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## Tin Gods, Heroes and One Perfect Rose: A History of the Right of Publicity's Rift with the First Amendment (and the Path to Reconciliation)

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### ABSTRACT

*Fictionalized speech fuses elements of the real world with elements of the imagination. Courts across the country agree it enjoys full First Amendment protection. Yet a curious, stubbornly enduring line of New York right-of-publicity cases threatens to strip that protection from works that inject too much fiction into stories about real people. This article investigates that unconstitutional (or perhaps pre-constitutional) anomaly, starting with the 1913 Court of Appeals ruling in *Binns v. Vitagraph Co.* and continuing to this day. A close review of trial records and historical news accounts over more than a century shows how badly we misunderstand the basic facts of these cases, which have gradually boxed generations of New York judges into a legal defense that can protect a strictly factual account of someone's life, but perhaps not an imaginative one. Under modern First Amendment jurisprudence, that line is impermissibly content-based—as is the right of publicity itself. What's missing, both in case law and in the national conversation, is a compelling account of how a person can be harmed by their non-defamatory depiction in an expressive work. When we shift away from constitutionally irrelevant details about the form a given work takes, toward an inquiry*

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*into the precise nature of the plaintiff's harm and an assessment of the governmental interest in preventing it, we find a constitutionally and logically sound path. Better 112 years late than never.*

## INTRODUCTION

How, precisely, can a person be harmed by the use of their name, likeness, or life story in an expressive work, and how, in a free-speech regime, should the law respond? It's a puzzle that has dogged generations of litigants, judges, and other legal thinkers on the cavernous right of publicity, and looms large as new media threatens to distort our intuitions once more.

This article investigates possible answers in pursuit of something logically and constitutionally sound. Its vehicle is new research into the roughly century-old branch of New York right-of-publicity cases that hold that a speaker can say fictional things about fictional people, and truthful things about real people, but not overly fictionalized things about real human beings. This fictionalization rule—or gap, more precisely, in New York's newsworthiness defense against a right-of-publicity claim—reaches from the 1913 New York Court of Appeals holding in the woefully misunderstood *Binns v. Vitagraph Co. of Am.*,<sup>1</sup> through the 2021 Appellate Division decision in *Porco v. Lifetime Ent. Servs.*<sup>2</sup> It is in dire need of examination both because of its discontinuity with modern First Amendment doctrine, and because New York courts simply refuse to reconcile them. Tracing the history shows how the rule came to be so far afield. It also enables careful consideration of the shifting answers that litigants and judges have offered over the years to the first part of the question I posed: how might a plaintiff be harmed by the use of their identity in an expressive work? Finally, history exposes a key distinction in expression that the newsworthiness defense can't detect, between:

*Category 1:* Statements that a speaker intends her listener to receive as factually accurate as to the real world, in a context in which that is how they reasonably are understood; and

*Category 2:* Statements that a speaker might intend the listener to receive as factually accurate, or imaginative in nature, or some blend thereof, in a context in which the listener reasonably understands that the statements might be any of those things.

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<sup>1</sup> 210 N.Y. 51, 57–58 (1913).

<sup>2</sup> 150 N.Y.S.3d 380, 386 (App. Div. 2021).

New York’s newsworthiness defense, which is its primary free-speech bulwark against a right-of-publicity claim, presumes the logic of a Category 1 work. When states build their speech-protective defenses around one type of expression that way, they can falter and leave out speech that is equally protected by the First Amendment but different in nature—like a Category 2 work. Newsworthiness is not a prerequisite for speech to garner First Amendment protection. And as New York courts consistently acknowledge, the newsworthiness defense is only a judge-made gloss on New York Civil Rights Law §§ 50–51, the state’s right-of-publicity statute—the express purpose of the defense is to avoid a constitutional clash, not cover all of the speech that the First Amendment does.<sup>3</sup> Any gaps in its coverage, for certain fictionalized works or otherwise, should be taken as infirmities in the defense, not an excuse to leave those works exposed to claims.

Modern First Amendment doctrine provides, and in fact compels, a smarter approach. As scholars and judges of late recognize, a standard right-of-publicity claim that targets an expressive work—a novel, a docudrama, a homemade TikTok—is a content-based restriction on constitutionally protected speech.<sup>4</sup> As such, it should be subject to strict scrutiny, which requires asking if the government has a compelling interest in preventing the plaintiff’s harm,

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<sup>3</sup> See, e.g., *Koussevitzky v. Allen Towne & Health*, 68 N.Y.S.2d 779, 782–83 (Sup. Ct. 1947), *aff’d* 69 N.Y.S.2d 432–33 (App. Div. 1947) (observing that courts have read news out of [New York Civil Rights Law] § 51 and given it a “realistic” definition because “[a] literal construction of these words would have resulted in seriously hampering freedom of speech and of the press.”); *Spahn v. Julian Messner, Inc.*, 274 N.Y.S.2d 877, 879 (Ct. App. 1966), *vacated on other grounds* 387 U.S. 239 (1967) (“ever mindful that the written word or picture is involved, courts have engrafted exceptions and restrictions onto the statute to avoid any conflict with the free dissemination of thoughts, ideas, newsworthy events, and matters of public interest.”); *Davis v. High Soc’y Mag.*, 457 N.Y.S.2d 308, 314–15 (App. Div. 1982) (“a too rigorous application of the legislative prohibition would impinge on our ideals of freedom of speech and the press”); *Alfano v. NGHT, Inc.*, 623 F. Supp. 2d 355, 359 (E.D.N.Y. 2009) (“[m]indful of its potential conflict with the First Amendment, courts have read Section 51 with sensitivity”) (internal quotations and citations omitted).

<sup>4</sup> See, e.g., *Sarver v. Chartier*, 813 F.3d 891, 905–06 (2016) (“If California’s right of publicity law applies in this case [involving a film], it is simply a content-based restriction . . . and cannot stand unless Sarver can show a compelling state interest in preventing the defendant’s speech.”); Robert C. Post & Jennifer E. Rothman, *The First Amendment and the Right(s) of Publicity*, 130 *YALE L. J.* 86, 135–38 (2020) (stating that the right of publicity “is unquestionably a content-based regulation” and, when it is applied to public discourse, a category that extends beyond governance to include “broader communicative activities such as art, music, and comedy,” it is “presumptively forbidden.”).

which in turn means figuring out what the harm is.<sup>5</sup> None of the plausible and enduring candidates for harm that emerge from New York's fictionalization cases—including a plaintiff's desire to control her public image, and any sense of indignity she may feel from being depicted in an imaginative setting—can justify an incursion into constitutionally protected speech.

This article begins with Jack Binns, a young wireless system operator who saved hundreds of people aboard a sinking ship in 1909, and then sued the Vitagraph Company ("Vitagraph") over its film about the rescue under the nascent §§ 50 and 51, which, in effect, created an early right of publicity.<sup>6</sup> The New York Court of Appeals acknowledged in *Binns* that there had to be some exception to the law to protect the news industry, laying the groundwork for the newsworthiness defense.<sup>7</sup> But for reasons I show to be unavailing, the Court refused to extend that protection to Vitagraph's film.<sup>8</sup> Next I juxtapose the *Binns* holding with the 1950 case *Molony v. Boy Comics Publishers*, another in New York's fictionalization line, in which an Appellate Division court held that the newsworthiness defense *did* protect a comic book's account of a heroic response to an airplane crash in the Empire State Building.<sup>9</sup> Finding the *Binns* and *Molony* holdings irreconcilable, I step back to examine the history of §§ 50 and 51, and the 120-year conflict nationwide between the right of publicity and free speech. The solution is the U.S. Supreme Court's content-neutrality principle, ensconced in First Amendment jurisprudence over the last 50 years. I then return to the thread of New York's fictionalization cases and the mystery of Vitagraph's film, asking: What struck the Court of Appeals in *Binns* as so problematic about the movie that it didn't deserve the same immunity as news? What have New York courts since understood that problem to be? Were those supposedly problematic features *actually true* of the movie in *Binns*, and the other expressive works that courts have consigned to its corner? And whatever their nature—whatever one supposes could have been the harm, or could be the harm today, in an imaginative take on a real person's life—does it hold up as a basis for liability under the modern First Amendment? I end by applying

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<sup>5</sup> See, e.g., *Reed v. Town of Gilbert*, 576 U.S. 155, 171–72 (2015).

<sup>6</sup> Record on Appeal at 6–10, *Binns v. Vitagraph Co. of Am.*, 210 N.Y. 51 (1913) (hereinafter "Binns Record").

<sup>7</sup> See *Binns*, 210 N.Y. at 56 ("It would not be within the evil sought to be remedied by [§§ 50–51] to construe it so as to prohibit the use of the name, portrait or picture of a living person in truthfully recounting or portraying an actual current event as is commonly done in a single issue of a regular newspaper.").

<sup>8</sup> *Id.* at 58.

<sup>9</sup> *Molony v. Boy Comics Publishers*, 98 N.Y.S.2d 119, 125–26 (App. Div. 1950).

strict scrutiny to New York's fictionalization rule and conclude that, even if it leaves just some sliver of fictionalized works exposed to §§ 50 and 51 liability, it still is unconstitutional. *Binns* and its progeny are and should be dead law.

Tension between the right-of-publicity and the First Amendment are a national concern, not just New York's. But by scrutinizing the fictionalization cases we can see how easily litigants and judges trip over constitutionally irrelevant features of different speech forms, or overlook crucial distinctions between them, or let biases creep in either toward sympathetic plaintiffs or against strange new forms of expression, when states ground their speech-protective defenses in mere subsets of the full universe of speech.

### I. JACK BINNS

At the turn of the 20th century, the young motion picture industry and the law were on a collision course over the use of real people in movies. On the film side, simply rendering life in motion on screen had been a surefire source of audience interest at first, but then the novelty wore off.<sup>10</sup> Increasingly, the business leaned on narrative forms of content to lure audiences into the rather underwhelming theaters of the day.<sup>11</sup> Real life, with real people, were an obvious and enduring source of interest—just as they had been for Charles Dickens, William Shakespeare, and historians through time.<sup>12</sup> In legal circles, meanwhile, prominent jurists for more than a decade had been wrestling with how all forms of new camera technology could turn people's faces into imagery for reprint, sale, and broad dissemination.<sup>13</sup> In tandem

<sup>10</sup> See, e.g., 1 CHARLES MUSSER, *THE EMERGENCE OF CINEMA: THE AMERICAN SCREEN TO 1907* 6–7, 109, 189 (1990) (describing how the initial audience “astonishment at the lifelike quality of the images” gave way to a rise in story films).

<sup>11</sup> See *id.* at 189 (“the dynamic of novelty was such that film companies had to quickly move beyond the simple task of dispersing a technological innovation” toward “the development of narrative”).

<sup>12</sup> See, e.g., Dalya Alberge, *Real-life Charles Dickens characters traced*, *THE GUARDIAN* (Feb. 1, 2012), <https://www.theguardian.com/books/2012/feb/01/charles-dickens-real-character-names> [<https://perma.cc/CXC5-VQ7S>]; Austin Tichenor, *Mangled glory: Fact and (mostly) fiction in Shakespeare's history plays*, *SHAKESPEARE & BEYOND* (July 31, 2020), <https://shakespeareandbeyond.folger.edu/2020/07/31/historical-fact-fiction-shakespeare-history-plays/> [<https://perma.cc/C7L7-VBKA>].

<sup>13</sup> See, e.g., Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 *HARV. L. REV.* 193, 195, 206, 213 (1890) (registering displeasure with the photographer or “possessor of any other modern device for recording or reproducing scenes or sounds[.]” and arguing that “[r]ecent inventions and business methods” necessitated

with lawmakers, they'd embarked on the long process of molding their concerns about what could be done with a person's identity and inner life into the legal doctrines that, by about mid-century, would be formally labeled the rights of publicity and privacy.<sup>14</sup>

This was the world of *Binns v. Vitagraph Co.* The case began with the crash of two passenger ships before dawn on January 23, 1909, off the coast of Nantucket. Both the *R.M.S. Republic* and the *S.S. Florida* were damaged in the collision, but with a gash in its side and water pouring into the engine room, the situation aboard the *Republic* was critical.<sup>15</sup> Luckily, it was outfitted with a Marconi Wireless system—novel technology that linked land and rescuers with distressed ships that otherwise might have sunk alone. Thanks in large part to Jack Binns, Marconi's 24-year-old wireless operator, who sat for hours in the frigid wreckage of his cabin coordinating the rescue, hundreds of passengers were ferried to a rescue ship and saved.<sup>16</sup>

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expanding tort law, most obviously by enabling everyday people to “prevent [their] public portraiture”); *Roberson v. Rochester Folding Box*, 171 N.Y. 538, 563 (1902) (Gray, J., dissenting) (stating that while “[i]nstantaneous photography” was a “species of aggression,” it generally had to be tolerated as an “irremediable and irrepressible feature of the social evolution”—except that the commercial use of a person's photo was “possibly more formidable and more painful in its consequences, than an actual bodily assault might be”); *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 80 (Ga. 1905) (stating that even a candidate for public office ought not be subject “to the humiliation and mortification of having his picture displayed in places where he would never go to be gazed upon, at times when and under circumstances where if he were personally present the sensibilities of his nature would be severely shocked.”).

<sup>14</sup> See, e.g., N.Y. LAWS CH. 132 (1903), renumbered as N.Y. CIVIL RIGHTS LAW §§ 50–51; *Pavesich*, 50 S.E. at 80–81 (recognizing a privacy right in Georgia); *Edison v. Edison Polyform Mfg. Co.*, 67 A. 392, 394 (N.J. Ch. 1907) (enjoining the sale of Edison-branded medicine and observing that, if one has a property right in one's name and likeness, then “its pecuniary value, if it has one,” ought to belong to him); *Foster-Milburn v. Chinn*, 120 S.W. 364 (Ky. Ct. App. 1909) (holding that advertisement for kidney pills that included an allegedly fake endorsement by the plaintiff, and his photo, could violate cognizable privacy rights).

<sup>15</sup> See, e.g., *Baltic Brings Full Details of Fog Crash*, N.Y. TIMES, Jan. 26, 1909, at 1 (reporting that the *Florida's* tip tore into cabins and the engine room, opening a “great hole ... through which immediately the water began to rush.”).

<sup>16</sup> See *Binns's Story of Wireless Work*, N.Y. TIMES, Jan. 27, 1909, at 2 (hereinafter *Binns's Story*) (describing his work in his “bitterly cold” cabin, where “a stiff breeze was blowing through the splintered wood work”, lasting into the afternoon).

Naturally, Binns arrived back in New York a celebrity.<sup>17</sup> He received awards and commendations, and his story was in the news for weeks.<sup>18</sup> He even wrote his own account of the rescue for *The New York Times*.<sup>19</sup> One night, his friends dragged him from the audience onto the stage of the Hippodrome Theater to cheers.<sup>20</sup> *The New York Times* reported the next day that Binns had fled out onto Sixth Avenue “bedaubed with rouge and powder, with the chorus girls still pursuing him[.]”<sup>21</sup> He was the toast of the town.

Before the rescued *Republic* passengers and crew even reached New York harbor, Vitagraph set about producing its own account of the ocean rescue, for its own novel motion-picture cameras, in its Brooklyn studios.<sup>22</sup> It took Vitagraph about three days to build the sets, write the script, and film the scenes, followed by post-production work; finally, several weeks later, it sent out to local theaters *C.Q.D.; or, Saved By Wireless; a True Story of The Wreck of the Republic* (“*C.Q.D.*”).<sup>23</sup> Binns had not seen it.<sup>24</sup> *C.Q.D.* was popular, but like many movies of the day, it was loaned to local theaters as part of a film exchange, and it cycled back out before Binns could find it.<sup>25</sup> He sued Vitagraph that summer anyway under New York Civil Rights Law §§ 50 and 51,

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<sup>17</sup> See, e.g., *How Binns Flashed His Calls For Help*, N.Y. TIMES, Jan. 26, 1909, at 4 (stating that as soon as the rescue ship *U.S.R.C. Seneca* dropped its anchor off Staten Island, “a dozen or more newspaper men boarded her ... [to] search for Binns, the Marconi operator of the Republic, who so heroically stuck to his post and flashed forth the messages that told of the Republic’s peril”).

<sup>18</sup> See, e.g., Binns Record at 59–63, 65–66; Binns v. Vitagraph Co. of Am., 210 N.Y. 51 (1913) (transcribing Binns’ trial testimony on the awards and news coverage he received); *Congress Applauds Binns*, N.Y. TIMES, Jan. 26, 1909, at 4 (quoting congressman on the House floor: “Jack Binns has given the world a splendid illustration of the heroism that dwells on seas”); *Binns Flees Cameras*, N.Y. TIMES, Feb. 9, 1909, at 1 (reporting that he was greeted upon arrival in Liverpool by a “battery of cameras waiting to take his picture,” and “hid in the corner of a dark shed”; the next day, he was due in his home town of Peterborough for a parade and “possibly [he] will be made a freeman of the city”).

<sup>19</sup> See Binns’s Story at 1.

<sup>20</sup> See *Binns, Wireless, Kissed by Chorus*, N.Y. TIMES, Jan. 29, 1909, at 2.

<sup>21</sup> *Id.*

<sup>22</sup> See Binns Record at 153–55 (describing Vitagraph founder and vice president testifying about the production of *C.Q.D.*).

<sup>23</sup> See *id.* at 153, 156, 176. *C.Q.D.*, the distress signal Binns sent out, stood for “All ships. Danger”. *Liner Republic Rammed At Seas; Four Lives Lost?*, N.Y. TIMES, Jan. 24, 1909, at 1.

<sup>24</sup> See Binns Record at 141.

