “right to be let alone”—leading courts to shape the facts of cases before them so that they could be addressed by existing torts.<sup>323</sup> Here, by contrast, the diffuseness is not caused by the absence of a legal remedy for reputational injury; rather, the concern is that existing doctrine has become unmoored from the harm it

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<sup>321</sup> Many thanks to Talha Syed and Mark McKenna for encouraging me to clarify these points.

<sup>322</sup> *Denver Publ’g Co. v. Bueno*, 54 P.3d 893, 902–03 (Colo. 2002) (“We believe that recognition of the different interests protected rests primarily on parsing a too subtle distinction between an individual’s personal sensibilities and his or her reputation in the community.”); *Gannett Co. v. Anderson*, 947 So.2d 1, 10 (Fla. Ct. App. 2006) (concluding that, “in practice, nearly all false light cases involve a claim that the false impression harmed the plaintiff’s reputation”).

<sup>323</sup> Warren & Brandeis, *supra* note 247, at 193, 207–13 (noting that courts used, *inter alia*, breach of contract or trade secret law to address privacy-related harms).

aims to vindicate because courts have paid insufficient attention to the true meaning of “reputation.”

Courts might, alternatively, refocus cases on core reputational interests by favoring doctrines in which audience interests are typically central, such as defamation and trademark infringement claims. Many reputational harms could, as the discussion in Part III suggests, be pled as more than one tort.<sup>324</sup> The unauthorized use of a celebrity’s voice in an advertisement, for example, might well be pled as defamation (in that the use falsely suggests that the celebrity has acquiesced to such activities) or as an unfair competition claim under the Lanham Act (in that the use falsely suggests endorsement).<sup>325</sup> Although courts and commentators have attempted to outline the boundaries of the various torts,<sup>326</sup> there is still enough overlap such that litigants are likely to plead a set of facts under whichever tort is most likely to maximize their chances of recovery.<sup>327</sup> William Van Alstyne has described ways in which a plaintiff injured by a particular publication can easily recharacterize the nature of the harm to avoid procedural or other constraints: the un-

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<sup>324</sup> See *supra* notes 120–298 and accompanying text.

<sup>325</sup> See, e.g., *Lahr v. Adell Chem. Co.*, 300 F.2d 256, 259–60 (1st Cir. 1962) (reversing the lower court’s dismissal of a complaint pleading both theories, although focusing in the unfair competition claim on the dilution of the commercial value of plaintiff’s voice).

<sup>326</sup> *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573 (1977) (noting that the false light tort protects a reputational interest, while the right of publicity protects a property interest); *Douglass v. Hustler Magazine*, 769 F.2d 1128, 1134 (7th Cir. 1985) (“The false-light tort, to the extent distinct from the tort of defamation (but there is indeed considerable overlap), rests on an awareness that people who are made to seem pathetic or ridiculous may be shunned, and not just people who are thought to be dishonest or incompetent or immoral.”); *Meyerkord v. Zipatoni Co.*, 276 S.W.3d 319, 324 (Mo. Ct. App. 2008) (noting that in defamation cases, “the interest sought to be protected is the objective one of reputation, either economic, political, or personal, in the outside world,” while in privacy cases, “the interest affected is the subjective one of injury to the person’s right to be let alone”); Kwall, *supra* note 309, at 1345–46 (noting that the right of publicity is typically seen as providing a means of compensation for use of the plaintiff’s persona, while the right of privacy provides compensation for “hurt feelings”); Daniel J. Solove & Neil M. Richards, *Rethinking Free Speech and Civil Liability*, 109 COLUM. L. REV. 1650, 1659 n.41 (2009) (noting that the “principle difference between false light and defamation is the theory of damages,” in that “[f]alse light remedies false statements that cause emotional or psychological injuries, while defamation remedies false statements that cause damage to a person’s reputation”).

<sup>327</sup> See, e.g., Complaint ¶ 1, *Fox News Network LLC v. Robin Carnahan for Senate, Inc.*, No. 4:10-cv-00906–GAF (W.D. Mo. Sept. 15, 2010) (bringing claims for copyright infringement, right of publicity, and invasion of privacy based on unauthorized use in political campaign of footage of news reporter “to [make] it appear—falsely—that [plaintiffs network and reporter] . . . are endorsing [politician’s] campaign for United States Senate”); *id.* ¶ 44 (use of news clip “created the false impression that Wallace was not an objective reporter but rather had endorsed Defendant”).

authorized use of a celebrity's photograph on the front cover of a gossip magazine, for example, might be alleged as a violation of the celebrity's publicity rights or as defamation.<sup>328</sup> Likewise, Diane Zimmerman suggests that plaintiffs often sue both for defamation and for false light invasion of privacy (prevailing, if they do, on the defamation claim) or have false light claims treated by the court as defamation claims.<sup>329</sup> The duplicative nature of many of these efforts is recognized by courts that ensure that successful plaintiffs do not obtain a double recovery; thus, a plaintiff who brings claims both for false implied endorsement and for right of publicity, based on the same misappropriation of reputation, will typically obtain, if successful, only one award.<sup>330</sup>

