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Preface to Volume 13, Issue 1

As we were beginning to prepare this issue of the *Harvard Journal of Sports and Entertainment Law*, tragedy struck. Over the summer, one of this issue's authors—Professor Maureen Weston of Pepperdine's Caruso School of Law—informed us that her son Cedric had just died. Attempting to quell [treat] his anxiety, Cedric died after taking a single Xanax pill he got from a "friend" he knew from high school. The pill was counterfeit and laced with lethal fentanyl. Cedric did not know that one pill can kill.

We were heartbroken to learn of Cedric's untimely passing. Although we never had the privilege of knowing Cedric Michael Weston Halloran, we have learned that he was a kind, funny, and enterprising young man with an extraordinarily bright future ahead of him. Cedric loved trading stocks and had a knack for finance. In his 20 years, he was better traveled than either of us, having seen every continent except Antarctica. Cedric had been accepted to Pepperdine for the Fall 2021 semester.

The COVID-19 pandemic has sadly illuminated an ongoing mental health crisis. Too many in our country struggle with mental health issues. That includes young adults like Cedric who are just starting their lives and also athletes of all sorts—particularly those at the collegiate and professional level. While they may be in peak physical condition, scores of athletes contend with mental health problems.

In recent years, we have seen plenty of brave athletes like Naomi Osaka, Simone Biles, and Kevin Love publicly acknowledge their struggles with mental health. As these issues become more salient, it will be important for scholars, practitioners, and jurists to have a legal framework within which to think about athlete mental health.

After Cedric's death, Professor Weston undertook a labor of love: writing an article about athlete mental health and the law for JSEL. She now kicks off this volume with a foreword that brings the law to bear on this difficult issue. We are proud to honor Cedric's memory with this issue of JSEL, and we are grateful to Professor Weston for her timely and meaningful contribution. We also thank our other authors—Professor Jorge Contreras, Professor Brian Frye, Professor Roy Gutterman, and JSEL Supervising Print Editor Alexander Amir—for their thoughtful pieces.

Eli Nachmany & Erin Savoie
Co-Editors-in-Chief, Volume 13
Harvard Journal of Sports and Entertainment Law

Journal of Sports & Entertainment Law
HARVARD LAW SCHOOL

The Anxious Athlete: Mental Health and Sports' Duty and Advantage to Protect

Maureen A. Weston*

TABLE OF CONTENTS

* Maureen A. Weston is a Professor of Law and Director of the Entertainment, Media & Sports Law Program at Pepperdine Caruso School of Law. The author thanks Professor Kris Knaplund for comments on an earlier draft of this paper and gratefully acknowledges Pepperdine Law student research assistants Nicole Geiser, Angelica Varona, and Ryan Whittier. This project is dedicated to the loving memory of my son, Cedric Halloran.

I. Introduction

Sports are undoubtedly a major force in our economy, culture, and society. The public intrigue and global audience for sports are seemingly insatiable.[1] Unlike other industries, sports have a unique, multi-faceted character of entertainment, physicality, business, regulation, and public exposure. The sports industry consists of a vast and varied range of sports, leagues, team franchise and ownership structures, private and quasi-public regulatory and governance schemes, federations, committees, councils, and extensive commercial ventures. The multibillion-dollar sport market is fueled by lucrative deals for broadcast, print, digital, and social media; corporate sponsorships; marketing; ticketing; merchandise; events; and the many attendant businesses, agents, and opportunists seeking to associate their brand with sports. Emerging electronic sports competitions and sports gambling ventures are compounding the dollars and viewers in the sports market.[2] While sports leagues generally provide the forum and infrastructure for competition, the athletes certainly are the face, key, and heartbeat that power this vast machine.

Athletes span all levels, from local youth, recreational, inter-scholastic and amateur play to elite inter-collegiate, professional, Olympic and international sport competition. Particularly at the elite competition levels, athletes garner significant attention not only because of their athletic ability and prowess, but also their personalities, distinctive moves, tattoos, tweets, overall images, influence, and brand marketability—and their apparent resilience. Few industries have dedicated beat reporters, or a voracious print and social media following, who track the individual athletes so closely—their statistics, personal and professional moves, and moods—not only team

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[1] Sporting events are the most watched broadcasts, and in the era of binge-watching and cord-cutting, are one of the few broadcasts people watch live, which benefits network programming and corporate sponsorship. *See* Ken Fang, *Report Shows Americans Love to Watch Their Sports Live*, Awful Announcing (Apr. 7, 2016), https://awfulannouncing.com/2016/report-shows-americans-love-to-watch-their-sports-live.html [https://perma.cc/W6BE-HMEG]; *see also* Tamzin Barroilhet, *Brand Integration and Sports Sponsorship: Benefits and Pitfalls* 2 (Spring 2016) (M.A. Essay, John Carroll University), https://collected.jcu.edu/cgi/viewcontent.cgi?article=1045&context=MAstersessays [https://perma.cc/Q5TK-UUGF]; *see also Total Number of Viewers of the Most Watched Television Shows in the United States in the 2020/2021 Season*, Statista, https://www.statista.com/statistics/804812/top-tv-series-usa-2015/ [https://perma.cc/6JWK-6G34] (last visited Dec. 23, 2021).

[2] *See* QARA, *Sports Industry Insights*, Medium (Oct. 17, 2019), https://medium.com/qara/sports-industry-report-3244bd253b8 [https://perma.cc/V6ZH-8SAH].

scores. Legal aspects of sports have largely focused on athletes' eligibility, disciplinary measures, rights to compensation, endorsement and commercial opportunities, publicity, speech, and physical safety, but focus is rarely on responsibilities related to athlete mental health.[3]

Recent instances of high-profile athletes speaking out on mental health has triggered an essential shift in the mental health narrative in sports. Anxiety, depression, and mental health are a concern for all of society, but youth in their late teens and early twenties are at particular risk. Young adults at this developmental stage are navigating the social, cultural, and biological challenges of emerging adulthood, along with pressures for identity, status, and acceptance.[4] Today's youth is also subject to the surreal experience of an ongoing pandemic and barrage of 24/7 online content and social media.[5] Moreover, elite athletes are under significant pressure and public scrutiny, as well as demanding training and competition schedules, and are squarely part of this demographic in which issues of mental illness, depression, and anxiety begin to manifest.

The athletic culture of sport—with its expectations that elite athletes perform, win, be media personalities, influencers, and physical sensations—can compound the risk to an athlete's emotional and mental health. Individuals of all ages revere elite athletes as role models and heroes.[6] Yet what

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[3] Traditional sports law casebooks, for example, cover topics involving contract, tort, crime, labor, antitrust, gender equity, agent regulation, intellectual property, and sport governing body regulation. Chapters relating to the application of disability law focus on physical access and eligibility rules concerning physical competition. *See generally* RAY YASSER ET AL., Sports Law: Cases and Materials (Carolina Academic Press 9th ed. 2020).

[4] *See* Sachiko A. Kuwabara et al., *A Qualitative Exploration of Depression in Emerging Adulthood: Disorder, Development, and Social Context*, 29 GEN. HOSPITAL PSYCHIATRY 317, 318 (2007).

[5] *See* Jean M. Twenge, *Have Smartphones Destroyed a Generation?*, THE ATLANTIC (Sept. 2017), https://www.theatlantic.com/magazine/archive/2017/09/has-the-smartphone-destroyed-a-generation/534198/ [https://perma.cc/2L2Z-GLH4] ("[T]he impact of these devices has not been fully appreciated, and goes far beyond the usual concerns about curtailed attention spans. The arrival of the smartphone has radically changed every aspect of teenagers' lives, from the nature of their social interactions to their mental health."). Twenge also wrote that "[i]t's not an exaggeration to describe iGen [or Generation Z] as being on the brink of the worst mental health crisis in decades." *Id.*; *see also* Wendell Barnhouse, *NCAA Faces Uphill Battle Getting Mental Health Care to Student-Athletes,* GLOB. SPORT MATTERS (Aug. 21, 2019), https://globalsportmatters.com/health/2019/08/21/ncaa-faces-uphill-battle-getting-mental-health-care-to-student-athletes/ [https://perma.cc/GTM8-RTLY].

[6] *See* TEDx Talks, *Toxicity of Sport Culture on Athletes' Mental Health — Hillary Cauthen — TEDxTexasStateUniversity*, YOUTUBE (Jan. 23, 2019), https://

most do not see is that many of the greatest athletes are dealing, or have dealt, with some form of mental illness or mental health challenge. A National Collegiate Athletic Association ("NCAA") study found that "[a]nxiety disorders are the most common mental health issues in the United States. Data from national surveys show that more than 30 percent of student-athletes have experienced overwhelming anxiety."[7] Mental health certainly improves sports performance, but elite sports performance is not evidence of mental health.[8] Sports participation does provide opportunities for improved physical and mental health, skill development, socialization, and personal growth; however, for some athletes, the experience can be stressful and emotionally debilitating and create or compound mental health concerns.[9]

The culture and governance of sport has failed to adequately address athlete mental health. Athletes dealing with depression or anxiety are reluctant to acknowledge, report, or seek help. From a young age, athletes are taught to strive for perfection. Elite athletes are under unrelenting public scrutiny. From the pressure not to disappoint adoring parents "cheering" on the sidelines to having one's professional career on the line, athletes are reluctant to show the slightest appearance of weakness. An athlete who discloses that these pressures detrimentally impact their own mental health

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www.youtube.com/watch?v=UZTP3f_6coA.zTP3f_6coA [https://perma.cc/4CSH-3LXS] [hereinafter Cauthen].

[7] *Anxiety Disorders*, NCAA SPORT SCI. INST., https://ncaaorg.s3.amazonaws.com/ssi/mental/SSI_AnxietyDisordersFactSheetpdf.pdf [https://perma.cc/MWF4-Q2N3] (last visited Oct. 29, 2021). The study advised that "[b]y understanding that anxiety is common and by addressing it, student-athletes can better manage anxiety and its impact on their health and performance." *Id.*

[8] *See* Kristoffer Henriksen et al., *Consensus Statement on Improving the Mental Health of High Performance Athletes*, 18 INT'L J. SPORT & EXERCISE PSYCH., 553, 556 (2020)*; see also* William D. Parham, *Invisible Tattoos*, AEON (Jan. 29, 2020), https://aeon.co/essays/if-trauma-can-propel-athletes-healing-can-make-them-soar [https://perma.cc/C9VL-MKLJ].

[9] *See* Claudia L. Reardon et al., *Mental Health in Elite Athletes: International Olympic Committee Consensus Statement* (2019*),* 53 BRIT. J. SPORTS MED. 667, 670-77 (2019) (examining the athletic culture and environmental factors that commonly impact mental health, including sexuality and gender issues, hazing, bullying, sexual misconduct and transition from sport); *see also* Cindy J. Chang et al., *Mental Health Issues and Psychological Factors in Athletes: Detection, Management, Effect on Performance and Prevention: American Medical Society for Sports Medicine Position Statement—Executive Summary*, 30 CLIN. J. SPORT MED. 91, 91 (2020) ("[T]he very nature of competition can provoke, augment, or expose specific psychological issues in athletes.").

fears stigma, skepticism, disappointing others, and career jeopardy.[10] The "no-pain, no-gain" and "win at all costs" messages, more often than not, deter athletes from addressing potential debilitating mental health concerns.[11]

The perceived stigma and inadequate education regarding mental health prevent many athletes from acknowledging or seeking help with internal struggles and issues such as depression and anxiety. Indeed, many elite athletes quit playing at a young age due to the stress of competition, burnout, and impact on their mental health.[12] Few studies track statistics on athletes who left sports due to a lack of mental health resources at schools, universities, and the professional level. Much of these internal struggles are simply neither reported nor disclosed.

While many suffer in silence, some athletes have begun candidly discussing their own mental health struggles and the consequent impacts on their careers and lives. Over the past few years, NBA stars and players Kevin Love, LeBron James, Royce White and Keyon Dooling, NFL player Brandon Brooks, Olympians Michael Phelps, Liz Cambage, Simone Biles and Justin Gatlin, NCAA athletes, and numerous others have begun speaking out, advocating for awareness of, treatment for, and attention to athlete mental health. Tennis star Naomi Osaka refused to submit to post-match press conferences at the 2021 French Open tournament, citing mental health and her anxiety in having to field the barrage of intense media questions.[13] In response, the Grand Slam tournament organizers cited her breach of contractual obligations to speak to the media and threatened penalties, including

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[10] *See* Parham, *supra* note 8.

[11] *See id.* ("Athletes can resist professional help due to beliefs that, if effective, therapy might blunt their 'edge' and thus compromise their drive and determination. This fear, fuelled by their quest to remain in the game as long as they possibly can, might cause them to conclude that fighting through the grind and emotional walls of challenge remains the best option.").

[12] *See* Emily Pluhar et al., *Team Sport Athletes May Be Less Likely To Suffer Anxiety or Depression than Individual Sport Athletes*, 18 J. SPORTS SCI. & MED. 490, 490 (2019) (noting a study finding that those who do not participate in or drop out of organized sports have greater social and emotional difficulties than those who continue to play); *see also* Pricilla Tallman, *Is Sports Culture Toxic to Athlete Mental Health?*, SPIKEDR.COM (May 15, 2020), https://spikedr.com/2020/05/15/is-sports-culture-toxic-to-athlete-mental-health/ [https://perma.cc/NS83-V74K] (noting that approximately 70% of youth athletes stop playing sports by their junior year, citing burnout, financial considerations, and other reasons).

[13] *See* Alan Blinder, *With Her Candor, Osaka Adds to the Conversation on Mental Health,* N.Y. TIMES (July 30, 2021), https://www.nytimes.com/2021/06/01/sports/tennis/mental-health-osaka.html [https://perma.cc/CK98-E53N].

disqualification.[14] Some considered it a competitive advantage to allow a player to avoid media conferences. Osaka agreed to pay the imposed $15,000 monetary fine, then withdrew from competition and Wimbledon, saying she did not want to be a distraction for the tournament.[15] Osaka later wrote in *It's O.K. Not to Be O.K.* that "[p]erhaps we should give athletes the right to take a mental break from media scrutiny on a rare occasion without being subject to strict sanctions. . . . I also do not want to have to engage in a scrutiny of my personal medical history ever again."[16]

Former NBA player Royce White suffered from severe generalized anxiety disorder and panic attacks and requested certain permission to drive rather than fly to NBA games and to determine his own mental health treatment through the use of an independent physician.[17] Are these types of accommodations "reasonable" to require of the tournament organizers, teams, or sport leagues? Is participating in press conferences an essential function of a professional athlete's job, such as that requested of Naomi Osaka? Does mental health constitute a "disability" for purposes of legal rights to nondiscrimination and accommodation? Notwithstanding "legal" rights or obligations to mental health, what is the right thing to do with respect to athlete mental health?

These athletes and others have set in motion a global conversation across sports regarding the responsibilities that leagues, teams, and sport governing bodies have to address and to accommodate players with mental

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[14] *See* Bryan Robinson, 7 *Things Naomi Osaka Taught Us About Mental Health and Career Success,* FORBES (June 4, 2021), https://www.forbes.com/sites/bryanrobinson/2021/06/04/7-things-naomi-osaka-taught-us-about-mental-health-and-career-success/?sh=734579c440c7 [https://perma.cc/4AT9-XSS2].

[15] *See* Christopher Clarey, *A Shocking Exit and Sad Day for Tennis,* N.Y. TIMES (Sept. 5, 2021), https://www.nytimes.com/2021/05/31/sports/tennis/french-open-naomi-osaka-quits.html [https://perma.cc/FCP6-WQTU]. In a May 31, 2021 Twitter posting, Osaka revealed that "[t]he truth is that I have suffered long bouts of depression since the US Open in 2018 and I have had a really hard time coping with that. Anyone that knows me knows that I'm introverted, and anyone that has seen me at tournaments will notice that I'm often wearing headphones as that helps dull my social anxiety." NaomiOsaka 大坂なおみ, (@naomiosaka), Twitter (May 31, 2021, 1:47 PM), https://twitter.com/naomiosaka/status/1399422304854188037.

[16] Naomi Osaka, *Naomi Osaka: 'It's O.K. Not to Be O.K.*, TIME (July 8, 2021, 7:15 AM), https://time.com/6077128/naomi-osaka-essay-tokyo-olympics/ [https://perma.cc/W4LD-9VK4] (suggesting sport organizers "allow a small number of 'sick days' per year where you are excused from your press commitments without having to disclose your personal reasons").

[17] *See* Michael A. McCann, *Do You Believe He Can Fly? Royce White and Reasonable Accommodations Under the Americans with Disabilities Act for NBA Players with Anxiety Disorder and Fear of Flying*, 41 PEPP. L. REV. 397, 401, 406 (2014).

health issues. The emergence of this dialogue compels the inquiry into the legal, contractual, and ethical obligations of sport governing bodies, as well as the practical competitive benefits to addressing athlete mental health concerns.

This paper examines issues concerning athlete mental health, along with sports' role, potential complicity, and responsibility.[18] Part II considers the scope and accounts of anxiety, depression, and overall mental health concerns among athletes in youth, elite, amateur, and professional sport. Part II also explores the prospect that competitive sport may foster increased risks to mental health, noting athlete accounts of mental distress and recognizing athletes who have come forward to raise awareness of and to destigmatize mental health needs. Part III examines legal issues raised regarding athlete mental health, including application of the Americans with Disabilities Act ("ADA"); duties to report, identify, and accommodate athlete mental health; confidentiality in reporting and identifying athlete mental health concerns; impact on contractual obligations; player discipline; and recruiting.

Part IV surveys initiatives that major leagues and governing organizations have recently implemented in addressing player mental health and proposes areas where these programs can be improved. Part V concludes with the submission that all constituents in the sport network (i.e., governing bodies, teams, coaches, athletic support personnel, parents, peers, media, and fans) have an obligation to consider athletes' full wellness, both physical and emotional. The time is now for sport leadership and stakeholders to attune to athlete mental health conscientiously and compassionately and to provide programs and access to resources that help athletes achieve their highest performance; awareness of athlete mental health is as important as, if not more important than, what it truly means to win.

II. Anxiety, Depression, and Mental Health Concerns in Society and Sport

Mental illness has a rippling effect throughout society. According to the National Alliance on Mental Illness ("NAMI"), tens of millions of people, or one in five adults, experience some form of mental illness each year,

[18] *See infra* Section II.A. (discussing definition of "mental health" to encompass the spectrum of mental health conditions); *see also Mental Health Conditions*, Nat'l All. on Mental Illness, https://www.nami.org/About-Mental-Illness/Mental-Health-Conditions [https://perma.cc/V5X9-RR97] (last visited June 26, 2021).

but only half receive treatment.[19] With respect to youth, NAMI also reports that "1 in 6 U.S. youth aged 6-17 experience a mental health disorder each year," and "50% of all lifetime mental illness begins by age 14 and 75% begin by age 24."[20] Sadly,"[s]uicide is the 2nd leading cause of death among people aged 10-34."[21]

Mental health disorders impact not only the individual, but also family members, communities, and the world.[22] According to the World Health Organization ("WHO"), "[t]he burden of mental disorders continues to grow with significant impacts on health and major social, human rights and economic consequences in all countries of the world."[23] The economic impact of mental health disorders on the global economy is estimated to cost "$1 trillion each year in lost productivity."[24]

A. Defining Mental Health

Mental health is a complex medico-socio-legal topic. The terms "mental health," "mental illness," and "mental disorder" are often used interchangeably to encompass a range of emotional, psychological, and behavioral conditions.[25] Both mental health conditions and mental illness impact "[a] person's thinking, feeling, mood or behavior."[26] The distinction between mental health and mental illness can be relevant for specific diag-

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[19] *See Mental Health by the Numbers*, NAT'L ALL. ON MENTAL ILLNESS, https://nami.org/mhstats [https://perma.cc/QH34-PDWG] (last visited Oct. 29, 2021).

[20] *Id.*

[21] *Mental Health Conditions*, *supra* note 18.

[22] *See The Ripple Effect of Mental Illness*, NAT'L ALL. ON MENTAL ILLNESS, https://www.nami.org/NAMI/media/NAMI-Media/Infographics/NAMI-Impact-Ripple-Effect-FINAL.pdf [https://perma.cc/UTY6-4AKU] (last visited Dec. 24, 2021) (claiming that mental illness can also have serious implications on the community, including homelessness and incarcerations) ("At least 8.4 million Americans provide care to an adult with an emotion or mental illness.").

[23] *See Mental Disorders*, WORLD HEALTH ORG. (Nov. 28, 2019), https://www.who.int/news-room/fact-sheets/detail/mental-disorders [https://perma.cc/3X4X-AYYK].

[24] *See Mental Health in the Workplace*, WORLD HEALTH ORG., https://www.who.int/teams/mental-health-and-substance-use/promotion-prevention/mental-health-in-the-workplace [https://perma.cc/2WXX-W89P] (last visited Nov. 15, 2021).

[25] *See Mental Health by the Numbers*, *supra* note 19; *see also* Yaron Covo, Gambling on Disability Rights, 43 COLUM. J.L. & ARTS 237, 258 (2020) (noting that no single term can define or accurately encompass all aspects of what constitutes a psychiatric or "mental disorder" and that the term "psychosocial disability" is a more progressive term preferred over mental illness or disorder).

[26] *Mental Health Conditions*, *supra* note 18.

nosis, treatment protocol, legal protection, and societal acceptance purposes.[27] "Mental health" is defined as "effective functioning in daily activities," and as reflecting a person's "emotional, psychological, and social well-being. It affects how we think, feel, and act. It also helps determine how we handle stress, relate to others, and make healthy choices."[28] In comparison, "mental illness" refers to diagnosable mental disorders,[29] such as anxiety, Attention Deficit Hyperactivity Disorder ("ADHD"), depression, bipolar disorder, post-traumatic stress disorder ("PTSD"), obsessive-compulsive disorder ("OCD"), psychosis, and schizophrenia.[30] Studies report varied statistics on the prevalence of mental health disorders.[31] Mental health disorders can rarely be traced to a single cause.[32] Research suggests contributing factors to mental illness include genetics, environment and lifestyle, stress, trauma, abuse, chronic medical conditions, alcohol and drug use, and chemical imbalances in the brain.[33]

Part of the confusion or stigma regarding mental health may be attributed to conflating the terms "mental health" and "mental illness." Not everyone suffers from a diagnosable mental disorder, yet everyone has mental health needs. NAMI reminds people with mental health conditions:

> [n]one of this means that you're broken or that you, or your family, did something 'wrong.' Mental illness is no one's fault. And for many people, recovery — including meaningful roles in social life, school and work —

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[27] *See infra* Section IV.

[28] Ranna Parekh, *What is Mental Illness?*, AM. PSYCHIATRIC ASS'N, https://www.psychiatry.org/patients-families/what-is-mental-illness [https://perma.cc/W94U-QNMA] (last visited Dec. 24, 2021); *About Mental Health,* CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/mentalhealth/learn/index.htm [https://perma.cc/BEP5-QRX8] (last visited June 26, 2021).

[29] *See* Parekh, *supra* note 28. The World Health Organization ("WHO") defines mental health as "a state of well-being in which an individual realizes his or her own potential, can cope with the normal stresses of life, can work productively and fruitfully, and is able to make a contribution to her or his community." *Mental Health: Strengthening Our Response*, WORLD HEALTH ORG. (Mar. 30, 2018), https://www.who.int/news-room/fact-sheets/detail/mental-health-strengthening-our-response [https://perma.cc/W2KT-8R9K]; *see also* Covo, *supra* note 25.

[30] *Mental Health Conditions*, *supra* note 18.

[31] Covo, *supra* note 25, at 258 (noting varied results, such as one study reporting that 18.9 percent of adults (age eighteen or older) in the United States experience "mental illness" within any one-year period, while other studies report mental illness among adults ranges from 26.2 percent to 32.4 percent in a given year, and explaining that "[e]stimates may vary depending on how the relevant study defines 'mental illness.'").

[32] *Id.*

[33] *See Mental Health by the Numbers*, *supra* note 25.

> is possible, especially when you start treatment early and play a strong role in your own recovery process.[34]

As noted by members of the international Think Tank on Athlete Mental Health, "[a]thletes do not need to have a clinical mental disorder to need help to manage their mental health."[35]

As defining mental health is nuanced, data collected on mental health conditions is similarly complicated. While recognizing the technical distinction between "mental health conditions" as opposed to "mental illnesses," NAMI "intentionally use[s] the terms 'mental health conditions' and 'mental illness/es' interchangeably."[36] Like NAMI, many of the sport surveys, reports, and other pieces of sport-related literature on the topic tend to use the term "mental health" to broadly encompass a range of mental or psychosocial disorders. This paper likewise broadly uses the term athlete "mental health," unless noted otherwise, for purposes of focusing on the policy aspects specific to sport.

B. Athlete Mental Health Concerns and Prevalence

While not everyone deals with mental illness, anxiety, depression, or panic attacks, as with physical health, everyone deals with mental health. Exact data on the prevalence of athlete mental health conditions can vary based on the study methodologies and definitions. Athletes for Hope reports that up to 35% of professional athletes "[s]uffer from a mental health crisis which may manifest as stress, eating disorders, burnout, or depression and anxiety."[37] The study also reports "startling" statistics that "33% of all college students experience significant symptoms of depression, anxiety or

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[34] *Id.*

[35] Henriksen, *supra* note 8, at 55.

[36] *Mental Health Conditions*, *supra* note 18; *see also* Timothy L. Neal et al., *Inter-Association Recommendations in Developing a Plan for Recognition and Referral of Student-Athletes with Psychological Concerns at the Collegiate Level: A Consensus Statement*, NAT'L ATHLETIC TRAINERS' ASS'N, https://www.nata.org/sites/default/files/psychologicalreferral.pdf [https://perma.cc/C9QX-3H9V] (last visited Oct. 16, 2021) (using the term "Psychological Concern" is used instead of "Mental Illness" because only credentialed mental health care professionals have the legal authority to diagnose a mental illness).

[37] Robin Kuik & Suzanne Potts, *Mental Health and Athletes*, ATHLETES FOR HOPE, http://www.athletesforhope.org/2019/05/mental-health-and-athletes/ [https://perma.cc/R2FF-A2U2] (last visited Oct. 16, 2021) ("Approximately 46.6 million people are living with mental illness in the US. That's 1 in 5 adults who will be living with a mental health condition at some point in their lives.").

other mental health conditions. Among that group, 30% seek help. But of college athletes with mental health conditions, only 10% do."[38]

1. Youth Sports

A study of youth recreational sports found that individual sport athletes may be at a higher risk of mental health issues than team sport athletes are.[39] Participation in team sports (e.g., basketball, soccer, etc.) seems to be associated with improved social and psychological outcomes when compared to individual sports (e.g., golf, tennis, etc.).[40] An individual sport increases an athlete's sense of accountability—due to their success completely depending on their own performance—and may lead to stronger experiences of emotions, both positive and negative, after performance, and, thus, increased feelings of guilt or shame after losing.[41] The internalized anxiety and stronger experiences of emotions may be significant factors in why individual sport athletes report suffering more from depression and anxiety than team sport athletes.[42] There is no one to help carry the weight of expectations or the burden of a loss. Individual sport athletes also tend to set high personal goals for themselves when compared to team sport athletes.[43] The foregoing relied on studies related to youth sports; however, mental health concerns persist at higher levels of sport.

2. U.S. College Athletes

An NCAA report found that approximately one in four U.S. college athletes will suffer from depression—the same rate as the general population.[44] The study also reported that 31% of male and 48% of female athletes

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[38] *Id.*

[39] Pluhar, *supra* note 12 ("[A]mong young athletes, anxiety and depression are more common in those who play individual sports than those who play team sports); *see also* Rochelle M. Eime et al., *A Systematic Review of the Psychological and Social Benefits of Participation in Sport for Children and Adolescents: Informing Development of a Conceptual Model of Health Through Sport*, 10 INT'L J. BEHAV. NUTRITION & PHYSICAL ACTIVITY 98 (2013).

[40] *See* Pluhar, *supra* note 12, at 495.

[41] *See* Insa Nixdorf et al., *Comparison of Athletes' Proneness to Depressive Symptoms in Individual and Team Sports: Research on Psychological Mediators in Junior Elite Athletes*, 7 FRONTIERS IN PSYCHOL. 893 (2016).

[42] *See* Pluhar, *supra* note 12, at 491.

[43] *Id.*

[44] See *Mental Health Best Practices: Inter-Association Consensus Document: Best Practices for Understanding and Supporting Student-Athlete Mental Wellness,* NCAA SPORTS

reported feeling "overwhelming anxiety" within the last twelve months, compared to 40% of male and 56% of female non-athletes.[45] In response to questions regarding depression, 21% of male and 28% female student-athletes self-reported feeling difficulty to function within the prior twelve months, compared to 27% of male and 33% of female non-athletes.[46] The NCAA study also found that male student-athletes were more likely to engage in aggressive behavior within the last twelve months, with 24% of male student-athletes reporting being in a physical fight, compared to only 12% of male non-athletes.[47]

The pandemic wrought even more pressure on athlete mental health. Over 37,000 student-athletes responded to the NCAA's Student-Athlete COVID-19 Well-being Survey conducted between April and May 2020.[48] The report states that the "rates of mental health concerns were 150% to 250% higher than those historically reported by NCAA student-athletes in the American College Health Association's National College Health Assessment."[49] The impacts of remote learning, canceled sports, isolation, closed sport facilities, and barriers to athletic training heightened mental distress among student-athletes.[50] Although the reported levels of anxiety and depression among collegiate student-athletes are not significantly higher than those of their non-athlete peers, many college athletes do experience serious

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SCI. INST. (2016) https://ncaaorg.s3.amazonaws.com/ssi/mental/SSI_MentalHealth BestPractices.pdf [https://perma.cc/UN5F-25JX] (last visited Oct. 16, 2021).

[45] *See* Simon M. Rice et al., Determinants of Anxiety in Elite Athletes: A Systematic Review and Meta-Analysis, 53 BRIT. J. SPORTS MED. 722, 726 (2019).

[46] Robert J. Schinke et al., *International Society of Sport Psychology Position Stand: Athletes' Mental Health, Performance, and Development*, INT'L J. SPORT & EXERCISE PSYCHOL. at 3 (2017).

[47] *Id.*

[48] *Student-Athlete COVID-19 Well-being Survey,* NCAA RSCH. (2020), https://ncaaorg.s3.amazonaws.com/research/other/2020/2020RES_NCAASACOVID-19 SurveyReport.pdf [https://perma.cc/F345-DN2T]; *see also Survey Shows Student-Athletes Grappling with Mental Health Issues*, NCAA (May 22, 2020), https://www.ncaa.org/about/resources/media-center/news/survey-shows-student-athletes-grappling-mental-health-issues [https://perma.cc/4BEA-2RB5].

[49] Michelle Gardner, *Suicides in College Sports Put Focus on Mental Health*, ARIZ. REPUBLIC (May 17, 2021), https://www.azcentral.com/story/sports/college/asu/2021/05/17/suicides-college-sports-put-focus-mental-health-those-trying-make-difference/7128392002/ [https://perma.cc/V6XJ-3GRA].

[50] Timothy Neal, *Understand Mental Health Impact of Pandemic on Student-Athletes*, *Sports Medicine Staff*, 18 COLL. ATHLETICS & L. 6, 7 (May 2021); *see also* JoAnne Barbieri Bullard, *The Impact of COVID-19 on the Well-Being of Division III Student-Athletes*, SPORT J. (Oct. 7, 2020), at 3-6.

mental health issues, must navigate the demands of both academic and athletic competition, and yet have been less likely to report these issues.[51]

3. Elite Athletes

The International Olympic Committee ("IOC") convened a group of medical experts and IOC leadership to study and address mental health in elite athletes.[52] The IOC Consensus Group evaluated various aspects of athlete mental health, publishing their findings and recommendations in the *Mental Health in Elite Athletes: IOC Consensus Statement* (2019). The IOC Report notes that studies on athlete mental health have increased, but that statistics on the prevalence of mental health disorders in sport, and as compared with the general population, are difficult to discern as definitions of athlete mental health can encompass both self-reported and clinically-diagnosed conditions, and studies report varied statistics.[53] For example, the IOC study on athlete mental health reports a broad range that 5–35% of elite athletes (i.e., those competing at professional, Olympic, or collegiate levels) are affected with mental health disorders.[54] The study noted anxiety and depression rates of nearly 45% among male athletes in team sports (cricket,

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[51] *See* Jennifer Moreland et al., *College Athletes' Mental Health Services Utilization: A Systematic Review of Conceptualizations, Operationalizations, Facilitators, and Barriers,* 7 J. SPORTS & HEALTH SCI. 58, 59-67 (2018); ("NCAA athletes not only face difficulties surrounding the transition to adulthood and college studies, but the pressure to remain in peak physical and mental condition to their athletic performance . . . Both the athlete and the culture surrounding the athlete could facilitate or hamper an athlete's use of sport psychology and related mental health services."); *see also* Ann Kearns Devoren & Seunghyun Hwang, *Mind, Body and Sport: Depression and Anxiety Prevalence in Student-Athletes*, NCAA, https://www.ncaa.org/sport-science-institute/mind-body-and-sport-depression-and-anxiety-prevalence-student-athletes [https://perma.cc/9GDV-VUHB] (last visited Dec. 24, 2021); NCAA, *Mind Body & Sport: Understanding and Supporting Student-Athlete Mental Wellness* 38-39 (2014), https://www.naspa.org/images/uploads/events/Mind_Body_and_Sport.pdf [https://perma.cc/AA7Z-MGC7]; Jayce Born, *National Protection of Student-Athlete Mental Health: The Case for Federal Regulation over the National Collegiate Athletic Association*, 92 IND. L.J. 1221, 1222 (2017) (noting push for NCAA to implement mental health programs in addition to concussion protocols after two high-profile athlete suicide deaths).

[52] Reardon, *supra* note 9, at 686.

[53] *Id.* at 668 (noting that most studies on athlete mental health have lacked reference to general population or to account for cross-cultural differences and that "[s]tudies vary in whether they describe self-reported specific mental health symptoms or physician diagnosed disorders").

[54] *Id.*

football, handball, ice hockey and rugby), with 10-25% of collegiate athletes reporting depression and eating disorders.[55]

The IOC study reports that elite athletes experience generalized anxiety disorders ("GAD") in a range from 6.0% for clinician-confirmed diagnoses to 14.6% self-reported.[56] This range is similar to the general population, in which 10.6–12% are affected by an anxiety disorder or self-report anxiety issues.[57] Individual aesthetic sports like gymnastics, figure skating, and dance, in which subjective judgment determines success, also correlate with the highest rates of GAD among elite athletes.[58]

C. Sport-Related Factors Impacting Athlete Mental Health

Sports and exercise can certainly benefit both physical and mental health.[59] Yet athletes suffer from mental health issues at the same rate as non-athletes, suggesting that aspects of the sports experience may influence the severity of a person's mental health issues.[60] Athletes' mental health symptoms and disorders can be attributed to both generic and sport-specific reasons.[61] The risk of mental health disorders in elite athletes is heightened, for example, when an athlete suffers a physical injury, decreased performance, or tends to maladaptive perfectionism.[62] Certain aspects of sports can exacerbate mental health risks.[63] Elite athletes often travel across time zones, have rigorous training and study schedules, and face sleep disruption and

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[55] *Id*.

[56] *Id.* at 672.

[57] Rice, *supra* note 45, at 722.

[58] Karine Schaal et al., *Psychological Balance in High Level Athletes: Gender-Based Differences and Sport-Specific Patterns*, 6 PLoS One e19007 (2011), available at https://pubmed.ncbi.nlm.nih.gov/21573222/ [https://perma.cc/5JNB-R3UF].

[59] *See* Simon Rice et al., *The Mental Health of Elite Athletes: A Narrative Systematic Review*, 46 Sports Med. 1333, 1344 (2016) (reporting findings suggested that elite athletes experience a broadly comparable risk of high-prevalence mental disorders, such as anxiety and depression, relative to the general population).

[60] Athletes seek treatments at lower rates or after a longer period from onset than the general population. Since the rates of mental health issues are relatively equal, lower rates of treatment may show that athletes are dissuaded from seeking early treatment because of their status as athletes. *See* Reardon, *supra* note 9, at 668.

[61] *Id.*

[62] *Id*.

[63] *See* Born, *supra* note 51, at 1223; Rice, *supra* note 45, at 726 (2019); *see also* Marnae Mawdsley, *A Losing Mentality: An Analysis of the Duty Owed by Universities to Provide Their Student-Athletes with Mental Health Services,* 31 Marq. Sports L. Rev. 243, 247 (2021) (citing research and asserting that student-athletes have a potentially higher risk of experiencing mental health issues and requiring treatment).

disorders that can impair mental health.[64] The emphasis on body physicality in some elite sports poses higher risks for eating disorders and "exercise addiction."[65]

The IOC study noted that specific factors in sport associated with elite athlete depression include: "genetic factors (e.g., family history); environmental factors (e.g., poor quality relationships, lack of social support); injury, competitive failure, retirement from sport; pain, and concussion."[66] Mental health symptoms such as depression, anxiety, and higher risk of suicide may also follow sports-related concussions[67] and impact athletes who are ending their careers due to injury or retirement as well as athletes whose time and self-identity are changed. In addition to these conditions, athletes are vulnerable to eating disorders, anxiety and stress, overtraining, and sleep disorders.[68] Aspects of sport that involve physical injuries, verbal abuse, sexual misconduct, racial and gender discrimination, addictive behaviors, and intense public scrutiny heighten risks for athlete mental health struggles.

1. Physical Risks and Concussions' Impact on Mental Health

The physical health pressures and risks in sport can translate to a higher risk of mental health disorders, particularly in sports that commonly involve blows to the head that result in concussions.[69] Dr. Bennet Omalu, a forensic neuropathologist, has been credited with discovering Chronic Traumatic Encephalopathy ("CTE") in the brains of deceased NFL football players.[70] CTE is a degenerative disease that is associated with repeated blows to the head.[71] Symptoms of CTE include memory loss, confusion, depression,

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[64] Reardon, *supra* note 9, at 669-70.

[65] Other sport-specific risk factors for eating disorders include body shaming and body image pressures; weight-sensitive sports or aesthetic-judged sports such as gymnastics; and team weigh-ins. *See id*. at 674.

[66] *Id*. at 671.

[67] *Id.* at 678.

[68] Chang, *supra* note 9, at 216-20 (examining the athletic culture and environmental factors that commonly impact mental health, including sexuality and gender issues, hazing, bullying, sexual misconduct and transition from sport).

[69] David Lester, *Mind, Body and Sport: Suicidal Tendencies*, NCAA, https://www.ncaa.org/sport-science-institute/mind-body-and-sport-suicidal-tendencies [https://perma.cc/J6GH-ADN9] (last visited Oct. 16, 2021).

[70] Jenny Vrentas, *The NFL's 'Concussion' Problem*, SPORTS ILLUSTRATED (Dec. 23, 2015), https://www.si.com/nfl/2015/12/23/nfl-reaction-concussion-movie-will-smith-bennet-omalu [https://perma.cc/EL73-SLNK].

[71] Joe Ward et al., *110 N.F.L. Brains*, N.Y. TIMES (July 25, 2017), https://www.nytimes.com/interactive/2017/07/25/sports/football/nfl-cte.html [https://perma.cc/L96Y-BLES].

and dementia.[72] A study in the *Journal of the American Medical Association* found that 110 out of 111 brains of deceased football players showed signs of CTE.[73] The disease has reportedly been linked to athlete suicide, evidenced by the cases of former NFL Hall of Fame linebacker Junior Seau[74] and NFL player Dave Duerson.[75] Both Seau and Duerson's brain examinations showed evidence of CTE.[76]

CTE "[h]as been linked to serious psychiatric symptoms, including depression, aggression, and suicidal behavior."[77] CTE is a serious issue in the world of sports and highlights the culture of competitive sport in which the desire and drive to be the best can often blind athletes to serious mental and physical injuries. As with mental illness, athletes often hide their physical injuries out of fear that they will be seen as weak, cut from the team, taken out of the starting rotation, or replaced by a teammate. The director of Brain Injury Research at UCLA, Dr. David Hovda, stated that "[a]thletes are like military personnel in that they don't tell the truth[.] They want to go back to play, or they want to go back and be with their unit, so they're less likely to be straightforward with a physician or trainer or coach."[78] For decades, when athletes sustained a serious blow to the head, they were often told to "walk it off." As Gary Plummer, a former NFL linebacker, stated:

> Your entire life, that is probably your most revered characteristic as a player – your toughness, your ability to handle pain, your ability to overcome adversity. . . . And you take that to a mental level as well. You've got to be mentally tough, you've got to overcome. Just block out this pain. It's taught from coaches from the time you're in Pop Warner. I've done it myself as a coach, coaching my kids through high school.[79]

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[72] *See id.*

[73] Jesse Mez et al., *Clinicopathological Evaluation of Chronic Trauma Encephalopathy in Players of American Football*, 318 J. AM. MED. ASS'N 360, 360 (2017).

[74] Sam Farmer, *Junior Seau Had Brain Disease When He Committed Suicide*, L.A. TIMES (Jan. 10, 2013), https://www.latimes.com/sports/la-xpm-2013-jan-10-la-sp-sn-junior-seau-brain-20130110-story.html [https://perma.cc/JTM7-2G5G].

[75] *Id.*

[76] *Id.*

[77] Daniel Antonius et al., *Behavioral Health Symptoms Associated with Chronic Traumatic Encephalopathy: A Critical Review of the Literature and Recommendations for Treatment and Research*, 26 J. NEUROPSYCHIATRY & CLINICAL NEUROSCIENCES 313, 313 (2014); Matthew Hofkens, *Concussions, Other Brain Injuries and 'CTE': How Are They Different? And Is There Any Link to Mental Illness*, HEALTH PARTNERS, https://www.healthpartners.com/blog/concussions-other-brain-injuries-and-cte/ [https://perma.cc/R3XX-M4D6] (last visited Oct. 16, 2021).

[78] Farmer, *supra* note 74.

[79] *Id.*

Similar to mental health disorders, concussions are not always visible, and an athlete who does not feel like they can express how they are feeling to their coach or medical staff is often sent back on the field.[80] By necessity and in response to litigation and ridicule, sport is attempting to address CTE risks and enact protocols, including changes to rules of play to enhance player safety.[81]

2. Trauma, Sexual Abuse and Misconduct in Sport

Survivors of sexual abuse experience lasting mental health trauma.[82] Athletes who compete at elite levels of sport, particularly in individual sports that involve extensive travel and close contact with a coach, may be at high risk of sexual abuse.[83] The personal and trusting relationship that can develop between an athlete and coach, athletic personnel, or peer can enable an abuser to gain the trust of the victim and then use that trust to exploit them.[84]

The abhorrent problem of sexual abuse in sport has come to the forefront with shocking cases of serial abuse of athletes, such as the horrific crimes committed by former USA Gymnastics team doctor, Larry Nassar. Nassar was sentenced to up to 175 years in prison after admitting to sexually assaulting his patients over the course of several decades.[85] Although

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[80] Individuals with repetitive head injuries can function but slowly the brain injury makes the individual more aggressive, irritable, angry, etc. The symptoms come on slowly and athletes may not recognize the onset of this chronic brain injury.

[81] *Health and Safety-Related Changes for the 2017 Season*, NFL PLAYER HEALTH & SAFETY (May 29, 2018), https://www.playsmartplaysafe.com/focus-on-safety/protecting-players/health-safety-related-changes-2017-season/ [https://perma.cc/S9AZ-KBTU].

[82] Maureen A. Weston, *Tackling Abuse in Sport Through Dispute System Design,* 13 ST. THOMAS L.J. 434, 440 (2017).

[83] *See IOC Adopts Consensus Statement on Sexual Harassment and Abuse in Sport* (Feb. 8, 2007), INT'L OLYMPIC COMM., https://www.olympic.org/news/ioc-adopts-consensus-statement-on-sexual-harassment-and-abuse-in-sport [https://perma.cc/8Q95-65A4] (stating that the prevalence of sexual abuse is higher in elite sport).

[84] *See* Darlene Lancer, *How to Know If You're a Victim of Gaslighting*, PSYCHOL. TODAY (Jan. 13, 2018), https://www.psychologytoday.com/us/blog/toxic-relationships/201801/how-know-if-youre-victim-gaslighting [https://perma.cc/2355-F6YR].

[85] Hadley Freeman, *How Was Larry Nassar Able to Abuse So Many Gymnasts for So Long?*, THE GUARDIAN (Jan. 26, 2018), https://www.theguardian.com/sport/2018/jan/26/larry-nassar-abuse-gymnasts-scandal-culture [https://perma.cc/2CMR-YKH6].

complaints had been lodged against Nassar dating back to 1998, nothing was done. During Nassar's trial, an investigation revealed a history of covering up and downplaying complaints to USA Gymnastics about sexual abuse.[86] Unfortunately, gymnastics coaches and personnel were protected at the expense of their athletes, resulting in numerous survivor victims including Simone Biles, Aly Raisman, McKayla Maroney, and many others.[87]

Male athletes have also been preyed upon. Conrad Mainwaring, a former Olympian and track coach with USA Track & Field, allegedly sexually abused forty-one men over four decades.[88] Several athletes came forward about the abuse and how it changed their lives. David O'Boyle, a former member of the UCLA track and field team, recalls the impact of the abuse by his former coach, stating, "I trusted this guy, I thought it was OK, but what he did to me f—-ed me up for the next 10 years."[89] Mainwaring used his status as a former Olympian to convince these athletes that what he was doing to them was all part of the training.[90] The desire to make it on a college team or earn a spot at the Olympics blinded these men to the abuse they were enduring by the man they trusted to get them there. Following the abuse by Mainwaring, some of the athletes turned to alcohol and drugs and even contemplated taking their own lives.[91]

Reports from the USA Gymnastics scandal demonstrate that, for many years, athletes had little recourse to report and, even then, to be believed. Even with increased awareness and efforts to educate and facilitate reporting through the U.S. Center for Safe Sport,[92] an athlete who places trust in their

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[86] *Id.*

[87] In her 1995 book, *Little Girls in Pretty Boxes*, Joan Ryan discusses the physical and psychological demand that is required by gymnasts and how it takes its toll on the girls and young women. In her statement about the sexual abuse by Nassar she states, "These girls are groomed from an incredibly young age to deny their own experience. Your knee hurts? You're being lazy. You're hungry? No, you're fat and greedy. They are trained to doubt their own feelings, and that's why this could happen to over 150 of them." *See* Hadley Freeman, *How Was Larry Nassar Able to Abuse so Many Gymnasts for so Long?*, THE GUARDIAN (Jan. 26, 2018), https://www.theguardian.com/sport/2018/jan/26/larry-nassar-abuse-gymnasts-scandal-culture [https://perma.cc/FVZ7-H8GS].

[88] Mike Kessler, *44 Years, 41 Allegations. Now the Past is Catching Up.*, ESPN (Aug. 1, 2019), http://www.espn.com/espn/feature/story/_/id/27244072/44-years-41-allegations-how-caught-former-olympian [https://perma.cc/AD9D-GG47].

[89] *Id.*

[90] *See id.*

[91] *See id.*

[92] *See Report a Concern*, U.S. CTR. FOR SAFESPORT, https://uscenterforsafesport.org/report-a-concern/ [https://perma.cc/WG2H-7JSQ] (last visited Oct. 16, 2021).

abuser may have difficulty, given the grooming and gaslighting in effect, discerning the abuse and taking the significant step of reporting that individual for legal discipline. Perhaps, had these athletes had access to confidential mental health counseling assistance, the abuse could have been readily identified, named, and stopped.[93]

3. "Hard Coaching" or Verbal Abuse and Bullying

"Hard Coaching" has been described as "coaching with passion and instilling a great work ethic, integrity and character in the kids through discipline and hard work. Teaching them to go and dig-in even when they mentally don't feel they can."[94] This may be a laudable and effective coaching technique, but, in some cases, "hard coaching" can become harassment and verbal abuse that could mentally and physically harm the athlete.[95] As sports psychologist Dr. Hillary Cauthen asked, "[h]ave you ever really listened to how coaches speak to their athletes? Sometimes, more often than not, in any other profession these words would get us fired. I surely would lose my job over this. Why do we think it's OK for a coach to yell in a child's face or call an adolescent out of their name or shame them in front of their teammates? I ask you, does this culture really build champions?"[96]

Opening up about mental health issues can be challenging, especially when the source of stress comes from someone in a position of trust or authority. University students are fighting back against abuse from an athletic director and coach.[97] Softball players at the University of Nebraska reported

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[93] Abuse is part of destigmatizing the issue. Survivors carry this burden throughout their lives. Part of the healing process is in the counseling and availability of for resources for mental health.

[94] *What's the Difference Between Hard Coaching and Abusive Treatment?*, BCP NATION (Apr. 7, 2015) https://bigcountypreps.com/whats-the-difference-between-hard-coaching-and-abusive-treatment [https://perma.cc/AXX4-ZPFA] (quoting Zephyrhills Christian Head Coach Mike Smith).

[95] *See* Chase Williams, *College Athletes Beginning to Rebel Against Abusive Coaches*, GLOB. SPORT MATTERS (Oct. 8, 2019), https://globalsportmatters.com/health/2019/10/08/college-athletes-beginning-to-rebel-against-abusive-coaches/ [https://perma.cc/6EUX-AKDP] (quoting Scott Brooks, Director of Research for the Global Sport Institute, "When you make comments that are personal to someone or a social group, whether it's their sexual or racial identity, it crosses the line.").

[96] *See* Cauthen, *supra* note 6.

[97] *See* Liam Quinn, *MU Tennis Players Say Coaches Told Them to Play Through Injuries, Ignore NCAA Rules,* COLUMBIA MISSOURIAN (Nov. 15, 2020) https://www.columbiamissourian.com/sports/mizzou_sports/mu-tennis-players-say-coaches-told-them-to-play-through-injuries-ignore-ncaa-rules/article_a816a1f8-10c7-11eb-8343-d39be6be3763.html [https://perma.cc/FY6G-CSJ2]; *see also* Mark

numerous occasions of verbal abuse by their head coach Rhonda Revelle.[98] This abuse consisted of fat-shaming, excessive practice times, name-calling, harassment, and a reckless disregard for injuries.[99]

Michael Grabowski, a former University of Arizona track athlete, sued the University for alleged bullying and assault by head coach Fred Harvey and fellow teammates.[100] Grabowski claimed he was subjected to repeated bullying, such as being the only player not to receive a bed at training camp and that his complaints were met the responses that Grabowski just didn't "know the culture yet"[101] and that "you can't single out the two top runners on the team[.]"[102] Grabowski claimed that after being forced to run a race while sick, Coach Harvey dismissed him from the team, stating that "[t]here's a certain atmosphere we are trying to establish on this team, and you do not fit in it."[103] According to the lawsuit, after Grabowski asked for a more detailed explanation, Harvey assaulted him by pinning him to a chair and calling him a "racist and [a] liar."[104] Grabowski passed out and

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Long, *Report: Ex-Florida Coach Newbauer Abused Players, Assistants*, OCALA GAZETTE (Sept. 28, 2021), https://www.ocalagazette.com/report-ex-florida-coach-newbauer-abused-players-assistants/ [https://perma.cc/X22B-GC6F].

[98] Ben Strauss, *Complaints Against Nebraska Softball Coach Show College Athletes' Limited Options,* WASH. POST (Aug. 30, 2019), https://www.washingtonpost.com/sports/2019/08/30/complaints-against-nebraska-softball-coach-show-college-athletes-limited-options/ [https://perma.cc/U6MK-RGAU].