<sup>25</sup> See *id.* at 141–42; see also *id.* at 30 (documenting the cross-examination of a theater manager, who testified that *C.Q.D.* was “in popular demand”).



a sweeping enactment from 1903 entitled a “Right of Privacy” that banned the use of any living person’s “name, portrait or picture” for advertising, or for “the purposes of trade,” without their written permission.<sup>26</sup>

Vitagraph waged a four-year court battle with Binns over whether *C.Q.D.* counted as “trade” within the meaning of the Privacy Law, and if it did, whether Vitagraph should have to pay damages.<sup>27</sup>

For the company, the stakes must have felt high: not being able to discuss or depict real people in film could cost it a promising line of business and, as its lawyers argued, “deprive society” of the “exceedingly valuable service which can be rendered in many ways by this new art.”<sup>28</sup> Vitagraph was founded in 1898 by James Stuart Blackton, a journalist and vaudevillian, and his partner, Albert Smith.<sup>29</sup> By 1909, with a string of messy fights over Thomas Edison’s patents in their wake, Blackton and Smith had built Vitagraph into a formidable player in the early film industry.<sup>30</sup> Motion pictures had become “extraordinarily popular almost overnight,” and the public had “an increasing perception of film as art”; movie companies were consciously moving past the role of manufacturers and becoming film producers.<sup>31</sup> Vitagraph’s freedom to draw on the same real-life sources other storytellers used would have mattered to its future and its bottom line. As Binns’ attorney, Arthur Hansl, put it, “[a] wide and lucrative field would be thrown open” if Vitagraph won, because “the graphic portrayal” of “public characters . . . would excite general curiosity.”<sup>32</sup>

At the end of the battle in 1913 in the Court of Appeals, Vitagraph lost. Judge Emory Chase acknowledged in the opinion that some form of defense against the Privacy Law ought to protect news, but he held that it would not

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<sup>26</sup> N.Y. CIVIL RIGHTS LAW §§ 50–51 (1909); *see also* Binns Record at 6–10 (Complaint). For simplicity and to use the terminology the Legislature gave it at the time, I sometimes refer to the statute in this essay as the “Privacy Law.”

<sup>27</sup> *See* Binns Record at 10 (demonstrating that Binns filed his complaint in the Supreme Court for New York County in July 1909); *Binns*, 210 N.Y. at 52 (recording the date of the Court of Appeals’ final decision as December 30, 1913, four years later).

<sup>28</sup> Brief for Appellant at 45, *Binns v. Vitagraph Co. of Am.*, 210 N.Y. 51 (1913) (hereinafter “Binns Appellant’s Br.”).

<sup>29</sup> *See, e.g.*, Musser, *supra* note 10, at 121, 254, 283, 405–06, 412 (recounting Blackton’s early career and rise of Vitagraph); *Blackton, Pioneer in Movies, Dies*, 66, N.Y. TIMES, Aug. 14, 1941, at 17 (describing Blackton’s career).

<sup>30</sup> *See id.*

<sup>31</sup> *See* EILEEN BOWSER, *THE TRANSFORMATION OF CINEMA* 35, 40, 266 (2d ed. 1990).

<sup>32</sup> Brief for Respondent at 26, *Binns v. Vitagraph Co. of Am.*, 210 N.Y. 51 (1913) (hereinafter “Binns Respondent’s Br.”).

in any event cover a work like *C.Q.D.*<sup>33</sup> That's the *Binns* rule. Beneath it, the nature of Vitagraph's loss, its scope and especially its implications, were open to interpretation. Decades of it.<sup>34</sup>

At the center of the case was the puzzle of § 51, the civil side of the two mirrored halves of the Privacy Law. Its language was so broad as to give courts a blank check to outlaw vast swaths of mass communication:

Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without [written consent] . . . may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use[.]<sup>35</sup>

Any speaker in the marketplace that needed to name or depict people would be affected by it. Regularly collecting a slew of written consent forms, as would be needed to put out a daily newspaper on the affairs of the world, would be prohibitively expensive, if not impossible.

Equally clear to Vitagraph's legal team was the collision of § 51 with free-speech principles—but at this point in the 20th century, finding a compelling way to deliver that argument to a court was hard.<sup>36</sup> Certainly the U.S. Constitution wasn't much help, since by its own terms, the First Amendment applies only to the federal government.<sup>37</sup> It wasn't until 1925 that the U.S. Supreme Court began to apply those clauses of the First Amendment to state-law matters, holding that speech and press freedom are among the liberties that the Fourteenth Amendment prohibits states from infringing without

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<sup>33</sup> See *Binns v. Vitagraph Co. of Am.*, 210 N.Y. 51, 56, 59 (1913).

<sup>34</sup> See, e.g., *Humiston v. Universal Film Corp.*, 178 N.Y.S. 752, 757 (App. Div. 1919) (expanding the defense *Binns* recognized for news to protect journalistic “films of actual events”); *Sarat Lahiri v. Daily Mirror*, 295 N.Y.S. 382, 388 (Sup. Ct. 1937) (limiting *Binns* to “a feature of current interest [that] was fictionalized in a film”); *Spahn v. Julian Messner, Inc.*, 21 N.Y.2d 124, 127–29, 131 (1967) (holding that under *Binns*, “‘all-pervasive’ use of imaginary incidents,” “invented dialogue,” and “attributed thoughts and feelings” in a children's biography of a baseball player were actionable as “knowing fictionalization”).

<sup>35</sup> N.Y. LAWS CH. 132 (1903), renumbered in 1909 as N.Y. CIVIL RIGHTS LAW § 51.

<sup>36</sup> See, e.g., *Binns Appellant's Br.* at 34 (“The statute was not intended to hamper literature, journalism or the pictorial or dramatic arts; and yet, if the plaintiff is right in his construction of this statute, all these things would be unlawful”).

<sup>37</sup> U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech, or of the press”) (emphasis added).

due process of law.<sup>38</sup> If free-speech principles could be brought to bear, they would have to come from state law.

Vitagraph did argue in its Court of Appeals briefing that New York's state constitutional provisions protecting "speech" and the "press" ought to apply to *C.Q.D.*, as they were broad and medium-neutral "representative terms": "The liberty which the constitution secures is not to be made dependent upon the particular substance, mechanism or device which happens at different times to be the vehicle of expression," the brief stated.<sup>39</sup> "The principle behind the constitutional guarantee requires all forms and mediums of expression to be kept free."<sup>40</sup> Vitagraph went on to invoke *Dailey v. Superior Court*, an 1896 case in which the California Supreme Court held that that state's constitutional speech and press clauses protected a play based on a pending murder trial from judicial prior restraint.<sup>41</sup> This was significant because, in addition to the factual similarity, one of the few things expressive freedom guaranteed at the time was "that speech restrictions could only be imposed by a jury after publication, rather than having a public official determine ahead of time what could be published."<sup>42</sup>

Binns' counsel responded to all of this perfunctorily in their briefing, writing that New York's constitution "cannot reasonably be construed to include the projection of photographs on a screen"—in other words, films categorically were not speech or part of the press.<sup>43</sup>

As for the court, Judge Chase essentially ignored the state constitutional question in favor of a more pragmatic analysis. He started with an assumption that the judiciary should—or would—carve out of the "very general"

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<sup>38</sup> The First Amendment was incorporated and made applicable to state law claims between *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (assuming, without squarely deciding, that "freedom of speech and of the press which are protected by the First Amendment from abridgment by Congress are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States") and *Near v. Minnesota*, 283 U.S. 697, 707 (1931) ("It is no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action.").

<sup>39</sup> Binns Appellant's Br. at 47; *See generally* N.Y. CONST. art. 1 § 8 (providing that "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.").

<sup>40</sup> Binns Appellant's Br. at 49.

<sup>41</sup> *Dailey v. Superior Ct.*, 112 Cal. 94, 100 (1896).

<sup>42</sup> *Jud Campbell, The Emergence of Neutrality*, 131 YALE L. J. 861, 866 (2022).

<sup>43</sup> Binns Respondent's Br. at 38.

Privacy Law some core amount of daily print news reporting, since news “would not be within the evil sought to be remedied by that act[.]”<sup>44</sup> Then he asked himself whether *C.Q.D.* deserved the same consideration and decided it did not.

The litigation had dwelt extensively on how *C.Q.D.* should be categorized. To Vitagraph, it was just like any of the scores of news accounts of the ocean rescue, and motion pictures were worthy of the same protection that everyone assumed a daily paper would receive:

If it was unlawful and criminal in the defendant to compose, and illustrate with motion pictures, the wreck of the Republic, and to name and depict the plaintiff therein, then it was unlawful to name, or to depict, any one . . . To apply the statute in this way would be to deprive society, and the state, of the exceedingly valuable service which can be rendered in many ways by this new art.<sup>45</sup>

A naked appeal to the social value of Vitagraph’s expression, arguing in effect that works like *C.Q.D.* were worth keeping around, made good sense in the vacuum of speech principles in which they found themselves. After all, the same reasoning had worked pretty well for newspapers. In 1908, a trial court assessing a § 51 claim in *Moser v. Press Publishing* concluded that “the statute was not intended by the Legislature to apply” to a newspaper’s use of the plaintiff’s photo because otherwise, the implications for a societally entrenched, valuable institution would be too severe.<sup>46</sup> Sure, the court acknowledged, “purposes of trade” and “advertising” might be broad enough linguistically to encompass certain kinds of marketing uses of individual photos in newspapers.<sup>47</sup> But if the judiciary read the law to include ordinary news uses of names and pictures of people, “the publication of a daily newspaper in this State, showing and giving an accurate account of occurrences throughout the civilized world, would be an impossibility, as no publishing corporation would undertake to successfully defend the numerous law suits that might deluge them[.]”<sup>48</sup>

To Hansl, arguing for Binns in the Court of Appeals briefing, *Moser* was but a holding “of necessity” since “the circulation of information by newspapers is of great benefit to the community[.]”<sup>49</sup> Films just weren’t the same.

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<sup>44</sup> Binns v. Vitagraph Co. of Am., 210 N.Y. 51, 55, 56 (1913).

<sup>45</sup> Binns Appellant’s Br. at 44–45.

<sup>46</sup> Moser v. Press Pub. Co., 109 N.Y.S. 963, 966 (Sup. Ct. 1908).

<sup>47</sup> *Id.* at 964–65.

<sup>48</sup> *Id.* 965–66.

<sup>49</sup> Binns Respondent’s Br. at 28, 32.

Newspapers, after all, were published regularly, and films were not; newspapers held as their “principal object” the “general dissemination of information of current news, and of the intellectual and material progress of the times,” while Vitagraph’s films were mostly fictional; and newspapers provided information daily, while film production could not.<sup>50</sup>

Judge Chase was less focused on what made newspapers special, than on what made *C.Q.D.* strange. He began by saying the Privacy Law was to be construed in light of the penal nature of § 50 and against the backdrop of *Roberson v. Rochester Folding Box Co.*, an 11-year-old decision in which the Court of Appeals had refused to hold that a common law privacy right existed in New York.<sup>51</sup> The Legislature enacted the Privacy Law in direct response to *Roberson*, Judge Chase reasoned, so its scope could be somewhat narrowed by that case, which only involved an unauthorized use of a likeness in advertising.<sup>52</sup> He declined to fully “define what is, or is not within” it.<sup>53</sup> All he needed in order to decide *Binns* was to agree with *Moser* that the Privacy Law should not be read at face value and that daily print news, at a minimum, must fall out of it, and then conclude that Vitagraph’s movie was not the same as daily print news.

Which of *C.Q.D.*’s features were meaningfully different and problematic to the Court of Appeals panel, and why? It’s just unclear. Maybe the key characteristic was Vitagraph’s use of actors and sets—visual stand-ins for the real thing.<sup>54</sup> Or its use of Jack Binns’ story within the entertainment marketplace, full stop.<sup>55</sup> It could have been the three factual inaccuracies Binns found in the story cards.<sup>56</sup> Or just that last card he’d mentioned and its accompanying shot,

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<sup>50</sup> *Id.* at 29–33.

<sup>51</sup> *See Binns v. Vitagraph Co. of Am.*, 210 N.Y. 51, 55–56 (1913).

<sup>52</sup> *Id.* at 56–57.

<sup>53</sup> *Id.* at 56.

<sup>54</sup> *See id.* at 56–58 (quoting trial testimony on the production of *C.Q.D.*, including the use of actors, and distinguishing it from “making and using a picture of a living person, when it is included in a picture of an actual event in which such person was an actor”).

<sup>55</sup> *See id.* at 57 (“[Vitagraph’s use] in the picture films, and pursuant to leases and agreements with the defendant in the moving picture shows was commercial ... [and for its] own selfish purposes”) (internal quotations removed).

<sup>56</sup> Binns testified that the film’s 19 narrative cards were accurate to the best of his knowledge, except for one that described the captain and passengers being awake pre-dawn and straining to see through the fog (he could not be sure they had), one that described the crew returning to New York aboard the *Baltic* when in fact part of the crew returned separately, and one that described his “American smile”—Binns was in fact British. *See Binns Record* at 71, 74, 80, 187–88.

in which the Binns character smiled for the camera.<sup>57</sup> Then again, maybe the problem that the judges saw was Vitagraph's goal of entertaining audiences as opposed to strictly informing them or the fact that *C.Q.D.* came out weeks after the collision when daily news reporters had begun to move on and forget Binns. Or maybe there was something in the translation of the story from print to film, the visual rendering of a not-Binns Binns, that was uniquely hurtful.<sup>58</sup>

Each of these characteristics, and others, came up in the *Binns* litigation and had to be contenders if you were looking for a distinguishing principle to undergird the holding. Which, in the wake of *Binns*, New York courts had to do. Whatever one thought the problematic characteristic was with *C.Q.D.*, any other form of real-life storytelling could fall within the reach of §§ 50 and 51, too. That meant it could be enjoined and subject its creator to criminal penalties. So over the ensuing decades, judges decided virtually work-by-work whether the daily print news defense could be stretched to cover other forms of storytelling or if the work was too much like *C.Q.D.* to qualify: A biography.<sup>59</sup> A news reel, of course.<sup>60</sup> Sports features, comedies, and true crime accounts.<sup>61</sup> Litigants were left with the puzzle of what *Binns* meant, while entertainers bore the risk.

## II. A COMIC BOOK CLOUDS THE PICTURE

Such was the state of New York law on July 28, 1945, when a military bomber crashed into the 79th floor of the Empire State Building.

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<sup>57</sup> See *Binns v. Vitagraph Co. of Am.*, 210 N.Y. 51, 58 (1913) (observing that “the last picture of the series had no connection whatever with any other place or person or with any event,” “was not designed to instruct or educate those who saw it” but rather “to amuse those who paid to be entertained”).

<sup>58</sup> See, e.g., *id.*

<sup>59</sup> See, e.g., *Koussevitzky v. Allen, Towne & Heath, Inc.*, 68 N.Y.S.2d 779, 783–84 (Sup. Ct. 1947), *aff'd* 68 N.Y.S.2d 432, 433 (App. Div. 1947) (referencing biography protected by news defense despite possible errors).

<sup>60</sup> See *Humiston v. Universal Film Mfg. Co. et al.*, 178 N.Y.S. 752, 757 (App. Div. 1919) (discussing photo of renowned attorney in news reel about a murder case she worked on protected by news defense).

<sup>61</sup> See, e.g., *Colyer v. Richard K. Fox Publ'g Co.*, 146 N.Y.S. 999, 1001 (App. Div. 1914) (discussing photo of stunt diver in sports newspaper protected by news defense); *Martin v. New Metro. Fiction*, 260 N.Y.S. 972 (App. Div. 1932) (discussing courtroom photo of murder victim's relative protected by news defense when run by true crime magazine years later); *Franklin v. Columbia Pictures Corp.*, 284 N.Y.S. 96, 97–98 (App. Div. 1935) (discussing short, humorous film cut from stock library footage about bullfighting not protected by news defense).

Seventeen-year-old Donald Molony, a U.S. Coast Guardsman and medical trainee from Michigan, saw it happen from the sidewalk below and sprang into action.<sup>62</sup> He climbed into the wreckage of an elevator that had dropped 75 floors to pull out a badly injured Betty Lou Oliver, and then he went upstairs toward the wreckage to treat other victims.<sup>63</sup> He was photographed helping people out to safety.<sup>64</sup> “A couple of shore patrolmen took me out to a bar at 1 o’clock when the head doctor said everything was under control,” Molony later recalled to a reporter.<sup>65</sup> “I started shaking as soon as he said that. I don’t know why. I was real calm before.”<sup>66</sup>

Like Jack Binns, Molony was “the most celebrated hero of the occasion.”<sup>67</sup> His story was all over newspapers and newsreels (by then, a distinct, familiar, and judicially approved category of journalism).<sup>68</sup> In February 1946, weeks after *The New York Times* ran a photo of Molony receiving his Navy Commendation Ribbon, *Boy Comics* issue #26 came out with a comic strip entitled “Real Hero,” about the “young Coast Guard lad who saved a dozen lives in the tragedy.”<sup>69</sup> Molony by this point was a full-fledged pharmacist’s mate, serving in a medical capacity.<sup>70</sup> When his Coast Guard bosses caught wind of the comic book, they nearly court-martialed him for, they assumed, selling his story to *Boy Comics*.<sup>71</sup> Molony sued the comic book publisher under § 51, alleging that the comic strip unlawfully used his name and likeness in trade.<sup>72</sup> In 1950, at the appellate level, he lost.<sup>73</sup>

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<sup>62</sup> See Donald Molony, USCG as told to Mary Harrington, *Detroit Youth Hero of New York Disaster*, DETROIT FREE PRESS, July 29, 1945, at 1.

<sup>63</sup> See *id.* at 1, 6.

<sup>64</sup> See Jess Stearn, *Hero Sailor Saves Dozen in 79-Floor Climb*, N.Y. DAILY NEWS, July 29, 1945, at 4 (accompanying photo of Molony helping women down a set of stairs).

<sup>65</sup> Molony, *supra* note 62, at 1.

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

<sup>67</sup> *Molony v. Boy Comics Publishers*, 98 N.Y.S.2d 119, 121 (App. Div. 1950).

<sup>68</sup> See *id.* (“The record shows that he was featured in the *New York Journal-American*, *New York Times*, *New York Herald-Tribune*, *Daily Mirror* and *Sunday Mirror*, in New York City, and that newsreel motion pictures and newspaper photographs were taken of him”).