Cabining plaintiff's options at the outset may therefore help to focus the courts' and the parties' attention on the reputational interest when present and thus make it more likely that all claims based on reputational harm will be assessed similarly. The defamation and trademark infringement torts in particular are useful models to consider, as both are sensitive to audience reception as a measure of reputational harm. Both doctrines also focus on the importance of accurate transmission flow as the way to vindicate that interest, and both doctrines incorporate a sensitivity to First Amendment-related discourse in ways that benefit audiences as well as speakers. Under this approach, a plaintiff attempting to use the public disclosure of private facts tort to vindicate a reputational interest would be encouraged, via threat of dismissal or other adverse action, to present her claim as defamation (to which, of course, the defense of truth would apply).

This framework would draw from jurisprudence such as the Supreme Court's decision in the 1988 case *Hustler Magazine, Inc. v. Falwell*, in which the Court rejected the plaintiff's attempt to plead as intentional infliction of emotional distress the harm resulting from a satirical

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<sup>328</sup> See Van Alstyne, *supra* note 288, at 809–14; see also David S. Welkowitz & Tyler T. Ochoa, *The Terminator as Eraser: How Arnold Schwarzenegger Used the Right of Publicity to Terminate Non-Defamatory Political Speech*, 45 SANTA CLARA L. REV. 651, 653 (2005) (“[P]ublic figures often turn to rights of publicity to avoid the *New York Times* standard. Although such suits are not always successful, courts are often more sympathetic to right of publicity claims than to defamation claims.”).

<sup>329</sup> Zimmerman, *supra* note 59, at 367 n.16; see also Kelso, *supra* note 278, at 785 (stating that for most cases, “[f]alse light is on the periphery, and the core of the case lies elsewhere”); Kate Silbaugh, Comment, *Sticks and Stones Can Break My Name: Nondefamatory Negligent Injury to Reputation*, 59 U. CHI. L. REV. 865, 877–78 (1992) (discussing plaintiffs' attempts to evade procedural requirements of the defamation tort by characterizing their claims as other torts); Wade, *supra* note 284, at 1121 (noting an overlap between defamation and privacy torts).

<sup>330</sup> See *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1112 (9th Cir. 1992).

advertisement in the defendant's magazine suggesting that the plaintiff had had sexual relations with his mother; such claims, the Court held, were subject to the same First Amendment limitations as defamation claims.<sup>331</sup> Other courts have expressed similar skepticism when presented with attempts to plead reputation-related claims as torts other than defamation, particularly when the injury alleged appears to relate to a harm caused by a statement disseminated to the public.<sup>332</sup> The line drawing that such an approach requires is difficult but not impossible: it requires a focus both on the nature of the harm and on the act of the defendant that allegedly caused it, rather than solely on the nature of the damages that the plaintiff has sought. If, for example, the plaintiff's case can be reduced to the claim that "the defendant made statements that harmed the plaintiff" in the eyes of the community, or if the plaintiff would have been unlikely to complain of the defendant's actions if the effect on the plaintiff's reputation had been positive rather than negative, such observations suggest that the harm at issue may be reputational.<sup>333</sup>

In many of these cases, however, the courts' concern arises from the belief that the plaintiff is engaging in artful pleading in order to

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<sup>331</sup> 485 U.S. 46, 56 (1988); *see also, e.g.*, *Blatty v. N.Y. Times Co.*, 728 P.2d 1177, 1184 (Cal. 1986) ("First Amendment limitations are applicable to all claims, of whatever label, whose gravamen is the alleged injurious falsehood of a statement.")

<sup>332</sup> *See, e.g.*, *Partington v. Bugliosi*, 56 F.3d 1147, 1160–61 (9th Cir. 1995); *Desnick v. Am. Broad. Cos.*, 44 F.3d 1345, 1355 (7th Cir. 1995) (rejecting trespass and fraud claims relating to an investigative journalism television program involving hidden cameras, noting that investigative journalism "is entitled to all the safeguards with which the Supreme Court has surrounded liability for defamation. And it is entitled to them regardless of the name of the tort, and, we add, regardless of whether the tort suit is aimed at the content of the broadcast or the production of the broadcast") (citation omitted); *Jorgensen v. Mass. Port Auth.*, 905 F.2d 515, 520 (1st Cir. 1990) (suggesting that "where there is an alleged injury to reputation *and* a communication, the plaintiff's claim sounds in defamation despite any attempt to characterize it otherwise"); *Brown & Williamson Tobacco Corp. v. Jacobson*, 713 F.2d 262, 274 (7th Cir. 1983) (noting that to allow defamation of a corporation to serve as the basis for a wrongful interference with business relations case would "enabl[e] the plaintiff to avoid the specific limitations with which the law of defamation—presumably to some purpose—is hedged about").