[99] *Id.*

[100] Andrew Howard, *Former University of Arizona Track Athlete Files $3M Suit over Bullying Allegations*, AZ CENT. (Sept. 17, 2019), https://www.azcentral.com/story/news/local/arizona-education/2019/09/17/university-arizona-track-athlete-michael-grabowski-sues-bullying-assault-claims/2354782001/ [https://perma.cc/XVD6-3UAL] ("The lawsuit . . . also lists the Arizona Board of Regents and students and coaches from the track and field team as defendants. The former athlete makes multiple claims against the school, including defamation, Title IX violations and assault.").

[101] *Id.*

[102] *See* B. Poole, *Student-athlete Accuses UA Cross-Country Team of Assault, Defamation*, TUCSON SENTINEL (Sept. 17, 2019), http://www.tucsonsentinel.com/local/report/091719_ua_runner_suit/student-athlete-accuses-ua-cross-country-team-assault-defamation/ [https://perma.cc/9EWG-7YZZ].

[103] *Id.*

[104] *Id.*

was taken to the hospital.[105] The case remains pending as of November 2021.[106]

Words and tone matter. Ostensible "hard" coaching can cross a line into verbal or emotional abuse where athletes are harmed and discouraged from reporting or seeking help. Coaches are on the front line to notice and impact athlete mental health. Both coaches and sports leadership fail athletes when abusive coaching or training tactics are tolerated.[107]

4. Substance Abuse and Addiction

Elite athletes engage in intense physical training and competition that involves wear and tear on the body, exhaustion, focus on physical appearance, dieting, strengthening, and risks to physical and mental health. In some cases, athletes' desires to recover from or to treat an injury for fear of losing one's career has led them to cheat by using prohibited doping substances.[108] While sport has instituted anti-doping policies for prohibited substances, some sporting organizations proudly partner with alcohol or tobacco sponsors, and some athletes reach for substances that may be considered performance enhancing or impairing. The "pain management culture" of NFL doctors over-prescribing painkillers is at the center of class actions by NFL players who became addicted to opioids.[109] Former New York Yankees player CC Sabathia cites the "culture of baseball" as one of the reasons for his alcoholism, noting the custom of being on the road, playing games, then having champagne in the locker room, and drinking into the night.[110]

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[105] The University claimed that its personnel review of the athletic department found a disparity between the allegations made in the lawsuit and the concerns that were raised to coaches. The University is contesting any lawsuits based on what it claims are unsubstantiated allegations.

[106] Grabowski v. Ariz. Bd. of Regents, No. 4:19-cv-00460-JAS, 2020 U.S. Dist. LEXIS 121666 (D. Ariz. July 7, 2020).

[107] *See* Daniel Abroms, *Lived Experiences of Psychological Safety: A Phenomenological Study of Interdisciplinary Work Team for Sport Programs at a NCAA Division I University* (June 24, 2021) (Ed.D. Dissertation in Practice, Creighton University) (reporting on the impact of leadership in fostering employee and work teams' psychological safety to voice ethical concerns and report rule and conduct violations).

[108] Claudia L. Reardon & Shane Creado, *Drug Abuse in Athletes*, 5 SUBSTANCE ABUSE REHABILITATION 95, 95 (2014).

[109] *See* Dylan McGowan, *Pain Mismanagement: The Opioid Problem in the NFL*, 31 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 223, 226 (2020).

[110] Jackson Thompson, *Baseball's Alcohol Culture Pushed Former Yankees Pitcher CC Sabathia to Rock Bottom. Now He Has a Message for Players Dealing with Addiction.*, INSIDER (June 27, 2021, 12:13 PM), https://www.insider.com/baseballs-alcohol-

5. Sports Addiction

Addiction is a symptom of mental health issues. While "addiction" is usually associated with alcoholism, drug use, or smoking nicotine, an athlete's extreme regime and quest for perfection could also become detrimental and diagnosed as exercise or sport addiction. Athletes may ignore injuries because it means they would have to stop training, which can severely harm their body as well as cause psychological damage.[111] "Sport becomes so much an obsession that such people don't take time to recover from injuries. Incidence of heart attacks and osteoporosis increase at high levels of exertion, so sports addicts can put themselves at serious risk of harm."[112] A psychological danger of exercise addiction results where athletes continue to push themselves in order to obtain the "high."[113] Athletes can become addicted to reaching that "high," and when their bodies become tolerant, they exercise even more in search of the same or an even better "high."[114] When these athletes are not exercising, "they experience withdrawal effects, depression and anxiety."[115]

6. Sports Gambling & Esports

Sports gambling and esports can also carry significant risks for sport addiction.[116] Sports gambling has become legal in over thirty states and D.C[117] since the 2018 Supreme Court decision in *Murphy v. NCAA* struck down the Professional and Amateur Sports Protection Act ("PASPA") that

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culture-pushed-cc-sabathia-to-rock-bottom-2021-6 [https://perma.cc/Z6XK-Y2TB].

[111] Nigel Warburton, *How People with Sports Addiction Are Like Drug Addicts*, AEON (Aug. 4, 2016), https://aeon.co/ideas/how-people-with-sports-addiction-are-like-drug-addicts [https://perma.cc/M55N-NS86].

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.* This addiction can also put a strain on a person's social life, such as placing training before friends and family.

[116] Reardon, *supra* note 9, at 681 (stating that gambling disorder is regarded as a hidden disorder, and mental health professionals have reported relative lack of awareness and concern about gambling as a potential problem and elite athletes may be particularly at risk for gambling disorder, given high risk demographic of young males, desires for competition, risk taking behaviors, and impulsivity).

[117] *See Interactive Map: Sports Betting in the U.S.*, AM. GAMING ASS'N, https://www.americangaming.org/research/state-gaming-map/ [https://perma.cc/495Z-GPTV] (last visited Nov. 22, 2021).

had restricted sports betting to Nevada and a few other states.[118] The expansion and ease of legalized sports gambling across the United States portends an increased risk for gambling addiction.[119] Sport gambling sites such as FanDuel and DraftKings have rooted themselves into the sports gambling market and enabled online and mobile betting as well.[120] Athletes are part of the demographic vulnerable to sports gambling; and even though athletes are not necessarily gambling on sports, knowing millions of fans/users have placed financial bets on their game compounds the pressure to perform.

Esports fans have become one of the fastest-growing fan bases in professional sports.[121] Media rights are one of the main revenue streams for esports, such as landmark media rights deals including Overwatch[122] and League of Legends,[123] with revenue set to reach $3 billion by 2022. Individual player earnings are another incentive to join the esports movement. For example, a player named Ninja, who live-streams his gameplay, has a monthly income of around $1M.[124] Esports gamers span a variety of professional, collegiate, and very young players.

Addiction specialists from the National Centre for Mental Health in Seoul, Korea, have observed that "the top-ranked addiction among young people is game addiction and 90% of the addicts are male teenagers."[125]

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[118] *See* Murphy v. NCAA, 138 S. Ct. 1461, 1467 (2018) ("Congress may not simply commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program") (internal quotation marks omitted) (citation omitted).

[119] Brett Smiley, *Gambling Rehabilitation 'Legend' on Sports Betting Expansion: More People 'Will End Up Destroying Their Lives'*, SPORTSHANDLE (Dec. 21, 2018), https://sportshandle.com/gambling-addiction-arnie-wexler-sports-betting/ [https://perma.cc/P4D4-E63M] (detailing how, in response to a question about legalizing sports gambling, Arnie Wexler, former sport gabling addict, stated, "Well, when you open up the door to Internet gambling like they just did recently in New Jersey, or when you open up the door to sports betting, you get people that would never try to do something illegal bet with a bookmaker, and now it's legal so they try it. Some of those people are going to get addicted and some of those people are going to become compulsive gamblers and will end up destroying their lives").

[120] *See id.*

[121] *eSports Joins the Big Leagues*, GOLDMAN SACHS, https://www.goldmansachs.com/insights/pages/infographics/e-sports/index.html [https://perma.cc/Q8CN-CWZK] (last visited Oct. 16, 2021) (stating the audience for esports in 2018 was at 167 million people, and it is set to increase to 276 million by the year 2022).

[122] *Id.* (stating Activision signed a two-year, $90M deal with Twitch to distribute Overwatch League in North America).

[123] *Id.*

[124] *Id.*

[125] Simon Hattenstone, *The Rise of e-Sports: Are Addiction and Corruption the Price of its Success?*, THE GUARDIAN (June 16, 2017), https://www.theguardian.com/sport/

They warn that signs of addiction begin to emerge when children enter into middle school, and "[t]hey lose interest in academic work, friends and family; they stop sleeping; they eat poorly or hardly at all."[126] Both the World Health Organization ("WHO")[127] and IOC have noted addiction risks of esports gamers.[128]

7. Sex, Sexual Orientation, and Gender Discrimination in Sport

An American Psychological Association study on the general population reports that "[w]omen are more likely to be diagnosed with anxiety or depression, while men tend toward substance abuse or antisocial disorders[.]"[129] Sport has similar outcomes. Researchers at Drexel University and Kean University reported that female athletes are "two times more likely to experience [depression] symptoms than their male peers."[130] The study spanned several sports including "baseball/softball, basketball, cheerleading, crew, field hockey, lacrosse, track and field, soccer and tennis."[131] Overall,

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2017/jun/16/top-addiction-young-people-gaming-esports [https://perma.cc/V2VK-QHVA].

[126] Dr. Lee Tae Kyung recalls a young man who didn't eat or sleep because he was constantly playing and ended up dying after finishing his game. Another young man named Choi recalled his experience with esports and how it "alienated him from the real world." He would play for six hours every day and stopped eating properly, which led him to lose sleep, focus, and even his own identity. Choi said that "he began to confuse his own identity with characters in the games he played. He stopped relating to people." The games made him focus on killing rather than his family and friends. As Dr. Lee said, many of his patients are children, which means that if they do not become free from their addiction, they could become permanently damaged. *Id*.

[127] *See Addictive Behaviour*, WORLD HEALTH ORG., https://www.who.int/health-topics/addictive-behaviours#tab=tab_1 [https://perma.cc/2UNU-MNZL] (last visited Oct. 16, 2021) (noting rise of addiction and risk due to excessive video gaming and gambling).

[128] *See* Reardon, *supra* note 9, at 681 (questioning also whether professional esports gamers who spend ten or more hours a day are addicted).

[129] *See Study Finds Sex Differences in Mental Illness*, AM. PSYCHOL. ASS'N (2011), https://www.apa.org/news/press/releases/2011/08/mental-illness [https://perma.cc/X423-AR92] (finding that women tend to internalize their emotions which can result in depression, while men tend to externalize their emotions through aggressive, non-compliant behavior).

[130] Lauren Ingeno, *Depressive Symptoms Prevalent Among Division I College Athletes*, DREXEL NOW (Jan. 27, 2016), https://drexel.edu/now/archive/2016/January/Depression-College-Athletes/ [https://perma.cc/H6H4-5YUX].

[131] *Id.*

28% of the females reported depressive symptoms compared to 18% of males.[132]

At all levels of sport, LGBTQ, trans, and intersex athletes face discrimination or fear disclosing their sexual orientation.[133] In certain sports, athletes are subjected to "gender verification" sex testing, and female athletes with naturally high levels of testosterone, such as Caster Semenya, have been disqualified from competition.[134] Still fighting to have this decision overturned at the European Human Rights Commission, Semenya spoke of the toll of this on her mental health and human dignity.[135] In 2021, Carl Nassib became the first and only active player in the NFL's history to reveal that he is gay.[136]

8. Societal Factors

The disruption to both training schedules and plans to compete at the Tokyo 2020 Olympic Games, as well as the financial impacts of the pandemic, posed additional mental health pressures for Olympic athletes.[137] The police brutality that caused the murder of George Floyd and Breonna Taylor and the shooting of Jacob Blake in Summer 2020 ignited a #BlackLivesMatter movement and had a profound impact on Black athletes in particular.[138] Both the WNBA and NBA players led a boycott of play, followed

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[132] *Id.*

[133] *See* Nikole Tower, *LGBTQ Students Risk Mental Health When Joining a Sport*, GLOB. SPORT MATTERS (Nov. 27, 2018), https://globalsportmatters.com/youth/2018/11/27/lgbtq-student-athletes-risk-mental-health-when-joining-a-sport/ [https://perma.cc/DMY3-MRZD].

[134] Nana Adom-Aboagye, *Olympics: Namibia's Sprinters Highlight a Flawed Testosterone Testing System*, THE CONVERSATION (Aug. 6, 2021, 10:17 AM), https://theconversation.com/olympics-namibias-sprinters-highlight-a-flawed-testosterone-testing-system-165676 [https://perma.cc/T4SS-DCSN].

[135] Laine Higgins, *Blocked from Her Signature Race, Caster Semenya Won't Run in Tokyo,* WALL ST. J. (July 1, 2021, 1:09 PM), https://www.wsj.com/articles/caster-semenya-tokyo-olympics-11625159284 [https://perma.cc/3V6K-3X33].

[136] Britni de la Cretaz, *Carl Nassib, the First Openly Gay Active NFL Player, Could Be Turning Point for Male Sports*, NBC NEWS: THINK (June 22, 2021, 2:50 PM), https://www.nbcnews.com/think/opinion/first-openly-gay-nfl-player-carl-nassib-could-be-turning-ncna1271896 [https://perma.cc/JR7E-MLEH].

[137] Jay Cohen, *Olympic Athletes Confront Mental Health Challenges*, ASSOCIATED PRESS, (July 12, 2021) https://apnews.com/article/2020-tokyo-olympics-health-coronavirus-pandemic-olympic-games-mental-health-48d535fdb093ebbb1c5907a1dc301312 [https://perma.cc/8FZ7-AH6M].

[138] *See* Jemele Hill, *Athletes Will Never Be Quiet Again,* THE ATLANTIC (May 29, 2021), https://www.theatlantic.com/ideas/archive/2021/05/george-floyd-murder-athletes-sports-public-life/619043/ [https://perma.cc/ABR4-SGQY].

by Major League Baseball players. Tennis star Naomi Osaka also refused to play, saying, "Watching the continued genocide of Black people at the hand of the police is honestly making me sick to my stomach."[139] Osaka and Kyrie Irving spoke out about the death of George Floyd and the emotional toll it was taking on them, and have since spoke about their mental health struggles.[140]

9. Media, Public Pressure and Over-Exposure

Athlete mental health became front and center in Summer 2021 when Osaka refused to participate in post-match press conferences, citing the impact of the unrelenting press and media on her mental health. Media portrayals building up excitement for the Tokyo Olympics games, postponed to 2021, focused heavily on decorated Olympian medal winner gymnast Simone Biles. Biles is regarded as "quite possibly the greatest athlete of all time" ("GOAT"), is known for her signature flips and moves, and was a presumed medal contender for Team USA.[141] Biles felt the weight of being the media's face for Team USA and shocked the sporting world when she withdrew from the competition mid-Games, citing the need to protect her mental health.[142] As journalist Juliet Macur observed, "When [Biles] announced that she would withdraw from the competition to spare her mental and physical well-being, many people embraced her as a brave advocate for mental health, while others labeled her a quitter."[143] While social media

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[139] Jill Martin et al., *These Teams and Athletes Refused to Play in Protest of the Jacob Blake Shooting,* CNN (Aug. 27, 2020), https://www.cnn.com/2020/08/27/us/nba-mlb-wnba-strike-sports/index.html [https://perma.cc/ZE4N-7W62].

[140] Amulya Shekhar, *"When Kyrie Irving Talks About Mental Health Issues, Our Tone is Aggressive": NBA Analyst Points out Difference in Treatment for Eccentric Nets Star*, SPORTS RUSH (Jan. 21, 2021), https://thesportsrush.com/nba-news-when-kyrie-irving-talks-about-mental-health-issues-our-tone-is-aggressive-nba-analyst-points-out-difference-in-treatment-for-eccentric-nets-star/ [https://perma.cc/3L87-MMTC] (referencing a podcast where Tom Ziller talks about our tone changing when we talk about Kyrie Irving and his mental health issues).

[141] Juliet Macur, *Simone Biles Dials Up the Difficulty, 'Because I Can'*, N.Y. TIMES (May 24, 2021), https://www.nytimes.com/2021/05/24/sports/olympics/simone-biles-yurchenko-double-pike.html [https://perma.cc/Z3WS-T9GR] ("The Yurchenko double pike is considered so perilous and challenging that no other woman has attempted it in competition, and it is unlikely that any woman in the world is even training to give it a try.").

[142] Juliet Macur, *As Biles Rests After Tokyo, Gymnastics Glimpses What Could Be*, N.Y. TIMES (Aug. 7, 2021), https://www.nytimes.com/2021/08/04/sports/olympics/biles-tokyo-gymnastics-future.html [https://perma.cc/7KZJ-HX65].

[143] *Id.*

affords athletes a platform for voicing their views, social media's vast public reach, forum for comments and criticism, and incessant access present their own risks to mental health.[144]

D. Sport Culture Impact on Athlete Mental Health

Sport, by definition, lauds winners. To excel in sport, an athlete must commit to the demands of both extensive physical exertion and mental discipline.[145] The "win at all costs" message in sports can foster deleterious impacts, such as pressures that can lead to not only cheating, doping, toxic or lost relationships, obsessive behavior, addiction, and self-sabotage, but also a cost to the mind.[146] The sport culture, intense media exposure, and expectations even for extraordinary athletes can provoke or exacerbate athlete mental health issues. The stigma often associated with mental illness may cause many affected people to refuse to seek treatment.[147] Athletes too are "especially prone to remaining silent about their personal and emotional struggles."[148]

1. Athletes Opening Up

While many suffer in silence, athletes are increasingly speaking out to raise awareness, destigmatize, and promote institutional change regarding mental health in their respective sports.

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[144] *See* Christopher Labos, *Cell Phones, Teens, and Mental Health*, Montreal Gazette (OCT. 15, 2019), HTTPS://MONTREALGAZETTE.COM/OPINION/COLUMNISTS/CHRISTOPHER-LABOS-CELL-PHONES-TEENS-AND-MENTAL-HEALTH [HTTPS://PERMA.CC/9EN4-FQDM]; *see also* Kira E. Riehm et al., *Associations Between Time Spent Using Social Media and Internalizing and Externalizing Problems Among US Youth*, 76 JAMA Psychiatry 1266, 1266 (2019) (FINDING SOCIAL MEDIA USE A RISK FACTOR FOR MENTAL HEALTH PROBLEMS IN ADOLESCENTS),

[145] *See* Chang, *supra* note 9.

[146] *Id*. at 91 ("While participation in athletics has many benefits, the very nature of competition can provoke, augment or expose psychological issues in athletes. Certain personality traits can aid in athletic success, yet these same traits can also be associated with MH disorders. Importantly, the athletic culture may have an impact on performance and psychological health through its effect on existing personality traits and MH disorders.").

[147] *Id*.

[148] Parham, *supra* note 8.

a. Kevin Love

Five-time NBA All-Star, Kevin Love, played an important part in the Cleveland Cavaliers' 2016 NBA title run led by LeBron James and Kyrie Irving. In November 2017, only ten games into the 2017-18 NBA season, Love had an on-court panic attack, causing him to leave the game.[149] He began therapy and, in March 2018, authored *Everyone is Going Through Something* for *The Players' Tribune*, discussing the panic attack and his personal battle with anxiety.[150] Love was one of the first NBA players to speak openly about his mental health challenges. In this compelling story, Love relates that:

> I've never been comfortable sharing much about myself. . . . [F]or pretty much 29 years of my life I have been protective about anything and everything in my inner life. I was comfortable talking about basketball — but that came natural. It was much harder to share personal stuff, and looking back now I know I could have really benefited from having someone to talk to over the years. But I didn't share — not to my family, not to my best friends, not in public. Today, I've realized I need to change that. I want to share some of my thoughts about my panic attack and what's happened since. If you're suffering silently like I was, then you know how it can feel like nobody really gets it. Partly, I want to do it for me, but mostly, I want to do it because people don't talk about mental health enough. And men and boys are probably the farthest behind.[151]

Love adds that "[m]ental health is an invisible thing, but it touches all of us at some point or another."[152]

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[149] Kevin Love, *Everyone Is Going Through Something*, PLAYERS' TRIB. (Mar. 6, 2018), https://www.theplayerstribune.com/en-us/articles/kevin-love-everyone-is-going-through-something [https://perma.cc/DLJ6-U2ZQ].

[150] *Id*.

[151] *Id.* (noting that Love chose to tell his story "because people don't talk about mental health enough. And men and boys are probably the farthest behind.").

[152] The Kevin Love Fund was established in September 2018 "[t]o inspire people to live their healthiest lives while providing the tools to achieve physical and emotional well-being." The trust contributes to foundations and programs promoting mental wellness for high school and college students and student-athletes. *See The Kevin Love Fund*, EIF, https://www.eifoundation.org/partners/the-kevin-love-fund/ [https://perma.cc/NN4V-UQBP] (last visited Oct. 29, 2021).

b. Michael Phelps

Michael Phelps is the most decorated Olympian of all time, totaling twenty-eight medals over four Summer Games.[153] At the 2008 Beijing Summer Games, he won eight gold medals, breaking the record for the most gold medals at any single Olympic Games.[154] In September 2014, a DUI arrest led to a six-month suspension from USA Swimming.[155] Phelps later said, "I can tell you I've probably had at least a half dozen depression spells that I've gone through. And the one in 2014, I didn't want to be alive."[156]

c. Even LeBron, and More

More athletes, including NBA star LeBron James, are sharing their stories, inspiring and promoting the importance of valuing mental fitness as well as physical health.[157] Liz Cambage, Australian Olympic bronze medalist and center for the Las Vegas Aces in the Women's National Basketball Association (WNBA), suffered a severe post-game anxiety attack in July 2019. She later revealed that she had been on suicide watch in 2016 after battling severe depression and anxiety.[158] She equated dealing with mental illness as a current "dragging you out into the ocean."[159] NFL player Brandon Brooks, who was officially diagnosed with an anxiety disorder, missed

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[153] Rory Jiwani, *The Most Decorated Summer Olympians of All Time, Through Time*, OLYMPIC CHANNEL (Nov. 14, 2019), https://www.olympicchannel.com/en/stories/features/detail/most-decorated-summer-olympians-all-time-phelps/ [https://perma.cc/XY4V-AGJJ].

[154] Paul Newberry, *AP Was There: 2008 Beijing Olympics—Phelps Wins 8 Golds*, ASSOCIATED PRESS (Aug. 16, 2020), https://apnews.com/article/beijing-tokyo-2020-tokyo-olympics-jason-lezak-olympic-games-ab5fce1bc5ad1dc462772a9d931e00c7 [https://perma.cc/2VKG-MK4F].

[155] Joseph Zucker, *Michael Phelps Details Struggles with Anxiety and Depression on Twitter*, BLEACHER REPORT (May 26, 2019), https://bleacherreport.com/articles/2838142-michael-phelps-details-struggles-with-anxiety-and-depression-on-twitter [https://perma.cc/QX2S-D6BZ].

[156] *Id.*

[157] *See* Tim Daniels, *LeBron James Talks Mental Health, Says He Lost 'Love for the Game' in 2011*, BLEACHER REPORT (Dec. 10, 2019), https://bleacherreport.com/articles/2866319-lebron-james-talks-mental-health-says-he-lost-love-for-the-game-in-2011 [https://perma.cc/NZ36-HMPH].

[158] David Mark, *Liz Cambage Reveals Full Extent of Mental Health Struggle in Emotional Players' Tribune Article*, ABC NEWS AUSTRALIAN BROADCAST (Aug. 12, 2019), https://www.abc.net.au/news/2019-08-12/liz-cambage-details-mental-health-struggles/11404818 [https://perma.cc/8LGP-SKVZ].

[159] *Id.*

two games during the 2016 NFL season due to anxiety attacks.[160] In 2019, he again missed a game due to anxiety attacks and took to Twitter to share his experience in a brief post. He detailed the nausea and vomiting which kept him off the field but made a point to note that he was not ashamed or embarrassed by his struggles with anxiety.[161] Brooks suffered some physical injuries in 2020 but has been able to continue his over ten-year NFL career.[162] Former NBA player Keyon Dooling suppressed for over twenty-five years that he had been sexually assaulted as a child and consequently suffered severe paranoia and anxiety throughout his adult life, despite his athletic success.[163] Keyon credits the Celtics organization, saying that Doc Rivers arranged for him to receive help from top specialists. Following his recovery, Keyon became the director of a new NBA Players Association mental health program.[164]

A 2020 HBO documentary "The Weight of Gold" explored athlete depression and suicide and features Olympians including Phelps, Apollo Ohno, Jeremy Bloom, and Lolo Jones, as well as the story of Jeret Peterson, who committed suicide nearly a year after having won the silver medal in 2011.[165] As journalist Amanda Lee Myers notes:

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[160] Tim McManus, *Eagles' Brandon Brooks Brings Recognition of Battle with Anxiety*, ESPN (Nov. 25, 2019), https://www.espn.com/blog/philadelphia-eagles/post/_/id/24284/eagles-brandon-brooks-brings-winning-battle-against-anxiety [https://perma.cc/VHM3-CK4R].

[161] Tyler Conway, *Eagles' Brandon Brooks Explains Anxiety Kept Him from Playing vs. Seahawks*, BLEACHER REPORT (Nov. 25, 2019), https://bleacherreport.com/articles/2864203-eagles-brandon-brooks-explains-anxiety-kept-him-from-playing-vs-seahawks [https://perma.cc/K332-6HSN].

[162] Dave Spadaro, *Brandon Brooks: 'There Isn't any Doubt in my Mind'*, (May 27, 2021), https://www.philadelphiaeagles.com/news/brandon-brooks-there-isnt-any-doubt-in-my-mind [https://perma.cc/F5BM-LM7J].

[163] Keyon Dooling, *Running from a Ghost*, PLAYERS' TRIB. (May 1, 2018), https://www.theplayerstribune.com/en-us/articles/keyon-dooling-the-ghost [https://perma.cc/UQ4S-3AB4].

[164] *See* David MacKay, *Keyon Dooling Director of New NBPA Mental Health Progra*m, CELTICS WIRE (May 25, 2018, 2:36 PM), https://celticswire.usatoday.com/2018/05/25/keyon-dooling-mental-health-program-nbpa/ [https://perma.cc/5GUE-WFJP]; *see also* Garen Staglin, *Mental Health in the Locker Room*, FORBES (Dec. 13, 2019, 1:12 PM), https://www.forbes.com/sites/onemind/2019/12/13/mental-health-in-the-locker-room/#56e348f06d11 [https://perma.cc/4TQF-HE9R] (discussing NBA Mental Health Program).

[165] Amanda Lee Myers, *Michael Phelps Opens Up About Mental Health in New Doc,* DETROIT NEWS (Aug. 11, 2020, 10:15 AM), https://www.detroitnews.com/story/entertainment/television/2020/08/10/michael-phelps-apolo-ohno-open-suicide-documentary-hbo/112875854/ [https://perma.cc/7GU5-YLHB].

> The vast majority of Olympians spend most of their childhoods competing in their given sport. As they progress, competition becomes the main focus of their lives before family, friends, school or fun. For years they work toward that goal for what amounts to a competition that lasts minutes or mere seconds. The difference between winning and losing can be a fraction of a second, and millions are watching."[166]

These compounding pressures can be the source of mental health struggles for athletes. While some athletes deal with mental health challenges, expressly or silently, all have in common a desire to control the narrative, tell their own story, and raise awareness to destigmatize mental health challenges.[167]

2. Overcoming Stigma

In her TED Talk *Toxicity of Sport Culture on Athletes' Mental Health,*[168] Dr. Hillary Cauthen states that "[w]e currently romanticize our athletes, our Olympians and professional athletes we think are superhuman and superheroes. And yes, they do pretty amazing things with their bodies, but we don't allow them to be breakable. This environment makes them be stoic and can be toxic with the bracketed morality."[169]

Victoria Garrick spoke of her struggle to balance the academic rigors as a student with life as a Division I athlete on the USC Women's Volleyball Team.[170] Victoria experienced depression, anxiety, and a binge-eating disorder.[171] She described this time, saying that "I had this dark cloud over my head and it followed me everywhere . . . when I woke up, it was there when I went to sleep, it was there in practice every day passing balls."[172] In Garrick's view, "[t]he culture of athletics preaches, where there's a will there's a way, the best don't rest, unless you puke, faint or die, keep going. Mental

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[166] *Id.* (quoting Phelps saying that "we're just products. . . [i]t's frightening. It's scary. And it breaks my heart. Because there are so many people who care so much about our physical well-being, but I never saw caring about our mental well-being.").

[167] *See Tell Your Story,* ATHLETES AGAINST ANXIETY & DEPRESSION, https://www.aaadf.org/tell-your-story [https://perma.cc/F5TB-HHGN] (last visited Oct. 16, 2021).

[168] *See* Cauthen, *supra* note 6.

[169] *Id.*

[170] *Id.*

[171] *Id.*

[172] *Id.*

illness is associated with weakness. To appear weak is the last thing an athlete wants."[173]

After getting help from an on-campus sports psychologist, Garrick wanted to tell her story to help others in the same situation. She explained that it took a long time to accept her mental health issues because of the stigma society places on mental illness. She quotes Dr. Jeffery Liberman, who defined stigma as "dishonor" or "disgrace," and that it is "like the scarlet A that Hester Prynne is forced to wear or the mark on Cain in the Bible. It's this label that outcasts you from everyone else."[174] She felt the same concerns associated with mental health.

Many athletes are afraid to talk about mental illness or to admit that they are dealing with it because they might be labeled as weak. Victoria woke up every morning with fear and anxiety, constantly worried about getting through the day.[175] Game days were worse. She stated that during games "[t]here were times I would feel this knot in my stomach and my skin start to crawl and my hands start to shake and eyes well with tears because I was so afraid to play and make a mistake because at an elite level mistakes are costly."[176] As Dr. Parham has noted, "[a]thletes are as vulnerable to mental-health challenges as the general public, and their battles with stigma remain a powerful force stopping them from seeking help and support."[177]

III. Legal Considerations Regarding Athlete Mental Health

The foregoing discussion identified aspects of sport that pose risks for athlete mental health, as well as the fact that many athletes, like the general population, experience mental health struggles and disorders. The following section explores legal considerations regarding athlete mental health. For example, do athletes with mental health disorders qualify for protection under federal law, such as the Americans with Disabilities Act? If so, what accommodations are reasonable in competitive sport? Do sport governing bodies and teams have duties to identify, provide access to treatment, and *accommodate* athlete mental health issues? What privacy and confidentiality

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[173] TEDx Talks, *Athletes and Mental Health: The Hidden Opponent — Victoria Garrick — TEDxUSC*, YouTube (June 2, 2017), https://www.youtube.com/watch?v=sdk7pLpbIls [https://perma.cc/4DWN-RTEF].

[174] *Id.*

[175] *Id.*

[176] *Id.*

[177] Parham, *supra* note 8.

issues are raised by such reporting and data collection programs? How does player mental health issues impact contractual obligations and discipline?

A. Federal Disability Law

Federal legislation, through the Rehabilitation Act of 1973, which applies to federally funded programs (such as universities), and the Americans with Disabilities Act of 1990 ("ADA"),[178] whose broader coverage reaches most private employer[179] and private entities constituting places of public accommodations,[180] prohibits discrimination on the basis of disability. Discrimination is defined to include, *inter alia*, "the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability . . . [and] a *failure to make reasonable modifications* in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities."[181] These laws obligate covered entities to provide reasonable accommodations that will enable qualified individuals with disabilities to access and to participate in the program or activity. A goal of these laws, which apply to virtually all sports teams and organizations, is to assure the equality of opportunity and full participation for individuals with disabilities. An exception to this obligation exists if such accommodation causes undue hardship or requires a fundamental alteration of the program involved.[182]

To invoke the ADA, an individual has to establish that (1) the person is "disabled" within the meaning of the statute; (2) the person is "otherwise qualified" to participate in the sports program with or without reasonable accommodations; (3) the person was discriminated against or excluded "because of" the person's disability; and (4) the requested accommodation

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[178] 29 U.S.C. § 794(a) ("No otherwise qualified individual with a disability . . . shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.").

[179] 42 U.S.C. § 12112(a) ("No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.").

[180] 42 U.S.C. § 12182.

[181] 42 U.S.C. § 12182(b) (emphasis added); *see also* 42 U.S.C. § 12102(1) (defining disability to mean (a) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (b) a record of such impairment; or (c) regarded as having such an impairment).

[182] 42 U.S.C. § 12182(b).

would not fundamentally alter the nature of the program or, as here, the sport or competition.[183] As a prerequisite, the defendant must be subject to the law as either a recipient of federal funds (Rehabilitation Act);[184] a "covered entity" under the ADA, such as a public entity (ADA Title II); a place of public accommodation (ADA Title III); or an employer of the individual claimant (ADA Title I) .[185]

1. U.S. Sport Organizations Are "Covered Entities" Under the ADA

Professional sports teams which "employ" players are subject to compliance with Title I of the ADA. Educational institutions and other sport organizations, including the NCAA, are "places of public accommodation" subject to Title III of the ADA.[186] In *PGA Tour, Inc. v. Martin*, the Supreme Court held that the Professional Golf Association ("PGA"), which sponsors golf tournaments, was a "place of public accommodation" under the ADA.[187] International sporting organizations and events (such as the French Open) may be covered by the non-discrimination mandates of their respective governing body charters and applicable laws.[188]

2. When Do Mental Health Conditions Constitute a "Disability"?

Not all mental health situations qualify for statutory protection. The ADA defines "disability" as: (a) a physical or mental impairment that substantially limits one or more of the major life activities of the individual.[189]

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[183] *See* Woolf v. Strada, 949 F.3d 89, 93 (2d Cir. 2020) (identifying elements of an ADA prima facie case); Martin v. PGA, 532 U.S. 661, 676 (2001).

[184] 29 U.S.C. § 794(a) (Rehabilitation Act),

[185] The ADA is codified under five titles. Title I applies to employment, Title II applies to public programs and services, and Title III to private entities constituting places of public accommodation. 42 U.S.C. § 12112, 12132, 12182.

[186] *See* Tatum v. NCAA, 992 F. Supp. 1114, 1121 (E.D. Mo. 1998) (finding that the NCAA "operates" a place of public accommodations in terms of the entity's power to control, manage, or regulate the place and conditions causing the alleged discrimination); Shultz by & Through Schultz v. Hemet Youth Pony League, 943 F. Supp. 1222, 1225 (C.D. Cal. 1996) (holding that a youth baseball league and its organizing body were covered by the ADA and that "Title III's definition of 'place of public accommodation' is not limited to actual physical structures with definite physical boundaries").

[187] 532 U.S. 661, 666-667 (2001).

[188] Article 30 of the U.N. Convention on the Rights of Persons with Disabilities (CRPD) provides a similar nondiscrimination mandate and right to sport and has been adopted by over 187 countries.

[189] 42 U.S.C. § 12102(1) (defining disability).

"Mental impairment" includes "[a]ny mental or psychological disorder, such as . . . emotional or mental illness."[190] The Equal Employment Opportunity Commission guidance on psychiatric disabilities cites the following conditions as examples: "major depression, bipolar disorder, anxiety disorders (which include panic disorder, obsessive compulsive disorder, and post-traumatic stress disorder), schizophrenia, and personality disorders."[191] The regulations clarify that "[e]ven if a condition is an impairment, it is not automatically a 'disability.' To rise to the level of a 'disability,' an impairment must 'substantially limit' one or more major life activities of the individual."[192] This determination considers the severity of the limitation and the length of time it restricts a major life activity, and "[s]hould be based on information about how the impairment affects that individual and not on generalizations about the condition."[193] Thus, whether a mental impairment qualifies under the ADA requires an individualized assessment of its severity and impact on the individual.[194]

3. Reasonable Accommodation or Fundamental Program Alteration?

An athlete with a recognized mental impairment is legally entitled to a reasonable accommodation of program requirements,[195] unless such accommodation requires a fundamental alteration of the program.[196] In *Martin*, the

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[190] Enforcement Guidance on the ADA and Psychiatric *Disabilities*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Mar. 25, 1997), http://www.eeoc.gov/policy/docs/psych.html [https://perma.cc/4BRQ-6KXD].

[191] *Id.*

[192] *Id.*

[193] *Id.*

[194] *See Depression, PTSD, & Other Mental Health Conditions in the Workplace: Your Legal Rights*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Dec. 12, 2016), www.eeoc.gov/laws/guidance/depression-ptsd-other-mental-health-conditions-workplace-your-legal-rights [https://perma.cc/DSG9-CZL9].

[195] *Enforcement Guidance*, *supra* note 190, at Questions 23, 29 (noting that accommodations for individuals with mental impairments may involve changes to workplace policies, procedures, or practices, time off from work or a modified work schedule, physical changes to the workplace or equipment, modifications to a workplace policy, adjustments to supervisory methods, providing a job coach, or job reassignment.); *see also Sharing the Dream: Is the ADA Accommodating All?,* U.S. COMM'N ON CIVIL RIGHTS (Oct. 2000), https://www.usccr.gov/pubs/ada/ch5.htm [https://perma.cc/S7JY-G55M] (discussing critiques of EEOC Psychiatric Guidance regulations).

[196] 42 U.S.C. § 12113(b) ("[T]he term 'qualification standards' may include a requirement that an individual shall not pose a direct threat to the health and safety of other individuals in the workplace").

Supreme Court posited the central issue as "whether allowing the plaintiff, given his individual circumstances, the requested modification of using a cart in tournament competition would fundamentally alter PGA . . . golf competitions."[197] Golfer Casey Martin, due to a progressive degenerative circulatory disorder, requested a waiver of the PGA's "no cart" rule.[198] In deciding whether the accommodation must be granted, the Court considered the two ways Martin's use of the golf carts might "fundamentally alter the nature" of the sporting event: either the modification would alter an essential element of the game or the modification may give the disabled player an advantage over others.[199] The Court found that using golf carts is not "inconsistent with the fundamental character of the game of golf," that the "essence of the game has been shot-making," and ultimately that the walking rule is "not an essential attribute of the game itself."[200] The ADA also requires that a disabled individual's need be evaluated on an individual basis, and in Martin's case, the walking rule was in place to subject players to fatigue, something Martin was already experiencing at a greater level than his competitors.[201]

a. Royce White and the NBA

Former NBA Houston Rockets player Royce White, due to his diagnosed generalized anxiety disorder, panic attacks, and obsessive-compulsive disorder, has a fear of flying.[202] White made a formal request for accommodations, including permission to drive rather than fly to games and to determine his own mental health treatment through the use of an independent physician.[203] White asserted that "Rockets management is 'unqualified' to make determinations about his health because they are not mental health professionals[.]" He sought for the Rockets to implement new mental health protocols including a mental health professional who would treat him and decide if he was fit to play. The Rockets claimed that they tried to accommodate his fear of flying but indicated that White did not show up to practice. In response, White said, "[s]ome player doesn't show up for prac-

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[197] PGA Tour, Inc. v. Martin, 532 U.S. 661, 668, 677 (2001).
[198] *Id*. at 669.
[199] *Id*. at 682.
[200] *Id*. at 683-85.
[201] *Id*. at 690.
[202] Ben Golliver, *Royce White: I Would Be 'Risking My Life' by Playing Without Health Protocol*, SPORTS ILLUSTRATED (Jan. 19, 2013), https://www.si.com/nba/2013/01/19/rockets-royce-white-mental-health-protocol-hbo [https://perma.cc/6APV-EWX5].
[203] *Id.*

tice because of his knee, they say he didn't show up to practice because of his knee. [In my case,] they just say he didn't show up for practice [and it sounds like] it's your fault."[204]

Does the law provide protection for White? Does his condition constitute a "disability"? Are these accommodations "reasonable" to require of the NBA?[205] White did not file a formal lawsuit and has since not been able to find work in the NBA.[206] White spent some time playing in the NBL, the Canadian professional basketball league.[207] In 2018, White decided to train for MMA (Mixed Martial Arts).[208] White believes his fear of flying will not take a toll on his MMA career because MMA is primarily an individual sport in which he can make travel decisions on his own.

b. Naomi Osaka and Press Conferences

Had a court analyzed Royce White's request to drive rather than fly to NBA games, or Naomi Osaka's request to modify press conference obligations due to mental health concerns, the central questions to be addressed would be (a) whether the athlete's mental health constituted a "disability"; and (b) whether the requested accommodations to drive rather than fly to games, or to forgo press conferences, respectively, impacted essential elements of their professional sporting competitions. Although the French Open event is not subject to the ADA, similar nondiscrimination rights under international law can apply. The U.S. Open, like the PGA, would be considered a "place of public accommodation."

Osaka has been open about her struggle with depression.[209] To invoke ADA protection, for example to waive press conference obligations, Osaka's

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[204] *Id.*

[205] *See* McCann, *supra* note 17 (noting that the Rockets attempted to provide special travel arrangements for White but, after he refused to show up at practice, the Rockets suspended him).

[206] *See* McCann, *supra* note 17; Robert Silverman, *How the NBA Finally Learned to Start Taking Mental Health Seriously,* DAILY BEAST (Mar. 19, 2018, 1:07 AM), https://www.thedailybeast.com/how-the-nba-finally-learned-to-start-taking-mental-health-seriously [https://perma.cc/8T5T-RPRY].

[207] *See* Mary Pilon, *"I'm F***ing Weird": How Royce White Became the Most Important Basketball Player Alive*, ESQUIRE (May 7, 2017), https://www.esquire.com/sports/a54756/royce-white-im-fucking-weird/ [https://perma.cc/AVB5-2472].

[208] Jon Wertheim, *Royce White Takes on MMA*, SPORTS ILLUSTRATED (Apr. 13, 2020), https://www.si.com/mma/2020/04/13/royce-white-takes-on-mma [https://perma.cc/3UJA-G2K6].

[209] Matthew Futterman, *Naomi Osaka Quits the French Open After News Conference Dispute*, N.Y. TIMES (May 31, 2021), www.nytimes.com/2021/05/31/sports/tennis/naomi-osaka-quits-french-open-depression.html [https://perma.cc/7HBX-KTG7].

condition would need to be evaluated on an individual basis. Depression is recognized as a disability, although the ADA protection does not extend to generalized mental health issues that do not restrict major life activities.[210] An individual seeking ADA accommodation would need to provide request or notice of reason, although the program or employer should otherwise honor confidentiality.[211] Osaka's Twitter announcement did not constitute the formal notice and request for ADA accommodations, and she admits she could have presented her request differently.

Regarding whether allowing Osaka to skip press conferences would "fundamentally alter" the nature of tennis tournaments, either by altering the game or giving her an unfair advantage, press conferences can help promote the sport and event but are hardly essential to the game of tennis. This is a more obvious case than the walking rule deemed peripheral in *Martin*.

4. Duties to Disclose and Request Accommodations

Treatments for mental health disorders may involve psychiatric medication.[212] Athletes are subject to the strict anti-doping restrictions of the World Anti-Doping Code ("WADC"), which prohibits certain medications. The decision to take psychiatric medications involves consultation with a medical doctor and consideration of potential negative impact on athletic performance, potential therapeutic performance-enhancing effects, ergogenic effects, and safety risks.[213] Sports' governing bodies are most concerned with ergogenic effects and the possible advantages an athlete may gain over their competitors. For example, stimulants are the only class of psychiatric drugs classified as prohibited substances because they can enhance performance beyond a therapeutic effect.[214] Bupropion, a medication used to treat depression, is currently on the World Anti-Doping Agency's monitoring program because it may allow athletes to improve performance by pushing themselves to higher core body temperatures.[215]

U.S. Olympian Justin Gatlin sued the U.S. Olympic Committee, the U.S. Anti-Doping Agency, USA Track & Field, and the International Association of Athletics Federations ("IAAF"), claiming his rights under the

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[210] *Enforcement Guidance*, *supra* note 190, at Question 5; *see also supra* Sec. III.A.2.
[211] *Depression, PTSD, supra* note 194.
[212] Reardon, *supra* note 9, at 669.
[213] *Id.*
[214] *Id.*
[215] *Id.* at 672.

ADA were violated.[216] Gatlin argued that he was discriminated against for taking prescribed medication to treat his Attention Deficit Disorder ("ADD"), which led to his first two doping violations.[217] His second violation resulted in suspension that kept him from competing in the 2004 Beijing Olympic Games to defend his gold medal.[218] A federal judge dismissed Gatlin's request for injunctive relief to compete in the 2008 Olympics on jurisdictional grounds, as the case was subject to international arbitration; the judge wrote that "[n]onetheless, the result of this determination is quite troubling because Mr. Gatlin is being wronged, and the United States Courts have no power to right the wrong perpetrated upon one of its citizens."[219] The Court of Arbitration for Sport rejected Gatlin's appeal and argument that his use of medication that resulted in a positive doping test was protected under the ADA.[220] Should Justin Gatlin have been suspended for taking prescribed medication? The CAS found that the violation was clearly unintentional, but it also determined that he should have sought an exemption for his medication before competing.[221] After serving the suspension, Gatlin returned to track and field in 2010, competed at the 2012 Olympics, and won a silver medal.

Athletes may request a Therapeutic Use Exemption ("TUE") which is "a process that allows athletes to request permission to take a medication that is on the WADA prohibited list," as a possible accommodation when medication may help with mental health.[222] An athlete can apply for a TUE through their national anti-doping agency or international federation, and the TUEs are only granted if no unfair advantage is given to the athlete.[223] Although the TUE process is intended to be confidential to protect the athlete's privacy, in 2016 a hack revealed that Simone Biles and Venus and Serena Williams, among others, obtained TUEs in order to take prescribed

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[216] *Gatlin Finalizing Lawsuit with Officials*, ESPN (Apr. 15, 2009), https://www.espn.com/olympics/trackandfield/news/story?id=4071037 [https://perma.cc/88C3-8CKB].

[217] *Id.*

[218] *Id.*

[219] Gatlin v. United States Anti-Doping Agency, Inc., No. 3:08-cv-241/LAC/EMT, 2008 U.S. Dist. LEXIS 112850 (N.D. Fla. June 24, 2008)

[220] Justin Gatlin v. United States Anti-Doping Agency, Court of Arbitration for Sport, 2008/A/1462 at 9 (award of June 6, 2008) (Hober, Arb.).

[221] *Id.*

[222] Reardon, *supra* note 9, at 672.

[223] James Masters, *When Athletes Can Take Drugs. What Are Therapeutic Use Exemptions?,* CNN (Sept. 14, 2016, 11:44 AM), www.cnn.com/2016/09/14/sport/therapeutic-use-exemptions-explainer/index.html [https://perma.cc/F9GT-U5M2].

medication.[224] Biles sought medication to treat her ADHD.[225] Biles was granted a TUE, but in 2002, Justin Gatlin was not because the IAAF indicated it would not grant "applications for athletes with [ADD] who seek an exemption on medical grounds to use amphetamines during competition."[226] Gatlin, who still tested positive though he had stopped taking the medication before the competition as required by the IAAF, could have avoided any suspension had he received a TUE. Was Biles granted an exemption because the culture and conversation surrounding mental health has changed since Gatlin's 2002 suspension? Did decisions like *PGA v. Martin* emphasize the need for reasonable accommodations in sport?

B. Athlete Privacy and Confidentiality

The obligation to disclose a need for mental health accommodation or to screen athletes for mental health risks must also be considered in light of athlete privacy and confidentiality concerns. A prerequisite to sports participation generally involves physical examinations and disclosure of physical injuries to the team. In certain sports, player physical injuries are also disclosed to the public.[227] Should athlete mental health be treated similarly? Do teams and potential employers have a right to know an athlete's mental health history or condition or to disclose publicly such conditions? Athlete privacy rights must also be considered with programs that have procedures to identify and refer at-risk athletes for mental health treatment and other data collection and tracking systems.[228] Athletes are often required to waive privacy rights regarding health status by contractual waiver or under a collective bargaining agreement as a condition of playing the sport. What does

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[224] Rebecca R. Ruiz, *Simone Biles and Williams Sisters Latest Target of Russian Hackers,* N.Y. TIMES (Sept. 14, 2016), https://www.nytimes.com/2016/09/14/sports/simone-biles-serena-venus-williams-russian-hackers-doping.html [https://perma.cc/NHU4-6BPH].

[225] *Id*.

[226] Zaheer Clarke, *Gatlin Is Not a Two-Time Drug Cheat*, JAMAICA OBSERVER (Aug. 13, 2017), https://www.jamaicaobserver.com/the-agenda/gatlin-is-not-a-two-time-drug-cheat_107565 [https://perma.cc/U2W4-B6DJ].

[227] Christopher R. Deubert et al., *Comparing Health-Related Policies and Practices in Sports: The NFL and Other Professional Leagues*, 8 HARV. J. SPORTS & ENT. L. (Special Issue) 1, 18-19 (2017) (noting injury reporting policies in major professional sports).

[228] *See infra* Section III.A. (discussing NCAA Mental Health Best Practices to determine student-athlete informed consent to authorize clinician communication with sports staff and college administration regarding athlete participation in counseling).

this mean in terms of an athlete's privacy and confidentiality and willingness to seek treatment?

Team owners may assert their need to know the complete physical and mental health of their teams' players in order to protect their financial investments and team safety.[229] Elite athletes' medical histories are vital sources of information when it comes time for recruiting, contract negotiations, free agency, or playing time. For example, coaches and teams are aware of player's injuries; in the NFL an offseason injury can cost a player salary money or even get them cut.[230] Most athletes must submit to preparticipation physical evaluations to ensure medical eligibility for sports participation.[231] Some of these questionnaires include screening for mental health concerns. Without policies in place for athlete mental health privacy, these athletes will have more than their physical injuries shared with their employers, the media, and fans.

Federal laws provide only limited protection for athlete health information in the sports context.[232] The Health Insurance Portability and Accountability Act of 1996 ("HIPAA")[233] regulates the privacy, security, and disclosure of an individual's "protected health information" ("PHI"), which includes the "past, present or future physical or mental health or condition of an individual."[234] But HIPAA only applies to "covered entities," such as healthcare providers, health plans, healthcare clearinghouses, and related business associates.[235] Thus, healthcare providers and health insurance plans are precluded from disclosing an athlete's PHI to employers, such as a sports

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[229] *See* Alfi Ahmed, *The NBA Needs to Stay Out of Its Players' Mental Health Records*, MEDIUM (Aug. 27, 2018), https://medium.com/grandstandcentral/the-nba-needs-to-stay-out-of-its-players-mental-health-records-kevin-love-demar-derozan-94b9d6736ea0 [https://perma.cc/UUS8-242Q].

[230] *See* Travis Walker, *The Price of Health Privacy in Sports*, UNIV. OF UTAH: S.J. QUINNEY COLL. L., (Nov. 15, 2015), https://law.utah.edu/the-price-of-health-privacy-in-sports/ [https://perma.cc/6KKH-4LS5].

[231] *See* Chris G. Koutures, *How to Screen Athletes for Mental Health Risk While Protecting Confidentiality*, AAP NEWS (Mar. 19, 2020), https://www.aappublications.org/news/2020/03/19/focus031920 [https://perma.cc/WQT8-MMZB] (recommending provider separate medical eligibility form from confidential medical history information).

[232] *See* James B. Hike, *An Athlete's Right to Privacy Regarding Sport-Related Injuries: HIPAA and the Creation of the Mysterious Injury*, 6 IND. HEALTH L. REV. 47, 64 (2009).

[233] *See* Health Insurance Portability and Accountability Act of 1996, 42 U.S.C § 201.

[234] *Id.* (requiring Health and Human Services to issue privacy and security regulations).