<sup>69</sup> *Real Hero*, BOY COMICS No. 26, 1946, at 28; see also *A Proud Mother Congratulates Her Hero*, N.Y. TIMES, Jan. 24, 1946, at 40 (showing photo of Molony and his mother at Navy Commendation ceremony).

<sup>70</sup> See *A Proud Mother Congratulates Her Hero*, N.Y. TIMES, Jan. 24, 1946, at 40 (showing photo of Molony and his mother at Navy commendation ceremony).

<sup>71</sup> *Molony*, 98 N.Y.S.2d at 127 (Dore, J., dissenting).

<sup>72</sup> See *id.* at 120.

<sup>73</sup> See *id.* at 126.

Here the *Binns* mystery deepens. *C.Q.D.* was a film, of course, and *Boy Comics* was in print. But by 1950, the New York judiciary had decided that the news-based defense to § 51 claims did not depend on medium, and that motion pictures could be protected.<sup>74</sup> Aside from that format difference, the two cases were strikingly similar:

- *Binns* and *Molony* both were visually represented by stand-ins — an actor in *C.Q.D.*, a drawing in *Boy Comics*.
- Both works were sold to audiences in the entertainment marketplace, and indeed both aimed to entertain audiences at least as much as inform or educate them.<sup>75</sup>
- Neither *C.Q.D.* nor *Boy Comics* was itself a news report of the disaster. Rather, each was a rendering of the story in a different medium, using news sources as a narrative backbone, and delivered to audiences several weeks (*Binns*) or months (*Molony*) later.<sup>76</sup>
- Both works included some factual inaccuracies in recounting the story — but just a few. For instance, according to the court, *Molony* carried one victim out a time, while *Boy Comics* showed him supporting two.<sup>77</sup> The comic strip also said he climbed to the 79th floor when in fact he only reached the 70th.<sup>78</sup> Likewise, *Binns* testified that *C.Q.D.* falsely implied that the entire crew of the *Republic* arrived back in New York together with the passengers; he and other crewmembers came separately.<sup>79</sup>
- In both the film and the comic strip, the “*Binns*” and “*Molony*” characters were depicted gratuitously smiling for the viewer.

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<sup>74</sup> See *Humiston v. Universal Film Mfg. Co. et al.*, 178 N.Y.S. 752, 757 (App. Div. 1919) (noting that in dispute over use of plaintiff’s photo in newsreel, finding no “practical difference between the presentation of these current events in a motion picture film and in a newspaper”).

<sup>75</sup> See *Binns Record* at 154. Vitagraph’s co-founder, James S. Blackton, testified that the company had “succeeded in making what all our customers told us, at least, to be a very dramatic, thrilling and satisfactory picture of the wreck.” *Id.*

<sup>76</sup> See *Molony v. Boy Comics Publishers*, 98 N.Y.S.2d 119, 120–21 (App. Div. 1950) (explaining that the Empire State Building crash happened on July 28, 1945, and *Boy Comics* # 26 was published six months later); see also *Binns Record* at 7, 22 (complaint stating that *Republic* crash occurred on January 23, 1909, and film exchange officer testifying that *C.Q.D.* was released to the public on February 20, 1909).

<sup>77</sup> See *Molony*, 98 N.Y.S.2d at 124.

<sup>78</sup> See *id.*

<sup>79</sup> See *Binns Record* at 80.



- Both disaster scenes were artistically rendered by people who apparently had not been there, and drew on their imaginations for the look, feel, and details. *Boy Comics* even supplied its account with dialogue that, one presumes, was fictional.<sup>80</sup>
- Binns and Molony both had been hailed post-rescue as heroes, and were widely talked about in the news — and they didn't entirely object to it. Both provided their own firsthand accounts to news reporters.<sup>81</sup> Binns testified that he hadn't loved the camera attention, but he "recognized that this was an event of great public interest" and that, in a "reasonable and proper way," it was acceptable for the press to provide the public with the drama of the rescue.<sup>82</sup> Even so, he and Molony both turned to §51 on the grounds that the defendant's work had crossed a line, into a form of media exploitation that uniquely harmed them.

So how could the *Boy Comics* strip be OK, if *C.Q.D.* was not?

### III. LOCATING THE *BINNS* CONUNDRUM IN THE BROADER CONTEXT OF PUBLICITY RIGHTS AND THE FIRST AMENDMENT

#### A. *A Brief History of the Tort and Free Speech*

What we know as the right of publicity arose, entwined with notions of privacy, out of Samuel D. Warren and Louis Brandeis's seminal 1890 essay in the *Harvard Law Review*.<sup>83</sup> Technology breakthroughs at the time were empowering people to photograph, then film and later broadcast one another, and notions of privacy and publicity twisted like a double helix around a judicial intuition that some of the new ways in which you could use someone's personhood in the commercial sphere — even in art and storytelling — were damaging.<sup>84</sup> This was the legal conversation humming along through the turn

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<sup>80</sup> See, e.g., *Real Hero*, *BOY COMICS* No. 26, 1946, at 30 ("Just take it easy miss! You'll be alright!" the comic strip's Molony told Betty Lou, who was depicted somewhat seductively, in typical comic book fashion, lying on the elevator floor).

<sup>81</sup> See Donald Molony, USCG as told to Mary Harrington, *Detroit Youth Hero of New York Disaster*, *DETROIT FREE PRESS*, July 29, 1945, at 1; Binns's Story at 1.

<sup>82</sup> Binns Record at 66.

<sup>83</sup> See Samuel D. Warren & Louis Brandeis, *The Right to Privacy*, 4 *HARV. L. REV.* 193 (1890).

<sup>84</sup> See, e.g., *id.* at 195 (arguing that "[r]ecent inventions and business methods", including photography and "numerous mechanical devices" threatened "the sacred precincts of private and domestic life"); Musser, *supra* note 10 (tracing development of film through the turn of the century and its social impact); JENNIFER E. ROTHMAN,

of the century and the years when *Binns* ascended through the legal system. Judges and litigants alike struggled to pinpoint which uses of someone's personhood led to which types of harm, and how, and what a legal system with free speech commitments ought to do about it.<sup>85</sup>

New York's Legislature stepped in early but provided little guidance in enacting the Privacy Law, which opened the courtroom door to any litigant whose name, portrait, or photo had been used without permission for advertising or "purposes of trade."<sup>86</sup> It was a wide invitation, indeed. It also sidestepped what became the more typical subject of privacy laws by focusing not on unwanted public exposure of intimate information or activities, but rather on exploitation through marketplace uses of a person's identity.<sup>87</sup> Functionally, in today's terms, New York had created one of the nation's first right-of-publicity laws.<sup>88</sup>

The legislators left unspecified precisely how a use of someone's name or likeness had to hurt them in order for the law's damages provisions to kick in — apparently, plaintiffs could recover for "any injuries sustained by reason of such use."<sup>89</sup> So they filed into court complaining variously that a use had mortified them or was an affront to their dignity, or that the user engaged in

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THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD 12–29 (2018) (discussing the influence of emerging camera technology and mass printing on developing privacy and publicity rights).

<sup>85</sup> For instance, whereas a New Jersey court in *Edison v. Edison Polyform Mfg. Co.* expressed an openness to viewing names and likenesses as a form of property, in *Binns*, Supreme Court Justice Samuel Greenbaum explained that the "peculiar injury" in a §51 case arose not because a commercial use harmed a plaintiff "in his business or deprived [him] of profits, but because of the humiliation, mortification and mental distress which he may have endured by reason of the defendant's invasion or intrusion upon his privacy." *Binns Record* at 131.

<sup>86</sup> N.Y. CIVIL RIGHTS LAW §§ 50–51.

<sup>87</sup> *See id.*; *see also* *Sutton v. Hearst*, 98 N.Y.S.2d 233, 239 (App. Div. 1950) (Peck, J., dissenting) (observing that New York's Privacy Law, "while accepting and incorporating into the law the principle of privacy, is not as broad in its embrace as the champions of privacy or pioneers in that field would make it.").

<sup>88</sup> The U.S. Supreme Court observed as much in its overview of the law in *Time Inc. v. Hill*: "Although 'Right of Privacy' is the caption of §§ 50–51, the term nowhere appears in the text of the statute itself[, which] ... appears to proscribe only conduct of the kind involved in *Roberson*, that is, the appropriation and use in advertising or to promote the sale of goods, of another's name, portrait or picture without his consent." 385 U.S. 374, 381 (1967). *See also* Rothman, *supra* note 84, at 25 ("[a]lthough often referred to as New York's right of privacy law, on its face the law describes a typical right of publicity law").

<sup>89</sup> N.Y. CIVIL RIGHTS LAW § 51.

a sort of rent-seeking on their personhood and should cough up the ill-gotten gains, or that the use laid them out before the public in an inaccurate light, either by getting their story wrong, or by implying that the plaintiff was the sort of person who would have authorized it.<sup>90</sup> Binns expressly denied that the source of his harm was Vitagraph profiting off the rescue instead of him; he did take a job that summer running a wireless system for a Coney Island show about a mid-sea ship collision and rescue, but he'd publicly and indignantly refused cash offers to appear on stage himself because he did not "want to be a tin god."<sup>91</sup> Rather, Binns alleged in his complaint that *C. Q. D.* had caused him "great anxiety of mind, humiliation, and mortification[.]"<sup>92</sup>

Adding to the chaos, the Privacy Law made no carveouts for news, or any other form of speech. Lawmakers delegated the entire matter of such

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<sup>90</sup> See, e.g., *Blumenthal v. Picture Classics*, 257 N.Y.S. 800, 801 (App. Div. 1932), *aff'd* 261 N.Y. 504, 505 (Ct. App. 1933) (O'Malley, J. dissenting) (discussing that plaintiff alleged that footage capturing her selling rolls on a street, and used in a film called "Sight-Seeing in New York with Nick and Tony[.]" depicted her "in a foolish, unnatural and undignified manner and held her up to public ridicule and the contempt of her neighbors and friends."); Transcript of Record at 281, *Franklin v. Columbia Pictures Corp.*, 2 N.E.2d 691 (1936) (hereinafter *Franklin Record*) (regarding famous American bullfighter sued over use of news reel footage depicting him in comedic sports feature, which he said differed from another comedic film in which he'd voluntarily appeared because, in the latter case, "[He] was paid for it."); *D'Altomonte v. New York Herald*, 139 N.Y.S. 200, 201-02 (App. Div. 1913), *modified by* 208 N.Y. 596 (Ct. App. 1913) (writer filed lawsuit over use of his byline on a first-person article about an "improbable adventure" he supposedly had, saving a man from cannibals, which he said was false and disgraced him); *Merle v. Sociological Research Film Corp.*, 152 N.Y.S. 829, 831 (App. Div. 1915) (regarding suit over depiction of business sign, which bore owner's name, on a building featured in a film scene about a factory where traffickers collected victims "from among the girls employed" there); *Koussevitzky*, 68 N.Y.S. 2d at 780 (regarding famous conductor alleged that biography "falsely and wrongfully portrays his life and musical career"); *Binns Record* at 64 (discussing that Binns testified about *C. Q. D.*: "It appeared to me that I had been—a certain fame had been handed to me by the public generally, and that I got a certain trust, and if I gave that trust up by such an action as the defendants have done, why I would lose caste among my own friends, and that is why it hurt me.").

<sup>91</sup> *Binns Won't Act For \$1,000 A Week*, N.Y. TIMES, Jan. 31, 1909, at 11 (quoting Binns that he had turned down "several good offers to go on the stage" and saying "Do you blame me? I am a wireless operator, not an actor, and I am going back to work."). Even so, Marconi loaned Binns out to oversee a wireless system for a Coney Island theatrical show with a plotline strikingly similar to his own rescue-at-sea tale, that he recalled was billed as "Jack Binns' own show." *Binns Record* at 81-89. He was paid for that work and admitted discussing his lawsuit against Vitagraph with the theater manager, but denied that the manager funded the litigation. *Id.* at 85, 93.

<sup>92</sup> *Binns Record* at 9.

defenses to the courts. Judicial conceptions of free expression back then didn't demand much; reaching today's place of rigorous scrutiny, grounded in an expansive list of social purposes the First Amendment might serve, was the work of theorists and jurists through the 20th century. "From the Founding" until the 1920s, Professor Jud Campbell has explained, the government was free to "restrict expression to promote the public good, subject to the rule against prior restraints and the privilege of discussing matters of public concern in good faith."<sup>93</sup> It was only in the wake of the first World War that Justices Brandeis and Holmes pulled the First Amendment to the fore of the Court's constitutional work and broadened the free speech paradigm, finding for it a fuller purpose of actively fostering the "free trade in ideas" in a search for truth.<sup>94</sup> Brandeis famously added to that another, more explicitly political purpose for free expression—serving self-governance in a democracy—in *Whitney v. California*:

Those who won our independence ... believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that, without free speech and assembly, discussion would be futile; that, with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty, and that this should be a fundamental principle of the American government.<sup>95</sup>

In the late 1940s, Alexander Meiklejohn linked free speech still more explicitly to the democratic process by analogy to a town meeting. Expression on "matters of public policy" ought to be free, he wrote, so that voters can be "made as wise as possible."<sup>96</sup>

Pivotal for Hollywood (among many others), in a pair of rulings between 1948 and 1952, the Supreme Court expanded the range of expression-types covered by the First Amendment to include entertainment. One can plainly see in the decisions the reigning marketplace and democratic conceptions of free speech at work. In *Winters v. New York*, for instance, Justice Reed explained that it was simply too difficult to disentangle entertainment from the "exposition of ideas"—suggesting that the latter was what really mattered—since "[w]hat is one man's amusement[] teaches another's doctrine."<sup>97</sup>

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<sup>93</sup> Campbell, *supra* note 42, at 870.

<sup>94</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

<sup>95</sup> *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

<sup>96</sup> ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 24–25 (1948).

<sup>97</sup> *Winters v. New York*, 333 U.S. 507, 510 (1948).

Four years later, in *Joseph Burstyn, Inc. v. Wilson*, Justice Clark applied *Winters* to motion pictures and held that it “cannot be doubted that motion pictures are a significant medium for the communication of ideas.”<sup>98</sup> Movies, Clark explained, can “affect public attitudes and behavior,” whether through the “direct espousal of a political or social doctrine” or “the subtle shaping of thought which characterizes all artistic expression.”<sup>99</sup> They were “an organ of public opinion,” not to be “lessened by the fact that they are designed to entertain as well as to inform.”<sup>100</sup> Altogether, it was their role in the marketplace of ideas, and the democratic process, that first garnered films and entertainment constitutional protection.

Modern speech doctrine finally took root in 1972, in the form of a content-neutrality principle. Agnostic between different categories, formats, or purposes of expression, the rule the Supreme Court began to shape in *Police Department of Chicago v. Mosley* is that, outside of select, historically-embedded exceptions like defamation and fraud, the government generally cannot draw lines based on the content of what people say.<sup>101</sup> It pared well with evolving theories of free speech that, more and more, could embrace artistic, entertaining or other cultural forms of expression on their own terms, and not just as a step toward political truth.<sup>102</sup>

All of which is to say that a crucial chunk of New York’s Privacy Law rulings—and judicial thinking about the harm in commercial uses of names and likenesses, the newsworthiness defense, and the *Binns*-based fictionalization exception to it—preceded the rule now fixed in First Amendment jurisprudence: A law that is content-based is “presumptively unconstitutional” and subject to strict judicial scrutiny.<sup>103</sup>

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<sup>98</sup> *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> See *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (“above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content”); see also Campbell, *supra* note 42, at 936–43 (describing how content neutrality solidified in Supreme Court doctrine through the 1970s and *Mosley* in particular).

<sup>102</sup> See, e.g., G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 MICH. L. REV. 299, 354–59, 363, 366, 386 (1996) (tracing the shift from truth-seeking and democracy-centered theories of free speech toward Thomas Emerson’s self-fulfillment rationale, and beyond that to notions of “emotive as well as cognitive freedom”; any of those can explain constitutional protection for literature and the arts more comfortably than their theoretical predecessors).

<sup>103</sup> See, e.g., *Reed v. Town of Gilbert*, 576 U.S. 155, 163–64 (2015).

But it wouldn't be right to say that the tort missed the modern constitutional boat altogether. Even as the *Mosley* rule settled into law through the 1970s, an Ohio case called *Zacchini v. Scripps-Howard Broadcasting Co.* was wending toward the U.S. Supreme Court, which eventually took the case as its first and, to date, only foray into the right of publicity-First Amendment controversy.<sup>104</sup>

Hugo Zacchini was a stunt performer from an old Italian circus family who had performed his human cannonball act at a 1972 county fair in Ohio.<sup>105</sup> A local news videographer recorded his 15-second act, even though Zacchini asked him not to, and WEWS Channel 5 showed footage of it that night on the local news.<sup>106</sup> Zacchini sued, asserting the rarest form of right-of-publicity claim, mirroring a claim for common law copyright infringement. The gravamen of his lawsuit was something that Binns had sworn did not animate his claim against Vitagraph—that the broadcast had usurped his ability to make a living.<sup>107</sup> As Lee Levine and Stephen Wermiel reported in 2016, some in the Supreme Court were reluctant to take up what clerks recognized in memos and notes as a peculiar case, in that Zacchini alleged neither the “seminal example” of a right of publicity claim, over a *Roberson*-type use in advertising, nor any of the torts that had driven the Court's recent, major First Amendment rulings.<sup>108</sup> Justice Powell wrote on one clerk's memo that this was a “[d]ifficult area;” better for the Court to “[l]et it develop.”<sup>109</sup> But just before voting on Zacchini's petition for a writ of certiorari, another clerk weighed in with a different view: “If the vote is close, I would cast a ‘fun-to-work-on’ vote to grant.”<sup>110</sup> The Court did grant Zacchini's petition for

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<sup>104</sup> See generally *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 562 (1977).

<sup>105</sup> See Lee Levine & Stephen Wermiel, *The Court and the Cannonball: An Inside Look*, 65 AM. U. L. REV. 607, 610–11 (2016) (describing the facts of the case).

<sup>106</sup> See *id.* at 611.