<sup>333</sup> *See Compuware Corp. v. Moody's Investors Servs.*, 499 F.3d 520, 533 (6th Cir. 2007) (calling "the 'defendant made statements that harmed the plaintiff' injury" a "classic example of reputational . . . harm"); *see also Unelko Corp. v. Rooney*, 912 F.2d 1049, 1057–1058 (9th Cir. 1990) (affirming dismissal of product disparagement and tortious interference with business relationships claims given summary judgment on defamation claim); *Redgrave v. Boston Symphony Orchestra, Inc.*, 855 F.2d 888, 895 n.5 (1st Cir. 1988) (concluding that defamation doctrine's First Amendment limitations did not apply to a breach of contract claim seeking reputation-related damages because the defendant's cancellation of the contract with the plaintiff "was not intended to be a form of symbolic speech or a 'statement'").

avoid the constitutional restrictions, statute of limitations, or other impediments that would apply if the tort were otherwise characterized.<sup>334</sup> In *Hustler v. Falwell*, for example, the Court noted that the application of the *New York Times v. Sullivan* standard to Falwell's intentional infliction of emotional distress claim was "necessary to give adequate 'breathing space' to the freedoms protected by the First Amendment."<sup>335</sup> But this concern is not particularly present where the concern is a lack of attention to audience interests. The constitutional and statute of limitations restrictions are focused primarily on the defendant's interests in swift resolution of pending matters and the freedom to speak on important issues without fear of liability; they are not directly concerned with the quality of the transmission of information to audiences. Put otherwise, the failure to more fully accommodate audience interests in reputation-related cases is not the result of plaintiffs' strategic behavior; rather, it is simply the result of the perspective encouraged by the bilateral model of litigation. Thus, while defamation and trademark infringement doctrine provide useful models for consideration of community interests, particularly in helping to determine how best to gauge community reaction,<sup>336</sup> it is not necessary, for the purposes of such interests, to require plaintiffs to plead their claims under those two torts.

Rather than restructure tort doctrine more dramatically, then, courts might be encouraged simply to give more attention to whether the plaintiff is asserting a reputation-related interest under whatever torts are the subject of the complaint; if so, the parties should be expected to present at least some evidence of the effect of the challenged statement on the relevant community's judgment and conduct. Even this more modest approach will likely require some definitional work at

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<sup>334</sup> *Braun v. Flynt*, 726 F.2d 245, 249 (5th Cir. 1984) ("It is clear that publications alleged to constitute invasions of privacy merit the same constitutional protections as do publications alleged to be defamatory."); *Gannett Co.*, 947 So. 2d at 7 (rejecting an attempt to circumvent a two-year statute of limitations for defamation actions by pleading facts under a false light privacy theory); Zimmerman, *supra* note 59, at 396 (noting that "solid reasons support treating all cases sounding in injury to reputation according to the same rules so that success or failure in litigation does not become a game of artful pleading").

<sup>335</sup> *Falwell*, 485 U.S. at 56. In *Bose Corporation v. Consumers Union of United States, Inc.*, the Court accepted the view of the lower appellate court, without deciding, that the *New York Times v. Sullivan* rule also applied to product disparagement cases. 466 U.S. 485, 513 (1984).

<sup>336</sup> Beth Simone Noveck, *Trademark Law and the Social Construction of Trust: Creating the Legal Framework for Online Identity*, 83 WASH. U. L.Q. 1773, 1740 (2005) (recommending borrowing from trademark law concepts "to account for the collective way [online] reputation is created").

the outset. For example, it will be important not to conflate a change in reputation with a change in cultural meaning or associations. When an image of John Wayne is recontextualized to challenge traditional icons of masculinity,<sup>337</sup> this is not a reputational harm (assuming the actor were alive to pursue such a claim). The act may challenge viewers to think more deeply about gender and sexuality issues, and it may well be the case that some viewers will subsequently not be able to see an image of John Wayne without calling the alternative image to mind. But these new associations are not reputation-related because they do not cause viewers to form a judgment about Wayne's qualities or characteristics based on actions or beliefs attributed to Wayne himself.<sup>338</sup> In other words, it is very likely that the relevant audience will interpret such alternative representations as self-consciously positioning themselves against an existing reputation rather than concluding that such representations attempt to speak for or impersonate Wayne.

Testing that assertion—in other words, determining whether reputational harm has occurred or is likely to occur as opposed to the extent of that harm<sup>339</sup>—is both difficult and important.<sup>340</sup> The touchstone, given the social construction of reputation, is a consideration of the view of the relevant audience to determine the likelihood of an attitude, behavioral, or opinion change.<sup>341</sup> Thus, the goal in assessing the

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<sup>337</sup> See Justin Hughes, "Recoding" *Intellectual Property and Overlooked Audience Interests*, 77 TEX. L. REV. 923, 958 (1999); Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 125, 144–45 (1993).

