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## Preface to Volume 14, Issue 2

Dear Readers,

I am Professor Peter Carfagna '79, the Harvard Law School Faculty Advisor to the Harvard Journal of Sports and Entertainment Law (JSEL). This has been a phenomenal year for JSEL and I am overwhelmingly proud to author the preface to the Summer Issue of Volume 14.

Throughout my time advising JSEL I have seen the Journal grow each year. With every new Board and Issue, I find myself more excited and continually hopeful for both the present and the future of sports and entertainment law and scholarship. This year was no exception and I look forward to seeing how Volume 15 is able to build upon the foundation the earlier Boards and Issues have helped to build.

In the Winter Issue, JSEL published four terrific pieces: an essay, two articles, and a student note:

Professor Robert M. Jarvis wrote *From the Ballfield to the Courthouse: The Life and Times of Judge Robert M. Gibson Sr.* This essay outlined the incredible life of former MLB player Robert M. Gibson Sr. who went on to become a District Court Judge after his playing career.

Professor Zachary L. Catanzaro's piece *NFT-tethered Sound Recordings and Digital Resale* outlined the emerging marketplace and economic implications of NFT sound recordings.

*Are College Athletes Employees Under The Fair Labor Standards Act* was written by Professor Michael H. LeRoy. He shared a thought-provoking new approach to college athletes seeking employment status.

Lastly, we had a student note by Seth M. Corwin entitled *Offsides: A Labor and Antitrust Analysis of How The Nonstatutory Labor Exemption Subverts Players' Medical Autonomy*. Seth wrote about how the National Hockey League and other sports leagues view medical autonomy and issues within the current frameworks.

In this Summer Issue, JSEL published an essay, three more great articles and a book review:

First we have an essay by Alex Sinatra and Trayveon Williams, *College Athletics and NIL: Perspectives from a Practitioner and an Athlete*, which provides unique perspectives on the emerging world of NIL and how student athletes are leveraging NIL laws to their advantage.

Professors Jorge Contreras and Dave Fagundes wrote *The Life Puzzle*, a piece diving into the legal rights and customs surrounding life rights, and their use in film and the complexity that underlies them.

Christopher Deubert wrote the next piece, entitled “*Baseball Would Certainly Fail*”: *A History of Sports Leagues’ Hyperbolic Predictions in the 20th Century’s Biggest Cases and the Largely Successful Evolution of Their Arguments*. Mr. Deubert provides an exploration into the history of some of the biggest cases in baseball and the arguments made within them.

Dr. Joel Timmer’s article, *NOT Playing at a Theater Near You: Deceptive Movie Trailers and the First Amendment*, describes a recent case where a studio faced legal liability for deceptive advertising where their trailer depicted an actress and a scene not present in the film and the potential legal ramifications this could have on the future.

*Destroying Defamation* is Leslie Tenzer’s article which outlines the unforeseen consequences of labeling news as “fake” and its effect specifically on defamation claims.

Last we have a book review written by Nick Noonan on *Understanding Sports Law* by Timothy Davis and N. Jeremi Duru. This review outlines a great new book on sports law and legal education.

I am so grateful to JSEL’s Executive Board for all of their incredible work this year. Specifically, I want to thank the graduating members of the Board: Ethan Borasso, Henry Cordova, Elizabeth Duncan, Jiha Min, Nick Noonan, Connor Oniki, Will Scarfone, Sandy Smith, Usman Syed, Caroline Toman, and Catherine Walker-Jacks. Finally, I am pleased to welcome the incoming JSEL Masthead for Volume 15, including our new Editors-in-Chief Brandon Broukhim and Brandon McCoy and their incoming Board. After another wonderful year, I look forward to next year’s volume!

—Peter A. Carfagna



## College Athletics and NIL: Perspectives from a Practitioner and an Athlete

Alex Sinatra and Trayveon Williams

### I. INTRODUCTION

“Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.”<sup>1</sup>

Section 2.9 of the National Collegiate Athletic Association (NCAA) Division 1 handbook lays out the Principle of Amateurism, which was the oft-used battle cry of the NCAA to maintain control over the careers of college athletes.<sup>2</sup> The NCAA specifically used the term “avocation,” defined as “a hobby or minor occupation,” and in doing so drew an implicit distinction with vocation,” a “person’s employment or main occupation, especially regarded as particularly worthy and requiring great dedication.”<sup>3</sup> We contend that college athletes’ participation in athletics is, in fact, a vocation—one that they strategically, and with great skill, balance with their studies and their personal lives.

In the 2021 case *NCAA v. Alston*, the Supreme Court gave college athletes back their agency over their careers by holding that the NCAA’s restrictions on college athletes receiving education-related compensation violated the Sherman Act, thereby making clear that antitrust laws applied

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<sup>1</sup> NAT’L COLLEGIATE ATHLETIC ASS’N, 2020-21 NCAA DIVISION 1 MANUAL § 2.9, AT 3 (2020), available at <https://www.ncaapublications.com/productdownloads/D121.pdf> <https://perma.cc/PJ4M-RG22>.

<sup>2</sup> *See id.*

<sup>3</sup> *See* Alex Sinatra, *Examining the Legal Landscape Involving Amateurism and the NCAA*, SPORTS LITIGATION ALERT (Jan. 29, 2021), <https://sportslitigation-alert.com/examining-the-legal-landscape-involving-amateurism-and-the-ncaa/> [<https://perma.cc/497H-NLDD>].

with full force to the NCAA.<sup>4</sup> Shortly after, the NCAA voted to allow college athletes to profit from their name, image, and likeness (NIL) for the first time.<sup>5</sup> This marked a seismic shift in college athletics. Since the inception of the NCAA, its limitations on compensation rendered college athletes effectively indentured to the NCAA. *Alston*, and the NCAA's subsequent NIL vote, broke those shackles in one fell swoop. Finally being able to profit from their NIL, college athletes can now add another title to their repertoire: "entrepreneur." Their non-athlete colleagues—whether on full-ride scholarships for academics, paying their own way through school, or anywhere in the middle—were always able to profit off their own NIL while building businesses and brands around their unique talents.

In this piece, we provide an overview of the opportunities, challenges, key developments, and uncertainties in the post-*Alston* world informed by our experiences as a sports law practitioner and a professional athlete. Section II discusses how the new NIL regime has changed the needs of college athletes. Section III considers how the athletics ecosystem can best respond to these needs. It provides an overview of the new programs emerging at colleges, business schools, and law schools and offers the programs that we have developed at the Texas A&M University as one promising model. Section IV looks at ongoing litigation over whether college athletes are employees of their universities and how this could complicate NIL rights. Section V analyzes uncertainties over the proper role of third party collectives in providing NIL opportunities to athletes and the NCAA's efforts to regulate in this space. Section VI concludes by offering our final thoughts on the future of NIL and college athletics.

Before we go further, you may have noticed we refer to these athletes as "college athletes" and not "student-athletes." This language is by design. The term student-athlete "was coined in the 1950s by the NCAA president and the Association's legal team to avoid paying worker's compensation to the widow of a football athlete who died after a game injury, while also preventing future generations of college athletes from receiving worker's compensation or pay-for-play."<sup>6</sup> Language matters. For years, the NCAA and its member schools have indoctrinated athletes into believing they

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<sup>4</sup> See *NCAA v. Alston*, 141 S. Ct. 2141 (2021).

<sup>5</sup> Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA (June 30, 2021), <https://www.ncaa.org/about/resources/media-center/news/ncaa-adopts-interim-name-image-and-likeness-policy> [https://perma.cc/83XU-CUY5].

<sup>6</sup> See Molly Harry, *A Reckoning for the Term "Student-Athlete,"* DIVERSE EDUCATION (Aug. 26, 2020), <https://www.diverseeducation.com/sports/article/15107633/a-reckoning-for-the-term-student-athlete> [https://perma.cc/V6M3-KWGR].

should not be afforded free agency over their careers because they are “student-athletes.” Now, gone are the days where the NCAA, member schools, broadcasters, and brands are the only ones able to profit off the successes of college athletes.

## II. COLLEGE ATHLETES NEED EDUCATION AND SUPPORT TO NAVIGATE NEW NIL OPPORTUNITIES

The transition from high school to college to the professional world is tough for anyone but extremely difficult for athletes. Successfully balancing academics, athletics, and personal life takes responsibility, adaptability, team-work, and talent. These skills make athletes phenomenal partners to brands and companies because these are many of the skills needed to be successful in the corporate world.

When Trayveon Williams, one of the co-authors of this piece, entered the National Football League, he was navigating many firsts on the field and in his personal life, including coaching changes, new teammates, and an entirely new city.<sup>7</sup> On their own, each of those firsts can be chaotic and stressful. But he was also entering into a new corporate world of branding, agents, marketing representatives, licensing his NIL, paid appearances, and more. He remembers feeling overwhelmed. He wasn’t prepared or educated for this new world of entrepreneurship in which he was the CEO of his own career. Trayveon wished he had the opportunity to learn about these areas of the business before he entered the professional ranks: “Adaptability was the first skill that needed to be possessed in my new environment. Name, image, and likeness are the three most translatable traits for any human being in any work environment.”

The NCAA’s recent NIL rule-change means college athletes can now enter this complicated world of entrepreneurship in college. Athletes who are properly educated in financial planning and business before they enter the professional world are better prepared for the challenges the next level brings. But while college athletes have gained this freedom, in many states high school athletes still face barriers. As of the writing of this article, states like Texas prohibit high school athletes from monetizing their NIL.<sup>8</sup> This restraint on trade puts Texas athletes at a disadvantage and has caused some high school athletes to graduate early and leave the state so they can pursue

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<sup>7</sup> See *Cincinnati Bengals select Texas A&M running back Trayveon Williams No. 182 in the 2019 NFL Draft*, NAT’L FOOTBALL LEAGUE, <https://www.nfl.com/videos/cincinnati-bengals-select-texas-a-m-running-back-trayveon-williams-no-182-430454> [https://perma.cc/5PAX-VJVM] (last visited Oct. 25, 2022).

<sup>8</sup> See Tex. Educ. Code § 51.9246.

NIL deals earlier.<sup>9</sup> Perhaps the tides are changing in Texas, however. The state legislature recently introduced House Bill 1802, which would amend the Education Code and allow those athletes competing in University Interscholastic League (UIL) to monetize their NIL if they meet certain requirements.<sup>10</sup>

In another positive sign for the rolling back of state NIL restrictions, another House Bill was introduced into the Texas legislature that would make it easier for college athletes to profit from their NIL.<sup>11</sup> House Bill 2804 proposes many changes including that an “employee of the institution, may identify or otherwise assist with opportunities for a currently-enrolled student athlete to earn compensation from a third party for the use of the student athlete’s name, image, or likeness” with some restrictions. Previously, employees of educational institutions could not assist with NIL deals for college athletes.

While it seems like the Texas legislature is looking to make the state more attractive to college and high school athletes, only time will tell if these changes have any meaningful impact on the state’s athletics landscape.

### III. HOW TO EDUCATE ATHLETES TO NAVIGATE NIL

It is no secret that college athletes have a plethora of athletic requirements in school, including intense practice schedules and required individual workouts during vacation periods.<sup>12</sup> Even though some events are labeled as “optional,” college athletes know that usually means “attend or else.” They are also inundated with educational opportunities from their athletic departments, such as tutoring. But how effective are these educational opportunities? Often, athletes want engaging and exciting learning opportunities that complement their athletic careers and have concrete applications to their lives. From my experience working with college athletes, however, many of the educational opportunities provided to them are

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<sup>9</sup> See KP Kelly, *Quinn Cashes In: Ewers Leaving High School to Enroll Early at Ohio State*, TEX. HS FOOTBALL (Aug. 2, 2021), <https://texashsfootball.com/quinn-cashes-in-ewers-leaving-high-school-to-enroll-early-at-ohio-state/> [https://perma.cc/S9T4-MFFN].

<sup>10</sup> Tex. H.B. No. 1802, available at <https://capitol.texas.gov/tlodocs/88R/billtext/pdf/HB01802I.pdf#navpanes=0> [https://perma.cc/U2QV-FNHX].

<sup>11</sup> *Id.*

<sup>12</sup> University of North Texas, *Athletics Activities*, <https://meangreensports.com/sports/2018/7/6/compliance-compliance-currentsa-Athletics-Activities-html> [https://perma.cc/PT6Y-2HFK].

cookie-cutter and do not provide an individually curated experience for the athletes.

To fill this need, college athletic departments are starting to hire staff directly to handle NIL and serve as entrepreneurial advisors to athletes. The University of Texas at Arlington has a Director of Name, Image, and Likeness, Kate Rosenberg, who recently hosted an open house-style event at a men's basketball game on campus.<sup>13</sup> With new positions like this popping up all over the country, there is a movement toward providing educational opportunities focused on helping college athletes succeed in the new world of entrepreneurship that is now open to them. Ben Chase, the Director of NIL Strategy at the University of Florida, recently explained his role in a little more depth in an interview with On3:

From what I understand, my role is to maximize NIL opportunities for all student-athletes at the University of Florida. To help Marcus (Castro-Walker) wherever he needs me. If I help roll out something to all student-athletes, help Marcus build it out for the football team as well. With Gator Made, everyone in and around the football facility, I'm there to support them. I can also be a second set of eyes on anything we're doing there. . . . My role is coming in and probably being the education leader for alumni, fans, student-athletes, and administration. I'm going to be at it for everything that happens in all sports, especially football."<sup>14</sup>

The NCAA did a study of athlete well-being in the fall of 2021 and released their results in May 2022.<sup>15</sup> A surprising (or not so surprising if you are locked into the industry) result was the emphasis players put in four key categories of educational support. According to the report, athletes most need educational resources in the following categories: "tax and financial literacy (49%), career planning (47%), navigating name, image and likeness

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<sup>13</sup> See Isaac Appelt, *Athletics director highlights name, image, and likeness deals for student athletes*, THE SHORTHORN (JAN. 19, 2023), [https://www.theshorthorn.com/sports/athletics-director-highlights-name-image-and-likeness-deals-for-student-athletes/article\\_03b18584-97bf-11ed-a0e6-f72ef7dab3a2.html](https://www.theshorthorn.com/sports/athletics-director-highlights-name-image-and-likeness-deals-for-student-athletes/article_03b18584-97bf-11ed-a0e6-f72ef7dab3a2.html) [https://perma.cc/S4SB-97NY].

<sup>14</sup> See Nick de la Torre, *Interview with Ben Chase, Florida's New Director of NIL Strategy*, GATORS Online (Jan. 19, 2023), <https://www.on3.com/teams/florida-gators/news/interview-with-ben-chase-floridas-new-director-of-nil-strategy/> [https://perma.cc/HX7Q-MBYF].

<sup>15</sup> See NCAA *Student-Athlete Well-Being Study (Fall 2021), Survey Results*, NAT'L COLLEGIATE ATHLETIC ASS'N, [https://ncaaorg.s3.amazonaws.com/research/other/2020/2022RES\\_NCAA-SA-Well-BeingSurveyPPT.pdf](https://ncaaorg.s3.amazonaws.com/research/other/2020/2022RES_NCAA-SA-Well-BeingSurveyPPT.pdf) [https://perma.cc/7UT5-ET53] (last visited Nov. 1, 2022).

(NIL) opportunities (40%) and professional opportunities in sport (37%).”<sup>16</sup> These numbers were averaged across gender and division.<sup>17</sup>

The need for this kind of practical educational support is clear. “We had somebody at our school have a \$35,000 deal,” Hanah Smrt, a graduate track and field athlete at the University of Nevada, told Josh Planos of 538.com in an interview.<sup>18</sup> “How are they just supposed to figure out what to do with that amount of money when they have no education on it?” The NCAA study clearly shows what educational opportunities are most important to athletes going into the second year of NIL at the college level. But are schools staffed well enough to meet the growing and ever-changing needs of their athletes? Only time will tell. Schools that want to attract the most entrepreneurial athletes will need robust NIL programs.

When the college NIL era began, many firms such as marketing agencies pivoted from sponsorship platforms catering to professional athletes to focusing on college athletes.<sup>19</sup> These platforms seem to be trying to become one-stop-shops for all things branding, education, and sponsorship deals. Too often, however, trying to be everything to everyone can lead to not being anything for anyone. These platforms created educational modules that schools spend significant amounts of money to implement into their NIL education.<sup>20</sup> However, athletes do not always have the time to enter a portal and watch pre-recorded videos. Instead, they are likely to prefer a short TikTok or YouTube video explaining the same concept in a quarter of the time. This leaves schools with the impression they are providing resources to their athletes, but athletes may not feel they are getting the support they need.

Instead of these cookie-cutter programs, athletes need carefully curated and often real-time education, such as in-the-moment advice, critiques, and coaching so they can get their individual questions answered based on their unique circumstances. Athletes are used to having coaches speak with them directly, text them, and support them in real-time—not through a pre-re-

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> See Josh Planos, *College Athletes Suffered When Schools Weren't Ready For NIL*, FIVETHIRTYEIGHT (Jun. 30, 2022, 6:00 AM), <https://fivethirtyeight.com/features/college-athletes-suffered-when-schools-werent-ready-for-nil/> [<https://perma.cc/2DXN-9752>].

<sup>19</sup> See Julian Valentin, *The Opendorse Story*, OPENDORSE (Apr. 27, 2022), <https://biz.opendorse.com/blog/the-opendorse-story/> [<https://perma.cc/H7F9-5SYW>].

<sup>20</sup> See Joey Kaufman, *Ohio State athletics to spend almost \$50k on new partnership with Opendorse*, BUCKEYEXTRA (June 10, 2021, 2:09 PM), <https://www.buckeyextra.com/story/football/2021/06/10/ohio-state-athletics-spend-almost-50-k-opendorse-nil-partnership/7635431002/> [<https://perma.cc/AQP8-5MBR>].

corded video. The methods of educating these athletes on how to navigate NIL opportunities must support them in ways that are responsive to their preferred learning and communication styles.

A model for an interactive and real-time educational program for athletes is Texas A&M Mays Business School's AmplifyU Program, which is a business and leadership education program for Aggie Athletes.<sup>21</sup> This hands-on education program grew from an idea presented by Alex Sinatra, a sports lawyer and CEO/Founder of sports consulting business Your Potential for Everything and one of the co-authors of this piece. Sinatra presented her idea to Dr. Janet Parish, who was Sinatra's professor while a student at Mays Business School and is the current Director of Reynolds and Reynolds Sales Leadership Institute at Mays.<sup>22</sup> "I realized more people than ever would be trying to take advantage of these athletes" after the NCAA changed its NIL rules, said Professor Sinatra. "I knew we needed to give them the resources and education to understand contracts and recognize when a deal is good or when a person has their best interests at heart."<sup>23</sup>

Dr. Parish, along with others, ran with the idea. Athletes apply to the program and "learn from Mays Business School faculty as well as former Aggie athletes and other successful professionals about important business, leadership, and legal topics. In addition, participants will have opportunities to apply what they learn through competitions and other experiential learning activities such as an etiquette dinner, a networking mixer, and perspective sessions with former athletes and industry representatives."<sup>24</sup>

The class Professor Sinatra teaches for the program centers around contract review, contract negotiation, and NIL law in Texas.<sup>25</sup> Athletes who successfully complete the program have a Mays Business School class on their official transcript and receive a certificate of completion. These types of in-person educational programs seem to be more impactful for athletes than pre-recorded learning modules. One of the college athletes who participated in the program was Ava Underwood, '26, who plays on the Texas A&M women's volleyball team. "It was truly life changing," she said in an inter-

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<sup>21</sup> See *AmplifyU*, TEX. A&M UNIV., <https://tx.ag/amplifyu> [<https://perma.cc/95RC-58YW>] (last visited Oct. 25, 2022).