<sup>107</sup> See *Zacchini*, 433 U.S. at 564 (“Petitioner then brought this action for damages, alleging that he is engaged in the entertainment business, that the act he performs is one invented by his father and . . . performed only by his family for the last fifty years, that respondent showed and commercialized the film of his act without his consent, and that such conduct was an unlawful appropriation of plaintiff's professional property.”) (internal quotations omitted).

<sup>108</sup> Levine & Wermiel, *supra* note 105, at 619–21.

<sup>109</sup> *Id.* at 621.

<sup>110</sup> *Id.*

certiorari and, in 1977, five years after *Mosley*, held that the First Amendment did not protect WEWS from liability for broadcasting Zacchini's entire act.<sup>111</sup>

It was readily apparent that Hugo Zacchini's specific type of harm—if viewers could watch his act for free on the news, they wouldn't pay to see him perform it live, in person—sounded in copyright, distinguishing it from the vast majority of right-of-publicity claims.<sup>112</sup> Copyright's incursions into free speech typically are justified without resorting to the content-neutrality principle, as copyright has its own constitutional roots, and its own speech-protective measures like the fair-use doctrine, and it ultimately serves the same goal as the First Amendment of fostering expression.<sup>113</sup> Creators would not create as much, the thinking goes, if they couldn't make a living at it, which they couldn't if others were allowed to simply take the content and, under the banner of their own free speech, give it to the public. That logic is openly at work in the *Zacchini* decision.<sup>114</sup>

Still, viewed at a very high level, the case says that the First Amendment is not always, in every instance, a complete bar to right of publicity claims—even when news is at stake. And with the passage of time, *Zacchini* has come to feel like the Supreme Court's final word on the First Amendment conflict with publicity rights, not an initial toe-dip. Perhaps that has somewhat emboldened judges (and litigants) around the country, in cases today involving the far more common type of right-of-publicity claim, to build defense structures that are doctrinally and analytically so infirm.<sup>115</sup>

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<sup>111</sup> See *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 565–66 (1977).

<sup>112</sup> See *id.* at 575–76 (observing that Zacchini's type of claim “may be the strongest case for a right of publicity involving, not the appropriation of an entertainer's reputation to enhance the attractiveness of a commercial product, but the appropriation of the very activity by which the entertainer acquired his reputation in the first place”) (internal quotes omitted).

<sup>113</sup> See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 218–21 (2003) (declining to apply heightened scrutiny in First Amendment challenge to extension of copyright term of existing works).

<sup>114</sup> See, e.g., *Zacchini*, 433 U.S. at 576 (“Ohio's decision to protect petitioner's right of publicity here rests on more than a desire to compensate the performer for the time and effort invested in his act; the protection provides an economic incentive for him to make the investment required ... This same consideration underlies the patent and copyright laws[.]”).

<sup>115</sup> See, e.g., *Hart v. Electronic Arts, Inc.*, 808 F. Supp. 2d 757, 775–76 (D.N.J. 2011), *rev'd on other grounds* 717 F.3d 141 (2013) (observing that the Supreme Court in *Zacchini* “did not engage in a balancing of the competing interests,” and that courts since “have limited [Zacchini's] application to its facts” while devising tests that did).

### B. *Today's Clash, and the Need for Resolution*

Scholars observing the right of publicity-free speech clash in the 2020s have pointed out that the capacious tort we've inherited in New York, and around the country, is in effect an umbrella term for a variety of claim-types, each arising from a distinct form of harm.<sup>116</sup> Jennifer Rothman and Robert Post propose placing these claim-types into four categories: A right of performance, best illustrated by *Zacchini*; a right of commercial value "protecting the market value of a person's identity"; a right of control over public uses of one's name or image; and a right of dignity, protecting the individual living in a "complex web of social norms" from uses and exposure that would humiliate them.<sup>117</sup>

A taxonomy would bring badly needed clarity to the right of publicity. It would give the public better notice of the types of uses of a name or likeness that a court will consider, and why, and the nature of proof they require. Above all, though, requiring litigants and judges to drill down on the precise nature of the plaintiff's harm would enable courts to tailor speech-protective defenses to its logic, consistent with modern First Amendment doctrine.<sup>118</sup> As Rothman and Post explain, a right-of-publicity claim brought to redress hurt feelings over a description of the plaintiff in a novel alleges a different form of harm, and has different implications for speech, than Hugo Zacchini's claim did. To the extent "the harms redressed by the tort are uncertain and ill-defined," they wrote, "so too is First Amendment treatment of the tort."<sup>119</sup>

But none of that organizing work has happened. Instead, courts and lawmakers around the country treat the broad array of right-of-publicity claims as a whole, and apply to them a tangled batch of statutory and common law defenses that focus on characteristics of the defendant's work rather than the plaintiff's specific form of harm.

For instance: If an artist is sued over a comic book, she might, depending on the state where it happens, be able to call on a defense that limits the First Amendment's expansive scope of protection to specific categories of democracy-centered speech, like news or matters of public interest.<sup>120</sup> The more topical or political our artist's comic book, the better. If our defendant lands

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<sup>116</sup> See Post & Rothman, *supra* note 4, at 92 (identifying "four distinct interests that the right of publicity typically seeks to vindicate", each of which could be conceived of as its own tort).

<sup>117</sup> See *id.* at 92, 107, 122.

<sup>118</sup> See *id.* at 92.

<sup>119</sup> *Id.* at 90.

<sup>120</sup> See, e.g., *Montana v. San Jose Mercury News*, 34 Cal. App. 4th 790, 794 (1995) (applying statutory and common law tests designed to protect discussions of "matters of public interest" that are, therefore, entitled to First Amendment protection).



in another state (or maybe the same one), she might benefit from the transformative use test, which focuses on the physical artistry of her work—the more Cubist or surreal, the better.<sup>121</sup> In this lane, artistic expression that aims for realism can suffer.<sup>122</sup> And under some states' right-of-publicity statutes, she might be able to argue that her work can't be exposed to legal liability simply because of the format or medium in which it's delivered to audiences, like a "sports broadcast" or a "book."<sup>123</sup>

Notably, the logic of these defenses has nothing to do with whether the plaintiff alleges that the artist's comic book humiliates him, or that it robs him of his ability to make a living, or something else entirely. They apply, or don't, regardless of the nature of the harm.

There are more state defenses, too, and if our artist is lucky, she'll be able to layer them up. Some are cast as constitutional avoidance measures, like the newsworthiness test in New York.<sup>124</sup> Other right-of-publicity defenses might be described as balancing the plaintiff's harm against the defendant's speech interests, in open contradiction of the Supreme Court's 2010 reminder that the First Amendment "does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits."<sup>125</sup> One common thread among these various defenses can be found in their roots in judicial and

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<sup>121</sup> See, e.g., *Comedy III Prods. v. Gary Saderup*, 25 Cal. 4th 387 (2001) (establishing transformative-use defense); *Winter v. DC Comics*, 30 Cal. 4th 881, 886 (2003) (applying transformative-use test to protect comic-book depiction of plaintiffs as "villainous half-worm, half-human offspring born from the rape of their mother by a supernatural worm creature"); *Kirby v. Sega of America*, 144 Cal. App. 4th 47, 59 (Cal. Ct. App. 2006). (transformative-use defense protected video game's alleged depiction of plaintiff, a pop star, as "as a space-age reporter in the 25th century").

<sup>122</sup> See, e.g., *No Doubt v. Activision Pub'g*, 192 Cal. App. 4th 1018, 1033 (Cal. Ct. App. 2011) (video game depictions that were "painstakingly designed to mimic [plaintiffs'] likenesses" were not protected by transformative-use defense).

<sup>123</sup> Cal. Civ. Code § 3344(d) (exempting uses of a name, signature, photograph, or likeness from right-of-publicity liability when done "in connection with any news, public affairs, or sports broadcast or account, or any political campaign"); La. Rev. S. 51 § 470.5(B)(3) (exempting from liability, among a laundry list of other uses, those done in "a play, book, magazine, newspaper, literary work, musical composition, single and original work of art or photograph, or visual work").

<sup>124</sup> See cases cited *supra* note 3.

<sup>125</sup> *United States v. Stevens*, 559 U.S. 460, 470 (2010). Notably, the California Supreme Court in *Comedy III* described its transformative-use test as "essentially a balancing test between the First Amendment and the right of publicity based on whether the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation." 25 Cal. 4th at 391. Other courts have echoed it. See, e.g., *No Doubt*, 192 Cal. App. 4th at 1030 (quoting *Comedy III* language above); *Keller v. Electronic Arts*, 724 F.3d 1268, 1271 (9th Cir. 2013) ("In this case, we must balance the right of publicity of a former

legislative pragmatism, and an instinct to protect common or culturally embedded forms of expression using a patchwork of borrowed legal concepts. They also typically sound in the logic of familiar free-speech principles. Newsworthiness, for instance, would seem to serve a marketplace of ideas. California's much-maligned transformative-use test acknowledges, as modern theories of speech often do, that art deserves protection on its own terms. But none of the country's prominent right of publicity defenses—not collectively and certainly not individually—protects all that the modern First Amendment does.<sup>126</sup>

For all the chaos, though, case outcomes for expressive works have not been as unpredictable as one might expect. For media and entertainment defendants in most courtrooms, particularly those who are sued over content in a culturally familiar form, like documentaries, books, or magazine articles, an intuitive application of one or more of the state defenses will be quite adequate.<sup>127</sup> If a trial-level judge doesn't reach that conclusion, an appellate court generally will.<sup>128</sup>

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college football player against the asserted First Amendment right of a video game developer to use his likeness in its expressive works.”).

<sup>126</sup> Typical of this form of reasoning, the California Supreme Court in *Comedy III* squarely recognized that the Three Stooges portrait at issue enjoyed full First Amendment protection. 25 Cal. 4th at 396–99. But rather than take the doctrinally appropriate next step and apply strict scrutiny, it concluded that “the Legislature has a rational basis for permitting celebrities and their heirs to control the commercial exploitation of the celebrity’s likeness” and devised the transformative-use test from part of copyright’s fair-use doctrine. *Id.* at 400.

<sup>127</sup> See, e.g., *Kline v. Robert M. McBride & Co.*, 11 N.Y.S.2d 674, 679 (Sup. Ct. 1939) (extending the news defense and refusing to enjoin the publication of *I Break Strikes!*, a book on American labor); *Goelet v. Confidential*, 171 N.Y.S.2d 223, 227 (App. Div. 1958) (article about society couple sufficiently related to news); *Man v. Warner Bros.*, 317 F. Supp. 50 (S.D.N.Y. 1970) (news defense covers use of footage of plaintiff, hopping on stage at Woodstock festival, in a film about the event); *Murray v. New York Magazine*, 27 N.Y.2d 406, 408–09 (Ct. App. 1971) (New York magazine’s cover story use of photo of plaintiff two years earlier, decked out in an “Irish” hat, green bowtie, and pin, watching the St. Patrick’s Day Parade in Manhattan, to illustrate an article entitled *The Last of the Irish Immigrants*, protected against § 51 claim by common law defense covering photo illustrations of articles on matters of public interest (an offshoot of the news defense)); *Friedan v. Friedan*, 414 F. Supp. 77, 79 (S.D.N.Y. 1976) (Carl Friedan’s Privacy Law claim against his ex-wife Betty and others, over the use of his name and photo in a New York magazine article in which she described her life as a housewife, failed under the newsworthiness line of cases); *Finger v. Omni Publications International*, 564 N.Y.S.2d 1014, 1018 (Ct. App. 1990) (parents’ claim over use of their family photo to illustrate science magazine article entitled *Caffeine and Fast Sperm* properly dismissed as newsworthy).

<sup>128</sup> See, e.g., *Walter v. NBC Television Network*, 811 N.Y.S.2d 521, 523 (App. Div. 2006) (plaintiff’s claim against NBC over use of her photo in a Headlines segment on

But occasionally, and quite recently, judges have permitted themselves to relegate certain forms of entertainment content to a First Amendment sub-tier, where they acknowledge the content is fully protected speech yet leave it exposed to right-of-publicity claims because it does not fit the narrow, contorted mold of a state defense.<sup>129</sup> In the 2010s, for instance, a panel of federal judges in the Ninth Circuit faced with an athlete's right-of-publicity claims over Electronic Arts' sports video games readily acknowledged that they were entitled to First Amendment protection—yet held that they were too realistic for the transformative-use test, and too preoccupied with the imaginative game to qualify for public interest.<sup>130</sup>

And New York's fictionalization gap in the protection it offers against a right-of-publicity claim remains a stumbling block, even for works that by now are quite culturally embedded. Lifetime Entertainment spent the better part of the 2010s in § 51 litigation over a docudrama it produced about a murder case, as various courts wrestled with whether the film was protected by the newsworthiness defense.<sup>131</sup> *Romeo Killer: The Chris Porco Story* was a 2013 Lifetime movie about the investigation and eventual conviction of Porco, an Upstate New York college student, for killing his father and severely injuring his mother.<sup>132</sup> Finally, in 2021, the Appellate Division held that the movie was protected—which in effect narrowed the fictionalization gap.<sup>133</sup> Porco had alleged that, out of the docudrama's "32 physical depictions" of him, "24 (75%) are complete fabrications with no factual underpinnings and no relation to real world events"—and even still the court held it did not fall

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*The Tonight Show* was covered by the newsworthiness exception and should have been dismissed).

<sup>129</sup> See, e.g., *Hart v. Electronic Arts*, 717 F.3d 141, 148 (3d Cir. 2012) ("noting the self-evident: video games are protected as expressive speech under the First Amendment" yet applying California's transformative-use test anyway and concluding that a college football player's claim "should have survived [EA's] motion for summary judgment"); *Keller*, 724 F.3d at 1270–71 (same, EA's First Amendment-based defenses were properly rejected below). My former law firm represented Electronic Arts in *Keller* and *Hart*. I joined the firm's defense team working on EA's behalf in subsequent right-of-publicity federal litigation in *Davis v. Electronic Arts* and, in California state court, in *Brown v. Electronic Arts*.

<sup>130</sup> See *Keller*, 724 F.3d at 1270–71, 1279, 1283–84 ("Given that *NCAA Football* realistically portrays college football players in the context of college football games" it failed the transformative-use test, and the public interest exception did not apply because "it is a game, not a reference source").

<sup>131</sup> See *Porco v. Lifetime Ent. Servs.*, 150 N.Y.S.3d 380, 382–83 (App. Div. 2021).

<sup>132</sup> See *id.* at 382.

<sup>133</sup> See *id.* at 386–87.

into the *Binns* gap, because the backbone of the story Lifetime told about his case was true.<sup>134</sup> Yet, with its unquestioning application of *Binns*, and its ready acceptance of the spin handed down through the case law, the court also reinforced that some degree of the fictionalization gap still exists in New York.<sup>135</sup> In other words, some expressive works enjoying full First Amendment protection might be considered for the newsworthiness test, yet lose because of the content of their message, their truth-fiction blend—and that would be a constitutionally permissible result.

Doctrinal coherence isn't all that's lost. Expressive content that seems pioneering in form, or genre-crossing, or delivered to audiences by novel means—expression that, for whatever reason, strikes a judge as squatting on a plaintiff's personhood under the banner of art—always will be at highest risk of falling into the cracks between state defenses whose logic serves traditional purposes and familiar categories of speech.

America's 21st century right-of-publicity defenses are out of sync with its free speech commitments, and their presumptions and limitations directly affect the expressive works around us. So it is of pressing importance, currently, to ask what exactly is wrong with *C.Q.D.*, in the eyes of the New York judiciary. And whatever the damning characteristic, under a proper application of modern First Amendment doctrine, does it withstand strict scrutiny today?

#### IV. EVERY POTENTIAL PROBLEM WITH *C.Q.D.*, CONSIDERED

To the appellate court recently giving the question a close look, in *Porco*, New York's newsworthiness defense does not apply where “the degree of fictionalization” in a film “transform[s] it into a materially and substantially fictitious biography, the purpose of which [is] an effort to trade off plaintiffs' names and likenesses[.]”<sup>136</sup> As the oldest disc in the backbone of that rule, the *Porco* court explained, *Binns* assigned liability to *C.Q.D.* because it was:

- “a fanciful dramatization” that
- “presented itself as the true story of the rescue;”

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<sup>134</sup> Pls.' Mot. Of Law In Opp'n To Def.'s Mot. For Summ. J. and In Supp. of Pls.' Cross-Mot. For Partial Summ. J. And For Renewal Of The Court's February 1, 2018 Decision & Order at 40, *Porco v. Lifetime Ent. Servs.*, 150 N.Y.S.3d 380 (App. Div. 2021) (No. 2013-0190).

<sup>135</sup> See *Porco*, 150 N.Y.S.3d at 385 (discussing and applying *Binns* standard).

<sup>136</sup> *Id.* at 386.

- portrayed Jack Binns in a way that had “no connection whatever with” the incident;
- “did not instruct or educate” the audience about it, and “served no apparent purpose beyond amusing the public and boosting ticket sales.”<sup>137</sup>

First, it’s worth pointing out a couple of characteristics of *C.Q.D.* that the *Binns* litigants and judges themselves thought could cost it the news defense. But they’re not on that list because, as film technology and its business have settled into American culture, courts like that in *Porco* have dropped them from the conversation.

In his order enjoining the film at the trial court level, for instance, Justice Charles L. Guy squarely rejected Vitagraph’s argument that *C.Q.D.* distributed news of *current* events: “It is true that the incident which defendant undertook to portray or reproduce had been a current event and an item of news[,]” he allowed, “but the films in question were manufactured by defendant a month after the occurrence, when it had ceased to be an item of current news[.]”<sup>138</sup> Binns’ attorney, too, scoffed at the idea that motion pictures could function like news since the “necessarily elaborate method of manufacture” took so long that “the event depicted has ceased to be an item of current news at the time the film is ready for exhibition[.]”<sup>139</sup>

But by mid-century, when television made same-day news exhibition quite feasible anyway, New York courts had decided that the news defense should cover weekly and monthly publications and film clips, in addition to daily reports.<sup>140</sup> So by the time Don Molony sued over the *Boy Comics* portrayal, the Appellate Division easily batted away the six-month interval between the crash at the Empire State Building and the publication of the strip, explaining that it was “settled that the right of privacy does not prohibit

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<sup>137</sup> *Id.* at 385 (internal quotations omitted). In other words, according to that panel of New York judges, a movie or video game or book that bore those qualities theoretically could be enjoined, and even criminally penalized, under §§ 50 and 51.