<sup>338</sup> Cf. McNAMARA, *supra* note 13, at 159 (contending that statements that merely incite others to avoid doing business with the plaintiff—such as the false statement that the plaintiff individual is deceased or that the plaintiff firm is no longer operational—should not be actionable defamation "if the purpose of defamation law is to protect reputation").

<sup>339</sup> This is not to say that there is automatically a remedy whenever a reputational harm is identified. Certain other policy interests, such as newsworthiness, may warrant a finding in favor of the defendant. See, e.g., *Messenger v. Gruner + Jahr Printing and Publ'g*, 208 F.3d 122, 129 (2d Cir. 2000) (finding no remedy, based on a certified question to the New York Court of Appeals, under New York privacy law when plaintiff's photograph was used to illustrate a magazine advice column, even though the publication might have created the false impression that the plaintiff was the subject of the column).

<sup>340</sup> See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974) (noting that the common law presumption of damages in defamation cases is "an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss"). Indeed, the difficulty of such proof was thought, at least in part, to underlie the common law doctrine of presumed damages in certain types of defamation cases. See Post, *supra* note 1, at 697–99 (discussing how presumed damages are difficult to justify via a conception of reputation as property).

<sup>341</sup> Calvert, *supra* note 31, at 939 (describing "two basic ways in which reputational harm is manifested: (1) attitude and opinion change, in the negative direction, toward the

existence of reputational harm should be, first, to define the relevant audience whose attitude counts<sup>342</sup> and, second, to determine how a change in attitude is to be measured. The first question relates to the “reputation for what?” inquiry. For both individuals and for corporations, the reputational assessment may well be multidimensional. An individual might have a different reputation with respect to different audiences: one’s reputation in the workplace might be different from one’s reputation in one’s social circle, which may be different yet again from one’s reputation as a writer or performer. Likewise, a brand might have one reputation in one community and a second reputation in another, such as when brands come to be adopted by different communities over time.<sup>343</sup> Thus, a more coherent assessment of reputational

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plaintiff; and (2) physical or behavioral change, also in the negative direction, toward the plaintiff”).

Logically, if defamation requires a detrimental change in readers’ opinions towards an individual, and not merely the distress suffered by the individual when he or she sees the publication or knows that others see it, then the determination of whether the tort has occurred hinges on numerous variables. These variables include the readers’ pre-publication attitude toward the plaintiff, the readers’ pre-publication attitude toward the media defendant, and the persuasive potency of the statement—all interchanging within the dynamic social setting of the community.

David McCraw, *How Do Readers Read?: Social Science and the Law of Libel*, 41 CATH. U. L. REV. 81, 84 (1991).

<sup>342</sup> Cf., e.g., McNAMARA, *supra* note 13, at 36 (suggesting that the evaluation of reputation by a community “always rests upon some sense of who is—and who is not—a part of the community”); Tiersma, *supra* note 129, at 317 (noting that “[t]he law will not provide a remedy if the accusation relates to moral standards that are considered antisocial or are held by too small a group of people, even if the harm to the victim is very real,” such as falsely stating that a drug dealer is an undercover narcotics agent) (footnotes omitted).

<sup>343</sup> BROMLEY, *supra* note 13, at 1.

In so far as there are channels of communication and overlapping membership *between* groups, information and influence are likely to be transmitted from one group to another and diffused throughout the wider community. It is possible, however, for opinions and beliefs to circulate among members *within* a group without people *outside* the group being party to them.

*Id.*; Berger & Ward, *supra* note 73, at 559 (“The meaning of consumption (e.g., brands, products, and cultural tastes) is not static, and it can shift based on the social identity of the individuals who hold those tastes.”). The development of different reputational signals in different communities may involve issues of race, gender, and socioeconomic status, to name just a few categories. See Douglas Century, *Jay-Z Puts a Cap on Cristal*, N.Y. TIMES, July 2, 2006, at H1 (describing a protest by the rap artist Jay-Z in reaction to unfavorable comments by the president of a champagne producer regarding the association of the brand with hip-hop music).

harm would determine, at the outset, the nature of the reputational interest and the community that bears responsibility for constructing it.

The second question encompasses both an inquiry as to which judgments count within a community and a consideration of the use of empirical evidence. Because reputation is based on a collective social judgment, idiosyncratic or outlier opinions should probably not be given much, if any, weight.<sup>344</sup> But here, as in other areas of the law, courts will have to consider whether the law's approach to audience perceptions should be reflective or normative, as well as the extent to which the law itself shapes those perceptions. For example, if a recording artist alleges that a politician's use of his song at a campaign appearance conveys the false message that the recording artist endorses the candidate, should the law provide a remedy so long as some cognizable percentage of the relevant audience perceives such an endorsement, or should the law deny a remedy on the grounds that the perception should be normatively discouraged?<sup>345</sup> To be sure, in various areas of the law, courts do not acknowledge every instance of confusion or deception among audiences; *New York Times v. Sullivan*, which permits some false information to circulate regarding public figures,<sup>346</sup> is but one example. And, of course, courts will occasionally hold that, under the circumstances, "no reasonable person" could hold a particular belief about the plaintiff;<sup>347</sup> the law would descend into meaninglessness if courts could not so determine.