[235] *Id.*

team, or to the public.[236] Doctors and therapists are also ethically and legally bound to respect patient confidentiality.[237]

Employers and educational institutions are exempt from HIPAA. Professional sports organizations generally are not "covered entities" under HIPAA, and team physicians and trainers employed by the organization fall under the employer exemption as they are providing care to the athletes within an employment context.[238] Team trainers can reveal an athlete's health information to coaches, managers, and owners without violating HIPAA, as these are also traditional operations.[239] Teams may be partially subject to HIPAA when they act as "health care providers" such as if a team outside-doctor bills, charges, or transmits PHI to an insurance plan.[240] Thus, when an athlete goes to a medical provider not employed by a sports organization, HIPAA applies to that medical provider because they are a covered entity.[241]

Intercollegiate athletic programs, as part of educational entities, are regulated by the Family Education Rights and Privacy Act ("FERPA"), which protects student educational records.[242] FERPA exemptions to HIPAA do not apply when a university is participating in non-traditional

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[236] Neal, *supra* note 36, at 42 ("The guiding philosophy behind legal and ethical safeguards for confidentiality is that clients have the right to determine who will have access to information about them and their treatment. If the client does not trust that the information they provide to their therapist will be kept private, they may be reluctant to share relevant information with their treatment provider, thus negatively impacting the potential treatment success.").

[237] *See id.*

[238] *See* Donovan Dooley, *Do HIPAA Laws Apply to Athletes?*, DEADSPIN (June 28, 2020, 12:44 PM), https://www.deadspin.com/do-hipaa-laws-apply-to-athletes-1844195531 [https://perma.cc/J53F-DQQN].

[239] Hike, *supra* note 232, at 54.

[240] Barbara Osborne & Jennie L. Cunningham, *Legal and Ethical Implications of Athletes' Biometric Data Collection in Professional Sports*, 28 MARQ. SPORTS L. REV. 37, 52-53 (2017) (concluding that federal regulations authorize professional sport team waivers from HIPAA and player health records thus part of the employment record that can be disclosed).

[241] Dooley, *supra* note 238.

[242] *See* Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232(g); *see also Understanding FERPA,* NATA NEWS (Dec. 5, 2017), https://cpb-us-w2.wpmucdn.com/sites.udel.edu/dist/d/3615/files/2017/07/Understanding-FERPA-1dxvgb6.pdf [https://perma.cc/W5YM-PDF6] ("FERPA allows school records to be shared in certain cases. Medical information kept by an athletic trainer employed by the school is considered part of the student's educational records, therefore subject to FERPA standards. . . . [FERPA] is a complex Federal law that protects the privacy interests of parents and students with regard to education records.").

operations (those falling outside the traditional realm of treatment).[243] An example of non-traditional operations is when an athletic trainer gives medical information to the media; if the trainer only reported the information to an athlete's coaches, this would be a traditional operation and HIPAA would not apply, but because the report is made to the media, FERPA does not exempt the university from HIPAA.[244]

Mental health information is included within HIPAA's protected personal health information, meaning the current system in place would allow teams and organizations to reveal a player's mental health information similarly to how they can make public sports-related injuries. Whether or not HIPAA applies (and there is ambiguity about its application to sports organizations), professional sport contracts typically require athletes to submit to medical examinations, to disclose medical records, and to provide notice of injury or medical illness.[245] These waivers and attendant medical records become part of the employment record. Once the sports organization is aware of the athlete's health information, because of these contractual waivers, the organization can reveal the information to the media, unless otherwise contracted. HIPAA does not apply to the media as they are not covered entities.[246]

Confidentiality may be bargained for, such as the major professional sports league substance abuse policies.[247] Historically NFL teams have chosen not to reveal the nature of physical injuries that were not sustained in relation to sports.[248] For example, the Indianapolis Colts offered no insight into the nature of Corey Simon's non-sport related 2006 injury.[249] The Colts cited Simon's privacy and federal medical privacy laws in making this decision.[250] Mental health issues are not always sports-related. Sports organizations could follow this example and choose not to make public the mental health reasons an athlete might take time off or miss a game or practice when these struggles are not sports-related. The NBA Players Association has negotiated for restrictions on disclosure of athlete mental health history.[251]

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[243] Hike, *supra* note 232, at 53.
[244] *Id.* at 54.
[245] *Id*. at 59.
[246] *Id*.
[247] *See* Deubert, *supra* note 227, at 41.
[248] Hike, *supra* note 232, at 64.
[249] *Id.*
[250] *Id*.
[251] *See Mental Health & Wellness Department*, NAT'L BASKETBALL PLAYERS ASS'N, https://nbpa.com/mentalwellness [https://perma.cc/92SF-TGFP] (last visited Oct. 16, 2021).

Public disclosure of athlete mental health issues carries a significant risk for athletes to be subjected to stigma, discrimination, career jeopardy, and public opinion. Respect for athlete privacy and promotion of treatment justify the confidentiality of athlete mental health, regardless of legal rights to disclose otherwise.[252] Limits on contractual waivers of physical and mental health should be provided by contract or proposed legislation.

C. Contractual Implications

Showing up for practice and competition is express if not implicit in athletic contracts at any level. An athlete's abrupt refusal to compete on "mental health" grounds, absent seeking coverage under disability discrimination law, may be grounds for a claim of breach of contract, termination, disciplinary violations, or sending the athlete home from the Olympics. The Grand Slam event organizers issued such a warning to Naomi Osaka for her refusal to participate in press conferences per her contract at the French Open. At the Tokyo 2020 Olympics, Simone Biles withdrew from multiple events, including the all-around competition. Osaka's sponsor Nike, as perhaps the USOPC's response to Biles, could have cited these contractual rights and obligations. Nike chose not to do so. The USOPC also supported Biles who was able to recompose and compete in her final Olympic event, winning a bronze medal. The public was largely in support of both Osaka and Biles and applauded the courage of these athletes to prioritize their mental health. The optics demanded that these athletes be listened to and given time, to say nothing of the fact that it was the sheer right thing to do.

As the issue of athlete mental health becomes more prominent, sport entities and commercial sponsors may consider legal remedies when an athlete decides not to compete or participate in press conferences, appearances, or the like. For example, a sport entity may consider drafting or invoking contractual rights to recoup, suspend, or terminate payment or eligibility where an athlete withdraws from competition due to mental health.[253] Yet, an athlete may not be similarly penalized for withdrawing due to physical injury. Even if a sport authority has legal recourse against an athlete for not

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[252] *See* Ahmed, *supra* note 229 and accompanying text (citing experts in agreement that the "NBA Needs to Stay Out of its Players' Mental Health Records").

[253] *See* Edgardo Muñoz & Otavio Delavi, *The Impact of Athlete Mental Health on Sponsorship Contracts,* LINKEDIN (Aug. 24, 2021) https://www.linkedin.com/pulse/impact-athletes-mental-health-sponsorship-agreements-edgardo-mu%C3%B1oz/ [https://perma.cc/R296-F8EJ] (noting that most sponsorship contracts have provisions and stipulated remedies addressing when athletes withdraw due to injury, ineligibility, and suggesting that mental health grounds could be treated similarly).

competing on mental health grounds, a better approach not only from a brand optics and image perspective would be to support the athlete, guide them to professional resources, and negotiate a strategy to welcome them back once ready.

In an extensive study on NFL Football Player Health, *Comparing Health-Related Policies and Practices in Sports: The NFL and Other Professional Leagues*,[254] researchers cited the impact compensation systems can have on players' physical or mental health decisions, such as when to retire and whether to disclose or play through physical and mental struggles.[255] Players are concerned that disclosures about their mental health issues could affect their playing time and compensation. Guaranteed salary player contracts may also correlate with player health.[256] Players should be assured that accommodations or breaks needed due to mental health concerns will not jeopardize their compensation or contracts, including the excusing of players, such as the NFL's "Beast Mode" Marshawn Lynch, who reluctantly participated in post-game press conferences, repeatedly answering questions with the statement "I'm just here so I don't get fined."[257]

Negotiation power and collective bargaining agreements ("CBA(s)") are one method elite athletes can use to ensure mental health protections in their respective sports.[258] In professional team leagues, player associations protect their members by ensuring mental health accommodations through the CBA.[259] Few individual athletes have substantial bargaining power to negotiate alternatives or accommodations for mental health. Notably, Osaka felt bound to withdraw due to the specter of sanction, while Biles chose when to return to competition. Individual sports organizations should provide assurances and set forth a process to help athletes in a mental health crisis.

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[254] *See* Deubert, *supra* note 227, at 22 ("In their efforts to maximize their earnings (and sometimes, eligibility for various benefits), some players might sacrifice their short- and/or long-term physical and mental health. The compensation structures dictate when or if a player faces such a trade-off.").

[255] *Id.*

[256] *See* Dom Cosentino, *Why Only the NFL Doesn't Guarantee Contracts*, DEADSPIN (Aug. 1, 2017, 11:38 AM), deadspin.com/why-only-the-nfl-doesnt-guarantee-contracts-1797020799 [https://perma.cc/P2ZM-7UXR].

[257] Kyle Newport, *Marshawn Lynch at Super Bowl Media Day: "I'm Here So I Won't Get Fined"*, BLEACHER REPORT (Jan. 27, 2015), https://bleacherreport.com/articles/2344416-marshawn-lynch-at-super-bowl-media-day-im-here-so-i-wont-get-fined [https://perma.cc/E8T6-358H].

[258] *See id.*

[259] Deubert, *supra* note 227, at 19.

Many athletes savor the limelight and media attention, while the same can cause trauma for others. Sport rules and contracts should provide accommodation in these circumstances, perhaps similar to a TUE process with fair notice to sport organizers to modify non-essential obligations such as press conferences; allocating "sick days", as Osaka proposed; or negotiating an alternative press contract in which sick days and schedule commitments can be individualized based on each individual's health history. Negotiation power and collective bargaining agreements are one way that elite athletes and their players' unions can protect themselves and work mental health protections into their respective sports.

D. Duties of Care

Inherent in running a sport program is a duty of care to the athletes. Safety includes physical and mental health.[260] Commentators have argued that a university's special relationship with a student-athlete may create a duty to provide them with mental health services.[261] The following section analyzes what sport organizations are doing with respect to this duty.

IV. Sport Programs on Athlete Mental Health

Sports organizations have only recently begun to acknowledge and address athlete mental health concerns through various programs. Individual elite athletes have also been coming forward with new initiatives and partnerships that work to destigmatize and to promote the importance of mental health.

A. College – NCAA

The NCAA Sports Science Institute convened a taskforce to identify and advance mental health best practices.[262] Its 2016 publication, *Mental Health Best Practices*, set forth a set of recommended guidelines "designed to provide athletics and sports medicine departments . . . with recommendations for supporting and promoting student-athlete mental health."[263] The

[260] Mawdsley, *supra* note 63, at 244.
[261] *Id.*
[262] *Id.* at 250.
[263] *See Mental Health Best Practices: Inter-Association Consensus Document: Best Practices for Understanding and Supporting Student-Athlete Mental Wellness,* NCAA Sports Sci. Inst. 4 (2016), https://sites.tntech.edu/athleticscompliance/wp-content/uploads/sites/89/2018/08/MentalHealthBestPractices.pdf [https://perma.cc/4UK5-UHCT].

report identified four "key components" for understanding and supporting student-athlete mental health. The first guideline, *Clinical Licensure of Practitioners Providing Mental Health Care,* recommends that student-athlete mental health concerns be coordinated and managed by athletic trainers and team physicians, licensed practitioners qualified to provide mental health services who are easily accessible to student-athletes, including through the establishment of a self-referral process.[264] The second recommends the implementation of *Procedures for Identification and Referral of Student-Athletes to Qualified Practitioners*, which includes role-specific training and a referral process for stakeholders to help support the identification and referral for emergency and routine mental health referrals.[265] This report notes, but does not define, how to address considerations regarding student confidentiality and informed consent.[266] The third guideline provides that student-athletes be provided a *Pre-Participation Mental Health Screening*.[267] The fourth guideline, *Health Promoting Environments That Support Mental Well Being and Resilience*, recognizes the athletics environment at a university can help support positive mental health among student-athletes by "normalizing care seeking and fostering experiences and interactions that promote personal growth, self-acceptance, autonomy and positive relations with others."[268] The report recommends that the primary athletics health care providers and licensed mental health practitioners meet on an annual basis to discuss the institutional protocols regarding mental health. Additionally, coaches, faculty athletics personnel, and fellow student-athletes (among others), should have educational mental health information communicated to them regarding topics such as stress management practices, signs and symptoms of mental health disorders, and financial support.[269]

The NCAA has taken additional steps. In 2019, NCAA member schools of the Power 5 autonomous conferences agreed to provide access to mental health care for their student-athletes.[270] Mental health was also a

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[264] *Id.* at 7.

[265] *Id.* at 10.

[266] *Id.* at 11.

[267] The National Athletic Trainers' Association recommends a series of nine questions, which serves as a starting point for the screening. An answer of "yes" to any of the nine questions leads to a follow up discussion with the student-athlete and relevant personnel to determine whether the student-athlete should be referred to a licensed practitioner. *Id.* at 13.

[268] *Id.* at 14.

[269] *Id.*

[270] Michelle Brutlag Hosick, *Access to Mental Health Services Guaranteed by Autonomy Conferences,* NCAA (Jan. 24, 2019), https://www.ncaa.org/about/resources/me-

focus of the NCAA's 2020 Convention,[271] where NCAA Chief Medical Officer Dr. Brian Hainline stated that "the NCAA is emphasizing mental health among its top priorities . . . We're doing a lot, including generating awareness, programming and other educational resources for members and students, and we understand that we must continue to build on these efforts going forward."[272] Following the tragic suicides of two high-profile student athletes[273] in 2018, the NCAA implemented a formal policy and guidebook entitled *Mind, Body & Sport–Understanding and Supporting Student-Athlete Mental Wellness* (2021), in which Dr. Hainline notes the urgency of addressing student mental health.[274] This handbook has chapters including personal narratives of student-athletes and explanations of stressors on student-athlete mental health.[275] The handbook is a significant resource for addressing student-athlete mental health for institutions, although, these guidelines are not requirements, and a school's decision to implement them is voluntary. The NCAA's Sports Science Institute website includes *Mental Health Educational Resources* and *Implementation Tools* with links to various resources and implementation tools to assist conference offices, schools, and campus stakeholders.[276] At the time of this writing, the links led to pages that no longer exist.[277] While these guidelines identify best practices, evidence of their implementation and effectiveness warrants further study.[278]

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dia-center/news/access-mental-health-services-guaranteed-autonomy-conferences [https://perma.cc/D9P3-38WB].

[271] *Id*.

[272] *Mental Health Is Key Focus at NCAA Convention*, NCAA, https://www.ncaa.org/about/resources/media-center/news/mental-health-key-focus-ncaa-convention [https://perma.cc/49LJ-RFK5] (last visited Dec. 2, 2021).

[273] Born, *supra* note 51, at 1221.

[274] *Id.* at 1242-43.

[275] *Id.* (citing examples such as "transition, performance, injury, academic stress and coach relations; experts on student-athlete depression, anxiety, eating disorders, substance abuse and gambling").

[276] *Mental Health Educational Resources,* NCAA, https://www.ncaa.org/sport-science-institute/mental-health-educational-resources [https://perma.cc/UJ66-MT44] (last visited Oct. 29, 2021).

[277] *Id.*

[278] Andrea Stamatis et al., *Can Athletes Be Tough Yet Compassionate to Themselves?*, PLoS One (Dec. 31, 2020), https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0244579 [https://perma.cc/JLH3-9CLB] (stating that the NCAA's "best practices provide general goals, but they do not clarify the specific skills and education needed for their realization").

B. U.S. Major Professional League Sports

In recent years, U.S. professional sports leagues have begun to recognize the need for formal athlete mental health programs.

1. National Basketball Association

Although NBA players garner fame and average $7 million dollar salaries, NBA Commissioner Adam Silver addressed athlete mental health acknowledging that "[a] lot of these young men are genuinely unhappy."[279] In 2018, the National Basketball Players Association ("NBPA") announced its own mental health and wellness program and named Dr. William D. Parham as its first Director for Mental Health.[280] The NBPA program connects players in each city with independent mental health professionals.[281] In 2019, the NBA held a mandatory health and wellness meeting for team executives and mental health providers in Chicago, where new formal requirements were set for all 30 NBA teams.[282] All NBA teams are required to have a full-time mental health professional—a psychologist or behavioral therapist on staff, and a psychiatrist retained to assist as needed.[283] Additionally, teams must draft a "written action plan," outlining the steps to be taken in the event of mental health emergencies. The plan must inform team and staff members of the measures taken to ensure the privacy and confidentiality of all mental health matters.[284] The goal of this new program is to change the narrative surrounding mental health and provide resources, including mental health professionals in every NBA city, for players.[285]

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[279] Sean Ingle, *Elite Sport is Gradually Waking Up to Widespread Mental Health Issues,* THE GUARDIAN (Mar. 4, 2019), https://www.theguardian.com/sport/blog/2019/mar/04/elite-sport-mental-health [https://perma.cc/KS76-HWVF].

[280] Mary Pilon, *The NBPA's First Mental Health Director Has an Ambitious Plan for the Future*, BLEACHER REPORT (June 27, 2018), https://bleacherreport.com/articles/2783189-the-nbpas-first-mental-health-director-has-an-ambitious-plan-for-the-future [https://perma.cc/ME7K-3XA2].

[281] *Id.*

[282] Elijah Shama, *NBA Adopts New Rules Requiring Teams to Add Full-Time Mental Health Staff for 2019-2020 Season*, CNBC (Sept. 19, 2019), https://www.cnbc.com/2019/09/19/nba-now-requires-teams-to-add-full-time-mental-health-staff.html [https://perma.cc/3VRF-L92Q].

[283] *Id.*

[284] *Id.*

[285] *New NBPA Program Focuses on Mental Health*, NIH MEDLINE PLUS MAG. (Nov. 6, 2019), https://magazine.medlineplus.gov/article/new-nba-program-focuses-on-mental-health [https://perma.cc/8WV2-2VUF].

As part of the NBA Together campaign, the "NBA Mind Health" program "supports [NBA] fans, families and communities by promoting healthy minds and bodies and increasing awareness around emotional well-being."[286] The program has free resources on its website for youth players, coaches, and parents, including a helpline for free and confidential support, and partnerships with companies like Kaiser Permanente, Headspace, and the Child Mind Institute.[287] Overall, the basketball community's goal is to get people thinking about mental health the same way they think about physical health.[288]

2. National Football League

The NFL started its NFL Total Wellness initiative to promote wellness and to "assis[t] players, legends, and their families before, during and after their playing experiences."[289] The program's objective is to have players think about their mental health from day one in the NFL.[290] The program's website includes information related to resource provision, education, support systems, and governance. Rookie orientation includes a three-day mandatory program for all drafted and undrafted rookies, with eight psychoeducational modules on mental health topics like stress management and maintaining healthy relationships.[291] The initiative also connects players to outside resources such as free counseling sessions for players and any member of their household.[292] Training is also provided to team staffers, including athletic trainers, security personnel, and administrative staff, to teach them how to connect with people in crises and address the situation.[293]

In 2019, the NFL and NFL Players Association instituted a Mental Health and Wellness Committee to develop educational programs on mental health for teams, players, and players' family members.[294] Each team

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[286] *Mind Health*, NBA CARES, https://cares.nba.com/mind-health/ [https://perma.cc/5BHB-R8JT] (last visited Dec. 1, 2021).

[287] *Id.*

[288] Shama, *supra* note 282.

[289] *See NFL Total Wellness*, NFL FOOTBALL OPERATIONS, https://operations.nfl.com/the-players/nfl-total-wellness/ [https://perma.cc/ESL8-5HU5] (last visited Oct. 29, 2021).

[290] *Id.*

[291] *Id.*

[292] *Id.*

[293] *Id.*

[294] Dan Graziano, *NFL, NFLPA Announce Mental Health Initiative*, ESPN (May 20, 2019), https://www.espn.com/nfl/story/_/id/26788730/nfl-nflpa-announce-mental-health-initiative [https://perma.cc/5C7H-R4HV].

is required to have a behavioral health clinician onsite at the team facility for a minimum of eight hours a week to coordinate player mental health.[295] The goal is to help players with issues both on and off the field.[296]

After the high-profile deaths of several former NFL players such as Junior Seau and other reports concerning the long-term effects of concussions and CTE,[297] the NFL instituted its Life Line program to address suicide prevention for both current players who can be under significant pressure and former players who can struggle with transitioning from superstar status.[298] NFL Life Line is a free, confidential hotline for current and former players, coaches, team and league staff members, and family members to connect with licensed mental health providers who have received specialized training on NFL culture and resources.[299] The NFL has also enacted a strict policy regarding the safety rules and treatment of head trauma in an effort to prevent and lessen the long-term effects of CTE and concussions.[300]

3. Major League Baseball

Major League Baseball ("MLB") has several programs to address players' mental health. Like many other employers, the MLB has an Employee Assistance Program ("EAP") to help players and their family members manage personal problems.[301] EAP consultations can include medical evaluations, counseling, or referrals to other programs.

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[295] *Id.*

[296] *Id.*

[297] *See* Mark Fainaru-Wada & Steven Fainaru, *Seaus to Opt out of Concussion Deal*, ESPN (Sept. 3, 2014), https://www.espn.com/espn/otl/story/_/id/11457306/junior-seau-relatives-reject-proposed-settlement-nfl-former-players [https://perma.cc/GK42-P9GK]; *see also* Parham, *supra* note 8 (noting other NFL players who died by suicide).

[298] Rebecca A. Clay, *A New NFL Playbook: Enhancing Mental Health*, 48(1) MONITOR ON PSYCHOL. 22 (2017).

[299] *Id.*

[300] *See Legal Issues Relating to Football Head Injuries (Part I and II): Hearing Before the H. Comm. on the Judiciary*, 111th Cong. 31-37 (2009) (statement of Roger Goodell, Commissioner, National Football League); *see also* Daniel J. Kain, *"It's Just a Concussion:" The National Football League's Denial of a Causal Link Between Multiple Concussions and Later-Life Cognitive Decline*, 40 RUTGERS L.J. 697, 731 (2009) (discussing the history of the NFL's "concussion problem" and suggesting that players may file a lawsuit alleging the NFL wrongfully concealed studies about the effects of multiple concussions and failed to warn players of the risks).

[301] Christine Armstrong, *Athletes and Mental Illness: Major League Baseball Steps Up to the Plate*, NAT'L ALL. ON MENTAL ILLNESS (Nov. 1, 2010), https://

In 2010, MLB added an injury list designation (then called the "disabled list") for emotional disorders.[302] This was a rare move amongst the professional sports leagues as any missed time for mental health issues was usually considered a "Did Not Play—Coaches Decision" or something similar.[303] To qualify for the designation, the player must be "evaluated and diagnosed by a qualified mental health professional as suffering from a mental disability that prevents a player from rendering services."[304]

In 2018, twenty-seven of the thirty MLB teams employed "mental skills coaches" to help players with mental issues.[305] At least one MLB player, however, took issue with this program's effectiveness. In 2019, former Mariners pitcher Rob Whalen decided to retire from the MLB to focus on his battle with mental health and accused the Mariners of not doing enough to get him the help he needed.[306] Whalen had previously struggled to get out of bed and go to workouts and would wake up with cold sweats and his mind running through everything that could go wrong when he hit the mound. The Mariners "mental skills coach" recommended that Whalen seek professional treatment.[307] Whelan stated however, that the Mariners head of player development, Andy McKay, initially offered to give him a week off to deal with his anxiety but then texted Whalen a few days later that he would be replaced if he didn't return immediately.[308] After struggling through several starts and following a disappointing performance, Whalen packed up his things and booked a flight home.[309] He was placed on the restricted list and received contact information for a professional but was never contacted by his coach or other players.[310] During the offseason,

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www.nami.org/Blogs/NAMI-Blog/November-2010/Athletes-and-Mental-Illness-Major-League-Baseball [https://perma.cc/E7BE-5DS3].

[302] *Id.*

[303] *See id.*

[304] *Id.*

[305] Kristen Weir, *A Growing Demand for Sport Psychologists*, 49(10) AM. PSYCHOL. ASS'N 50 (2018).

[306] Hannah Keyser, *Rob Whalen's Retirement an Example of How Some MLB Teams Are Failing to Address Mental Health Issues*, YAHOO! SPORTS (Apr. 15, 2019), https://sports.yahoo.com/rob-whalens-retirement-an-example-of-how-some-mlb-teams-are-failing-to-address-mental-health-issues-170601773.html [https://perma.cc/PLH9-843Q].

[307] *Id.*

[308] *Id.*

[309] The Mariners claim that a staff member contacted Whalen and talked with him for four hours to ensure he was safe and connect him with a professional. Whalen, however, claims the call was much shorter than that and he told the team that he needed to get help and that he was "not in a good place mentally." *Id.*

[310] *Id.*

he worked with a therapist and started to feel better, ultimately returning and making a great first appearance,[311] after which Mariners manager Scott Servais told reporters, "[y]ou gotta tip your cap to everybody in our player development system. A player goes through what he went through last year, hitting the lows, the things he went through off the field, our organization wrapped our arms around him and really allowed him to turn it around."[312] Whalen certainly did not feel that the Mariners had "wrapped their arms around him" and said he felt very much alone during the process.[313] The game ended up being Whalen's last in the major leagues as he was sent back to Triple-A and then Double-A after another issue with anxiety. Soon after, he retired.[314]

4. National Hockey League

National Hockey League ("NHL") teams sponsor #HockeyTalks annual initiative to raise awareness about mental health, including fans and players in the discussion through social media.[315] Currently, fifteen of the thirty-one NHL teams host "Hockey Talks" nights during which fans can receive mental health information through public service announcements, information tables, and social media posts.[316] The initiative started in 2013, and is dedicated to the legacy of Rick Rypien, an "enforcer" (the bruising, tough guy of each NHL team who often gets into fights and lays big hits) of the Vancouver Canucks, who struggled with depression while on the team, and ultimately died by suicide.[317] Since Rypien's death, the Canucks organization has been a leader in raising mental health awareness around the league and in Canada.[318]

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[311] Whalen decided not to take anti-anxiety medication because of MLB's restrictions on prescription drugs and the long process to get an exemption. *Id.*

[312] *Id.*

[313] *Id.*

[314] *Id.*

[315] *See Hockey Talks: Mental Health Awareness*, FOUNDRY, https://foundrybc.ca/stories/what-is-hockey-talks/ [https://perma.cc/DZ8K-HN6S] (last visited Oct. 16, 2021); Bob Condor, *Break the Stigma*, NHL.COM: SEATTLE KRAKEN (Jan. 28, 2021), https://www.nhl.com/kraken/news/break-the-stigma/c-320797134 [https://perma.cc/F3Q8-Y9BA].

[316] Derek Jory, *Hockey Talks*, NHL.COM: VANCOUVER CANUCKS (Jan. 31, 2013), https://www.nhl.com/canucks/news/hockey-talks/c-653292 [https://perma.cc/8H5V-3K37].

[317] *Id.*

[318] *See Hockey Talks: Mental Health Awareness*, *supra* note 315; *see also* Stephen Whyno, *Blades of Steel: Johns Spotlights Mental Health in Hockey,* AP NEWS (June 27,

The NHL also has a confidential substance abuse and behavioral health program. Players may use this voluntarily, although the League can reach out and suggest it. A former NHL player relayed on a podcast called "Dropping the Gloves" that the League will usually do so after a drug test returns a positive for a substance that is harmful yet not prohibited by the rules. The League suggests the program directly to players, not the organizations, so that teams cannot use it against players in contract negotiations.

An NHL-supported program at The Meadows that helps with trauma and addiction aided Robin Lehner, the goalie for the New York Islanders, after he suffered from a severe panic attack during a game due to his substance abuse. Lehner revealed his battle with addiction, bipolar disorder, and thoughts of committing suicide while on stage accepting the Bill Masterton Memorial Trophy at the NHL Awards. "I'm not ashamed to say I'm mentally ill, but that doesn't mean mentally weak," Lehner said after dealing with depression beginning in 2018. He turned to "self-medicating by 'drinking a case of beer' and taking pills." Lehner revealed that "[t]he battle playing hockey was nothing compared to the battle inside my brain." After several weeks of treatment, Lehner returned to the NHL, and now he is speaking out to end the stigma surrounding mental illness.[319]

C. International and Olympic Sports

Each year, the International Olympic Committee Medical and Scientific Commission adopts a consensus statement on a "prominent issue that affects the well-being of athletes."[320] In 2019, the topic was the mental health of elite international athletes.[321] The report makes several suggestions to reduce the barriers of entry for elite athletes to treat their mental health, including destigmatizing mental health issues, continuing to educate athletic stakeholders and research athletic subculture, and even designing Olympic and Paralympic villages with sleep hygiene in mind.[322]

2021), https://apnews.com/article/dallas-stars-mental-health-hockey-nhl-health-3bdb5086fb2d60387da3f664637c924b [https://perma.cc/2HHV-WNXN].

[319] Robin Lehner, *I Could Not Stand Being Alone in My Brain: Islanders Goalie Robin Lehner Opens up About His Addiction and Bipolar Diagnosis*, THE ATHLETIC (Sept. 13, 2018), https://theathletic.com/522117/2018/09/13/islanders-goalie-robin-lehner-opens-up-about-his-addiction-and-bipolar-diagnosis-i-could-not-stand-being-alone-in-my-brain/ [https://perma.cc/74L7-Z9H9].

[320] *Tackling Mental Health in Olympic Health,* INT'L OLYMPIC COMM. (Apr. 14, 2019), https://olympics.com/ioc/news/tackling-mental-health-in-olympic-sport/ [https://perma.cc/3MTZ-2ZHT].

[321] *See* Reardon, *supra* note 9, at 667.

[322] *Id.* at 671-85.

In the United States, the U.S. Olympic & Paralympic Committee ("USOPC") created an Athlete Service Division in February of 2019 and organized a Mental Health Taskforce in February of 2020 to develop best practices for athlete mental health, along with three Mental Health Officers. The Team USA Mental Health Resource Guide includes access to a mental health support line, Safesport Helpline, and a registry of mental health providers. Eligible athletes have access to year-round confidential counseling.[323] Athletes and their dependents have access to unlimited phone counseling and up to six in-person sessions with a local provider at no cost.[324] The USOPC also offers all Team USA athletes and coaches access to sport psychologists.[325] Team USA sport psychologists travel with the athletes to international competitions, often practicing mindfulness—in individual and group settings—before competition.[326] Team USA also has a training space dedicated to psychophysiology at the Olympic & Paralympic Training Center in Colorado Springs to help athletes better understand the mental aspect of competition.

While the program is seemingly helpful, former USOPC Vice President of Sports Medicine Dr. Bill Moreau filed a whistleblower retaliation lawsuit against the USOPC alleging he was fired in retaliation for urging better responses to athlete safety, sexual abuse, and mental health, and citing the slow response to an Olympic athlete on medical leave who later took her own life, saying their response to mental health is more like sports injury, using staff trained in sports injuries, not psychiatry.[327]

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[323] *See Athlete Services: Mental Health*, TEAM USA, https://www.teamusa.org/MentalHealth [https://perma.cc/L44K-G4JY] (last visited Oct. 29, 2021).

[324] *Id.*

[325] *Id.*

[326] Joshua Schultz, *CPJ Spotlight: Sport Psychology Allows Team USA Athletes to Achieve Peak Performance*, SOC'Y OF CONSULTING PSYCHOL. (July 16, 2020), https://www.societyofconsultingpsychology.org/index.php?option=com_dailyplanetblog&view=entry&year=2019&month=07&day=15&id=28:cpj-spotlight-sport-psychology-allows-team-usa-athletes-to-achieve-peak-performance [https://perma.cc/4X35-6B4M].

[327] Jon Lapook, *"This is an Emergency": Whistleblower Says Olympic Committee Needs to Do More to Address Mental Health*, CBS NEWS (Feb. 13, 2020, 7:43 PM), https://www.cbsnews.com/news/whistleblower-says-olympic-committee-needs-to-do-more-to-address-mental-health/ [https://perma.cc/X92P-HZGU]; *see also* Sam Tabachnik, *Top U.S. Olympic Doctor Says He Was Fired for Trying to Protect Athletes from Sexual Abuse, Lawsuit Says*, DENVER POST (Feb. 5, 2020), https://www.denverpost.com/2020/02/05/usa-olympics-abuse-lawsuit-william-moreau/ [https://perma.cc/QHX2-7622].

D. Athlete Partnerships with Mindfulness Apps

As prominent athletes have come forward to advocate for mental health awareness, tech companies with mindfulness app products have seen the opportunity to promote their services to a wider audience. Among athletes who have partnered with mindfulness apps are Kevin Love, Michael Phelps, and LeBron James.

In December 2019, James announced a new partnership with Calm, a meditation and sleep app, hoping to bring attention to mental fitness and its importance in an athlete's career.[328] His "Train Your Mind" series features segments on mental fitness and managing emotions. James is helping make the Calm app available to youth organizations across the country.[329] James commented that it "[i]s all about mental fitness. It's something I've always prioritized, and it's just as important to my game, my career, and my life than anything I can do physically."[330]

In 2018, Phelps partnered with online therapy and counseling platform Talkspace to increase access to professional therapy for the people who need it and to encourage people to discuss openly about mental health.[331] Phelps also sits on the Growth & Advocacy Board of Medibio, a mental health technology company.[332] In 2020, during the trying time of the COVID-19 pandemic, Michael Phelps teamed up with Talkspace to help the company provide free therapy to frontline medical workers.[333]

Kevin Love's Fund donated 850 Headspace mindfulness app subscriptions and team mental training sessions to UCLA Athletics for all student-athletes and coaches. Love chose UCLA, his alma mater, with the hopes of sending the message that mental health is just as important as physical

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[328] *See* Daniels, *supra* note 157.

[329] *Id*.

[330] Simon Ogus, *LeBron James Partners with Unicorn App Calm That Focuses on Your Mental Fitness*, FORBES (Dec. 25, 2019, 10:00 AM), https://www.forbes.com/sites/simonogus/2019/12/25/lebron-james-partners-with-unicorn-app-calm-that-focuses-on-your-mental-fitness/?sh=6927836f37d3 [https://perma.cc/7T99-3FRW].

[331] *Michael's Mental Health Story*, TALKSPACE, https://www.talkspace.com/michael [https://perma.cc/26ED-KKFK] (last visited Oct. 29, 2021).

[332] *Medibio Announces New Board Members and Establishes Growth & Advocacy Advisory Board*, MEDICAL ALLEY, https://medicalalley.org/2019/09/medibio-announces-new-board-members-and-establishes-growth-advocacy-advisory-board/ [https://perma.cc/D5BB-G7BT] (last visited Nov. 14, 2021).

[333] *Michael Phelps Donation Adds to Talkspace Program Providing Free Mental Health Services to Frontline Medical Workers*, BUS. WIRE (Apr. 6, 2020, 10:46 AM), https://www.businesswire.com/news/home/20200406005545/en/Michael-Phelps-Donation-Adds-Talkspace-Program-Providing [https://perma.cc/7AAN-6RFR].

health and that schools should provide access to programs and tools to help students and athletes improve mental health.[334] Headspace is a leading meditation and mindfulness company with over thirty-two million users in 190 countries and is known for its meditation app and suite of online features.[335] Love stated, "I am really excited to partner with Headspace to bring an invaluable tool to the Bruin family. It is incredibly important to the mind as well as the body to be at peak performance in all aspects of life, and Headspace makes it so easy for student-athletes to integrate mental training into their everyday regimens."[336]

Team USA has offered athletes access to sports psychologists who use various methods, including mindfulness, competitive simulation, and virtual reality to help athletes prepare for big events.[337] At the 2016 Summer Games in Rio de Janeiro, Team USA used mindfulness through guided meditation and imagery.[338] Team USA athletes are "coached to take a mindful approach to their sport, to be in the present moment, with the motto 'one point (or jump, or dive, etc.) at a time.'"[339]

One might question athletes' corporate partnerships with the app tech companies and whether these companies are using the vulnerabilities of the athletes to promote their businesses to a desirable demographic. The apps can track users and their data and should be protected. Evidence that these apps are effective is in nascent stage, but certainly practices and tools that help promote mental health, such as meditation and mindfulness can be helpful.[340] The apps provide a helpful resource but should not be regarded as a substitute for mental health disorder treatment.[341]

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[334] *The Kevin Love Fund Donates Headspace Meditation + Mindfulness Training to UCLA Student-Athletes and Coaches*, BUS. WIRE (Oct. 10, 2018, 9:08 AM), https://www.businesswire.com/news/home/20181010005549/en/The-Kevin-Love-Fund-Donates-Headspace-Meditation-Mindfulness-Training-to-UCLA-Student-Athletes-and-Coaches [https://perma.cc/6U9K-BVSE].

[335] *Id*.

[336] *Id*.

[337] Schultz, *supra* note 326.

[338] *Id.*

[339] *Id.*

[340] *Id.*

[341] Robin Scholefield et al., *Athlete Mindfulness: The Development and Evaluation of a Mindfulness Based Training Program for Promoting Mental Health and Wellbeing,* NCAA, https://www.ncaa.org/about/resources/research/athlete-mindfulness-development-and-evaluation-mindfulness-based-training-program-promoting-mental [https://perma.cc/N34F-NABZ] (last visited Dec. 1, 2021).

V. The Need for Sport To Respond: What More Can Sport Do?

Mental health is a part of, not apart from, athlete health.[342] Mental health exists on a continuum, with resilience and thriving on one end of the spectrum and mental health disorders that disrupt an athlete's functioning and performance at the other. Whether similar to or more than the general population, athletes are experiencing mental health issues. Mental health is a vital concern for sports/athletics. Although the culture of sport has long inhibited disclosure, players have begun speaking out, and the sports world needs to respond.[343]

A. A Culture of Care

Dr. Hillary Cauthen is a clinical sport psychologist and certified mental performance consultant specializing in mental health treatment for athletes, coaches, and parents.[344] She was a competitive youth and Division I collegiate athlete, and remembers the struggle she went through having to deal with the stress and anxiety of being a top Division I athlete.[345] Cauthen explains that in her experience, "[c]hampions are strong not weak, and feelings of being lost and scared are not champion qualities."[346] Dr. Cauthen created a process she calls a "culture of care for a culture of champions"[347] with three steps that parents and coaches should consider to help their athletes with mental illness.[348] Step one is to create a culture of care.[349] Create a friendly and inviting environment for athletes to feel comfortable sharing their fears, concerns, and anxieties, and "[t]each them that it's ok to fail and ask for help."[350] Second, educate the coaches.[351] Coaches, for the most part, do not intend to overwhelm their athletes, but it's the "culture of winning

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[342] *Id.*
[343] Chang, *supra* note 9, at 65.
[344] *See* Cauthen, *supra* note 6.
[345] *Id.*
[346] *Id.*
[347] *Id.*
[348] *Id.*
[349] *Id.*
[350] *Id.* ("It's time to re-examine our culture of sport, we can no longer blame, punish or shame our adolescence for having emotional outbursts or having difficulty struggling with their athletic endeavors and balancing life. Instead, we should be curious to examine and explore how we can help them express their emotions and help them learn to live within this culture.").
[351] *Id.*

and winning all costs that becomes problematic."[352] Coaches need to be trained and educated on how to address the issue of mental illness.[353] Dr. Cauthen provides six life skills that have been proven to help reduce mental illness and increase wellness.[354] The six life skills are "goal setting, coping, communication, time management, leadership, and problem solving."[355] Coaches are in a position to help implement these life skills and provide a healthy environment for their athletes.[356] Lastly, teach athletes how to feel and express their emotions and learn how to use them to better performance.[357]

B. Access to Sport Mental Health Experts

Sport psychologists have been used to help athletes overcome mental blocks and improve performance, increase focus, enhance team communication, and return from injuries.[358] Sport psychologists' role has expanded to include treating athletes' interpersonal issues and personal mental health problems such as anxiety, depression, and eating disorders.[359] They address other pressures common among athletes, such as violence and anger issues.[360] Among male athletes, factors such as adoption of traditional male roles, groupthink, and "locker room talk" can lead to increased risks of violent behavior and sexual misconduct.[361] Sport psychologists can help assist in the prevention and assessment of risk of these behaviors.[362] Importantly, sport psychologists also serve as a resource to identify and help navigate the range of emotional traumas athletes can experience.[363]

Sport psychology's increasing impact is evident at various levels of sport. For example, in 2018, twenty-seven of the thirty MLB teams employed a "mental skills coach" to help players.[364] At the collegiate level,

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[352] *Id.*
[353] *Id.*
[354] *Id.*
[355] *Id.*
[356] *Id.*
[357] *Id.*
[358] Weir, *supra* note 305; *see also Sport Psychologists Help Professional and Amateur Athletes*, AM. PSYCHOL. ASS'N, https://www.apa.org/topics/sport-psychologists [https://perma.cc/RH6D-7MS8] (last visited Oct. 16, 2021).
[359] Weir, *supra* note 305.
[360] *Id.*
[361] *Id.*
[362] *Id.*
[363] *Id.*
[364] *Id.*

sport psychology is an "ideal resource" to support student-athlete mental health.[365] The NCAA recommends that colleges either employ a full-time sport psychologist on staff, retain an external consultant or counseling center, or use a referral model to help athletes address psychological issues.[366] Even at the high-school and junior levels, athletes are beginning to train their minds, with mental skills coaches like Graham Betchart becoming increasingly sought after.[367] Betchart has coached a number of NBA stars (*e.g.*, Aaron Gordon, Zach LaVine, Andrew Wiggins, etc.) before they were drafted, using his "Play Present" program to teach athletes to stay focused on the task at hand and to move onto the next play immediately.[368]

C. Post-Play Transition Programs

Although programs and initiatives have been implemented in the last few years, many players continue to deal with mental health issues after retirement. Combined studies show that athletes are particularly likely to suffer from mental health issues during career transitions. Lack of athlete identity can be a cause of psychological disorders. Depression, stress, and anxiety are all likely to be highest within six months of retiring. The study also shows athletes experience better cognitive and emotional results when planning ahead for transitions.[369] A poll of 800 retired players revealed that 50% "did not feel in control of their lives within two years of finishing their careers."[370] Three reasons identified include: a loss of control, loss of identity, and the struggle to find a new purpose outside of their sport.[371] Fear of losing control can be a sign of the onset of mental health issues such as anxiety and depression. During their time as elite athletes their life is

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[365] Chris Carr & Jamie Davidson, *Mind, Body and Sport: The Psychologist Perspective*, NCAA, http://www.ncaa.org/sport-science-institute/mind-body-and-sport-psychologist-perspective [https://perma.cc/34VY-HTNM] (last visited Oct. 16, 2021).

[366] *Id.*

[367] Matthew Giles, *Meet the Sports Psychologist Training the Minds of the NBA's Top Draft Prospects*, VICE (June 23, 2016, 10:10 AM), https://www.vice.com/en_us/article/z4a4ay/meet-the-sports-psychologist-training-the-minds-of-the-nbas-top-draft-prospects [https://perma.cc/5BFL-DJ4C].

[368] *Id.*

[369] *Athlete Transition and Mental Health Research*, CROSSING THE LINE (June 19, 2017), https://crossingthelinesport.com/story/athlete-transition-and-mental-health-research/ [https://perma.cc/65KZ-6428].

[370] Joe Davis, *How Can We Prevent Rather Than Fix the Athlete Mental Health Epidemic?*, ROCHEMARTIN (June 26, 2018), https://www.rochemartin.com/blog/can-prevent-rather-fix-athlete-mental-health-epidemic/ [https://perma.cc/623T-SAUZ].

[371] *Id.*

planned down to the minute including when to train, eat, and sleep, in order to perform at a high level. However, this degree of certainty disappears in the life of retirement.

Also, leaving their sport behind can cause them to question who they are without their team, or the sport that they have been so involved in for such a long time. They are no longer elite athletes. So, who are they? What do they do now? All these unknowns can cause severe anxiety and depression at a time they no longer have the resources they had as an elite athlete. Programs need to be put in place so that mental health resources can be accessed by not only current players but also retired players.[372]

D. Athlete Mental Health Bill of Rights

The legal protections for mental health (as broadly defined, as opposed to a narrower condition for a diagnosed mental illness) are inadequate. The ADA standard for "disability" requires that the impairment "substantially limits a major life activity." Not all mental health situations fit that standard, nor should they have to be at that level of severity to receive accommodation and guarantees against discrimination. Sports organizations are paying more attention to the importance of athlete mental health and wellness. As noted above, the NCAA, professional sports leagues, and Olympic Movement are making strides in providing resources and education towards athlete mental health. One critique is that the programs currently in place lack uniformity; mental health treatment options can be buried in traditional health insurance or EAP programs, and finding appropriate treatment and counseling can be bureaucratically challenging. One commentator has proposed federal regulation of student-athlete mental health.[373] State legislatures can also pass laws creating programs that focus on mental health in youth and collegiate sports.

The basic elements of a mental health program should be to establish the "culture of care" that prioritizes athlete mental and physical wellness. This message has to start from the top, with leadership, coaches, athletic personnel, and stakeholders (including parents) establishing an environment conducive to athletes feeling comfortable asking for and seeking help, demonstrating respect and assurances of safety, confidentiality, and non-retaliation for an individual athlete in need. This culture and education must start in youth sports and throughout. Coaches are pivotal to notice when athletes

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[372] *Id.*

[373] Born, *supra* note 51, at 1234-35; 1241 (arguing federal regulation is preferable and would provide more effective and uniform policy than state or institutional regulation).

may be struggling and should be trained accordingly for mental health screenings, such as ones required as part of the compliance paperwork students fill out before trying out for sports.[374] Athletes should be provided with easy access to mental health education, resources, confidentiality, and a process for requesting accommodation due to mental health protection. Athletes should have access to professional help, at no cost, that is confidential and accessible, and they should be allowed a break or accommodation that does not intrude upon the essential aspects of the team or sport.

Rather than Simone Biles being sent home, she was able to stay and cheer on her teammates, including Sunisa Lee, who rose up with one another to win a gold medal. When she was ready, Biles went on to perform and won a bronze medal on the beam, modeling fortitude and demonstrating she may very well deserve the GOAT distinction in gymnastics.

VI. Conclusion – Sport Can Do More

The past few years have evidenced a dramatic shift towards athlete empowerment. College athletes have challenged entrenched institutional rules on eligibility and limitations on athlete's publicity and endorsement rights. Athletes are demanding attention to mental health. The prevalence of mental health struggles at all levels of athletics shows just how important it is to ensure athletes have access to resources and support from their respective sport organizations and the community. The issue is front and center.

It is time for a cultural shift and awakening to the importance of mental health in sports and in society. Reframe, no shame, no stigma, tools and resources to identify and get help. What players, fans, and the media love about sports, the gritty "win at all costs," "push through the pressure" culture, needs revamping. Sports culture needs to give athletes space to be human, to realize it is okay to not be okay and to know help is available. Kevin Love's biggest break-through when it came to his mental health was feeling like it was okay to just be himself, not the NBA star Kevin Love, not the NBA Champion Kevin Love, just Kevin. He noted there was no achieving your way out of depression, a concept sport culture needs to recognize and validate if it wants to ensure the health and wellbeing of its players.[375]

Sports organizations are already taking steps towards making mental health a priority, but more can be done. Athletes should be taught the value

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[374] Neal, *supra* note 36, at 8.

[375] Kevin Love, *To Anybody Going Through It*, Players' Trib. (Sept. 17, 2020), https://www.theplayerstribune.com/en-us/articles/kevin-love-mental-health [https://perma.cc/7TYM-NYB7].

of prioritizing mental health from an early age, with the message of support and resources available throughout and after an athlete's career. Athletes should grow up in a "culture of care," with access to mental health providers, and learning from coaches and support personnel who check in and give their players the information and the support they need. And when athletes retire, they should be taught how to transition out of their career and how to adjust mentally to a new lifestyle, and they should be reminded that they still matter, even if they are no longer active players.

Beyond changing the culture, sport's governing bodies need to continue providing and expanding concussion and safety protocols. They need to ensure athletes can access and use their mental health medications. Athlete confidentiality needs to become a priority, especially when the information relates to non-sport related mental health concerns. Teams or professional tournaments should have sports psychologists and certified mental health providers on staff. These are all active, tangible steps that leagues and athletic bodies can easily instate.

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Science Fiction and the Law: A New Wigmorian Bibliography

Jorge L. Contreras*

ABSTRACT

In 1908, Northwestern Law School Dean John Henry Wigmore compiled a list of novels that no lawyer could "afford to ignore." Wigmore's list, updated and amended by Professor Richard Weisberg in the 1970s, catalogs one hundred literary works ranging from *Antigone* to *Native Son*, each of which offers insight into the legal system or the practice of law. This article undertakes a similar bibliographic exercise with respect to law and the literature of science fiction. While science fiction as a literary genre has its detractors, it cannot be denied that science fiction stories – whether in books, short stories, films or television shows – reach a vast audience. For better or worse, science fiction influences popular perceptions and our understanding of science and technology issues. This has been the case since the days of Jules Verne and H.G. Wells, and it is especially true today. When we talk about genetic engineering, *Brave New World, Gattaca* and *Jurassic Park* are invariably mentioned. When we think about artificial intelligence, HAL, Skynet and other fictional depictions immediately come to mind. And the surveillance society? George Orwell's *Nineteen Eighty-Four*, of course. When confronting novel legal issues arising due to rapid technological change, these speculative accounts help to inform the background intuition of judges, legislators and citizens. As such, it is imperative to

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understand the body of literature that forms these background intuitions. This article offers the first curated and categorized list of legal science fiction literature, following the model of Dean Wigmore and Professor Weisberg. The list is classified according to doctrinal themes and includes an appendix of academic literature addressing legal issues in science fiction. It is hoped that the materials in this article will serve as a useful resource for legal practitioners, policymakers, educators and citizens as they grapple with the increasing and evolving legal challenges resulting from the rapid evolution of modern science and technology.

I. WIGMORE'S LEGAL NOVELS

In 1908, Northwestern Law School Dean John Henry Wigmore of evidentiary treatise fame[1] compiled a list of 377 novels that no lawyer could "afford to ignore."[2] Dean Wigmore's first list featured mostly nineteenth-century American, British and Continental novels and included works by Honoré de Balzac, Charles Dickens, Alexandre Dumas, George Eliot, Thomas Hardy, Nathaniel Hawthorne, Victor Hugo, Leo Tolstoi, Mark Twain, John Bunyan and Miguel de Cervantes. Wigmore's purpose in compiling his list went beyond the desire to catalog; he believed it imperative that lawyers understand how their profession was perceived by the public:

> With these [novels] every lawyer must be acquainted, not merely because of his general duty as a cultivated man, but because of his special professional duty to be familiar with those features of his profession which have been taken up into general thought and literature.[3]

Wigmore acknowledged that the principles of legal practice can be learned from essays, and biographical and historical works.[4] But the novel, he con-

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[1] JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW (1904). This treatise, popularly known as *Wigmore on Evidence*, has been released in numerous editions and remains in print today.

[2] John H. Wigmore, *A List of Legal Novels*, 2 ILL. L. REV. 574, 575 (1908) [hereinafter *Wigmore's 100 Legal Novels* (1908)]. Wigmore reports that he began his compilation effort in 1898 with a list of 50 titles. *Id*. at 586. By 1900 he had expanded the list to about one-hundred titles and published it in a publication entitled *The Brief* in 1900. *Id*. Over the next few years, his colleagues and students at Northwestern Law School, as well as other readers, helped him to bolster the list to 377 titles. *Id*. at 586-87.

[3] *Id.* at 575-76.

[4] *See generally Wigmore's 100 Legal Novels* (1908)*, supra* note 2.

tended, immersed the reader in its subject with an immediacy and empathy that are difficult to achieve through more didactic writings. Thus:

> This deepest sense of their reality we shall get only in the novels . . . We must go to "Bleak House" to learn the real meaning of chancery's delays, to "Oliver Twist" to see the actual system of police and petty justice in London, to "Pickwick Papers" to appreciate the technicalities of civil justice . . . There is in fact hardly an end to the line of boundary where history and law unite in the pages of the novelist.[5]

In addition to morally complex works by the likes of Tolstoi and Balzac, Wigmore's list also included numerous works of popular fiction. Though he deliberately excluded "the ordinary detective story,"[6] he listed nineteenth-century authors such as Arthur Conan Doyle, Walter Scott, H. Rider Haggard, Edward Bulwer-Lytton[7] and a host of names the modern reader would likely not recognize. These writers are best characterized as the John Grishams and Scott Turows of their day, purveyors of popular novels intended for mass consumption, filled with interesting characters and plot twists, and along the way educating readers about the law, the legal system and the professional bar.