<sup>22</sup> *Id.*

<sup>23</sup> Jeannie Ralston, *The Game of Their Lives*, TEXAS A&M FOUND. (Feb. 14, 2023), [https://www.txamfoundation.com/News/The-Game-of-Their-Lives.aspx?fbclid=IWAR0Q\\_7Zm8MFe8wVCxb6Ho2xEYJyx6jYQXA3CwzRF5O6JwTHMHfEPIvZ-rZY](https://www.txamfoundation.com/News/The-Game-of-Their-Lives.aspx?fbclid=IWAR0Q_7Zm8MFe8wVCxb6Ho2xEYJyx6jYQXA3CwzRF5O6JwTHMHfEPIvZ-rZY) [<https://perma.cc/W6VP-FAJG>].

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

view for a recent article.<sup>26</sup> “The information provided is great insight on how to make the most of your talents and abilities as a student-athlete. There is nothing comparable to the unique caliber of this experience in the nation, and we are blessed as Texas A&M student-athletes to have the opportunity to be part of this special program.” Athletes of any sport are encouraged to enroll in the program and thus far, athletes from track and field, football, volleyball, and equestrian have attended. “Student athletes at Texas A&M have many, MANY opportunities for success ahead of them. Some will have long pro careers. Some will have short pro careers followed by long business careers. Some will go straight to the business world and quickly into leadership roles. Some will be entrepreneurs leveraging their own brands, creating other brands or businesses. AmplifyU aims to provide experiential business education and a network of successful former athletes to elevate the student athletes as future business leaders,” says Dr. Parish.<sup>27</sup>

Another area college and high school athletes need help navigating in the NIL landscape is the legal dimension of this new frontier. Curated legal help from law firms can be expensive, so this assistance might not be sought out by athletes. While some law schools like Harvard have sports law clinics that sometimes offer free legal assistance to athletes, there are not many services available for college and high school athletes to obtain affordable legal counsel.<sup>28</sup> While athletes who already have lucrative NIL deals will likely have agents and family attorneys, many athletes from lower income households or who are first-generation college students are navigating this NIL world alone.

In an attempt to combat this hole in the market, Professor and Attorney Dan Lust, along with his students at New York Law School, created an NIL pro bono legal program.<sup>29</sup> The mission of The NIL Project at New York Law School is to: “provide free legal assistance to athletes regarding their NIL activities. As NIL continues to evolve, there is a necessity to not only provide athletes with proper guidance to effectively navigate their NIL landscape, but a need to educate them as well. Further, this project will

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<sup>26</sup> *Id.*

<sup>27</sup> Email from Dr. Janet Parish, Director of Reynolds and Reynolds Sales Leadership Institute, Tex. A&M U. Mays Bus. Sch., to AUTHOR NAME, AUTHOR POSITION, AUTHOR INSTITUTION (Sept 16, 2022) (on file with author).

<sup>28</sup> *Sports Law Clinic*, HARV. L. SCH., <https://hls.harvard.edu/clinics/externship-clinics/sports-law-clinic/> [<https://perma.cc/66VE-KFCJ>] (last visited May 17, 2023).

<sup>29</sup> See NYLS *Sports Law NIL Pro Bono Project*, N.Y. LAW SCHOOL, <https://nylssportslawsocie.wixsite.com/nyls-sls/probonoproject> [<https://perma.cc/7HPX-WQ4D>] (last visited Oct. 25, 2022).



ensure that athletes are not being taken advantage of in the new and ever-changing world of NIL.”<sup>30</sup>

College athletes have stressed the critical need for legal advice as they navigate their athletic careers. “Honestly, in terms of the legal stuff, we don’t have a lot of help at all,” explained Smrt, the track and field athlete at the University of Nevada.<sup>31</sup> “I’m a psychology major. I’m sure there’s plenty of athletes who are business marketing majors, but I don’t know what deals to not do . . . In the end, it’s like, we’re not being told that we’re basically being taken advantage of. There’s really not a lot of guidance.”<sup>32</sup>

In order for lawyers to adequately represent college athletes in navigating NIL opportunities, lawyers have to be trained in not only the substantive law of NIL but in the personal and professional needs of college athletes. To meet this need, we have developed a program at the Texas A&M University School of Law to train law students how to best work with college and professional athlete clients. In our new course, which we taught for the first time in the spring 2023 semester, law students learn negotiation, contract review, and contract drafting geared at the needs of college athletes with a focus on experiential learning.<sup>33</sup> For example, in the first session of the course in January 2023, students presented NIL business plans. Each student picked an area of the law, target market, and content stream to focus on, with students choosing to focus on educating collectives, small-school college athletes, high school athletes, and everything in between. Throughout the semester, Mr. Williams provided his unique perspective on NIL, college athletics, and professional athletics as someone immersed in this world day in and day out. A critical point the course stresses is that athletes are people. “Too often, people see these athletes as commodities to be traded and sold, and they forget that they’re humans first,” said Sinatra. “I hope people will invest in them as human beings whose inherent value is not dependent upon their performance on the court or the pitch or the field.”<sup>34</sup>

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<sup>30</sup> *Id.*

<sup>31</sup> See Josh Planos, *College Athletes Suffered When Schools Weren’t Ready For NIL*, FIVETHIRTYEIGHT (Jun. 30, 2022), <https://fivethirtyeight.com/features/college-athletes-suffered-when-schools-werent-ready-for-nil/> [<https://perma.cc/2DXN-9752>].

<sup>32</sup> *Id.*

<sup>33</sup> See Caitlin Clark, *Bengals Running Back Trayveon Williams to Co-Teach NIL Course At Texas A&M School Of Law*, TEX. A&M TODAY (July 1, 2022), <https://today.tamu.edu/2022/07/01/bengals-running-back-trayveon-williams-to-co-teach-nil-course-at-texas-am-school-of-law/> [<https://perma.cc/GDT7-MU5J>]; Alex Sinatra (@YourPotential4), Twitter, <https://twitter.com/i/broadcasts/1MYxNnPP1mvxw> [<https://perma.cc/8R6P-D6CP>] (last visited Oct. 25, 2022).

<sup>34</sup> Ralston, *supra* note 23.

We contend that this unique, interdisciplinary educational approach offers an effective way to train aspiring sports lawyers to support college athletes in the new age of NIL. Student responses to the class have been positive. “Participating in the NIL & Athlete Advocacy course has been one of the most enlightening experiences of my time in law school,” student Kate Rosenberg said of the class. “Our professors teach us from two vastly different perspectives, and my fellow students continue to amaze me with their creativity and ingenuity when it comes to navigating the NIL educational space.”<sup>35</sup>

Our goal is to ultimately combine the business and law school programs at Texas A&M and bring law students and college athletes into the classroom together to learn from each other. We envision bringing versions of this class not only to other law schools, but to undergraduate and graduate programs and high schools.

There is no one-size fits all for the athletes or the schools. However, one thing is clear to us: athletes need specially curated advice and real-time help for their myriad of questions.

#### IV. POTENTIAL COMPLICATIONS TO NIL RIGHTS: COLLEGE ATHLETES AS EMPLOYEES

So far, we have discussed the challenges and opportunities for college athletes under the new NIL regime for college athletes. But this is not the only paradigm shift ushered in by *Alston* that has radically reshaped college athletics and the rights of college athletes. Another critical development is the growing movement in favor of paying college athletes for their labor as employees. While this movement is still in its early phases, it has the potential to transform the world of college athletics once again in ways that could both benefit and inhibit the ability of college athletes to monetize their talent.

In September 2021, the National Labor Relations Board General Counsel Jennifer Abruzzo issued a memorandum arguing that college athletes are employees under the National Labor Relations Act (NLRA).<sup>36</sup> “Players at Academic Institutions perform services for institutions in return for com-

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<sup>35</sup> Interview with Texas A&M University School of Law student Kate Rosenberg (March 10, 2023).

<sup>36</sup> See Office of Public Affairs, *NLRB General Counsel Jennifer Abruzzo Issues Memo on Employee Status of Players at Academic Institutions*, NAT’L LAB. REL. BD. (Sept. 29, 2021), <https://www.nlr.gov/news-outreach/news-story/nlr-general-counsel-jennifer-abruzzo-issues-memo-on-employee-status-of> [https://perma.cc/WR6M-9RNV].

pensation and subject to their control. Thus, the broad language of Section 2(3) of the Act, the policies underlying the NLRA, Board law, and the common law fully support the conclusion that certain Players at Academic Institutions are statutory employees, who have the right to act collectively to improve their terms and conditions of employment,” wrote Abruzzo.<sup>37</sup> “My intent in issuing this memo is to help educate the public, especially Players at Academic Institutions, colleges and universities, athletic conferences, and the NCAA, about the legal position that I will be taking regarding employee status and misclassification in appropriate cases.”<sup>38</sup>

College athletes are beginning to advance a similar interpretation in court. One recent example is *Johnson v. NCAA*, which was filed in November 2019 by former Villanova University football player Trey Johnson.<sup>39</sup> The lawsuit contends “that student athletes who engage in interscholastic athletic activity for their colleges and universities are employees who should be paid for the time they spend related to those athletic activities” under the Fair Labor Standards Act.<sup>40</sup> The action further argues that these athletes are student-workers who take classes while also performing a job for the university. It contends that since students who sell tickets to basketball games are compensated for their time, the basketball players should be paid for their time as well.<sup>41</sup> This argument has gained steam since the *Alston* decision and the NLRB memorandum,<sup>42</sup> as well as recent scrutiny of the NCAA’s unequal treatment of women’s teams in tournaments like March Madness.<sup>43</sup> In March 2021, Oregon basketball star Sedona Prince brought to light the disparity in facilities and treatment between the March Madness tournaments for men’s and women’s teams. The video went viral and caught the attention of members of Congress, leading to a report documenting the inequities in the NCAA’s treatment of women in sport and how to address it. This video precipitated a cascade of sweeping changes to the way the NCAA undervalues women’s sports despite findings that investment into women’s sports actually reaps huge financial returns.

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> See *Johnson v. NCAA*, 556 F. Supp. 3d 491 (E.D. Pa. 2021).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Office of Public Affairs, *supra* note 36.

<sup>43</sup> See *NCAA External Gender Equity Review*, KAPLAN HECKER & FINK LLP (Oct. 21, 2021), <https://ncaagenderequityreview.com/> [<https://perma.cc/X7DT-RHDR>]; Sedona Price (@sedonerrr), TIKTOK (Mar. 18, 2021), <https://www.tiktok.com/@sedonerrr/video/6941180880127888646?lang=EN> [<https://perma.cc/KL2J-B85A>].

While it has not reached a final conclusion on the merits, Johnson's suit survived the NCAA's motion to dismiss in August 2021. In reaching that decision, the U.S. District Court for the Eastern District of Pennsylvania wrote that "the Complaint plausibly alleges that Plaintiffs are employees."<sup>44</sup>

The District Court's denial of the NCAA's motion to dismiss is now under appellate review in the Third Circuit.<sup>45</sup> On appeal, the NCAA and other member schools argue that college athletes are not student workers because college athletics are part of an educational program, not a business venture.

The Third Circuit panel heard oral arguments in February 2023 in which the judges largely appeared hostile to the NCAA's arguments,<sup>46</sup> but as of the writing of this article the panel has not issued a decision. Even if the Third Circuit upheld the District Court's denial of the motion to dismiss, this would not constitute a final judgment endorsing Johnson's argument that college athletes are student workers. It would merely allow the case to proceed beyond the initial motion to dismiss phase. The final outcome of this litigation therefore may not be known for some time.

If college athletes are classified as employees, then educational institutions would have to pay them for their labor. But employee status would not necessarily be straightforwardly beneficial to student athletes. It could potentially reduce athletes' ability to monetize their NIL. Many public universities have regulations that prevent their employees from having another job outside of the university or engaging in consulting work unless they receive permission from supervisors.<sup>47</sup> It is not hard to imagine that universities might withhold permission to athletes who want to engage in activities like brand ambassador work, autograph signings, or merchandise sales. Would we then go back to a time before *Alston* when college athletes could not be entrepreneurs without the permission of the NCAA? Maddie Salamone, the Vice President of the College Football Players Association, identifies further complications:

[S]imply changing the employment status of athletes will not automatically make things better for athletes or fix what is broken within college

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<sup>44</sup> Johnson v. NCAA, 556 F. Supp. 3d 491, 512 (E.D. Pa. 2021).

<sup>45</sup> Complaint, Johnson v. NCAA, No. 22-1223 (3d Cir. Feb. 8, 2022).

<sup>46</sup> Amanda Christovich, *Federal Judges Blast NCAA Amateurism Model*, FRONT OFF. SPORTS (Feb. 15, 2023), <https://frontofficesports.com/federal-judges-blast-ncaas-amateurism-model/> [https://perma.cc/3VWG-8D5L].

<sup>47</sup> Human Resources, *Outside Employment*, U. TEX. AT AUSTIN, <https://hr.utexas.edu/current/compliance/outside-employment> [https://perma.cc/52K5-A5XV] (last visited May 17, 2023).

athletics. It's even possible that things could get worse for athletes initially, because we still don't have the appropriate structures in place to support athletes as employees, including a process for collective bargaining. The CFBPA exists to serve as a powerful collective voice for college football athletes and is committed to ensuring these athletes have the support they need now and as changes continue to take place within college athletics.<sup>48</sup>

#### V. COLLECTIVES AND BOOSTERS: THIRD-PARTY SUPPORT AND PAY-FOR-PLAY CONCERNS IN THE NEW NIL LANDSCAPE

A new entity that has emerged in the wake of the NCAA allowing college athletes to profit from their NIL are "NIL collectives." These are independent, school-specific groups of alumni and other donors that "pool funds from boosters and businesses, help facilitate NIL deals for athletes and also create their own ways for athletes to monetize their brands."<sup>49</sup> Currently, these NIL collective are largely unregulated. However, many schools have argued collectives should be regulated or banned by Congress over concerns that they provide a "pay for play model" that "damages the integrity of the collegiate athletic model," and Senators Tommy Tuberville and Joe Manchin have been considering the status of collectives as part of their plans to introduce an NIL bill in the Senate.

Pay-for play in the NCAA is essentially paying athletes to play their sport. Athletes are not allowed to earn a salary or be paid to play their sport or be offered money to attend a specific school or to remain at a specific school.<sup>50</sup>

Recently, it was announced that more than 100 Texas Tech University football players will receive "\$25,000 deals" from The Matador Club, a local nonprofit collective.<sup>51</sup> The players will receive these payments to "perform community service, serve as ambassadors for local and West Texas

<sup>48</sup> Text interview with Maddie Salamone (Sept 17, 2022).

<sup>49</sup> <https://www.on3.com/nil/news/what-are-nil-collectives-and-how-do-they-operate/>

<sup>50</sup> See *Name, Image and Likeness*, NCAA, <https://www.ncaa.org/sports/2021/2/8/about-taking-action.aspx> [<https://perma.cc/WT2M-SPYS>] (last visited Nov. 1, 2022); See Paul Myerberg & Stever Berkowitz, *Two Senators Ask NIL Collectives to Provide Feedback on Activities Influencing College Athletics*, USA TODAY, <https://www.usatoday.com/story/sports/college/2022/09/22/senators-ask-nil-collectives-engaged-college-athletics-feedback/8082116001/> [<https://perma.cc/RFA5-LRXX>] (Sep. 22, 2022, 3:05 PM).

<sup>51</sup> See Max Olson, *Texas Tech Collective to Offer \$25,000 NIL Deals to 100-Plus Football Players*, THE ATHLETIC (Jul, 19, 2022, 4:33 PM), <https://theathletic.com/>

charities and appear at Matador Club events.”<sup>52</sup> “This serves as sort of a base salary for the whole locker room,” Cody Campbell, a founding member of the Matador Club and Texas Tech regent, told *The Athletic*, “And that should add a lot of stability and continuity to the program.”<sup>53</sup>

There are several issues this type of deal raises in the new NIL landscape. When an NIL deal is given in exchange for something fluid and not clearly defined, such as community service, it is harder to establish that the players are in fact being paid for their community service rather than for playing their sport and thereby running afoul of the NCAA’s pay-for-play prohibition.<sup>54</sup> The parameters of an NIL deal with a collective therefore need to be very clearly defined so as to not violate NCAA rules. When all players in a group or on a team receive an NIL deal from a collective, there is an even stronger argument that a pay-for-play situation has occurred.<sup>55</sup>

Finally, when a collective is closely entwined with its university, or where a university itself is promoting NIL deals for its athletes, there could be an argument that this entwinement triggers Title IX, which protects against sex discrimination in education. If a collective focuses only on a sport like football, which is dominated by male athletes, one wonders if its lack of NIL support for any women’s teams could violate Title IX.<sup>56</sup> University of Florida’s Director of NIL Strategy discussed Title IX in an interview with On3<sup>57</sup>:

Louisiana, Ohio, Idaho, and Tennessee, their state laws let the schools help facilitate opportunities. They don’t really need a collective because the schools can help do those deals for the student-athletes. [The state of] Florida, from a legislation standpoint, I think is moving toward that because it’s a competitive disadvantage for us not to. Then Title IX stuff comes up. If they have someone on staff that is doing deals for student-athletes, where is the equity piece? That’s a lot of where my role will be. Make sure we’re doing our part on all sports.”

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news/texas-tech-boosters-nil-deal-players/ncfXRrM0sTXt/ [https://perma.cc/4FNH-QRTF].

<sup>52</sup> *Id.*

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

<sup>54</sup> *See id.*

<sup>55</sup> *See* Wilton Johnson, *BYU Football Strikes NIL Deal to Pay Tuition for Walk-On Players*, SPORTS ILLUSTRATED (Aug. 12, 2021), <https://www.si.com/college/2021/08/12/byu-football-nil-deal-walk-on-tuition-built-bar> [https://perma.cc/NLX7-UW64].

<sup>56</sup> *See* Amanda Christovich, *NIL Collectives Are Slacking on Supporting Women’s Sports*, FRONT OFF. SPORTS (Jan. 10, 2023), <https://frontofficesports.com/collectives-womens-sports/> [https://perma.cc/67H9-ASVJ].

<sup>57</sup> *See* de la Torre, *supra* note 14.

This is an area of sports law to watch.