But this doesn't necessarily mean that courts should always impose their views about what are appropriate judgments within a particular community by crediting only those views that are "reasonable," as is the

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<sup>344</sup> See, e.g., BROMLEY, *supra* note 13, at 17 (suggesting that one's reputation "can be defined either as the sum of all the attributions [given by others], including those that are idiosyncratic, or more simply, as the attributions that are widely shared").

<sup>345</sup> Cf. *Am. Italian Pasta Co. v. New World Pasta Co.*, 371 F.3d 387, 394 (8th Cir. 2004) ("[T]he Lanham Act protects against misleading and false statements of fact, not misunderstood statements."); *Mead Johnson & Co. v. Abbott Labs.*, 201 F.3d 883, 887 (7th Cir. 2000) (rejecting survey evidence as the basis for determining the meaning of advertising claims); NETANEL, *supra* note 315, at 50–52 (suggesting that "[a]uthors do have a cognizable speech interest in refraining from appearing to convey or endorse a message that is not their own" but noting that this speech interest "is contingent on social practices and perceptions that are themselves contingent on whether authors enjoy exclusive rights").

<sup>346</sup> 376 U.S. at 279–80.

<sup>347</sup> See, e.g., *Mason v. Jews for Jesus*, No. 06 Civ. 6433 (RMB), 2006 WL 3230279, at \*2 (S.D.N.Y. Nov. 8, 2006) (declining to issue a preliminary injunction against the distribution of a pamphlet using comedian Jackie Mason's name and caricature, in part because no reasonable reader of the pamphlet, in context, would believe that Mason had endorsed the defendant organization).

standard in defamation doctrine and trademark law.<sup>348</sup> If the focus of reputational harm is judgment by a particular community, it is difficult to justify rejecting evidence of a change in assessment simply because the community experience is not one shared by the trier of fact. Moreover, decision makers may be susceptible to what communications scholars have called the “third-person effect”—the concept that “people feel media messages will have more influence on others than on themselves” and so overestimate the reputational harm of a given statement.<sup>349</sup> While the effect of any particular communication on an audience is rarely simple to determine,<sup>350</sup> the difficulties involved in asking decision-makers to surmise the reputational effect of a statement on a community with which they may not be familiar suggests that the more direct evidence of attitudinal change that can be derived directly from the community at issue, the better the assessment of reputational harm will be.

Notably, when copyright law, trademark anti-dilution law, privacy law, and the right of publicity are used to vindicate reputational interests, the community’s response is not frequently present in the consid-

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<sup>348</sup> See McCraw, *supra* note 341, at 100.

Although interested in readers’ response and not just the words themselves, the reasonable reader approach is not synonymous with the pure positivist approach, an approach that focuses on the meaning actually given to the words by those who read them, no matter how unreasonable, and allows for multiple meanings across the community of readers.

*Id.*

<sup>349</sup> Jeremy Cohen & Albert C. Gunther, *Libel as Communication Phenomena*, 9 COMM. & L. 9, 17 (1987); see also Jeremy Cohen et al., *Perceived Impact of Defamation: An Experiment on Third-Person Effects*, 52 PUB. OPINION Q. 161, 171–72 (1988) (reporting the results of a study suggesting the existence of a more robust third-person effect for defamatory communications the larger the readership group (e.g., national readership versus local readership)); W. Phillips Davison, *The Third-Person Effect in Communication*, 47 PUB. OPINION Q. 1, 3 (1983) (defining the effect as a hypothesis that “people will tend to overestimate the influence that mass communications have on the attitudes and behavior of others”); Laurie Mason, *Newspaper as Repeater: An Experiment on Defamation and Third-Person Effect*, 72 JOURNALISM & MASS COMM. Q. 610, 616–17 (1995) (reporting results of an experiment suggesting that the third-person effect is likely to be more robust when a defamatory message is conveyed by a republisher such as a newspaper).

<sup>350</sup> Cohen & Gunther, *supra* note 349, at 21; Lidsky, *supra* note 74, at 45–47 (arguing that courts should be more upfront about the social implications of this analysis); McCraw, *supra* note 341, at 82 n.10 (asserting that the use of social science and survey research in defamation cases is more difficult than its use in trademark cases because “empirical research must account for diverse variables reflecting how individuals define and evaluate ‘reputation’”); *id.* at 90 (“[T]he idea that there is a simple and direct causal relationship between the mass-communicated message and its cognitive, attitudinal, and behavioral effects on an audience no longer prevails in communications research.”).