<sup>138</sup> Binns Record at 212.

<sup>139</sup> Binns Respondent’s Br. at 33.

<sup>140</sup> *See, e.g.,* Colyer v. Richard K. Fox Pub. Co., 146 N.Y.S. 999, 1001 (1914) (pointing out that the statute had never been applied to “publication in a daily, weekly or periodical paper or magazine”); *Humiston v. Universal Film Corp.*, 178 N.Y.S. 752, 759 (App. Div. 1919) (extending news defense to cover weekly clip compilation in newsreel); *Sidis v. F-R Pub.*, 113 F.2d 806 (2d Cir. 1940) (news defense protected *New Yorker* magazine against former child prodigy’s §§ 50 and 51 claims over “Where Are They Now?” article).

the publication of matter which is of legitimate public or general interest, although no longer current.”<sup>141</sup>

Likewise, the industrial nature and the economic practices of filmmaking were matters of great interest—and suspicion—in the *Binns* litigation. In *Binns*’ brief before the Court of Appeals, his lawyer derided Vitagraph’s business with emphasis as “purely and simply to manufacture and trade in an *amusement device*—motion picture films.”<sup>142</sup> Judge Chase picked up the thread in his opinion for the Court of Appeals, writing that Vitagraph’s “manufactured product” had been “placed upon the market” and used “in moving picture shows pursuant to leases from and other agreements with [Vitagraph].”<sup>143</sup> Using Jack *Binns*’ name and likeness in that context “was commercial” and therefore actionable.<sup>144</sup>

His skepticism of the new medium, with its social odor of dodgy nickelodeon theaters, wasn’t uncommon at the time. *Binns* was decided two years before *Mutual Film Corp. v. Industrial Commission of Ohio*, in which the U.S. Supreme Court upheld state censorship of films that were not “of a moral, educational, or amusing and harmless character[.]”<sup>145</sup> Taking note of movies’ “power of amusement” and special capacity “for evil ... the greater because of their attractiveness and manner of exhibition[.]” Justice McKenna explained that “the exhibition of moving pictures is a business, pure and simple, originated and conducted for profit, like other spectacles” and not, under Ohio’s constitution, “part of the press of the country, or ... organs of public opinion.”<sup>146</sup>

But the Supreme Court rolled back *Mutual Film* in 1952, announcing in *Joseph Burstyn* that it would no longer adhere to the ruling because “expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments.”<sup>147</sup> And in New York, as cultural suspicion receded and film came to be seen as a

<sup>141</sup> *Molony v. Boy Comics Publishers*, 98 N.Y.S.2d 119, 122 (2021).

<sup>142</sup> *Binns* Respondent’s Br. at 35. The New York Court of Appeals approached television with the same tentative, technical eye in *Gautier v. Pro-Football*, 304 N.Y. 354, 357 (1952), explaining that the footage at issue “was sent by coaxial cable from Washington to New York and there transmitted to viewers from [ABC’s] television station, WJZ-TV, while the audio portions were carried by direct wire[.]”

<sup>143</sup> *Binns v. Vitagraph Co. of Am.*, 210 N.Y. 51, 57 (1913).

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

<sup>145</sup> *Mutual Film Corp. v. Indus. Comm’n of Ohio*, 236 U.S. 230, 240 (1915), *overruled by Joseph Burstyn v. Wilson*, 343 U.S. 495, 502 (1952) (quoting Ohio state law).

<sup>146</sup> *Id.* at 242, 244.

<sup>147</sup> *Joseph Burstyn v. Wilson*, 343 U.S. 495, 502 (1952).

genuine art form, courts simply shifted their focus to other aspects of the *Binns* holding.

### A. *Fanciful Dramatization (or Fictionalization)*

Chief among them was the notion of fictionalization, or as the *Porco* court put it, “fanciful dramatization.”<sup>148</sup> Judge Chase never used the word “fiction” or any variation thereof in *Binns*, but courts frequently cite his 1913 opinion as a kind of stamp for the notion that New York’s newsworthiness defense does not cover fictionalized works involving real people.<sup>149</sup>

Fictionalization is a slippery concept, though. It could refer to the presence of incorrect information, or to the use of dramatic reenactment—or something else altogether.

#### 1. Fictionalization as Falsity?

If it means tabulating the number of factually incorrect statements within a story, as courts since *Binns* imply when they say Vitagraph’s movie was “pure fiction and not fact,” then we should care that *C.Q.D.* was no more so than the *Boy Comics* strip, which was accurate but for “minor particulars.”<sup>150</sup> In the courtroom, when Vitagraph’s attorney walked *Binns* through the 19 intertitle cards—which in the silent-film era provided *C.Q.D.*’s narrative of the rescue—*Binns* found errors in only three of them: As to “Captain Sealby and passengers on the ill-fated Republic straining their eyes through the dense fog,” he said there was fog, but he wasn’t sure if the captain had strained to see through it, and he doubted that passengers were awake pre-dawn when the collision occurred.<sup>151</sup> Second, the card saying “[t]he crew of the unfortunate Republic aboard the Baltic, nearing New York” wasn’t quite right, *Binns*

<sup>148</sup> *Porco v. Lifetime Ent. Servs.*, 150 N.Y.S. 3d 380, 385 (2021).

<sup>149</sup> See, e.g., *Koussevitzky v. Allen, Town & Health, Inc.*, 68 N.Y.S.2d 779, 783 (1947) (“[the Privacy Law], it has been held, also applies to the unauthorized fictional use of a name or photograph”, and citing *Binns*); *Garner v. Triangle Publ’n*, 97 F. Supp. 546, 549 (S.D.N.Y. 1951) (“the right to invade a person’s privacy to disseminate public information does not extend to a fictional or novelized representation of a person” and citing *Binns*); *Youssouff v. Columbia Broad. Sys.*, 244 N.Y.S.2d 701, 704 (Sup. Ct. 1963), *aff’d* 244 N.Y.S.2d 1 (App. Div. 1963) (“[Privacy Law] does apply if the treatment is fictionalized” and citing *Binns*).

<sup>150</sup> *Humiston v. Universal Film Corp.*, 178 N.Y.S. 752, 758 (App. Div. 1919); *Molony v. Boy Comics Publishers*, 98 N.Y.S.2d 119, 124 (1950).

<sup>151</sup> *Binns* Record at 73–74.

testified, because only part of the crew returned on the *Baltic* while the rest stayed with the doomed *Republic* and returned to New York later on a different ship.<sup>152</sup> Finally, he acknowledged that the last card—“Jack Binns and his good American Smile,” with the “Binns” actor grinning for the camera—was inaccurate, because he was British, but he said he did not object to the fact of misstatement.<sup>153</sup> Otherwise, he agreed, *C.Q.D.* told the story accurately.

That aspect of the case has been obscured in a judicial game of telephone over time. It may have started with a point in Vitagraph founder Blackton’s testimony, when he was asked what the “action on the part of the person who represented Mr. Binns”—the actor Eddie Phillips—“consisted of” and to “describe what that scene is, as far as you can.”<sup>154</sup> Blackton replied, “Why, we have to use our imagination largely in those cases.”<sup>155</sup> In context, he seems to be referring to Phillips’ acting in the scene—how they decided specifically what he should do. Coupled with language in Judge Chase’s opinion discussed further below, though, that quote came to be understood as Blackton saying that *C.Q.D.* itself “was largely the product of imagination,” in the sense of being largely incorrect, and therefore distinguishable from works that tell a story in a factually accurate way.<sup>156</sup> Notably, Judge Chase made no mention in the *Binns* opinion of any factual inaccuracies in *C.Q.D.*

Where *C.Q.D.* and *Boy Comics* more meaningfully may have deviated from raw history was, of course, in their visual renderings — the scenery, the actors’ faces, the drawings. How anxious the Binns character did or didn’t look in his cabin; the way injured Betty Lou Oliver was draped on the elevator floor. Plus, of course, the good British-American smile.

It is not quite right to call those elements factually incorrect, though. Certainly, the film’s creators would have wanted them to be as true to reality as technology and skill could manage — only perhaps a heightened version of reality that would better catch the eye.<sup>157</sup> And the renderings surely got close. It’s not like Vitagraph depicted Binns riding a train across Mars. Binns himself admitted on the stand that even the last card wasn’t exactly wrong; he told the court he really did smile with pride after the rescue, privately and

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<sup>152</sup> *Id.* at 80.

<sup>153</sup> *See id.* at 71.

<sup>154</sup> *Id.* at 155.

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

<sup>156</sup> *Youssouppoff v. Columbia Broad. Sys.*, 244 N.Y.S.2d 701, 705 (Sup. Ct. 1963).

<sup>157</sup> *See Binns Record* at 152–55 (Vitagraph co-founder James S. Blackton’s testifying to the production work that went into understanding what had happened in the collision and recreating “a complete history of the event” on film).



publicly.<sup>158</sup> The salient feature of the film's fictional information wasn't so much factual inaccuracy, as invention.

This is the point that Judge Chase actually did make about *C.Q.D.*, when he observed that it lacked actual footage of the collision rescue and instead was “mainly a product of the imagination, based, however, largely upon such information relating to an actual occurrence as could readily be obtained.”<sup>159</sup> He didn't return to this point or suggest that it weighed particularly heavily in his ruling. But courts over time have grown that line into a *Binns*-based rule that “invented” biographies and other works involving real people may be impermissible in New York.<sup>160</sup> In other words, according to this line of thinking, an account of reality that is blended with sufficient imaginative information can constitute “trade” within the meaning of § 51, and become unprotected expression.

Maybe Judge Chase thought that. Maybe the 1903 New York Legislature intended it, though nothing in the wording of § 51 draws that line. Even if so, even if an expressive work becomes actionable in New York when it contains a particular degree of imaginative information—how much? Can it really be as little as we see in *C.Q.D.*? Where does this rule leave novelists, whose commitment to the imaginative can be total?—it's unclear why that would be.<sup>161</sup> If a film like *C.Q.D.* celebrates its subject, so that it doesn't defame him, then in what way can its entwinement of fact and imagination do him harm?

## 2. Fictionalization as Reenactment?

Alternatively, perhaps the fictionalization problem with *C.Q.D.* was its use of reenactment, or impersonation. *Binns*' lawyer notably described the film in a brief as “a fictitious pantomime calculated to amuse[,]” and Judge Chase quoted from Blackton's testimony that he had cast “various actors and

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<sup>158</sup> See *id.* at 72 (*Binns* agreeing “naturally I smiled” because of his role in the rescue and, when asked if he confined “those smiles to the inner circle of your friends”, saying he had not).

<sup>159</sup> *Binns v. Vitagraph Co. of Am.*, 210 N.Y. 51, 56 (1913).

<sup>160</sup> *Messenger ex rel. Messenger v. Gruner + Jahr Print'g and Publ'g*, 94 N.Y. 2d 436, 445–46 (2000).

<sup>161</sup> Indeed, the U.S. Supreme Court declared that fiction and other forms of entertaining speech enjoy full First Amendment protection in *Winters*: “Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine ... [the plaintiff's magazines] are as much entitled to the protection of free speech as the best of literature.” 333 U.S. 507, 510 (1948).

actresses in our employ to take the various parts,” including that of Binns.<sup>162</sup> A trial court judge picked up on that thread 18 years later in *Martin v. New Metropolitan Fiction*, reading *Binns* as holding that “impersonation in a moving picture” could be actionable under the Privacy Law.<sup>163</sup> And Justice John Van Voorhis, writing for the Appellate Division in *Molony*, said that the stage-shy Binns “justly felt aggrieved at being impersonated” — one feature distinguishing *C.Q.D.* from the *Boy Comics* strip.<sup>164</sup>

But reenactment wasn’t just a device for dramatists. Turn-of-the-century cameras were bulky and hard to carry around. When they could be wrangled to the scene of some interesting event, their lenses might not capture the action in any kind of discernible or interesting way.<sup>165</sup> So Vitagraph and its contemporaries routinely relied on reenactments to show audiences battle scenes.<sup>166</sup> Model boats were filmed floating in a tub; real soldiers on both sides of a battle line were asked to reenact fights for the cameras — and they complied.<sup>167</sup> One observer joked that an early filmed military skirmish should have been called “A Drill at Van Cortland Park.”<sup>168</sup> And reenactment was a fact that the filmmakers might not make clear to viewers.<sup>169</sup> They were just beginning to create genres of film that we now recognize as distinct categories, with distinctively different norms.

By the 1950s, the documentary was not just an established subspecies but one appreciated for its art and social commentary. *The March of Time* in

<sup>162</sup> *Binns* Respondent’s Br. at 36; *Binns*, 210 N.Y. at 56.

<sup>163</sup> *Martin v. New Metro. Fiction*, 28 N.Y.S. 292 (Sup. Ct. 1931). The appellate division later reversed in *Martin*, without specifically addressing this point. 260 N.Y.S.972 (1932).

<sup>164</sup> *Molony v. Boy Comics Publishers*, 98 N.Y.S.2d 119, 125 (2021).

<sup>165</sup> See, e.g., RAYMOND FIELDING, *THE AMERICAN NEWSREEL: 1911–1967*, 38–39 (1972) (quoting Vitagraph co-founder Albert E. Smith on a trip he took to film the Boer War in southern Africa, “When I got back to the camp at Estacourt ... I saw that I had little of actual warfare, having been forced to remain at a distance beyond camera range. I asked a few of the British soldiers if they would put on Boer clothes and go through a few mock skirmishes, which they did.”).

<sup>166</sup> See, e.g., MUSSER, *supra* note 10, at 247–48, 254–58.

<sup>167</sup> See FIELDING, *supra* note 165, at 40–41.

<sup>168</sup> *Id.* at 41 (quoting a 1900 article published in the *Rochester Democrat and Chronicle*).

<sup>169</sup> See, e.g., MUSSER, *supra* note 10, at 247, 255–56 (describing how the International Film Company “photographed a sister ship of the *Maine* and passed it off as an authentic film of the *Maine* taken in Havana Harbor” before it sunk, while ads for others’ films produced using miniatures “strongly implied that these were photographed accounts of actual battles”).

particular was a shining example of what newsreels could become.<sup>170</sup> Debuting in theaters in 1935 under the wing of *Time* magazine, its monthly installments took an unflinching look at raw and serious topics like the dust bowl, the rise of Nazism, and the reign of Huey Long.<sup>171</sup> It also relied heavily on reenactment, “sometimes to the almost complete exclusion of authentic footage.”<sup>172</sup> By 1950, it had been nominated for five Academy Awards.<sup>173</sup>

All of this might have weighed on Justice Van Voorhis as he thought in *Molony* about reenactment, and decided it wasn’t really an undeserving form of expression: “Moving pictures, such as the March of Time,” he wrote, “are not prohibited under ordinary circumstances, merely for the reason that, to some extent, persons are impersonated who are in the public eye, and the events dramatized.”<sup>174</sup> Driving home the point 13 years later, the trial court in *Youssouppoff v. Columbia Broadcasting System* considered whether, assuming a CBS drama about the murder of Grigory Rasputin were historically accurate, its use of actors and imagined dialogue could make it actionable.<sup>175</sup> No, the court decided, and *Binns* specifically “is by no means clear authority for the proposition that the mere use of an actor to impersonate the plaintiff and of manufactured scenery and dialogue is sufficient, in itself, to create liability under our privacy statute.”<sup>176</sup>

As odd as it may have seemed to some in the early 1900s—perhaps including Judge Chase—reenactment in film was and has, over the years, remained normal, even an essential tool of documentarians.<sup>177</sup> If it ever was, dramatization does not now appear to be the problem courts have with *C. Q. D.*

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<sup>170</sup> See generally RAYMOND FIELDING, *THE MARCH OF TIME* (1978).

<sup>171</sup> *Id.* at 336, 338.

<sup>172</sup> *Id.* at 76.

<sup>173</sup> See Oscars, *Experience Over Nine Decades of the Oscars From 1927 to 2022*, <https://www.oscars.org/oscars/ceremonies> [https://perma.cc/D6DM-9GJB] (listing nominees for Best Documentary (Short Subject) or Best Documentary in 1942, 1943, 1944, 1947, and 1950 (listed under producer Richard de Rochemont)).

<sup>174</sup> *Molony v. Boy Comics Publishers*, 98 N.Y.S.2d 119, 123 (2021).

<sup>175</sup> See *Youssouppoff v. Columbia Broad. Sys.*, 244 N.Y.S.2d 701, 704–05 (Sup. Ct. 1963).

<sup>176</sup> *Id.* at 705.

<sup>177</sup> In 1996, HBO prevailed against a New York Privacy Law claim over a scene in a docuseries entitled *Real Sex* that the plaintiff alleged was in part “staged.” *Gaeta v. Home Box Office*, 645 N.Y.S.2d 707, 710 (Civ. Ct. 1996). The court explained that the producers’ “staging or pre-arrangement” of photographer Spencer Tunick taking nude shots of models on a street, which drew a crowd that the plaintiff joined, “merely permitted Tunick’s work to be memorialized on film. Plaintiff makes no suggestion that Tunick was not a ‘real’ photographer whose work HBO was documenting, or that the segment featuring Tunick was otherwise a fictional creation of HBO.” *Id.*

### 3. Fictionalization as a Lie? (New York's Supreme Misadventure)

There is one more clue to glean from the line of § 51 cases that construed fictionalization as inaccuracy. Despite playing no discernible role in the *Binns* decision or, as it turns out, any meaningful one in *C.Q.D.* itself, this is the conception of the term that has caused New York courts the greatest headaches—and may tee up a solution to the entire *Binns* mystery.

To navigate this part of the story, it helps to have in mind two archetypes of expression:

*Category 1:* Statements that a speaker intends her listener to receive as factually accurate as to the real world, in a context in which that's how they reasonably are understood.