It remains to be seen what deals will ultimately run afoul of current state legislation and NCAA rules. In this uncertain landscape, it is important that the athletes themselves do not suffer. If there are rules violations, the brands, collectives, and universities, all of which have significant resources, should bear the brunt of the reprimands, rather than young athletes. The complicated regulatory landscape surrounding collectives and NIL provides another reason why athletes require education and professional and legal support.

The NCAA has started to take notice of collectives' actions. "The expectation is that there is actual NIL activity, not just payments of cash," SEC commissioner Greg Sankey says. "It's not clear that these collectives are actually engaged in meeting that expectation."<sup>58</sup> In May 2022, the NCAA approved new guidance centered around how third parties, specifically boosters and collectives generally, can engage with prospective college athletes and current athletes.<sup>59</sup> The new guidance is likely based on the assumption that some of the behaviors exhibited by third parties violate existing NCAA rules and regulations.<sup>60</sup>

As noted in the NCAA Division I Board of Directors' charge, the expectation of the membership and representatives of their athletics interests is that they are abiding by current NCAA rules regarding recruiting and pay-for-play.<sup>61</sup> The NCAA's definition of a booster is "as an individual, independent agency, corporate entity (e.g., apparel or equipment manufacturer) or other organization who is known (or who should have been known) by a member of the institution's executive or athletics administration to have participated in or to be a member of an agency or organization promoting the institution's intercollegiate athletics program or to assist or to have assisted in providing benefits to enrolled student-athletes or their family members."<sup>62</sup>

The policy goes on to explain that many of the third parties referenced in their policy trigger the definition of a booster and thus cannot be involved in the recruiting of prospective college athletes. Involvement in-

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<sup>58</sup> See Ross Dellenger, *Big Money Donors Have Stepped Out of the Shadows to Create 'Chaotic' NIL Market*, SPORTS ILLUSTRATED (May 2, 2022), <https://www.si.com/college/2022/05/02/nil-name-image-likeness-experts-divided-over-boosters-laws-recruiting> [<https://perma.cc/T3CM-7GG9>].

<sup>59</sup> See NCAA, *Interim Name, Image and Likeness Policy Guidance Regarding Third Party Involvement* (Jul. 1, 2021), [https://ncaaorg.s3.amazonaws.com/ncaa/NIL/May2022NIL\\_Guidance.pdf](https://ncaaorg.s3.amazonaws.com/ncaa/NIL/May2022NIL_Guidance.pdf) [<https://perma.cc/8P68-SYY3>].

<sup>60</sup> *Id.* at 1.

<sup>61</sup> *Id.* at 1.

<sup>62</sup> *Id.*

cludes but is not limited to: (1) recruiting conversations between an individual or entity that has triggered booster status and a prospective college athlete or (2) communication (e.g., call, text, direct message) with a prospective college athlete, a prospective college athlete's family, or others affiliated with the prospective college athlete for a recruiting purpose or to encourage the prospective college athlete's enrollment at a particular institution.<sup>63</sup>

The NCAA also places restrictions on how institutional staff and coaches can interact with prospective college athletes and third parties. They may not "organize, facilitate or arrange a meeting between a booster/NIL entity and a prospective college athlete (e.g., provide the individual or entity with a recruiting list or watch list, including the NCAA Transfer Portal)."<sup>64</sup> Additionally, they may not "communicate directly or indirectly with a PSA on behalf of a booster/NIL entity."<sup>65</sup>

The NCAA's interim policy on NIL also lays out how third parties, including collectives, can engage with current college athletes. NIL agreements cannot be "guaranteed or promised contingent on initial or continuing enrollment at a particular institution."<sup>66</sup> This also applies to prospective college athletes.<sup>67</sup> Additionally, similar to the regulations on NIL agreements for prospective college athletes, they must be based on "an independent, case-by-case analysis of the value that each athlete brings to an NIL agreement as opposed to providing compensation or incentives for enrollment decisions, athletic performance, achievement, or membership on a team."<sup>68</sup>

We have begun to see the first cases involving boosters and NIL violations in this new college athletics landscape.<sup>69</sup> The NCAA recently released the negotiated resolution in a case involving around the University of Miami (Florida) head women's basketball coach and the recruiting of twins Haley

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<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 2.

<sup>65</sup> See NCAA, *supra* note 59; NCAA, *Bylaw, Article 19: Infractions Program*, NCAA LEG. SERV. DATABASE, <https://web3.ncaa.org/lstdbi/search/bylawView?id=11781> [<https://perma.cc/TE5A-VLH5>] (last visited May 17, 2023).

<sup>66</sup> See NCAA, *supra* note 59.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> See Meghan Durham, *Recruiting violations occurred in Miami (Florida) women's basketball program*, NCAA INFRACTIONS (Feb. 24, 2023), <https://www.ncaa.org/news/2023/2/24/media-center-recruiting-violations-occurred-in-miami-florida-womens-basketball-program.aspx> [<https://perma.cc/L2C8-HXVF>].



and Hanna Cavinder.<sup>70</sup> In this case, the “women’s basketball head coach violated NCAA rules when she facilitated impermissible contact between two prospects and a booster, according to an agreement released by the Division I Committee on Infractions. In facilitating the contact, the head coach also violated rules on publicity before signing and, because of her direct involvement, she violated head coach responsibility rules.”<sup>71</sup> Haley and Hanna Cavinder are two of the most public, popular, and highly paid athletes in the college NIL world, so this case sends a warning signal to other schools, collectives, and boosters that the NCAA is willing to actively enforce its NIL rules. It remains to be seen whether the NCAA will have the resources, manpower, and motivation to investigate the backlog of cases they have on their docket, but this is a warning shot that many were waiting for.

After this case, the NCAA’s bylaw on NIL violations took effect on January 1, 2023. Bylaw 19.7.3 reads:

19.7.3 Violations Presumed in Select Cases. In cases involving name, image and likeness offers, agreements and/or activities in which related communications and conduct are subject to NCAA regulation, the infractions process (including interpretive requests) shall presume a violation occurred if circumstantial information suggests that one or more parties engaged in impermissible conduct. The enforcement staff may make a formal allegation based on the presumption. The hearing panel shall conclude a violation occurred unless the institution or involved individual clearly demonstrates with credible and sufficient information that all communications and conduct surrounding the name, image and likeness activity complied with NCAA legislation. (Adopted: 10/26/22 effective 1/1/23).

These recent efforts by the NCAA are meant to shed light on the murky regulations surrounding NIL, boosters, and collectives. However, if the NCAA shies away from enforcing its rules, this guidance will have little effect in curbing impermissible activities by third parties in the NIL space. Perhaps the enforcement in the Cavinder case is an omen of things to come.

## VI. THE FUTURE OF COLLEGE ATHLETICS AND NIL

While it is impossible to confidently predict the future of NIL in college athletics given its current state of flux, there are certain indications of possible future directions. Some states are amending and even repealing

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<sup>70</sup> *Negotiated Resolution: University of Miami (Florida) — Case No. 020161*, NCAA COMM. ON INFRACTIONS PANEL (Feb. 24, 2023), [https://ncaaorg.s3.amazonaws.com/infractions/decisions/FEB2023D1INF\\_COIPublicReportUniversityMiamiFL.pdf](https://ncaaorg.s3.amazonaws.com/infractions/decisions/FEB2023D1INF_COIPublicReportUniversityMiamiFL.pdf) [<https://perma.cc/XEB3-VQNR>].

<sup>71</sup> See Durham, *supra* note 69.

their NIL laws to keep pace with states whose laws are less restrictive and more appealing to players.<sup>72</sup> Consistent enforcement of state and NCAA regulations are necessary to ensure a fair playing field, which was one of the founding principles of the NCAA.<sup>73</sup> The NCAA, however, seems to be reluctant to uniformly enforce rules and regulations because it is fearful of generating additional litigation. After its loss in *Alston* and ongoing court battles like *Johnson*, it is not surprising the NCAA fears another blow to its business. According to recent tax records, the NCAA paid out \$52.5 million in outside legal costs in FY21.<sup>74</sup> The NCAA also spent \$470,000 in lobbying while its NIL interim policy went into effect without a federal NIL law on the books.<sup>75</sup> Some say federal legislation is necessary to have conformity in the industry, but that does not seem likely in the near future.<sup>76</sup> Others believe more regulation will come soon to the NIL ecosystem.<sup>77</sup>

What is clear is that although college athletes now have more flexibility to receive NIL compensation, the profits most athletes have so far are miniscule in the context of how profitable college athletics are. According to filing documents, the NCAA had total revenues of \$1.1 billion and media rights revenues of \$915.8 million in FY21.<sup>78</sup> But “through May 31, the average NCAA Division 1 athlete has received \$3,711 of money through NIL.”<sup>79</sup>

<sup>72</sup> See Derin Dickerson & Trenton Hafley, *State Experiments with NIL Rules Put Athletes on Defense*, BLOOMBERG L. (Apr. 1, 2022, 3:00 AM), <https://news.bloomberglaw.com/ip-law/state-experiments-with-nil-rules-put-athletes-on-defense>.

<sup>73</sup> See *History of NCAA*, NCAA, <https://www.ncaa.org/sports/2021/5/4/history.aspx> [https://perma.cc/64G5-KKZH] (last visited Oct. 30, 2022).

<sup>74</sup> See Amanda Christovich, *Tax Returns Reveal Mark Emmert, Coach K Paydays and NCAA Legal Fees*, FRONT OFF. SPORTS (May 17, 2022, 4:33 PM), <https://frontofficesports.com/newsletter/fos-pm-ncaas-big-spending-reveal/> [https://perma.cc/ENX9-PB6N].

<sup>75</sup> *Id.*

<sup>76</sup> Myerberg & Berkowitz, *supra* note 50.

<sup>77</sup> Email interview with Christian Dennie, Partner, Fox Rothschild LLP & Adjunct Professor, Texas A&M University School of Law (Aug. 12, 2022).

<sup>78</sup> Christovich, *supra* note 74.

<sup>79</sup> See Josh Schafer, *NIL: Here's How Much Athletes Earned in the First Year of New NCAA Rules*, YAHOO! FINANCE (Jul. 1, 2022), [https://finance.yahoo.com/news/nil-heres-how-much-ncaa-athletes-earned-185901941.html?guccounter=1&guce\\_referrer=AHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce\\_referrer\\_sig=AQAAAF4oq8FJ-FMyE\\_SGNV6yrDLrOCyYxvbUcYdDqptBSqVqScJ-vLaI7MqspZpOPuLVnmO1qHW60uRqz2S1NWj6UUdlg8TGMZC9EfwQ0cnt4zcbENsx3mqC1oMFg0K-1DMQq\\_Jb4gcoJ\\_6ZgO9a8Wcf1v4gIZS31sRL2S6NxXezlPs](https://finance.yahoo.com/news/nil-heres-how-much-ncaa-athletes-earned-185901941.html?guccounter=1&guce_referrer=AHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAF4oq8FJ-FMyE_SGNV6yrDLrOCyYxvbUcYdDqptBSqVqScJ-vLaI7MqspZpOPuLVnmO1qHW60uRqz2S1NWj6UUdlg8TGMZC9EfwQ0cnt4zcbENsx3mqC1oMFg0K-1DMQq_Jb4gcoJ_6ZgO9a8Wcf1v4gIZS31sRL2S6NxXezlPs) [https://perma.cc/N9EP-P3S2].

The world of college athletics is ever-changing. As the athletics landscape shifts toward a hopefully more human-focused ecosystem, we must remember athletes are humans first. The NCAA rule changes, new legislation, and brand partnerships should be crafted through the lens of human-focused changes and not changes solely predicated on the bottom line. We hope to see more positive changes coming into the ecosystem in the future.



## The Life Story Rights Puzzle

Jorge L. Contreras\* and Dave Fagundes†

### ABSTRACT

The life story deal is a staple of Hollywood entertainment law practice. Studios seeking to make a docudrama (a feature based on real life facts but including dramatized elements) often do so only after securing life story rights from the subject of the production. Yet “life story rights” are a fiction. No source of law vests exclusive rights in the facts that comprise the narratives of our lives. Despite popular misconceptions, neither copyright, trademark, privacy, nor the right of publicity give individuals the exclusive right to exploit facts concerning their lives. On the contrary: in the United States, First Amendment considerations severely limit any legal constraint on expressive speech, including dramatic depictions. So why do production

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companies pay amounts that are sometimes in the millions to acquire these “rights”? Drawing on interviews with practitioners across the entertainment industry, we approach this puzzle by identifying the principal components of life story rights: a grant of (illusory) rights, a waiver of liability claims, guaranteed access to the subject, and an agreement to work exclusively with the acquirer. The modularization of these distinct jural relations under the rubric “life story rights” is the result of successful private ordering within a fast-moving and highly competitive industry, thereby enhancing transactional efficiency through reduced information costs, signaling and litigation avoidance.

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## INTRODUCTION

One of the breakout hits of early 2022 was *Inventing Anna*.<sup>1</sup> The Netflix series recounted the story of Anna Delvey, purportedly a German heiress who wormed her way into New York’s social and financial elite circles. In fact, “Anna Delvey” was actually Anna Sorokin, a Russian woman who was eventually jailed for fraud based on her subterfuge.<sup>2</sup> *Inventing Anna* was widely perceived as a true story and was compelling, in part, for that reason. But was it true? The answer to the question lies in the distinctive niche that such productions occupy in the entertainment world.

*Inventing Anna* is a docudrama. Docudramas are rooted in true facts, hence part documentary, but are also substantially fictionalized, hence part drama.<sup>3</sup> For this reason, ads for the show claimed not that it was a true story,

<sup>1</sup> See Kelli Boyle, ‘*Inventing Anna*’ Tops Every Nielsen Streaming Ratings Chart in Second Week, TV INSIDER (Mar. 18, 2022), <https://www.tvinsider.com/1036973/inventing-anna-tops-nielsen-streaming-ratings/>.

<sup>2</sup> INVENTING ANNA (Netflix 2022). Among other things, Sorokin hoodwinked a series of minor New York celebrities (former child star Macaulay Culkin, pharmacist Martin Shkreli and Fyre Festival promoter Billy MacFarland) and wheedled her way into a surprising number of unpaid hotel stays and lines of credit.

<sup>3</sup> *Seale v. Gramercy Pictures*, 964 F. Supp. 918, 923 (E.D. Pa. 1997) (quoting a definition of docudrama in *Davis v. Costa-Gavras*, 654 F. Supp. 653 (S.D.N.Y. 1987) as “a dramatization of an historical event or lives of real people, using actors or actresses . . . utiliz[ing] simulated dialogue, composite characters, and a telescoping of events occurring over a period into a composite scene or scenes”). See also Tom W. Hoffer & Richard Alan Nelson, *Docudrama on American Television*, 30 J. UNIV. FILM ASSN. 21 (1978) (defining docudrama as a “blend of fact and fiction which dramatizes events and historical personages from our recent memory”). Other terms for film/television productions that dramatize recent real-life events include story documentary, dramatic reconstruction, faction, reality-based film, murdo-fact, fact-based drama and biopic. See ALAN ROSENTHAL, WHY DOCUDRAMA? FACT-FICTION ON FILM AND TV (1999). For the sake of consistency, we use the term “docudrama” to describe this category. We intentionally avoid the term “biopic” (biographical pic-

but that it was “inspired by a true story.” And opening-scene chyrons coyly inform viewers that “This whole story is completely true—except for all the parts that are totally made up.”<sup>4</sup> Despite (or perhaps because of) its ambivalent relationship with the historical record, the docudrama is one of the most popular genres in film and television and has been for decades.<sup>5</sup>

Because of their popularity, studios compete fiercely to make and release the leading docudramas each season. This competition manifests in races to secure “life story deals” with the subjects of compelling narratives. These deals are understood within the entertainment industry to reserve to the acquirer the exclusive right to make a production based on that subject’s life. As such, life story deals are the subject of industry gossip and news, often earning subjects substantial paychecks. Netflix, for example, paid Anna Sorokin \$300,000 for the exclusive right to dramatize her story.<sup>6</sup> For all of these reasons, life story deals are big business.

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ture), as it is generally understood to encompass depictions of historical, as well as contemporary, subjects. See GEORGE F. CUSTEN, *BIO/PICS: HOW HOLLYWOOD CONSTRUCTED PUBLIC HISTORY* (1992). While some biopics are docudramas, many are not.

<sup>4</sup> *INVENTING ANNA*, *supra* note 2. This line seemingly pays homage to Kurt Vonnegut’s famous opening lines to *Slaughterhouse-Five*, “All this happened, more or less. The war parts, anyway, are pretty much true.” KURT VONNEGUT, *SLAUGHTERHOUSE-FIVE* (Random House) (1969).

<sup>5</sup> See Section II.A, *infra*. There is no comprehensive bibliography of docudrama productions, though some related compilations give a sense for the large body of this work. See EILEEN KARSTEN, *FROM REAL LIFE TO REEL LIFE: A FILMOGRAPHY OF BIOGRAPHICAL FILMS* (1993) (cataloging over 1,000 biographical films), MICHAEL G. STEVENS, *REEL PORTRAYALS: THE LIVES OF 640 HISTORICAL PERSONS ON FILM, 1929 THROUGH 2001* (2003) (cataloging 640 individuals about whom two or more films have been produced). For more recent, though selective, lists, see *71 Must-Watch Movies Based on True Stories*, TOWN & COUNTRY, Sept. 27, 2022, <https://www.townandcountrymag.com/society/g15907978/best-movies-based-on-true-stories/>; Samuel R. Murrian, *65 of the Best Movies Based on True Stories—Must-Watch Movies From History!* PARADE, June 20, 2022, <https://parade.com/1253091/samuelmurrian/best-movies-based-on-true-stories/>; Matthew Singer, *The 20 best movies based on true stories*, TIME OUT, Mar. 15, 2022, <https://www.timeout.com/film/best-movies-based-on-true-stories>. Although not definitive, the Wikipedia entries for *List of films based on actual events*, [https://en.wikipedia.org/wiki/List\\_of\\_films\\_based\\_on\\_actual\\_events](https://en.wikipedia.org/wiki/List_of_films_based_on_actual_events) (visited Apr. 17, 2022) and *List of films based on actual events (2000–present)*, [https://en.wikipedia.org/wiki/List\\_of\\_films\\_based\\_on\\_actual\\_events\\_\(2000–present\)#2020](https://en.wikipedia.org/wiki/List_of_films_based_on_actual_events_(2000–present)#2020) (visited Apr. 17, 2022) are informative.