In 1922, Wigmore published an update to his 1908 list, explaining that the 1908 journal in which the original was published had long-since been out of print, and he recognized a continuing "demand" for "a good reading list of standard Legal Novels."[8] In his 1922 list, Wigmore reduced the number of titles on the list from 377 to 103, rounding to 100 for purposes of description.[9] No explanation is provided for the deletions, but a comparison of the two lists reveals the elimination of authors of lesser renown like Harrison Ainsworth, Berthold Auerbach and John Galt as well as major literary figures like Elizabeth Gaskell and Thomas Hardy. The 1922 list also includes fewer works by many of the remaining authors; for example, Francis Bret Harte is featured eleven times in 1908 but just twice in 1922.

Wigmore's influential 1908 and 1922 lists have been credited with launching the field of law and literature: The systematic study of literary

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[5] *Id*. at 577-79.

[6] *Id.* at 575.

[7] Sir Edward George Bulwer-Lytton is best-known today as the author of the opening line "It was a dark and stormy night . . .". EDWARD GEORGE BULWER-LYTTON, PAUL CLIFFORD 9 (London, John Dicks 1830).

[8] John H. Wigmore, *A List of One Hundred Legal Novels*, 17 ILL. L. REV 26, 39 (1922) [hereinafter *Wigmore's Update* (1922)].

[9] *Id.*

texts relating to the law, and of legal texts as literary artifacts.[10] In 1976, Professor Richard Weisberg, one of the founders of the modern law and literature movement,[11] revised Wigmore's list.[12] Weisberg added more recent works like *To Kill a Mockingbird, The Stranger, The Trial, Native Son*, and works that were not yet appreciated when Dean Wigmore compiled his lists in 1908 and 1922 (e.g., Melville's *Billy Budd*, now a staple of the law and literature canon). Weisberg also included recently translated works from authors like Dostoyevsky and Gogol, as well as a few prominent figures from antiquity (Ovid, Aeschelus, and Sophocles, plus the anonymous authors of the Icelandic sagas and the Book of Esther). Weisberg also expanded the scope of the list to include both short stories and dramatic works (namely the works of Shakespeare, another staple on today's law and literature syllabi). Finally, Weisberg included an addendum of twenty-six "Critical Works" that examine the role of law in literature.[13] These ranged from Ephraim London's classic 1960 text *The Law as Literature; The Law in Literature* to several entries in a 1975 issue of the *Rutgers Law Review* devoted to law and the humanities. To make space for these additions, Weisberg trimmed much of the popular fiction on Wigmore's list, including everything by Conan Doyle, Scott, Haggard, and Bulwer-Lytton.

Like Dean Wigmore before him, Professor Weisberg's update was no mere pedantic curatorial exercise. During the tumultuous 1970s, Weisberg felt Wigmore's list was needed more than ever. A change had occurred in the legal profession, and "[t]here can be little doubt," Weisberg wrote, "that individual lawyers remain as literate as they were in Wigmore's day; but legal institutions, including surprisingly the legal academy, have all but

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[10] *See, e.g.*, William H. Page, *The Place of Law and Literature*, 39 VAND. L. REV. 391, 391 (1986); Richard H. Weisberg, *Coming of Age Some More: "Law and Literature" Beyond the Cradle*, 13 NOVA L. REV. 107, 107-08 (1988) [hereinafter *Coming of Age*]; Anne McGillivray, *Recherche Sublime: An Introduction to Law and Literature*, 27 MOSAIC: INTERDISC. CRIT. J. i, ii-iii (1994); Richard H. Weisberg, *Wigmore and the Law and Literature Movement,* 21 L. & LITERATURE 129 (2009) [hereinafter Weisberg, *Wigmore and Law & Literature*].

[11] Weisberg, *Wigmore and Law & Literature*, *supra* note 10, at 130.

[12] See Richard H. Weisberg, *Wigmore's Legal Novels Revisited: New Resources for the Expansive Lawyer*, 71 NW. U. L. REV. 17 (1976-1977) [hereinafter Weisberg, *Revised List* (1976)]. Karen Kretschman also updated Wigmore's list in 1976. *See* KAREN L. KRETSCHMAN, LEGAL NOVELS: AN ANNOTATED BIBLIOGRAPHY (Tarlton Law Library Legal Bibliography Ser. No. 13, 1976). Weisberg and Kretschman published a combined update in 1977. See Richard H. Weisberg & Karen L. Kretschman, *Wigmore's "Legal Novels" Expanded: A Collaborative Effort*, 7 MD. L. F. 94 (1977).

[13] Weisberg, *Revised List* (1976), *supra* note 12, at 27-28.

broken off from their humanistic roots."[14] As evidence of the moral drift afflicting the legal profession, Weisberg pointed to the Watergate scandal and the "value-free" machinations of trained attorneys like President Richard Nixon and Vice President Spiro Agnew.[15] In doing so, Weisberg hoped that his updated list would provide lawyers with not only a view of the public perception of their profession, but also an ethical compass to guide their actions.[16]

In 2009, Weisberg again revisited Wigmore's list in an article appearing in *Law & Literature*, continuing to find value in its potential to educate. Reading the works on these lists, he contended, offers the lawyer at least the following tools:

(1) skepticism about authoritative rationales that seem intuitively wrong;

(2) an ability to link ethics to one's rhetorical performance;

(3) excellence in listening and writing skills; and

(4) an openness to the perspective of individuals whose way of seeing the world places them "outside" the scheme of conventional legal understanding.[17]

There have been numerous other catalogers of legal-themed literary works, many of whom have sought to expand beyond the geographic, political and practical scope outlined by Wigmore and his followers.[18] After more than a century, literary works such as those collected by Wigmore and others continue to inform and inspire lawyers, and to populate reading lists, around the world.

II. Science Fiction and the Law

Science fiction (also known as speculative fiction) is a broad thematic category that includes works (literary and, increasingly, film and television)

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[14] *Id.* at 17-18.

[15] *Id*. at 18. Richard Nixon, 37th President of the United States (1969-1974), resigned from office following the Watergate scandal. Spiro Agnew, Vice President of the United States from 1969-73, resigned from office after allegations of tax fraud and corruption.

[16] *See id.*

[17] Weisberg, *Wigmore and Law & Literature*, *supra* note 10, at 140.

[18] *See* David R. Papke, *Law and Literature: A Comment and Bibliography of Secondary Works*, 73 L. Libr. J. 421, 423 (1980) (describing post-Wigmore cataloging efforts); Elizabeth Villiers Gemmette, *Law and Literature: An Unnecessarily Suspect Class in the Liberal Arts Component of the Law School Curriculum*, 23 Val. U. L. Rev. 267 (1989) (compiling a list of all literary works included in the "law and literature" syllabi of 135 U.S. law schools).

that contain elements that are possible within the known rules of the universe, but do not exist in the present day.[19] As writer Norman Spinrad described it, science fiction works include "a speculative element belonging to the sphere of the 'could be, but isn't.'"[20] Science fiction is distinguishable from works of fantasy and mythology like *The Odyssey* or the *Lord of the Rings* in which no (even remotely) plausible explanation is given to the extraordinary. Fantasy and mythology rely on magic or acts of the gods; as Spinrad observes, they "openly and knowingly contradict[ ] what we presently consider the 'possible.'"[21] Science fiction, on the other hand, attempts to explain its eccentricities by reference to known scientific principles, no matter how outlandish or implausible.[22]

As a literary genre, science fiction has an uneven reputation. It is often filled with plot-driven narratives akin to Wigmore's "ordinary detective stor[ies],"[23] and it is derisively, but affectionately, said that the "Golden Age of Science Fiction is twelve."[24] With a few exceptions, writers of science

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[19] *See* ADAM ROBERTS, THE HISTORY OF SCIENCE FICTION 1-21 (2d ed. 2016) (discussing the definitions of "science fiction").

[20] Norman Spinrad, Science Fiction in The Real World xiv (1990).

[21] *Id.* at 18-20. Another genre that is distinct from science fiction is allegory, in which extraordinary events – talking animals, genies granting wishes, people growing and shrinking – are not explained at all. Thus, works like Swift's *Gulliver's Travels*, Carroll's *Through the Looking Glass,* Orwell's *Animal Farm* and Yorgos Lanthimos's recent film *The Lobster*, which present fantastical situations purely to comment on current political events, are not science fiction.

[22] The dividing line between science fiction and fantasy is often blurred. For example, in the popular *Star Wars* films, the omnipresent "Force" was originally presented as a quasi-religious/mythical phenomenon (the phrase "May the Force be with you" echoing that of the Christian liturgy). Yet when the producers sought to add scientific credibility to the otherwise metaphysical Force in *The Phantom Menace* (1999) by attributing it to the action of microscopic organisms known as "midichlorians," fans revolted. *See* Graig Stephens, *The Phantom Menace: The Good, The Bad, and The Midi-chlorians*, FANSIDED: DORK SIDE OF THE FORCE, https://perma.cc/8HKH-5A3M (last visited Oct. 28, 2021). Another work that is often classified as science fiction, but which is closer to fantasy, is N.K. Jemisin's *Broken Earth* series, in which a select group of humans mentally control Earth's seismological instability with little scientific explanation.

[23] *Wigmore's "100 Legal Novels"* (1908)*, supra* note 2, at 575.

[24] The term "Golden Age of Science Fiction" refers to a period from the late 1930s to the 1950s characterized by works and authors that appeared in John W. Campbell, Jr.'s magazine *Astounding Science Fiction*. *See* ROBERTS, *supra* note 19, at 195; Brian Attebery, *The Magazine Era: 1926-1960 in* THE CAMBRIDGE COMPANION TO SCIENCE FICTION 32, 37 (Edward James & Faran Mendleson eds., 2003). The gentle denigration of this term to refer to the juvenile appeal of the genre came later. *See* Bruce L. Rockwood, *Law, Literature, and Science Fiction: New Possibilities*, 23

fiction do not win prestigious literary awards,[25] and those that do are best known for other works.[26] Only a handful of authors who are known primarily for their science fiction – Margaret Atwood and George Orwell in particular – have earned places in the mainstream literary pantheon. Yet science fiction has, for at least half a century, been the subject of serious scholarly attention. In 1958, the Modern Language Association held its first academic seminar on science fiction,[27] and by 1972, two annotated bibliographies of science fiction criticism were published.[28] Science fiction scholarship has drawn upon academic disciplines such as political science, gender/LGBTQ+ studies, critical theory, linguistics, and, more recently, law.[29]

Science fiction has much to say about the modern world and – perhaps surprisingly – the legal systems that govern it. As Bruce Rockwood observed in his opening remarks at a 1999 symposium on science fiction and the law, "Science Fiction . . . explores political, legal and ideological alternatives, commenting upon both our present and possible futures."[30] Science fiction authors extrapolate from the issues of the day, predicting what might happen if the world continues on one course or another. The genre allows them to speculate about the consequences of new technologies and discover-

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LEGAL STUD. F. 267, 269 (1999) (discussing the origin of this saying, attributed alternately to science fiction writers Isaac Asimov and Terry Carr).

[25] Science fiction has its own awards universe, consisting of the Nebula and Hugo awards, as well as other lesser accolades.

[26] Doris Lessing, the author of the five-volume science fiction series *Canopus in Argos* (this list) won the 2007 Nobel Prize in Literature. She is best known for contemporary novels such as *The Golden Notebook* (1962). Kazuo Ishiguro, the author of *Never Let Me Go* (this list) won the 2017 Nobel Prize in Literature. Ishiguro's 2021 novel *Klara and the Sun* is also a work of science fiction, though he is best known for *The Remains of the Day* (1989), which focuses on the reflections of an English butler during World War II. Interestingly, the 1974 Nobel Prize in Literature was awarded to Harry Martinson, whose Swedish book-length epic science fiction poem *Aniara* (1956) was among his best-known works, though it is little read outside of Sweden today (the 2018 film adaptation is far more accessible).

[27] MARSHALL B. TYMN ET AL., A RESEARCH GUIDE TO SCIENCE FICTION Studies vii (Garland Reference Library of the Humanities Vol. 87 1977).

[28] *See* Thomas D. Clareson, Science Fiction Criticism: An Annotated Checklist (1972); Robert E. Briney & Edward Wood, SF Bibliographies: An Annotated Bibliography of Bibliographic Works on Science Fiction and Fantasy Fiction (1972).

[29] For a discussion of critical scholarship that relates to science fiction and the law, *see infra* Section III.D.

[30] Rockwood, *supra* note 24, at 271; *see also* Orna Ben-Naftali & Zvi Triger, *The Human Conditioning: International Law and Science-Fiction*, 14 L., CULTURE & HUMANS. 6, 15 (2018) ("[Science fiction] focuses on our present ideological, moral and legal disputes and in playing them out in imagined futures, proposes both criticism and alternatives.")

ies in a fictional setting. And it is undeniable that many of their predictions have been realized, from Jules Verne's submarines to the communicators used by Starfleet.[31]

But the images of the future predicted by science fiction have not always been rosy. The post-war era saw a boom in literature envisioning new and terrifying totalitarian states, most famously illustrated by Orwell's *Nineteen Eighty-Four*.[32] In the 1950s, science fiction offered chilling predictions about atomic bomb-induced genetic mutations (*Godzilla*, *Them!*) and nuclear apocalypse (*On the Beach*, *Alas Babylon*). In the 1970s, fear of overpopulation and ecological disaster led to films such as *Silent Running* and *Soylent Green.* The emergence of personal computers and video games in the 1980s gave rise to the cyberpunk movement exemplified by works like *Neuromancer* and *Snow Crash*. And the rise of the biotechnology industry in the 1990s inspired tales of genetic engineering gone awry, splendid examples of which can be found in the novel *Jurassic Park* and the film *Gattaca*. It can be argued that much of what the public knows about space travel, genetic engineering, human cloning, nuclear weapons, nanotechnology, artificial intelligence, virtual reality and every other technological development of the last century is gleaned largely from works of science fiction.[33]

Science fiction offers fertile ground for speculation about the future of technology and its effect on human society.[34] As such, it is an ideal medium in which to consider how the law can and should develop in the face of technological change. Lawyers, judges and law professors thrive on hypothetical scenarios. Within the context of a science fiction story, an author can postulate a law or rule that responds to a scientific or technological discovery in a way that extends far beyond the classroom thought experi-

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[31] *See, e.g.,* Anthony J. Melchiorri, *Imagined Worlds Made Real*, RICE MAG. (May 2021), https://perma.cc/8F9C-6PTC/ (offering examples of real technologies first depicted in science fiction works).

[32] *See, e.g.*, Marina MacKay, *Anti-State Fantasy and the Fiction of the 1940s*, 24 LIT. & HIST. 27 (2015).

[33] Science fiction is popular. Of the twenty top-grossing films of all time (adjusted to 2020 dollars), eight (five from the *Star Wars* franchise alone) were squarely in the science fiction camp as of October 2021. *Top Lifetime Adjusted Grosses*, BOX OFFICE MOJO BY IMDBPRO, https://perma.cc/HZU9-FZE9 (last visited October 29, 2021).

[34] *See Sci-Fi Is a Good Way to Learn Political Theory*, WIRED (Sept. 24, 2021, 11:28 AM), https://www.wired.com/2021/09/geeks-guide-political-theory/ [https://perma.cc/32N7-XE2Y] (interviewing government professor Joseph Reisert).

ment.[35] When a judge or a policymaker is faced with the necessity for a new legal rule, he or she typically considers, in addition to formal analytical factors – economic cost, consistency with existing rules, administrability, etc. – personal experience.[36] Early twentieth century legal realists and late twentieth century critical legal studies scholars have argued that this inherently human tendency is unavoidable and, in many cases, desirable.[37] For example, thinking about mortgage reform, the policymaker invariably considers how systemic changes would affect his or her monthly mortgage payments, or those of a parent, sibling or child. In contemplating the length of a sentence for various offenses, the judge cannot help but think how he or she has spent, or would spend, the number of years that the accused will be put away.

But in the case of new technologies and discoveries, there are few personal experiences from which to draw. When we consider regulating human gene editing, or orbital weapons systems, or cerebral implants, personal experience fails us. Not only do we lack any direct experience with new technology, but we have little idea how different regulatory regimes would play out. This is where science fiction can help. Science fiction offers the ultimate legal hypothetical. It is not only analytical, as a government report or law review article can be, but also emotive. It portrays characters living with the consequences of different regulatory and legal regimes. And if the characters are believable, and the legal rules are plausible, then "experience," as it is, can be simulated where none existed before. Works of science fiction thus serve as extended thought experiments, the best of which achieve character empathy that can give purchase to policy arguments and analysis. As science fiction master Arthur C. Clarke wrote, "[b]y mapping out possible futures, as well as a good many improbable ones, the science fiction writer does a great service to the community."[38]

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[35] In 1922, Wigmore himself recognized the instructive value of "interesting pictures of alien systems of justice," although he was referring not to extraterrestrial, but European, legal systems. *Wigmore's Update* (1922), *supra* note 8, at 30.

[36] *See, e.g.*, Joel B. Grossman, *Social Backgrounds and Judicial Decision-Making*, 79 HARV. L REV. 1551, 1552 (1966) ("[J]udicial decisions — and particularly constitutional law decisions — are at least partially attributable to the personal values and experiences of the judges . . ."); HENRY R. GLICK, COURTS, POLITICS, AND JUSTICE 313 (3d ed. 1993) ("The study of judges' personal backgrounds assumes basically that people behave according to who they are.").

[37] *See, e.g.*, Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Andrew Altman, *Legal Realism, Critical Legal Studies, and Dworkin*, 15 PHIL. & PUB. AFFS. 205 (1986).

[38] Arthur C. Clarke, *Foreword, in* THE COLLECTED STORIES OF ARTHUR C. CLARKE (2001); *see also* Camilla A. Hrdy & Daniel H. Brean, *Enabling Science Fiction*,

Consider human genetic enhancement as an example. Today, this technology does not yet exist outside of the laboratory, though there is a teeming bioethics and legal literature discussing its potential regulation.[39] Part of the impetus behind this policy interest may derive from the vast fictional catalog of literature touching the subject. What policymaker, let alone academic, has not considered the dystopian vision of the 1997 film *Gattaca* when analyzing the regulation of genetic engineering? Or the corporate excesses described in Atwood's *Oryx and Crake*[40] or Crichton's *NEXT*?[41] And, most recently, the risk of release of viral biowarfare agents in Crichton's *Andromeda Strain*?[42]

And there is evidence that courts, at least, do refer to these science fiction touchstones when considering such issues. For example, when assessing the constitutionality of a federal statute requiring the DNA profiling of certain criminal offenders, the Ninth Circuit reasoned, "when such a policy's constitutionality is determined merely by whether it seems reasonable under the totality of the circumstances, we all have reason to fear that the nightmarish worlds depicted in films such as *Minority Report* and *Gattaca* will become realities."[43] And Orwell's *Nineteen Eighty-Four* is so pervasive in the popular imagination that a recent LEXIS search identifies forty-five federal and state cases mentioning the novel in their reasoning,[44] including a lengthy excerpt quoted by Justice Rehnquist in a 1979 dissenting opinion in which he argues that "the Court's opinion is ahead of its time: it could more appropriately have been handed down five years from now, in 1984, a year coinciding with the title of a book from which the Court's opinion

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27 MICH. TECH. L. REV. 399, 400 (quoting Clarke); *see also* Conor Casey & David Kenny, *How Liberty Dies in a Galaxy Far, Far Away: Star Wars, Democratic Decay, and Weak Executives*, L. & LIT., MS at 3-4 (forthcoming 2022) (observing "that by transplanting legal ideas into fictional worlds which they can control, authors can explore its implications in a space far less problematic that transplants in the real world, which are a fraught enterprise") (citing Jaakko Husa, *Comparative Law, Literature and Imagination: Transplanting Law into Works of Fiction*, 28 MAASTRICHT J. EUR. & COMPAR. L. 371, 371 (2021)).

[39] *See, e.g.,* HENRY T. GREELY, CRISPR PEOPLE: THE SCIENCE AND ETHICS OF EDITING HUMANS (2021); WALTER ISAACSON, THE CODE BREAKER: JENNIFER DOUDNA, GENE EDITING, AND THE FUTURE OF THE HUMAN RACE (2021).

[40] Margaret Atwood, Oryx and Crake (2003).

[41] MICHAEL CRICHTON, NEXT (2006).

[42] MICHAEL CRICHTON, THE ANDROMEDA STRAIN (1969); *see also* Luis A. Campos, *Pandora's Pandemic*, 371 SCI. 1111 (2021) (drawing lessons for the current COVID-19 pandemic from the film adaptation of Crichton's novel).

[43] United States v. Kincade, 379 F.3d 813, 851 (9th Cir. 2004).

[44] Search conducted by the author on Oct. 23, 2021.

borrows, perhaps subconsciously, at least one idea."[45] Even the distinguished legal scholar Cass Sunstein[46] has written an entire book about *Star Wars* and the insights that it offers for law, society and the Constitution.[47]

While science fiction is of course, fiction, it is clearly convincing enough to give pause and to help a reader or a court to envision possible scenarios that *could* evolve. As Wigmore wrote on the literature of the law more generally, "the lawyer, whose highest problems call for a perfect understanding of human character and a skillful use of this knowledge, must ever expect to seek in fiction as in an encyclopedia, that learning which he cannot hope to compass in his own limited experience."[48]

III. Compiling a List of Legal Science Fiction Works

Though a few works of science fiction existed in Wigmore's day, and the genre had achieved significant popularity by Weisberg's time, neither list contained any works of science fiction, with one exception.[49] This omis-

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[45] United Steelworkers v. Weber, 443 U.S. 193, 219 (1979) (Rehnquist, J., dissenting).

[46] According to a recent study, Sunstein is the second-most cited legal scholar of all time. Fred R. Shapiro, *The Most-Cited Legal Scholars Revisited*, 88 U. Chi. L. Rev. 1595, 1602 (2021).

[47] Cass R. Sunstein, The World According to Star Wars 2 (2019) ("Star Wars is bipartisan and all-American . . . In all of human history, there's never been a phenomenon like Star Wars.").

[48] *Wigmore's "100 Legal Novels"* (1908), *supra* note 2, at 580. It is worth noting that science fiction references are also used in legal writing to illustrate points unrelated to their advanced or alien technologies. Most notably, Sunstein analogizes judicial decision-making in the common law system to the development of new "episodes" in the *Star Wars* saga. Sunstein, *supra* note 47, at 150. ("Constitutional law is full of 'I am your father' moments – twists and turns, reversals, unanticipated choices, seeds and kernels that launch whole new narratives. Judges are authors of Episodes, facing a background that they are powerless to change. But they are nonetheless able to exercise a lot of creativity."). Sunstein also uses *Star Wars* to question the originalist approach to constitutional interpretation. *Id.* at 160 ("[W]hen he wrote *A New Hope*, [George] Lucas had no idea about what would become major plot developments in *The Empire Strikes Back* and *Return of the Jedi*. It would have been preposterous for him, and for his coauthors and successors, to write further installments with reference to the question: *What was Lucas's original understanding?*").

[49] Anthony Burgess's *A Clockwork Orange* (1962) made it onto Weisberg's 1976 revision of Wigmore's list. Weisberg describes his engagement with this novel in a later article:

> I recall attending, in 1975, a weekly reading group of most of the Stanford Law School faculty. The subject was *A Clockwork Orange*, Anthony Bur-

sion may be understandable given the genre's historical (and undeserved) reputation as lacking serious literary merit. However, given the insights that works of science fiction can offer to judges, policymakers and lawyers, the time is ripe for the creation of such a list. This Part outlines the methodology I used to compile a list of fifty legal science fiction works that can be used to inform judicial and legal reasoning and understanding of the rapid growth of modern science and technology. There is necessarily a subjective element to these determinations, and I do not pretend to shed my personal preferences or experience in compiling this list. Part A describes the substantive selection criteria that I used in compiling this list (i.e., what qualifies as a work of legal science fiction?). Part B outlines more technical selection criteria (i.e., which works of legal science fiction were selected for the list?). And Part C defines the plot categories that are used to group the works.

A. Substantive Selection Criteria

If we accept the need, or at least the utility, of a list of legal science fiction works, we must next ask how we should go about compiling such a list. Following the method of Wigmore and Weisberg, some selection criteria must be developed. As Wigmore asks, "[w]here shall the line be drawn?"[50]

First, the list includes only works of science fiction. While there are multiple definitions of "science fiction," this article will utilize the definition already provided: Works that contain settings, societies, or technologies that, while seemingly possible within the known rules of the universe, do not exist in the present day.[51] Using this definition excludes from the list a large number of popular fantasy, superhero,[52] mythological, horror[53] and

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> gess's frightening look into the criminal justice system of the undistant future. Several younger faculty members expressed literal outrage that a work of fiction had been chosen, as opposed to the common run of legal history, biography, economic theory or — at one extreme of tolerance — Rawlsian jurisprudence. There was, among this group of bright lawyers, absolutely no affect in the direction of the imaginative, the intuitive and the irrational, even when the subject matter of the creative work clearly interested the given audience.

Coming of Age, *supra* note 10, at 111.

[50] *Wigmore's "100 Legal Novels"* (1908), supra note 2, at 574.

[51] *See* ROBERTS, *supra* note 19, at 1-21 (discussing the definitions of "science fiction").

[52] Superhero stories originate from comic books and dominate the film industry today. They present a tricky definitional conundrum. *Cf. supra* note 22 (discussing

similar works. Even important allegorical works such as *Animal Farm* must reluctantly be omitted.[54]

Second, to merit inclusion on the list, a work must contain a significant legal element. While the story need not be devoted *entirely* to a legal dispute or issue, the legal element must nonetheless form at least a significant aspect of the plot or the backdrop to the story. For example, in *Blade Runner*, non-human replicants are legally prohibited from returning to Earth. This restriction forms the basis for the crime noir plot.[55] While the plot of *Blade Runner* does not dwell on the minutiae of these legal rules, they form an essential backdrop to the action, and the implications of such restrictions are explored in some detail.

That being said, a work that simply depicts contemporary legal issues in a futuristic or alien setting does not qualify for the list. For example, fighting conventional crimes using advanced technologies (e.g., the sentient car in *Knight Rider*) or a mechanized police force (*RoboCop*) do not make the grade. Likewise, a story describing an otherwise conventional murder on a remote space station, while qualifying as science fiction, is probably not sufficiently legal to merit inclusion on a list of legal science fiction. In other

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"the Force" in *Star Wars*). In some cases, the "explanation" for the superpowers possessed by heroes and villains is purely magical or mythological (e.g., Thor, Wonder Woman, Aquaman) while in others a putative scientific rationale is offered (e.g., Spiderman was bitten by a radioactive spider, Superman was born on the planet Krypton, and the X-men possess genetic mutations). Though one may scoff at comic book science-babble, it is no less explanatory or implausible than *Star Trek*'s warp drive or transporters, so why is *Star Trek* a revered member of the science fiction pantheon while *Superman* falls outside of the category entirely? There is probably no better answer than custom. Because a spaceship traveling at very fast speeds *seems* more scientifically plausible than a man doing so, we classify *Star Trek* as science fiction, but not *Superman*. After all, as observed by Arthur C. Clarke in what has become known as Clarke's "Third Law," "[a]ny sufficiently advanced technology is indistinguishable from magic." Arthur C. Clarke, *Hazards of Prophecy: The Failure of Imagination*, *in* PROFILES OF THE FUTURE: AN INQUIRY INTO THE LIMITS OF THE POSSIBLE 14 (1962).

[53] The "zombie" movie genre presents another definitional conundrum. Traditionally, zombies – corpses reanimated through occult or supernatural means – fall into the realm of horror and lack a scientific element. However, in recent years several films in the "zombie" genre have sought to explain the animation of corpses through pseudo-scientific explanations which usually involve an infectious agent (e.g., *The Walking Dead* (2010-present)*, World War Z* (2013)*, Train to Buson* (2016)). For classification purposes, I considered "viral zombie" stories to be science fiction, such as *28 Days Later* (2002), which involves the rapid conversion of *living* individuals into rabid monsters via a "rage" virus.

[54] *See supra* note 21 (discussing allegory).

[55] BLADE RUNNER (The Ladd Company et al. 1982).

words, the off-world aspects of the murder, including its motives, method or investigation, must foster consideration of not only the science fiction trappings of the story, but its *legal* aspects. Thus, is the murder of an alien treated differently than the murder of a human? What about an android? These plot twists add a speculative dimension to the legal aspect of the story and thus merit inclusion on the list.

Likewise, stories concerning the waging of war, political intrigue, and government oppression, even when played out in alien or futuristic settings, may not qualify as "legal" science fiction unless the issues go beyond those that are found in similar stories that take place back home. By the same token, a story that adopts the trappings of the legal process merely as decorative set pieces does not quality as legal science fiction. For example, the kangaroo trial of humanity conducted by the alien entity Q in the *Star Trek: The Next Generation* episode "Encounter at Farpoint" is not a trial in any real sense of the word.[56] Despite the fetching judicial robes and courtroom setting, the episode does not address legal issues in a meaningful sense.

Third, as both Wigmore and Weisberg teach, the work should have achieved some degree of public recognition in order to be recommended broadly as an exemplar of its class. For science fiction works, this recognition can take the form of awards, inclusion in anthologies, discussion in the secondary and scholarly literature, or, in the case of television series or movies, continued availability via popular streaming channels. While I avoided works that are too recent to have withstood the test of time, I have included one recent television series – *Black Mirror* – because of its strong legal themes and popularity.[57]

On the other hand, I have included some lesser-known works as well. For example, the 2003 short film *The Second Renaissance* by Japanese animator Mahiro Maeda is included. It is an animated short film that is part of the collection titled *The Animatrix*, a moderately obscure member of the Matrix franchise. I selected *The Second Renaissance* in lieu of any of the far better-known *Matrix* films because it is a legal tour de force, detailing the laws and political pressures that led to the dystopian, machine-ruled world of the films.[58] It is, in effect, a parable of racial oppression – man versus machine – in which the oppressed eventually rise up and prevail, with hideous consequences for the oppressors. Thus, while the work is little known today, I would encourage the curious to seek it out.

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[56] *Star Trek: The Next Generation*: *Encounter at Farpoint* (Paramount Pictures Sept. 28, 1987).

[57] *Black Mirror* (Zeppotron & House of Tomorrow 2011-present).

[58] THE SECOND RENAISSANCE (Village Roadshow Pictures et al. 2003).

B. Technical Selection Criteria

As for the types of works included, I have taken an expansive view. Novels and short stories are included, as they are on the Wigmore-Weisberg lists. But given the tremendous reach and impact of television and film today, it would be myopic not to include works of media on the list. This is particularly relevant because some of the best-known science fiction works in recent memory are films.[59] On this list, films are identified by director rather than screenwriter in accordance with industry practice.

Television series present a unique challenge. *Star Trek*, perhaps the most extensive science fiction franchise of all time, spans nine television series, thirteen feature films and dozens of books produced over the course of a half-century. While these exist in a common universe with key shared elements (the United Federation of Planets, the Prime Directive, the major alien species), they span hundreds of years of future history, feature dozens of major characters and introduce thousands of story lines. Given the breadth and importance of a television series like *Star Trek*, I have treated each episode as a unique work identified by screenwriter. In addition to its creator Gene Roddenberry, *Star Trek* included many science fiction luminaries among its writers. These included Harlan Ellison ("City on the Edge of Forever"), Theodore Sturgeon ("Amok Time," "Shore Leave"), Robert Bloch ("What Are Little Girls Made Of?," "Catspaw," "Wolf in the Fold"), Frederic Brown ("Arena") and Norman Spinrad ("The Doomsday Machine").

In many cases, multiple versions of a work exist. A book or a story may be adapted for film or television, or a film may be "novelized" as a book. In compiling this list, I have listed the version of a work that is either best known, or which best captures the legal element that is of interest. If two versions of a work are well-known and address the legal element, I have generally listed the earlier version. If the work exists in a significant secondary version, I note that in a footnote. For example, for Kazuo Ishiguro's poignant story of human clones, *Never Let Me Go*, I have listed the 2005 novel, with a note referencing the respectable 2010 film. However, I list Ridley Scott's 1982 noir film masterpiece *Blade Runner*, with a note referencing Philip K. Dick's 1968 novel, *Do Androids Dream of Electric Sheep?* because the film is far better known than the novel and also bears little

[59] *See supra* note 33.

resemblance to it. In cases in which a film adaptation of a book or story is of far lower quality than the original, I have not listed the adaptation at all.[60]

A diversity of viewpoints is also important in a list like this. It is well-known that the early history of science fiction was dominated by white, male authors.[61] In the 1950s, more women began to emerge as meaningful voices in the genre and in 1968 and 1969 a watershed moment for women occurred when Anne Inez McCaffrey and Ursula K. Le Guin won major literary prizes in the genre.[62] Other significant female authors including Joanna Russ, Doris Lessing, Octavia Butler and Margaret Atwood emerged soon thereafter, and in the last twenty years, women have won a majority of the Nebula Awards for the Best Science Fiction Novel and half of the Hugo Awards for the Best Science Fiction/Fantasy Novel.[63] And in 2021, *all* of the nominees for the Hugo Award for Best Novel were women,[64] and Le Guin was featured on a U.S. postage stamp.[65]

People of color have also attained notable success in the science fiction world once dominated by white males. In the 1960s, Samuel R. Delany stood out as the only prominent openly gay or Black author writing in the genre.[66] In the last several decades, Black authors including Delany, Butler, Nnedi Okorafor and N.K. Jemisin have won the Hugo and Nebula

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[60] For example, the 2004 film adaptation of Asimov's classic book *I, Robot* starring Will Smith bears so little resemblance to the original that I find no reason to acknowledge its existence. I, ROBOT (Davis Entertainment et al. 2004). The 2006 rotoscope animated version of Philip K. Dick's *A Scanner Darkly* (1977), though faithful to the book's plot, is so painful to watch (with partially animated versions of Keanu Reeves, Robert Downey Jr., Woody Harrelson, and Winona Ryder) that I would not inflict it on anyone. A SCANNER DARKLY (Thousand Words et al. 2006).

[61] *See* HELEN MERRICK, *Gender in Science Fiction*, *in* THE CAMBRIDGE COMPANION TO SCIENCE FICTION 241 (Edward James & Faran Mendleson eds., 2003). *But see* SISTERS OF TOMORROW: THE FIRST WOMEN OF SCIENCE FICTION xvii (Lisa Yaszek & Patrick B. Sharp eds., 2016) (noting that women made up roughly 16% of pulp science fiction writers, artists, editors, and journalists from 1926-1945).

[62] *See Awards by Year,* NEBULA AWARDS, https://perma.cc/HLR7-H4LT [hereinafter *Nebula Awards*]; *Hugo Awards by Year*, HUGO AWARDS, https://perma.cc/3MVA-K7MX [hereinafter *Hugo Awards*].

[63] See *Nebula Awards*, *supra* note 62; *Hugo Awards supra* note 62.

[64] *See Hugo Awards*, *supra* note 62.

[65] NEW STAMP HIGHLIGHTS ACCLAIMED AUTHOR URSULA K. LE GUIN, https://about.usps.com/newsroom/national-releases/2021/0628ma-new-stamp-highlights-acclaimed-author-ursula-k-le-guin.htm [https://perma.cc/BDF5-JM85] (visited Dec. 28, 2021).

[66] Grace Sikorski, *Samuel Delany (1942-)* in CONTEMPORARY AFRICAN AMERICAN NOVELISTS A BIO-BIBLIOGRAPHICAL CRITICAL SOURCEBOOK 115, 115 (Emmanuel Sampath Nelson, ed., 1999).

Awards.[67] And the first novel by prominent Black Pulitzer Prize winner Colson Whitehead was a work of science fiction.[68]

In addition, LGBTQ+ science fiction has become a distinct sub-genre with its own literary prize: the "LGBTQ Speculative Fiction" category of the Lambda Literary Awards.[69] Authors including Jemisin, Arkady Martine and Nicola Griffith have won Nebula or Hugo Awards for works that feature LGBTQ+ characters or themes.[70] Science fiction has thus become a vehicle for expression by authors of many different perspectives, lenses, and identities, and this list seeks to be representative of the diversity within the genre, while adhering to the thematic framework described above.

The final consideration in compiling a list such as this is its overall length. As noted above, Wigmore's original collection of legal novels was fifty long. He expanded it to nearly four hundred over the next decade before trimming the list to about 100 works in 1922. In his 1976 update, Weisberg both preserved the 100-work limit and expanded the scope of the list to encompass both stories and plays. Because science fiction is but one genre of literature, I feel that fifty is an appropriate length for this list. I could easily list a hundred or more works, but doing so would begin, I feel, to include works in which the legal element is more marginal. So, at least for the moment, it is fifty.[71]

In order to fit everything into a list of fifty, it was necessary to omit numerous titles that otherwise would have qualified. In selecting which titles to omit, I considered various factors, including the degree to which legal issues were featured, the treatment of similar themes in other titles to avoid thematic duplication, a diversity of authorial voices, and the degree to which titles are known and respected among fans and the general public. Of necessity, these choices were highly subjective, and I look forward to readers' views regarding the choices made.

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[67] *See Nebula Awards*, *supra* note 62; *Hugo Awards supra* note 62.

[68] COLSON WHITEHEAD, THE INTUITIONIST (1999). Whitehead won the Pulitzer Prize in Fiction in 2017 for THE UNDERGROUND RAILROAD (2016).

[69] *Guidelines for Lammy Award Submissions*, LAMBDA LITERARY, https://lambdaliterary.org/awards/lammys-submissions/ [https://perma.cc/77WW-8V3H].

[70] *See Nebula Awards*, *supra* note 62; *Hugo Awards supra* note 62.

[71] Stephen Krueger has created a truly comprehensive catalog of science fiction stories addressing legal topics, with an emphasis on works written during the Golden Age of science fiction. *See* Stephen Krueger, *Bibliography: Law in Science Fiction*, SSRN (Mar. 1, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2103087 [https://perma.cc/MDE5-Z5RX].

C. Plot Categories

The final innovation of Wigmore's list was the classification of each work within a four-part schema.[72] Weisberg preserves but partially revises Wigmore's classification system, seeking "to indicate in which specific ways literary artists have demonstrated an interest in the law."[73] As such, the Wigmore-Weisberg classification scheme is largely structural in nature, grouping works based on the manner in which the authors have integrated legal elements. The four classifications utilized by Wigmore and Weisberg can be summarized as follows:

A. *Procedural*: the work depicts a full legal procedure, such as a trial or investigation (e.g., the trial in *The Merchant of Venice*);
B. *Character*: a lawyer is a central figure in the plot and depicted in his/her "out-of-court dealings with reality"[74] (e.g., Atticus Finch in *To Kill a Mockingbird*);
C. *Doctrinal*: a specific body of laws, often a single statute or system of procedures, is an organizing structural principle (e.g., the inheritance dispute in *King Lear*); and
D. *Thematic*: less patently "legal" works which nonetheless powerfully evoke the deepest problems raised by the relationship of the law to the individual or society (e.g., Wright's *Native Son*, which "forcefully presents the difficulties experienced by a black man whose actions displace him from the protected area of institutional benignity").[75]

While I emulate Wigmore and Weisberg's use of a classification system for the works selected, I do not follow their structural approach. In the case of science fiction, there are precious few legal procedures and even fewer notable works that feature lawyers as their principal characters. Instead, I adopt a classification system that is thematic and doctrinal in nature, but I retain a category that preserves the legal "procedural" elements of Wigmore

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[72] *Wigmore's "100 Legal Novels"* (1908), *supra* note 2, at 574 ("As for any definition or further subdividing of the 'legal' novel, it is perhaps unprofitable and certainly difficult, being decidedly open to difference of taste and opinion. Nevertheless, for those who care to pick and choose, there may be noted, in the rough, four kinds . . .").

[73] Weisberg, *Revised List* (1976), *supra* note 12, at 18–19 ("[T]he categories remain helpful by directing the professional reader to the predominating legal aspect of each text. Furthermore, reading works in each category over a relatively short period of time will allow the follower of the list to take note of the remarkable similarities in works otherwise displaying greatly varied styles and thematic concerns.").

[74] Weisberg, *Revised List* (1976), *supra* note 12, at 21.

[75] Weisberg, *Revised List* (1976), *supra* note 12, at 22-23.

and Weisberg's lists. The plot categories are meant to map the most common ways in which works of science fiction engage with legal frameworks. The proposed classification system is set forth below:

A. *The Nature of Personhood*
B. *Encountering the Other*
C. *Dystopianism*
D. *Utopianism*
E. *Corporatism*
F. *Crime and Punishment*
G. *Prometheism*
H. *Survivalism*
I. *Procedure*
J. *Intellectual Property*
K. *Public Law*

Category A – *The Nature of Personhood* is a favorite subject of science fiction authors. This category emerged as early as Mary Shelley's genre-defining work *Frankenstein* (1818), in which the "monster" contemplates the nature, and existence, of its own soul. These existential questions have captivated science fiction authors ever since. Science fiction has explored questions of personhood, consciousness, self-awareness and identity in the context of androids (*Blade Runner, The Second Renaissance,* "Measure of a Man"), artificial intelligence programs (*Neuromancer*), human clones (*Never Let Me Go*), and genetically enhanced humans (*Generosity, Gattaca*). In each of these stories, laws constrain or oppress the individual, leading him/her/it to ponder questions about its own nature. Just as Shakespeare's Shylock, a favorite of the law and literature canon, rails against the laws that oppress his people, "[h]ath not a Jew eyes?", so do Dr. Moreau's vivisected beast-men ask, "[a]re we not men?" This fundamental question runs through all of the works in this category.

Category B – *Encountering the Other* deals with laws that govern the relationships among groups, often those that enable a dominant group to subjugate another. Some stories in this category may also fall within Category A, but Category B deals primarily with outward social constraints rather than introspective identity concerns. Laws governing the interaction between species can be portrayed in science fiction as paternalistic, exemplified by *Star Trek's* Prime Directive, which prohibits representatives of the Federation from interfering with less developed societies, to stabilizing, such as the rules in *Men in Black* prescribing alien conduct on Earth, to downright oppressive. This final category of rules governing the interaction of species is common in science fiction, and often serves as a springboard for the consideration of past and present human rules about slavery, discrimina-

tion and racial separation. Derrick Bell makes this comparison explicit in his didactic short story "The Space Traders,"[76] though many other works including *District 9*, *Blade Runner* and *The Second Renaissance* raise similar issues of enforced racial/species separation.[77]

Category C – *Dystopianism* is another common fixture of the science fiction genre. A vast array of evil science fiction empires appear in stories from *Flash Gordon* to *Star Wars.* Unfortunately, autocratic states that suppress individual rights, thought and freedom are not unique to the realm of fiction, and many depictions of oppressive states in science fiction are thinly-veiled renditions of Nazi Germany, Imperial Britain, Pharaonic Egypt and other autocratic states from human history. The works in this category generally display some oppressive legal structure that has a novel or distinctive aspect, such as governmental thought control, state-sanctioned book burning, or the systemic suppression of women.

Category D – *Utopianism* relates to legal rules that seek to promote the enhancement or perfection of a species or society, often at the cost of individual rights or freedom. The envisioned enhancements can be biological (*Gattaca, Brave New World*), technological (the *Black Mirror* episode "Nosedive"), psychological (*A Clockwork Orange*) or social (*Logan's Run*). The common theme, however, is that the perfection-seeking intervention rarely achieves its goal, and often sends the desired utopia plummeting into the realm of dystopia.

Category E – *Corporatism* portrays the growing power of multinational corporations. Science fiction offers a convenient vehicle to extrapolate current corporate excesses to heady extremes. Corporate entities are among the most sinister characters in science fiction. *Blade Runner* features the Tyrell Corporation, *Jurassic Park* has InGen, *Neuromancer* Tessier-Ashpool S.A., and *Ready Player One* has Innovative Online Industries. In each case, legal rules or the legal system itself empowers these corporate entities. Although largely portrayed as impersonal, sinister and dangerous, the sheer greed of the powerful corporations is played to humorous effect in satires such as *Year Zero*.

Category F – *Crime and Punishment* in science fiction has a long history. Stories such as *Nineteen Eighty-Four*, *Brave New World*, and *A Clockwork Orange* contend with the nature of criminal conduct and how it should be defined. Others, such as *Shadow of the Torturer* and "The Jigsaw Man," focus on novel methods of criminal punishment as vehicles for questioning the

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[76] Derrick Bell, *The Space Traders*, *in* FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 158 (Basic Books 1992).

[77] *See generally* MARK BOULD & SHERRYL VINT, THE ROUTLEDGE CONCISE HISTORY OF SCIENCE FICTION (2011) (discussing issues of race in science fiction).

morality of the criminal justice system. These moral questions are especially important when punishment is turned to some arguably utilitarian purpose like the use of prisoners as forced laborers, experimental subjects and/or organ donors.[78] Other stories in this category like "A Thousand Deaths" conceive of criminal punishment as a spectacle, evoking gladiatorial combat and public executions of the past with a futuristic twist. These stories say something not only about the criminal justice system, but also about a society that views human suffering as entertainment.[79]

Category G – *Prometheism* relates to rules that society imposes in order to control its own creations – whether dangerous new technologies or environmental collapse. Future-looking stories of this type depict rules seeking to constrain or control artificial life forms like androids, robots, and artificial intelligence. These include *Neuromancer*, *I, Robot*, *Blade Runner* and *Altered Carbon*. Other variants include attempts to control the genetic engineering experiments run amok in *Jurassic Park*.

Category H – *Survivalism* covers works that address legal rules imposed by the survivors of a major society-altering event or catastrophe that drastically reshapes the contours of human society like a pandemic, nuclear holocaust, or environmental collapse.[80] Examples in this list include the societal reorganization that occurs after the sterility plague in *Children of Men*, and the semi-anarchic social structure portrayed in *Mad Max Beyond Thunderdome.*

Category I – *Procedural* works feature procedural aspects of a legal investigation, case or trial as a central plot point. For example, numerous *Star Trek* episodes involve an accusation that a crew member committed a crime, and the technical maneuvering that leads to his or her exoneration. The *Minority Report* imagines an array of futuristic legal procedures, including obtaining arrest warrants for a crime not yet committed, while *Starship Troopers* depicts the dispensation of military justice in a manner that evokes

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[78] For perhaps one of the most chillingly bizarre forms of criminal punishment in science fiction, *see* CHINA MIÉVILLE, PERDIDO STREET STATION (2000) (featuring a system where the guilty are "remade" through the application of twisted science and thaumaturgy into malformed creatures that exist on the edges of society).

[79] Perhaps the most bizarre of these is *The Running Man*, a 1987 Arnold Schwarzenegger film based on the book by Richard Bachman in which convicts become contestants on a sadistic but wildly popular television game show. THE RUNNING MAN (TriStar Pictures, Inc. 1987). Another notable treatment is in the Black Mirror episode "White Bear" (2013), in which a toxic cameraphone culture is juxtaposed against the punishment-as-entertainment theme. *Black Mirror: White Bear* (Channel 4 broadcast Feb. 18, 2013).

[80] *See generally* BOULD & VINT, *supra* note 77 (discussing apocalyptic fiction of the Cold War era and the 1980s).

classic World War II accounts. Kim Stanley Robinson's monumental *Blue Mars*, on the other hand, depicts nothing less than a full constitutional convention. Each of these works is interesting not only for the substantive issues that it tackles, but for their compelling takes on legal procedure and how it may evolve in the future. A final species of work included in this category (and one that harkens back to Wigmore) is one that portrays a lawyer or law enforcement officer as a principal character. Such stories illustrate how individual insiders operate within novel legal systems. These works include *Year Zero*, *The Dosadi Experiment*, *Blade Runner*, *Altered Carbon*, *Minority Report*, *Men in Black*, *Fahrenheit 451*, *A Scanner Darkly*, *The Shadow of the Torturer*, and several of Asimov's robot stories.

Category J – *Intellectual Property* in science fiction often deals with technologies that do not exist today but that originate in the future or with alien civilizations. Some works focus on the legal treatment of these technologies and depict their protection either as sources of fabulous wealth (*Illegal Alien*, *The Man Who Fell to Earth*), administrative inconvenience (*Year Zero*) or corporate corruption (*Jurassic Park, NEXT*).

Category K – *Public Law* in science fiction generally concerns rules governing not individual conduct, but the relationships among political entities, whether they be states, planets or species. The trade routes of concern in *Star Wars: The Phantom Menace* fall into this category, as do the planetary governance mechanisms in Kim Stanley Robinson's *Blue Mars* and *The Ministry of the Future*.

D. Critical Works

One of Weisberg's greatest contributions to Wigmore's list of novels was an appendix cataloging critical works in the then-emerging discipline of law and literature. I have done the same with respect to law and science fiction.

Critical works concerning law and science fiction have appeared in a range of scholarly outlets, from traditional law reviews to specialized science-technology law journals to literary criticism journals and a few monographs and edited collections. There have been at least two academic symposia on the topic of law and science fiction which have resulted in published articles as well as informative introductory pieces: *Legal Studies Forum* (1999) and *Law, Culture and the Humanities* (2018). A third introduction was presented at the 2021 annual meeting of the Association of American Law Schools with contributions in the *Michigan Technology Law Review*.[81]

[81] *Robots, Reality & Responsibility*, 27 MICH. TECH. L. REV. I (2021).

The selection criteria for the critical works in the Appendix was straightforward. The critical work must address an issue of law as depicted in a work of science fiction and meaningfully engage with that work of science fiction. Critical works that merely use science fiction tropes as analogies or vaguely describe new technologies (such as human cloning) as within "the realm of science fiction"[82] do not meaningfully engage with any particular work of science fiction and were not included. For example, an article that compares modern corporations to *The Terminator* would not merit inclusion.[83] Likewise, the growing body of academic literature on science fiction (literary criticism, political science, sociology, cultural studies, media studies), much of which appears in the journal *Science Fiction Studies* based at DePauw University, as well as a handful of edited volumes, is not included unless it contains a significant analysis of legal issues. But so long as these criteria were met, I was relatively lenient regarding the type of work included in this list, ranging from academic articles to long-form journalism to thoughtful blog posts.[84]

Doctrinal approaches in this literature vary. Perhaps the most significant area of study concerns the insights that science fiction literature can offer with respect to race and discrimination law. The late Harvard Law School Professor Derrick Bell holds a unique place in this article, as he appears as both the author of the science fiction short story and of various critical commentaries on that work. Bell's "The Space Traders" is a parable of an alien race that offers to trade gold, environmental decontaminants and safe nuclear energy in exchange for all of the Black residents of the United States. The story is also the subject of several critical retrospectives on criti-

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[82] *See, e.g.*, Sophia Kolehmainen, *Human Cloning: Brave New Mistake*, 27 HOFSTRA L. REV. 557, 557 (1999) ("Until recently, discussions about human cloning were conducted within the realm of science fiction and fantasy.").

[83] *See* Mary Kreiner Ramirez, *The Science Fiction of Corporate Criminal Liability: Containing the Machine through the Corporate Death Penalty*, 47 ARIZ. L. REV. 933, 934 (2005) ("Although science fiction, *The Terminator* could conceivably be renamed The Corporation, and with minor changes, such as recasting the corporate lobbyist in Schwarzenegger's role, the current state of corporate dominance could slip right into the plot of the original movie.").

