

III. DOCTRINAL AND PRACTICAL OBJECTIONS TO AI FREE SPEECH COVERAGE

We have demonstrated the theoretical difficulty of placing AI speakers wholly outside the First Amendment. A great deal of computer speech shares similarities with the human speech that courts *already* protect, especially when we emphasize expression's value to listeners. Non-humanness does not necessarily pose any insurmountable theoretical obstacle to strong AI rights.

The law, however, is more than theory, and there are arguably a host of practical and doctrinal hurdles to protecting strong AI speech. This Part explains how both prevailing doctrine and practical concerns also fail to eliminate the possibility of First Amendment coverage for AI speech, even while they identify important challenges and questions yet to be addressed.

A. CAN AI SPEAKERS HAVE CULPABLE MENTAL STATES?

First Amendment law sometimes requires intent to cause harm (or some other culpable mental state on the part of the speaker) as a condition of imposing liability for speakers' harmful expression.¹¹³ Courts justify such a requirement in an effort to protect valuable speech from the possible chilling effects of over-regulating less culpably motivated speakers.¹¹⁴ But this

symbolism inherent in an object, the context of the situation, and an intention of expression can combine to create a protected form of expression).

113. Massaro & Norton, *supra* note 6, at 1172–85.

114. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (holding that advocacy of illegal conduct is protected unless intentionally directed to inciting imminent illegal action); see also *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (holding that false assertions of fact regarding public officials are protected absent the speaker's malicious mental state); Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 WM. & MARY L. REV. 1633, 1640 (2013) (arguing that a stricter standard of liability would cause over-deterrence of speech).

creates a problem if the doctrine were to insulate AI speakers (but not human speakers) from liability because they lack provably culpable mental states.

Say, for example, a computer produces defamatory speech—i.e., false factual claims that damage its target’s reputation—about a public official. First Amendment doctrine currently requires a showing of the speaker’s actual malice before even demonstrably false political attacks may become actionable.¹¹⁵ How might a court determine whether an AI speaker acted with knowledge of or reckless disregard for the falsity of its assertions, or that it “entertained serious doubts as to the truth of [its] publication”?¹¹⁶ If the culpable intent cannot be shown, then liability arguably does not attach.

Rather than insulating AIs’ defamatory speech from liability altogether, courts could manage these complexities by altering the doctrine to prevent an AI windfall or otherwise mitigate the harmful effects of defamatory AI speech.¹¹⁷ Even contemporary free speech doctrine, despite its growing emphasis on formalism over nuance, offers ways to address important regulatory concerns.¹¹⁸

115. See *Sullivan*, 376 U.S. at 279–80; see also Meg Leta Ambrose & Ben M. Ambrose, *When Robots Lie: A Comparison of Auto-Defamation Law*, in IEEE WORKSHOP ON ADVANCED ROBOTICS AND ITS SOCIAL IMPACTS 56, 57 (2014), <http://ieeexplore.ieee.org/stamp/stamp.jsp?arnumber=7020980> (“[R]obots also serve as information and communication participants that may cause social unrest and individual harm which current legal regimes will find challenging. . . . [E]merging robotic systems pose novel issues concerning defamation due to their unprecedented ability to experience the world and potential to communicate that experience to humans.”).

116. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

117. For an analysis of the difficulties that already exist with mapping defamation law onto new social media, see LAWRENCE LESSIG, *CODE: AND OTHER LAWS OF CYBERSPACE* 164–85 (1999); see also Lyrissa Barnett Lidsky & Ronnell Andersen Jones, *Of Reasonable Readers and Unreasonable Speakers: Libel Law in a Networked World*, 23 VA. J. SOC. POL’Y & L. 155, 156 (2016) (discussing the unique implications that social media has for the malice rule); Frank Pasquale, *Reforming the Law of Reputation*, 47 LOY. U. CHI. L.J. 515, 527–38 (2015) (discussing implications of new technologies for reputation law); Robinson Meyer, *Did Facebook Defame Megyn Kelly?: Which Is Another Way of Asking: Can a Bot Commit Libel?*, THE ATLANTIC (Aug. 30, 2016), <http://www.theatlantic.com/technology/archive/2016/08/did-facebook-defame-megyn-kelly/498080> (discussing Facebook’s potential liability for a shift in the algorithm for its trending feature, which promoted a fake story that claimed Megyn Kelly endorsed Hillary Clinton for President).

118. See Toni M. Massaro, *Tread on Me!*, 17 U. PA. J. CONST. L. 365, 369–82 (2014) (discussing ways in which the Roberts Court has moved toward greater formalism in its approach to free speech, but noting the many ways in which existing doctrine still offers judges significant and necessary flexibility

Indeed, our legal tradition has long had to find ways to manage the challenges presented by new machines and other technology. Copyright law provides one such example of law's adaptation to technology at the doctrinal edges. The concept of vicarious liability, with its focus on a potentially liable person's benefit from and control of a copyright infringer, was initially poorly suited for the age of mass filesharing.¹¹⁹ Software distributors benefit from filesharing in more indirect ways than their physical world counterparts: through online advertisements, for example, instead of rent or direct kickbacks. The element of control presents similar doctrinal challenges: software distributors can either easily control all users, exposing themselves to broad liability and accruing what can be high monitoring costs, or can create situations of willful blindness. Over time, courts have (admittedly with serious struggles) figured out doctrinal ways to ascribe secondary liability to software distributors.¹²⁰ The sheer scale of filesharing, balanced against fears of chilling technological development, resulted not in a refusal to apply copyright law to new technologies, but in doctrinal development that made room for complicated debates about overarching policy concerns. Courts similarly may adapt First Amendment doctrine on its edges to address the challenges posed by AI speakers' defamatory speech, even absent a provably culpable mental state.

to address context-specific concerns).

119. *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 261–62 (9th Cir. 1996) (explaining that the “concept of vicarious copyright liability . . . [is] an outgrowth of the agency principles of respondeat superior”).

120. See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005) (holding filesharing software company Grokster liable for inducing copyright infringement); *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984) (explaining that for its maker to escape secondary liability, a technology must be “capable of commercially significant non-infringing uses”); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001) (holding filesharing software company Napster liable for user copyright infringement). But see *Am. Broad. Co. v. Aereo, Inc.*, 134 S. Ct. 2498, 2516 (2014) (Scalia, J., dissenting) (“It will take years, perhaps decades, to determine which automated systems now in existence are governed by the traditional volitional-conduct test and which get the Aereo treatment. (And automated systems now in contemplation will have to take their chances).”); Bruce E. Boyden, *Aereo and the Problem of Machine Volition*, 2015 MICH. ST. L. REV. 485, 499–505 (discussing how technology muddies issues of responsibility in copyright infringement cases).