<sup>6</sup> Vicky Baker, *Netflix and Anna Delvey: The Race to Secure the Story of New York’s ‘Fake Heiress’*, BBC NEWS (Feb. 20, 2021), <https://www.bbc.com/news/world-us-canada-56113478>. Paying Sorokin for her story raised complications under New York’s “Son of Sam” law, N.Y. Exec. Law § 632-a (McKinney 2001), which re-



There's only one problem: "life story rights" do not exist.<sup>7</sup> They have been referred to by entertainment industry insiders as a legal fiction,<sup>8</sup> a misnomer<sup>9</sup> and an urban myth.<sup>10</sup> No source of American law secures to individuals the exclusive right in the facts that comprise the narrative of their lives. Quite the contrary: copyright law explicitly reserves all facts, including the facts that make up life stories, to the public domain. Nor does trademark law prevent studios from freely making features based on true life facts, absent confusion about false endorsement or source of origin. Moreover, courts have generally interpreted the First Amendment's Speech Clause to bar any laws from restricting expressive speech based on its content (life stories or otherwise).<sup>11</sup>

There are state law tort theories that pose some threat of liability to studios that make unauthorized docudramas, but conceptually this liability, even if found, does not amount to a "life story right." That is, the *ex post* risk of tort liability is not the equivalent of, nor does it give rise to, an *ex ante* property right in the content of one's life narrative. And most of these causes of action pose only remote liability risks to studios willing to make

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quires that victims be notified when incarcerated felons profit from depictions of their crimes. According to press reports, Netflix complied with the law and paid funds owed to Sorokin into an escrow account while she was in prison. Baker, *supra*; Emma Tucker, *New York's 'Son of Sam' Law Invoked in German Heiress Fraud Scheme*, WALL ST. J. (Dec. 28, 2020), <https://www.wsj.com/articles/new-yorks-son-of-sam-law-invoked-in-german-heiress-fraud-scheme-11609167604>.

<sup>7</sup> See, e.g., Bob Tarrantino, *Life story rights: They don't exist, but you should still get them*, ENTERTAINMENT & MEDIA LAW SIGNAL, Dec. 1, 2020, <https://www.entertainmentmedialawsignal.com/life-story-rights-they-dont-exist-but-you-should-still-get-them/>; Eric Goldman, *The True Story About Life Story Rights*, UPCOUNSEL BLOG (2019), <https://www.upcounsel.com/blog/true-story-life-story-rights> ("The truth is that life story rights do not exist."). See also Emma Perot, *The Interaction of the Influences of Law, Contract, and Social Norms on the Commercialisation of Persona: A Comparative Empirical Study of The United Kingdom and the United States of America* (2020) (Ph.D. dissertation, King's College London) (similar views expressed by interview subjects).

<sup>8</sup> Perot, *supra* note 7, at 200 (quoting anonymous California interview subject).

<sup>9</sup> Anonymous Interview #8 at 2 (calling life story rights a misnomer); Anonymous Interview #5 at 4 ("[L]ife rights is one of the biggest misnomers in the entertainment industry").

<sup>10</sup> See Anonymous Interview #4 at 7 (calling the idea of life story rights "almost like this urban myth").

<sup>11</sup> E.g., *De Havilland v. FX Networks, LLC*, 230 Cal. Rptr. 3d 625, 630 (2018) ("Whether a person portrayed in one of these expressive works is a world-renowned film star—a living legend—or a person no one knows, she or he does not own history. Nor does she or he have the legal right to control, dictate, approve, disapprove, or veto the creator's portrayal of actual people.").

unauthorized docudramas. Defamation and invasion of privacy protect reputational and dignitary interests, but these theories require plaintiffs to overcome enough substantive hurdles that the risk of liability is low and cases involving successful recoveries are nearly nonexistent.<sup>12</sup> The right of publicity, which allows individuals to recover some of the value created by unauthorized uses of their identities, represents the most plausible basis of recovery for a subject incensed by an unlicensed feature based on their life, though even these claims have seldom been successful against docudrama productions.<sup>13</sup>

Life story rights thus present a puzzle: why do production companies pay considerable sums to acquire rights that don't exist? This article offers a solution to the puzzle. While life story deals do not convey a recognized property interest, like a copyright or trademark, they do establish a set of privately ordered contractual commitments that can be important in the production of works based on true stories. Life story rights, as the term is commonly used throughout the entertainment industry, emerge from acquisition contracts (and related option agreements) that generally embody four sets of related provisions:

- (1) the producer's authorization to use and adapt factual events concerning the subject,
- (2) the subject's release of the producer from liability for claims arising from the production, whether for defamation, violation of the right of publicity, or otherwise,
- (3) a prohibition against the subject's cooperation with any other producer on a similar project and
- (4) the producer's access to the subject for consultation and interviews, as well as a commitment to provide further information and/or documents, photographs and other artifacts.

In short, in exchange for a payment, the purchaser of life story rights obtains a contractual package containing an authorization, a release, exclusivity and access.

In this article, for the first time, we excavate the theoretical underpinnings of life story transactions and analyze the systemic implications of this longstanding entertainment industry practice. Our solution to the life story rights puzzle yields further descriptive insights. First, it contributes to the growing literature about the prevalence of norms-based regulation of property and business relationships. The practice of enforcing life story rights seems to be a product of such norms. While one would expect that these

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<sup>12</sup> See Sections I.C and I.D, *infra*.

<sup>13</sup> See Section I.B, *infra*.

agreements are occasionally breached or are at least the site of strategic behavior between competing studios, our interview subjects reported that industry actors exhibit near-perfect compliance with them, and reported that cases involving breach are vanishingly rare. Interview subjects suggested that the high rate of fidelity to these agreements was due to industry participants' aversion to sanctions and exclusion. By contrast, studios appear to acquire life story rights not due to customary pressures, but from cost-benefit analyses suggesting that they are justified (indeed, in some cases where they are not warranted, studios eschew them). This analysis reveals that both law and norms are at play in the domain of life story rights, and illustrates that the two can function as complementary rather than mutually exclusive forms of regulation.

Second, we show how the life story phenomenon connects to scholarly observations of modularization in transactional law. The bundling of contractual elements under the unitary label of life story rights exemplifies how a complex set of contractual arrangements can be simplified by the deployment of a modular approach. Henry Smith observes that the modularization of rights reduces information costs, as parties need only observe and comprehend the module, rather than its constituent elements, thereby facilitating transactions in modularized assets.<sup>14</sup> This account shows *why* life story rights took their distinctive form: as means to lower transaction costs, increase transactional efficiency and provide important signals to the market.

Finally, we explore why life story rights are acquired in some docudrama productions but not in others. For example, while Netflix took pains to acquire rights to Anna Sorokin's story for *Inventing Anna*, the producers of *The Social Network* (concerning Mark Zuckerberg and the founding of Facebook) and *The Crown* (concerning Queen Elizabeth II and the British royal family) did not. In interviews that we conducted with industry insiders, most conceded that life story rights are acquired in a majority, but not all, docudrama productions, with the percentage varying based on the type of production, producer and story.<sup>15</sup> We conclude that producers are

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<sup>14</sup> Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1708 (2012). See also Carol M. Rose, *Modularity, Modernist Property, and the Modern Architecture of Property*, 10 PROP. RIGHTS J. 69, 70-71 (2022) (noting such modularized architectures "save[ ] us all from spending a great deal of time figuring out what we can and cannot do vis-à-vis all kinds of resources").

<sup>15</sup> Anonymous Interview #4, follow-up email Oct. 27, 2022 (80-90%), Anonymous Interview #7, follow-up email Nov. 10, 2022 (70%), Anonymous Interview #10 ("more likely than not"), Anonymous Interview #11 (30-70%).

pragmatists who carefully assess both benefits and risks before deciding to acquire life story rights from the subject(s) of a particular production.<sup>16</sup>

Our analysis draws on a comprehensive review of the case law concerning life story rights, together with adjacent topics such as copyright, trademark, the right of publicity and right of privacy, as well as interviews that we conducted with experienced in-house counsel at television and motion picture production companies and law firm practitioners in the entertainment industry.<sup>17</sup>

The remainder of this article proceeds as follows: Part I summarizes existing U.S. law governing the production of works based on real persons and events. It begins with a review of First Amendment principles applicable to the relation and adaptation of factual events, then discusses in turn various doctrines that have been raised, mostly unsuccessfully, to attempt to control or limit the production of such works – copyright, right of publicity, right of privacy, defamation, and trademark. Part II summarizes the history and contours of life story transactions, including the types of productions for which life story rights are sought and the key contractual elements of life story rights transactions. Part III then explains the private ordering mechanisms that led to the emergence of life story deals and describes how they have enhanced transactional efficiency through reduced information costs, signaling and litigation avoidance.

## I. NO RIGHT TO ONE'S STORY

Life story deals are a familiar and longstanding practice of the entertainment industry. Yet, as we show in this Part, their mere existence is confounding because, as a matter of law, “life story rights” do not exist, and

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<sup>16</sup> See *Christian Simonds, When To Acquire Life Rights In Biographical Content Battle*, LAW360, Sep. 13, 2022 (outlining legal considerations favoring and disfavoring acquisition of life story rights).

<sup>17</sup> We conducted semi-structured interviews of 13 individuals using Zoom video conferencing. One or both of the authors conducted each interview, which lasted from approximately 30 to 60 minutes. All interviews were transcribed. The interview subjects included 8 entertainment attorneys in private practice, 4 in-house attorneys at major motion picture or television production studios, and one independent producer. Ten subjects were based in California, two in Utah and one in Japan (working for a U.S. studio). All subjects had at least ten years of experience in the entertainment industry and indicated that they had been personally involved in the drafting and negotiation of more than ten life story rights transactions.

there is no vested property interest in the facts that comprise one's life story.<sup>18</sup>

On the contrary, our constitutional tradition protects expressive speech regardless of subject matter. The First Amendment broadly prohibits states from enacting laws that abridge the freedom of speech.<sup>19</sup> Laws that target speech based on its communicative content—content-based restrictions—are presumptively unconstitutional and may be justified only if the restrictions are narrowly tailored to serve compelling state interests.<sup>20</sup> As such, the First Amendment creates a strong presumption favoring expressive speech, even in the face of otherwise applicable rights of publicity and privacy.<sup>21</sup> As one California appellate court recently explained in rejecting a legal challenge to an unauthorized docudrama,

Authors write books. Filmmakers make films. Playwrights craft plays. And television writers, directors, and producers create television shows and put them on the air—or, in these modern times, online. The First Amendment protects these expressive works and the free speech rights of their creators. Some of these works are fiction. Some are factual. And some are a combination of fact and fiction . . . Whether a person portrayed in one of these expressive works is a world-renowned film star—“a living legend”—or a person no one knows, she or he does not own history. Nor does she or he have the legal right to control, dictate, approve, disapprove, or veto the creator's portrayal of actual people.<sup>22</sup>

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<sup>18</sup> This is, of course, only one way of understanding what it may mean to have a life story right. We choose this framing because both the interview subjects we spoke to and the popular conversations we observed seemed to invoke the idea of life rights in this vested property sense. We discuss later how one may think of these agreements as creating, if not transferring, other kinds of rights. See *infra* Part II.

<sup>19</sup> *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

<sup>20</sup> *Id.*

<sup>21</sup> See *infra* Parts I.B and I.C. See also Robert C. Post & Jennifer E. Rothman, *The First Amendment and the Right(s) of Publicity*, 130 *YALE L.J.* 86, 150-51 (2020) (“The First Amendment requires that in public discourse the public be constitutionally entitled to discuss whatever public information comes to its attention, including the names and images of persons. It contradicts the constitutional function of public discourse to make speakers pay for this privilege.”).

<sup>22</sup> *De Havilland v. FX Networks LLC*, 21 Cal. App. 5th 845, 849-50 (2018) (action brought by actress Olivia de Havilland against FX Networks with respect to its docudrama miniseries *Feud: Bette and Joan* (2017). The series depicted the rivalry between film stars Joan Crawford and Bette Davis. An actress portraying de Havilland appeared in two fictionalized scenes spanning less than 17 minutes of the 392-minute miniseries).

Laws that could give rise to claims based on the production of an expressive work such as a docudrama are thus subject to strict scrutiny under the First Amendment.

But even though producers should be in the clear to make docudramas without significant legal hurdles, they often seek subjects' agreement before doing so. In this Part, we explore the paradoxical pervasiveness of life story rights, considering causes of action that have been used to challenge the production of dramatized versions of individual life stories. We show that while most of these theories range from marginal to completely unworkable, one—the right of publicity—has more purchase in doctrine and case law. Nevertheless, the propensity for litigation in Hollywood supports producers' acquisition of life story rights, if only as a prophylactic measure.<sup>23</sup>

#### A. Copyright

The events that make up our lives, whether salacious or mundane, enjoy no copyright protection. Copyright inheres in creative expression that an author generates, such as a novel, film, or musical composition.<sup>24</sup> Conversely, facts—mere data about the world that do not originate with any author—are not copyrightable.<sup>25</sup> Though researchers may expend significant effort to unearth previously unknown facts, this does not change matters—there is no “sweat of the brow” copyright conferred simply because one invested effort in producing a work that is not otherwise original.<sup>26</sup> Thus, when an author who laboriously gathered facts surrounding the destruction of the airship Hindenburg and developed theories surrounding the perpetrators' motives sued the producers of a film that relied on those facts, the Second Circuit held that “where, as here, the idea at issue is an interpretation of an historical event, our cases hold that such interpretations are not copyrightable as a matter of law . . . Such an historical interpretation, whether or not it originated with [the author], is not protected by his copyright and can be freely used by subsequent authors.”<sup>27</sup> Originality, not ef-

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<sup>23</sup> As one commentator notes, life story acquisitions are, to a large degree, done for “peace of mind.” Eriq Gardner, *Inside HBO's Lakers Headache*, PUCK NEWS, Apr. 25, 2022, <https://puck.news/when-tv-shows-lie-inside-hbos-lakers-headache/>.

<sup>24</sup> See 17 U.S.C. § 102(a).

<sup>25</sup> *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1368 (5th Cir. 1981) (“Obviously, a fact does not originate with the author of a book describing the fact. Neither does it originate with one who ‘discovers’ the fact.”).

<sup>26</sup> See *Feist Pubs., Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 352-54 (1991) (rejecting “sweat of the brow” copyright); *Miller*, 650 F.2d at 1371-72 (stressing that research itself is not copyrightable).

<sup>27</sup> *Hoehling v. Universal City Studios*, 618 F.2d 972 (2d Cir. 1980).

fort, is “the *sine qua non* of copyright.”<sup>28</sup> Because the details of all life stories are facts, they lie well outside copyright’s domain.<sup>29</sup> So while a docudrama may make for a gripping viewing experience, and may contain audiovisual expression that merits copyright protection, any true facts that comprise the core narrative of that docudrama remain part of the public domain, free for all to use.<sup>30</sup>

The lack of copyright in facts does not, however, necessarily dissuade aggrieved parties from threatening or initiating legal action. For example, the estate of the author of the 1983 magazine article that inspired the 1986 film *Top Gun* recently sued the producers of the 2022 blockbuster sequel *Top Gun: Maverick*.<sup>31</sup> That article factually profiled Yogi and Possum, two brash, young F-14 fighter pilots at the Navy Fighter Weapons School known as Top Gun. To our knowledge, the sequel used no original lines, or even characters, from that article, thereby eliminating the typical grounds for a claim of copyright infringement. But because the rights acquired by the producers of the 1986 film apparently terminated in 2019, before production of *Top Gun: Maverick* was completed, the successors in title to the author’s copyright sued the producers of the sequel for copyright infringement. That case is currently pending and could lead to a monetary settlement or, at a minimum, substantial attorneys’ fees, despite its tenuous copyright argument.<sup>32</sup>

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<sup>28</sup> *Feist*, 499 U.S. at 345.

<sup>29</sup> See, generally, Jacqui Gold Grunfeld, *Docudramas: The Legality of Producing Fact-Based Dramas – What Every Producer’s Attorney Should Know*, 14 HASTINGS COMM. & ENT. L.J. 483, 511-15 (1991) (analyzing copyright issues in docudramas).

<sup>30</sup> E.g., *Miller*, 650 F.2d 1365 (not infringement for studio to make film about victim’s kidnapping without permission from her or from author of news articles about the incident); cf. *Childress v. Taylor*, 945 F.2d 500 (2d Cir. 1991) (purported co-author acquired no copyright interest in script about historical person by accumulating information about her).

<sup>31</sup> *Yonay v. Paramount Pictures Corp.*, Case No. 22-CV-03846 (C.D. Cal., filed Jun 6, 2022). Ehud Yonay’s article “Top Guns” appeared in the May 1983 issue of *California* magazine.

<sup>32</sup> A similar copyright claim was made under English law in 1994, when Sir Stephen Spender sued the publisher of a novel that was allegedly based on Spender’s autobiography, published in 1951. The case settled with the publisher’s agreement to withdraw the novel from the market. See David Streitfeld, *Publisher Kills Novel over Pilfered Plot*, WASH. POST, Feb. 17, 1994, <https://www.washingtonpost.com/archive/politics/1994/02/17/publisher-kills-novel-over-pilfered-plot/765ca239-abc9-40c8-9ea9-b9403f97af8b/> (the authors thank Professor Michael Madison for bringing this episode to our attention).

### B. Right of Publicity

The right of publicity is a state-law cause of action that enables individuals to recover a share of the economic value created when their identities are used without consent.<sup>33</sup> Thus, unlike defamation and invasion of privacy, and like copyright and trademark, this cause of action seeks predominately to advance a plaintiff's financial rather than dignitary interests.<sup>34</sup> Thus, though the right of publicity is not an IP right, *per se*,<sup>35</sup> we consider it to be IP-adjacent.

The right of publicity is notoriously fragmented. It is broadly construed in many jurisdictions, more narrowly in others, and some states have no right of publicity at all. Some states extend the right of publicity to all people, while others limit it to public figures.<sup>36</sup> Amid this disarray, however, one thing is clear: attempts are being made to expand the right of publicity further.<sup>37</sup> It was once used almost exclusively to prevent unauthorized uses of plaintiffs' personae in commercial settings—hence Johnny Carson's successful right of publicity claim against a company that sought to brand a portable toilet with his famous tagline "Here's Johnny!",<sup>38</sup> and singer Bette Midler's successful publicity claim against Ford Motor Company, which used a voice impersonator singing one of her most famous songs in a car commercial.<sup>39</sup> In its more expansive iterations, rights of publicity extend not only to unauthorized uses of plaintiffs' identities in consumer

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<sup>33</sup> See Restatement (Third) of Unfair Competition § 46 (Am. L. Inst. 1995).

<sup>34</sup> This was not always the case. As Jennifer Rothman has illustrated, the right of publicity and the right of privacy share a common origin and used to vindicate similar interests. The emergence of a distinct right of publicity giving individuals a property-like interest in their personae emerged only when the two causes of action diverged during the mid-to-late twentieth century. JENNIFER E. ROTHMAN, *THE RIGHT OF PUBLICITY* 11-44 (2018) (showing the shared origin of these causes of action in right of privacy law of the early twentieth century).

<sup>35</sup> See *Ratermann v. Pierre Fabre USA, Inc.*, 2023 WL 199533 (S.D.N.Y. 2023) (claims under the New York Civil Right Law (right of publicity) "sound in privacy, not intellectual property" for purposes of the exemption from liability under Section 230 of the Copyright Act).

<sup>36</sup> See ROTHMAN, *supra* note 34, at 96-98 (describing the patchwork of U.S. rights of publicity as "the state(s) of disarray").

<sup>37</sup> *Id.* at 87 (explaining that after the Supreme Court's decision in *U.S. v. Zacchini*, "the right of publicity has proliferated across the United States and increasingly across the globe, and expanded in its breadth").