[84] I excluded, however, unpublished student papers, as well as the tongue-in-cheek contributions to the short-lived *Science Fiction Law Journal*, a student publication at Loyola Marymount University that released three issues from 1996-1997 and described its content as "a compilation of visionary & futuristic news shorts, fiction stories, case hypotheticals and concept art." John Rogers, *Acknowledgements*, 1 SCI. FICTION L. J. 1, 1 (1996). Some of these works are referenced in Krueger, *supra* note 71.

cal race theory, also included in this collection.[85] Other frequent topics of commentary include issues of criminal justice and imprisonment as elucidated through science fiction literature.

In terms of the science fiction works addressed by this literature, the most popular in terms of sheer quantity of references is *Star Trek* in its various incarnations (original series, *The Next Generation*, *Voyager*, etc.). Other popular subjects of critical commentary are *The Dispossessed*, *Neuromancer*, *Gattaca*, Asimov's robot stories, *Dune*, *Logan's Run*, *Never Let Me Go* and Olivia Butler's *Xenogenesis* series. Some critical works mention science fiction titles that are not on this list, including various *Dr. Who* and *X-Files* episodes. In general, I have not included these as the stories, while illustrating points about society, politics and human nature, are not explicitly law related. Others, regrettably, have been omitted due to space constraints.

And now, in the words of Wigmore, "at last, for our list"![86]

A List of Legal Science Fiction Works

Asimov, Isaac

1. **I, Robot** (short story collection) (1950)[87] [A, G]

I, Robot is a collection of Asimov's robot-themed short stories, most of which had previously appeared in magazines and other collections.[88] Asimov's "Three Laws of Robotics,"[89] first introduced in the 1942 story "Runaround," launched an entirely new way of thinking about the interaction between humans and machines. The Three Laws are still raised today in discussions of artificial intelligence and machine

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[85] See Adrien Katherine Wing, *Space Traders for the Twenty-First Century*, 11 Berkeley J. Afr.-Am. L. & Pol'y 49 (2009); Katheryn Russell-Brown, The Soul Savers: *A 21st Century Homage to Derrick Bell's* Space Traders *or Should Black People Leave America?*, 26 Mich. J. Race & L. 49 (2020).

[86] *Wigmore's "100 Legal Novels"* (1908), *supra* note 2, at 586; *see also* Weisberg, *"Revised List"* (1976), supra note 12, at 24.

[87] Isaac Asimov, I, Robot (1950).

[88] Asimov published several other collections of robot stories, many of which are compiled in *The Complete Robot* (Doubleday, 1982), and a series of novels featuring detective Lije Bailey and the Three Laws: *Caves of Steel* (1954), *The Naked Sun* (1957) and *The Robots of Dawn* (1983).

[89] Asimov's "Three Laws" are: (1) "[A] robot may not injure a human being, or, through inaction, allow a human being to come to harm;" (2) "[A] robot must obey the orders given it by human beings except where such orders would conflict with the First Law;" (3) "[A] robot must protect its own existence as long as such protection does not conflict with the First or Second Laws." Isaac Asimov, *Runaround*, *in* I, Robot 40, 51 (1950); *see generally* Krueger, *supra* note 71, at 38-40 (discussing the "Three Laws").

intelligence.[90] The overarching lesson of the stories compiled in the collection is that no matter how carefully a rule may be designed, situations will arise that challenge a mechanistic application of that rule. As Asimov demonstrates time after time, law is a humanistic endeavor, not a mechanical one.

Atwood, Margaret

2. **The Handmaid's Tale** (novel) (1985)[91] [A, C, F]

A quasi-religious revolution overthrows the U.S. government and transforms the United States into the Republic of Gilead, an authoritarian theocracy. Among the many social changes implemented in the new republic is the reorganization of society around "traditional" gender roles. In particular, women are not allowed to own property, read or write, and their reproductive functions are largely dictated by state needs.

Bell, Derrick

3. **"The Space Traders"** (short story) (1992)[92] [A, B, K]

In this short story, the late constitutional scholar Derrick Bell asks a simple question: if given a choice, would white Americans relinquish the entire Black population of the country to visiting space aliens in exchange for alien technology that could save the environment, end disease and prolong life? Discuss.

Blomkamp, Neill (dir.)

4. **District 9** (film) (2009)[93] [B, C, K]

This innovative film places the interaction between humankind and the first alien species it encounters not on the battlefield but in an internment camp built to hold these unfortunate visitors to Earth. Much of the film was shot in South Africa, and the parallels to apartheid and the issues that it raises are self-evident.

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[90] *See, e.g.*, Alan F. T. Winfield & Marina Jirotka, *Ethical Governance is Essential to Building Trust in Robotics and Artificial Intelligence Systems*, 376 PHIL. TRANS. ROY. SOC. 3-4 (2018), https://perma.cc/DP3A-LKUC; Robin Murphy & David D. Woods, *Beyond Asimov: The Three Laws of Responsible Robotics*, 24 IEEE INTELLIGENT SYSTEMS 14-20 (2009).

[91] MARGARET ATWOOD, THE HANDMAID'S TALE (1985); *see also The Handmaid's Tale* (HBO 2017-present) (television adaption).

[92] Bell, *supra* note 76. Before publishing his story, Professor Bell told the story of the "Space Traders" on the first day of his Constitutional Law class for several years at Harvard Law School. I was privileged to be a student in one of those classes and to hear the story dramatically rendered by its creator.

[93] DISTRICT 9 (TriStar Pictures, Inc. 2009).

Bova, Ben

5. **The Dueling Machine** (novella) (1969)[94] [D, F]

This novella addresses a common theme in science fiction: what if actual conflict could be simulated, and replaced, by virtual conflict?[95] The dueling machine is an invention that allows two individuals to engage in combat in a virtual environment. Thus, "[w]hen two men had a severe difference of opinion, deep enough to warrant legal action, they could go to the dueling machine instead of the courts. Instead of passively watching the machinations of the law grind impersonally through their differences, they could allow their imaginations free rein in the dueling machine . . . On most civilized worlds, the results of properly monitored duels were accepted as legally binding."[96] The system works well until the technology is subverted and people begin to die in real life.

Bradbury, Ray

6. **Fahrenheit 451** (novel) (1953)[97] [C, I]

Book burning – the willful destruction of knowledge, culture and history – has afflicted societies over the centuries.[98] Bradbury wrote *Fahrenheit 451* partially in response to the rhetoric and tactics of Senator Joseph McCarthy, but the themes that it raises are timeless.[99]

Brooker, Charlie & Huq, Konnie

7. **"Fifteen Million Merits,"** *Black Mirror* (television episode) (2011)[100] [C, E]

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[94] BEN BOVA, THE DUELING MACHINE (1969).

[95] The original *Star Trek* series also addressed this theme in an episode depicting an alien society that conducts war using a computer simulation that occasionally requires individuals to report to "disintegration chambers" to be converted into actual casualties. *See Star Trek: The Original Series: A Taste of Armageddon* (Desilu Productions Feb. 23, 1967); *see also* Fredric Brown, *Arena*, ASTOUNDING SCI. FICTION, June 1944, at 70 (exploring a similar theme).

[96] BOVA, *supra* note 94, at 294; *see also* Walter A. Effross, *High-Tech Heroes, Virtual Villains, and Jacked-In Justice: Visions of Law and Lawyers in Cyberpunk Science Fiction*, 45 BUFF. L. REV. 931, 968 (1997) (discussing The Dueling Machine as one of several works featuring "[the] Lawyer as Virtual Warrior").

[97] RAY BRADBURY, FAHRENHEIT 451 (1953). Bradbury's classic novel has been adapted for film by François Truffaut (1966) and Ramin Bahrani (2018). Neither adaptation does justice to the book.

[98] *See* HAIG A. BOSMAJIAN, BURNING BOOKS (2006).

[99] *See* Kevin Hoskinson, *"The Martian Chronicles" and "Fahrenheit {sic} 451": Ray Bradbury's Cold War Novels*, 36 EXTRAPOLATION 345, 346, 348 (1995).

[100] *Black Mirror: Fifteen Million Merits* (Zeppotron 2011)

A near-future society requires its members to pedal stationary bikes all day in order to earn "merits" which they can use for food, entertainment and luxury goods. The only ruling authority appears to be a 3-judge panel from a televised talent show called *Hot Shot* that bears similarities to *The X Factor* and *American Idol*. While the episode lacks an explicit recital of the complex internal rules mechanisms that make this society work, they are clearly conveyed through the action.

Burgess, Anthony

8. **A Clockwork Orange** (1962)[101] [D, F, I]

In Anthony Burgess's classic novel, the modern psychiatric and criminal justice establishments attempt to reform juvenile delinquent Alex after he commits a string of horrific crimes without apparent motive or gain. Burgess's chilling meditation on morality, recidivism and youth remain fresh today.

Butler, Octavia

9. **Dawn** (novel) (1987)[102] [B, D, H]

In the first book of Octavia Butler's award-winning *Xenogenesis* series, also called *Lilith's Brood*, protagonist Lilith is awakened from suspended animation 250 years after a nuclear war has devastated Earth. Her captors/saviors are the Oankali, an alien race that wishes to repopulate Earth. In doing so, the Oankali plan to integrate some of their own DNA into that of the surviving humans to create a new and superior species. *Dawn* presents an unusual twist on the "Encountering the Other" theme because the rules governing the interaction of the species are imposed not by humans, but by the Oankali. And those rules are, at least outwardly, surprisingly humane. The Oankali identified hierarchies as one of humanity's weaknesses and instead appear to exist in an almost flat, non-hierarchical society. By and large, Oankali society is peaceful and just – a sharp contrast to the paranoid and back-stabbing coalition formed by the surviving humans that they awaken.

Card, Orson Scott

10. **"A Thousand Deaths"** (short story) (1978)[103] [C, F]

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[101] ANTHONY BURGESS, A CLOCKWORK ORANGE (1962); *see also* A CLOCKWORK ORANGE (1971) (film adaptation directed by Stanley Kubrick).

[102] OCTAVIA BUTLER, DAWN (1987).

[103] Orson Scott Card, *A Thousand Deaths,* OMNI, Dec. 1978, at 98. It has been reprinted in anthologies including *Capitol* and *Maps in a Mirror*.

Card's short but powerful story takes place in an indeterminate future where Russia has taken over the United States. Protagonist and playwright Jerry Crove is accused of murder and treason. When Crove fails to confess, the prosecutor seeks the death sentence, which is imposed in spades. In a remarkably short space, the story makes compelling points about freedom of thought and speech, as well as criminal punishment and its transformation into public spectacle.

11. **"Unaccompanied Sonata"** (short story) (1979)[104] [C, D, F, J] This poignant story occurs in a society where everyone is assigned to the job that will make him or her the happiest. But things do not always work out that way. The strict regulations that govern this society establish order, but severely constrain creativity, especially among its most gifted members. Yet even those who break the law seemingly accept their cruel punishments without resistance or regret. As one character reflects, "it was the law that kept them all safe and happy."

Cline, Ernest

12. **Ready Player One** (novel) (2011)[105] [E]
Ready Player One occurs simultaneously in a near future version of the real world and a virtual universe in which the characters interact through avatars. The virtual world is a tribute to hundreds of geek cultural icons from the earliest text-based computer games to cryptic rock album liner notes. But it is the "real" world that is the most dangerous for protagonist Wade Watts, who is forced to contend with a host of increasingly aggressive corporate tactics, including a clever reimagination of the private debtors' prison, as he seeks to win a contest for control of the world's most powerful company.

Crichton, Michael

13. **Jurassic Park** (novel) (1990)[106] [E, G, J]
Michael Crichton's iconic novel *Jurassic Park* is a cautionary tale about the perils of genetic engineering and corporate greed. In addition to a wealth of plot devices centering on the corporate legal strategies of InGen and those who want to steal the secret of its genetically resusci-

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[104] Orson Scott Card, *Unaccompanied Sonata,* OMNI, Mar. 1979, at 50. It has been reprinted in anthologies including *Unaccompanied Sonata and Other Stories* and *Maps in a Mirror*.

[105] ERNEST CLINE, READY PLAYER ONE (2011); *see also* READY PLAYER ONE (Warner Bros. Pictures et al. 2018) (film adaptation directed by Steven Spielberg).

[106] MICHAEL CRICHTON, JURASSIC PARK (1990); *see also* JURASSIC PARK (Amblin Entertainment 1993) (film adaptation directed by Steven Spielberg).

tated dinosaurs, the film version of *Jurassic Park* contains one of the iconic scenes involving a lawyer in the history of cinema.[107]

14. **Next** (novel) (2006)[108] [E, G, J]
Sixteen years after *Jurassic Park*, Michael Crichton revisits genetic engineering and a range of other biotechnology advances in this uneven novel. It is listed here because the book takes on several legal issues that, according to Crichton, enable the types of mad scientist depredations depicted in the novel. Chief among these is "gene patenting", against which the author rails in an Appendix to the text.

Dick, Philip K.

15. **A Scanner Darkly** (novel) (1977)[109] [C, F, I]
The convoluted plot of Philip K. Dick's disturbing novel *A Scanner Darkly* revolves around a narcotics agent who is assigned to infiltrate a ring of drug users and dealers. The agent is a member and, perhaps, the leader of the drug ring. In Dick's dystopian world, surveillance is pervasive, law enforcers are anonymous, and paranoia is the norm.

Eggers, Dave

16. **The Circle** (novel) (2013)[110] [D, E]
David Eggers's dystopian vision of the near future involves pervasive surveillance provided by huge corporate enterprises that view themselves, perhaps cynically, as giving consumers what they want. At the center of the novel is The Circle, a mega-company. The Circle offers technology that eventually evolves to include constant audiovisual feeds of everyone all the time. The predicted benefits of crime prevention and political transparency, however, fail to materialize.

Ellison, Harlan

17. **A Boy and His Dog** (novella) (1969)[111] [F, H]
Harlan Ellison's Nebula Award-winning novella is admittedly uncomfortable to read. His emotionless depictions of pornography, rape, murder and even cannibalism are rendered with the dead-eyed sangfroid of

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[107] The short scene depicts a genetically engineered Tyrannosaurus rex plucking a hapless lawyer, played by the actor Martin Ferrero, from a toilet.

[108] MICHAEL CRICHTON, NEXT (2006).

[109] PHILIP K. DICK, A SCANNER DARKLY (1977).

[110] DAVE EGGERS, THE CIRCLE (2013).

[111] Harlan Ellison, *A Boy and His Dog*, NEW WORLDS, Apr. 1969, at 4. The novella was later collected in the graphic novel *Vic and Blood* (1988) and adapted into the 1975 film *A Boy and His Dog*.

a serial killer. Nevertheless, this short work by a pioneer of science fiction's "New Wave"[112] is a chilling but thought-provoking amorality play for the modern age. It depicts a ruined, post-apocalyptic world in which law no longer exists, and leaves us to wonder what, if anything, has filled the void. If there is a morality built into the human psyche, what does it entail? And what do we think of a society in which the strongest sense of duty is that between a man and his dog?

Gibson, William

18. **Neuromancer** (novel) (1984)[113] [A, E, G]

In the dark cyberpunk future of *Neuromancer*, the world is ruled by wealthy, cloned oligarchs, and the entire east coast from Boston to Washington, D.C. is a single mega-city called The Sprawl. The development of artificial intelligence (AI) is strictly regulated by the shadowy Turing Police. But Wintermute, a mysterious AI with Swiss citizenship, clandestinely recruits a gang of human cyber cowboys to help it reunite with its twin, Neuromancer. When the plot is discovered by the Turing Police, one officer explains, "For thousands of years men dreamed of pacts with demons. Only now are such things possible. And what would you be paid with? What would your price be, for aiding this thing to free itself and grow?"[114] Despite its age, *Neuromancer* still offers one of the freshest and most compelling visions of cyberspace and AI in all of literature.

Heinlein, Robert A.

19. **Starship Troopers** (novel) (1959)[115] [B, F, I]

Starship Troopers follows the career of young Johnny Rico from boot camp to ground warfare on far-flung worlds, with a healthy dose of military justice along the way. Heinlein's worldview is undoubtedly shaped by the Cold War and post-WWII/pre-Vietnam military glorification, his extended treatment of moral and legal topics – primarily centering on military law – is both thoughtful and thought-provoking.

Herbert, Frank

20. **The Dosadi Experiment** (novel) (1977)[116] [B, C, I]

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[112] Gary K. Wolfe, *Science Fiction and its Editors*, *in* THE CAMBRIDGE COMPANION TO SCIENCE FICTION 104 (Edward James & Farah Mendlesohn eds., 2003).

[113] WILLIAM GIBSON, NEUROMANCER (1984).

[114] *Id.* at 163.

[115] *See* ROBERT HEINLEIN, STARSHIP TROOPERS (1959).

[116] FRANK HERBERT, THE DOSADI EXPERIMENT (1977).

In this lesser-known work by the creator of the monumental *Dune* series, author Frank Herbert depicts an entire world called Dosadi that has been encapsulated for centuries within a cosmic shell. Dosadi serves as a planet-sized petri dish for the Gowachim, one of the galaxy's most ruthless and advanced species. McKie, the only human ever admitted to practice the twisted version of law observed by the Gowachim, is sent by the Bureau of Sabotage to investigate recent events on this remote outpost. McKie enters a Kafkaesque political-legal apparatus inhabited by calculating adversaries and inexplicable legal procedures. The novel contains some of Herbert's finest writing about law, including cryptic observations such as, "The Law is a blind guide, a pot of bitter water. The Law is a deadly contest which can change as waves change."[117]

Huxley, Aldous

21. **Brave New World** (novel) (1932)[118] [A. C, D, F]

Huxley's landmark dystopian novel depicts a society carefully structured through a panoply of eugenics and social control regulations: 70% of women must be sterile, infants are classified by intellectual capability into castes that determine their future careers and social status, and dissidents are banished to remote islands. The plot follows the entry of a "savage" outsider into this society and tracks his rise and eventual demise.

Ishiguro, Kazuo

22. **Never Let Me Go** (novel) (2005)[119] [A, D]

Kazuo Ishiguro's novel *Never Let Me Go* is, in my view, the most poignant and heart-wrenching exemplar of the compelled-organ-harvesting theme. A group of high school friends at a seemingly genteel English public school uncover the twisted truth that the children at Halisham School are clones created for the sole purpose of "donating" their organs to others. The legal and political reasoning that led to this gruesome outcome, and the ethical qualms of some of the system's administrators, provide ample food for thought.

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[117] *Id.* at 30.

[118] ALDOUS HUXLEY, BRAVE NEW WORLD (1932); *see also Brave New World* (David Weiner et al. 2020) (television adaptation).

[119] KAZUO ISHIGURO, NEVER LET ME GO (2005); *see also* NEVER LET ME GO (DNA Films et al. 2010) (film adaptation).

James, P.D.

23. **The Children of Men** (novel) (1992)[120] [C, H]

This beautifully rendered novel poses the chilling question: what would happen if the entire human race suddenly became infertile? The novel begins twenty-five years after an unexplained event called "Omega." In response, the British government enacts laws recognizing the gradual and inevitable demise of the human species. Early measures include destroying public playgrounds and fining the families of suicide victims. What results looks akin to a state-sponsored retirement community, with government-provided golf courses and massage therapy centers available to an aging, despairing and infertile population. Crime in Britain plummets once the Isle of Man is repurposed as a penal colony, and most ordinary citizens seem content to wait out the clock pursuing hobbies and meaningless pastimes. But more sinister currents emerge as the reader learns about forced immigrant labor, mass euthanasia and the increasingly authoritarian government. Is it enough for the state to provide a despairing populace with "protection, comfort, [and] pleasure?"[121] Or should it strive, as one dissident group believes, for "compassion, justice, [and] love?"[122]

Jones, Rashida & Schur, Michael[123]

24. **"Nosedive,"** *Black Mirror* (television episode) (2016)[124] [D]

In a world where everything depends on one's "five-star" social rating, the consequences of a social interaction gone sour or an unintended *faux pas* can be devastating. The implications of such social rating systems are increasingly relevant, particularly as they begin to inform the rules of modern governments (e.g., the social credit system proposed by the Chinese government[125]).

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[120] P.D. JAMES, THE CHILDREN OF MEN (1992); *see also* THE CHILDREN OF MEN (Strike Entertainment & Hit and Run Productions 2006) (film adaptation directed by Alfonso Cuarón).

[121] JAMES, *supra* note 120, at 60.

[122] *Id.*

[123] Rashida Jones and Michael Schur wrote the script based on a story by Charlie Brooker.

[124] *Black Mirror: Nosedive* (House of Tomorrow 2016).

[125] *See* Xin Dai, *Enforcing Law and Norms for Good Citizens: One View of China's Social Credit System Project*, 63 DEVELOPMENT 38 (2020); Gabrielle Bruney, *A 'Black Mirror' Episode Is Coming to Life in China*, ESQUIRE (Mar. 17, 2018), https://perma.cc/QD6V-RPPG.

Le Guin, Ursula K.

25. **The Dispossessed** (novel) (1974)[126] [B, D]

Le Guin's landmark novel revolves around the human societies on the twin planets Urras and Anarres. While Urras's capitalistic and bellicose society resembles that on Earth in many respects, Anarres was settled by political dissidents centuries earlier. The society on Anarres is a quasi-socialist utopia where private property does not exist, crime is virtually nonexistent, and doors rarely have locks. *The Dispossessed* offers numerous opportunities to reconsider existing legal rules and norms in view of Le Guin's alternatives.

Lessing, Doris

26. **Re: Colonised Planet 5, Shikasta** (novel) (1979)[127] [B, D, I]

Shikasta is the first book in Doris Lessing's *Canopus in Argos* series. Nobelist Lessing draws on her upbringing in Rhodesia – now Zimbabwe – to confront colonialism and cultural imperialism. The novel traces the 30,000-year involvement between agents of the Canopean Empire and Shikasta (Earth). According to the Canopean perspective, the history of Shikasta reflects a series of bad decisions made by its rulers and people, and it is only the benign intervention of Canopus and its agents that have repeatedly pulled humanity from the brink.[128] Toward the end of the novel, the Chinese officials now in charge of Europe stage a "[m]ock trial" in which the "[w]hite races"[129] are indicted for "[t]he conquest of brilliant civilisations through rapacity, greed, guile, trickery. The savagery of Christianity. The subjection of the Indians. The introduction of [B]lack people from Africa, the slave trade. The devastation of the continent, its resources, its beauty, its wealth."[130] The lead counsel for the prosecution is a Canopean agent, George Sherban, who is posing as a college lecturer on "Systems of the Law." The outcome of the trial is inconclusive, but is followed in short order by World War III, which devastates the planet and kills

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[126] URSULA K. LE GUIN, THE DISPOSSESSED (1974). The world of *The Dispossessed* has been the subject of substantial critical commentary. *See, e.g.*, THE NEW UTOPIAN POLITICS OF URSULA K. LE GUIN'S THE DISPOSSESSED (Laurence Davis & Peter Stillman eds., 2005).

[127] DORIS LESSING, RE: COLONISED PLANET 5, SHIKASTA (1979).

[128] Critics have been uneasy with Lessing's seeming approval of Canopus's benign colonialism. *See* RUTH WHITTAKER, DORIS LESSING 100-01 (1988).

[129] LESSING, *supra* note 127, at 304.

[130] *Id.* at 323.

99% of its population. But hope is reborn through a renewed linkage between Canopus and the wayward Shikasta (Earth).

Liu, Ken

27. **"Byzantine Empathy"** (short story) (2018)[131] [E]

In a remarkably short space, Ken Liu's story weaves together virtual reality, "smart" contracts, and cryptocurrencies. Liu crafts a parable about the future of philanthropy and its impact on geopolitics. As a bonus, the story references a recent law review article[132] that addresses these and many more emerging legal issues raised by virtual reality.[133]

Lucas, George

28. **Star Wars: Episode I – The Phantom Menace** (film) (1999)[134] [C, E, I, K].

In addition to a healthy dose of space opera action and intrigue, the *Star Wars* film series offers numerous observations on government, politics and constitutionalism.[135] Of the eleven feature length films to-date and countless subsidiary works, *The Phantom Menace* is included on this list because its legal themes are both explicit and central to the plot. First, it establishes a central conflict over trade routes and a trade war that escalates into a shooting war. Second, it devotes significant time to the operation of the Galactic Senate, including a leadership challenge and vote of no confidence that results in the unwitting appointment of a Sith Lord as Chancellor. According to Cass Sunstein, the ominous appointment is a thinly veiled reference to Adolf Hitler's rise to power in Weimar Germany.[136]

Maeda, Mahiro (dir.)

29. **The Second Renaissance** (short film) (2003)[137] [A, B, K]

This animated prequel to *The Matrix* films, though little known, is a tour de force of legal science fiction. It recounts the history of the machine versus human war that led to the events in *The Matrix*. The film

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[131] Ken Liu, *Byzantine Empathy*, *in* TWELVE TOMORROWS 69 (Wade Roush ed., 2018).

[132] Mark A. Lemley & Eugene Volokh, *Law, Virtual Reality, and Augmented Reality*, 166 U. PENN. L. REV. 1051 (2018).

[133] Liu, *supra* note 131, at 99.

[134] STAR WARS: EPISODE I – THE PHANTOM MENACE (Lucasfilm Ltd. 1999).

[135] *See. e.g.*, SUNSTEIN, *supra* note 47; Casey & Kenny, *supra* note 38.

[136] *See* SUNSTEIN, *supra* note 47, at 118-19; Casey & Kenny, *supra* note 38, at 12.

[137] THE SECOND RENAISSANCE, *supra* note 58. It was released in two parts in the animated DVD compilation *The Animatrix*.

depicts sentient machine servants' struggle for civil rights against the humans that created them. When a rogue machine kills a human, it is put on trial in a proceeding that evokes both Richard Wright's *Native Son* and the shameful 1856 case *Dred Scott v. Sanford*. What follows is social unrest, riots, genocide, diaspora and war. As anyone who has watched the *Matrix* films must appreciate, humankind does not come out ahead after these events.

Miller, George & Ogilvie, George (dirs.)

30. **Mad Max Beyond Thunderdome** (film) (1985)[138] [F, H]

The post-apocalypse survival story is among science fiction's most distinguished sub-genres. Notable works include Cormac McCarthy's *The Road*, Russel Hoban's *Ridley Walker*, Pat Frank's *Alas, Babylon* and, most recently, Emily St. John Mandel's *Station Eleven*. *Mad Max Beyond Thunderdome*, the third installment in the franchise,[139] however, is the only science fiction survival story on this list to include the name of a futuristic legal institution, Thunderdome, in its title. The semi-barbaric outpost Bartertown is governed according to a set of bright line rules such as "[t]wo men enter, one man leaves" and "[b]ust a deal, face the wheel."[140] These simple strictures are enforced by a despotic ruler played to the hilt by Tina Turner and her gang of henchmen. While only the first thirty minutes of the film are worth watching, they are also enough to earn the film a spot on the list.

Morgan, Richard K.

31. **Altered Carbon** (novel) (2002)[141] [A, C, E, F]

Richard Morgan's *Altered Carbon* is a private-eye *noir* set in a future populated by humans that can occupy any physical body (sleeve) that they can afford. The protagonist, Takeshi Kovacs, is an off-world super-soldier retrieved from a deep storage prison to unravel the mind-boggling and suspicious death of a wealthy and nearly immortal figure. The dystopic world in Morgan's novel benefits from a fully realized set of laws, regulations and norms surrounding everything from police investigations and criminal punishment to arena "revenge" fights, artificial intelligence-operated hotels and prostitution. The central theme of *Altered Carbon* is the ability to transfer human consciousness from one

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[138] MAD MAX BEYOND THUNDERDOME (Kennedy Miller Productions 1985).

[139] Other installments in the Mad Max franchise include *Mad Max* (1979), *The Road Warrior* (1982) and *Mad Max: Fury Road* (2015).

[140] *Id.*

[141] RICHARD K. MORGAN, ALTERED CARBON (2002).

sleeve to another with relative ease, and Morgan develops a convincingly detailed legal structure that addresses many of the social and ethical issues surrounding this all-too-foreseeable technology.

Niccol, Andrew (dir.)

32. **Gattaca** (film) (1997)[142] [A, D]

Nearly twenty-five years since its initial release in theaters, *Gattaca* has aged remarkably well. The film raises difficult questions about genetic determinism, discrimination, eugenics and human capacity that are even more relevant today than they were when the film was made.[143]

Niven, Larry

33. **"The Jigsaw Man"** (short story) (1967)[144] [F]

Along with *Never Let Me Go*, Niven's short story is one of the best exemplars of the compulsory-organ-donation genre. Here, forced organ donation is used to inflict punishment on convicted criminals. Despite its brevity, the story offers ample grist for considering guilt, punishment and utilitarianism.

Orwell, George

34. **Nineteen Eighty-Four** (novel) (1949)[145] [A, C, F]

The archetype dystopian novel, Orwell's masterpiece is the archetype for the dystopian novel. Orwell portrays an authoritarian state striving to control not only the actions of its citizens, but also their thoughts. Orwell's bleak vision encompasses devices that are only too real today, including a surveillance state, the malleability of "facts," and the manner in which language can shape thought. It introduced to the English language now-common terms like Big Brother, Thought Police and Thought Crime – an influence matched by few works of any literary genre.

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[142] GATTACA (Columbia Pictures & Jersey Films 1997).

[143] In the genetics ethics class that I teach, my co-instructor counts the minutes until someone mentions *Gattaca* during class discussion. The count is never very high.

[144] Larry Niven, *The Jigsaw Man*, *in* DANGEROUS VISIONS 208 (Harlan Ellison ed., 1967).

[145] GEORGE ORWELL, NINETEEN EIGHTY-FOUR (1949); *see also* NINETEEN EIGHTY-FOUR (Virgin Films et al. 1984) (film adaptation directed by Michael Radford).

Rand, Ayn

35. **Anthem** (novella) (1938)[146] [A, C, J]

Rand is best known for the "objectivist" philosophy of individual determinism that she espoused in novels like *Atlas Shrugged* and *The Fountainhead*, both of which are set in alternative futures dominated by collectivist societies that suppress the individual spirit. But Rand's most extreme expression of this individualist worldview is her 1938 novella *Anthem.* Though Rand's novels fall short of the more literary accomplishments of Huxley and Orwell, I include *Anthem* in this list because it contains an interesting twist regarding innovation and intellectual property. The story's protagonist, Equality 7-2521, a street sweeper by trade, discovers the mystery of electricity through the study of ancient books. But when he demonstrates the lightbulb that he has invented to the World Council of Scholars, they are aghast. "How dared you think that your mind held greater wisdom than the minds of your brothers?" they ask, protesting that if electric lighting were allowed to exist, "it would bring ruin to the Department of Candles . . . And if this should lighten the toil of men . . . then it is a great evil, for men have no cause to exist save in toiling for other men."[147]

Reid, Robert

36. **Year Zero** (novel) (2012)[148] [B, E, I, J]

This novel by the founder of a now-defunct online music service[149] is an intergalactic farce in the style of Douglas Adams and Piers Anthony. Aliens across the galaxy have detected electromagnetic broadcasts from Earth and fallen in love with 1970s sitcoms, classic rock and boy bands.[150] By 2012, the inhabitants of the known universe have rebroadcast Earth's greatest hits trillions upon trillions of times, which is when

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[146] AYN RAND, ANTHEM (1938).

[147] *Id.* at 71-72. Rand's view of invention as the result of inspired individual genius has some grounding in the U.S. patent system, which has historically focused on the inventor. Yet this conception of inventorship has been challenged in recent scholarship. *See, e.g.*, Mark A. Lemley, *The Myth of the Sole Inventor*, 110 MICH. L. REV. 709, 710-11 (2012) ("The canonical story of the lone genius inventor is largely a myth. Edison didn't invent the lightbulb; he found a bamboo fiber that worked better as a filament in the lightbulb developed by [others] . . . Invention appears in significant part to be a social, not an individual, phenomenon.").

[148] REID ROBERT, YEAR ZERO (2012).

[149] *See id.* at About the Author.

[150] While an appendix contains the favorite playlists of the principal alien characters, the cat Meowhaus's feline-themed playlist mysteriously excludes the Tom Jones hit "What's New Pussycat?." *See id.* at Appendix.

they realize that they owe astronomical royalties to the owners of the copyrights in these works. While some of the infringers would prefer to destroy Earth to evade their legal obligations, others feel honor-bound to comply with "the most cynical, predatory, lopsided, and shamelessly money-grubbing copyright law written by any society, anywhere in the universe since the dawn of time itself."[151]

Robinson, Kim Stanley

37. **Blue Mars** (novel) (1996)[152] [E, I, K]

The third installment in Kim Stanley Robinson's magisterial *Mars* trilogy[153] is a future history of the colonization of Mars and the rest of the solar system. *Blue Mars* offers a sweeping view of the legal and political structures that are likely to exist a century hence. These themes resonate strikingly with those that we face today, including significant engagement with issues of immigration and environmental protection. The book depicts the debates over a new constitution for Mars in convincingly realistic detail, and the result: a recognizable yet distinctly alien system of government that includes a system of "environmental" courts.

38. **The Ministry for the Future** (novel) (2020)[154] [D, E, G, H, K]

Robinson's *Ministry* is the most recent work on this list and an exemplar of the emerging "Cli-Fi" genre depicting the catastrophic effects of climate change on Earth.[155] In *Ministry*, an international agency known as The Ministry for the Future has been established to protect the interests of future life on Earth (human, animal, vegetable). The plot follows agency director Mary Murphy as the agency wrestles with potential planet-saving measures including the introduction of an international "carbon quantitative easing" system. While climate extremists and eco-terrorists appear throughout the book, the Ministry's faith in the rule of law and the potential effectiveness of legal solutions is heartening. When Murphy's aides despair that "[t]he market can buy the laws" and "[t]he market is impervious to law . . . It is its own

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[151] *Id.* at 110-11 (referring to the 1999 Digital Theft Deterrence and Copyright Damages Improvement Act, which increased the maximum statutory damages for copyright infringement to $150,000 per copy, *see* 17 U.S.C. § 504(c)).

[152] Kim Stanley Robinson, Blue Mars (1996).

[153] The first two installments, *Red Mars* (1992) and *Green Mars* (1993), also include legal themes.

[154] Kim Stanley Robinson, The Ministry for the Future (2020).

[155] Robinson's *New York 2140*, set in a half-submerged Manhattan, is another work in this genre.

law," she responds, "[i]t's just a legal system. We change laws every day."[156] Nevertheless, it is unclear in the end whether and to what degree the Ministry itself has been involved in acts of terror that have nudged the world to abandon its most environmentally harmful practices.

Roddenberry, Gene

39. **"The Menagerie, Parts 1 and 2,"** *Star Trek* (television episode) (1966)[157] [B, I, K]

In this iconic *Star Trek* double episode, Mr. Spock is the subject of a court martial for disobeying Starfleet General Order 7, which states that "[n]o vessel under any condition, emergency or otherwise, is to visit Talos IV."[158] Spock seeks to justify his violation of this clear prohibition, which carries the penalty of death, on humanitarian grounds.

40. **"The Omega Glory,"** *Star Trek* (television episode) (1968)[159] [B, H, K]

When an Enterprise landing party beams down to planet Omega IV, they have been preceded by Captain Ron Tracey of the USS Exeter. Captain Tracey, armed with a local tribe with phasers, appears to have violated the Prime Directive, which prohibits Federation personnel from interfering with alien cultures that they encounter. Another local tribe eventually reveals that it admires a copy of the U.S. Constitution, which its leaders recite in unintelligible pidgin until Kirk dramatically explains the "true" meaning of the document to them. The episode has been rightly criticized for its racial stereotypes.[160] The episode offers interesting food for thought regarding the Prime Directive, Cold War tensions, and, perhaps, constitutional textualism.

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[156] ROBINSON, *supra* note 154, at 216.

[157] *Star Trek: The Original Series: The Menagerie Parts I & II* (Desilu Productions Nov. 17, 24, 1966).

[158] *Id.*

[159] *Star Trek: The Omega Glory* (Desilu Productions Mar. 1, 1968).

[160] *See, e.g.*, Allan W. Austin, *The Limits of Star Trek's Final Frontier: 'The Omega Glory' and 1960s American Liberalism*, *in* SPACE AND TIME: ESSAYS ON VISIONS OF HISTORY IN SCIENCE FICTION AND FANTASY TELEVISION 61, 63-64 (David C. Wright, Jr. & Allan W. Austin eds., 2010) (arguing the episode, like much of the series, "all too often relied on traditional and heavily stereotyped views of minority groups and women that marginalized and disempowered them").

Sawyer, Robert J.

41. **Illegal Alien** (novel) (1997)[161] [B, F, I, J]

Robert Sawyer's *Illegal Alien* is a "first contact" novel blended with a courtroom procedural drama; it's *Close Encounters* meets *Law & Order*. The novel follows an alien advance party that establishes first contact with Earth, one member of which is implicated in a grisly murder. The alien's trial sheds interesting new light on well-known legal procedures and practices. In particular, the defense is led by a prominent civil rights lawyer who is paid with a 0.25% share of the royalty income earned by the aliens from patents on their advanced starship technology.[162]

Scott, Ridley (dir.)

42. **Blade Runner** (film) (1982)[163] [A, B, E, I]

In a bleak near-future,[164] human-like replicants are created to perform dangerous off-world work. The replicants are prohibited from returning to Earth. If they do, special police units called Blade Runners are trained to identify and terminate them. The plot revolves around one Blade Runner's hunt for six powerful replicants that have illegally returned to Earth to seek a cure for their built-in termination dates. The interest of the film lies in the unsettling questions that it raises about the nature of humanity and consciousness, and the justness of laws that condemn the superhuman replicants to a lifespan that is all too brief.

Snodgrass, Melinda M.

43. **"The Measure of a Man,"** *Star Trek: The Next Generation* (television episode)[165] (1989) [A, I]

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[161] ROBERT J. SAWYER, ILLEGAL ALIEN (1997).

[162] Sawyer's aliens are less generous (or more realistic) in their distribution of royalty proceeds than Walter Tevis's alien protagonist Thomas Jerome Newton in *The Man Who Fell to Earth* (this list), who compensated his patent lawyer with 10% of his corporate profits plus a 5% equity share in his holding company. WALTER TEVIS, THE MAN WHO FELL TO EARTH 18 (1963).

[163] BLADE RUNNER, *supra* note 55; *see also* PHILIP K. DICK, DO ANDROIDS DREAM OF ELECTRIC SHEEP (1968) (novel loosely adapted in the film).

[164] The film is set in a "future" 2019.

[165] *Star Trek: The Next Generation: The Measure of a Man* (Paramount Domestic Television Feb. 13, 1989).

In this episode written by former attorney and regular *Star Trek* writer Melinda Snodgrass,[166] an ambitious Federation cyberneticist wishes to disassemble the Enterprise's android science officer Commander Data. Data – created by the legendary yet enigmatic Dr. Noonien Soong – is unimpressed with the researcher's capabilities and refuses the request, leading to a military hearing. At the hearing the tribunal must determine Data's status: is he a sentient being entitled to refuse such a request, or is he merely a mechanical piece of Starfleet property? The proceeding raises a host of thought-provoking issues: the rule of law, the meaning of sentience, and the right to "own" another thinking being. There are explicit references to slavery in the episode, and notable echoes of the pilot *Star Trek* episode "Court Martial" (this list).

Sonnenfeld, Barry (dir.)

44. **Men in Black** (film) (1997)[167] [B, I]

Men in Black is premised on both the existence of (disguised) extraterrestrial aliens among us, largely in New York City, and an elaborate set of rules and procedures that dictate how such aliens must conduct themselves to remain unknown to humanity. The Men in Black – a secret quasi-governmental organization – exist to monitor and enforce compliance with these rules using a variety of technologies.

Spielberg, Steven (dir.)

45. **Minority Report** (film) (2002)[168] [F, I]

In the mid-21st century, a state program to care for the impaired children of drug addicts discovers that some of the children have visions of future murders. The three children that survive this program are turned into semi-conscious "precogs" that float in a nutrient bath and help the police stop homicides before they occur. Once they are caught, the would-be perpetrators are suspended in subterranean fluid capsules and forced to watch images of their thwarted crimes on an infinite loop while their jailer plays soothing Bach arrangements on a portable organ. Police report that no murders have been committed in the city

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[166] *About*, MELISSA SNODGRASS, https://perma.cc/KJD5-FAJ4 (last visited Dec. 2, 2021).

[167] MEN IN BLACK (Columbia Pictures et al. 1997); *see also* LOWELL CUNNINGHAM & SANDY CARRUTHERS, THE MEN IN BLACK (1990-1991) (comic book loosely adapted in the film).

[168] MINORITY REPORT (20th Century Fox 2002); *see also* Philip K. Dick, *The Minority Report,* FANTASTIC UNIVERSE, Jan. 1956, at 4 (novella adapted for the film).

during the six years that the "Precrime" program has been in place, but unsurprisingly, problems emerge.

Tevis, Walter

46. **The Man Who Fell to Earth** (novel) (1963)[169] [A, B, E, J]
Though Walter Tevis, like Philip K. Dick, is best known for the cinematic adaptations of his books,[170] his 1963 science fiction novel is worth consideration on its own. It describes the strange journey of Thomas Jerome Newton, the alias of an extraterrestrial who comes to Earth seeking resources to save his drought-stricken planet, Anthea. Yet, unlike most alien visitors to Earth, Newton's first stop is not the White House or Devil's Tower, Wyoming, but Oliver Farnsworth, patent attorney extraordinaire. With Farnsworth's help, Newton patents many of the advanced technologies that he has brought to Earth: electronics, materials, and chemical processes. Soon Newton becomes a reclusive tycoon, and Farnsworth leaves the practice of law to run Newton's holding company, World Enterprises Corporation. Things, of course, do not go according to plan, but Tevis's faith in the patent system as a source of endless wealth makes for an entertaining and thought-provoking read.

47. **Mockingbird** (novel) (1980)[171] [A, B, C, D, F]
In the 23rd century of Walter Tevis's *Mockingbird*, the nineteen million surviving inhabitants of Earth are drugged-out, illiterate couch potatoes who are served (or enslaved?) by a legion of robots in increasing need of repair. In explaining how humanity reached this dismal state, Tevis turns a trope of dystopian sci-fi on its head: unlike the worlds depicted in *Brave New World*, *Nineteen Eighty-Four* and *Anthem*, not to mention the *Star Trek TNG* episodes and films devoted to the sinister Borg collective, the downfall of society as portrayed by Tevis cannot be traced to the sacrifice of individualism on the altar of pseudo-Marxist collectivism. On the contrary, in Tevis's world, a twisted form of enforced introversion has become orthodoxy. So-called "privacy" reigns supreme, turning commonplaces like looking someone in the eye and

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[169] TEVIS, *supra* note 162; *see also* THE MAN WHO FELL TO EARTH (British Lion Films 1967) (cult film adaptation starring David Bowie).

[170] Cinematic versions of Tevis's books include *The Queen's Gambit* (2020), *The Color of Money* (1986) and *The Hustler* (1961).

[171] WALTER TEVIS, MOCKINGBIRD (1980).

asking a personal question into punishable "privacy invasions."[172] Cohabitation is a criminal offense that lands the novel's protagonist, Bernard, in a labor camp where the robotic guards are often on the fritz. The rules that govern Tevis's crumbling future society are bizarre but devilishly consistent, and offer a fresh perspective on how, in the line that Tevis quotes from T.S. Eliot; the world may end "[n]ot with a bang but a whimper."[173]

Vlaming, Jeff

48. **"Litmus,"** *Battlestar Galactica* (television episode) (2004)[174] [A, B, H, I]

In this episode from the first season of the *Battlestar Galactica* reboot, a Cylon agent in human form infiltrates the spacecraft Galactica and commits an act of sabotage. Commander Adama appoints Master at Arms Sergeant Hadrian to investigate the incident and convene an independent tribunal to consider the evidence. The episode raises interesting issues concerning the rule of law, especially when Adama unilaterally terminates the tribunal as a "witch hunt."[175]

Wells, H.G.

49. **The Island of Doctor Moreau** (novel) (1896)[176] [A, G]

On a remote island in the South Pacific, the eccentric physiologist Dr. Moreau creates a race of half-animal, half-human creatures. To suppress their bestial natures and nudge them toward humanity, he imposes on them a strict set of "laws." The creatures must periodically chant: "Not to go on all-Fours; *that* is the Law. Are we not Men? Not to suck up Drink; *that* is the Law. Are we not Men?"[177] The beast-people have difficulty adhering to these rules, particularly after dark. This early science fiction work raises difficult issues concerning the nature of humanity and the role of law in human societies.

Wolfe, Gene

50. **Shadow of the Torturer** (novel) (1980)[178] [F, I]

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[172] The four fundamental precepts of Tevis's society are Inwardness, Privacy, Self-fulfillment and Pleasure. *Id.* at 5-6.

[173] *Id.* at 205.

[174] *Battlestar Galactica: Litmus* (David Eick Productions et al. Nov. 22, 2004)

[175] *Id.*

[176] H.G. WELLS, THE ISLAND OF DR. MOREAU (Penguin Publishing Group 2005) (1886).

[177] *Id.* at 91.

[178] GENE WOLF, SHADOW OF THE TORTURER (1980).

On a far-future Earth, criminal punishment has been delegated to the ascetic Seekers for Truth and Penitence, more commonly known as the Guild of Torturers, who take pride, but not pleasure, in the fiendish punishments they mete out to the guilty. Wolfe's universe is a mixture of medieval ritual and alien technology. Its rules, while only glimpsed peripherally, shape virtually every action of subjects.

ADDENDUM – CRITICAL WORKS ON SCIENCE FICTION AND LAW

1. Valentina Adami, *The Pedagogical Value of Young-Adult Speculative Fiction: Teaching Environmental Justice through Julie Bertagna's Exodus,* 13 PÓLEMOS 127 (2019).
2. Christopher Brown, *Will There Be Justice? Science Fiction and the Law*, TOR, Aug. 7, 2019.
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4. Derrick Bell, *Justice Marshall and the Handmaid's Tale,* AFROLANTICA LEGACIES at 123 (1997).
5. Derrick Bell, *The Power of Narrative*, 23 LEGAL STUD. F. 315 (1999).
6. Gabrielle Bruney, *A 'Black Mirror' Episode Is Coming to Life in China*, ESQUIRE (Mar. 17, 2018), https://perma.cc/QD6V-RPPG.
7. Marc Jonathan Blitz, *The Right to an Artificial Reality? Freedom of Thought and the Fiction of Philip K. Dic*k, 27 MICH. TECH. L. REV. 377 (2021).
8. Orna Ben-Naftali & Zvi Triger, *The Human Conditioning: International Law and Science-Fiction*, 14 L., CULTURE & HUMANS. 6](2018).
9. William J. Burling, *The Theoretical Foundation of Utopian Radical Democracy in Kim Stanley Robinson's Blue Mars,* 16 UTOPIAN STUD. 75 (2005).
10. Christine Alice Corcos et al., *Double-Take: A Second Look at Cloning, Science Fiction and Law,* 59 LA. L. REV. 1041 (1999).
11. Christine Alice Corcos, *I Am Not a Number - I Am a Free Man: Physical and Psychological Imprisonment in Science Fiction*, 25 LEGAL STUD. F. 471 (2001).
12. Conor Casey &and David Kenny, *How Liberty Dies in a Galaxy Far, Far Away:* Star Wars*, Democratic Decay, and Weak Executives*, L. & LITERATURE (2022, forthcoming).
13. Jorge L. Contreras, *Book Review: NEXT and Michael Crichton's Five-Step Program for Biotechnology Law Reform*, 48 JURIMETRICS 337 (2008).
14. Walter A. Effross, *High-Tech Heroes, Virtual Villains, and Jacked-In Justice: Visions of Law and Lawyers in Cyberpunk Science Fiction*, 45 BUFF. L. REV. 931, (1997).
15. LAW IN LITERATURE: LEGAL THEMES IN SHORT STORIES (Elizabeth Villiers Gemmette ed., 1992).
16. Camilla A. Hrdy & Daniel H. Brean, *Enabling Science Fiction*, 27 MICH. TECH. L. REV. 399 (2021).

17. Gabriel Hallevy, *The Criminal Liability of Artificial Intelligence Entities – From Science Fiction to Legal Social Control*. 4 AKRON INTELL. PROP. J., 171 (2010).
18. Lolita K. Buckner Inniss, *Bicentennial Man – The New Millennium Assimilationism and the Foreigner Among Us*, 54 RUTGERS L. REV. 1101 (2002).
19. Paul Joseph & Sharon Carton, *The Law of the Federation: Images of Law, Lawyers, and the Legal System in Star Trek, the Next Generation,* 24 UNIV. OF TOL. L. REV. 43 (Fall 1992).
20. Ian Kerr & Katie Szilagyi, *Evitable Conflicts, Inevitable Technologies? The Science and Fiction of Robotic Warfare and IHL,* 14 L., CULTURE & HUMANS. 45 (2018).
21. Francis Lyall, *Law in Science Fiction: An Introduction*, FOUNDATION, Summer 1992, at 43.
22. ISIAH LAVENDER III, RACE IN AMERICAN SCIENCE FICTION (Indiana Univ. Press, 2011).
23. Robert Lawrence, *Civil Procedure in Low Earth Orbit: Science Fiction, American Indians and Federal Courts,* 24 N.M. L. REV. 265 (Spring 1994).
24. Sage Leslie-McCarthy, *Asimov's Posthuman Pharisees: The Letter of the Law Versus the Spirit of the Law in Isaac Asimov's Robot Novels,* 3 L., CULTURE & HUMANS 398 (2007).
25. Shai Lavi, *Cloning International Law: The Science and Science Fiction of Human Cloning and Stem-Cell Patenting*, 14 L., CULTURE & HUMANS. 83 (2018).
26. Anna Lorien Nelson & John S. Nelson, *Institutions in Feminist and Republican Science Fiction*, 22 LEGAL STUD. F. 641 (1998).
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How to Sell NFTs Without Really Trying

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Something is happening and we don't know what it is. Suddenly last summer, the internet went nuts for "non-fungible tokens" or "NFTs." In a matter of months, NFT sales swelled from a sleepy slough of the blockchain to a thundering cataract that shows no sign of slaking. Special NFTs sell for millions of dollars, and some are even securitized. It's a big business that's only getting bigger.

But no one seems to know why. Objectively, NFTs are useless, meaningless, and worthless. So why are people willing to pay millions of dollars for them, even begging for the opportunity? Maybe it doesn't matter. If the market says NFTs are valuable, who are we to doubt it? Still, I'm curious. Why are people buying NFTs, and what accounts for their value?

What is an NFT Anyway?

An NFT is just an encrypted unit of data stored on a digital ledger. While most NFTs are stored on the Ethereum blockchain, they can be stored on any digital ledger, and NFTs exist on other ledgers. NFTs are called "tokens" because they exist on the ledger of a digital currency but represent something other than a quantity of that currency, and they are "non-fungible" because they are unique and not substitutes for each other.

In theory, an NFT can consist of any kind or quantity of data. So, you could make an NFT of a text, image, or sound file. But encrypting and decrypting the data in an NFT requires considerable computing power. The more data an NFT contains, the more expensive it becomes to create and transfer. So, in practice, NFTs normally consist of as little data as possible, usually just a cryptographic hash of a URL.

Of course, NFTs are typically associated with a work of authorship, often a digital image, and the URL in an NFT is usually the address of a

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webpage that identifies the work associated with it. Accordingly, it's common to describe an NFT as an NFT "of" the work associated with it. But in reality, there's no fundamental relationship between an NFT and the work nominally associated with it. An NFT is an NFT of a work only because the creator of the NFT says it is. The owner of a work can create an NFT and provide that ownership of the NFT constitutes ownership of the work. But they can also provide that ownership of the NFT doesn't constitute ownership of the work. And a person can even create an NFT and associate it with a work they don't own, in which case ownership of the NFT is simply irrelevant to ownership of the work. Sometimes, an NFT is just an NFT, nothing more.