*Category 2:* Statements that a speaker might intend the listener to receive as factually accurate, or imaginative in nature, or some blend thereof, in a context in which the listener reasonably understands that the statements might be any of those things.

Category 1 and Category 2 differ most saliently here in the magnitude of damage that falsity can do. In Category 1, where the listener reasonably believes he is getting accurate information, a false statement can lead him to hold opinions, or make decisions, or take actions that he otherwise would not. Individual reputations can be ravaged as a result. Category 1 expression readily can be understood as serving truth-seeking and democratic ends, and the distortive effects of factual inaccuracy in this context on discourse and the political process are clear.

In Category 2, that concern is muted. Audiences here are on guard for the possibility of falsity. They open a novel and tacitly accept that some pieces of information inside it might have been journalistically gathered or personally known by the author, just like in any Category 1 report. But the source of at least some of the information will be the speaker's imagination — and it could be accurate or inaccurate as to the real world. Whatever kind of statement she encounters in Category 2, the reader is contextually primed not to change her real-world actions or opinions solely based on those statements, the way she reasonably might in Category 1. Accordingly, falsity is less apt to distort discourse and the social order. To the contrary, audiences typically seek out Category 2 expression believing that its imaginative, nonliteral nature is a good thing; it might open them up to an experience — emotional, artistic, entertaining — or perhaps an understanding of an event that a straight news account could not provide. In Category 2, in other words, falsity can serve the cause of deeper truths and new meanings. It can be art.

Judge Chase essentially recognized Vitagraph's film in *Binns* as a Category 2 work, and concluded that Category 2 works simply didn't have the same social value meriting special protection from legal liability as works in Category 1 should get. He did not say that it was because *C.Q.D.* was factually incorrect, of course. But over the years, courts repeatedly characterized the *Binns* case in language suggestive of falsity, like "pure fiction and not fact."<sup>178</sup> By the middle of the 20th century, litigants had seized on that and sought to generalize it out to a *Binns*-based rule that expression otherwise eligible for the newsworthiness defense—even in Category 1—could become actionable under §§ 50 and 51 if it contained falsity.

*Sutton v. Hearst Corp.*, in all its strange sadness, is a perfect illustration.<sup>179</sup> Mildred Fitzpatrick was a "pretty and popular" office worker in Norfolk, Virginia in the lead-up to World War II, when her paths crossed with a quiet man named Valentine Lawless.<sup>180</sup> He fell in love with her, and wrote but never sent her a stash of letters over the course of three years.<sup>181</sup> Weeks before the United States entered the war, Lawless wrote a will instructing how he would want his Philco Radio Phonograph, his gold seal ring, and other items distributed if he died.<sup>182</sup> On October 16, 1944, his bomber was shot down over Austria, and Lawless was killed.<sup>183</sup>

His siblings fought over his will—an affair of minimal press intrigue, except for the questionable effect of a "special purpose" Lawless had mentioned for whatever cash was left, which he described more specifically in a side letter to his brother, Kirwan: Mildred should be sent every Saturday morning, anonymously, "one perfect rose."<sup>184</sup> "I love her very much, Kirwan, and would like to be the type of person that could make her love me and marry me[.]" Lawless had written.<sup>185</sup> "But, as I'm not a personality which is likable and as I do not have mental qualifications requisite of one who is likely to be successful socially or financially, I must make this request."<sup>186</sup>

When the Lawless family litigation reached the Virginia Supreme Court and a local florist started sending the roses, the story became news.<sup>187</sup> One

<sup>178</sup> *Humiston v Universal Film Mfg. Co.*, 178 N.Y.S. 752, 758 (App. Div. 1919).

<sup>179</sup> *Sutton v. Hearst Corp.*, 98 N.Y.S.2d 233, 233 (App. Div. 1950).

<sup>180</sup> *Id.* at 235 (Peck, P.J., dissenting).

<sup>181</sup> *Lawless v. Lawless*, 187 Va. 511, 517 (1948).

<sup>182</sup> *Lawless*, 187 Va. at 513–14.

<sup>183</sup> *See Sutton*, 98 N.Y.S.2d at 234; *see also Lawless*, 187 Va. at 512 (date of death).

<sup>184</sup> *Lawless*, 187 Va. at 516 (italics removed); *Sutton*, 98 N.Y.S.2d at 234.

<sup>185</sup> *Lawless*, 187 Va. at 516.

<sup>186</sup> *Id.* at 516–17.

<sup>187</sup> *Sutton*, 98 N.Y.S.2d at 238.

magazine in the Hearst empire gave its account a particularly colorful illustration, with sketches of “a turret gunner in a Flying Fortress” and “a woman holding a rose.”<sup>188</sup> Captions around them said: “It is now possible to guess what the turret gunner of that B-17 was thinking in that flaming split-second over Linz, in Austria” and “Here, told for the first time in all its poignant and dramatic detail, is one of the great true love stories of our time ... A Flower a Week Forever for a Girl He Could Not Have.”<sup>189</sup> Soon enough, the article drew a § 51 claim.

Mildred Fitzpatrick was by then Mildred Sutton—as the appellate division called her, “a matron married to another man[.]”<sup>190</sup> She alleged in her suit that Hearst’s account of the rose story gave the “total dominant impression” that she had “she accepted the rose and regarded the donor with romantic sentiment,” both of which were false.<sup>191</sup> Section 51 permitted plaintiffs to recover damages for any injury resulting from an infraction, and Sutton covered all her bases by alleging, as the dissent put it, that the article gave her “great bodily and mental anguish” but also subjected her to “public ridicule,” and “greatly injured ... her reputation[.]”<sup>192</sup> The trial court refused to dismiss her complaint and, under the authority of *Binns*, the appellate division affirmed.<sup>193</sup>

*Sutton* might not have seemed like a huge leap from *Binns*. But by inflating *Binns* into a general ban on falsity and applying that rule to a Category 1 work, the appellate division effectively blessed an entirely new type of tort that William Prosser soon and famously would describe as arising from “publicity that places the plaintiff in a false light in the public eye.”<sup>194</sup> A false light tort, as Prosser explained, has a “good deal of overlapping of defamation”, both in its key element of falsity and the fact that the “interest protected is clearly that of reputation.”<sup>195</sup> But false light could sweep up much more speech, because it was not beset by all the “restrictions and limitations which have hedged defamation about for many years, in the interest of freedom of the press[.]”<sup>196</sup> For instance, Mildred Sutton might have been precluded from bringing a defamation claim over the Hearst article if she could not point to

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<sup>188</sup> *Id.* at 236.

<sup>189</sup> *Id.* (quotation omitted).

<sup>190</sup> *Id.* at 234.

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

<sup>192</sup> *Id.* at 237.

<sup>193</sup> *Id.* at 235.

<sup>194</sup> William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 398 (1960).

<sup>195</sup> *Id.* at 400.

<sup>196</sup> *Id.* at 401.

any specific, factual statement within it that said she was in love with Lawless. With a false light spin on § 51, she only had to allege that was the article's general impression.<sup>197</sup>

*Sutton* and its progeny are crucial to a free-speech analysis of § 51. They paved the way for the false light-type claim, in a Category 1 case, that first drew the U.S. Supreme Court's attention to the statute's constitutionality.

*Time, Inc. v. Hill* dealt with a *Life* magazine article that said a forthcoming play would "re-enact[]" a story inspired by the real-life experience of James Hill and his family, when three escaped convicts held them hostage in the Hills' Pennsylvania home for 19 hours.<sup>198</sup> It included a photo spread in which actors posed in scenes from the play inside the house where the Hills had been held, with "the son being 'roughed up' by one of the convicts," "the daughter biting the hand of a convict to make him drop a gun," and "the father throwing his gun through the door after a 'brave try' to save his family is foiled."<sup>199</sup> Hill's claim was that the play didn't in fact "mirror[]" his family's experience; he'd told reporters after the crime that "the convicts had treated the family courteously, had not molested them, and had not been at all violent."<sup>200</sup> Leveraging the logic of *Sutton*, Hill sued under the Privacy Law.

To the U.S. Supreme Court, if a § 51 claim looked this much like a defamation action—its crux was falsity—then it couldn't escape the constitutional structure erected four years earlier, in *New York Times Co. v. Sullivan*, to prevent defamation from eroding too much valuable Category 1 speech.<sup>201</sup>

*Sullivan's* great revelation was that, even though false speech in Category 1 could be distortive, in a free-speech regime, some of it still was worth protecting. If nothing else, Justice Brennan wrote in *Sullivan*, falsity was "inevitable in free debate" and "must be protected if the freedoms of expression are

<sup>197</sup> Other Category 1 cases through the 1950s and into the 1960s perpetuated the idea that false light was cognizable under § 51. For instance, New York scion Robert Goelet, Jr. and his wife brought § 51 claims over an article in the magazine *Confidential*, alleging that it was "a fictional, sensational and distorted representation, purporting to be a true portrayal of highly intimate details of their lives[.]" *Goelet*, 171 N.Y.S.2d at 226. The appellate division ordered the case dismissed, curtly explaining that it was unwilling to "pass judgment on [American] reading tastes," but it preserved *Sutton* and, indirectly, the false light path. *Id.* It distinguished the two cases as best it could on the basis that Mildred Sutton, unlike Goelet, was "a person known only to her friends and acquaintances ... plucked out of obscurity and cast into the public eye." *Id.*

<sup>198</sup> *Time, Inc. v. Hill*, 385 U.S. 374, 377–78 (1967).

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

<sup>200</sup> *Id.* at 378.

<sup>201</sup> *Id.* at 387–88; see also *Sullivan*, 376 U.S. 254, 283–84 (1964).

to have the breathing space that they need . . . to survive.”<sup>202</sup> *Sullivan* came down in 1964, and its assumptions about the purposes of free expression were steeped in the democratic and governance-centered speech theories of the time. It was a case about criticism of government officials, and the rule Brennan devised in *Sullivan* fit the Category 1 archetype: Even false and defamatory statements of fact had to be protected under the First Amendment if they were mistakes. Only false statements made with actual malice—knowledge or reckless disregard to its falsity—fell out of the First Amendment bubble.<sup>203</sup> Intent was the dividing line.

Three years later, the Supreme Court held that the First Amendment required the same treatment of James Hill’s § 51 claim.<sup>204</sup> And because *Life*’s article squarely fit within the truth-seeking logic of Category 1, asking the *Sullivan* question in the case made sense: Had the editor known, or should he have known, that the implication of a close link between the play and the real crime was false? If so, a free-speech regime could afford to lose them; if not, if the editor simply was mistaken, then the article had to be immune. Assuming New York courts applied *Sullivan* and set the bar of falsity at “[m]aterial and substantial falsification”—minor errors, too, had to stay in the speech bubble—then the Supreme Court seemed to tell them that they would have addressed the First Amendment problem with § 51.<sup>205</sup>

But for all its speech-protective power against defamation-esque false light claims, particularly in Category 1 works like news, the *Sullivan* rule can do less with a § 51 claim in the blended-imaginative world of Category 2. Imaginative content is by definition intentional. It easily can be inaccurate—false in the literal sense—as to the outside world. If the First Amendment only required courts to ask if *C.Q.D.*’s imaginative content was intentional, then it essentially required nothing at all.

This conundrum was immediately obvious to New York Court of Appeals Judge Bergan, when the Supreme Court handed *Hill* back down along with a separate pending § 51 case that bled from the truth-seeking Category 1 world into the blended-imaginative Category 2: *Spahn v. Julian Messner, Inc.*<sup>206</sup> At the heart of this case was a biographical book, aimed at pre-*teens*, about the legendary baseball pitcher Warren Spahn.<sup>207</sup> Like *C.Q.D.*,

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<sup>202</sup> *Sullivan*, 376 U.S. at 271–272 (internal quotes omitted).

<sup>203</sup> *See id.* at 279–80.

<sup>204</sup> *See* *Time Inc. v. Hill*, 385 U.S. 374, 387–88 (1967).

<sup>205</sup> *Hill*, 385 U.S. at 386 (declaring “[m]aterial and substantial falsification is the test”).

<sup>206</sup> *Spahn v. Julian Messner, Inc.*, 21 N.Y.2d 124, 131 (1967).

<sup>207</sup> *See* MILTON J. SHAPIRO, *THE WARREN SPAHN STORY* (1958).



*The Warren Spahn Story* generally celebrated its subject, and Spahn didn't bring a false-light type suit alleging reputational harm but rather a standard § 51 fictionalization claim. In the scattershot fashion typical of *Binns* cases, Spahn alleged that the biography contained imaginative, false, embellished, and dramatized information and caused him both humiliation and right of publicity-type harm by, among other things, interfering with a deal he had just brokered to publish his own account of his life.<sup>208</sup>

The Court of Appeals applied *Sullivan*, as the Supreme Court had instructed, and easily found the actual malice standard met.<sup>209</sup> *The Warren Spahn Story* included “imaginary incidents,” “invented dialogue,” and “attributed thoughts and feelings”—how could one say those things weren't knowingly done?<sup>210</sup> If anything, the panel observed, the publisher's arguments in its defense “are, in essence, not a denial of knowing falsity but a justification for it.”<sup>211</sup>

To Judge Bergan, dissenting in *Spahn*, that was precisely the point. “All fiction is false in the literal sense that it is imagined rather than actual[,]” he wrote.<sup>212</sup> Perhaps the Supreme Court hadn't gotten close enough to *Spahn* to realize it, but *Sullivan*'s “categorical assignments do not quite accurately encompass the situation of which Spahn complains and on which defendants claim their constitutional privilege to write and print.”<sup>213</sup> In his view, a fictionalized account of Spahn's life should not be actionable under § 51 unless Spahn could show it was “actually damaging” to him in some legally cognizable way.<sup>214</sup>

Category 2 speech certainly might cause harm to individuals. Jack Binns, Don Molony and Warren Spahn reported sincerely that they'd been damaged, and even in a free-speech regime, courts need some way of evaluating those claims. But if one starts from the modern premise that *C.Q.D.*, *Boy Comics*, and *The Warren Spahn Story* generally have social and constitutional value—whether because of their indirect relationship to governance, or on their own humanistic and cultural terms—then a rule that would excise them from the First Amendment bubble *because of their inherent characteristics* is

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<sup>208</sup> See, e.g., Complaint at 36, 39, *Spahn v. Julian Messner, Inc.* 18 N.Y.2d 324 (1958) (No. 12098) (“the [misled] public, having purchased the book referred to herein, will not purchase the plaintiff's autobiography when it is published”).

<sup>209</sup> See *Spahn*, 21 N.Y.2d at 127.

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

<sup>211</sup> *Id.* at 128.

<sup>212</sup> *Id.* at 131.

<sup>213</sup> *Id.*

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

simply the wrong constitutional tool to use. As Judge Bergan suggested, we need some other way of identifying and evaluating the subcategory of Category 2, blended-imaginative speech that causes harm.

New York's false light misadventure ended in 1993, when the Court of Appeals declared that it was not a separately cognizable tort under § 51 after all.<sup>215</sup> The Legislature had not seen fit to build false light into the Privacy Law and courts could not use *Binns* to create the tort indirectly. That dealt a blow to *Sutton* and sharply curtailed the applicability of *Binns* to Category 1 works. But given the opportunity seven years later to wind *Binns* down altogether in *Messenger v. Gruner + Jahr Print'g and Publ'g*, the New York Court of Appeals refused.<sup>216</sup> It was willing to pack a lot of cultural speech into Category 1, so that Judge Chase's newsworthiness test could cover much more than daily print news—anything from “make-over pictures in *Seventeen* magazine” to a “picture of plaintiffs illustrating [a] guide to nude beaches” made the cut.<sup>217</sup> But speech overly “infected with fiction, dramatization or embellishment”, the court said, simply remained orthogonal to the fundamentally truth-seeking purpose of the newsworthiness defense.<sup>218</sup>

That is why *Binns* remained good law and the *Porco* court felt the need to contend with it. Even then, after a century of case law analysis, the questions about imaginative expression that mattered still were unasked—and unless they could win on the logic of the newsworthiness test, docudramas in New York risked falling out of the First Amendment bubble.

### B. *Instruct, Educate, or Amuse the Public*

Further down on *Porco*'s list of damning features of *C.Q.D.* is the idea that it did not “instruct or educate” and that it “served no apparent purpose beyond amusing the public and boosting ticket sales.”<sup>219</sup>

It's probably a stretch, factually, to say that nobody learned by watching the film. Some in the audience could have known nothing or very little about the rescue, and been filled in by watching *C.Q.D.* In any case, the idea that it didn't educate comes from this section of Judge Chase's opinion:

The first picture of the series was essentially a picture of the plaintiff, although included therewith was a place having relation to the other parts

<sup>215</sup> See *Howell v. New York Post Co.*, 81 N.Y.2d 115, 123–24 (1993).

<sup>216</sup> See 94 N.Y.2d 436, 446 (2000).

<sup>217</sup> *Id.* at 442 (internal quotations omitted).

<sup>218</sup> *Id.* at 446.

<sup>219</sup> *Porco v. Lifetime Ent. Servs.*, 150 N.Y.S.3d 380, 385 (App. Div. 2021).

of the pictures exhibited — but the last picture of the series had no connection whatever with any other place or person or with any event. His alleged personal movements as exhibited in the now well-known form of moving pictures had no relation to the other pictures, and *it was not designed to instruct or educate those who saw it*. The defendant used the plaintiff's alleged picture to *amuse those who paid to be entertained*. If the use of the plaintiff's name and picture as shown in this case is not within the terms of the statute, then the picture of any individual can be similarly made and exhibited for the purpose of showing his peculiarities as of dress and walk, and his personal fads, eccentricities, amusements and even his private life. *By such pictures an audience would be amused and the maker of the films and the exhibitors would be enriched*. The greater the exaggeration in such a series of pictures, so long as they were not libelous, *the greater would be the profit of the picture-maker and exhibitor*.<sup>220</sup>

Punting just a moment on the problem of the scene with the smile, it seems like Judge Chase's point is that *that scene* of the film failed to instruct or educate, as opposed to the film overall. And maybe it wasn't even his view that a work (or any given element of it) necessarily had to instruct or educate in order to be judicially excused from §§ 50 and 51. If it wasn't news, though, it had to lay some other claim to a social benefit deserving of protection from the law—and that could not be entertainment.