<sup>38</sup> *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983).

<sup>39</sup> *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988).



products, but also in expressive works.<sup>40</sup> And while the right of publicity conceptually remains a tort, courts have begun to imbue it with property-like characteristics such as transferability and heritability.<sup>41</sup>

As the breadth of the right of publicity has grown, plaintiffs have increasingly sought to invoke it to recover a share of the value generated by nonconsensual uses of their identities in film and other creative media. For the most part, these suits have failed on First Amendment grounds.<sup>42</sup> Films and television shows are generally considered to be expressive speech that merits greater protection under the First Amendment than products and advertising.<sup>43</sup> The Ninth Circuit's recent rejection of a right of publicity claim against the producers of the film *The Hurt Locker* clearly articulates this point. The film, the court held, "is speech that is fully protected by the First Amendment, which safeguards the storytellers and artists who take the raw materials of life—including the stories of real individuals, ordinary or extraordinary—and transform them into art, be it articles, books, movies, or plays. If California's right of publicity law applies in this case, it is simply a content-based speech restriction. As such, it is presumptively unconstitutional[.]"<sup>44</sup>

While the run of cases has been against plaintiffs who have raised right of publicity claims for unauthorized docudramas, there are notable exceptions. Olivia de Havilland lost the appeal of her much-publicized lawsuit against FX Studios for its unflattering portrayal of her in the docudrama *Feud: Bette and Joan*,<sup>45</sup> but originally prevailed at the trial court.<sup>46</sup> And in *Doe v. TCI Cablevision*, NHL tough guy Tony Twist won his right of publicity

<sup>40</sup> Consider, for example, the Restatement's broad framing of the right of publicity as arising whenever someone "appropriates the commercial value of a person's identity by using without consent a person's name, likeness, or other indicia for purposes of trade[.]" RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (AM. L. INST. 1995). See also ROTHMAN, *supra* note 34, at 3 (observing that many states' rights of publicity appear to extend to "virtually any use of a person's identity, including use in news, movies, books, video games, and political campaigns.").

<sup>41</sup> In California, for example, the right of publicity can be transferred, inherited by the beneficiaries of the original subject's estate, and lasts for 70 years after the subject's death. CAL. CIV. CODE § 3344.1(b) (2022); *but see* James v. Delilah Films, Inc., 544 N.Y.S.2d 447, 451 (N.Y. Sup. Ct. 1989) (in New York, right of publicity does not survive original subject).

<sup>42</sup> See, e.g., *Sarver v. Chartier*, 813 F.3d 891 (9th Cir. 2016) (denying right of publicity claim brought with respect to film *The Hurt Locker* on First Amendment grounds).

<sup>43</sup> See Post & Rothman, *supra* note 21.

<sup>44</sup> *Sarver*, 813 F.3d at 905-06; see also *De Havilland v. FX Networks, LLC*, 230 Cal. Rptr. 3d 625, 630 (2018).

<sup>45</sup> *De Havilland*, 230 Cal. Rptr. 3d. at 630.

suit over his portrayal as a heavily fictionalized villain in the “Spawn” comic book series.<sup>47</sup>

Different courts have come to very different conclusions concerning the right of publicity and fictionalization due to the tension between the plaintiffs’ interest in their identity and the defendants’ First Amendment rights. The *Sarver* and appellate *de Havilland* courts situated the plaintiffs’ right of publicity claims as content-based speech restrictions, which unsurprisingly led to the defendants prevailing. But the *de Havilland* trial court asked a question less favorable to the studios—was the use of the subject’s identity transformative?<sup>48</sup>—which led to a preliminary victory for the plaintiff.<sup>49</sup> And the Missouri Supreme Court in *TCI Cablevision* asked a more plaintiff-friendly question still—whether the use of the defendant’s identity was predominately commercial or expressive<sup>50</sup>—eventually resulting in an eight-figure judgment for the plaintiff on remand. Given this doctrinal variance, with its outcome-determinative implications, studios cannot be confident about what law will apply, let alone what the outcome may be.

In light of the foregoing, our interview subjects indicated that when thinking about the possible legal risks associated with a docudrama, they weigh the right of publicity quite seriously.<sup>51</sup> This concern reflects an awareness of the expanding doctrinal footprint of this cause of action. Second, and related, the elements of a right of publicity cause of action present a low threshold to plaintiffs as compared to defamation and invasion of privacy claims.<sup>52</sup> In a publicity claim, it is generally not necessary to show that the defendant harmed the plaintiff’s reputation or engaged in conduct that was “objectively outrageous,” but only that an unauthorized use was made

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<sup>46</sup> *De Havilland v. FX Networks, LLC*, No. BC667011, 2017 WL 4682951 (2017) (denying defendant’s anti-SLAPP motion to strike complaint).

<sup>47</sup> *Doe v. TCI Cablevision*, 110 S.W.3d 363 (Mo. 2003).

<sup>48</sup> This is the leading test used in California to mediate between right of publicity and free speech. See *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.2d 797, 807-11 (Cal. 2001). The appeals court in *de Havilland* held that the test did not apply to docudramas because they were inherently transformative.

<sup>49</sup> The trial court did not rule for *de Havilland* after a trial on the merits, but rather held that her complaint survived the defendant’s motion to strike it under the California anti-SLAPP statute.

<sup>50</sup> *TCI Cablevision*, 110 S.W.3d at 374.

<sup>51</sup> *E.g.*, Anonymous Interview #3 at 11 (discussing the pitfalls of the right of publicity for docudramas and identifying it as the primary concern that motivated execution of life story rights deals).

<sup>52</sup> Invasion of privacy suits are hamstrung in particular by the showing that the defendant’s conduct is “unreasonably offensive.” We catalog these and other doctrinal limits in *supra* Parts I.C and I.D.

of the plaintiff's persona. Finally, and perhaps most importantly, while courts have usually rejected plaintiffs' right of publicity claims in the context of creative productions, there are enough counterexamples to give pause to risk-averse studios, especially in light of the doctrinal uncertainty plaguing the free speech/right of publicity interface.

### C. Public Disclosure of Private Facts

Among the several iterations of privacy torts familiarly outlined by Dean Prosser,<sup>53</sup> the cause of action for public disclosure of private facts has been invoked periodically by subjects of unauthorized docudramas. Such an invasion of privacy is actionable when a defendant makes public some fact about the plaintiff that was formerly private in a manner that would be highly offensive to a reasonable person.<sup>54</sup> This tort does not arise where the disclosed fact is of legitimate public concern.<sup>55</sup> Examples of violations include making public facts about a plaintiff's physical condition or sexual preferences purely for purposes of providing titillation or shock value.<sup>56</sup>

Unauthorized docudramas may expose studios to some risk from this tort. A docudrama is fictionalized but includes substantial true facts about its subjects. While many of those facts are likely to be in the public record, some may be private facts that a studio acquires through legitimate means such as interviews with the subject's friends and family. If those facts are embarrassing to the subject and not in themselves of public interest, the subject could plausibly sue the studio for the disclosure of private facts.

Consider an example: a television studio is making a dramatized feature based on a story from a local paper about an otherwise obscure man's battle with cancer. The production team interviews the man's family and friends to learn more about his life, and in one such interview, the subject's

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<sup>53</sup> Prosser identified four iterations of the right of privacy: intrusion on seclusion; appropriation; publicizing private facts; and false light. RESTATEMENT (SECOND) OF TORTS §§ 652A–652E (1976). Appropriation has developed into the right of publicity, which we discuss above. We address false light below.

<sup>54</sup> *Id.* § 652D. Not all jurisdictions recognize this tort. *See, e.g.,* *Freihofer v. Hearst Corp.*, 480 N.E.2d 349 (N.Y. 1985) (declining to recognize a common-law cause of action for public disclosure of private facts); *Hall v. Post*, 372 S.E.2d 711 (1988) (same).

<sup>55</sup> *Id.*

<sup>56</sup> *E.g.,* *Diaz v. Oakland Tribune, Inc.*, 139 Cal.App.3d 118 (1983) (disclosing student's transsexual identity held actionable because unrelated to news story); *Catsouras v. Department of Cal. Highway Patrol*, 181 Cal. App. 4th 856, 874 (publicizing pictures of decapitated woman held actionable because it was done so only to appeal to a "morbid or sensational interest").

ex-spouse volunteers explicit information about his sexual proclivities. While this information may have little to do with the man's brave fight against disease, the studio decides to include the prurient revelations solely to attract viewers. This kind of gratuitous exposure of embarrassing, highly personal information unrelated to the public interest in the subject would likely be actionable as a tortious disclosure of private facts.<sup>57</sup>

While this risk of liability theoretically exists for unauthorized docudramas, in practical terms it remains remote. One reason is evident from the implausible character of the foregoing example. Docudramas almost always seek to pursue a coherent narrative and derive appeal from the subject's story. If that story is not compelling in itself, the studio will not make a financial commitment to the project in the first place. Adding unrelated facts for shock or titillation is thus rare in the genre.

But what about otherwise private facts that are related to the subject's story, and are also embarrassing? For example, what if the hypothetical docudrama showed scenes in which the subject vomited on himself after undergoing chemotherapy? This scene would probably not trigger liability due to courts' extremely broad interpretation of "legitimate public concern." This latter category is not limited to public figures, but extends to otherwise private figures who are swept up in public events.<sup>58</sup> In *Cox Broadcasting Corp. v. Cohn*, the Supreme Court held that a television station's disclosure of the identity of a rape and murder victim did not violate her father's right of privacy because the crime was a newsworthy event.<sup>59</sup> "Legitimate public concern" need not even involve public events. In *Haynes v. Alfred A. Knopf, Inc.*, for example, Judge Posner opined that disclosing intimate (though not explicit) details of the lives of several working-class people did not violate their rights of privacy because those details were germane to

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<sup>57</sup> The defendant's motive matters. Here, we are assuming that the fact was disclosed only for prurient appeal. But if the producers sincerely thought that it was related to the subject's story, that might make the fact part of the feature's "public concern," and hence not actionable. See, e.g., *Sipple v. Chronicle Publ'g Co.*, 154 Cal.App.3d 118 (1984) (holding that a newspaper's disclosure of the sexual orientation of an otherwise private citizen who helped thwart a presidential assassination was newsworthy because the newspaper reported the fact because it thought knowing the sexual orientation of the plaintiff would help counter negative stereotypes about gay people).

<sup>58</sup> E.g., *Shulman v. Group W Prods., Inc.*, 955 P.2d 469 (1998) (holding newspaper was not liable for showing pictures of auto accident victims who were not public figures because the accident was newsworthy).

<sup>59</sup> 420 U.S. 469, 492-96 (1975).

the narrative work of sociology in which they appeared.<sup>60</sup> And because studios choose to develop docudramas because they leverage well-known public narratives or because they tell new stories that will have broad audiences, it is unlikely that a court would regard any legitimate docudrama as not being of public concern.

*Cox* and *Haynes* signal the narrowing of the tort of public disclosure of private facts. While its domain originally extended to telling any story that might be offensive to its subject, now this tort can arise only where a defendant gratuitously publicizes a highly intimate and embarrassing detail that was not before widely known and that is unrelated to the public interest. Because the aim of docudramas is to tell stories that are currently salient and/or generate substantial interest, the chances that an unauthorized docudrama will have liability under this privacy tort are small.

#### D. Defamation

Defamation imposes liability on defendants who make false public statements that cause plaintiffs harm. Unlike the public disclosure of private facts, defamation centers on falsehoods rather than true but embarrassing facts. Defamation remedies seek to vindicate injury both to the defendant's dignity as well as to her economic reputational interests.<sup>61</sup> In order to state a claim for defamation, a plaintiff must show that the defendant made a false statement about the plaintiff to some third party or the public and that the statement caused the plaintiff measurable harm.<sup>62</sup> If the plaintiff is not a public figure, they need only show that the defendant made the false statement negligently.<sup>63</sup> If they are a public figure, they must show that the defendant made the statement knowing of, or with reckless disregard for, its falsehood.<sup>64</sup>

Because docudramas often fictionalize the true stories on which they are based, they relate the kind of falsehoods that may give rise to defamation liability. Imagine, for example, that a docudrama purports to tell the story of a famous athlete but fictionalizes the story to invent an ongoing struggle with drug addiction in order to increase the feature's dramatic impact. The

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<sup>60</sup> 8 F.3d 1222, 1233 (7th Cir. 1993) ("No detail in the book claimed to violate the Hayneses' privacy is not germane to the story that the author wanted to tell[.]").

<sup>61</sup> DAN B. DOBBS, ET AL., HORNBOOK ON TORTS (2d ed. 2011) 931-32 (discussing and contrasting economic and dignitary function of defamation law).

<sup>62</sup> RESTATEMENT (SECOND) TORTS § 558 (1977); e.g., *Davis v. Boeheim*, 24 N.Y.3d 262 (N.Y. 2014).

<sup>63</sup> *Id.* § 580A (1977).

<sup>64</sup> *Id.* § 580B (1977).

athlete could plausibly argue that the film conveyed a falsehood about him (the drug addiction) to third parties (the film's audience) and caused him harm (reputational costs, lost endorsements, etc.).<sup>65</sup> Because the athlete is a public figure, he must prove either that the studio knowingly or recklessly propounded these falsehoods, but since we are assuming that the producers intentionally invented this story line to make the story more enticing, that standard would be met. This hypothetical is not implausible. Recently, chess grandmaster Nona Gaprindashvili sued Netflix, arguing that its brief depiction of her in *The Queen's Gambit* as a chess competitor who had never played a male opponent was defamatory.<sup>66</sup> The district court denied Netflix's motion to dismiss, concluding that the statement was objectively false (since Gaprindashvili had in fact played and beaten many of the world's top male chess players) and injurious to her reputation (because it cast aspersions on her skill and status as a professional chess player).<sup>67</sup>

One hurdle that will complicate most docudrama subjects' defamation claims is the heightened "actual malice" standard for defamation that applies when the subject is a public figure.<sup>68</sup> This higher bar is intended to mediate between the free speech interests at play when speaking about a matter of public import and the reputational interests of the subject. What it means in practice, though, is that if a plaintiff is reasonably well known, they cannot state a defamation cause of action unless they can show that the producer acted with knowledge of, or reckless indifference to, the falsity of the statement. Plaintiffs have generally found this standard difficult to meet.<sup>69</sup> But it is not impossible, especially in the context of docudramas where screenwriters often consciously invent facts they know to be untrue in

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<sup>65</sup> *Cf., e.g.,* Bindrim v. Mitchell, 92 Cal.App.3d 61 (Cal. App. 1979) (finding a book publisher liable for defamation where it released a novel portraying the therapist subject as using vulgar language in sessions and making sexual advances to clients).

<sup>66</sup> Gaprindashvili v. Netflix, Inc., 2022 WL 363537 (C.D. Cal. Jan. 27, 2022). ("The Queen's Gambit" is a fictional feature, not a docudrama, that is based on a novel. But it refers to many actual chess players from the mid-late twentieth century, and those depictions can be the subject of defamation liability regardless of whether they are in docudramas or pure dramas.) *See id.* at \*5 ("[T]he fact that the Series is a fictional work does not insulate Netflix from liability from defamation if all the elements of defamation are present.").

<sup>67</sup> *Id.* at \*6-8.

<sup>68</sup> *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964) (establishing the "actual malice" standard in defamation cases for public figures).

<sup>69</sup> *See Philadelphia Newspapers v. Hepps*, 465 U.S. 767 (1986) (holding that the Constitution requires the scales to be tipped against private figure plaintiffs in defamation matters).

order to enhance the story. This is precisely what happened in the *Queen's Gambit* case: the screenwriters concocted the detail that Gaprindashvili had not played male opponents, despite knowing from the book on which their script was based that this was not true.<sup>70</sup> On this basis, the court held that her defamation complaint survived Netflix's motion to dismiss even when applying the actual malice standard.<sup>71</sup>

Since the nature of docudramas is the fictionalization of subjects' lives to make them more entertaining to the viewing public, depicted subjects will be able to state plausible defamation cases if fictionalization portrays them negatively. For this reason, the industry professionals we spoke with highlighted defamation, along with the right of publicity, as one of the chief sources of liability that led them to acquire life story rights from their subjects.

#### E. False light

It is also worth considering false light. This common law cause of action is enumerated as part of Prosser's taxonomy of privacy torts, though, like defamation, it vindicates the plaintiff's interest in being depicted truthfully.<sup>72</sup> False light is, however, unlike defamation in several key ways. First, the information publicized by the defendant need not be false; it can be accurate but misleading.<sup>73</sup> Second, the defendant's statement need not be defamatory, but only "highly offensive to a reasonable person."<sup>74</sup> Third, the defendant must have known of the false light in which they were placing the plaintiff, or acted in reckless disregard of it.<sup>75</sup>

These elements of false light tend to offer plaintiffs a lower threshold than defamation. Plaintiffs need not show that they suffered reputational harm, only that the facts asserted by the defendant would cause a reasonable person psychological harm. Plaintiffs may thus state false light claims even where defamation is unavailable. A film portrayal could simply distort a subject's life or embarrass them in a way that triggered false-light liability even if it fell short of inflicting the kind of reputational harm required for

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<sup>70</sup> *Id.* at \*8-9.

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

<sup>72</sup> See Haynes, 8 F.3d at 1230 (observing that both defamation and false light protect "the interest in being represented truthfully to the world").

<sup>73</sup> See e.g., *Uhl v. Columbia Broad. Sys., Inc.*, 476 F. Supp. 1134 (W.D. Pa. 1979) (plaintiff prevailed in a false light claim against a television station when the station spliced together actual footage of the plaintiff but did so to make it seem as though he shot geese on the ground rather than in flight).

<sup>74</sup> Restatement (Second) of Torts § 652E (1977).

<sup>75</sup> *Id.*

defamation. Hall of Fame baseball pitcher Warren Spahn, for example, stated a false light claim against the publisher of a book that, in Spahn's view, portrayed him in an excessively *positive* light. A court eventually held that Spahn stated a valid claim for false light because the hagiographic portrayal was objectively offensive, even though it cost the pitcher nothing reputationally.<sup>76</sup>

While plaintiffs likely have an easier time making a false light claim than a defamation claim based on a docudrama, numerous roadblocks remain. Defendants cannot be held liable unless they acted with knowledge or reckless indifference to the false light in which they placed the plaintiff.<sup>77</sup> This is a high bar but not an insurmountable one, especially because—as with defamation—docudramas as a matter of course involve conscious fictionalization of the subject's life. Second, and more troublesome to plaintiffs, false light typically applies only to aspects of a plaintiff's private life.<sup>78</sup> So to the extent that most docudramas involve details that have already been made public, this cause of action will be categorically unavailable.<sup>79</sup> Finally, the false light tort is falling into desuetude. Many jurisdictions have ceased to recognize it or never did,<sup>80</sup> often finding its differences with defamation too slender to warrant a separate cause of action. The most recent Restatement of Torts, for example, does not even mention false light.