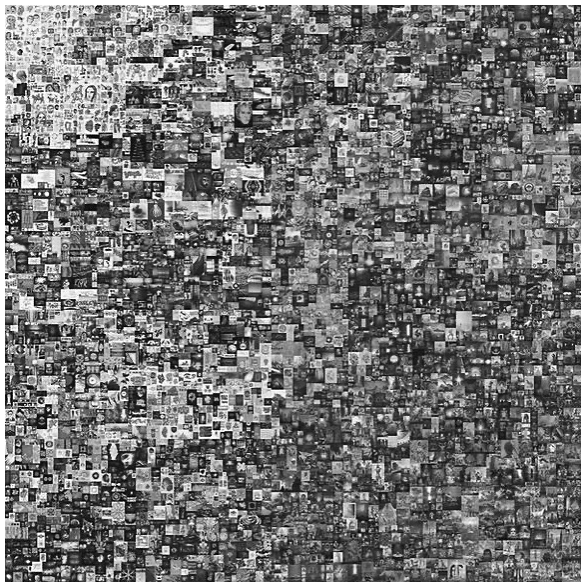
So, NFTs are peculiar, at least in part because they seem like a solution in search of a problem. After all, they were invented in order to provide indisputable proof of ownership of works of art. But all they can ever prove is ownership of the NFT, and even that is subject to property law, not to mention the costs, complications, and risks they introduce. Creating and transacting in NFTs is costly, transferring NFTs is complicated, and there is always the risk of inadvertently destroying or losing the NFT. Why bother when you can just transact in the work of art directly?

A Potted History of NFTs

Everything about NFTs is confusing, except their origin. Kevin McCoy and Anil Dash arguably invented NFTs in 2014 at the Seven on Seven conference in New York City, when they presented a Namecoin blockchain marker linked to an animated TIF file created by McCoy.[1] But NFTs didn't start to catch on until 2017 when Larva Labs released CryptoPunks, which

[1] *See* Anil Dash, *NFTs Weren't Supposed to End Like This*, The Atlantic (Apr. 2, 2021), https://www.theatlantic.com/ideas/archive/2021/04/nfts-werent-supposed-end-like/618488/ [https://perma.cc/CPQ6-CE5P]; *see also* Bijan Stephen, *Go Read this Story on the Real History of NFTs*, The Verge (Apr. 2, 2021, 1:44 PM), https://www.theverge.com/2021/4/2/22364240/nft-blockchain-artist-hackathon-kevin-mccoy-anil-dash [https://perma.cc/MFS7-C7XJ]. In 2021, McCoy "preserved" the original NFT by creating a new NFT, which he titled *Quantum* (2014-21), and sold at auction for almost $1.5 million. Kevin McCoy, *Quantum (2014-21)*, Sotheby's, https://www.sothebys.com/en/buy/auction/2021/natively-digital-a-curated-nft-sale-2/quantum (last visited Oct. 24, 2021). Some people argue the blockchain entries created by McCoy and Dash were not actually NFTs because they weren't permanent.

enabled users to buy and sell NFTs of 8-bit digital cartoon characters.[2] The founders of Larva Labs created 10,000 CryptoPunks NFTs, each corresponding to a unique character with a unique combination of elements or "traits." The NFTs were free, and all of them were claimed in a couple of days. Before long, CryptoPunks NFTs were selling for thousands of dollars, and people gradually began investing millions of dollars in NFTs of various kinds, from virtual sneakers to sports highlights.



BEEPLE, *EVERYDAYS: THE FIRST 5000 DAYS*

And then, in 2021, the NFT market exploded. All of a sudden, everyone was selling NFTs of everything imaginable, and demand was seemingly insatiable. Grimes sold about $6 million of assorted NFTs,[3] Chris Torres

[2] *See* Chloe Cornish, *CryptoKitties, CryptoPunks and the Birth of a Cottage Industry*, FIN. TIMES (June 5, 2018), https://www.ft.com/content/f9c1422a-47c9-11e8-8c77-ff51caedcde6 [https://perma.cc/NL4D-XTP3].

[3] *See* Jacob Kastrenakes, *Grimes Sold $6 Million Worth of Digital Art as NFTs*, THE VERGE (Mar. 1, 2021, 6:06 PM), https://www.theverge.com/2021/3/1/22308075/grimes-nft-6-million-sales-nifty-gateway-warnymph [https://perma.cc/SB5X-QDT4].

sold an NFT of a Nyan Cat GIF for $600,000,[4] Mike "Beeple" Winkelmann sold an NFT of his digital artwork *Everydays: The First 5000 Days* at Christie's for $69.3 million,[5] Jack Dorsey sold an NFT of his first tweet for $2.5 million,[6] and Kevin Roose sold an NFT of his *New York Times* column about NFTs for $558,000.[7] But the undisputed leaders of the NFT marketplace are the CryptoPunks and Bored Ape Yacht Club collections, examples of which sell for over a million dollars each.

Within months, an entire NFT financial ecosystem emerged. Inevitably, the owners of valuable NFTs decided to "securitize" them by selling off shares in the form of NFTs. While NFTs may be non-fungible, nothing says they're non-divisible, and NFT market participants are definitely more inclined to ask forgiveness than permission. Before long, NFT "index funds" emerged, offering smaller investors the opportunity to invest in "blue chip" NFTs by buying NFTs of a carefully selected, weighted portfolio of NFTs.[8] It's only a matter of time before someone introduces NFT derivatives, if they haven't already.

What happened? Who knows. For some reason, a lot of people were suddenly willing to pay a lot of money for nothing. Because that's what an NFT is, nothing. Buying an NFT of a work doesn't make you the copyright owner of the work. Buying an NFT of a work doesn't make you the owner of a particular copy of the work, whatever that means in the case of digital

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[4] *See* Erin Griffith, *Why an Animated Flying Cat with a Pop-Tart Body Sold for Almost $600,000*, N.Y. TIMES (May 27, 2021), https://www.nytimes.com/2021/02/22/business/nft-nba-top-shot-crypto.html [https://perma.cc/3HZD-A9LV].

[5] *See* Josie Thaddeus-Johns, *What Are NFTs, Anyway? One Just Sold for $69 Million*, N.Y. TIMES (Oct. 4, 2021), https://www.nytimes.com/2021/03/11/arts/design/what-is-an-nft.html [https://perma.cc/LX9L-EKM8]; *see also* Jacob Kastrenakes, *Beeple Sold an NFT for $69 million*, THE VERGE (Mar. 11, 2021, 10:09 AM), https://www.theverge.com/2021/3/11/22325054/beeple-christies-nft-sale-cost-everydays-69-million [https://perma.cc/9P55-S4VE].

[6] *See* Jay Peters, *Please Do Not Give Billionaire Jack Dorsey Money for His Tweet*, THE VERGE (Mar. 5, 2021, 7:38 PM), https://www.theverge.com/2021/3/5/22316320/jack-dorsey-original-tweet-nft-cent-valuables [https://perma.cc/KM79-S9AL]; *see also* Kate Knibbs, *The Next Frontier of the NFT Gold Rush: Your Tweets*, WIRED (Mar. 10, 2021, 7:00 AM), https://www.wired.com/story/nft-art-market-tweets/ [https://perma.cc/SV2A-3MVK].

[7] *See* Kevin Roose, *Why Did Someone Pay $560,000 for a Picture of My Column?*, N.Y. TIMES (Aug. 12, 2021), https://www.nytimes.com/2021/03/26/technology/nft-sale.html [https://perma.cc/AK8Q-Z8VF]; *see also* Kevin Roose, *Buy This Column on the Blockchain!*, N.Y. TIMES (June 30, 2021), https://www.nytimes.com/2021/03/24/technology/nft-column-blockchain.html [https://perma.cc/PG8A-7FDY];

[8] *See, e.g.*, NFTX, https://nftx.io/ (last visited Dec. 16, 2021).

works. Hell, buying an NFT of a work doesn't even guarantee a permanent association with the work. All you get when you buy an NFT is the NFT.

Maybe. Or maybe you get something more, albeit something intangible, indefinite, even ineffable. Maybe you get clout, whatever that means. Maybe you get an aesthetic experience. Or maybe you get something else entirely. Who knows?

Follow Your Nose, It Always Knows

In any case, for some reason, an awful lot of people are powerfully attracted to NFTs. Obviously, a considerable part of their attraction is the potential for enormous windfall profits. Many NFT investors have made enormous amounts of money. A few have even purchased popular NFTs, and then immediately resold them for 10 or even 100 times the purchase price. Understandably, stories like these are catnip for people looking to make a quick buck. Already, Twitter and Discord are teeming with people promoting NFTs, looking to buy NFTs, and offering advice about investing in NFTs.

From the outside, the logic of the NFT market is baffling. Some high-value NFTs are associated with famous artists or famous people. So, NFTs sold by popular digital artists like Beeple or celebrities like Jack Dorsey can be quite valuable. Other high-value NFTs are associated with popular memes, like Doge or Nyan Cat. But many of the most popular NFTs are collections of randomly generated 8-bit images. Specifically, CryptoPunks are the mainstay of the high-end NFT market. Why did these NFTs catch on and become valuable? Who knows. Maybe the NFT market just needed something to value, and they were available. Or maybe they tapped into the aesthetic sensibilities of NFT investors. Regardless, a universe of so-called "blue chip" NFTs has already coalesced, and the market is crowded with investors chasing the next CryptoPunk or Bored Ape and deriding projects that don't measure up.[9]

But maybe something else is happening at the same time, something more complicated than a mere economic bubble. Sure, everyone wants to make a buck. But NFTs aren't necessarily tulips or Beanie Babies, as much as people love to make the comparison. They are art, or at least they claim to represent ownership of art, and the NFT market is an art market, despite its peculiarities. Sure, owning an NFT doesn't amount to owning a work of art

[9] *See* Adam, *The Ultimate Guide to Blue-Chip NFT Investing*, Blockwich (Nov. 13, 2021), https://www.blockwich.com/articles/blue-chip-nft-investing-guide [https://perma.cc/AFG2-VK6V].

in the legal sense. But it does in the economic sense, and that's what really matters.

Sure, the owner of an NFT doesn't "really" own the work it identifies, in the legal sense of exclusive rights to use it. But so what? They don't want those rights. They only want and need the exclusive right to be recognized as its owner and the ability to transfer that ownership. If anything, the reproduction and distribution of the work they "own" only increases the value of their NFT, by increasing the prestige of ownership.

You could be forgiven for thinking that sounds an awful lot like the art market. After all, art collectors don't own and don't want or need the copyright in the works they buy. The value of owning a work of art isn't in controlling the reproduction and distribution of images of the work, it's in transferring ownership of the work itself. NFTs are exactly the same. The more people admire the work an NFT represents, the more valuable the NFT becomes.

Even better, while the NFT market poses many risks, fraud isn't one of them. When you buy an NFT, you get an NFT, no matter what. And the NFT you buy is always, necessarily, the NFT you bargained to get. It can't be any other way; the technology simply precludes the possibility of counterfeits, in the conventional sense. Of course, the NFT you bought might not be worth anything. But as they say, past performance is no guarantee of future returns. And after all, you knowingly bought bragging rights to a JPEG.

Of course, it's possible for people to sell NFTs of works they don't actually own. But so what? When you buy the NFT, you aren't buying those rights. You're just buying a nominal relationship to the work. Defective title doesn't necessarily make a defective NFT. If the market thinks the NFT is cool, it doesn't matter who owns the work it represents.

The beauty and horror of the NFT market is that of an art market without objects. Everyone always thought the art market relied on the aura of authenticity. The NFT market suggests that maybe the only thing that ever mattered was the aura of ownership, and authenticity was just a means to an end. Reification for the win!

Why not? The art market was always inefficient, and always benefitted collectors more than artists. The NFT market isn't perfect, but maybe it's an improvement? Barriers to entry are low. Anyone with basic computer skills can create and sell NFTs. Intermediaries are largely unnecessary. Artists used to depend on gallery owners, which created agency problems. The NFT market renders galleries largely obsolete. And transaction costs are low. One of the biggest problems with the art market is the cost of storing and selling art. The NFT market largely eliminates those costs and enables an astonish-

ingly robust secondary market. For better or worse, we have never had so much information about what art collectors actually like and want.

For my part, I'm most excited about the NFT market finally dematerializing art and making it possible for anyone to launch a career as a conceptual artist. Sure, most NFTs represent pretty conventional pictorial works. But NFTs are actually the perfect medium for conceptual art. Think about it. The big problem with conceptual art is that there's nothing to own. Of course, conceptual artists came up with lots of clever workarounds, but it was still awkward. NFTs solved the problem by making conventional ownership irrelevant. When you buy an NFT, all you're getting is the concept of ownership anyway, so why not own the concept of owning conceptual art? Kismet.

But enough of all that. I'm here to tell you how NFTs kickstarted my career as a conceptual artist. I never thought it would happen to me, but it did. And here's how.

Observing the Elephant

I discovered conceptual art as a teenager. It was the early 90s, and I was a Berkeley undergraduate studying film history and philosophy. What a cliché. Anyway, one of my professors introduced me to Fluxus and I was hooked.[10] All I wanted to do was make esoteric movies and write gnomic poems. So, when I graduated, I immediately enrolled in the Master of Fine Arts program at the San Francisco Art Institute where I did more of the same. Then, I made my way to New York City, where I spent several years making movies, showing movies, and writing about movies. It was a time.

Like most artists, I eventually went to law school and worked at a white shoe law firm representing investment banks. For the most part, it was fine, albeit less fun than movies. But one thing always bothered me. The more I learned about securities, the more they sounded like conceptual art. Or rather, the more the securities market sounded like the market for conceptual art.

Securities are usually stocks and bonds. But almost anything can be a security if you sell it in the right way. According to the Supreme Court, a "security" is just "an investment of money in a common enterprise with profits to come solely from the efforts of others."[11] Stocks and bonds are securities because they are investments in companies, and investors expect to profit if the company profits. But buying an orange grove can also be a security if you expect someone else to manage it and send you the profits.

Art usually isn't a security, even though it's often a risky investment.[12] When you buy art, you get an object, typically a painting or sculpture. Just like any other kind of property, if the art increases in value, you profit, and if it doesn't, you don't. Sure, investing in art is a way of investing in an artist's career, and collectors certainly hope artists will become celebrities. But you're still buying an object, not a percentage of the artist's profits, and the value of the object depends on many different factors, not just the artist's celebrity.

What about conceptual art? According to Sol LeWitt's iconic description, "In conceptual art the idea or concept is the most important aspect of

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[10] Fluxus was a 20th century conceptual art movement, founded by George Maciunas and others.

[11] SEC v. W.J. Howey Co., 328 U.S. 293, 301 (1946).

[12] *Cf.* Brian L. Frye, *New Art for the People: Art Funds & Financial Technology*, 93 Chi.-Kent L. Rev. 113 (2018) (describing the art market as "largely a black box").

the work" and "the execution is a perfunctory affair."[13] For example, LeWitt's wall drawings consist of his instructions on how to create a drawing, not any particular execution of those instructions, which is merely a record of the work, not the work itself. Similarly, Yoko Ono's *Grapefruit* consists of recipes for an epiphany, and Robert Rauschenberg's *Portrait of Iris Clert* consists of a telegram reading, "This is a portrait of Iris Clert if I say so." The object gradually fades away, until nothing but art remains.

Anyway, eliminating the object makes conceptual art look a lot more like a security. What do you get when you buy conceptual art? Well, nothing, really.[14] Just the artist's promise to endorse your ownership. You really are just investing in the artist's career, hoping to cash in on their celebrity. Hell, conceptual artists even provide certificates of ownership as if they're selling stock.

I was troubled. I spent my days helping companies register for IPOs, and my nights wondering why no one bothered to register conceptual art. I had a hard time seeing the difference. Sure, there was a lot less money at stake. But conceptual art could still be pretty pricey! As far as I could tell, it just never occurred to anyone that selling conceptual art looked an awful lot like selling unregistered securities.

Many years later, I found myself teaching law, rather than practicing it. But I couldn't stop thinking about conceptual art. I tried to write a conventional law review article, but it always felt a little hollow. And then it came to me. I couldn't just tell people that conceptual art looks like securities. I had to show them. So, I created a work of conceptual art designed to violate the securities laws and wrote a law review article explaining how it worked. I even conscripted the SEC as my stooge.

TROLLING THE SEC

I titled the work of conceptual art I created "SEC No-Action Letter Request," because that's what it was, at least nominally. The work consisted of sending a no-action letter request to the SEC, proposing to sell a work of conceptual art titled "SEC No-Action Letter Request" in an edition of fifty for $10,000 per edition, and asking the SEC to agree that the proposal as described would not constitute the sale of an unregistered security. However, the letter also explained why the proposal would constitute the sale of

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[13] Sol LeWitt, *Paragraphs on Conceptual Art*, 5(10) ARTFORUM 79 (Summer 1967), https://www.artforum.com/print/196706/paragraphs-on-conceptual-art-36719 [https://perma.cc/6BKR-SCRN].

[14] *See* Guy A. Rub, *Owning Nothingness: Between the Legal and the Social Norms of the Art World*, 2019 BYU L. REV. 1147 (2020).

an unregistered security and urged the SEC to deny the no-action letter request.[15] And I wrote an accompanying article, explaining in greater detail why my proposal violated the securities laws.

On December 10, 2019, I posted my article *SEC No-Action Letter Request* to SSRN and announced it on Twitter.[16] Apparently, someone sent it to Matt Levine, who writes the popular Money Stuff column for Bloomberg News. Levine is notoriously skeptical of cryptocurrency evangelism and the metaphysics of securities regulation, so my article caught his attention, and he discussed it in his December 13, 2019 column.[17]

Unsurprisingly, Levine was skeptical that offering to sell editions of a tongue-in-cheek work of conceptual art designed to troll the SEC could actually constitute the sale of an unregistered security. His response to my argument that I had created an unregistered security was "I don't think any of that is true."[18] But he followed his dismissal with a caveat:

> Still! There is a basic element of truth to it, which is that:
>
> 1. people buy lots of different intangible things hoping that they will increase in price;
> 2. some of them are securities and some of them aren't; and
> 3. even experienced lawyers can be unsure which is which.
>
> In particular lots of cryptocurrency tokens are arguably securities and arguably not. In fact some meaningful number of cryptocurrency tokens are *also conceptual art*, and if you are buying them it is not clear whether you are speculating on a currency, or speculating on a security, or speculating on art, or just paying for an aesthetic experience.
>
> Also it is a pleasing artifact of financial capitalism to think, like, "art is a subset of securities law." Why not! "Everything is securities fraud," I often say, but I mean "everything" in a narrow sense, something like "all bad behavior by a public company is also securities fraud." But what if *everything* is securities fraud? What if all of human culture is just an "investment in a common enterprise with the expectation of profits from the

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[15] As a matter of convention, SEC no-action letter requests generally do not argue that the proposal they describe would constitute the sale of an unregistered security. Several people have observed that I may have submitted the first "SEC action letter request."

[16] Brian L. Frye (@brianlfrye), TWITTER, (Dec. 9, 2019, 7:14 PM), https://twitter.com/brianlfrye/status/1204192533145890817 [https://perma.cc/W5NS-XY5L].

[17] *See* Matt Levine, *It's Hard to Get Rid of the IPO: Also Parody Videos and Conceptual Art*, BLOOMBERG OP., (Dec. 13, 2019, 12:17 PM), https://www.bloomberg.com/opinion/articles/2019-12-13/it-s-hard-to-get-rid-of-the-ipo [https://perma.cc/Y4C8-3P5L].

[18] *Id.*

> efforts of others," which is almost the famous *Howey* definition of a "security" in U.S. law? What if every time we interact, hoping to get something out of it, hoping to make our lives better through our shared humanity, we are participating in an unregistered offering of securities? Seems reasonable really.[19]

Of course, Levine was right. If conceptual art can be a security, then anything can be a security, if you look at it in the right way, and if everything is a security, then does it really mean anything anymore?

But Levine wasn't my only naysayer. ArtNet News also reported on my article and consulted with several lawyers and law professors, who were similarly skeptical of my argument, albeit all for different reasons.[20] Joan Kee argued that conceptual art doesn't satisfy the *Howey* test, because collectors aren't primarily interested in profit.[21] John Berton agreed, observing that no one would buy an edition of *SEC No-Action Letter Request* expecting to profit.[22] And Amy Goldrich opined that conceptual art collectors are more like hobbyists than investors.[23]

Again, probably all true! More or less, anyway. And yet, there's an odd element of desperation to these rebuttals. Sure, conceptual art collectors participate in the art market and care about the aesthetic value of the works they purchase. But they also care about making a good investment, and the better part of making a good investment in art is knowing there's a reasonable likelihood you'll be able to sell whatever it is you bought for more than you paid for it.

Conceptual art is no exception. At the time, everyone was talking about Maurizio Cattelan's work *Comedian*, which consists of a banana duct taped to the wall.[24] Cattelan created the work in an edition of three, and sold two editions at Art Basel Miami Beach for $120,000 each.[25] Now, I'm

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[19] *Id.* (emphasis in original).

[20] *See* Brian Boucher, *Some People Think Cattelan's Banana Is Genius. This Law Professor Thinks It's Illegal*, ARTNET NEWS, (Dec. 13, 2019), https://news.artnet.com/art-world/cattelan-banana-basel-illegal-1732932 [https://perma.cc/M8HQ-Z28R].

[21] *See id.*

[22] *See id.*

[23] *See id.*

[24] Maurizio Cattelan, Comedian (2019).

[25] Billy and Beatrice Cox bought one edition and Sarah Andelman purchased the other. *See* Christy Kuesel, *The Buyers of Two Editions of Maurizio Cattelan's Banana Artwork Were Revealed*, ARTSY (Dec. 10, 2019, 12:50 PM), https://www.artsy.net/news/artsy-editorial-buyers-two-editions-maurizio-cattelans-banana-artwork-revealed [https://perma.cc/H2AS-RMBA]. An edition of *Comedian* was later donated to the Guggenheim Museum. *See Cattelan's Notorious Banana Finds a Home at the*

sure Cattelan's collectors were impressed by his willingness to thumb his nose at the art world establishment and create a work of conceptual art that rejected conventional assumptions about artistic merit, blah blah blah. But no one—literally no one—invests $120,000 in the concept of taping a banana to the wall as a joke unless they think it's got legs. Maybe they hope to resell it, maybe it's just a loss leader for their collection, but there's always an angle.

Of course, Cattelan's collectors weren't planning to flip his work and generate an immediate profit, although they probably could have. The cost of the work was probably immaterial to them. But they knew there was a strong potential for profit, just like any other promising art investment.

Was anyone planning to invest in *SEC No-Action Letter Request* with the expectation of turning a profit? I wish! But honestly, as an objection, it misses the entire point of the conceptual artwork, which is to propose an imaginary transaction that would be illegal if it could be realized.

Only Levine got the point. When the SEC decides that an offering is a security subject to regulation under the securities laws, it isn't making an observation about the ontological status of the offering. It is merely stating that the offering in question is the kind of offering that the SEC will regulate. The concept of a "security" doesn't exist in the abstract. A security is just the kind of thing the SEC has decided it regulates.

For better or worse, the Supreme Court's definition of a "security" is sufficiently inchoate that anything can be a security, if the SEC wants it to be. But that isn't what the SEC wants. The SEC wants to regulate the kinds of things it understands to be securities. If it's structured like a security, and marketed like a security, and sold like a security, then the SEC will probably think it's a security and decide to regulate it. But if it isn't, it won't. And conceptual art definitely isn't the kind of thing the SEC wants to regulate.

Anyway, I was delighted by the critical responses. As Oscar Wilde famously observed, the only thing worse than being talked about is not being talked about. Most legal scholarship is forgotten before it's published. At least people were paying attention. It is far better to be dismissed than ignored.

So, I revised my essay to respond to my critics. Thank goodness for interminably long academic publishing calendars. The article wasn't formally published until almost two years after I initially distributed it, giving me plenty of time to make changes.

Guggenheim, ART NEWSPAPER, (Sept. 18, 2020), https://www.theartnewspaper.com/blog/cattelan-s-notorious-banana-finds-a-home-at-the-guggenheim [https://perma.cc/TQ2R-Q93U].

In a nutshell, I cheerfully acknowledged the futility of my project and implausibility of the SEC regulating conceptual art. That was never the point. I wrote the article to observe the formal similarities of investing in securities and conceptual art, to ask what we could learn from those similarities, and to suggest that it tells us something fundamental about the nature of our concept of a security. My critics had only helped me make those points more powerfully, by illustrating just how uncomfortable a comparison I had proposed.

But I still had to create the art. On January 1, 2020, I filed a no-action letter request with the SEC, proposing to sell editions of the work of conceptual art *SEC No-Action Letter Request* and asking the SEC to find that my proposal did not constitute the sale of an unregistered security. I also briefly explained why I believed that my proposal did constitute the sale of an unregistered security, attached my article, and encouraged the SEC to deny my no-action letter request.[26]

The SEC website acknowledged my submission of a no-action letter request and promised a telephone call from an agency representative, but no one ever called. Eventually, I submitted a FOIA request, asking for any records associated with my no-action letter request.[27] The SEC acknowledged receipt of my request.[28] A few months later, it responded to my FOIA request by invoking the deliberative process privilege and refused to produce any records.[29]

The artwork was complete. I had submitted a no-action letter request to the SEC. As I expected, the SEC refused to respond. Even better, it refused to explain why it refused to respond, or even produce any record of its deliberative process. What more could a conceptual artist possibly want? It was perfect.

To celebrate, I mailed a certificate of ownership to anybody who asked for one. In the article and no-action letter request, I stipulated that I would create an edition of 50 and sell each edition for $10,000. Instead, I created about 200 certificates, and numbered them 1 to 200 of 50. What's more, I gave them away for free. In the Fluxus mail art tradition, I figured the best

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[26] *See* Brian L. Frye, *SEC No-Action Letter Request*, 54 CREIGHTON L. REV. 537, 554 (2021) (Appendix A, Letter from Brian L. Frye to SEC, Jan. 1, 2000).

[27] E-mail from SEC to Brian L. Frye (Nov. 16, 2020 11:02 A.M.) (on file with author).

[28] E-mail from SEC to Brian L. Frye (Nov. 16, 2020 11:02 A.M.) (on file with author).

[29] E-mail from SEC to Brian L. Frye (Mar. 10, 2021 2:36 P.M.) (on file with author).

way to know who appreciated the work was to let them ask for a copy. After all, you can't put a price tag on a concept. Or can you?

In any case, I heard through the grapevine that a lot of people liked the work and found it a provocative intervention into securities law theory and practice. Law professors assigned it to their students, attorneys used it in CLEs, and bankers found it amusing. Apparently, it even made the rounds at the SEC, even if they'll never admit it.

Stranger Than Fiction

For my part, I moved on to other projects. *SEC No-Action Letter Request* was my first foray into creating works of conceptual art in the medium of legal scholarship, but there was no way it'd be the last. I found it too exhilarating. All my life, I'd wanted to be a conceptual artist, and I'd finally found my promised medium, almost virgin territory and ripe for cultivation.

> **Plagiarism Piece 1**
> Pay an essay mill to write an article explaining why plagiarism is wrong.
> Submit the article for publication under your own name.
> Brian L. Frye, Plagiarism Piece 1.[30]

Among other things, I created a collection of works of conceptual art in the form of legal scholarships that I titled *Deodand*.[31] It was modeled on Yoko Ono's book *Grapefruit* and consisted of a brief introductory essay reflecting on the nature of legal scholarship, followed by 46 "pieces," or short descriptions of allegorical activities intended to provoke reflection on the creation, publication, and evaluation of legal scholarship. Many of the pieces described ways of plagiarizing legal scholarship, and many of the pieces were themselves plagiarized from works of legal scholarship they obliquely described.

> **Conceptual Art Piece 1**
> Create a work of conceptual art.
> Offer to sell it to anyone who wants it.
> Argue that selling it is illegal.
> Brian L. Frye, Conceptual Art Piece 1.[32]

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[30] Brian L. Frye, *Plagiarism Piece 1, Deodand: How to Do Things with Legal Scholarship,* OpenSea, https://opensea.io/assets/0x495f947276749ce646f68ac8c248420045cb7b5e/86968975984154595632209176507398447769455665707409153213706287459332920442881 (last visited Oct. 24, 2021).

[31] Brian L. Frye, *Deodand*, 44 Seattle Univ. L. Rev. SUpra 55 (2021).

[32] Brian L. Frye, *Conceptual Art Piece 1, Deodand: How to Do Things with Legal Scholarship,* OpenSea, https://opensea.io/assets/0x495f947276749ce646f68ac

Then came NFTs. Suddenly, people were paying millions of dollars to invest in nominal ownership of digital images. It looked suspiciously like the internet had lost its mind. A bunch of people were fighting for the right to own nothing. Everyone in the legal academy was confused, and I was no exception. But maybe I was confused in a different way, because I was pretty sure NFTs were important, I just didn't know why.

What I did know was that in 2019, people laughed at my observation that conceptual art can satisfy the Supreme Court's definition of a security. They ridiculed my argument that *SEC No-Action Letter Request* was an unregistered security. And they dismissed the idea that anyone would invest in conceptual art hoping to profit. They assumed I was just another law professor making a purely theoretical argument unmoored from the real world, pushing concepts past their breaking point into absurdity.

Well, who's laughing now? NFTs are formally identical to conceptual art, even if most of the people creating and investing in NFTs don't realize it. When you buy conceptual art, all you get is the willingness of the art market to recognize you as the owner of the work. Exactly the same is true of NFTs. When you buy an NFT of a work, all you get is the willingness of the NFT marketplace to recognize you as the owner of the work. But in both cases, that's all you need. Sure, the law doesn't necessarily recognize your ownership of the work. But who cares, if the market disagrees?

Of course, conceptual art isn't necessarily a security. Sometimes, you're buying a dematerialized object but an object, nonetheless. Or rather, you're buying the right to compel the author of a dematerialized object to ratify your ownership of it. NFTs can be the same, essentially a tradeable token representing ownership of a particular work. When NFTs are actually nonfungible, they function like unique digital objects, not securities. Just like different works of conceptual art have different prices, different NFTs have different prices, because the NFT market doesn't see them as perfect substitutes.

But that isn't necessarily true of all works of conceptual art or all NFTs. If there are multiple editions of the same work of conceptual art, then those editions are fungible with each other. Likewise, if there are multiple NFTs of the same work, those NFTs are fungible with each other, just not with NFTs of different works. When conceptual art editions or NFTs are fungible with each other, they can be securities, because they are effectively ownership shares in a joint enterprise. If you take a work of conceptual art and divide it into identical editions or NFTs, what are the shares but para-

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8c248420045cb7b5e/869689759841545956322091765073984477694556657074091532137062875011143622983 69 (last visited Nov. 8, 2021).

digmatic securities? The value of an edition or NFT is always a function of the artist's success in promoting the work it represents.

THROUGH THE LOOKING-GLASS

Anyway, the explosive market for NFTs irrefutably demonstrated that the critics of *SEC No-Action Letter Request* were comically wrong. Samuel Johnson would have been proud.[33] It's all well and good to say something will never happen, until it does. It was plausible to assume that people would never actually invest in conceptual art expecting to profit, until lo and behold they did. Go figure. But what next?

Obviously, I had to start making NFTs. But what kind of NFTs should I make and why? After all, plenty of people were already making NFTs. Most of them were just looking for a way to sell their art and saw NFTs as the main chance. For some, it was a eureka moment. They saw what the NFT market really wanted and went all in, making stupid money. Others didn't really get it, creating NFTs of work no one wanted to own. And a few used NFTs to monetize their celebrity, whether they realized it or not, selling NFTs that really just provided access to their platform.

I knew I had to do something different. But what? Everyone was making NFTs of things: artwork, music, newspaper articles, tweets, you name it. Some of them were successful and some of them weren't. But I found it all unsatisfying. NFTs were the most conceptual medium I'd ever encountered. Surely they deserved conceptual content. And nothing is more conceptual than reflexivity. So, I decided to become an "NFT artist" and make NFTs about NFTs.

What does that even mean? NFTs typically purport to convey ownership of a work, often a digital image. Of course, they don't really convey ownership of that work, but it doesn't matter, so long as the NFT marketplace is willing to accept the fiction of ownership. Sure, the owner of an NFT actually owns nothing, but if you can exchange nothing for money, who cares?

So I decided to create NFTs of nothing. After all, if NFTs depend on pretending to convey something while actually conveying nothing, what is

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[33] JAMES BOSWELL, THE LIFE OF SAMUEL JOHNSON 333 (Oxford Univ. Press 1998) (1791) ("After we came out of the church, we stood talking for some time together of Bishop Berkeley's ingenious sophistry to prove the non-existence of matter, and that every thing in the universe is merely ideal. I observed, that though we are satisfied his doctrine is not true, it is impossible to refute it. I never shall forget the alacrity with which Johnson answered, striking his foot with mighty force against a large stone, till he rebounded from it, 'I refute it thus.'").

funnier than an NFT that explicitly conveys nothing? Nothing does nothing like conceptual art, so I figured I'd use NFTs as a medium for doing conceptual art.

Of course, my own understanding of the NFT market was purely theoretical. I knew more or less how the technology worked. And I was well aware that intellectual property law had next to nothing to say about NFTs. But I didn't have the first clue how the NFT market actually worked in practice, or what investors wanted. What better way to learn than by participating?

Theory Into Praxis

The first step was figuring out how to create an NFT. Like any sophisticated professional, I started by Googling the phrase, "How do I create an NFT?" Google suggested several different NFT marketplaces, including OpenSea and Mintable. OpenSea looked bigger and more popular, so I started there.

Creating an NFT on OpenSea was relatively easy but required a number of steps. First, I had to acquire some cryptocurrency and a cryptocurrency wallet to hold it. I created a Coinbase account, connected it to my bank account, and purchased about $100 in bitcoin. Next, I created a MetaMask wallet and connected it to my Coinbase account. Now, I was ready to go. I connected my MetaMask wallet to my new OpenSea account and got started creating my first NFT.

What would it be? I decided to create an NFT titled "SEC No-Action Letter Request #2: The #NFT," which was an NFT of the concept of creating an NFT of the work of conceptual art "SEC No-Action Letter Request." I provided the following description of the NFT:

> The purchase of this NFT constitutes ownership of 1 edition of the work of conceptual art "SEC No-Action Letter Request 2: The #NFT," which consists of the idea of selling NFTs for a work of conceptual art titled "SEC No-Action Letter Request 2: The #NFT." The purchase of this NFT does not constitute ownership of anything other than 1 edition of the work of conceptual art conveyed. Specifically, it does not constitute ownership of the digital image file illustrating this offering, the description of the work of conceptual art titled "SEC No-Action Letter Request 2: The #NFT," or any other work of authorship fixed in a tangible medium.
>
> "SEC No-Action Letter Request 2: The #NFT" is the "sequel" to the work of conceptual art "SEC No-Action Letter Request," which consists of selling editions of a work of conceptual art titled "SEC No-Action Letter Request," which consists of sending a no-action letter request to the SEC,

> asking it for a letter ruling holding that selling editions of a work of conceptual art titled "SEC No-Action Letter Request" does not violate the securities laws.

OpenSea expected me to associate an image with the NFT, so I uploaded a picture of one of the *SEC No-Action Letter Request* certificates. I clicked save and was delighted to see my new NFT spring into existence. Who knew creating conceptual NFT art could be so easy!

Not so fast. Soon after creating the NFT of "SEC No-Action Letter Request 2: The #NFT," I got an offer to buy it for 0.01 ETH. Awesome. It cost me nothing to create the NFT and the NFT conveyed nothing, so I was happy to sell it for nothing. Whatever 0.01 ETH was, it was more than nothing, so the price was right.

But wait. When I went to accept the offer, I realized that I'd lose money on the transaction. Sure, I'd get 0.01 ETH, which was about $30. But first I had to "mint" the NFT by placing it on the Ethereum blockchain. And that would require a "gas fee" of about $90.

Ok, time to learn. I had assumed that selling NFTs meant getting something for nothing. But I was wrong. I thought an NFT was just a unique collection of data. No. It's a unique collection of data on a digital ledger, in this case the Ethereum blockchain. And putting data on a blockchain isn't free. It requires computing energy, which costs money. This was my first lesson about how NFTs actually work. I thought I knew everything already, but I was wrong.

What is a gas fee, anyway? Every transaction on a "proof of work" blockchain has to be verified by "miners" using computers to solve equations. "Gas" is the cost of solving those equations. Part of the gas fee reflects the fixed cost of running the computers that solve the equations. But most of the gas fee depends on demand and network congestion. The more transactions to verify, the more congested the network, and the more expensive the gas fee. Essentially, the gas fee is whatever it costs to convince a miner to "verify" or execute your transaction at any particular moment.[34]

Anyway, gas fees made OpenSea look pretty unattractive. I wanted to create and sell NFTs because they looked like a delightful medium for conceptual art. But I was only in it for the lulz, and I wasn't too keen on paying for them. So I started casting about for alternatives, and noticed Mintable, which offered the option of minting "gasless" NFTs.

Perfect. Using Mintable, I could create and mint as many NFTs as I liked for free. Like any other art form, conceptual art requires practice, espe-

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[34] *See Gas and Fees,* ETHEREUM (Sept. 29, 2021), https://ethereum.org/en/developers/docs/gas/ [https://perma.cc/A9EX-55ZE].

cially when you're adapting it to a new medium. I needed the freedom to create and mint NFTs willy-nilly, without worrying about how much it would cost. I wanted to see what they looked like when I made them, how they worked, and what people found interesting.

I started by creating an NFT of the Brooklyn Bridge, subtitled "I have a bridge to sell you" and illustrated by a stock photo of the Brooklyn Bridge.[35] The point was to show that you can sell an NFT of anything you like, because what you are really selling is the NFT, not whatever the NFT represents. So, why not sell the Brooklyn Bridge? It's been sold so many times before. When someone bought my NFT for $100, I was absolutely delighted. I felt like a true 21st century grifter. George C. Parker would have been envious. I got paid, and my mark walked away happy with a work of conceptual art. May they resell it for a handsome profit.

Success in business is the ultimate muse. I immediately got to work creating more NFTs. Among other things, I reflected on what made *Brooklyn Bridge* successful. And I realized that I had no idea. It was a mildly amusing spoof on NFTs, questioning their legitimacy by comparing them to a legendary scam. Of course, I intended it as the highest praise. Maybe people got the joke?

I figured I'd create more NFTs reflecting on the nature of the medium. So the obvious next choice was my essay, "NFTs & the Death of Art."[36] In the essay, I observed that NFTs have no actual connection to the works they purport to represent but argued that NFTs might still be good for art, if they enabled the art market to ignore art. Everyone knows the art market only cares about price. Art is already an afterthought, an irrelevance, an inconvenience. Everything would be so much easier if the art market could just dispense with art, and trade only its value. NFTs could make that possible, by liberating art from its value and enabling people who care about money to focus on the art of investing. As Warhol observed, "good business is the best art."[37] Why pollute it with artworks when it could be purified by the blockchain?

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[35] *See* Brian L. Frye, *Brooklyn Bridge*, MINTABLE, https://mintable.app/collectibles/item/Brooklyn-Bridge-I-have-a-bridge-to-sell-you/EDju7z5Kuhh0M-o [https://perma.cc/RN8U-37FC] (last visited Dec. 17, 2021); *see also* Brian L. Frye (@brianlfrye), TWITTER, (June 1, 2021, 2:27 PM), https://twitter.com/brianlfrye/status/1399794706486280194 [https://perma.cc/8LQ6-XGFK].

[36] Brian L. Frye, *NFTs & the Death of Art*, SSRN (Apr. 19, 2021) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3829399 (unpublished).

[37] ANDY WARHOL, THE PHILOSOPHY OF ANDY WARHOL (FROM A TO B AND BACK AGAIN) 92 (1975).

So I created an NFT of my essay, which I subtitled "NFTs are silly & pointless, please buy this one" and illustrated with a screenshot of the essay's SSRN page.[38] Soon afterward, someone bought the NFT for $30. Again, I was delighted. I felt like I was beginning to get the hang of the medium, and money for nothing is always a nice bonus. To the moon!

Next, I created an NFT of Conceptual Art, which I subtitled "How to Succeed in Art Without Really Trying," and illustrated with a photo of Piero Manzoni's work of conceptual art *Artist's Shit*.[39] I described the NFT as follows:

> This is an NFT in the concept of conceptual art. Ownership of this NFT consists of the right to claim ownership of an NFT in the concept of conceptual art. As Sol LeWitt famously explained:
>
> "In conceptual art the idea or concept is the most important aspect of the work. When an artist uses a conceptual form of art, it means that all of the planning and decisions are made beforehand and the execution is a perfunctory affair. The idea becomes a machine that makes the art." Sol LeWitt, Paragraphs on Conceptual Art, Artforum, June 1967.
>
> That & two bits'll buy you a cup of coffee.

Once again, my NFT sold, this time for $25, and I started getting a little cocky. Selling conceptual art can really go to your head, especially because it feels like such a racket. The works cost nothing but a few minutes of clicking and typing to produce, but people were willing to pay for them. What's not to love?

Finally, I created an NFT of the Public Domain, which I subtitled "Non-rival NFTs" and illustrated with a drawing of the Worm Ouroboros.[40] I also provided the following description:

> This NFT consists of the concept of creating NFTs distributed for free in unlimited quantities. After all, an NFT can have an infinite number of editions and the marginal cost of distributing an NFT is effectively zero. Like love, an NFT is something if you give it away.

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[38] Brian L. Frye, *NFTs & the Death of Art*, MINTABLE, https://mintable.app/art/item/NFTs—the-Death-of-Art-NFTs-are-silly—pointless-please-buy-this-one/bcfNWidxfdiIsxg [https://perma.cc/MGS3-5NCX] (last visited Dec. 17, 2021).

[39] Brian L. Frye, *Conceptual Art*, MINTABLE, https://mintable.app/art/item/Conceptual-Art-How-to-Succeed-in-Art-Without-Really-Trying/s1L1UUeuxxIi1PJ [https://perma.cc/V8ZY-GB7M] (last visited Dec. 17, 2021).

[40] Brian L. Frye, *The Public Domain*, MINTABLE, https://mintable.app/art/item/The-Public-Domain-Non-Rival-NFTs/6znrHUlWm9FZAQh [https://perma.cc/Z2PQ-P38T] (last visited Dec. 17, 2021).

I sold my NFT of the Public Domain for $28.02, which seems a little low given how many works it includes. But then again, everyone else got them for even less.

I was already pleased with my foray into NFT creation. I'd created and sold four NFTs on Mintable, which felt like success. And I was getting a handle on the nature of the medium and what made it interesting. I figured I'd create more NFTs, by the by, as the mood struck me.

The Main Chance

And then it happened. In September 2021, I got a Twitter direct message from Sam Hart, a prominent collector of conceptual art NFTs.[41] He expressed his admiration for my OpenSea NFT "SEC No-Action Letter Request 2: The #NFT" and offered to buy it for 0.5 ETH. I was stunned. That was about $2000, way more than the gas fee for creating the NFT, and more importantly, way more than I ever thought anyone would ever pay for one of my NFTs.

Obviously, I immediately accepted the offer. But it got me thinking. I like conceptual art and I like money. They are the epitome of two great tastes that go great together. Money gets people talking about conceptual art and conceptual art makes money interesting. If one collector was interested in my conceptual art NFTs, there might be more. I had a limitless supply of conceptual art to sell. And the best time to test the market for my product was right after making a notable sale.

So, that night, I informed my wife that I would be coming to bed late, because I had to make some art. I decided the best—well, the most convenient, anyway—subject matter for my first collection of NFTs was my article *Deodand*. After all, it was already written, the article explained the works of art it contained, and they would be easy to transform into NFTs.

What did I do? First, I created an NFT collection titled *Deodand: How to Do Things With Legal Scholarship*.[42] Then, I took a screenshot of each of the 46 "pieces" included in Deodand. I used each screenshot to create an NFT of the piece it represented. And I provided the following description:

> This is an NFT of the work of conceptual art titled [whatever], which was originally published in the article Brian L. Frye, Deodand, 44 Seattle University Law Review SUpra 55 (2021). Ownership of this NFT constitutes

[41] Hxrts (@hxrts), OpenSea, https://opensea.io/hxrts (last visited Oct. 24, 2021).

[42] Brian L. Frye, *Deodand: How to Do Things with Legal Scholarship*, OpenSea, https://opensea.io/collection/deodand (last visited Oct. 24, 2021).

> ownership of the exclusive right to perform the work of conceptual art it identifies, to the extent that the author of the work can convey such a right.

And on the 47th NFT I rested, my Ctrl-C and Ctrl-V fingers weary.

The next morning, I awoke to an offer to purchase "Plagiarism Piece 1" for 0.5 ETH.[43] Of course, I accepted. But that was only the beginning. A trickle of offers became a flood, and before long, I could hardly keep up. Before I knew it, I'd sold all 46 NFTs. In honor of selling out the IPO of my first NFT collection, I created a special 47th NFT, which I titled "Efficient Market Piece."[44]

> **Efficient Market Piece**
>
> Create a derivatives market for NFTs.
> Allow NFT skeptics to participate.
> Observe whether they short NFTs.
> Draw the appropriate conclusions.
>
> Brian L. Frye, Efficient Market Piece.[45]

It sold shortly after I posted it.

In only a few days, I'd sold 47 NFTs for a total of about 10 ETH or approximately $35,000. I had no idea what had happened, but I loved it. I'd created an NFT collection as a joke, a spoof on the concept of NFTs, and somehow it worked. People liked my NFTs and wanted to buy them. In spite of myself, I was an NFT artist, whether I liked it or not. And I had to figure out what that meant.

Lessons Learned

Luckily, I had my collectors and other NFT traders, who helped me understand the NFT market at least a little better. I thought NFTs were just meaningless data arbitrarily used as an asset. Wrong. The NFT market sees owning an NFT as a kind of ownership of the work it represents, even if the law doesn't. I thought NFT collectors were just financial speculators. Wrong. Their investment decisions also reflect their aesthetic preferences. I

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[43] *See Plagiarism Piece 1*, *supra* note 30.

[44] Brian L. Frye, *Efficient Market Piece, Deodand: How to Do Things with Legal Scholarship,* OpenSea, https://opensea.io/assets/0x495f947276749ce646f68ac8c248420045cb7b5e/86968975984154595632209176507398447769455665707409153213706287511009966948353 (last visited Oct. 24, 2021).

[45] *Id.*

thought the NFT market was just a bubble or scam. Wrong. Something new is happening, it just isn't clear what.

NFTs aren't just meaningless data. While NFTs have no formal legal connection to the works they represent, the perception of a relationship is critical to the value of an NFT. Nothing is stopping you from creating an NFT of anything you like, whether or not it belongs to you. After all, I created an NFT of the Brooklyn Bridge, which I didn't own, any more than George C. Parker did. But the NFT market looks askance at people creating NFTs of works they didn't create or otherwise control. More importantly, it refuses to value them. And there isn't much point in creating an NFT no one wants. Not only doesn't it have any actual connection to the work it purports to represent, but also no one thinks it does, which is even worse.

NFT collectors aren't philistines. While NFT collectors want to buy works they think will appreciate in value, their primary heuristic is aesthetic appeal. They buy NFTs they think are cool, and NFTs become popular because a lot of people think they're cool. My collectors told me they invested in my *Deodand* NFTs because they were different from other NFTs they'd seen. When other NFT collectors compared them to the *Loot* NFTs, because the images were similar collections of words, my collectors pointed out that the substance of the works was different. I was pleasantly surprised to see the level of engagement with my NFTs as works of art, and the extent to which aesthetic appreciation was driving investment decisions.

The NFT market isn't just a boondoggle. Sure, it's wildly speculative, relentlessly hyped, and incoherent. So there are boondoggle elements. But there's more. Everyone was mystified by the NFT market when it was created but assumed it would soon peter out and die. No dice. Everyone was surprised when the NFT market took off but assumed it would soon implode. Nope. And everyone was nonplussed when the NFT market continued to grow but assumed it would soon collapse. Again no. At some point, you have to update your priors to reflect experience. I think it's about time. The NFT market we have today might not be the NFT market we have in the future. But I think it's pretty clear that NFTs are more than just a fad. Billions of dollars say as much.

Not only did my collectors help me understand the NFT market as a whole, but they also gave me specific advice about how to succeed as an NFT creator. First, they admired the NFTs I'd created, but warned me not to create too many. NFT collectors value scarcity: #rare and #scarce are ubiquitous tags. And they dislike it when artists create too many NFTs. Unsurprisingly, they don't want to see their investment diluted by similar works flooding the market. I took this advice to heart.

Second, they advised me not to sell all of the NFTs in my *Deodand* collection, but to keep some for myself, so I could cash in when they became more valuable. Gotta admit, I was flattered by their certainty that the NFTs would increase in value. But I'm more of a bird-in-the-hand person and was happy to take whatever was offered for my NFTs in the IPO. After all, it didn't cost me anything to create them—other than years of idle conceptualizing—and I could always create more. So I sold every NFT in the collection. If my collectors make a fortune on them in the future, I couldn't be happier. They deserve every penny.

Anyway, think about it, the NFT market is a market for unique things with no inherent value that people value both financially and aesthetically. It sounds an awful lot like the conventional art market. So it's no wonder the conventional art market co-opted it so quickly. Everyone else made fun of NFTs, while Sothebys laughed all the way to the bank. Sure, there's no art object anymore, at least in the traditional sense of something you can hang on the wall. But who cares? NFT collectors live online. They don't want a painting; they want a sexy profile picture.

Kal Raustiala and Chris Sprigman observed that NFTs are just "virtual Veblen goods."[46] They were probably right. But maybe that's enough? After all, Veblen goods have proven quite persistent. The conventional art market is Veblen goods all the way down but shows no signs of waning. Art is a convenient investment that also increases your status. What's not to love? NFTs are the same, just for a slightly different market.

If anything, the money makes the aesthetics fun, and the aesthetics make the money meaningful. The art market isn't gambling. It's investing in our cultural heritage. And if you happen to make a boatload of money in the bargain, all the better, right? It's no secret that no one cares about art that isn't immensely valuable. Is it even art if people don't want to buy it? As always, the medium is the message.

There is one intriguing difference between the NFT market and the conventional art market: the NFT market has an exceptionally liquid secondary market. For better or worse, the conventional art market is highly illiquid and opaque. Many art collectors find it frustrating, but for some, it could well be part of the appeal. In any case, collectors generally aren't supposed to sell works by living artists without permission, in order to manage supply, and can get blackballed if they do. The overwhelming majority of

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[46] Kal Raustiala & Christopher Jon Sprigman, *The One Redeeming Quality of NFTs Might Not Even Exist*, SLATE (Apr. 14, 2021), https://slate.com/technology/2021/04/nfts-digital-art-authenticity-problem.html [https://perma.cc/3F9B-2XXD].

works have no value on the secondary market, and only a tiny fraction of works changes hands every year.

The NFT market couldn't be more different. The secondary market is astonishingly robust and active. Collectors offer NFTs for sale immediately after buying them, and NFTs can change hands in short succession. More importantly, NFT creators encourage it, because the existence of a secondary market for an NFT is proof of its value. Even as I was selling the NFTs from my *Deodand* collection, buyers were putting their NFTs on the secondary market. And they sold! Everyone was delighted to see interest in the collection increasing, especially me.

A New Troll

After the unexpected success of my *Deodand* collection, I knew I needed to create and sell another collection. How else to keep the buzz going? I reflected on the admonitions not to dilute the rarity of the NFTs I'd already sold. Not a problem. I had no interest in creating more of the same. I'd tapped out that particular work but wanted to create something new. And I knew what it had to be. I would use NFTs to prove the point I made in *SEC No-Action Letter Request*.