Judge Chase wasn't alone in his skepticism. For much of the first half of the 20th Century, as illustrated by *Mutual Film* and the decades of film regulation it ushered in, film and its entertaining nature generally were not seen as carrying much social value. If anything, there was a prevailing concern that, as Justice McKenna put it in that case, “a prurient interest may be excited and appealed to.”<sup>221</sup> A wary essayist in the trade magazine *Moving Picture World* exhorted film “[m]anufacturers” in 1909 to “make their films as amusing as possible” and “not forget the educative feature,” but to avoid introducing “anything which tends to degrade or pollute the show. Keep it clean and lively and the patronage will be yours.”<sup>222</sup>

*Franklin v. Columbia Pictures* provides a vivid example of what early- to mid-century filmmakers could face in a courtroom.<sup>223</sup>

<sup>220</sup> *Binns v. Vitagraph Co. of Am.*, 210 N.Y. 51, 58 (1913) (emphasis added).

<sup>221</sup> *Mutual Film Corp. v. Indus. Comm'n of Ohio*, 236 U.S. 230, 242 (1915).

<sup>222</sup> Burton H. Allbee, *Province of the Moving Picture*, *THE MOVING PICTURE WORLD*, Jan. 30, 1909, at 114.

<sup>223</sup> *Franklin v. Columbia Pictures*, 284 N.Y.S. 96 (App. Div. 1935), *aff'd* 271 N.Y. 554 (Ct. App. 1936).

Sidney Franklin was a Brooklyn-born bullfighter who performed his way to fame across Spain in the 1920s and 30s.<sup>224</sup> He was friends with Ernest Hemingway and worked in Hollywood; he even appeared in the 1932 film *The Kid From Spain*.<sup>225</sup> In 1933, Franklin brought a New York Privacy Law claim against Columbia Pictures over a short sports feature it produced called *Throwing the Bull*, using newsreel footage of him performing.<sup>226</sup>

As Franklin himself described it in court, his gripe with Columbia's film, the thing that drove him to sue, seems not to have been its light-hearted genre, or the ridicule his complaint alleged he suffered, so much as the fact that he didn't reap the financial rewards.<sup>227</sup> When Columbia's counsel pointed out that *The Kid From Spain* too was a comedy, Franklin shot back, "And I was paid for it."<sup>228</sup>

But the sin of jocularly is what mattered to the presiding Justice John Carew, and the lawyers duly focused on it.<sup>229</sup> In addition to colorful arguments over the accuracy of *Throwing the Bull*—like whether or not bulls ultimately became, as the narrator described it, "beef stew"—and testimony about the extent of audience laughter at it, the trial record shows Columbia's lawyer working hard to impress upon Justice Carew that any comedic elements of *Throwing the Bull* were incidental to its educational, complimentary value.<sup>230</sup> "I assure your Honor that I am not at all keen for wise-cracking," Hugh Williamson said, but "that is absolutely secondary if you will see the picture[.]"<sup>231</sup> So Justice Carew and the parties, their lawyers, and the stenographer decamped to the Columbia Pictures offices in Midtown for a screening.<sup>232</sup> Whatever he saw there didn't sway the judge toward Columbia. He enjoined the studio from using Franklin's name and image in *Throwing the Bull* and awarded damages, finding that the film was "a comic": Columbia

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<sup>224</sup> Corey Kilgannon, *The Gay Jewish Matador From Brooklyn*, N.Y. TIMES (June 25, 2019), <https://www.nytimes.com/2019/06/25/nyregion/pride-sidney-franklin-bullfighter.html> [<https://perma.cc/TEP7-TA49>].

<sup>225</sup> See *id.*; see also Franklin Record at 52.

<sup>226</sup> See Franklin Record at 5–14 (amended complaint).

<sup>227</sup> See *id.* at 7–8.

<sup>228</sup> *Id.* at 281.

<sup>229</sup> See, e.g., *id.* at 282 (Justice Carew advising Franklin's lawyer that if "you hold yourself out to be a clown to the world . . . they may have a right, within certain bounds, to talk about you") and 224 (declaring that "the newspapers and the movies go out of their way to make things ridiculous and they are very liable to pay for it").

<sup>230</sup> *Id.* at 82–83, 166–67; 214.

<sup>231</sup> *Id.* at 221.

<sup>232</sup> *Id.* at 283.

“was funny at the expense of the plaintiff and must now pay the plaintiff for its fun.”<sup>233</sup>

That was in 1935. Soon after, as World War II took hold, the judicial tone in this line of Privacy Law cases began to shift. Justice Salvatore Cotillo adopted a position more sympathetic toward speech with broad appeal in the 1939 case *Kline v. Robert M. McBride & Co.*, in which he held a book about strike-breaking immune from a Privacy Law claim by a man who was named in it: “Instead of a government publication buried in dusty archives which few read, this popularized presentation ... is conveniently perpetuated in book form for future sociological research.”<sup>234</sup>

Nine years later, the U.S. Supreme Court cemented the shift in *Winters*, rejecting outright the argument that the First Amendment only protected serious ideas and not the entertaining.<sup>235</sup> That holding gave Justice Van Voorhis ammunition to declare in *Molony* that the newsworthiness defense did not require a work to be “educational, even if it does not pertain strictly to current news. Such subjects as cartoons, *Believe-it-or-not Ripley*, gossip and social columns, are not chiefly educative in character, yet, if about persons in the limelight, they are not likely to be actionable[.]”<sup>236</sup>

It would be a stretch to say that the skepticism Judge Chase and Justice Carew felt about entertainment is gone from American society, or judicial circles. But under modern constitutional doctrine and any of the predominant free speech theories, its entitlement to First Amendment protection is engrained.

### C. *No Connection With the Rescue Story*

Probably the biggest thorn *C.Q.D.* stuck in Jack Binns’s side was its final shot. As his lawyer described it in briefing for the Court of Appeals, after a card flashed on screen reading “Jack Binns and His Good American Smile,” the actor Ed Phillips, “the ever-present cigarette tilted between his lips[,] ... smiles and winks and grimaces for the amusement of the spectators[.]”<sup>237</sup> This mortified Binns, and not because he was British. He complained in court that

<sup>233</sup> *Id.* at 43, 59, 76.

<sup>234</sup> *Kline v. Robert M. McBride & Co.*, 11 N.Y.S.2d 674, 683 (Sup. Ct. 1939).

<sup>235</sup> *See Winters v. New York*, 333 U.S. 507, 510 (1948).

<sup>236</sup> *Molony v. Boy Comics Publishers*, 98 N.Y.S.2d 119, 123 (App. Div. 1950) (emphasis added).

<sup>237</sup> Binns Respondent’s Br. at 8.

the shot “described a state of being that I only exhibit to my friends or to my immediate associates.”<sup>238</sup> Vitagraph’s counsel pressed him:

Q. You are not so sensitive, are you, as to think that it hurt you that the public should know that you ever smiled?

A. No, that does not hurt me at all; that is not the question.

Q. But what is the question?

A. The question is whether the public should see me smile or not.<sup>239</sup>

But that still wasn’t quite it. Binns agreed with the lawyer that his smile had been “very broad”, and that he had not exactly confined it “to the inner circle of” his friends.<sup>240</sup>

As best he could articulate it, the problem with the card and the smiling actor in a motion picture was that they were “undignified.”<sup>241</sup> In other words, they were goofy. Even looking back a century later, one can see that what he’d been through was not. Beneath the media maelstrom, the Coney Island show, the chorus girls chasing him onto Sixth Avenue, Jack Binns was a guy who had kept his wits about him and stayed tethered to his job, in frigid open air, through a grave disaster.<sup>242</sup> He saved hundreds of people from the fate that the *RMS Titanic* victims met three years later. And when it was over, his colleague told a reporter, when Binns finally climbed aboard the rescue ship, he “staggered into my room and wept and begged me to go below with him when he turned in, as his nerves had been so shattered that he was afraid to be left alone.”<sup>243</sup> Maybe, after all of the whiplash Binns endured between the crisis and the celebrations, the silly grin and wink were just the last straw.

But sincere moral sympathy for Binns’ trauma doesn’t necessarily tell us how the law should respond to *C.Q.D.*’s last scene. Judge Chase gave it his lengthiest and most passionate indictment (laying a path for other judges to cabin *Binns* off on the idea that the grin and wink were *C.Q.D.*’s essential, problematic feature). The scene “had no connection whatever” to the rest of Vitagraph’s story of the rescue, Judge Chase wrote—though as the film company’s lawyer drew out in his cross-examination of Binns, that wasn’t exactly true.<sup>244</sup> The final scene didn’t depict Binns caring for zoo animals or playing baseball.

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<sup>238</sup> Binns Record at 71.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.* at 72.

<sup>241</sup> *Id.* at 71.

<sup>242</sup> See *How Binns Flashed His Calls for Help*, *supra* note 17, at 4 (operator of Marconi Wireless aboard the *Seneca* describing the rescue operation).

<sup>243</sup> *Id.*

<sup>244</sup> *Binns v. Vitagraph Co. of Am.*, 210 N.Y. 51, 58 (1913).

Judge Chase's deeper concern was the awesome new power of Vitagraph's camera technology to capture, manipulate, and render someone, in living motion, in ways that could humiliate him either because they were fake or, perhaps worse, because they were real. If the final scene of *C.Q.D.* passed legal muster, Judge Chase wrote, then some new film could depict anyone's "peculiarities as of dress and walk, and his personal fads, eccentricities, amusements and even his private life."<sup>245</sup> It could show *you*. And the goofier and more embellished it was, "the greater would be the profit of the picture-maker and exhibitor."<sup>246</sup> Because Judge Chase already had concluded that such a film could not offer meaningful news or educational value, and its entertainment value was not a social good worthy of protection, the depiction would be akin to rent-seeking.

Fear of widespread viewing of one's "eccentricities" harkened back to the Court of Appeals case that launched the entire privacy conversation in New York, eleven years earlier, in the famed *Roberson v. Rochester Folding Box Co.*<sup>247</sup> Chief Judge Alton B. Parker in that case refused to judicially create the new right that Abigail Roberson asserted a flour company had violated in using her portrait in its ads, and the story goes that his decision so infuriated state lawmakers that they enacted the Privacy Law the following year.<sup>248</sup> In his *Roberson* opinion, Chief Judge Parker acknowledged the concerns that proponents of the new privacy right raised about a person "having his picture published, his business enterprises discussed, his successful experiments written up for the benefit of others, or his eccentricities commented upon either in handbills, circulars, catalogues, periodicals, or newspapers[.]"<sup>249</sup> He went on to counter that a judge-made privacy right wouldn't be nuanced enough to avoid sweeping up valuable speech, and he suggested that the Legislature could pick up the delicate task of defining the right in a tailored fashion—which, of course, they did not really do.<sup>250</sup> But the notion that a person's eccentricities, or odd aspects of her personality or behavior of which she might not even be aware, could now be captured and laid out for crowds of strangers to see—at a profit to the taker!—seems to have been a deeply felt paranoia at the time.

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<sup>245</sup> *Id.*

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

<sup>247</sup> *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 544 (Ct. App. 1902).

<sup>248</sup> *Id.* at 542–43, 555.

<sup>249</sup> *Id.* at 544 (emphasis added).

<sup>250</sup> *Id.* at 544–46, 556.

Today, we have TikTok and Instagram. Eccentricities are widely on display on social media and around the internet, from phone to phone.<sup>251</sup> Maybe, hopefully, they also are more readily understood and forgiven for their deep universality. What's stuck around in case law about this section of the *Binns* decision, though, is the whiff of a disconnect and something wrong with the wink-and-smile shot, and disgust that someone would make a dime off it.

Looked at through a modern constitutional lens, these simply are inadequate reasons for a state to impose liability. These putative problems with *C.Q.D.* are vestiges of how jurists reacted to that particular technology a century ago. Given the sweeping protection that modern First Amendment jurisprudence gives to expression, if Queen Elizabeth broke the fourth wall in *The Crown* and smiled at the camera, it is impossible to see how that could reduce the show to actionable speech.<sup>252</sup>

Maybe by 1950, in *Molony*, Justice Van Voorhis shared that view. Because while he described the *Boy Comics* strip as lacking *C.Q.D.*'s problematic "departure from the narrative to introduce the reader to the imaginary personal life or characteristics of plaintiff," it's hard to see how he could have missed the encircled portrait of a cartoon Molony on the first page, grinning straight at the reader.<sup>253</sup>

#### D. Presentation of *C.Q.D.* as True

That leaves on *Porco*'s list of concerns the labeling of *C.Q.D.*, and it is a pivotal matter. For expression to succeed in Category 2, audiences must be reasonably prepared for the presence of imaginative information—or at a minimum, they can't be duped into believing that it is entirely real. To a modern viewer, this is the work of disclaimers.

Did Vitagraph try to make audiences believe that *C.Q.D.* was a Category 1 work? Consider the marketplace evidence. The film's full title was "*C.Q.D.*" *Or, Saved by Wireless. A True Story of "The Wreck of the Republic"*—readable perhaps with the emphasis on "True", or on "Story." Vitagraph also

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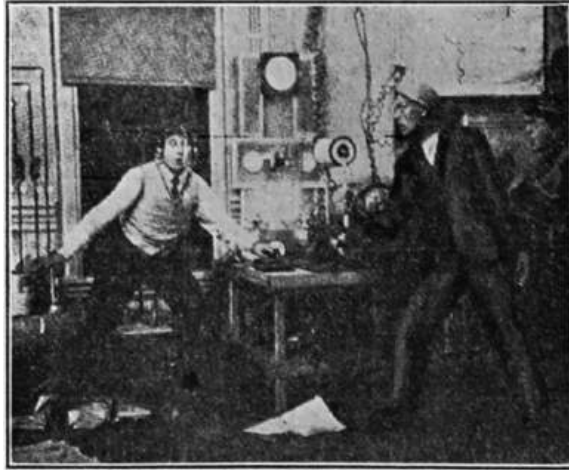
<sup>251</sup> See, e.g., Madison Malone Kircher, *Top Social Media Trends of 2023: Roman Empire, Grimace Shake, Keith Lee and More*, N.Y. TIMES (Dec. 20, 2023), [https://www.nytimes.com/2023/12/20/style/social-media-tiktok-news-trends-2023.html/\[https://perma.cc/UV3B-4H88\]](https://www.nytimes.com/2023/12/20/style/social-media-tiktok-news-trends-2023.html/[https://perma.cc/UV3B-4H88) (describing the "people, trends, feuds and frenzies" that fed viewers' "weird and wonderful and even secret interests" on social media).

<sup>252</sup> See *The Crown* (Sony Pictures Television Studios 2016).

<sup>253</sup> *Molony v. Boy Comics Publishers*, 98 N.Y.S.2d 119, 125 (App. Div. 1950).



prepared a two-page circular that went not to the public directly but to interested licensees, to entice them to take *C. Q. D.*<sup>254</sup> It included stills of the actors that one struggles to imagine 1909 theater owners confusing for real crew and passengers actually aboard the *Republic*:



And the circular described the film:

The important part played in the rescue by wireless telegraphy, but for which many hundreds of lives would have been sacrificed, is *graphically portrayed* in this picture. *Accurate scenes* of the wireless stations on land and aboard the ships *are faithfully reproduced*; also *actual pictures* of the disabled Florida and officers and crew of the Republic, including the heroes, Captain Sealby and *Jack Binns*, the wireless operator.<sup>255</sup>

Examining the language, “[a]ccurate scenes” implies that the film is true-to-life, and of course, Binns quibbled with that. But the circular made clear that those scenes would be “reproduced”—faithfully so, yet reproduced nonetheless—and that the role of wireless would be “graphically portrayed”, suggesting a visual re-casting on screen.

Those familiar with the story probably could have guessed that scenes of the wreck only could be portrayed or reproduced on screen through a reenactment; if there had been cameras aboard the *Republic*, surely that either would have been widely known, or prominently announced at the top of the

<sup>254</sup> See Binns Record at 170 (describing Blackton’s testimony on the circular).

<sup>255</sup> Binns Record at 177 (emphases added).

circular. Its intended audience of film industry professionals likely understood the language this way, too, judging by a *Moving Picture World* review of *C.Q.D.*:

In the annals of wireless telegraphy Jack Binns will be immortal, and the Vitagraph people have reproduced the sinking of the *Republic* and the attendant exciting scenes with a good deal of fidelity and in such a way that those who see it obtain a reasonably clear idea of what actually occurred.<sup>256</sup>

Aside from the reproduced scenes, though, the circular advised theater managers that *C.Q.D.* contained “actual pictures” of the damaged *Florida*, as well as Binns himself. The latter part of the line seems to have been an outright misstatement; it said that the film contained footage of Binns, and apparently it did not. But James Blackton explained in his trial testimony that they really had shot footage of “the injured bows of the *Florida*.”<sup>257</sup> They’d relied on reenactment to depict the mid-sea transfer of the passengers off the *Republic*—some 40 actors trudged out to Red Hook with camera operators on an overcast January day to “imitate[] the panic at the collision and the carrying of the passengers down on the boats”—but the footage they shot of the *Baltic* also was real.<sup>258</sup> “I could not tell, I could not be sure,” Blackton said, when asked if he knew whether Vitagraph’s camera operators had captured images of Binns.<sup>259</sup> But he said that the “actual pictures that were secured, were pictures of the crew, the ship’s crew, which had been transferred from the *Republic* to the *Baltic* and the pictures were made on the *Baltic*.”<sup>260</sup>

In fact they did not capture Binns there, because as he pointed out in his own testimony, he was not on the *Baltic*.<sup>261</sup> Nor were the captain and part of the crew, all of whom sailed back to New York with him separately, aboard the *Seneca*.<sup>262</sup>

Binns’ attorney argued that Vitagraph’s pamphlet was “a fraud upon its customers and the public.”<sup>263</sup> But taking the erroneous statement in *C.Q.D.*’s intertitle cards, that “[t]he crew” came back on the *Baltic*, together with the real footage of the *Baltic* and the circular’s promise that “actual pictures” of

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<sup>256</sup> *Comments on Film Subjects*, THE MOVING PICTURE WORLD, Feb. 27, 1909, at 236.