eration of reputational harm. Because copyright's harms are largely focused on unlawful uses of the work that deprive the author of economic benefits, an author who uses copyright law to vindicate reputational interests need not make any showing that the challenged use has caused harm to her reputation. Likewise, although the Lanham Act defines "dilution by tarnishment" as an "association arising from the similarity between a mark or trade name and a famous mark that harms the reputation of the famous mark," the statute suggests no factors whatsoever for courts to take into account to determine when a mark's reputation has been harmed.<sup>351</sup> Privacy law, similarly, focuses on the circumstances of the dissemination of the information at issue, not on the public reception to that information. A more rigorous focus on audience reaction to ameliorate these concerns may increase the costs of litigation in that it may call for surveys, expert testimony, or other empirical evidence. But costs may be saved in other respects: if reputational injury is the real harm at issue, narrowing the issues to those truly in dispute may save litigation costs overall. Moreover, a focus on audience does not require mathematical certainty; it simply requires enough evidence so that a court can determine that it is truly reputational harm, and not merely the plaintiff's hurt feelings, for which the plaintiff is seeking compensation.<sup>352</sup> Determining whether a change in attitude toward the plaintiff has taken place that arises from false information attributed to the plaintiff should be at the core of this analysis.

Admittedly, it will not always be apparent when reputational claims are at issue. Even after the recent guidance of the Supreme Court on the requirements of federal pleading standards,<sup>353</sup> plaintiffs are not required to delineate the interests they are attempting to vindicate, so long as they adequately allege the facts necessary to support the cause of action pleaded. Nevertheless, the plaintiff's allegations as to the nature and scope of the injury suffered and the damages requested may pro-

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<sup>351</sup> 15 U.S.C. § 1125 (c)(2)(C) (2006). By contrast, the statute suggests six factors that courts may take into account to determine when a mark is likely to cause dilution by blurring. *Id.* § 1125(c)(2)(B).

<sup>352</sup> *Cf.* 15 U.S.C. §§ 1114, 1125(a) (deeming unlawful uses of a trademark that are likely to cause confusion); RESTATEMENT (SECOND) OF TORTS § 559 cmt. d (1977) (noting that a defamatory statement need only have the tendency to harm one's reputation); *see also* Lidsky, *supra* note 74, at 7 (noting that courts in defamation cases "rarely resort to polls, surveys or even witness testimony to determine the values held by the community segment but instead rely on their own personal knowledge and intuitive judgments which they subsequently label common knowledge and common sense"); *id.* at 44–45 (recommending that defamation law require proof of actual harm to reputation).

<sup>353</sup> *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949–50 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554–63 (2007).

vide a clue as to the interest at stake, and discovery may flesh things out further as the case approaches summary judgment or other resolution.

### B. *The Nature of the Remedy*

A focus on audience interests and reception may also provide guidance on the scope of an appropriate remedy. Although monetary damages are typically awarded in many cases involving reputational injury,<sup>354</sup> such awards tend to serve as a proxy for the degree of emotional harm alleged to have been felt by the plaintiff as a result of the harm to her reputation or, in the case of a business, the loss of selling power of the mark.<sup>355</sup> There is, however, an uneasy fit between monetary awards and various justifications for the legal protection of reputation, particularly those that do not conceive of reputation as a property interest.<sup>356</sup> Monetary damages, while perhaps satisfying to the plaintiff, do not on their own provide any benefit for audiences;<sup>357</sup> indeed, some commentators have suggested that the availability of the judicial process for a public airing of the dispute vindicates the plaintiff's interests in this regard more than does a monetary award.<sup>358</sup> A focus on audience interests, therefore, might counsel more attention to disclaimers, retractions, and other forms of information correction as an appropriate

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<sup>354</sup> See Barrett, *supra* note 93, at 853 (providing critical commentary).

<sup>355</sup> See *Waits*, 978 F.2d at 1104 (“We have no doubt, in light of general tort liability principles, that where the misappropriation of identity causes injury to reputation, compensation for such injury is appropriate.”); Smolla, *supra* note 207, at 19 (“[I]t seems clear that the bulk of the money paid out in damage awards in defamation suits is to compensate for psychic injury, rather than to compensate for any objectively verifiable damage to one’s community standing.”).

<sup>356</sup> Post, *supra* note 1, at 727 (noting that compensation “is compatible only with the concept of reputation as property. Reputation as dignity is not a value susceptible to objective measurement; and the paramount goal of a defamation law designed to protect dignity would not be compensation, but rehabilitation.”); see also, e.g., *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 16 (7th Cir. 1992) (noting that it is “virtually impossible to ascertain the precise economic consequences of intangible harms, such as damage to reputation and loss of goodwill”).

<sup>357</sup> Cf. Lemley & McKenna, *supra* note 50, at 446 n.122 (contending that injunctions are always appropriate in trademark infringement cases involving confusion as to source or responsibility for quality of goods or services).