The domain of the false light tort has shrunk enough that it is not a meaningful threat of liability to makers of unauthorized docudramas as compared with the right of publicity or defamation. It cannot be wholly dismissed, though. Where jurisdictions continue to recognize it, and where the facts at issue relate to the subject's personal life, it remains a plausible cause of action.<sup>81</sup>

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<sup>76</sup> See *Spahn v. Julian Messner*, 18 N.Y.2d 324, 329 (N.Y. 1967) (upholding false light cause of action against publisher for book that distorted details of baseball player's life).

<sup>77</sup> See *Time, Inc. v. Hill*, 385 U.S. 374, 387 (1967) (articulating "actual malice" standard in false light case).

<sup>78</sup> See *Patton v. Royal Indus., Inc.*, 263 Cal. App. 2d 760, 768 (Cal. App. 1968) ("[F]alse light is a division of invasion of privacy tort, the claim must relate to the plaintiff's interest in privacy, and hence cannot involve matters, however offensively misrepresented to the public, which are in essence "public" themselves.").

<sup>79</sup> See, e.g., *Gaprindashvili*, 2022 WL 363537 at \*4 (dismissing false light claim as a matter of law on this basis).

<sup>80</sup> E.g., *Denver Publ'g Co. v. Bueno*, 54 P.3d 893 (Colo. 2002) (rejecting the false light tort as a common-law cause of action); *Cain v. Hearst Corp.*, 878 S.W.2d 577, 579 (Tex. 1994); *Costanza v. Seinfeld*, 279 A.F.2d 255 (N.Y. App. Div. 2001)

<sup>81</sup> For example, false light was among the causes of action that survived the initial motion to dismiss in Olivia de Havilland's lawsuit against FX, along with



### F. Trademark

Trademarks generally indicate the source of a product or service to consumers. Well-known personalities can acquire trademark rights in their names and personae when the public associates them with particular goods or services (e.g., Jack Nicklaus golfing attire and accessories).<sup>82</sup> Likewise, goods or services that use the name or likeness of a well-known personality, or which imply that such a person has endorsed the good or service, can be liable under trademark theories.<sup>83</sup> This being said, First Amendment considerations impact the analysis of trademark claims when applied to expressive works, just as they do in the other types of claims discussed above.

Courts have decided relatively few cases involving the assertion of trademark rights against fictionalized dramas. The best known of these involved a fictional film about two Italian dancers who become known as “Ginger and Fred,” after the legendary American dancing team of Fred Astaire and Ginger Rogers. Following the film’s U.S. release, Rogers sued the producers for violation of her right of publicity, defamation, false light invasion of privacy and on a trademark-based theory for creating a false impression that she endorsed the film by virtue of its title.<sup>84</sup> In rejecting Rogers’s trademark claim, the court held that the title “Ginger and Fred” bore a sufficient relationship to the artistic content of the film that its use was justified, observing that “to the extent that there is a risk that the title will mislead some consumers as to what the work is about, that risk is outweighed by the danger that suppressing an artistically relevant though ambiguous title will unduly restrict expression.”<sup>85</sup>

### G. Conclusion

Despite the ubiquity of “life-rights” deals, industry insiders dismiss the notion of life rights as a legal fiction and an urban legend. This Part has given substantive heft to this instinct, showing that wherever one looks in the law—from copyright to trademark, rights of privacy to rights of public-

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right of publicity and defamation. *Havilland, DBE v. FX Networks*, 2017 WL 4682951 (Cal. App. Supp. Sept. 29, 2017), \*2-9.

<sup>82</sup> In a recent article, Jennifer Rothman argues that trademark law also serves more directly to protect individual personality and persona. Jennifer E. Rothman, *Navigating the Identity Thicket: Trademark’s Lost Theory of Personality, The Right of Publicity, and Preemption*, 135 HARV. L. REV. 1271 (2022).

<sup>83</sup> *Id.*

<sup>84</sup> *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989).

<sup>85</sup> *Id.* at 1001.

ity—there is no legal theory that gives individuals ownership of the facts that comprise their lives. So why do production companies regularly pay significant sums to secure deals for rights that don't exist? This is the puzzle that we address in Part II.

## II. SOLVING THE LIFE STORY PUZZLE

If there is no legal right to one's life story, why do studios often pay to acquire such rights? In this Part, we examine this puzzle. Life story rights are not recognized property rights, but as something else entirely. Life story deals comprise a bundle of semi-standardized rights packaged together under a common label. This Part discusses how and when life story rights emerged as tradable commodities in the entertainment industry, and what a life story acquisition today generally entails.

### A. History of Docudramas and Life Story Rights

The dramatization of real-life people and events has been a staple of dramatic practice for centuries.<sup>86</sup> William Shakespeare's "history plays" are hardly historical, even by sixteenth century standards, yet their rich characters and text are far more memorable than renditions of the same events by contemporary historical scribes.<sup>87</sup> Many of the earliest moving picture newsreels from the late nineteenth and early twentieth centuries involved recreated or dramatized versions of battles and other recent events that could not practically be captured on film as they were occurring.<sup>88</sup>

New York's 1903 Civil Rights Law<sup>89</sup> was the first indication that the producers of such dramatized works, as opposed to documentary or news productions, might require the consent of the individuals that they depicted. The law, for the first time, expressly prohibited the use of an individual's "name, portrait or picture" in trade without that person's prior

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<sup>86</sup> John Aquino traces the first attempts to "present dramas based on contemporary events" to a Greek play written in 492 B.C. JOHN T. AQUINO, *TRUTH AND LIVES ON FILM: THE LEGAL PROBLEMS OF DEPICTING REAL PERSON AND EVENTS IN A FICTIONAL MEDIUM* 11 (2d ed. 2022).

<sup>87</sup> See IRVING RIBNER, *THE ENGLISH HISTORY PLAY IN THE AGE OF SHAKESPEARE* 12 (2005 Routledge ed., first published 1957) ("In the history play the dramatic and the historical intentions are inseparable. The dramatist's first objective is to entertain a group of people in a theatre").

<sup>88</sup> See Hoffer & Nelson, *supra* note 3, at 22, John Corner, *British TV Drama: Origins and Developments* in ROSENTHAL, ED., *supra* note 3, 38-39.

<sup>89</sup> Civil Rights Law, NY Consol. Laws, §50 c.6 (1903).

written consent.<sup>90</sup> Numerous early actions under the New York statute involved unauthorized reproductions of photographic images of individuals, including in motion pictures.<sup>91</sup> Some of these cases indicate that written consents were obtained from individuals in cases involving motion pictures, suggesting an early precursor today's life story deals.<sup>92</sup> However, it was not until the 1913 case *Binns v. Vitagraph Co. of America*<sup>93</sup> that a U.S. court formally considered an individual's right to bar an actor's depiction of him in a film.

John R. ("Jack") Binns was the wireless telegraph operator on the steamship *Republic* when it collided with another vessel in 1909.<sup>94</sup> Thanks to Binns's quick dispatch of the telegraphed distress code "C.Q.D.," another ship came to the rescue and saved the passengers and crew of the *Republic*. Shortly after this newsworthy event, Vitagraph produced a short film titled "C.Q.D. or Saved by the Wireless; A True Story of the Wreck of the *Republic*." In the film, Vitagraph staged scenes using actors and sets constructed to resemble parts of the ship.<sup>95</sup> Binns sued to enjoin distribution of the film under the New York Civil Rights Law. In ruling for Binns, the court reasoned that, unlike a newsreel, Vitagraph used an actor portraying Binns "to amuse those who paid to be entertained."<sup>96</sup> The statute was clear that such uses in trade, without the prior written consent of the subject, were prohibited.<sup>97</sup>

Lawsuits like the one brought in *Binns* raised a cautionary flag among motion picture producers and caused them to begin to seek permission from real life subjects before making films about them. It was not until World

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<sup>90</sup> Prior to the enactment of the Civil Rights Law in 1903, the right of privacy in New York was found not to prohibit the use of an individual's likeness in trade. See *Roberson v. Rochester Folding Box Co.*, 171 NY 538 (N.Y. 1902) (denying recovery for the unauthorized use of an individual's photograph on a flour advertisement). See also ROTHMAN, *supra* note 34, at 22-25 (discussing case and its impact on NY legislation).

<sup>91</sup> See Louis D. Frohlich & Charles Schwartz, *The Law of Motion Pictures, Including the Law of the Theatre* 274-78 (1918) (collecting cases), Rothman, *supra* note 34 at 31-35.

<sup>92</sup> See, e.g., *Ford v. Heaney* 170 App. Div. 979 (N.Y. App. 1910) (reproduced in FROHLICH & SCHWARTZ, *supra* note 91, at 275-76) (written consent obtained but expired after one year).

<sup>93</sup> *Binns* 103 N.E. 1108 (N.Y. App. 1913).

<sup>94</sup> *Id.* at 1109.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 1111.

<sup>97</sup> *Id.* at 1109.

War II, however, that the docudrama format truly came into its own. As explained by John Corner,

the central idea was to take a documentary theme (the submarine service, for example, or the nightly bombing raids of the Royal Air Force) and treat this by “particularizing” it around a story line with characters, which could be given an intimate rendering using the depictive methods of feature fiction. The result mixed informational throughput with narrative satisfaction, allowing for empathy with the main figures of portrayal, whose experiences and whose personal qualities were projected with far greater intensity and focus than more conventional documentary formats could have achieved.<sup>98</sup>

The growing popularity of docudramas in the United States led to an increasing awareness of the need for contractual consents from their subjects. As noted above, the 1903 New York Civil Rights Law required a producer to obtain consent to use an individual’s “name, portrait or picture.” It was not long, however, before motion picture producers began, in addition to name and image permissions, to acquire rights to events comprising individuals’ “life stories.”

The earliest assignment of life story rights for a film that we have identified was made by Sergeant Alvin C. York, one of the most famous American heroes of World War I.<sup>99</sup> In 1919, film producer Jesse Lasky saw the potential for a film focusing on the war hero. But when Lasky offered to buy York’s story, the soldier is reported to have replied, “My life is not for sale.”<sup>100</sup> After a series of failed overtures by Lasky, York finally agreed in 1940 to sell the motion picture rights to his life story for \$50,000.<sup>101</sup> The

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<sup>98</sup> Corner, *supra* note 88, at 35, 36. In addition to these aesthetic considerations, docudramas were also cheaper and more practical to produce than news footage that required filming on location, often in places with restricted access. *See id.* at 37.

<sup>99</sup> *See* PAT SILVER-LASKY, HOLLYWOOD ROYALTY: A FAMILY IN FILMS (2017) (“This American soldier unbelievably, and practically unassisted, had wiped out a machine-gun battalion in the Argonne Forest in north-eastern France, and with just twenty-eight bullets in his rifle, had killed twenty-eight German soldiers, captured 132 more, and had taken possession of thirty-five machine guns. As war heroes went, nobody could top Sergeant York.”).

<sup>100</sup> SILVER-LASKEY, *supra* note 99. *See also* Todd McCarthy, *The Making of Howard Hawks ‘Sergeant York,’* New Yorker, Jan. 9, 2017.

<sup>101</sup> *See* Lasky v. Commissioner of Internal Revenue, 22 T.C. 13, 14 (1954). In addition to the rights to York’s life story, Lasky obtained motion picture rights to three books about York: SAM K. COWAN, SERGEANT YORK AND HIS PEOPLE (1922), TOM SKEYKILL, SERGEANT YORK: LAST OF THE LONG HUNTERS (1930), and ALVIN C. YORK, SERGEANT YORK: HIS OWN LIFE STORY AND WAR DIARY (Tom Skeykill, ed., 1928). *See* McCarthy, *supra* note 100.

film *Sergeant York* became the top-grossing film of 1941 (topping even *Citizen Kane*) and earned actor Gary Cooper an Oscar.<sup>102</sup> Though York did not actually agree to sell his life story rights until 1940, it is clear that Lasky, a prominent Hollywood producer, perceived such acquisitions as necessary, or at least desirable, when he first approached York in 1919.

The expansion of television to homes throughout the United States in the 1950s led to an increasing number of televised docudrama movies and miniseries based on true stories.<sup>103</sup> Yet it appears that life story rights were still acquired predominantly in the motion picture industry, most likely for budgetary reasons. Even so, not all life story acquisitions during this period commanded the sums paid to *Sergeant York*. For example, in 1956, Christine Sizemore, the psychiatric patient whose case first brought multiple personality disorder to the attention of the public, sold her life story rights to Twentieth Century-Fox for \$7,000.<sup>104</sup> The result was the popular 1957 film *The Three Faces of Eve*, for which Joan Woodward won an Oscar playing a fictionalized version of Sizemore.<sup>105</sup>

It was not until the 1970s and 1980s, a period characterized by the overwhelming popularity of made-for-tv docudramas (so-called “movies of the week”),<sup>106</sup> that television producers became sensitized both to potential liability arising from these productions as well as the advisability of acquir-

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<sup>102</sup> See *id.*

<sup>103</sup> See Hoffer & Nelson, *supra* note 3, at 23-24, KARSTEN, *supra* note 5, at vii-viii (“With the advent of television, biographical films reached a new popularity, and were made not only about major current and historical personalities, but also about minor personalities who briefly made the headlines — films frequently limited to the event that made them famous. With television, too, the lives of major figures now could be made into mini-series lasting four to eight hours, stretching over two or three nights and exploring many aspects of their lives in detail.”).

<sup>104</sup> Michael L. Rudell, *The Three Faces of Eve: Granting Life Story Rights*, N.Y.L.J., Apr. 28, 1989, at 3, col. 1. The film grossed approximately \$3 million at the box office. See Emanuel Levy, *Three Faces of Eve, The (1957): Joanne Woodward as Multi-Personality Patient in Oscar-Winning Performance*, Cinema 24/7, Jun. 27, 2008, <https://emanuellevy.com/review/three-faces-of-eve-the-1957-3/>.

<sup>105</sup> THE THREE FACES OF EVE (20th Century-Fox, 1957). Sizemore’s story was also the subject of a book, CORBERT H. THIGPEN & HERVEY M. CLECKLEY, THE THREE FACES OF EVE (1957). According to one report, one of Sizemore’s physicians, Corbert Thigpen, persuaded her to enter into the agreement with Twentieth Century-Fox. Rudell, *supra* note 105.

<sup>106</sup> See, e.g., sources cited at n. 108, *infra*. See also Renee Wayne Golden, *The Business of Movies for TV: What Practitioners Should Know*, N.Y.L.J., May 29, 1987 (“The subject of docudramas that do not concern the celebrity will vary. So many have covered quadriplegics, Alzheimer’s disease, cancer, blindness, etc. that they have become known as ‘disease of the week.’ Others depict the heroic exploits of an individual overcoming insuperable odds, e.g., winning a highly contested athletic

ing life story rights from their subjects. This trend was likely reinforced by a spate of high-profile controversies and lawsuits relating to docudramas that played out during the 1980s and which involved well-known figures including Elizabeth Taylor and Senator Joseph McCarthy's lawyer Roy Cohn, as well as the victims and defendants in several high profile murder trials.<sup>107</sup>

These cases attracted the attention of practitioners, legal academics and law students, who published a spate of articles, notes and comments exploring the boundaries of docudrama liability and the parameters of life story rights deals.<sup>108</sup> By the mid-1990s, however, this fascination with docudramas and life story rights appears to have subsided, perhaps as the docudrama gave way to reality television and other forms of entertainment, and as life story acquisition practices became more normalized within the film and television industries.<sup>109</sup> From the mid-1990s through the early

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event or escaping from a prison camp. Some are love stories, some are political, few are comedic.”)

<sup>107</sup> See, e.g., *Taylor v American Broadcasting Co.*, No. 82, Civ 6977 (S.D.N.Y. 1982), *Cohn v. N.B.C.*, 67 A.D.2d 140, (N.Y.S.2d1979), *aff'd*, 50 N.Y.2d 885, *cert. denied*, 449 U.S. 1022 (1980) and William E. Schmidt, *TV Movie on Atlanta Child Killings Stirs Debate and Casts Doubt on Guilt*, N.Y. TIMES, Feb. 1, 1985.

<sup>108</sup> See, e.g., Erik D. Lazar, *Towards a Right of Biography: Controlling Commercial Exploitation of Personal History*, 2 COMM/ENT J. COMM. & ENT. L. 489 (1979). Deborah Manson, *The Television Docudrama and the Right of Publicity*, 7 COMM. & L. 41 (1985) (Taylor case); Lisa A. Lawrence, *Television Docudramas and the Right of Publicity: Too Bad Liz, That's Show Biz*, 8 COMM/ENT J. COMM. & ENT. L. 257 (1985) (Taylor case); Marsha S. Brooks, *The Maze of Docudrama: Issues to Consider when Dramatizing Factual Material*, N.Y.L.J., Apr. 19, 1985 (general discussion); Neil J. Rosini, *Releases for Docudramas: When Are They Advisable and What Goes into Them*, 5 COMM. L. 7 (1987) (general discussion); Renee Wayne Golden, *Docudramas Raise Thorny Legal Issues*, N.Y.L.J., Jun. 12, 1987 at 5, 19 (general discussion); Joan Hansen, *Docudrama - Invented Dialogue, Impersonation and Concocted Scenes: Beware of Lurking Lawsuits*, 5 ENT. & SPORTS L. 1 (1987) (general discussion); Rudell, *supra* note 104 (Sizemore case); Tim A. Pilgrim, *Docudramas and False-Light Invasion of Privacy*, 10 COMM. & L. 3 (1988) (general discussion); Diane Leenheer Zimmerman, *False Light Invasion of Privacy: The Light that Failed*, 64 N.Y.U. L. REV. 364 (1989) (general discussion); Michelle E. Lentzner, *My Life, My Story, Right - Fashioning Life Story Rights in the Motion Picture Industry*, 12 HASTINGS COMM. & ENT. L.J. 627 (1990) (Sizemore case); Debra Meyer Glatt, *Trial by Docudrama: Fact or Fiction*, 9 CARDOZO ARTS & ENT. L.J. 201 (1990) (Hunt case); Grunfeld, *supra* note 29 (general discussion); Megan Moshayedi, *Defamation by Docudrama: Protecting Reputations from Derogatory Speculation*, 1993 U. CHI. LEGAL. F. 331 (1993) (Street case).

<sup>109</sup> As an illustration of the absorption of this practice as a standard industry practice, a 1997 episode of *Seinfeld* turned on hijinks resulting from Kramer's sale of his life story rights to J. Peterman. "The Van Buren Boys," *Seinfeld* episode #148 (first aired Feb. 6, 1997). Among other things, Elaine believes that Kramer

2010s, relatively few life-story-related lawsuits were filed in the U.S. and comparatively little academic literature was published concerning them.<sup>110</sup>

The industry shifted again in the early 2010s. As we discuss in Part III, the rise of the major streaming networks – Netflix, Amazon Prime, AppleTV, and HBO Max, among others – as content producers in constant need of new programming, coupled with the increasing popularity of social media influencers and testimonials, has led to renewed interest in the docudrama genre. While some recent productions have been based on deceased subjects, likely not requiring the acquisition of life story rights at all (see Section II.B.2.d, below), many concern subjects who were living at the time of production, and thus, like *Inventing Anna*, likely involved life story acquisitions.