<sup>257</sup> Binns Record at 156.

<sup>258</sup> *Id.* at 154.

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

<sup>260</sup> *Id.*

<sup>261</sup> *Id.* at 80.

<sup>262</sup> *See Sealby Here Exhausted*, N.Y. TIMES, Jan. 26, 1909, at 1 (describing the arrival in New York of the *Republic*’s captain and members of the crew aboard the *Seneca*).

<sup>263</sup> Binns Respondent’s Br. at 23.

all these people appeared in the film, a better read seems to be of a mistake. Vitagraph thought—hoped, maybe recklessly—that they had real footage of Binns and all the others. And they didn't.

In any case, it's unclear how heavily this misstatement about the film's contents weighed in Judge Chase's analysis. He came closest to addressing it in the part of the decision where he held that Vitagraph's depiction qualified as a use of Binns' likeness, even though it was done with an actor:

The picture *represented by the defendant to be a true picture* of the plaintiff and exhibited to the public as such, was intended to be, and it was, a representation of the plaintiff. The defendant is in no position to say that the picture does not represent the plaintiff or that it was an actual picture of a person made up to look like and impersonate the plaintiff.<sup>264</sup>

But beyond that reference to a use “represented” as a “true picture,” he simply didn't spotlight this aspect of the case in the opinion.

Despite the thin evidence, the notions that Vitagraph affirmatively misrepresented the narrative of the film to the public, and that such fraud played a role in Judge Chase's opinion, have persisted in the fictionalization cases. One need look no further than the central holding in *Porco*: Because Lifetime made clear that its film was “[b]ased on a true story,” owning up to the fictionalization, the film's inaccuracies could be excused; the company's goal “was obviously not the actionable one of profiting off of plaintiffs by falsely claiming to give viewers the true story of their actions.”<sup>265</sup> In *Molony*, too, Justice Van Voorhis wrote pointedly that the *Boy Comics* strip was “not to be classed as fictional merely for the reason that it is presented pictorially,” with drawings that “do not purport to be exact replicas of the original subjects.”<sup>266</sup>

Given its staying power in the case law, though, and the importance of audience expectations in the success of fictionalized speech, the idea is worth consideration: If the sin of Category 1 is a knowingly false statement, then perhaps a sin in Category 2 is deceiving the reasonable reader, expressly or through context, into believing that an imaginative statement is true.<sup>267</sup>

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<sup>264</sup> *Binns v. Vitagraph Co. of Am.*, 210 N.Y. 51, 57 (1913) (emphasis added).

<sup>265</sup> *Porco v. Lifetime Ent. Servs.*, 150 N.Y.S.3d 380, 386 (App. Div. 2021) (emphasis added).

<sup>266</sup> *Molony v. Boy Comics Publishers*, 98 N.Y.S.2d 119, 123 (App. Div. 1950) (emphasis added). Sure enough, the *Boy Comics* strip did not purport to be an exact replica of the rescue. But the key language in its caption was no different than the words Vitagraph chose for the full title of *C.Q.D.*: “The *True Story* of the Empire State Building.” *Id.* at 121 (emphasis added).

<sup>267</sup> Jed Rubenfeld captured this distinction in arguing for First Amendment protection over “a free imagination ... at liberty both to imagine the world however it

V. A MODERN ANSWER TO THE *BINNS* QUESTION

A better approach to fictionalization—a contemporary constitutional analysis of a right-of-publicity claim targeting a fictionalized work, or any novel or genre-bending form of expression—would look like this.

First, is the work at issue sufficiently expressive that it qualifies as speech under the First Amendment? For docudramas, comic books, songs, artwork, music videos, literature, video games, and countless other forms of entertaining speech, the answer is now an obvious yes.<sup>268</sup>

That being the case, under the Supreme Court’s current articulation of the doctrine, the proper next question is whether fictionalized speech, or speech violating the right-of-publicity more broadly, falls into the few “historic and traditional categories [of expression] long familiar to the bar” in which the government *may* regulate on the basis of content—such as defamation, obscenity and fraud.<sup>269</sup> For fictionalization, the deep roots of storytelling in human history would seem to end the discussion. As to the right of publicity, one argument in favor of such a categorical exemption can be found in *United States v. Alvarez*, in which the Court struck down a federal law that criminally punished anyone who falsely claimed to have received a military medal of honor.<sup>270</sup> After listing the government’s examples of earlier instances in which it thought the Court had suggested that “false statements have no value and hence no First Amendment protection,” Justice Kennedy discounted them all as deriving “from cases discussing defamation, fraud, or some other legally cognizable harm associated with a false statement, *such as an invasion of privacy* or the costs of vexatious litigation.”<sup>271</sup>

But this is dicta. And none of the cases Kennedy raised in that paragraph actually centered on a claim in the right-of-publicity branch or, it would appear, even the privacy tort itself.<sup>272</sup>

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can and to put its imagination into words [but not] ... to assert that its imaginings are *not* imaginings when it knows otherwise.” *The Freedom of Imagination: Copyright’s Constitutionalality*, 112 *YALE L.J.* 1, 45 (2002).

<sup>268</sup> See, e.g., *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 790 (2011) (“Like the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices ... and through features distinctive to the medium[.]. That suffices to confer First Amendment protection.”).

<sup>269</sup> *United States v. Stevens*, 559 U.S. 460, 468 (2010).

<sup>270</sup> *United States v. Alvarez*, 567 U.S. 709, 729–30 (2012) (plurality opinion).

<sup>271</sup> *Id.* at 718–19 (emphasis added).

<sup>272</sup> See *id.* (describing statements in *Hustler Mag. v. Falwell*, 485 U.S. 46 (1988), which originally involved an invasion of privacy claim but only the plaintiff’s claim

More likely, the Court would undertake a historical look at the right of publicity to decide whether the tort is “part of a long (if heretofore unrecognized) tradition of proscription.”<sup>273</sup> Given the origin story told in this article and elsewhere, the Court likely would conclude it is a modern invention.

As such, the next question is whether the lines of legal liability that New York draws in fictionalization cases are content-based. In 2015, the Supreme Court explained that a law is content-based if it “applies to particular speech because of the topic discussed or the idea or message expressed.”<sup>274</sup> Taking § 51 as a typical formulation of the right of publicity, it currently assigns liability based on whether a “name, portrait, picture, likeness or voice” is used “for the purposes of trade[.]”<sup>275</sup> When it applies to such a use within an expressive work — and even more obviously so when it applies to such a work *because of its fictionalization* — § 51 clearly is a content-based rule.

That requires elevating the judicial analysis to strict scrutiny, asking: Does the fictionalization rule, or the plaintiff’s right of publicity claim generally, “further[] a compelling governmental interest,” and is it “narrowly tailored to that end”?<sup>276</sup>

Here the Supreme Court’s content-neutrality rule could do a world of good. Rather than faulting characteristics of the expressive work, with a hopelessly subjective and time-bound assessment of its social worth, or succumbing to the urge to protect a sympathetic plaintiff, strict scrutiny focuses judges on long-punted questions about the nature of the plaintiff’s harm. Instead of asking what was wrong with *C.Q.D.*, what did *C.Q.D.* do that was wrong? And however it might have hurt Jack Binns, was that the same sort of harm that Hugo Zacchini experienced?

To echo Rothman and Post’s broader view, the answer is surely no. Zacchini’s harm was economic in nature — the news station’s use of his act usurped his ability to make a living performing it. If we like performances, and incentivizing them sounds like a compelling, copyright-esque state

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for intentional infliction of emotional distress was appealed to the Supreme Court; *Brown v. Hartlage*, 456 U.S. 45 (1982), which involved a statute aimed at government corruption; *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748 (1976), a seminal commercial-speech case; *Herbert v. Lando*, 441 U.S. 153 (1979), denying a media defendant’s claim of privilege against testifying in a defamation suit; *Gertz v. Robert Welch*, 418 U.S. 323 (1974), a defamation case; and *Garrison v. Louisiana*, 379 U.S. 64 (1964), same).

<sup>273</sup> *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 792 (2011).

<sup>274</sup> *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

<sup>275</sup> N.Y. Civ. Rights Law § 51 (2024).

<sup>276</sup> *Reed*, 576 U.S. at 171.

interest, then barring activity that directly undercuts it could be a sufficiently tailored means of doing so. Properly understood, *Zacchini* draws a fair and sensible line through otherwise fully protected speech.

But that has been the rare right-of-publicity scenario. For Binns, Molony, and others in their footsteps, the alleged harm sounds more in what Rothman and Post would call a right of control, and an intuition that “persons should be able to control their identity to the extent necessary for the full development of their own personhood.”<sup>277</sup> I consist of my life experiences, the thinking goes. If someone else takes control of how my experiences are discussed, depicted or understood in the public sphere, then I am less an autonomous me.

Of course, the First Amendment flatly rejects the idea that Binns or Molony or any of us has such a right to control the use of our identities or personalities in discourse.<sup>278</sup> Without denying the value of memoirs and other first-hand accounts, were any of us to hold an *exclusive right* in the stories of our lives, speech would suffer profoundly. For one thing, we might find it far too tempting to use the right as a tool for image control — ensuring that my story is told in a way that flatters me — and to censor versions we disfavor, regardless of their truth or artistic merit. For another, many of our life experiences involve other people, not just us. Any form of possession over the memory would have to be shared among all the witnesses — which could include, for very big events, even journalists and the public at large — and human minds being what they are, the contours and meaning of the memory inevitably would be contested among them. On what basis could a court declare just one the exclusive owner of the story, imbued with the right to tell it their way and shut down everybody else? Whatever our conception of the First Amendment, both image control and the concept of a government-designated holder of truth are affronts to it.

Alternatively, in the context of their day, perhaps Binns’ and Molony’s harm is best understood as an affront to their right of dignity, which Rothman and Post might define as protecting “the integrity of personality from . . . mental anguish” and offense arising from the violation of a social norm not to depict them in entertaining works.<sup>279</sup> But even if it might have been considered highly offensive to be depicted in a motion picture in the early

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<sup>277</sup> Post & Rothman, *supra* note 4, at 116.

<sup>278</sup> *See id.* at 163 (arguing that a right of control over one’s meaning in the public sphere “is incompatible with the constitutional value of public discourse”).

<sup>279</sup> *Id.* at 122; *see also id.* at 123–24 (describing discomfort some felt at photographic and advertising uses of their likenesses in the early 1900s).

1900s, it is not now, as the advent of video-based social media illustrates. Any argument that the First Amendment ought to give way to such a bygone notion of propriety is unavailing.<sup>280</sup>

There is also the possibility I suggested at the end of the last section, that a sin unique to Category 2, essentially passing a blended-imaginative work like *C.Q.D.* off to an audience as literally true, could rise to the level of a harm worthy of government interference. This dovetails with what emerged in *Porco* as the favored explanation of *Binns* — and from a speech perspective, it is perhaps the least-offensive pillar still standing beneath the fictionalization exception.<sup>281</sup> It also can be squared more easily than the previous two harm candidates with the modern First Amendment apparatus. Courts today recognize that the marketplace packaging of an expressive work can affect consumer expectations and behavior in a way that justifies the law stepping into that more commercial zone, even if the same incursions into the expressive work itself would not be permissible.<sup>282</sup> Maybe, as the *Porco* court suggested, the government has a sufficient interest in the labeling of fictionalized works — those familiar “based on a true story” disclaimers — as a sort of consumer-protection measure against Category 2 sins.

But if so, providing people who are unwittingly depicted in those fictionalized works with a cause of action to enforce the rule seems an inexact way of protecting the interest. There are vastly more fictional and fictionalized works in the country that would, under this theory, require policing, than there are living people depicted in them to undertake it. And even assuming that a legally cognizable harm occurs when reasonable viewers are confused by a Category 2 work, it’s not clear how that harm falls on an individual depicted in it, as opposed to the viewers themselves.

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<sup>280</sup> *Id.* at 165 (on the difficulty of mounting a dignity-based claim against the First Amendment).

<sup>281</sup> *See, e.g., Porco v. Lifetime Ent. Services*, 150 N.Y.S.3d 380, 386 (App. Div. 2021) (observing that “[*Romeo Killer*] makes no effort to present itself as unalloyed truth or claim that its depiction of plaintiffs was entirely accurate, instead alerting the viewer at the outset that it is only ‘[b]ased on a true story’ and reiterating at the end that it is ‘a dramatization’ in which ‘some names have been changed, some characters are composites and certain other characters and events have been fictionalized’”).

<sup>282</sup> *See, e.g., Rogers v. Grimaldi*, 875 F.2d 994, 998–99 (2d Cir. 1989) (devising test to avoid First Amendment clash in trademark protection of film titles, where the “artistic and commercial elements ... are inextricably intertwined” and consumers have an interest in both).

In the end, as is so often the case, strict scrutiny likely would be fatal to the fictionalization exception and to the *Binns* type of right of publicity claim.

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Beneath all the explanations posited for them, *Binns* and *Molony* both are best understood as expressions of yesteryear judicial intuitions about storytelling, new media, and commerce, in light of the free-speech conceptions and doctrines of their day. *Binns* was litigated and adjudicated by people newly encountering motion pictures, and primarily focused — as Vitagraph still was, in part — on the mechanical work of production for motion-picture cameras, and the economics of distributing films to theaters so that audiences would come. What exactly those films depicted, the story, wasn't yet an embedded part of American culture, with clear and respected expressive value. Whatever you believe Judge Chase thought to be his holding, *Binns* is, by now, largely an anachronism.

*Molony*, in the post-*Winters* world of expanding speech protection under the First Amendment, offers the case in point. In truth, the comic book didn't meaningfully differ from *C.Q.D.* Justice Van Voorhis simply decided to stretch the news defense he'd inherited and protect a Category 2 account of a different heroic story. Unlike films in 1913, comic books felt familiar enough to him and his fellow judges, and the free-speech climate of the time was more liberal, and, thankfully, the internal logic of the news defense was flexible enough to cover *Boy Comics* if that's how a court chose to apply it. But the modern First Amendment demands more certainty for protected expression.

A content-neutral analysis is agnostic between Category 1 and Category 2 expression; it presumes both are socially valuable and deserve First Amendment protection. Approaching fictionalization this way would align New York law with free speech values the Supreme Court has carefully guarded in the defamation context, including the notion that *Sullivan* allows a writer to intentionally alter quotes so long as the speaker's essential meaning comes through.<sup>283</sup> It also would harmonize §§ 50 and 51 with today's expansive

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<sup>283</sup> See, e.g., *Masson v. New Yorker*, 501 U.S. 496, 517 (1991). Notably, the *Masson* Court observed that “an acknowledgement that the work is so-called docudrama or historical fiction ... might indicate that the quotations should not be interpreted as the actual statements of the speaker[.]” *Id.* at 513. That echoes Judge Bergan's dissenting view in *Spahn* of *Sullivan*'s inexact application to the juvenile biography at issue there, more so than the majority's take that fictionalization, by definition, meets the actual malice standard.



conceptions of free speech that celebrate culture and imagination, and share space with the traditional truth-seeking, self-governance, and democratic theories in the First Amendment canon. One might object that the Supreme Court has twice taken up cases in this area, in *Zacchini* and *Hill*, weighed the First Amendment concerns, and not seen fit to apply this approach — but we've seen that neither squarely posed the question.

Within a docudrama, or a historical novel, or whatever blend of truth and fiction humanity drums up next, the imaginative can be the search for meaning, or the ascription of it. Binns' attorney pointed out in disgust a century ago that imaginative information readily serves to elicit in the audience a smile, or horror, or sorrow, "excitement, passion and the unusual in persons."<sup>284</sup> A forensic account of Marie Curie's life is certainly valuable speech, but so is a 1943 biopic that "posited a vision of what a scientist should be, how the experimental method is applied to scientific discovery, and how a scientist should behave if the scientist was also a woman."<sup>285</sup> As Professor Jed Rubenfeld articulated it, in arguing for a "freedom of imagination" as "First Amendment bedrock": "To imagine is to form an idea that goes beyond — that introduces something new to — what the mind has heretofore seen, heard, thought, or otherwise sensed . . . The freedom of imagination means the freedom to explore the world not present, creatively and communicatively."<sup>286</sup>

Different Category 2 works use imaginative and factual information in different proportions. Some use real names and expressly aim to recount history beat-by-beat. Others take a more abstract approach to a real person's life, placing them in absurd situations—or they'll borrow only the conceptual framework of real events and build vast fictional worlds around them. From *Citizen Kane* to *Schindler's List*, *Lawrence of Arabia* and *Patton* to *Erin Brockovich*, *Oppenheimer* and *Hamilton*, the results can be culturally momentous. Of course, like all artistic works can, some imaginative deviations from the raw historical record don't land in the world as the speaker hopes. And when they fall flat, their fictionalization can seem like the author's idle toying with the world's already-tenuous grasp of history. But the First Amendment doesn't allow the government to police contests over historical meaning, and it doesn't require speech to succeed.

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<sup>284</sup> Binns Respondent's Br. at 35.

<sup>285</sup> GEORGE CUSTEN, *BIO/PICS: HOW HOLLYWOOD CONSTRUCTED PUBLIC HISTORY* 17 (1992).

<sup>286</sup> Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 *YALE L.J.* 1, 37–38 (2002).

## CONCLUSION

To me, the cases I've described would be worth revisiting purely for the pleasure of it. Jack Binns tapping at the wireless button in his frigid, splintered stateroom; the Norfolk floral shop dutifully delivering a rose to Mildred Sutton's doorstep—these stories landed in the mass media precisely because they ignite the imagination. But they also illustrate the opportunities for missteps, and the threat to speech, if courts don't have a logically and constitutionally sound defense for them. Reconciling the right of publicity with First Amendment principles that the Supreme Court has applied for decades would provide it.