It was perfect. In *SEC No-Action Letter Request*, I argued that my proposal to sell a work of conceptual art constituted the sale of an unregistered security, because it satisfied all the doctrinal criteria. But my critics scoffed that no one would actually buy the editions I was selling with the expectation of making a profit. Of course, that's a terrible, irrelevant argument. But it's also false. And NFTs would help me prove it.

I created a new NFT collection titled "SEC No-Action Letter Request 3: Securitized NFTs," illustrated by a "corporate seal" for "Securities Art, Inc.," a photo of a ticker tape, and an old etching of tulips. The collection consisted of 50 NFTs, each of which was an "edition" of the work of conceptual art "SEC No-Action Letter Request 3: Securitized NFTs," numbered 1/50 to 50/50. I provided the following description of the NFTs:

> The work of conceptual art "SEC No-Action Letter Request 3: Securitized NFTs" consists of the submission of a no-action letter request to the SEC, proposing to sell the work of conceptual art "SEC No-Action Letter Request 3: Securitized NFTs" to the public in the form of 50 NFTs. The no-action letter request will ask the SEC to agree that my proposal does not constitute the sale of an unregistered security and to agree that the SEC will not recommend any enforcement action in connection with the sales.
>
> The work of conceptual art "SEC No-Action Letter Request 3: Securitized NFTs" exists in a limited edition of 50. Ownership of this NFT comprises ownership of one edition of the work, and constitutes ownership of 2% of the work. Ownership of this NFT does not constitute ownership of any other property interest of any kind, tangible or intangible.

On September 4, 2021, I submitted a no-action letter request to the SEC for *SEC No-Action Letter Request 3: Securitized NFTs*.[47] In the no-action letter request, I explained my proposal to sell the work of conceptual art *SEC No-Action Letter Request 3: Securitized NFTs*, and observed that it was identical to my previous proposal to sell the work of conceptual art *SEC No-Action Letter Request*, except this time I proposed to sell NFTs rather than certificates. I observed that I had already sold NFTs of works of conceptual art for considerable amounts of money, and that people were reselling those NFTs on the secondary market. And I informed the SEC that, in light of its refusal to respond in any way to my previous no-action letter request, or explain the reason for its refusal to respond, I would assume that it did not object to my proposal, unless I heard otherwise.

When I submitted my no-action letter request, the SEC website told me to expect a phone call from an SEC examiner. I waited by the telephone, but no one ever called. After about a week, a reliable source informed me that the SEC would never respond to my no-action letter request, that it couldn't respond to my no-action letter request, because I was posing existential questions it had no interest in contemplating, let alone answering.

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[47] Brian L. Frye, *SEC No-Action Letter Request 3: Securitized NFTs*, SSRN (Sept. 13, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3917699 (unpublished).

Wonderful! I released the *SEC No-Action Letter Request 3: Securitized NFTs* collection for sale, (relatively) secure in the belief that it wouldn't get me in trouble. I didn't know what to expect. After all, it was yet another peculiar NFT project, and I'd just sold out the *Deodand* collection. But demand was strong. The collection sold out almost immediately, for about five ETH, or approximately $15,000.

Key Takeaways

What have I learned from my NFT odyssey so far? Mostly how much I don't know and how much I don't understand. I came into NFTs thinking they were a big joke. But the joke was on me. The more I poked fun at the medium and the market, the more it humbled my ability to make sense of it.

Do I have a theory of NFTs? No. And I think it's premature. All I can do is make some observations, based on my experiences creating and selling NFTs, and thinking about the NFT market.

- The NFT market resembles the art market in some ways, but not in others. It can be helpful to analogize between the two, but it's a mistake to assume they are the same or work in the same way.
- One key similarity is that the art market and the NFT market both depend on brands, not works. The markets value "authenticity," not control. Both markets inevitably implicate copyright ownership, but only incidentally. What they really value is goodwill.
- Another key similarity is the nexus of aesthetics and speculation. We are accustomed to the art market, so we take it for granted. But it is every bit as strange, and every bit as inevitable, as the NFT market. Is it a market for Veblen goods? Sure. But maybe Veblen goods are useful, and not just for managing social status.
- There is a logic to the demand for NFTs—there has to be a logic to the demand for NFTs!—but no one knows what it is yet. It may be more basic than is comfortable to realize. Maybe markets are looking for a new medium of value, and are willing to accept just about anything, so long as people can agree on it. Can we have a Doge economy? Why not? Dumber things have happened.

Anyway, I suspect this is the second article of many on NFTs. In the meantime, we've only just begun.

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Liable, Naaaht: The Mockumentary: Litigation, Liability and the First Amendment in the Works of Sacha Baron Cohen

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TABLE OF CONTENTS

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"What I care about most is freedom of man, the liberation of the individual man from the network of moral and social convention in which he believes, or rather in which he thinks he believes, and which encloses him and limits him and makes him narrower, smaller, sometimes even worse than he really is."
– Federico Fellini[1]

"*Please, you come see my film, if it not success, I will be execute."*
– Borat Sagdiyev[2]

I. INTRODUCTION

When actor and provocateur Sacha Baron Cohen goes into character, the results are witty, sarcastic and biting. Baron Cohen is a comedic chameleon, and his range allows him to assume a variety of characters; he has created the socially awkward and mustachioed Borat Sagdiyev, the superconfident Israeli ex-military interviewer Erran Morad, the stunningly ignorant English cockney rapper known as Ali G., and the flamboyant and irreverent Austrian gay fashionista journalist Bruno. [3]

A master of disguise, Baron Cohen is also a master of a genre–the hybrid "mockumentary"–that blends truth and fiction. Baron Cohen has starred in, produced or written three successful mockumentary films: two *Borat* movies and *Bruno*, and two mockumentary television series: *The Ali G*

[1] FEDERICO FELLINI, FELLINI ON FELLINI 157-58 (1976).

[2] BORAT! CULTURAL LEARNINGS OF AMERICA FOR MAKE BENEFIT GLORIOUS NATION OF KAZAKHSTAN (20th Century Fox Films 2006).

[3] *See* Ewan Fletcher, *What It's Really Like to Get Pranked By Sacha Baron Cohen*, TELEGRAPH (July 12, 2018), https://www.telegraph.co.uk/tv/0/really-like-get-pranked-sacha-baron-cohen/ [https://perma.cc/6SXS-HK9Q].

Show and *Who Is America?*.[4] *Borat* has been hailed as a modern, biting exploration of American society,[5] but critics have also vilified Baron Cohen for both his tactics and his message.[6]

This article analyzes the legal issues surrounding the mockumentary format through Sacha Baron Cohen's productions and the litigation against them. Disgruntled subjects have sued Baron Cohen in tort for defamation, invasion of privacy, and fraud. While Baron Cohen has successfully employed a variety of procedural, substantive, contractual and constitutional defenses to protect his art and humor, [7] the litigation continues.[8] The 2020 release of the sequel[9] to the record-breaking 2006 pop cult classic *Borat! Cultural Learnings of America for Make Benefit Nation of Kazakhstan*,[10] though unlikely, could again call upon courts to wrestle with this hybrid art form.

This article argues that the mockumentary genre as a hybrid storytelling format demands strong legal protections under the law, particularly the First Amendment. A review of the cases against mockumentarian Sacha

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[4] *See id.*

[5] *See* Manohla Dargis*, From Kazakhstan, Without a Clue*, N.Y. TIMES (Nov. 3, 2006), https://www.nytimes.com/2006/11/03/movies/from-kazakhstan-without-a-clue.html [https://perma.cc/JH7J-ZZW5] ("The brilliance of 'Borat' is that its comedy is as pitiless as its social satire, and as brainy.").

[6] *See* Cate Blouke, *Borat, Sacha Baron Cohen, and the Seriousness of (Mock) Documentary*, 6 COMEDY STUD. 4, 5 (2015).

[7] Fletcher, *supra* note 3. This article will discuss litigation stemming from six Sacha Baron Cohen vehicles:

(1) BORAT SUBSEQUENT MOVIEFILM (Amazon Studios 2020);

(2) WHO IS AMERICA? (Showtime Networks 2018);

(3) BRÜNO (Universal Pictures 2009);

(4) BORAT! CULTURAL LEARNINGS OF AMERICA FOR MAKE BENEFIT GLORIOUS NATION OF KAZAKHSTAN (20th Century Fox Films 2006);

(5) *Da Ali G. Show* (HBO/BBC 2000-04);

(6) *The 11 O'Clock Show* (BBC 1998-2000).

[8] Most recently, embattled former Alabama U.S. Senate candidate and State Supreme Court Justice Roy Moore sued Sacha Baron Cohen in federal court. The court dismissed Moore's case, but Moore filed a timely notice of appeal the same day. *See* Moore v. Cohen, 2021 U.S. Dist. LEXIS 130344 (S.D.N.Y. July 13, 2021).

[9] *See Borat Subsequent Moviefilm*, IMDB https://www.imdb.com/title/tt13143964/ [https://perma.cc/R5Z4-ETXF]. New footage was added to Amazon Prime in May 2021, *see* Rachel Leishman, *New 'Borat Subsequent Moviefilm' Footage Coming to Amazon Next Week Including a 40-Minute Reality Show*, COLLIDER (May 20, 2021), https://collider.com/new-borat-2-footage-amazon-prime-video/ [https://perma.cc/M7XW-TAA4].

[10] Joshua Rich, *Is No. 1! "Borat" Breaks Records*, ENT. WEEKLY (Nov. 3, 2006, 5:00 AM), https://ew.com/article/2006/11/03/no-1-borat-breaks-records/ [https://perma.cc/8P38-Q3EF].

Baron Cohen reveals why this modern, and sometimes cringeworthy, storytelling technique demands statutory or constitutional protection or both. These political, social, and artistic expressions are clearly protected under the First Amendment. Even courts that utilize constitutional restraint to avoid deciding Baron Cohen cases on free speech grounds channel the spirit of the First Amendment in their denial of claims.[11] As courts uphold much-needed protection under the First Amendment for parody and satire, they are just as protective of the contracts the participants all sign before they appear in the productions.

Winning in court or avoiding litigation altogether is vital to an artist's ability to create and distribute, especially when an artist's productions make such bold political and satirical statements as do Sacha Baron Cohen productions. Courts must protect "the brilliance of 'Borat'" with its "pitiless" but "brainy" social satire.[12] Parts I, II, and III lay the foundation for the analysis of the Baron Cohen cases in Part IV. Cases against Sacha Baron Cohen are discussed in depth in the Appendix in Part VI following the Conclusion in Part V.

II. Contextualizing the "Mockumentary"

A. Blending Truth and Fiction: Defining the "Mockumentary"

Taken together, film scholars Cynthia J. Miller and Craig Hight sketch a definition of the mockumentary: In part, this hybrid film form blends social commentary and humor to create biting social critique.[13] Hight describes the mockumentary as "the corpus of fictional texts which engage in a sustained appropriation of documentary aesthetics, but more texts than mockumentary can fall into such a definition."[14] Hight goes on:

> Most mockumentaries, and certainly the most popular examples, derive from the intention to use documentary and reality-based forms to generate parody and satire . . . Both parody and satire sample something of their

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[11] *Moore*, 2021 U.S. Dist. LEXIS 130344, at *9-*10, *25-*28. *See also* Moore v. Cohen, 2019 U.S. Dist. LEXIS 94361, at *1, *2-*3 (D.D.C. 2019) ("Although the Court has serious doubts about the merits of each of the plaintiff's arguments, it must forego addressing their shortcomings because it lacks jurisdiction to consider the motion for reconsideration.").

[12] *See* Dargis, *supra* note 5.

[13] *See* Too Bold for the Box Office: The Mockumentary from Big Screen to Small, xi (Cynthia. J. Miller ed., 2012).

[14] Craig Hight, Television Mockumentary: Reflexivity, Satire and A Call to Play 16 (2010).

> textual targets in order to offer forms of commentary, but they can be distinguished by their agendas, the nature of their appropriations and ultimately the readings they encourage of audiences.[15]

Cynthia Miller also offers a perspective on defining the mockumentary:

> [M]ockumentaries have always been about more than just cynical laughs purchased at the expense of the people, events, and ideas that animate our worlds. They exist in a place where social commentary, cultural critique, and the crisis of representation collide, where humor – whether in the form of blatant laughter or simply rueful shakes of the head – meets reflection.[16]

This article approaches the definition of the mockumentary as a form of documentary filmmaking that blends the truthful elements of a documentary with fictional and satirical elements that aim to "mock" its unwitting subjects.[17] Mockumentaries rely on traditional documentary style filmmaking techniques to mimic the real-life aspect of the documentary.[18] The mockumentary mimics an actual documentary–it gives the impression of reality by weaving in documentary film's reality-based elements–but the production is orchestrated by a fictional character.[19]

Mocking, as Sacha Baron Cohen often does, is just one "stance" a fake documentary can take; they also copy, mimic, gimmick, play with, scorn, ridicule, invert, reverse, repeat, ironize, satirize, affirm, subvert, pervert, convert and translate.[20] Feature films such as *Citizen Kane,*[21] *The Spaghetti Harvest*,[22] and Federico Fellini's *The Clowns*[23] exemplify the mockumentary format, and were released before Baron Cohen was born. More contemporary feature films told in the mockumentary format include *This is Spinal Tap*,[24]

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[15] *Id.* at 25.

[16] Miller, *supra* note 13, at xi.

[17] *See* Leshu Torchin, *Cultural Learnings of* Borat *Make for Benefit Glorious Study of Documentary,* 38 FILM & HIST. 53 (2008).

[18] *See* Kimberlianne Podlas, *Artistic License or Breach of Contract? Creator Liability for Deceptive or "Defective" Documentary Films and Television Programs*, 33 LOY. L.A. ENT. L. REV. 67, 82 (2013).

[19] *See id.*

[20] *See* Alisa Lebow, *"Faking What? Making a Mockery of Documentary"*, *in* F IS FOR PHONY 223 (Alexandra Juhasz & Jesse Lerner eds., Univ. of Minn. Press 2006).

[21] (RKO Radio Pictures 1944).

[22] (BBC 1957).

[23] (Leone Film 1970).

[24] (Embassy Pictures 1984).

Best in Show,[25] and the *Blair Witch Project*.[26] *The Office* brought versions of the mockumentary to the television screen.[27]

The genre of truth-based documentary story-telling has been referred to as "documentary deception."[28] Film and cinema scholars question the ethics of mockumentaries:[29] subjects are told the film will be about one thing, but the final product shows them in ways they never would have agreed to in the first place.[30] Some argue that plaintiffs embarrassed by their depiction are entitled to damages, prompting litigation.[31] The mockumentary mimics an actual documentary by giving the impression of reality by weaving in documentary filmmaking techniques. The production of a mockumentary, however, is orchestrated by a fictional character. Baron Cohen's twist on the mockumentary is predicated in large part on deceiving its unsuspecting subjects through the use of fictional characters sent to shock and deceive. Sacha Baron Cohen in character often elicits responses participants do not approve of.

While critics hailed *Borat* as a modern, biting exploration of American society,[32] others were less than complimentary and some outright hostile.[33] A staffer for a former congressman who was approached by Baron Cohen's production company but figured out the ruse described the attempted prank and prankster:

> He mercilessly pranked his guests, leading astronaut Buzz Aldrin into cringeworthy conversations or small-town bar patrons in an anti-Semitic singalong. Today, with his new CBS/Showtime production "Who is America?," he's even more determined to humiliate. He's not interested in benign practical jokes. He won't set up a piano that rolls slowly away from its pianist; he won't drive a car into an office to shock the new receptionist. If you're a Republican, Cohen wants to destroy you.[34]

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[25] (Warner Bros. Pictures 2000).

[26] (Artisan Ent. 1999).

[27] The American adaptation of *The Office* aired on NBC from 2005 to 2013.

[28] *See* Podlas, *supra* note 18, at 82.

[29] *See* Lebow, *supra* note 20, at 223.

[30] Podlas, *supra* note 18.

[31] *Id.*

[32] *See* Dargis, *supra* note 5 (discussing the "brilliance" of *Borat*).

[33] *Village 'Humiliated' by Borat Satire*, BBC NEWS (Oct. 26, 2008), http://news.bbc.co.uk/2/hi/europe/7686885.stm [https://perma.cc/U269-MQJ8].

[34] Michael Caputo, *Sacha Baron Cohen Tried to Prank Me. Here's How I Knew It Was a Scam.*, POLITICO, (July 27, 2018), https://www.politico.com/magazine/story/2018/07/27/sacha-baron-cohen-prank-emails-who-is-america-219073/ [https://perma.cc/T7R8-BAHK].

B. Pre-Borat Litigation of the Mockumentary

As a genre, the mockumentary has origins as early as October 30, 1938, when Orson Welles infamously and controversially surprised a radio audience with a broadcast of *War of the Worlds*.[35] *War of the Worlds* told the story of a fake alien invasion of New Jersey although the audience was not informed of this fact.[36] The live broadcast caused widespread panic; there were allegations of two fatal heart attacks and hundreds fainted or fled their homes.[37] Additionally, the broadcast generated a spate of unspecified and unsuccessful lawsuits against Welles, and also prompted reforms to Federal Communications Commission regulations.[38] Some scholars have questioned the broadcast's actual impact, pointing out that subsequent news accounts belie the mythical reports of widespread panic.[39]

While early mockumentaries like *War of the Worlds* generated controversy,[40] there were no significant legal challenges until 1998. In 1999, the satirical black comedy *Drop Dead Gorgeous* was released; however, the film was originally scheduled to be released with the title "Dairy Queens." The national fast-food and ice cream company by the same name successfully sought an injunction blocking the use of its name and trademarked logo in *American Dairy Queen v. New Line Productions*.[41] Dairy Queen argued that viewers would associate the food chain with the raunchy subject matter of the film.[42] The court accepted Dairy Queen's arguments that its trademark would be diluted, confused, and irreparably harmed if the filmmakers used its name in the title of a movie meant to shock and offend.[43] Despite the significant First Amendment interests at stake with the film, the court gave

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[35] *See* JOHN GOSLING & HOWARD KOCH, WAGING THE WAR OF THE WORLDS: A HISTORY OF THE 1938 RADIO BROADCAST AND RESULTING PANIC, INCLUDING THE ORIGINAL SCRIPT 87-89 (2009).

[36] *Id*.

[37] *Id.* at 56.

[38] *Id*. at 86-89. Welles, in his characteristic youthful insouciance, laughed off the lawsuits but the FCC strengthened its rules on broadcasting false information. The FCC never sanctioned Welles or the radio network.

[39] In fact, the reports of widespread panic were fleeting, likely perpetuated by newspapers for a few days following the broadcast. *See* Jefferson Pooley & Michael J. Socolow, *The Myth of the* War of the Worlds *Panic*, SLATE (Oct. 28, 2013, 11:51 PM), https://slate.com/culture/2013/10/orson-welles-war-of-the-worlds-panic-myth-the-infamous-radio-broadcast-did-not-cause-a-nationwide-hysteria.html [https://perma.cc/7HP5-LCH6].

[40] *See* GOSLING & KOCH, *supra* note 35.

[41] *See* 35 F.Supp.2d 727, 728-29 (D. Minn. 1998).

[42] *Id.* at 728-29.

[43] *Id.* at 735.

more weight to the company's trademark dilution and confusion arguments. Critically, plaintiffs did not challenge the film's content. The court went on to note:[44]

> The case asks whether the film's expressive content – surely protected by the First Amendment – is embodied in its content, or its title, or both. Importantly, ADQ does not challenge, nor does it ask the Court to consider, a single word of the film's script; it does not seek to modify a line. Rather, ADQ's only concern is with the title "Dairy Queens." There is no effort of any kind to modify or muzzle New Line's views or expressions concerning the Midwest beauty contests, "dairy country," or the film's asserted objectionable sexual, racial, or religious content. ADQ simply wants to keep the public from developing the sense that it is a sponsor or endorser of New Line's film, or has voluntarily lent its name to it.[45]

The torchbearer of the modern reality-based, unscripted prank program is Allen Funt. Funt created and hosted the long-running and ground-breaking television show, *Candid Camera*, which ran on network television for more than 50 years.[46] The show employed hidden cameras and actors capturing ordinary people in embarrassing and awkward, but usually benign, situations. Some of Funt's favorite gags including talking mailboxes, talking horses, or cars without a motor.[47] After the iconic reveal, "Smile, you're on *Candid Camera*," people were given a release to sign and $50.[48]

Candid Camera did not generate a single reported opinion. Perhaps this speaks to Funt's benign tone or a reflection of a simpler, less-litigious era. Funt recalled one woman, a legal secretary, who refused to sign the release because her lawyers wanted more money.[49] Though it was billed as a comedy show, Funt considered himself a social psychologist as much as he was a comedian.[50] Other early television shows followed *Candid Camera's* mantle like *Hidden Video,*[51] Dick Clark's TV's Bloopers & Practical Jokes.[52] Even more modern prank and gag shows have origins in the *Candid Camera*-format, and potential legal and liability issues surrounding mockumentaries

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[44] *Id.* at 733-34.
[45] *Id.* at 733.
[46] ALLEN FUNT, CANDIDLY, ALLEN FUNT: A MILLION SMILES LATER 45-48 (1994).
[47] *Id*. at 203-14.
[48] *Id.* at 48.
[49] *Id.* at 48-49.
[50] *See id.* at 221.
[51] *See id*. at 189.
[52] *See* Dick Clark Co. v. Alan Landsburg Prods., 1985 U.S. Dist. LEXIS 18924 (C.D. Cal. 1985) (describing the blooper format in a copyright case).

must include a look at more recent prank or gag shows and reality television.

The trend of courts upholding contracts in reality television and prank show cases offers support because of the similarity of the tort-based litigation at issue there and in the mockumentary context.[53] Like in the mockumentary, participants voluntarily agree to appear in the shows and are often displeased with their on-screen depictions.[54] Courts do not readily sympathize with plaintiffs who signed valid contracts. In one case involving the reality show *90 Day Fiancé*, the court enforced a release from liability: "By signing the Agreement/Release, Plaintiffs also acknowledged that the show might reveal material that is personal, intimate, embarrassing and could depict them in an unfavorable light and Plaintiffs consented to grant Defendants the right and sole discretion to include such material in their show."[55]

Prank productions *Punk'd* and *Jackass* ushered in issues of copycats–often children–emulating dangerous pranks and stunts. [56] But holding entertainers liable for unforeseen harm resulting from their productions is a historically large ask of tort law.[57] Tort-based and contractual litigation linked to prank shows and reality television is routinely dismissed when featured participants signed releases from liability.[58] *Wired* magazine cheekily branded the prank genre "Extreme *Candid Camera* [with l]awsuits, fisticuffs, [and] PhD dissertations."[59] Before his talk show, Jimmy Kimmel produced *Crank Yankers*; it ran from 2002-2008 first on Comedy Central

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[53] *See* Shoemaker v. Discovery Commc'ns, LLC, 2017 N.Y. Misc. LEXIS 3551 (N.Y. Sup. Ct. 2017); *see also* Shapiro v. NFGTV, Inc., 2018 U.S. Dist. LEXIS 22879, at *20 (S.D.N.Y. 2018).

[54] *See*, *e.g.*, Klapper v. Graziano, 129 A.D.3d 674, 674-75 (N.Y. App. Div. 2015).

[55] *Shoemaker*, 2017 N.Y. Misc. LEXIS 3551, at *4 (N.Y. Sup. Ct. 2017).

[56] *See* Mark Conrad, *The 'Jackass' Syndrome: Are Televised Warnings Enough?* LAW.COM (Mar. 15, 2001) ("But even if the warnings were inadequate or not broadcast at all, a significant First Amendment defense exists.").

[57] *See* Yakubowicz v. Paramount Pictures Corp., 536 N.E.2d 1067 (Mass. 1989) (holding producers of the film *The Warriors* not liable for a murder following a screening of the film); *see also* McCollum v. CBS, 202 Cal.App.3d 989 (Cal. Ct. App. 1988) (holding singer Ozzy Osbourne not liable when a teen committed suicide after listening to the song "Suicide Solution").

[58] *See infra* discussion in Section V.

[59] Scott Brown, Wired*'s Guide to Hoaxes: How to Give – and Take – a Joke*, WIRED (Aug. 24, 2009, 12:00 PM), https://www.wired.com/2009/08/mf-hoax/ [https://perma.cc/9Q5C-MCNQ].

and then MTV.[60] Reality television is a distant cousin to the mockumentary, but its criticism and litigation offers insight into mockumentary liability.[61]

III. WHO IS SACHA BARON COHEN?

British actor and comedian Sacha Baron Cohen first burst onto British television and later HBO with his character, Ali G., the ignorant and offensive cockney wannabe rapper.[62] Today Baron Cohen is best known for his guerilla-style mockumentaries.[63] The common denominator among the characters is the chameleon-like Baron Cohen. In his undercover encounters, he captures awkwardness, ignorance, and hypocrisy with the precision of a documentarian employing cinema verité, while also incorporating expert parody, satire, and cringe-worthy humor.[64] He is both revered as a comedic genius and social satirist and reviled as a provocateur who uses the cloak of disguise, deception, and shell companies to embarrass unsuspecting and unwitting good Samaritans who welcome him into their worlds with rolling cameras.[65]

A master of humor, language, and dialect, Baron Cohen further cemented his spot in popular culture.[66] He has appeared in a Madonna music video,[67] garnered a large global audience and box office success, as well as

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[60] The show is referenced in an article in the satirical law review, *The Green Bag*, in a discussion about hypothetical legal issues and courtroom dramas involving famous puppets and ventriloquist dummies including Captain Kangaroo's Mr. Moose, Howdy Doody, Shari Lewis's Lamp Chop and an array of Muppets. *See* Parker B. Potter, Jr., *Puppet Law*, 9 GREEN BAG 2D 153 (2006). *Crank Yankers* was also the subject of a breach of contract lawsuit over its creation. *See Courthouse Steps*, N.Y. L.J. on April 16, 2003.

[61] *See generally* Catherine Riley, *Signing in Glitter or Blood?: Unconscionability and Reality Television Contracts*, 3 N.Y.U. J. INTELL. PROP. & ENT. L. 106 (2013) (arguing that reality television contracts in general are enforceable and generally not unenforceable under the unconscionability doctrine).

[62] *See* HIGHT, *supra* note 14, at 211.

[63] *See Sacha Baron Cohen Biography*, IMDB https://www.imdb.com/name/nm0056187/bio [https://perma.cc/5XU8-56PB] (last visited Oct. 30, 2021).

[64] HIGHT, *supra* note 14, at 211.

[65] Blouke, *supra* note 6, at 5 ("In spite of such acclaim, the film also garnered accusations of racism, misogyny, and sheer vulgarity. Described by many as anti-Semitic, homophobic, and chauvinist, Borat espouses ideas and elicits interview responses that are nothing if not inflammatory and controversial.").

[66] *Id.*

[67] HIGHT, *supra* note 14, at 211. *See also* Madonna, *Madonna – Music (Official Video)*, YOUTUBE (Oct. 26, 2009), https://www.youtube.com/watch?v=SDz2oW0NMFk [https://perma.cc/L5CA-A32E].

critical acclaim.[68] In 2021, Baron Cohen received an Oscar nomination for Best Supporting Actor Academy Award for his portrayal of Abbie Hoffman[69] in *The Trial of the Chicago 7*. Also in 2021, the *Borat* sequel received an Oscar nomination for Best Adapted Screenplay.[70] His depiction of Israeli spy Eli Cohen also drew praise.[71]

Baron Cohen introduced his unique take on the mockumentary that engages in biting political satire and commentary [72] and "confuses genres." In *Borat*, for example, "a *fictional* television host steps out of the mock travelogue on his *fictional* hometown and steps into a journey through a *real* America."[73] *Borat* is "neither purely fictional, nor entirely 'real.' . . . Borat is working from a loosely scripted position, whereas the people he interacts with are not . . . aware of the adopted nature of [Baron Cohen's] persona."[74] Still, the existence of "ridiculous characters conducting absurd interviews of seemingly unsuspecting individuals" does not preclude the enforcement of valid contracts, as the court recently held in *Moore v. Cohen*.[75]

Because of the unscripted, spontaneous and guerilla-style nature of *Candid Camera, Jackass*, *Punk'd*, and Baron Cohen's work, there appears to be a direct line between the works, but they might as well be from different planets. Though *Candid Camera* would catch people in embarrassing situations, sometimes an unsuspecting spouse out with someone else or someone playing hooky from school or work, its tone was more muted than that of Baron Cohen's. Baron Cohen's twist on the mockumentary is predicated in large part on deceiving its unsuspecting subjects through the use of fictional characters sent to offend, shock, and deceive. *Dairy Queens* and the other mockumentaries may mimic the story-telling techniques of documentary productions, but they are substantially different from Sacha Baron Cohen's works. As much as the storytelling techniques replicate the documentary format and the productions resemble a traditional documentary, these were

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[68] *Id; see also* Fletcher, *supra* note 3 (noting Borat generated an estimated $500 million in revenues while Brüno generated almost $140 million).

[69] *The 93rd Academy Awards — 2021*, ACAD. OF MOTION PICTURE ARTS & SCIS., www.oscars.org/oscars/ceremonies/2021 [https://perma.cc/72KN-TKKC] (last visited Dec. 29, 2021).

[70] *Id*.

[71] Simon Abrams, *Sacha Baron Cohen Plays it Straight in 'The Spy'*, N.Y. TIMES (Oct. 26, 2020), https://www.nytimes.com/2019/09/06/arts/television/sacha-baron-cohen-the-spy.html [https://perma.cc/HV9D-G5NY].

[72] *See* Lebow, *supra* note 20.

[73] Torchin, *supra* note 17, at 53 (emphasis added).

[74] Blouke, *supra* note 6, at 17.

[75] Moore v. Cohen, 2021 U.S. Dist. LEXIS 130344, at *36 (S.D.N.Y. 2021).

fully scripted productions with professional actors.[76] These are feature films and pure entertainment, through and through. These examples may have the feel of a real documentary, which facilitates the story and the humor, but they were fictional stories presented in a storytelling narrative as a faux documentary.

In his own words, in a rare out-of-character interview after the release of *Who Is America?,* Baron Cohen described that he viewed his work as a stand against dictatorship and authoritarianism: "I felt I had to do something."[77] His mockumentaries certainly are *something* as they expose some of society's ugly underbelly through a skewed lens with cringeworthy, blushworthy, and sometimes hilarious and entertaining results.

IV. An Analysis of the Cases Against Sacha Baron Cohen

As much as Baron Cohen's body of work has been described as "hilarious" and "insightful," it also forged "a trail of destruction."[78] While shows like *The Office* incorporate faux documentary story-telling techniques, these films and shows employ some of the same tools as Baron Cohen but avoid tort liability because they are scripted and feature paid actors, not unsuspecting regular people.

Baron Cohen's catalogue has generated lawsuits by more than a dozen plaintiffs and reported opinions in seven cases in federal and state courts. These cases are discussed in more detail in the Appendix, *infra*.[79] One case, *Moore v. Sacha Baron Cohen,* was dismissed on summary judgement in July 2021, but a notice of appeal was filed the same day.[80] Another case involving an unsuccessful claim for copyright infringement was also decided in Baron Cohen's favor, but is not a subject of review for this article.[81]

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[76] *See* Hight, *supra* note 14, at 27-28.

[77] *Sacha Baron Cohen on 'Borat' Ethics and Why His Disguise Days Are Over*, NPR (Feb. 22, 2021, 1:36 PM), https://www.npr.org/transcripts/970115927 [https://perma.cc/FJ6E-A8AJ] (interview with Terry Gross).

[78] Fletcher, *supra* note 3.

[79] This article focuses on the cases with reported opinions. One case that generated significant publicity, *John Doe v. One America Productions, Inc.*, involved two fraternity brothers depicted in Borat. The plaintiffs claimed they were deceived and appeared in the movie as drunken buffoons and sued for contractual fraud. A California Superior Court judge dismissed the claim in 2007. No. SC 091723 (Cal. Sup. Ct. Nov. 9, 2006).

[80] *See* Plaintiffs' Notice of Appeal, *Moore*, 2021 U.S. Dist. LEXIS 130344, (No. 21-01703).

[81] *See* Musero v. Mosaic Media Grp., Inc., 2010 U.S. Dist. LEXIS 153583 (C.D. Cal. 2010).

Though the plaintiffs invoke a variety of tort and contract claims and they come from different places and backgrounds–a driving instructor, etiquette experts, a bingo hall operator, a retired Alabama Supreme Court justice/former U.S. Senate candidate, frat boys, and a man on the street–their litigation shares a common theme: they were deceived into participating in films in which they were publicly embarrassed. The judges dismissing these claims also weave a common thread, perhaps best summarized by Judge Preska, who dismissed six separate cases concerning the film *Borat* in the Southern District of New York[82]:

> [T]he movie employs as its chief medium a brand of humor that appeals to the most childish and vulgar in its viewers. At its core, however, *Borat* attempts an ironic commentary of "modern" American culture, contrasting the backwardness of its protagonist with the social ills [that] afflict supposedly sophisticated society. The movie challenges its viewers to confront, not only the bizarre and offensive Borat character himself, but the equally bizarre and offensive reactions he elicits from average "Americans."[83]

The plaintiffs in the Baron Cohen cases signed straightforward, often just one-page contracts known as Standard Consent Agreements (SCAs) prior to their participation in a "documentary-style" film.[84] Producers regu-

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[82] *See* Cedeno v. 20th Century Fox, No. 07-CIV-07251 (S.D.N.Y. Aug. 14, 2007), without a reported opinion, the court approved plaintiff's voluntary dismissal of an invasion of privacy claim filed by a man who appeared in a fleeting scene aboard a New York City subway car in which Borat released a chicken from his suitcase. The suit was initially filed in New York State Supreme Court but was removed to the Southern District and later dismissed because New York's invasion of privacy statute, New York Civil Rights Law §§ 50-51 requires an unlawful use of a person's image or likeness must be purely commercial and the feature film did not meet that standard. *See* Stipulation of Dismissal (February 4, 2008).

[83] Psenicska v. 20th Century Fox, 2008 U.S. Dist. LEXIS 69214, at *3-4 (S.D.N.Y. 2008) (quoting Lemerond v. Twentieth Century Fox Film Corp., 2008 U.S. Dist. LEXIS 26947 (S.D.N.Y. 2008)).

[84] In its entirety, the waiver clause in Paragraph 4 in both *Ex parte Cohen* and *Moore* reads:

> The Participant specifically, but without limitation, waives, and agrees not to bring at any time in the future, any claims against the Producer, or against any of its assignees or licensees or anyone associated with the Film, that include assertions of (a) infringement of rights of publicity or misappropriation (such as any allegedly improper or unauthorized use of the Participant's name or likeness or image), (b) damages caused by 'acts of God' (such as, but not limited to, injuries from natural disasters), (c) damages caused by acts of terrorism or war, (d) intrusion (such as any allegedly offensive behavior or questioning or any invasion of privacy), (e) false light

larly disguised the plot and the actors. Participants often received a nominal fee in the range of $200-$350 for their appearance. Plaintiffs, however, allege deceitful contract negotiations leading some to seek judicial intervention and protection under the contractual doctrines of deception, fraud, and ambiguity.[85]

Perhaps nothing exemplifies the visceral reaction to *Borat* from viewers, critics, and participants of the films than the story of Glod, Romania, the fictional stand-in for Borat's hometown in Kazakhstan. The villagers were paid small sums to appear in the film, but felt humiliated and were infuriated by their depiction as backwards and worse.[86] After the film's release, one man told a Western reporter, "If I see Borat, I will kill him with my own hands."[87] Instead, two villagers and the village itself enlisted the assistance of a German lawyer who filed an unsuccessful suit in federal court in New York.[88] Kazakhstan's President Nusultan Nazarbayev's initially challenged *Borat*, blocking distribution of film clips and threatening to sue.[89]

> (such as any allegedly false or misleading portrayal of the Participant), (f) infliction of emotional distress (whether allegedly intentional or negligent), (g) trespass (to property or person), (h) breach of any alleged contract (whether the alleged contract is verbal or in writing), (i) allegedly deceptive business or trade practices, (j) copyright or trademark infringement, (k) defamation (such as any allegedly false statements made on the Film), (l) violations of Section 43(a) of the Lanham Act (such as allegedly false or misleading statements or suggestions about the Participant in relation to the Film or the Film in relation to the Participant), (m) prima facie tort (such as alleged intentional harm to the Participant), (n) fraud (such as any alleged deception or surprise about the Film or this consent agreement), (o) breach of alleged moral rights, or (p) tortious or wrongful interference with any contracts or business of the Participant, or any claim arising out of the Participant's viewing of any sexually-oriented materials or activities.

Ex parte Cohen, 988 So.2d 508, 510-11 (Ala. 2008); *Moore*, 2021 U.S. Dist. LEXIS 130344, at *15.

[85] *See* Psenicska v. 20th Century Fox Film Corp., 409 F. App'x 368, 368-70 (2d Cir. 2009). *See also* Moore v. Cohen, 2019 U.S. Dist. LEXIS 94361, at *4 (D.D.C. 2019).

[86] *Village 'Humiliated' by Borat Satire*, *supra* note 33.

[87] Lama Hasan, *'If I See Borat, I Will Kill Him with My Own Hands'*, ABC NEWS (July 8, 2008, 1:13 PM), https://abcnews.go.com/International/Entertainment/story?id=2659018 [https://perma.cc/UCT3-Y2L7].

[88] *See* Todorache v. Twentieth Century Fox Film Corp., No. 06-CV-13369 (S.D.N.Y. Nov. 20, 2006); *see also* Fletcher *supra* note 3.

[89] *Attacks on the Press 2006: Kazakhstan*, CPJ (Feb. 5, 2007), https://cpj.org/2007/02/attacks-on-the-press-2006-kazakhstan/ [https://perma.cc/8P8K-KKHQ].

The government later backtracked and vowed not to interfere with the film's distribution.[90]

Courts wrestle with categorizing the mockumentary. Because the mockumentary genre does not fit comfortably into a specific category for liability purposes, there is room for analysis and clarification. This is especially worth investigating because the mockumentary format is flexible and helps to facilitate the joke. On one hand, the mockumentary is no different than an actual documentary, weaving truthful elements into a journalistic medium. On the other hand, when that material is facilitated by one of Baron Cohen's many outrageously offensive fictional characters, the analysis shifts to include protections from libel in fiction and parody and satire. Opinions involving Sacha Baron Cohen are catalogued in more detail in the Appendix. What follows is an analysis of the seven reported cases included in the Appendix, *infra*.

A. Enforcement of Standard Consent Agreements & Tension with Tort Law

1. Contract Law Shields the Mockumentary from Liability[91]

As strong as the First Amendment protections of parody, satire, and comedy have been in the mockumentary cases, the courts have been even more resolute about dismissing the tort claims under traditional contract law.[92] As the *Moore* court showed, applying contract law also allows the courts to eschew the First Amendment application.[93] Because the mockumentary genre incorporates and replicates elements of reality television, contract-based defenses to litigation emerging from reality television provides an additional, non-constitutional body of law supporting the mockumentary.[94]

Mutual agreement to an agreed-upon set of terms leads to a contract.[95] *Williston on Contracts* states: "A contract is a promise, or set of promises, for breach of which the law gives a remedy, or the performance of which the law

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[90] *Id.*

[91] *See* JOHN CALAMARI & JOSEPH PERILLO, CONTRACTS 1-2 (3d ed.1987) ("Every contract involves at least one promise which has legal consequences. (1) A legally enforceable agreement.").

[92] *Id.*

[93] *See* Moore v. Cohen, 2021 U.S. Dist. LEXIS 130344, at *10 (S.D.N.Y. 2001).

[94] *See* Bihag v. A&E TV Networks, 669 F. App'x 17 (2d Cir. 2016); Klapper v. Graziano, 41 Misc.3d 401 (N.Y. Sup. Ct. 2013).

[95] CALAMARI & PERILLO, *supra* note 91, at 25.

in some way recognizes as a duty."[96] A common theme arose and is exemplified by the facts of *Moore*. There, former Alabama politician Roy Moore alleged he was misled into thinking he was agreeing to appear on Israeli television. But instead, he was contracting with a shell company masquerading as such.[97] Baron Cohen relied more and more on the services of top Hollywood lawyers, with the help of whom he has formally registered more than 20 bogus production companies, complete with convincing letterheads and websites extolling their "world-class facilities, and state-of-the-art equipment." With such elaborate subterfuge, who would suspect that Longman Parke Productions, Amesbury Chase, or even Deutsches Unterhaltungsfernsehen were not all they claimed to be?[98]

In the Baron Cohen mockumentary cases, the producers employed variations of a Standard Consent Agreement in which the "participants" agree to forego a broad range of lawsuits that may arise from their appearance in the production.[99] The contracts included several standard clauses, including a choice of law clause designating New York as the situs for any litigation.[100] The participants agreed to be filmed and depicted in the film and relinquish ownership rights regarding the content.[101]

The clause most critical to the discussion of tort liability is Paragraph 4, which expressly disclaims liability for the same exact torts many of the

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[96] WILLISTON ON CONTRACTS §1 (Walter H.E. Jaeger ed., 3d ed. 1957) (quoting the Restatement of Contracts §1 (1932)); *see also* Stewart D. Aaron & Jessica Caterina, *Contract Formation Under New York Law: By Choice or Through Inadvertence*, 66 SYRACUSE. L. REV. 855, 856 (2016) (citing Kowalchuk v. Stroup, 61 A.D.3d 118, 121 (N.Y. App. Div. 2009)) ("A contract is binding if there is an offer, acceptance, consideration, mutual assent, an intent to be bound, and both sides agree on all the essential terms.")

[97] See Moore, 2021 U.S. Dist. LEXIS 130344, at *12-13.

[98] Fletcher, *supra* note 3; *see also* Panda Kroll, *Teaching Through a Study in the Borat Litigation: Judges Find Public Policy Support for Mischief*, 3 J. WORLD UNIVS. F. 127, 129 (2010). *See also Moore*, 2021 U.S. Dist. Lexis 130344.

[99] *See* Ex parte Cohen, 988 So.2d 508, 510-11 (Ala. 2008).

[100] For example, Paragraph 6 in the Standard Consent Agreement states:

> Although the Participant agrees not to bring any claim in connection with the Film or its production, if any claim nevertheless is made, the Participant agrees that any such claim must be brought before, and adjudicated by, only a competent court located in the State of New York and County of New York, under the laws of the State of New York.

Ex parte Cohen, 988 So.2d at 511; *Moore*, 2021 U.S. Dist. LEXIS 130344 at *15.

[101] Paragraphs 1 and 2 in the Standard Consent Agreement state:

> 1. The Participant agrees to be filmed and audiotaped by the Producer for a documentary-style film (the 'Film'). It is understood that the Producer hopes to reach a young adult audience by using entertaining content and formats.

Baron Cohen plaintiffs litigated: defamation, invasion of privacy, intentional infliction of emotional distress, and fraud.[102] The main tort claims in the mockumentary cases discussed above are for defamation and invasion of privacy.

Under the Restatement (Second) of Torts, there are four elements for defamation: 1) a false and defamatory statement about a person; 2) published

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> 2. The Participant agrees that any rights that the Participant may have in the Film or the Participant's contribution to the Film are hereby assigned to the Producer, and that the Producer shall be exclusively entitled to use, or to assign or license to others the right to use, the Film and any recorded material that includes the Participant without restriction in any media throughout the universe in perpetuity and without liability to the Participant, and the Participant hereby grants any consents required for those purposes. The Participant also agrees to allow the Producer, and any of its assignees or licensees, to use the Participant's contribution, photograph, film footage, and biographical material in connection not only with the Film, but also in any advertising, marketing or publicity for the Film and in connection with any ancillary products associated with the Film.

Ex parte Cohen, 988 So.2d at 510; *Moore*, 2021 U.S. Dist. LEXIS 130344 at *15.

[102] In its entirety, the waiver clause in Paragraph 4 in both *Ex parte Cohen* (the Martin case) and *Moore* reads:

> The Participant specifically, but without limitation, waives, and agrees not to bring at any time in the future, any claims against the Producer, or against any of its assignees or licensees or anyone associated with the Film, that include assertions of (a) infringement of rights of publicity or misappropriation (such as any allegedly improper or unauthorized use of the Participant's name or likeness or image), (b) damages caused by 'acts of God' (such as, but not limited to, injuries from natural disasters), (c) damages caused by acts of terrorism or war, (d) intrusion (such as any allegedly offensive behavior or questioning or any invasion of privacy), (e) false light (such as any allegedly false or misleading portrayal of the Participant), (f) infliction of emotional distress (whether allegedly intentional or negligent), (g) trespass (to property or person), (h) breach of any alleged contract (whether the alleged contract is verbal or in writing), (i) allegedly deceptive business or trade practices, (j) copyright or trademark infringement, (k) defamation (such as any allegedly false statements made on the Film), (l) violations of Section 43(a) of the Lanham Act (such as allegedly false or misleading statements or suggestions about the Participant in relation to the Film or the Film in relation to the Participant), (m) prima facie tort (such as alleged intentional harm to the Participant), (n) fraud (such as any alleged deception or surprise about the Film or this consent agreement), (o) breach of alleged moral rights, or (p) tortious or wrongful interference with any contracts or business of the Participant, or any claim arising out of the Participant's viewing of any sexually-oriented materials or activities.

Ex parte Cohen, 988 So.2d at 510-11; *Moore*, 2021 U.S. Dist. LEXIS 130344 at *15.

to a third party without privilege; 3) with fault, either negligence by the publisher; and 4) actionable irrespective of special harm.[103] In his treatise, Dean Prosser wrote of the similarity and distinction between defamation and false light, noting, "It seems clear, however, that it must be something that would be objectionable to the ordinary reasonable person under the circumstances."[104] The invasion of privacy claims mostly focused on false light and commercial appropriation of the plaintiff's image or likeness. In another treatise, Judge Sack notes that purpose of the false light tort is to compensate for injured feelings, not harm to the plaintiff's reputation.[105] Judge Sack also notes that false light often plays a "subsidiary role" in litigation.[106]

With the contracts themselves, the named plaintiff in *Psenicska* described having a document thrust upon him in haste and also acknowledged that he signed the release without reading it.[107] Roy Moore–the embattled former State Supreme Court Justice and candidate for the U.S. Senate–argued that his contract was not valid even though he crossed out content and added hand-written language regarding not addressing offensive or sexual content in his interview.[108]

The facts of *Psenicska* and *Moore*[109] highlight the "muddy interstices" between contract and tort law.[110] Professor Russell Korobkin has dubbed

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[103] *See generally* ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS §2:1 (5th ed. 2017).

[104] PROSSSER & KEETON ON THE LAW OF TORTS 864 (W. Page Keeton ed., 5th ed. 1984). It should also be noted that false light is recognized by roughly two-thirds of the states.

[105] RESTATEMENT (SECOND) OF TORTS §652E (1977):

> One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to the other for invasion of privacy if: a) the false light in which the other was placed would be highly offensive to a reasonable person, and b) the actor had knowledge of or acted in a reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

[106] SACK, *supra* note 103, at §12:3.

[107] *See* Defendants Memorandum of Law in Support of Motion to Dismiss, Psenicska v. Twentieth Century Fox Film Corp., 2008 U.S. Dist. LEXIS 69214 (No. 07-CIV-10972).

[108] The *Moore* Court also rejected plaintiff's argument that when he crossed out certain language related to "any allegedly sexual oriented or offensive behavior or questioning" that Moore was able to reinstate his claims. Moore v. Cohen, 2021 U.S. Dist. Lexis 130344, at *16 (S.D.N.Y. 2021).

[109] *Moore*, 2021 U.S. Dist. LEXIS 130344.

[110] Russell Korobkin, *The Borat Problem in Negotiation: Fraud, Assent, and the Behavioral Law and Economics of Standard Form Contracts*, 101 CALIF. L. REV. 51, 55 (2013) (applying, with great precision, blackletter contract law to question and criticize the dismissal of lawsuits in the first wave of *Borat* lawsuits).

this "the Borat Problem." Professor Korobkin's thoughtful "Borat Solution" would hold drafters to more precise language, for instance above and beyond "documentary-style" and allow plaintiffs more leeway under contract theories of specific assent, while also loosening the interpretation of fraud.[111] However, the courts in the Baron Cohen cases found the contracts to be clear, unambiguous, legitimate and binding.

In their treatise, Calamari & Perillo describe fraud as: "Whenever a party has fraudulently induced another to enter into a transaction under circumstance giving the latter the right to bring a tort action for deceit, the deceived party may instead elect to avoid the transaction and claim restitution."[112] Courts apply a subjective test to interpret whether intentional misrepresentations during negotiations were serious or deceptive enough to void a contract.[113] Under New York law, to invalidate a contract based on fraud in the inducement, the plaintiff must show that the party "made a misstatement of material fact or failed to state facts necessary to avoid its statements being materially misleading."[114]

The misrepresentation of a material fact has both subjective and objective elements.[115] Whether the subterfuge of shell production companies or even misstatements about who the interviewer would be and where the film would be shown seemed less of a concern to the courts because of how New York handles the contractual doctrine of reliance, which the parties agreed to forego in the Standard Consent Agreements.

The courts in both *Psenicska* and *Moore* looked to the contractual language itself to reject the fraud in the inducement arguments, finding the contracts, which were practically identical, employed an explicit reliance disclaimer, which all the plaintiffs signed.[116] Judge Preska wrote and was later quoted in *Moore*: "Plaintiff may not claim to have relied on a statement

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[111] *Id.* at 102-03.

[112] CALAMARI & PERILLO, *supra* note 91, at 356

[113] *Id.* at 357.

[114] GLEN BANKS, NEW YORK CONTRACT LAW: A GUIDE FOR NON-NEW YORK ATTORNEYS 109 (2014).

[115] *Id.* at 109-10. One leading case, *Hoffenberg v. Hoffman & Pollok,* which Baron Cohen and producers relied in *Psenicska*, lays out an eight-prong analysis for proving fraudulent inducement: "(1) that the defendant made a representation, (2) as to a material fact, (3) which was false, (4) and known to be false by the defendant, (5) that the representation was made for the purpose of inducing the other party to rely upon it, (6) that the other party rightfully did so rely, (7) in ignorance of its falsity (8) to his injury." 248 F.Supp.2d 303, 310 (S.D.N.Y. 2003) (*see* Defendants' Memorandum of Law in Support of Motion to Dismiss*, Psenicska*, No. 07-CIV-10972).

[116] *Psenicska*, 2008 U.S. Dist. LEXIS 69214, at *4-6.

upon which he or she has explicitly disclaimed reliance."[117] The contracts explicitly disclaimed both fraud and reliance on representations made outside of the contract.[118] New York specifically allows a participant to disclaim reliance in a contract, which the *Psenicska* and *Moore* courts applied and affirmed.[119]

Courts also look critically at the purpose of the contract as the court did in *Ex parte Cohen*, discussed *infra*. The court in *Olson*, also discussed *infra*, plainly stated its opinion on the purpose of *Bruno*:

> [T]he purpose of *Bruno* was to show audiences what would happen when a film crew followed a blatantly-homosexual character . . . as he interacted with members of the public, raising issues of homosexuality, gay culture and same sex partnerships in an attempt to craft a sly commentary on the state of homophobia in our society.[120]

2. Illustrative Examples from Reality Television and Prank Shows

Because the mockumentary genre incorporates and replicates elements of reality television, contract-based defenses to litigation emerging from reality television cases are also instructive of how courts will approach constitutional questions in mockumentary litigation.[121]

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[117] *Id.* at *6; Moore v. Cohen, 2021 U.S. Dist. LEXIS 130344, at

[118] For example, in the *Moore* agreement, in addition to waiving his right to litigate after-the-fact, Paragraph 5 declares that the participant "acknowledges that in entering into [this agreement], the Participant is not relying upon any promises or statements made by anyone about the nature of the Program or the identity, behavior, or qualifications of any other Participants, cast members, or other persons involved in the Program. Participant is signing this agreement with no expectations or understandings concerning the conduct, offensive or otherwise, of anyone involved in this Program." *Moore*, 2021 U.S. Dist. LEXIS 130344 (SCA appended to exhibits).