### B. *The Mechanics of Acquiring Life Story Rights*

Before detailing the principal features of life story deals in Part C, below, we pause to explain how these deals typically unfold in the industry. The process often begins with some true story reported in the news or featured in a book or magazine article that a producer deems promising as the subject of a docudrama.<sup>111</sup> The producer will contact the subject or their agent or manager (and, in some cases, the author of the relevant book or article) to solicit interest in making the story into a feature film or television production. If the subject agrees, the producer will ask the subject to enter into an option agreement for a life story deal, so that when the producer shops the project to studios, they are not just pitching an idea but have actually “acquired the life rights”—i.e., secured the many advantages of life story agreements outlined in this Subpart.<sup>112</sup> If the studio greenlights the

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can no longer tell others about his adventures following the sale. Luckily for the series, Peterman rescinds the sale at the end of the episode.

<sup>110</sup> Although the decades of the 1990s and 2000s did not see the level of controversy that the 1980s saw, they were not wholly without disputes. See, e.g., AQUINO, *supra* note 86, at 9-11 (discussing cases).

<sup>111</sup> Anonymous Interview #1 at 3-5. This could be an independent producer who shops prospective films to different studios like Paramount or Netflix, or an in-house producer for one of those production companies. In either case, the producer needs to make the case to the studio that the docudrama is a compelling project that the studio should develop into a film. *Id.*

<sup>112</sup> DINA APPLETON & DANIEL YANKELEVITZ, HOLLYWOOD DEALMAKING: NEGOTIATING TALENT AGREEMENTS FOR FILM, TV AND NEW MEDIA 31 (2d ed., 2010) (noting that option fees are usually around 10% of the purchase prices); see also Anonymous Interview #6 at 14 (explaining that options nearly always precede final life rights deals).

project, the producer will often assign the option agreement to the studio, which may then exercise the option and pay the subject the agreed purchase price. Upon exercise, the subject and the studio will execute a full life story acquisition agreement.

In the remainder of this Part B, we discuss in greater detail the types of stories and productions for which life story rights are typically acquired, and from whom.

### 1. Fictionalization

The term “fictionalization” has been defined as “the blending of truth and fiction in such a manner that it is difficult, if not impossible, to determine which parts are real and which are invented.”<sup>113</sup> Fictionalization can entail adding a couple of spicy details about a subject’s life or creating entirely new characters, scenes, dialog, and events.<sup>114</sup> Fictionalization is one of the defining characteristics of the docudrama genre, situated between the entirely factual accounts presented by documentaries and the entirely fictitious portrayals offered by dramas. Studios have fictionalized true stories since the Golden Age of Hollywood, in which films such as *Billy the Kid* (1930) and *Mata Hari* (1931) indiscriminately combined historical facts with stock elements of melodrama.<sup>115</sup>

It is fictionalization that warrants life story rights agreements for docudramas but not documentaries. Netflix would have required no rights from Anna Sorokin if it were merely producing a documentary along the lines of HBO Max’s one-hour episode about Sorokin in its *Generation Hustle* documentary series.<sup>116</sup> But Netflix envisioned *Inventing Anna* not as a documentary, but as a fully dramatized narrative series in which invented elements, dialog and scenes were necessary to propel the narrative. And when a

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<sup>113</sup> Lawrence, *supra* note 108, at 278.

<sup>114</sup> For example, the producers of the 2022 Netflix series *Dahmer – Monster: The Jeffrey Dahmer Story*, are reported to have added numerous gruesome details to the depiction of serial killer Jeffrey Dahmer, including his drinking of human blood when he was employed at a local blood bank. See Jasmine Washington, *Fact Or Fiction: How Much of Netflix’s Dahmer Show Monster Is REALLY True?* Seventeen, Oct. 3, 2022, <https://www.seventeen.com/celebrity/movies-tv/a41463978/how-true-is-monster-jeffrey-dahmer/>.

<sup>115</sup> See AQUINO, *supra* note 86, at 26.

<sup>116</sup> Documentary producers typically obtain written appearance releases from subjects that they wish to interview on screen, often with no payment or a modest fee. See JON M. GARON, *THE INDEPENDENT FILMMAKER’S LAW AND BUSINESS GUIDE: FINANCING, SHOOTING, AND DISTRIBUTING INDEPENDENT AND DIGITAL FILMS* 306-07 (3d ed. 2021).



screenwriter adds invented material to a portrayal of a real person, that subject has a plausible claim for defamation, and the producer's First Amendment protection is lessened, because the film is portraying the subject in a manner that is partially false.<sup>117</sup> Accordingly, as one court has noted, "dramatization, imagined dialog, manipulated chronologies, and fictionalization of events" have all given rise to claims by a depicted subject.<sup>118</sup>

Fictionalization may also have upsides for producers. Inventing a wholly fictional character raises few liability concerns because such characters are unrecognizable as actual persons and their portrayal cannot be found to have defamed someone. For this reason, producers often use fictionalization as a way to handle secondary characters from whom the producer has not obtained full life story rights or releases of liability. For example, the 2022 Netflix docudrama *The Stranger* was based on the real life murder of a 13-year old Australian boy and the subsequent manhunt for his killer.<sup>119</sup> Because the victim's family objected to the production, the producers invented several scenes and changed the names of the principal characters, though their appearances and actions were largely based on a nonfiction book that described the case.<sup>120</sup> An even more extreme case of altering char-

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<sup>117</sup> See *Porco v. Lifetime Entertainment Services LLC*, 147 A.D.3d 1253, 1254-44 (N.Y. App. Div. 2017) ("a work may be so infected with fiction, dramatization or embellishment that it cannot be said to fulfill the purpose of the [First Amendment] newsworthiness exception" (citing *Messenger v. Gruner+ Jahr Print. & Publ.*, 94 NY2d 436, 441 (N.Y. 2000))).

<sup>118</sup> See *Spahn v. Julian Messner, Inc.*, 221 N.E.2d 543 (N.Y.1966) (fictionalized biography of a well-known baseball player was not authorized under First Amendment, as an accurate biography would have been). See also James M. Treece, *Commercial Exploitation of Names, Likenesses, and Personal Histories*, 51 TEX. L. REV. 637, 655 (1973) ("Liability for factual inaccuracy proceeds from an inference, based on evidence of "fictionalization," that the publisher intended to blend fact and fiction to increase circulation. Courts then weight this commercial purpose to override any purpose to convey information about newsworthy events. As a result, the publisher finds himself stripped of his constitutional privilege and charged with invasion of privacy.")

<sup>119</sup> *The Stranger* (Netflix, 2022).

<sup>120</sup> See Leslie Katz, *'The Stranger' on Netflix: The True Story That Inspired the Unsettling Thriller*, CNET, Nov. 9, 2022, <https://www.cnet.com/culture/entertainment/the-stranger-on-netflix-the-true-story-that-inspired-the-unsettling-thriller/> According to the *Sydney Morning Post*, the actor playing the lead detective in the case never met his subject, who remains anonymous. The actor explained "we were investigating the truth, taking that truth and telling a fictionalised version of it, which is about protecting everyone involved." Stephanie Bunbury, *'So much at stake': Joel Edgerton's risky mission for The Stranger*, SYDNEY MORNING POST, Oct. 8, 2022, <https://www.smh.com.au/culture/movies/so-much-at-stake-joel-edgerton-s-risky-mission-for-the-stranger-20221003-p5bmu3.html>.

acters can be found in the hit 1942 musical film *Yankee Doodle Dandy*, in which composer George M. Cohan's two wives (Ethel, whom he divorced, and Agnes, a dancer) were combined into a single composite character named Mary, largely because Cohan wanted no reference to Ethel in the film and preferred the more melodic name Mary for use in his lyrics.<sup>121</sup>

In stories about particularly prominent figures, public sentiment has caused producers to clarify their role in fictionalizing real events. For example, in Season 5 of *The Crown*, which aired shortly after the death of Queen Elizabeth II, private meetings between Prime Minister John Major and both Prince Charles and the Queen were portrayed. Buckingham Palace, Major, Dame Judy Dench and other prominent figures condemned the portrayals, with Major calling them a "barrel-load of nonsense."<sup>122</sup> In response, the producers added a disclaimer to the trailer for the show emphasizing its fictionalized nature: "Inspired by real events, this fictional dramatisation tells the story of Queen Elizabeth II and the political and personal events that shaped her reign."<sup>123</sup>

## 2. From Whom Are Life Story Rights Acquired?

### a. Sources of Life Story Rights

Though the principal sources of life story rights are the individual subjects being depicted, producers may also seek to secure life story rights from third parties who knew subjects well, such as family members, journalists and police investigators.<sup>124</sup> The reason for this practice is that such third parties serve as alternative sources for the subject's narrative, and could give rise to competing projects. For example, though Netflix acquired life story rights for *Inventing Anna* directly from Anna Sorokin, HBO Max is reported to have optioned a tell-all article about Sorokin written by her former friend Rachel Williams.<sup>125</sup> Netflix's gamble may have paid off, however, as a scripted HBO docudrama about Sorokin has not yet emerged, though HBO

<sup>121</sup> See AQUINO, *supra* note 86, at 53.

<sup>122</sup> Emily Burack, *The Drama Over Adding a Disclaimer to The Crown, Explained*, Town & Country Mag., Oct. 27, 2022, <https://www.townandcountrymag.com/leisure/arts-and-culture/a41735275/the-crown-season-5-disclaimer-controversy/>

<sup>123</sup> *Id.*

<sup>124</sup> See Grunfeld, *supra* note 29, at 516.

<sup>125</sup> See Stacey Lamb, *Anna Sorokin's Story of Fraud Documented in 'Generation Hustle' and Shonda Rhimes Series*, ET, Oct. 25, 2021, <https://www.etonline.com/anna-delvey-from-fake-german-heiress-to-subject-of-shonda-rhimes-netflix-series-164058>.

did produce the aforementioned one-hour documentary episode that recounted Sorokin's story.<sup>126</sup>

*b. Uncooperative Subjects*

It is always possible that an individual whom a producer plans to depict will not wish to be depicted, will not give the producer sufficient artistic control over the depiction, or demands an unreasonable level of compensation.<sup>127</sup> Other subjects may decline to enter life story deals because they correctly intuit that fictionalization clauses give producers the right to depict them in an unflattering light.<sup>128</sup> And some subjects (e.g., the British royal family) may simply feel that "selling" their life story rights is beneath their dignity and not something that they wish to entertain. Sometimes, a producer may not be able to obtain life story rights for an individual depicted in a docudrama. In some cases, this lack of rights will persuade a producer not to pursue the project. As noted in Part I.A, above, producer Jesse Lasky waited twenty-one years until Sergeant Alvin York was willing to sell his life story rights for film.

In other cases, a producer may be willing to take the risk of producing a film about a living person without obtaining their consent. Such was the case with the 2010 film *The Social Network*, which portrayed Facebook founder Mark Zuckerberg without his permission or cooperation.<sup>129</sup> While Zuckerberg criticized aspects of his on-screen depiction, to our knowledge neither he nor Facebook brought litigation.<sup>130</sup> The result was different for Equinox's docudrama *Winnie Mandela*, which the principal subject disparaged in the media before it was released, contributing to the film's critical and commercial failure.<sup>131</sup>

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

<sup>127</sup> See Grunfeld, *supra* note 29, at 516; Perot, *supra* note 7, at 205.

<sup>128</sup> Anonymous interview subject #4 at 9-10 (noting that subjects will frequently walk away from life story deals when they realize studios will be allowed to depict them in a negative light).

<sup>129</sup> See Ben Child, *Mark Zuckerberg rejects his portrayal in The Social Network*, THE GUARDIAN, Oct. 20, 2010, <https://perma.cc/SN4H-UXAP>.

<sup>130</sup> Whatever the likelihood that such litigation would ultimately have been successful, a lawsuit by a well-funded plaintiff could have caused problems, and certainly increased costs, for the producers. Some press accounts have speculated that Zuckerberg did not sue because the movie seemingly increased the popularity of Facebook. *Id.*

<sup>131</sup> See notes *infra* 181-183 and accompanying text.

*c. Centrality of the Character*

Even a docudrama that focuses intensely on one particular character usually depicts other individuals — friends, relatives, neighbors, colleagues, teammates, opposing counsel, police officers, victims, and the like. A producer must decide which of these individuals warrant the acquisition of life story rights, and which may require only a release<sup>132</sup> or, if the subject is uncooperative, how to proceed absent the subject's cooperation. Unlike a principal character, a secondary character may more readily be depicted in a non-controversial and accurate manner or fictionalized to a degree that the real person is no longer represented.<sup>133</sup>

*d. Living Persons*

Producers generally acquire life story rights only from living individuals, as most claims for defamation, privacy rights and rights of publicity do not survive the subject's death,<sup>134</sup> and deceased individuals will be unable to cooperate with a production. While some posthumous rights, such as rights of publicity, do exist, in some states, industry practice, by and large, is not to seek life story rights other than from living individuals.<sup>135</sup> As one commentator suggests, "[t]his may account for the abundance of biographical docudramas produced shortly after a celebrity's death."<sup>136</sup>

3. Insurance Coverage

A final, but crucial, element in the acquisition of life story rights is their role in securing errors and omissions (E&O) insurance coverage for a project. As explained by one entertainment industry broker,

Producers Errors and Omissions Insurance covers all of the potential legal liabilities and defense costs against lawsuits alleging unauthorized use of titles, formats, ideas, characters, plots, plagiarism, unfair competition or privacy, and breach of contract. It also protects against alleged libel, slan-

<sup>132</sup> See discussion *infra* Part II.D.

<sup>133</sup> See *supra* Part II.B.1.

<sup>134</sup> *But see* ROTHMAN, *supra* note 34, at 81-88 (discussing post-mortem rights of publicity recognized in some states).

<sup>135</sup> See Anonymous Interview #2 at 8; MARK LITWAK, DEALMAKING IN THE FILM & TV INDUSTRY (4th ed., 2016) ("If the subject of the life story is deceased, much of the rationale for buying these rights disappears.")

<sup>136</sup> Grunfeld, *supra* note 29, at 494 and n.76 (noting 1980s docudramas based on the lives of Rock Hudson, Karen Carpenter and Liberace that were produced shortly after their deaths).

der, defamation of character or invasion of privacy. Errors & Omissions is a requirement for distribution deals with studios, television, cable networks, DVD and Internet sites prior to the release of any film production.<sup>137</sup>

By the 1980s, the acquisition of life story rights from docudrama subjects had become so common within the film and television industry that leading E&O insurance carriers required a producer to represent that it had acquired releases from all persons depicted in a production as part of the policy application process.<sup>138</sup> Moreover, the policies of major television networks began to tie the authorization of a production to the satisfaction of carrier requirements for insurability.<sup>139</sup>

Risk averse E&O carriers are influential norm-setters in the film and television world.<sup>140</sup> Several of the entertainment practitioners whom we interviewed emphasized the importance of obtaining life story rights in order to secure E&O coverage. Though some carriers may be willing to insure productions for which such rights have not been obtained,<sup>141</sup> the result may be a substantially higher premium.<sup>142</sup> Larger studios, however, may self-insure their productions, thereby eliminating the need to bow to the demands of third party E&O carriers.<sup>143</sup>

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<sup>137</sup> front row insurance brokers inc., *E&O insurance 101: How to protect your film* (2021).

<sup>138</sup> See, e.g., Perot, *supra* note 7, at 199; Grunfeld, *supra* note 29, at 530, 539 (quoting Fireman's Fund Insurance Co. application, "Written releases must be obtained from all persons who are recognizable or who might reasonably claim to be identifiable in the Insured production, or whose name, image or likeness is used.").

<sup>139</sup> See Golden, *Docudramas*, *supra* note 108 (citing ABC Program Standards Guide).

<sup>140</sup> Cf. Patricia Aufderheide, *Fair Use Put to Good Use: 'Documentary Filmmakers' Statement' Makes Decisive Impact*, DOCUMENTARY MAGAZINE, Aug. 15, 2007, <https://perma.cc/ZKA4-BCVN> ("insurance companies are both the ultimate gatekeepers for television documentary and also historically cautious to adopt practices that involve risk"); see also James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 893-94 (2007) (discussing the importance of E&O coverage and the risk aversion of E&O carriers).

<sup>141</sup> E.g., *The Social Network*, *supra* Part II.B.2.b.

<sup>142</sup> See Front Row, *supra* note 137, at 46 ("a possible result of not getting permission from a celebrity to do a docudrama could be a much higher E&O deductible . . . In some cases your deductible could jump from around \$10,000 to as high as \$250,000 for that one item"); Perot, *supra* note 7, at 199-200, 206.

<sup>143</sup> Interview with Subject #10 (date of interview).

## 4. Life Story Rights Across Media

It is worth noting that practices surrounding the acquisition of life story rights in the film and television industry have not been widely adopted in other media industries such as publishing, radio broadcasting or podcasting. This is not to say, of course, that the potential for liability does not exist when real persons are depicted in these media. For example, in the 1960s, the reclusive tycoon Howard Hughes assigned to a personal holding company the exclusive right to exploit his “name, personality, likeness or the life story or incidents in [his] life.”<sup>144</sup> When Random House announced plans to publish a biography of Hughes, the company sued the publisher under a number of theories.<sup>145</sup> Similar cases have been brought against other book, newspaper and magazine publishers that have released fictionalized portrayals of real people.<sup>146</sup>

Given cases such as these, one might envision the practice of obtaining life story rights, or at least releases, emerging in the publishing industry as it did in the motion picture industry. Yet journalists, authors and publishers seldom enter into life story agreements with their subjects.<sup>147</sup> There are several possible reasons for this difference between industries. First, films and television shows are typically produced by corporate entities with legal representation and significant financial backing, whereas journalists and authors typically produce articles and books independently on modest budgets, with large advances reserved for only the most prominent. And while pub-

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<sup>144</sup> *Rosemont Enterprises, Inc. v. Random House, Inc.*, 294 N.Y.S.2d 122, 125 (Sup. Ct. 1968).

<sup>145</sup> The plaintiff's theories of liability were not entirely clear to the court. *Id.* at 126 (referring to plaintiff's theories as a “combination of diverse allegations relating to several separate and distinct legal concepts which are all woven together into some not easily decipherable hybrid”). The case was dismissed, the court holding that “a public figure can have no exclusive rights to his own life story, and others need no consent or permission of the subject to write a biography of a celebrity.” *Id.* at 129. *But see Spahn v. Julian Messner, Inc.*, 221 N.E.2d 543 (N.Y. App. 1966) (fictionalized biography of a famous baseball player was enjoined under NY Civil Rights Law).

<sup>146</sup> See Streitfeld, *supra* note 32; Treece, *supra* note 118, at 655-59. Even non-fiction biographies have been subject to lawsuits when pursued without the permission of a living subject, though these lawsuits have seldom been successful. See NPR Staff, *Kitty Kelley Defends The ‘Unauthorized’ Biography*, NPR (Dec. 11, 2010), <https://perma.cc/VT5R-C5EY>.