<sup>358</sup> Bezanson, *supra* note 108, at 799 (suggesting that “[t]he act of suing itself represents a public response denying the story, which legitimates the plaintiff’s claim of falsity more effectively than any other method”); Emler, *supra* note 115, at 185–86 (discussing research suggesting that “a strategy for protecting one’s reputation is to give others one’s own account of” events as well as “arming and priming one’s supporters to defend it on one’s behalf”). The amount of an award likely serves an expressive function in that it emphasizes the degree of the defendant’s wrongdoing, but that function may be adequately served by statements on the record.

remedy or as a consideration in determining whether further relief from the court is warranted.<sup>359</sup> Such a remedy helps to ameliorate issues regarding the falsity of the communication, the attribution or authorization of the plaintiff, and the information flow that audiences receive; it involves not only “setting the record straight in a public forum” but also acting as a public admonishment to the defendant.<sup>360</sup> Taking account of such measures serves defendants’ interests in addition to audiences’ interests. More tailored remedies are less likely to prevent speakers from speaking altogether (or, in the case of copyright claims, from using the work at issue) and more likely to recalibrate the nature of the information flow by requiring the defendant to speak truthful matter on his own behalf. Speakers would therefore not risk crippling monetary awards or fear speaking at all due to the chilling effect associated with the risk of liability.<sup>361</sup>

There are at least two concerns that arise in considering remedies in this context. First, it is unclear whether a court, consistent with the First Amendment, could *require* a defendant to issue a retraction or disclaimer in a noncommercial speech context.<sup>362</sup> This does not mean, however, that such statements should be irrelevant to the question of remedy in reputation-related cases. Courts could, for example, take the nature and timing of a voluntary retraction into account in determining whether additional relief is warranted or in considering the scope of monetary damages; alternatively, as Paul LeBel has suggested, de-

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<sup>359</sup> See Lidsky, *supra* note 308, at 821 n.130 (“It is more troublesome when the government forces ignorance on its citizens by withholding information than when it forces knowledge on them through disclosure requirements. Mandatory disclosure does not compromise autonomy in the same way as withholding information.”); Mark P. McKenna, *Back to the Future: Rediscovering Equitable Discretion in Trademark Cases*, 14 LEWIS & CLARK L. REV. 537, 553 (2010) (proposing that courts in trademark cases consider narrow equitable remedies, such as disclaimers, more often).

<sup>360</sup> Stanley Ingber, *Defamation: A Conflict Between Reason and Decency*, 65 VA. L. REV. 785, 791–92 (1979); see also Bezanson, *supra* note 108, at 793 (contending that plaintiffs pursue libel actions not for monetary relief but rather for “restoring reputation, correcting what plaintiffs view as falsity, and vengeance” and that plaintiffs view libel lawsuits “as a form of public vindication”).

<sup>361</sup> It should be noted, however, that some plaintiffs may not be in a position to fund litigation without the expectation of monetary damages. I thank Lisa Ramsey for highlighting this point.

<sup>362</sup> See *Kramer v. Thompson*, 947 F.2d 666, 680–82 (3d Cir. 1991) (expressing skepticism regarding the court’s ability to order mandatory retractions); cf. *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 256 (1974).

defendants could be offered the option of a “remedy of repair” in lieu of damages for reputational injury.<sup>363</sup>

Second, it is true that some research indicates that retractions and disclaimers do not have the hoped-for effect, and that, by including the plaintiff’s name or the substance of the challenged statement itself, such disclaimers in fact have the opposite effect from that intended, reinforcing the falsehood or misattribution in the minds of the audience.<sup>364</sup> This does not necessarily mean, however, that resort to such remedies is futile; rather, it may simply require increased attention to the form of the disclosure. Consistent with research demonstrating the importance of source to an audience’s willingness to accept a statement, for example, one might encourage courts to provide clearer and more definitive statements on the record regarding the reputational interest.<sup>365</sup> The courts not only, as Robert Post has noted, “speak[] for the community at large,” but also speak *to* the community at large in a way that plaintiffs, defendants, and audiences will tend to recognize.<sup>366</sup>

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<sup>363</sup> Paul A. LeBel, *Defamation and the First Amendment: The End of the Affair*, 25 WM. & MARY L. REV. 779, 788–90 & n.40 (1984) (proposing a “remedy of repair” in which the defendant would be required “to explain the defamatory statement, and the circumstances that caused the defendant to publish it,” occupying “as much space or time as the defamatory communication”).

<sup>364</sup> See, e.g., *Falwell*, 485 U.S. at 52 (stating that defamatory statements “cause damage to an individual’s reputation that cannot easily be repaired by counterspeech, however persuasive or effective”); CASS R. SUNSTEIN, ON RUMORS: HOW FALSEHOODS SPREAD, WHY WE BELIEVE THEM, WHAT CAN BE DONE 46 (2009) (noting that “corrections of false impressions can be futile; they can also actually strengthen those very impressions”).

<sup>365</sup> See, e.g., SUNSTEIN, *supra* note 364, at 54 (suggesting that corrections of false rumors work when “those hearing the false rumor do not have strong motivations for accepting it, if their prior knowledge is weak or nonexistent, and if they trust those who are providing the correction”).