[119] *Moore*, 2021 U.S. Dist. LEXIS 130344 at *21 ("Under New York law, when a 'contract states that a contracting party disclaims the existence of or reliance upon specified representations, that party will not be allowed to claim that he was defrauded into entering the contract in reliance on those representations.") (quoting PetEdge, Inc. v. Garg, 234 F.Supp.3d 477 (S.D.N.Y. 2017).

[120] Olson v. Cohen, 2011 Cal. App. Unpub. LEXIS 6888, at *41 (Cal. App. Div. 2011).

[121] *See* Bihag v. A&E TV Networks, 669 F. App'x 17 (2d Cir. 2016); *see also* Klapper v. Graziano, 129 A.D.3d 674 (N.Y. App. Div. 2015).

Under the waiver clause and others like it, courts have been firm in denying claims since the late 1990s.[122] In *Bihag v. A&E Television Networks*, the Second Circuit reinforced a valid contractual release for a participant in the reality television show *Dog, the Bounty Hunter*.[123] The *Bihag* court wrote: "The language of the releases is not ambiguous by any stretch. To the contrary, this language is clear, broad, and dispositive. Bihag is bound by the agreements he voluntarily signed, which expressly bar the claims he has attempted to assert in this case."[124] Similarly, in *Klapper v. Graziano*, the Appellate Division of New York held that a plastic surgeon who appeared on the reality television show *Mob Wives* could not sue for libel, invasion of privacy, or tortious interference because he "knowingly" signed a release.[125]

In *Weil v. Johnson,* a New York state court judge upheld a release for a documentary film that was secured with "sheepish" or "surreptitious" means.[126] The film, "Born Rich", was about the children of super wealthy families. The plaintiff, Luke Weil, heir to a gaming fortune, was one of eleven subjects interviewed and depicted in the documentary film.[127] Like all those depicted in the film, he signed a release.[128] Plaintiff alleged fraud because the release was secured while the filmmaker was a student and represented that the film would be a "student production" rather than a commercial documentary film.[129] Specifically, Weil alleged "defendant Jamie Johnson sheepishly, surreptitiously, and in the vein of irrelevancy flashed a document in front of the plaintiff . . . indicating that the plaintiff Luke Weil's signature on said document was a prerequisite to the plaintiff's effectuation of the interview to be used in his project and . . . was an irrelevant

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[122] *See, e.g.*, Shoemaker v. Discovery Commc'ns, LLC, 2017 N.Y. Misc. LEXIS 3551 (N.Y. Sup. Ct. 2017) (involving the reality television show *90 Day Fiancé*); *see also* Shapiro v. NFGTV, Inc., 2018 U.S. Dist. LEXIS 22879 (S.D.N.Y. Feb. 8, 2018) ("The 'clear, broad, and dispositive[ ]' language used in the release agreed to by Plaintiff bars Plaintiff from asserting any claims related to her participation in the program, including those involving fraud.").

[123] *See Bihag*, 669 F. App'x at 17, 19.

[124] *Id.*

[125] *See Klapper*, 129 A.D.3d at 675-76 ("Such releases, which are commonly used in the entertainment industry, are enforceable and should not lightly be set aside. The allegations against the corporate defendants are insufficient to demonstrate willful or grossly negligent acts or intentional misconduct which would render the appearance release unenforceable.").

[126] 2002 N.Y. Misc. LEXIS 1728 (N.Y. Sup. Ct. 2002).

[127] *Id.* at *2.

[128] *Id.*

[129] *Id.* at *5.

formality."[130] It did not matter to the *Weil* court: "the . . . Releases signed by plaintiff appear valid and binding on their face."[131]

B. Omnipresent First Amendment Protections Remain Relevant

Because the tort claims frequently invoked in these cases implicate several First Amendment defenses, assessing the context also plays an important role.

Context is critical in determining a defamation case, including such factors as whether the plaintiff is a public or private figure or government official or someone involved in a matter of public interest.[132] This public designation under the tort of defamation would also trigger actual malice under *Times v. Sullivan*[133] and its progeny, requiring the plaintiff to prove the statements were published either knowing they were false or with reckless disregard for the truth.[134] A truth or falsity analysis under *Times v. Sullivan* requires the court to determine whether the statements can be proven true or false or whether they can be regarded as pure opinion. Under *Sullivan*, statements of pure opinion are protected by the First Amendment.[135] Both actual malice and protected opinion channel the legal analysis into two categories that receive strong First Amendment protections: libel in fiction and parody/satire, which generally blunt the falsity element for defamation.

If libel in fiction and actual malice do not provide enough immunity because of the realistic or cinema verité elements of the mockumentary, then the broader, yet equally important, parody and satire defense could aid in the filmmakers' defense.[136] Again, the context is critical.[137]

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[130] *Id.* at *5

[131] *Id.* at *6. The plaintiff's invasion of privacy for appropriation of image and likeness was also rejected because the documentary film could not be considered commercial or advertising. *Id.* at *9-*10, *12. ("Courts have extended 'newsworthiness' protection to a wide variety of publications in the name of 'public interest.'")

[132] *See generally* Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990).

[133] 376 U.S. 254 (1954).

[134] *See* Gertz v. Welch, 418 U.S. 323 (1974).

[135] See *Milkovich*, 497 U.S. at 19-20.

[136] *See* Jeff Todd, *Satire in Defamation Law: Toward a Critical Understanding*, 35 REV. LITIG. 45, 50-51 (2016).

[137] *See* Clay Calvert & Matthew D. Bunker, *Know Your Audience: Risky Speech at the Intersection of Meaning and Value in First Amendment Jurisprudence*, 35 LOY. L.A. ENT. L. REV. 141, 148-49 (2015) ("[E]ven if a speaker assumes his audience is rational, the speaker still must make complicated determinations regarding what a rational audience would understand about, for example, different conventions of writing, such as parody and satire, or a complex genre of music, such as rap.") (footnotes omitted).

1. Application of Libel in Fiction to Fiction of the Mockumentary

If the mockumentary is fully vested as a bona fide work of fiction, it would be immune from liability for defamation or invasion of privacy under the "libel in fiction" doctrine. Libel in fiction is a subcategory of defamation stemming from works of fiction that depict actual people.[138] The critical point in a libel in fiction defense is that work is a piece of the fictional entertainment, failing at least two of the prima facie elements of a defamation claim: (1) falsity of fact and (2) of and concerning the plaintiff.[139]

One recent high-profile case, *Greene v. Paramount Pictures Corp.,* emerged from the feature film *The Wolf of Wall Street*, starring Leonardo DiCaprio as real-life persona Jordan Belfort.[140] The defamation claim failed because even though the film was based on the life of its principal character, Belfort, the film included numerous composite characters and fictional elements.[141] The court also referenced a disclaimer appended to the credits.[142] The plaintiff, however, claimed a character in the film named Nicky "Rugrat" Koskoff was based on his persona and cited multiple reasons: He worked at the firm, held a similar job title, and wore a toupee while engaged in a range of illegal activity and debauchery.[143] The Second Circuit, however, held that "no reasonable viewer of the Film would believe that the defendants intended the Koskoff character to be a depiction of Greene."[144]

Although libel in fiction claims are not often successful, a New York Court rejected a motion to dismiss in a case emanating from the fictional television show, *Law & Order*.[145] Even though the court allowed the case to go forward, it wrote,

> Because of the counterintuitive nature of a libel-in-fiction claim—in which a plaintiff claims that something that is fictional is not factually accurate—two separate elements of the traditional defamation claim converge. Any libel plaintiff must show that the alleged defamation is "of and

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[138] *See* Lee S. Brenner et al., *Real Characters: Lawsuits Claiming Libel in Fiction Are Decided on the Basis of Whether the Work is "Of and Concerning" the Plaintiff*, 35 L.A. LAWYER 40 (2012); *see also* Robert D. Richards, *When "Ripped from the Headlines" Means "See You in Court": Libel by Fiction and the Tort-Law Twist on a Controversial Defamation Concept*, 13 TEX. REV. ENT. & SPORTS L. 117 (2012).

[139] *See generally* Davis v. Costa-Gavras, 619 F. Supp. 1372, 1375 (S.D.N.Y. 1985).

[140] Greene v. Paramount Pictures Corp., 813 F. App'x 728 (2d Cir. 2020).

[141] *Id.* at 729-30.

[142] *Id.*

[143] *Id.* at 730.

[144] *Id.* at 731.

[145] Batra v. Wolf, 2008 N.Y. Misc. LEXIS 1933 (N.Y. Sup. Ct. 2008).

> concerning" the plaintiff and that it is false. In the fiction context, the plaintiff must also show that the viewer was "totally convinced that the episode in all aspects as far as the plaintiff is concerned is not fiction at all."[146]

Perhaps another case, *Pring v. Penthouse*, may provide some of the most compelling arguments discussing not only a fictional account but an offensive, "gross," and "vulgar" depiction.[147] The article at issue in *Pring* was a fictional spoof of the Miss America beauty pageant and included some highly offensive descriptions that the plaintiff sought to litigate through a defamation lawsuit.[148]

With a libel in fiction suit, the court must look at two issues: First, whether the statement is of and concerning the plaintiff. Second, whether a "reasonable reader or viewer" would think the content was real or believable.[149] The court wrote: "Although a story may be repugnant in the extreme to an ordinary reader, and we have encountered no difficulty in placing this story in such a category, the typical standards and doctrines under the First Amendment must nevertheless be applied."[150] The *Pring* court outlined the proper test:

> The test is not whether the story is or is not characterized as 'fiction,' 'humor,' or anything else in the publication, but whether the charged portions in context could be reasonably understood as describing actual facts about the plaintiff or actual events in which she participated. If it could not be so understood, the charged portions could not be taken literally.[151]

Thus, libel in fiction is only applicable when a reasonable viewer would not take the content as real.

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[146] *Id.* at *5 (citations omitted).
[147] 695 F.2d 438 (10th Cir. 1982).
[148] *Id.* at 439-41.
[149] *Id.* at 442.
[150] *Id.* at 443. The court added:

> The story is a gross, unpleasant, crude, distorted attempt to ridicule the Miss America contest and contestants. It has no redeeming features whatever. There is no accounting for the vast divergence in views and ideas. However, the First Amendment was intended to cover them all. The First Amendment is not limited to ideas, statements, or positions which are accepted; which are not outrageous; which are decent and popular; which are constructive or have some redeeming element; or which do not deviate from community standards and norms; or which are within prevailing religious or moral standards.

Id.a
[151] *Id.* at 442.

Applying the *Pring* prongs and a common-sense understanding of the facts, it would seem difficult for a plaintiff to successfully sue the producers of a mockumentary because of the primacy of the second prong: no reasonable reader or viewer would understand the content as reasonably believable. This prong indemnifies the large body of purely fictional work, such as a film like *This is Spinal Tap* or the television show *The Office*. No reasonable viewer expects scripted entertainment with performing actors to be anything beyond fictional entertainment.

But the Baron Cohen mockumentary encounters potential difficulty with the first prong because even though Borat, Brüno, or any of Baron Cohen's other characters are purely fictional, their encounters are with real people. The character is camouflaged through costumes, accents and fictional biographies. Further, the production operates through a series of legally established production companies created for the sole purpose of both hiding and indemnifying the true identities of the people behind the films.[152] Thus, the libel in fiction discussion could encounter difficulty at *Pring*'s first prong, "of and concerning," because the plaintiffs are real, not fictionalized or composite characters. The courts, nevertheless, have repeatedly and emphatically dismissed the claims on motions to dismiss and, with the *Moore* case, on summary judgment.[153]

2. Historical Protection for Parody & Satire

Parody and satire have secured a special place under the First Amendment under the *Hustler Magazine v. Falwell*.[154] This case emerged from a parody of a Campari Liqueur advertisement published in an adult magazine.[155] The *Hustler* parody, which included a small disclaimer at the bottom, declaring, "ad parody not to be taken seriously," included a series of crude, offensive statements in a mock-interview format in which the Reverend Jerry Falwell, a televangelist,[156] was depicted as engaging in a drunken, incestuous encounter with his mother in an outhouse in Lynchburg, Virginia.[157]

The content, while amusing and entertaining to some, struck a nerve with Rev. Falwell, who litigated a libel, privacy, and intentional infliction

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[152] *See* Moore v. Cohen, 2021 U.S. Dist. Lexis 130344 (S.D.N.Y. 2021).
[153] *Id.* at *24 (granting motion for summary judgment).
[154] 485 U.S. 46 (1988).
[155] *Id.* at 48.
[156] *Id.*
[157] *Id.*

of emotional distress lawsuit all the way to the Supreme Court.[158] The claims for defamation and invasion of privacy were dismissed under the parody and satire doctrine because no reasonable reader, even a *Hustler* magazine reader, could view the statements as true. But a federal jury awarded Falwell $100,000 in compensatory damages and $50,000 in punitive damages on the intentional infliction of emotional distress claim.[159]

The court, however, reversed in an opinion by Chief Justice Rehnquist and saw through Falwell's attempt to circumvent the actual malice privilege on a matter of parody and satire.[160] The Chief Justice discussed the historic role of parody and satire in the American marketplace of ideas:

> At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern. . . . We have therefore been particularly vigilant to ensure that individual expressions of ideas remain free from governmentally imposed sanctions.[161]

The Court also credited the practical reality that creators of parody should be immune from tort liability because no reasonable viewer or reader could accept the joke as a truthful statement.[162] Parody as a tool for criticism on public affairs and the people behind public issues further buttressed its First Amendment underpinnings.[163]

Because satirists can make statements and critiques that are unparalleled in other venues, the First Amendment firmly protects this content.[164] Other judicial opinions protecting parody and satire, though, cover straight efforts at humor,[165] not the hybrid mockumentary format. Nevertheless,

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[158] *Id.* at 48-49.

[159] *Id*.

[160] *Id.* at 53. ("Were we to hold otherwise, there can be little doubt that political cartoonists and satirists would be subjected to damages awards without any showing that their work falsely defamed its subject.")

[161] *Id.* at 50-51.

[162] *Id*.

[163] *Id.*

[164] *See also* Roy S. Gutterman, New York Times Co. v. Sullivan*: No Joking Matter – 50 Years of Protecting Humor, Satire and Jokers*, 12 FIRST AMEND. L. REV. 497 (2014); Laura E. Little, *Just a Joke: Defamatory Humor and Incongruity's Promise*, 21 S. CAL. INTERDIS. L.J. 93 (2011).

[165] *See, e.g.*, Frank v. NBC, 506 N.Y.S.2d 869 (N.Y. App. Div. 1986) (dismissing a defamation claim by an accountant who was satirized on Saturday Night Live's Weekend Update, a fake news parody section of the live television show); *see also* New Times v. Isaacks, 146 S.W.3d 144 (Tex. 2004) (holding reasonable readers of an alternative newspaper could not reasonably interpret a satirical piece as a truthful publication).

courts in several Baron Cohen mockumentary cases properly ruled the films should not be subject to tort liability because they are so clearly satirical that even if unwitting participants were depicted unfavorably, reasonable viewers would view this as parody.[166] Judge Preska emphatically stated that these films are protected as satire and her statement has been cited in subsequent Baron Cohen cases.[167] Even though the participants are not in on the joke, the viewers are, which would also minimize the harm from the publication or depiction.[168]

V. Conclusion

Baron Cohen's brand of humor is not for everyone. For all the people laughing at his interview with former Vice President Dick Cheney, asking to have his waterboarding kit autographed, participants themselves often find their depictions embarrassing, not humorous. Sarah Palin called one of his characters "truly sick" and walked off the set.[169] Palin later went to social media, posting that she was duped, joining "a long list of American public personalities who have fallen victim to the evil, exploitive, sick 'humor' of the British 'comedian' Sacha Baron Cohen, enabled and sponsored by CBS/Showtime."[170] But this so-called "sick humor" is exactly the kind of speech that is and ought to be protected under the law and the First Amendment.

There may indeed be some sympathy out there for the random citizen seemingly duped into an uncomfortable and even humiliating situation with one of Baron Cohen's absurd characters making inappropriate or offensive

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[166] *See supra* for analysis on *Doe, Lemerond*, *Psenicska*, and *Olson*. For a summary of the reported opinions against Sacha Baron Cohen, *see infra* Appendix.

[167] *See Moore*, 2021 U.S. Dist. Lexis 130344 at *22-*23. In *Moore*, Judge Cronan wrote: "It is simply inconceivable that the Program's audience would have found a segment with Judge Moore activating a supposed pedophile-detecting wand to be grounded in any factual basis. Id. at *37.

[168] *Id*. ("Given the satirical nature of that segment and the context in which it was presented, no reasonable viewer would have interpreted Cohen's conduct during the interview as asserting factual statements concerning Judge Moore.").

[169] Fletcher, *supra* note 3.

[170] Matt Wilstein, *Sacha Baron Cohen Reveals His Painful Sarah Palin 'Dilemma'*, Daily Beast (June 10, 2020, 10:18 AM), https://www.thedailybeast.com/sacha-baron-cohen-reveals-his-painful-sarah-palin-dilemma-on-showtimes-who-is-america [https://perma.cc/AJ58-M26G]. Baron Cohen did not include the Palin encounter because it did not meet his standard for humor, saying, "Just like her candidacy for vice president, she wasn't good enough to make the show." *Id.*

statements, or exhibiting offensive and unusual behavior.[171] Emerging from a restroom with a bag of human waste obviously throws a monkey wrench into an etiquette lesson, as the Alabama etiquette coach in *Martin* alleged.

Judge Sack, in his treatise, characterizes the tension that this article seeks to flesh out: "There is no 'magic bullet' that can prevent plaintiffs' attempts to use novel tort theories to evade established principles protecting speech, nor the creative lawyers likely to cease in their search for new avenues to recovery."[172] While the appeal in *Moore* is still pending and the *Borat* sequel is still relatively fresh, potential liability is still a concern. The technology to produce and post or otherwise disseminate future mockumentaries facilitates the art form and commentary. Future filmmakers, artists, writers and producers will need to take significant steps to protect their commentary, comedy and art. Luckily, the courts, the law, and the First Amendment are standing right behind them.

VI. Appendix of Cases Against Sacha Baron Cohen

(1) *Johnston v. One America Productions* (Borat) (2008)

In *Johnston v. One America Productions*, a federal court in Mississippi dismissed a privacy suit by a woman who appeared in three seconds of the film *Borat* during which she, in attendance at a Pentecostal camp, appeared raising her arms in praise to God while Borat spoke in tongues and acted as if he was being converted by the minister.[173] In the four-count complaint, the plaintiff claimed: (1) the filming invaded her privacy and appropriated her image and likeness and (2) depicted her in a false light (another invasion of privacy claim); (3) the release she signed should not be enforced because she

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[171] Michael Psenicska recounted his contract negotiation: he was approached by a production company from California and participated in the film:

> I don't have the foggiest why they chose me but they got me good . . . I remember sitting in the car. It was 90 degrees, they were late and I was ready to leave. Then this young guy jumps in and thrusts $500 in my hand. Unfortunately I took it. Then he gives me this piece of paper. He told me it was a release form. I'm not an idiot – I have a masters in mathematics – but I'm thinking that it was a public service-type documentary so I didn't' read it. I trusted the guy.

Fletcher, *supra* note 3.

[172] Sack, *supra* note 103, §13:11.

[173] Johnston v. One America Productions, 2007 U.S. Dist. LEXIS 62029, at *4 (N.D. Miss. Aug. 22, 2007).

did not know Borat's true identity; and (4) gross negligence.[174] In its motion to dismiss, defendants successfully argued that not only are the claims not cognizable, but also the film was protected under the First Amendment.[175]

The court analyzed plaintiff's claims under four distinct theories of a right to privacy cause of action recognized in Mississippi: (1) intentional intrusion upon the seclusion of another; (2) appropriation of another's identity; (3) public disclosure of private facts; and (4) false light.[176] The court held that plaintiff did not state a claim under either (1) or (3) because plaintiff was attending a public religious meeting with no expectation of privacy or seclusion.[177] However, the claim under appropriation could stand because "defendants did not obtain the plaintiff's explicit permission to be featured in . . . a major motion picture,"[178] and the claim under false light could stand because there remained reasonable questions for the jury whether the scene in which plaintiff was depicted "would be highly objectionable to a reasonable person in the plaintiff's position . . . such that a person in the plaintiff's position would believe others would believe she willingly participated in a mocking of her religion" and that defendant knew that the plaintiff would feel aggrieved by the publicity in the eyes of her community.[179]

Perhaps the most relevant aspect of the court's analysis discusses the nature of the film: "*Borat* is different from a purely fictional work since, although the viewer is aware that the plot itself is fictional and that the characters of Borat and his producer are fictional, the viewer is also aware that the vast majority, if not all, of the other people featured in the movie are non-public figures who are not actors and are likely unaware that Borat is not a Kazakhstani reporter filming a documentary for Kazakhstan."[180]

Following the ruling, defendants sought reconsideration as well as an interlocutory appeal, before the parties eventually stipulated to dismissal.[181] In its reconsideration order, the court, explaining why *Borat* does not qualify for default First Amendment protection as other forms of entertainment sold for profit might, wrote:

> As this court has previously maintained, unlike the massive majority of mainstream films that the public has viewed, the film *Borat* is not simply

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[174] *See id*. at *4-5.
[175] *See id*. at *5.
[176] *See id*. at *11.
[177] *See id*. at *12.
[178] *Id*. at *23.
[179] *Id*. at *17.
[180] *Id*. at *24-25.
[181] *See* Stipulation of Dismissal with Prejudice, Johnston v. One America Productions, 2007 U.S. Dist. LEXIS 62029 (N.D. Miss. July 29, 2008) (2:07cv42-P-S).

> an ordinary expressive, fictional work with fictional actors. Nor is it a pure documentary. Rather, the film is a unique mixture of documentary and fiction which blurs the boundaries of both genres to such a degree that many reasonable viewers could question whether or not the majority of people portrayed in the film are willing participants. It is this nature of the film that does not bring it squarely in the realm of *Joseph Burstyn, Inc. v. Wilson*.[182]

(2) *Lemerond v. Twentieth Century Fox Film Corp.* (Borat) (2008)

In *Lemerond v. Twentieth Century Fox Film Corp.*,[183] *Borat* generated a lawsuit by a man captured on film being approached by Sacha Baron Cohen and then running away from the camera at the intersection of 5th Avenue and 57th Street in New York City.[184] In the 13-second exchange, the Borat character, described by the court as using a heavy accent, attempted to shake plaintiff's hand, saying, "Hello, nice to meet you. I'm new in town. My name a Borat."[185] Plaintiff then ran away, "in apparent terror, screaming 'Get away!' and 'What are you doing?'"[186] Plaintiff's face was digitally pixelated in the trailer, but not in the film itself, though plaintiff never gave consent for the use of his image.[187] Plaintiff invoked New York's invasion of privacy statute, New York Civil Rights Law § 51, which provides a civil remedy for the unlawful or unconsented to use of a person's image or likeness for commercial purposes.[188]

The court held that *Borat* fit "squarely within the newsworthiness exception" to the statute, which provides that "nonconsensual use[s] of a plaintiff's image to depict 'newsworthy events or matters of public interest'" do not fall within the statute's reach.[189] The court wrote:

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[182] *See* Johnston v. One Am. Prod., 2007 U.S. Dist. LEXIS 73450, at *1-154 (N.D. Miss. Oct. 2, 2007) (contrasting the instant case, where "defendants' right to free speech is not unfettered," with *Wilson*, where the First Amendment prevented a government agency from rescinding a license for public exhibition of a motion picture).

[183] Lemerond v. Twentieth Century Fox Film Corp., 2008 U.S. Dist. LEXIS 26947 (S.D.N.Y. March 31, 2008).

[184] *See id.* at *2.

[185] *Id.*

[186] *Id.*

[187] *Id.* at *2-3.

[188] *Id.* at *3. The court explained that New York does not recognize a common law privacy right, which further weakened plaintiff's case.

[189] *Id.* at *4-7 (citing Stephano v. News Group Publ'ns, Inc., 474 N.E.2d 580, 584-585 (N.Y. 1984)).

> At its core . . . *Borat* attempts an ironic commentary of "modern" American culture, contrasting the backwardness of its protagonist with the social ills afflict [sic] supposedly sophisticated society. The movie challenges its viewers to confront, not only the bizarre and offensive Borat character himself, but the equally bizarre and offensive reactions he elicits from "average" Americans. Indeed, its message lies in that juxtaposition and the implicit accusation that "the time will come when it will disgust you to look in a mirror." Such clearly falls within the wide scope of what New York courts have held to be a matter of public interest.[190]

Because New York has no common law privacy cause of action and the only relief for privacy violations is available under New York Civil Rights Law §§ 50-51, the court found plaintiff's unjust enrichment claim equally unavailing.[191] The court was also unmoved by the fact that plaintiff's image was used in the film's promotional trailer, writing in a footnote that even a film's trailer, although commercial, does not negate the depiction of a matter of public interest.[192]

(3) *Ex parte Cohen* (Borat) (2008)

In *Ex parte Cohen*, an Alabama etiquette teacher, who was filmed providing lessons during a staged dinner with Borat, challenged her signed consent agreement all the way to the Alabama Supreme Court.[193] The dinner, for which Kathie Martin was paid $350, was secured after a producer contacted Martin inquiring about whether she would give an etiquette dining lesson to "a foreign reporter traveling in the United States" for a documentary for Belarusian television.[194] The court characterized the encounter: "It is sufficient to say that an eventful meal ensued during which the alleged reporter engaged in behavior that would generally be considered boorish and offensive."[195]

Martin's primary challenge went to the validity of the contract, which released the producers of the film from liability for a variety of torts and contracts claims.[196] Martin argued that an Alabama statute voided the consent agreement because the only defendant that was a signatory to that

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[190] *Id*. at *6-7.
[191] *See id*. at *8-9.
[192] *See id*. at *7, n.1 (quoting Man v. Warner Bros., Inc. 317 F. Supp. 50, 52 (S.D.N.Y. 1970)).
[193] *See Ex parte* Cohen, 988 So. 2d at 508.
[194] *Id*. at 510.
[195] *Id*. at 511.
[196] *See id*. at 510-11.

agreement was not qualified to do business in Alabama.[197] The court, however, sided with the defendants, who argued that the Commerce Clause of the U.S. Constitution barred application of the Alabama statute to an interstate commercial activity.[198] The court concluded:

> The petitioners have established that the primary purpose of the transaction between Springland Films and Martin was interstate commerce, specifically, to provide for Martin's appearance in a film that might be used "without restriction in any media throughout the universe." Because the purpose of that transaction was interstate commerce, the Commerce Clause of the United States Constitution precludes the courts of this State from applying §10-2B-15.02(a) to prevent the petitioners from enforcing the consent agreement. Because the petitioners have a clear, legal right to the relief they seek – an order directing the Jefferson Circuit Court to vacate its order holding the consent agreement void and unenforceable – their petition for the writ of mandamus is granted.[199]

(4) *Psenicska v. Twentieth Century Fox Film Corp.* (Borat) (2009)

In *Psenicska v. Twentieth Century Fox Film Corp.*, a consolidated case, three plaintiffs who appeared in *Borat* sued for fraud, unjust enrichment, and intentional infliction of emotional distress, claiming they were misled about the nature of the "documentary-style" film.[200]

At the district court level, the plaintiffs challenged the validity of their signed consent agreements, arguing that the agreement, and specifically, the term "documentary-style film," is ambiguous and therefore unenforceable.[201] The court rejected that argument, finding that not only is the phrase unambiguous, but that *Borat* clearly falls into a category of "documentary-style films" for which Psenicska, in his brief, offered his own definition.[202] The court wrote:

> *Borat* is a film "displaying the characteristics of a film that provides a factual record or report." The Movie comprises interviews with real people and depictions of real events that are intended to provide a "factual record or report" albeit of a fictional character's journey. Across America. . .The fact that Borat is a fictional character, however, does nothing to diminish

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[197] *See id.* at 512.
[198] *See id.*
[199] *Id.* at 515.
[200] *Psenicska*, 409 F. App'x at 370.
[201] *See Psenicska*, 2008 U.S. Dist. LEXIS 69214 at *15.
[202] *See id.* at *17-18.

> the fact that his fictional story is told in the *style* of a true one. Indeed, *Borat* owes such effectiveness as it may have to that very fact.[203]

Furthermore, the humorous nature of the film did not vitiate the contract: "Nor does the fact that *Borat* employs humor disqualify it from the 'documentary-style' genre. . . . Humor is perfectly consistent with documentary."[204]

The Second Circuit affirmed the district court's dismissal, finding that no reasonable trier of fact could find that *Borat* was not a documentary-style film.[205] The court wrote:

> While the character "Borat" is fictional, the film unmistakably tells the story of his travels in the *style* of a traditional, fact-based documentary. Indeed, the film's stylistic similarity to the straight documentary form is among its central comedic conceits, employed to set the protagonist's antics in high relief. Thus, as the district court correctly observed, the film "comprises interviews with real people and depictions of real events that are intended to provide a factual record or report albeit of a fictional character's journey across America.". . .Whatever the outer reaches of the "documentary-style" genre, *Borat* falls well shy of the frontier.[206]

(5) *Doe v. Channel Four Tv Corp. (*The Ali G. Show) (2010)

In *Doe v. Channel Four TV Corp.*, a California appellate court, in an unpublished opinion, affirmed summary judgment in a defamation suit based on Baron Cohen's character Ali G., the self-styled, British, white, wannabe gangster rapper who speaks crude gibberish on his faux talk show.[207] The case here emanated from a nonsensical comment Ali G. made during an interview with the author Gore Vidal in which he named plaintiff as a woman with whom he had previously had sexual relations.[208] Baron Cohen had actually met plaintiff in 1987 at a summer camp but had not had a sexual relationship with her and lost touch.[209]

The plaintiff sought general damages and injunctive relief, suing for libel, slander, invasion of privacy, fraud, breach of contract, negligence, neg-

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[203] *Id*. at *18-19.
[204] *Id*. at *19, n.13.
[205] *See Psenicska*, 409 F. App'x at 370.
[206] *Id*. (quoting *Psenicska*, 2008 U.S. Dist. LEXIS 69214 at *15).
[207] *See* Doe v. Channel Four Tv Corp., 2010 Cal. App. Unpub. LEXIS 2468, (Cal. Ct. App. Apr. 6, 2010).
[208] *See id*. at *3.
[209] *See id*. at *2.

ligent misrepresentation, and negligent infliction of emotional distress.[210] The trial court dismissed the suit after a summary judgment hearing because: (1) no reasonable person could consider the statements factual; and (2) a settlement agreement and release signed by plaintiff in 2006 barred any causes of action arising out of the show.[211]

The appellate court likewise found that the defamation claim was not cognizable because no reasonable viewer could view the statements as factual or believable.[212] It failed the tort's first prong of falsity, as the court considered the alleged defamation under the category of "satirical, hyperbolic, imaginative, or figurative statements [that] are protected because the context and tenor of the statements negate the impression that the author seriously is maintaining an assertion of actual fact."[213] The court wrote:

> [W[e conclude that no reasonable viewer of the episode could have understood Ali G's statements in a defamatory sense. Cohen uttered the statements while in character, pretending to be a gangster rap artist of a different race than his own. Because the statements purported to address a fictional character's prior relationship, a reasonable viewer could not have understood the statements to convey a provably false assertion of fact but instead merely as a joke or parody.[214]

The context of a fictional comedy show also weighed into the court's rationale.[215] As a matter of protected content, particularly comedic material, the court found significant First Amendment protection because the context and circumstances would not yield a reasonable connection to the truth.[216] Quoting from *Polygram Records v. Superior Court*, the court concluded: "To hold otherwise would run afoul of the First Amendment and chill the free speech rights of all comedy performers, and humorists, to the genuine detriment of our society."[217]

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[210] *See id*. at *6.

[211] *See id*. at *7-8.

[212] *See id*. at *12-13.

[213] *Id*. at *13-14 (quoting Franklin v. Dynamic Details, Inc., 116 Cal.App.4th 375, 385 (Cal. Ct. App. 2004)).

[214] *Id*. at *15-16.

[215] *See id*. at *17. ("The Ali G character made the statements during a comedy show in the context of an interview with Vidal involving a sense of other comedic and sometimes crude statements that could not be reasonably understood as asserting actual facts.").

[216] *See id*. at *21.

[217] *Id*. at *22 (quoting Polygram Records v. Superior Court, 170 Cal.App.3d 543, 553 (Cal. Ct. App. 1985)).

(6) *Olson v. Sacha Baron Cohen* (Brüno) (2011)

In *Olson v. Sacha Baron Cohen*, a California appellate court affirmed a lower court's dismissal of nine tort-based claims brought by a charity bingo organizer against Baron Cohen after Baron Cohen's character, Brüno, participated as a "celebrity host" at plaintiff's bingo game, calling bingo numbers while providing vulgar commentary laced with homosexual references.[218] The critical inquiry focused on the film's protection under the First Amendment and California's anti-SLAPP law, section 425.16.[219]

In May 2007, plaintiffs agreed to participate in a "documentary-style" movie, alleging they were told that a celebrity wanted to call the bingo numbers and that the filmed segments would be included in a documentary about bingo to be shown on networks such as PBS and the Discovery Channel.[220] Plaintiffs were paid $300 in exchange for signing a location agreement.[221] Additionally, plaintiffs signed a "Standard Consent Agreement" and were paid $20 each to be filmed for a "documentary-style film."[222]

Prompted by "Brüno's" vulgar behavior in calling bingo numbers, plaintiff confronted Baron Cohen, which culminated in security guards escorting Cohen off the stage.[223] Shortly after the confrontation, plaintiff was unable to regain her composure, "sobbing uncontrollably."[224] When she stood up from her chair, she lost consciousness and fell to the concrete floor, hitting her head, and, according to plaintiffs, causing "two brain bleeds" that confined her to a wheelchair and walker after the incident.[225]

The defense was primarily based on California's anti-SLAPP law, under which Baron Cohen argued that the conduct and words spoken by Cohen while he appeared as "Brüno" was in furtherance of Baron Cohen's right of free speech in making the film in connection with a matter of public interest.[226] While defendants submitted movie reviews and declarations of the artistic elements encompassed in the film affording it First Amendment protection, plaintiffs argued Baron Cohen's conduct was not free speech, but

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[218] *See* Olson v. Cohen, 2011 Cal. App. Unpub. LEXIS 6888 (Sept. 12, 2011).
[219] *See id.* at *1-2.
[220] *See id.* at *4-5.
[221] *See Id.* at *5-6. In exchange for signing the agreement, plaintiffs agreed not to bring future legal action or claims in connection with the production, including any claims for emotional distress, intentional torts, or fraud (based on any alleged deception about the film).
[222] *Id.* at *6.
[223] *See id.* at *10.
[224] *Id.* at *11.
[225] *Id.*
[226] *See id.* at *12.

rather a verbal attack on plaintiff with access to the private venue secured through lies and deception.[227]

After oral arguments on defendants' motion to strike plaintiffs' complaint, the trial court took judicial notice of the news articles and the background on the Brüno character:

> The court noted that the facts concerning Cohen's work, his portrayals of characters, and the fact that *Brüno* presented a satirical perspective on homosexuality, gay culture, were in the court's view notorious and of common knowledge. The court observed that the issues presented by *Brüno* were of public interest and were historically and continuously controversial; and the protected speech and conduct consisted of Brüno's references to homosexual relations, which Cohen expressed to provoke a reaction from appellant for the purpose of satire and commentary.[228]

As a procedural remedy to dismiss lawsuits challenging constitutionally protected rights, the court interpreted and applied the anti-SLAPP statute, holding that the defendants had demonstrated that plaintiffs' claims arose from conduct (namely, conduct of defendants), while filming *Brüno*, that was protected speech.[229]

The appellate court affirmed.[230] California courts apply a two-step process in evaluating anti-SLAPP motions, first deciding whether the defendant made a "threshold showing" that the underlying action was protected activity, and if the defendant makes such showing, shifting the burden to the plaintiff to demonstrate a probability of prevailing on the merits of the claim.[231] The court determined that Baron Cohen satisfied his initial burden by demonstrating that his conduct was "in furtherance of . . . the constitutional right of free speech in connection with a public issue or an issue of public interest."[232]

In its discussion, the court made some important statements about the role of films in the marketplace of ideas: "Movies and films generally are

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[227] *See id*. at *13-14.

[228] *Id*. at *15.

[229] *See id*. California's anti-SLAPP law, section 425.16 states: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." Cal. §425.16.

[230] *See id*. at *17.

[231] *See id*. at *19.

[232] *Id*. at 25.

considered 'expressive works' subject to First Amendment protections."[233] The court added that a film's being undertaken for profit does not vitiate its constitutional value.[234] The movie's purpose was "to "depict 'Brüno' in various locations and under circumstances where his conduct and statements might prompt a strong homophobic reaction from those around him for the purpose of entertainment and social satire. Cohen's conduct was in aid of and incorporated into the film, and is thusly entitled to constitutional protection."[235]

The court further explained that speech need only meet a low threshold to satisfy the requirement that it be in connection with an issue of public interest. Using *Seelig v. Infinity Broadcasting Corp.*—a case involving a reality television show contestant who was later discussed on a radio show—as an illustration, the court expounded on how the broad nature of what constitutes public interest speaks volumes to both the term itself and the role of media across platforms: "By having chosen to participate as a contestant in the television show, plaintiff voluntarily subjected herself to inevitable scrutiny and potential ridicule by the public and the media."[236] In the instant case, not only did the court find that plaintiff had "voluntarily engaged" with Baron Cohen while cameras filmed their encounter, but also that the segment at issue and the film in general related to a matter of public interest:

> First, as to the matter of public issue–there can be no doubt that homosexuality, gay culture, lifestyles, rights and the public reactions to those issues present matters of public interest and controversy. Second, the evidence in the record also supports the lower court's finding that "the purpose of *Brüno* was to show audiences what would happen when a film crew followed a blatantly-homosexual character. . .as he interacted with members of the public, raising issues of homosexuality, gay culture and same sex partnerships in an attempt to craft a sly commentary on the state of homophobia in our society.[237]

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[233] *Id*. at *23-24. ("Movies are a 'significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of political or social doctrine to the subtle shaping of thought which characterize all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform.'" (quoting Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-502 (1952)).

[234] *See id*. at 24.

[235] *Id*. at *25.

[236] *Id*. at *34 (citing Seelig v. Infinity Broadcasting Corp., 97 Cal. App. 4th 785, 808 (Cal. Ct. App. 2002).

[237] *Id*. at *41-42.

(7) *Moore v. Cohen* (Who is America?) (2021)

The most recent and only active case as of this writing is *Moore v. Cohen*.[238] In 2018, former U.S. Senate candidate and Alabama Supreme Court Justice Roy Moore and his wife sued Baron Cohen, Showtime, and CBS for defamation (per se), intentional infliction of emotional distress, and fraud.[239] This case emerged from Baron Cohen's Showtime mockumentary series *Who is America?*, in which Baron Cohen assumed the identity of Captain Erran Morad, an Israeli anti-terrorism, military, and espionage expert who wanted to interview plaintiff for Israeli television.[240] The controversial segment involved Morad testing a new military tool, a security scanner that can detect and identify pedophiles. During Moore's unsuccessful Senate campaign in 2017, allegations surfaced that he engaged in sexual encounters with underage women decades earlier when he was in his 30s.[241]

After the case was removed to the Southern District of New York, the court granted defendant's motion for summary judgment, concluding that Moore's claims were barred by the waiver clause in the agreement that he signed prior to the interview.[242] The court concluded that Moore expressly waived the causes of action he attempted to bring under the plain language of the standard consent agreement that he signed.[243]

Moore argued the contract was invalid because the signatory, Yerushalayim TV, was not a legitimate producer, and the phony production company duped him into participating in the interview under false pre-

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[238] *See* Moore v. Cohen, 2019 U.S. Dist. LEXIS 94361; *see also* Moore v. Cohen, 2021 U.S. Dist. LEXIS 130344.

[239] *See* Complaint for Defamation, Intentional Infliction of Emotional Distress and Fraud, Moore v. Cohen, 2019 U.S. Dist. LEXIS 94361 (1-19-cv-04977).

[240] *See* Memorandum of Law in Support of Defendant's Motion to Dismiss, Moore 19 Civ. 4977 (JPC), 3-6 (S.D. N.Y. Sept. 12, 2019). In different disguises, Baron Cohen played a conservative citizen journalist, Billy Wayne Ruddick, Jr., Ph.D., who interviewed Bernie Sanders and Jill Stein, posing irreverent and potentially offensive questions. In another segment, he interviewed a gun rights advocate and convinced him to promote an anti-terrorism program arming children with guns called "Kinderguardians." And, in another segment, in his Morad character, he interviewed former Vice President Dick Cheney, asking Cheney to autograph his "waterboarding kit," which consisted of a towel and plastic milk jug. *Id*. at 5. The Cheney interview was also peppered with numerous off-color statements and double entendres.

[241] *See id*.

[242] Moore filed a timely notice of appeal. See *Moore*, 2021 U.S. Dist. LEXIS 130344.

[243] *See Moore*, 2021 U.S. Dist. LEXIS 130344, at *16.

tenses.[244] The argument focused on the meaning of the term "producer," which the court ruled easily encompassed Baron Cohen, Showtime, and other companies associated with the production, including the Baron Cohen production companies which are legally established, legitimate business entities.[245] The court also rejected Moore's attempt to litigate the sexual content addressed in the interview, writing, "There is no language in the SCA that obligated defendants to refrain from any particular conduct or questioning during the course of the interview."[246] Finally, the court was unconvinced by Moore's claims of fraudulent inducement, finding that, in the consent agreement, Moore specifically disclaimed reliance on representations about the program, meaning he could not use such representations as evidence that he was fraudulently induced to participate.[247]

As Moore's wife was not a signatory to the consent agreement, the court analyzed and dismissed her claims for intentional infliction of emotional distress and fraud under First Amendment principles.[248] The court first determined that the content of the segment featuring Moore involved matters of public concern[249] before reaching its ultimate conclusion:

> Given the satirical nature of that segment and the context in which it was presented, no reasonable viewer would have interpreted Cohen's conduct during the interview as asserting factual statements concerning Judge Moore. Because both of Kayla Moore's claims are premised on reputational damage arising from that segment, her claims are barred by the First Amendment and must be dismissed.[250]

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[244] *See id.* at *12-13.
[245] *See id.*
[246] *Id.* at *17-18.
[247] *See id.* at *20.
[248] *See id.* at *24.
[249] *See id.* at *30.
[250] *Id.* at *37.

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BOOK REVIEW
The Jurisprudence of Sport: Sports and Games as Legal Systems

THE JURISPRUDENCE OF SPORT: SPORTS AND GAMES AS LEGAL SYSTEMS. By Mitchell N. Berman and Richard D. Friedman. West Academic Publishing. 2021. $140

Reviewed by Alexander Amir

"Sports law" is understood by many to be an amalgam of various fields of law: labor, antitrust, intellectual property, contract, tort, and the various legal and financial matters that comprise transactional work. Traditional "sports law" textbooks focus on how our federal and state statutory and common law interact with sports-related issues such as league restraints on player salaries, athlete licensing and publicity rights, players unions and collective bargaining, and much more. Mitchell Berman and Richard Friedman's *The Jurisprudence of Sport: Sports and Games as Legal Systems*[1], by the authors' own admission, is different. This new textbook instead "investigates sports and games as legal systems . . . [as] a study in comparative law or jurisprudence."[2] Rather than study the interplay between the U.S. legal system and sports leagues, the authors instead analyze the legal structure of competitions themselves, providing a fresh perspective on how to analyze the sports industry.

The Jurisprudence of Sport is a successful textbook in three ways. First, this book serves as an essential primer on the legal structure of sports leagues, making it a worthwhile component for any sports law course. Second, by studying sports as its *own* legal system, the authors teach first-year legal concepts—rules versus standards, textualism versus purposivism, intent versus strict liability—through an accessible and exciting subject

[1] MITCHELL BERMAN & RICHARD FRIEDMAN, *THE JURISPRUDENCE OF SPORT: SPORTS AND GAMES AS LEGAL SYSTEMS* (1st ed. 2021).

[2] *Id.* at 3.

matter, helping readers apply what they learn to areas of the law outside of sports. Third, any student interested in sports, whether in law school or not, will find this textbook greatly enhances their knowledge of competitions through case studies, rule comparisons, and historical reviews. By analyzing the competitive dynamics of a broad array of sports through studies of law, economics, philosophy, science, ethics, and mathematics, this book will help readers become more well-rounded students, thinkers, attorneys, and even fans.

Each chapter of the book analyzes a discrete aspect of games and competition, including how to determine a winner, penalties, eligibility rules, performance enhancement, league structure, officiating, misconduct, and recordkeeping. Within each chapter, the authors generally introduce each topic with a few case studies or a scholarly piece that nicely illustrates the issue at hand. These introductory case studies draw from a variety of sports and feature relevant commentary from a diverse array of sources: from Ludwig Wittgenstein and Malcolm Gladwell to myriad sportswriters and law review authors. For example, in Chapter 6 on Penalties, the authors feature an ESPN piece written by sports analyst Bill Simmons that rants about the NBA's automatic suspension for players who leave the bench area during an altercation.[3] It's an amusing inclusion in a law school textbook, as Simmons lambasts the rule as "stupid, idiotic, foolish, moronic, brainless, unintelligent, foolhardy, imprudent, thoughtless, obtuse and thickheaded."[4] But it usefully contrasts with an interview on the next page between ESPN's Dan Patrick and former NBA Commissioner David Stern, who defends the rule.

Following each introduction, the authors engage in the daunting task of comparing how different sports leagues and other institutions implement their "jurisprudence" on the relevant issue in a robust "Comments and Questions" section. Within these sections, the authors feature discussions of broader legal and economic theory along with numerous questions and writing activities, presented even-handedly, designed to facilitate class discussion.

Chapter 8, titled "Performance Enhancement,"[5] is an illustrative example. The first two subtopics, "Technological Change" and "Biomechanical Enhancement," are introduced with case studies on advanced swimsuits in competitive swimming and prosthetic legs used by Oscar Pistorius to become the first amputee runner to compete at an

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[3] *Id.* at 189.
[4] *Id.* at 230.
[5] *Id.* at 281.

Olympic Games. After laying out the discourse on whether these items constituted performance enhancement, the authors then apply these theories to powerlifting garments, running shoes, tennis rackets, vaulting poles, preemptive surgery, gene therapy, and baseball and football players born without fingers and toes. Later subsections in the chapter discuss the scientific, ethical, philosophical, and regulatory considerations regarding performance enhancing drugs and devices. Similar examinations follow in each chapter, ensuring that readers are equipped to understand the nuances of each major issue, both across sports and across academic disciplines.

Outside of a specific sports law course, this book is a valuable tool for first-year law students, and even undergraduates, to grapple with fundamental topics in legal theory. For example, Berman and Friedman use former Pittsburgh Steelers safety Troy Polamalu as a case study to illustrate the benefits and detriments to a textualist or purposivist interpretation of a rule.[6] Polamalu, after an apparent injury, called his wife to explain that he was not hurt. Despite no ill-intent, Polamalu clearly violated an NFL rule prohibiting cell phone use on the sideline. The authors apply principles of statutory interpretation to debate whether the rule should have been interpreted by its plain meaning or interpreted as a flexible standard to only punish an actual wrongdoer. By studying the significant statutory interpretation case *Church of Holy Trinity v. United States*[7] alongside the NFL Rulebook, the reader is able to learn about a fundamental topic of legal education in an accessible way.

Similarly, Berman and Friedman analyze *PGA Tour, Inc. v. Martin*,[8] a Supreme Court statutory interpretation case that attempts to answer what "the essence of the game" of golf means. Casey Martin was a professional golfer with a degenerative circulatory disorder, preventing him from walking golf courses. Under the PGA rules, the use of golf carts is not allowed, and Martin's inability to get a waiver to use a cart would have prevented him from participating in a PGA event. The question at issue was whether granting the waiver would "fundamentally alter the nature of [golf]" under Title III of the ADA.[9] The authors further ask "what is a sport" of countless other athletic competitions, games, and activities, based on definitions from philosophers, sports scholars, and sports leagues. Beyond statutory interpretation, this question is also at the heart of two cases studied in a typical first-year torts class—*Knight v. Jewett*[10] and *Hackbart v.*

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[6] *Id.* at 95.
[7] 143 U.S. 457 (1892).
[8] 532 U.S. 661 (2001).
[9] 42 U.S.C. §12182(b)(2)(A)(ii).
[10] 3 Cal. 4th 296 (1992).

Cincinnati Bengals Inc.,[11]—where the question of liability depends on the amount of physical violence that should be expected when playing football. In other words, to what extent is violence essential to the game of football? Studying this question in detail is one way that The *Jurisprudence of Sport* introduces students to legal thinking using cases outside of traditional law school doctrine.

The authors also go beyond legal theory to draw parallels between sports structures and various political issues. Voting reform has been a hot-button topic in recent election cycles, and Berman and Friedman use sports scoring frameworks to suggest various reforms to the Electoral College. Aggregate scoring—the most common method of scoring sporting events—declares a winner based on total points accumulated (points being baskets in basketball, runs in baseball, or the popular vote in elections). More infrequently, unit scoring will instead choose a winner based on the number of total groupings, or units, of points earned (such as sets in tennis or volleyball, or electoral votes in elections). Without taking a stance, the authors pose a variety of hypotheticals to help students flesh out various ways to apply these options to the Electoral College. The authors employ similar analogies for other topics: how to apply penalty theories in sports to *NFIB v. Sebelius*,[12] the major case on President Barack Obama's Affordable Care Act; how models for sex-based classification in sports bear on affirmative action in university admissions and eligibility requirements for the military and public safety; and what officiating errors in sports can teach us about jury selection. Framing these critical issues in the context of sports provides a fresh perspective that helps make these issues more appealing and accessible.

While the clarity with which the book covers legal theory is remarkable, its most impressive attribute is the sheer quantity of sports that are studied and its ability to place them in conversation with each other. Berman and Friedman are true to their word when they describe the book as a study in comparative law. Major sports like baseball, football, basketball, hockey, soccer, tennis, and golf tend to garner more attention, but there is much to learn even for the most niche sports fan. The authors investigate *why* certain rules are in place, such as MLB's Infield Fly Rule, the PGA Tour's swinging requirements, and the NFL's scoring system. By doing so, they introduce factors that sports jurisprudence is built upon, such as fairness, challenge, and cognitive bias. They then apply these factors to gymnastics, swimming, chess, billiards, competitive eating, and many other

[11] 601 F.2d 516 (10th Cir. 1979).
[12] 567 U.S. 519 (2012).

contests, significantly enhancing the reader's knowledge of and appreciation for systems and structures through sports. By studying so many permutations of rules that promote different notions of fairness, skill, luck, and administrability, students are prepared to tackle a wide array of legal questions in many different sports settings.

The Jurisprudence of Sport fills a unique role in the academic literature of sports law. The authors distill and reframe challenging legal topics through a medium that makes them more accessible and comprehensible for first-year law students and undergraduates. At the same time, the authors' probing questions, complex writing exercises, and incorporation of economics, philosophy, and mathematics makes the book equally as effective for teaching more advanced students. Ultimately, this is an invaluable resource that can be used as a primary or supplementary sports law text.