<sup>366</sup> Post, *supra* note 1, at 713. Likewise,

the spectacle of criminal punishment is much more than a decision about the liability of a particular offender. It is also, importantly, a referendum on the social standing and worth of the victim. A successful punishment indicates that the community values the victim. A failure to punish indicates something less—perhaps indifference toward the victim, perhaps even disdain.

Kenworthy Bilz, *The Puzzle of Delegated Revenge*, 87 B.U. L. REV. 1059, 1088 (2007); see also, e.g., Skolnick, *supra* note 112, at 679–680 (“The formal recourse to the courts is thus symbolically significant. The plaintiff perceives the judiciary as a fair, competent, and impartial arbiter of the dispute—the only societal institution capable of destigmatizing, of restoring the plaintiff’s lost dignity.”). But see Marc A. Franklin, *A Declaratory Judgment Alternative to Current Libel Law*, 74 CALIF. L. REV. 809, 816 (1986) (discussing proposal in which an appropriate retraction would preclude a declaratory judgment action for libel, suggesting that “an appropriate retraction is preferable to a judicial declaration issued after a disputed hearing” because it “constitutes an admission and publication of the correct facts”).

Additionally, communications research might also be consulted to determine the best way in which to phrase a correction or retraction so as to ensure maximum effectiveness. For example, much work has been done on the appropriate and effective form of product warnings in the products liability context given that consumers are expected to read such warnings under the law; indeed, a failure-to-warn case posits that the plaintiff's injury would not have occurred had an effective warning been provided.<sup>367</sup> It would therefore be unduly pessimistic, given existing research, to assume that retractions or disclaimers can never be effective, no matter what their form of presentation.<sup>368</sup>

This is not to say that monetary damage awards for injury to reputation might not be appropriate in many circumstances. An individual who can demonstrate lost employment opportunities or a firm that can prove lost sales directly resulting from reputational injury should be able to recover those damages. But many cases do not involve such damages, and plaintiffs who are alleging unspecified harm merely from a change in audience opinion should not be assumed to be entitled to monetary damages where an alternative remedy can correct the record while not imposing other restraints on the free flow of information.<sup>369</sup>

#### CONCLUSION

The importance of reputation does not mean, of course, that harms to reputation need always be redressed legally. Gossip and other forms of informal information exchanges play an important role in maintaining accurate information flows,<sup>370</sup> and various communities have developed more elaborate methods of enforcing reputational

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<sup>367</sup> See Laura A. Heymann, *Reading the Product: Warnings, Disclaimers, and Literary Theory*, 22 YALE J.L. & HUMAN. 393, 396 (2010).

<sup>368</sup> Calvert, *supra* note 31, at 938 (describing an experiment showing that a repeated statement of denial within the same article containing defamatory allegations "may significantly mitigate or reduce the extent of harm to reputation caused by defamatory statements"); Carl I. Hovland & Walter Weiss, *The Influence of Source Credibility on Communication Effectiveness*, 15 PUB. OPINION Q. 635, 647 (1951-52) (reporting results of an experiment in which "changes in opinion [were] significantly related to the trustworthiness of the source used in the communication").

<sup>369</sup> Cf. McKenna, *supra* note 359, at 553 (suggesting that a disclaimer that OutKast's song was not endorsed by Rosa Parks would have been a preferable solution to a finding of infringement, although noting that a disclaimer remedy would be a second-best result to a finding of noninfringement).

<sup>370</sup> See Nicholas Emler, *Gossip, Reputation, and Social Adaptation*, in GOOD GOSSIP 117, 138 (Robert F. Goodman and Aaron Ben-Ze'ev eds., 1994) ("As an exchange of information and observations about the inhabitants of one's environment, gossip contributes centrally to successful functioning in that environment.").

norms, even in online environments where the attributional norms that govern are often related to pseudonyms and screen names. Indeed, it is in many of these environments—such as the participant rating systems of eBay and other online fora—that the importance of reputation to audiences seems most clear. An individual participating in such communities values his or her reputation precisely because it will encourage others in the community to engage with him or her; relatedly, the community has an interest in ensuring that reputations are built on legitimate informational inputs so that those reputational ratings are useful grounds on which to base decision making.<sup>371</sup> The same concerns should be taken into account when individuals and firms attempt to vindicate reputational interests legally. The plaintiff and defendant are the parties before the court, but the resolution of their dispute necessarily requires the consideration of audience interests.

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<sup>371</sup> See, e.g., Macey, *supra* note 41, at 18 (“The very existence of many of the key institutional components of the financial world, including credit rating agencies and audit firms, can be explained only by the theory of reputation.”); Paul Resnick et al., *Reputation Systems*, 43 COMMUNICATIONS OF THE ACM 45, 47 (2000) (“To operate effectively, reputation systems require at least three properties: [1] Long-lived entities that inspire an expectation of future interaction; [2] Capture and distribution of feedback about current interactions (such information must be visible in the future); and [3] Use of feedback to guide trust decisions.”).