<sup>147</sup> One growing exception is podcasts, in which producers increasingly seek life story rights from their subjects. See Anonymous Interview #4 at 20 (describing life story deal for a podcast). Anonymous Interview #12 (increasing acquisition of life story rights by podcast producers who had experience in television industry).

lishers may earn significant revenue from popular books (more, in some cases, than motion pictures), norms in the publishing industry place the onus for obtaining third party permissions on the author rather than the publisher. Thus, most authors and independent journalists are unable to afford a significant outlay to acquire life story rights, whereas even films with modest production budgets can accommodate these costs. Further, E&O insurance does not exist to the same extent in the publishing industry as it does in television and film. Thus, there appears to be little external pressure for journalists and authors, and even publishers, to acquire life story rights. For all of these reasons, we see few life story deals outside the film and television industries.

### C. *Basic Elements of a Life Story Deal*

Agreements to acquire life story rights are multilayered contracts that include four key features: a putative conveyance of rights; a waiver of liability; an exclusivity commitment; and an agreement to grant access or cooperate. We discuss each of these features, as well as some others, in greater detail in this Section.

#### 1. Grant of Rights

Since at least the 1940s, life story agreements have contained a formal grant of rights of the type typically seen in intellectual property licenses.<sup>148</sup> This grant includes the right to portray the subject factually or fictionally. For example, the 1956 agreement between Christine Sizemore, the psychiatric patient on whom *The Three Faces of Eve* was based, and Twentieth Century-Fox contains an assignment to the studio of “all versions of my life story heretofore published or hereafter published and unpublished versions thereof.”<sup>149</sup> By the 1980s a more robust version of this grant, phrased as a license rather than an assignment or conveyance of rights, had become common in life story agreements, requiring the subject to grant to the producer:

A perpetual, exclusive, and irrevocable right, throughout the universe, to depict the subject, whether wholly or partially factually or fictionally, and to use the subject’s name, likeness, voice, and biography, in any and all media and by any and all means whether now known or hereafter developed and in all advertising and exploitation thereof [and] to portray, im-

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<sup>148</sup> See JORGE L. CONTRERAS, *INTELLECTUAL PROPERTY LICENSING AND TRANSACTIONS: THEORY AND PRACTICE* 149 (2022) (describing grants of rights in intellectual property licenses).

<sup>149</sup> Rudell, *supra* note 105.

personate, and simulate the subject in any way in which the producer in his sole discretion may determine.<sup>150</sup>

Such a grant of rights continues to appear prominently in life story agreements today. Yet, as discussed in Part II, life story rights are not property rights that can be conveyed and licensed like copyrights or trademarks. The grant of rights in life story rights agreements, then, seems superfluous, or at least redundant in view of the operative contractual provisions discussed below (i.e., access, exclusivity, and waiver).<sup>151</sup>

This being said, the grant of rights in life story agreements may serve at least one important function: it may establish, beyond a shadow of a doubt, that the producer is permitted to fictionalize the subject's story.<sup>152</sup> If an express authorization to fictionalize is not granted, the subject could argue that the producer is only entitled to depict their actual story, truthfully and without embellishment, as in a documentary. The grant of fictionalization rights thus authorizes producers to embellish the truth, eliminating any risk that the agreement will be read otherwise.<sup>153</sup>

Such contractual grant language may also be useful to evidence the scope of a subject's agreement and thereby avoid disputes between competing producers. For example, in 2009 sportswriter Kirstie McLellan Day co-authored with Canadian hockey star Theo Fleury a book about his experiences with sexual abuse as a junior league player.<sup>154</sup> In 2021, a Hollywood studio announced plans to produce a docudrama about Fleury's life. Day objected on the ground that the agreement she signed with Fleury gave her

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<sup>150</sup> Lentzner, *supra* note 108, at 633 (quoting Williams & Frascott, *The Lawyer's Role in the Acquisition and Exploitation of Life Story Rights*, 31 BOSTON BAR J., July/Aug. 1987, at 9).

<sup>151</sup> In *Marder v. Lopez*, the Ninth Circuit held that a grant of rights in a life story agreement was *not* redundant with a release from claims. The court explained that while a release "extinguishes claims against the released party," a grant, by contrast, "is an agreement that creates a right. Parties may include both provisions in a contract without undermining the effect of either the grant or the release." 450 F.3d 445, 452 (9th Cir. 2006). *Id.*

<sup>152</sup> See *Kelly v. William Morrow & Co.*, 186 Cal. App. 1625 (1986) (holding that a "personal depiction waiver" for book publication covered the book's mixed truthful and invented portrayal of the subject because it granted the right to depict that subject "either factually or fictionally").

<sup>153</sup> *Id.* (implying that granting the right to portray the subject's life fictionally was necessary to allow the grantee to do so).

<sup>154</sup> Theo Fleury & Kristie McLellan Day, *Playing with Fire* (2009).



“the right to exploit all subsidiary rights in respect of the [book].”<sup>155</sup> Despite Day’s contentions, it is not clear that this contractual language would apply to an original script about Fleury’s life that is not derivative of the book itself.<sup>156</sup> Had Day wished more reliably to secure the exclusive right to make a production based on Fleury’s life story, she might have been better off with a contractual grant of rights akin to those described above.

## 2. Liability Waiver

Industry insiders describe the liability disclaimer or waiver clause as the central feature of life story agreements.<sup>157</sup> These clauses are broad and include general waivers of liability as well as disclaimers of liability under specific theories ranging from plausible (right of privacy and defamation) to largely inapplicable (copyright and trademark).<sup>158</sup>

Despite the relative freedom that producers have under the First Amendment to tell stories that are based on true facts, and the decreased risk of liability when characters are partially or fully fictionalized, liability rooted in the right of publicity and defamation is a real threat, so these waivers do reduce studios’ litigation exposure.<sup>159</sup> Their greatest value, though, is likely as a preemptive, litigation-avoidance measure. Unhappy docudrama subjects may sue regardless of whether they have a valid cause of action and even meritless lawsuits can exact costs in terms of attorney’s fees, distraction, bad publicity and possible nuisance-value settlements. By requiring subjects to agree to liability waivers, producers can reduce the possibility that such litigation will be initiated, since individuals tend to comply with agreements that they execute.<sup>160</sup>

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<sup>155</sup> Meghan Grant, Hollywood movie about Theo Fleury stalled as autobiography co-author claims ownership over his life story, CBC News, Jul. 6, 2021, <https://perma.cc/4FHN-92JR>.

<sup>156</sup> The matter is pending in Canada, and we express no views about Canadian law.

<sup>157</sup> Anonymous Interview #6 at 4 (summarizing “life story rights” as “you’re buying the right not to be sued”); Anonymous Interview at 7 (“[T]he key from my perspective is the release. What we’re trying to do is avoid a lawsuit by getting this. That’s really, to me, what it’s all about.”).

<sup>158</sup> See Anonymous Interview #4 (waivers list all of these enumerated causes of action, even though copyright and trademark are likely unnecessary).

<sup>159</sup> James Gibson observes similar risk aversion behavior in a variety of copyright licensing contexts where a license may not actually be required by law but is useful to avoid potential litigation. Gibson, *supra* note 140.

<sup>160</sup> Anonymous Interview #6 at 14 (reporting that subjects tend to comply with life story rights agreements). Empirical work also shows that people tend to perceive contracts they execute as binding, at least where (as here) the parties have a mean-

### 3. Exclusivity

Life story rights agreements generally require the subject to agree to sweeping exclusivity restrictions.<sup>161</sup> This means, at a minimum, that the subject will not cooperate with another producer or studio to create a docudrama based on their life. Sometimes, such provisions also mandate that subjects refrain from sharing their stories with other media outlets: no news interviews, no confessional blog posts, no magazine features.<sup>162</sup> When subjects want to engage with media in a manner that will not undermine the project, the life story agreement could expressly permit such engagement, or require the subject to seek the prior authorization of the studio (which may be granted if the request is reasonable).<sup>163</sup>

Studios desire exclusivity in part because preventing a subject from cooperating with other production companies will make it harder for them to make competing films, notwithstanding their general ability to depict known facts.<sup>164</sup> Moreover, the more the details of the subject's story become widely known, the less public appetite is likely to remain for the production once it is released. While there are instances of multiple docudramas being released on the same subject, the later market entrant has often had its thunder stolen by the earlier one.<sup>165</sup> For example, the 2005 Truman Capote biopic, *Capote*, won widespread critical acclaim, was a box office hit, and won an Oscar for Philip Seymour Hoffman.<sup>166</sup> The 2006 film *Infamous* also dram-

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ingful sense of the contract's content. See Zev J. Eigen, *When and Why Individuals Obey Contracts: Experimental Evidence of Consent, Compliance, Promise, and Performance*, 41 J. LEGAL STUD. 67, 87-88 (2012) (demonstrating that people are more likely to comply with negotiated contracts than with adhesory ones).

<sup>161</sup> GARON, *supra* note 116, at 315 (discussing exclusivity as a core feature of life story rights).

<sup>162</sup> Anonymous Interview #3 at 5.

<sup>163</sup> Anonymous Interview #10; Stephen Rodner, *Life story rights: What's possible and what's not?* HOLLYWOOD REP., Jan. 24, 2008 ("Usually, an exclusion is negotiated which gives the subject the right to appear on news interviews and (sometimes) to appear in documentary films that would not interfere with the producer's fictional film.").

<sup>164</sup> Anonymous Interview #5 at 9 (explaining that with exclusivity "you can prevent those people [subjects] from working on the other ones [competing projects] and making their projects better or spilling their secret sauce").

<sup>165</sup> Anonymous Interview #7 at 11 ("It's very hard to do two movies on the same subject matter. The second one usually tanks").

<sup>166</sup> See Kenneth Turan, *'Infamous' Fails Where 'Capote' Succeeded*, NPR, Oct. 13, 2006, <https://perma.cc/KZG9-P7RU>. Interestingly, Capote's most famous book, *In Cold Blood* (1965), was itself a fictionalized account of a notorious murder and the trial and execution of its perpetrators. See CASEY CEP, *FURIOUS HOURS: MURDER*,

atized the same period in Capote's life. Nevertheless, the public appetite for Capote dramatizations had seemingly been sated by the earlier film, and *Infamous* turned out to be a commercial failure.<sup>167</sup>

All of these reasons help to explain why Netflix secured Anna Sorokin's exclusive cooperation for *Inventing Anna*,<sup>168</sup> despite the fact that, prior to the series' release, Sorokin's story had already been the subject of a televised documentary episode on HBO Max, features on news programs, and podcasts produced by BBC and others.<sup>169</sup> Though Sorokin appears personally in several of these, none dramatizes her story using actors and staged scenes in the manner of *Inventing Anna*. While Netflix's agreement with Sorokin could not keep her story under wraps, it did guarantee Sorokin's exclusive cooperation, complicating the efforts of any other studio to create an Anna Delvey dramatization.

Whether exclusivity provisions are enforceable is debatable as a practical and legal matter.<sup>170</sup> If a subject who signed an exclusive life story agreement with a studio then did an interview with a newspaper discussing features of her story, it is not clear that the studio could successfully enforce the agreement.<sup>171</sup> Optically, the public perception of the studio seeking to silence its subject could reflect poorly on the studio and its project. Suing the subject could also destroy any goodwill between the subject and the studio, making it unlikely the subject would cooperate in a useful manner with the film's production. And, legally, whether the studio could enforce

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FRAUD, AND THE LAST TRIAL OF HARPER LEE (2020) (discussing Capote's writing of *In Cold Blood*).

<sup>167</sup> See Turan, *supra* note 166.

<sup>168</sup> Baker, *supra* note 6 ("A "life rights" deal does not mean other people can't tell the story – which has multiple perspectives – but it gives the company free rein and ensures Sorokin cannot assist the competition.").

<sup>169</sup> Divya Meena, 5 Anna Delvey Documentaries and Podcasts to Check Out Before "Inventing Anna", Yahoo!, Feb. 8, 2022, <https://perma.cc/H2X9-STNJ>.

<sup>170</sup> See Anonymous Interview #5 at 10 (conceding that whether exclusivity clauses are enforceable is debatable).

<sup>171</sup> A contractual non-disparagement clause waiving an individual's First Amendment right to free speech will generally be enforceable only if it was entered into knowingly and voluntarily and, under the circumstances, the interest in enforcing the waiver is not outweighed by a relevant public policy that would be harmed by enforcement. *Overbey v. Mayor of Baltimore*, 930 F.3d 215, 223 (4th Cir. 2019). In addition, in the wake of the Harvey Weinstein scandal and the #MeToo movement, California enacted legislation prohibiting employment contracts and settlement agreements from containing non-disparagement clauses restricting an individual's right to disclose information regarding sexual harassment and other unlawful activities. Cal. Civ. Proc. Code § 1001 (2022); Cal. Gov't Code § 12964.5 (2022).

an exclusivity provision to bar the subject from speaking about a matter of public interest with a news outlet is questionable given the free speech objections the subject and outlet could plausibly raise. So here, too, the function of a broad exclusivity clause could be predominantly *in terrorem*. Knowing that they have executed such a clause, a subject is less likely to tell their story publicly. If a studio were to learn that a subject were contemplating doing a media interview, they could remind the subject of the exclusivity clause in an effort to prevent them from doing so.<sup>172</sup>

#### 4. Access and Cooperation

Life story agreements secure subjects' cooperation with a project both by engaging their help with the production and by preventing disparagement.<sup>173</sup> Many docudrama subjects are not well known enough that the details of their lives are in the public record.<sup>174</sup> Extensive research can be necessary to acquire enough detail to tell the subject's story richly. Many life story agreements thus include provisions requiring subjects to be interviewed at length and to provide access to source material, such as journals, news clippings, notes, photographs, or family albums, that may help the writers to tell their story.<sup>175</sup> Access clauses may also obligate subjects to secure the cooperation of other people essential to the project, such as friends and family members.<sup>176</sup>

One principal feature of access clauses is to require subjects to be available to give commentary and advice on the script or film during its produc-

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<sup>172</sup> See Anonymous Interview #5 at 10 (indicating that these clauses are enforced informally by reminding subjects of their existence rather than via litigation); *cf.* Anonymous Interview #8 at 14 (recalling no instances of breach of life rights agreements in their practice experience). A studio would, however, be more likely to aggressively enforce an exclusivity provision in the event of a more consequential breach, such as where a subject sought to execute another life story rights deal with a competing studio. In that case, the breach would threaten the viability of the studio's project, rather than just marginally sating the public appetite for information about the subject.

<sup>173</sup> GARON, *supra* note 116, at 315 (noting that many life story deals entail "active assistance" with, not just passive agreement to, the project).

<sup>174</sup> Anonymous Interview #8 at 2 (explaining that life rights agreements secure access to "things that aren't accessible publicly" such as "photos and home videos and whatever else").

<sup>175</sup> See Anonymous Interview #3 at 6 (observing that the subject may "have access [to] materials that you really want that are going to enhance the story or the script. And so you get that cooperation even if, under the law, you don't need it.").

<sup>176</sup> Anonymous Interview #6 at 7 (cooperation clauses often extend to securing cooperation from family and friends).

tion, in some cases in exchange for additional compensation. Studios may want, perhaps even need, some subjects to advise on the project to assure realism. They will want other subjects to stay away to avoid unwanted interference.<sup>177</sup> For example, with *Inventing Anna*, Anna Sorokin consulted on the Netflix production, including by meeting with actress Julia Garner, who played her, while Sorokin was still in prison.<sup>178</sup> And consulting with a subject, especially one who may be opinionated or even hostile toward the project, can assure that they approve, or at least do not feel blindsided by, the final version.<sup>179</sup>

Access clauses may also prohibit the subject from publicly disparaging a production. Especially where the subject of a life-based project is well known, the project could fail both critically and commercially if the subject were to trash it in the press.<sup>180</sup> For example, in 2011, Equinoxe Films released *Winnie Mandela*, a dramatization based on an unauthorized biography of Mandela.<sup>181</sup> The filmmakers did not secure a life story agreement with Mandela and declined her requests to be involved in its production. Before the film release, Mandela publicly distanced herself from the project, questioning its truthfulness and calling it an “insult.”<sup>182</sup> Likely in part because its beloved subject disparaged it before it even hit theatres, *Winnie Mandela* failed at the box office and was panned by critics.<sup>183</sup> This fiasco may have been avoided had the studio secured Mandela’s cooperation, or at least prevented her public disparagement of the project.<sup>184</sup> Life story agreements may thus seek to secure the goodwill of both the subject and the public. As

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<sup>177</sup> Anonymous Interview #5 at 4 (“[I]t depends on what kind of relationship you want to have with that person. Sometimes, you want to have a collaborative relationship. You really want them involved in the production. [While] sometimes you don’t want these people involved at all in your project[.]”).

<sup>178</sup> Baker, *supra* note 6.

<sup>179</sup> Anonymous Interview #5 at 8.

<sup>180</sup> Anonymous Interview #3 (“[S]ometimes you just want to do a deal . . . because the [subject is] super influential or they have an angle, a lever they can pull to either enhance the success and the marketing and the publicity of the production, or to the contrary, put a torch to it.”).

<sup>181</sup> *Winnie Mandela* (Equinoxe, 2011).

<sup>182</sup> David Smith, *Winnie Madikizela-Mandela ‘insulted’ by movie about her life*, THE GUARDIAN, June 14, 2011, <https://perma.cc/4SjX-2ZNQ>.

<sup>183</sup> See, e.g., ROTTEN TOMATOS, [rottentomatoes.com/m/winnie\\_mandela](https://www.rottentomatoes.com/m/winnie_mandela) (last visited Apr. 22, 2022) (only 15% of critic’s reviews were positive).

<sup>184</sup> Criticism by figures not covered by non-disparagement commitments does not necessarily sink a film. Tom Ford publicly excoriated the docudrama *House of Gucci*, but this did not prevent the film from earning a broad viewership. Priya Elan, *Tom Ford ‘laughed out loud’ during House of Gucci screening*, THE GUARDIAN, Nov. 30, 2021, <https://perma.cc/AE8P-V7TG>

basketball legend Ervin “Magic” Johnson said of the recent HBO docudrama *Winning Time*, which did not seek cooperation from him or other team members, “You gotta have the guys.”<sup>185</sup> Even though a subject’s story may be told without executing a life story agreement, telling a story—especially the story of a sympathetic subject—without their permission can create bad optics for studios and generate negative PR.<sup>186</sup>

### 5. Valuing Life Stories: Compensation

Perhaps the most important feature of a life story deal, at least from the subject’s standpoint, is compensation.<sup>187</sup> Yet, often compensation is far less than the subject expects or the public imagines. Studio executives and entertainment lawyers alike report that while subjects increasingly think they are entitled to huge paydays, life story deals tend to disappoint these expectations.<sup>188</sup> Thus, as one commentator notes:

Unless the person whose life rights you’re acquiring is a world leader, pop culture icon, or unquestionably revered household name, the rights are worth considerably less than you think. While most people assume their life rights will sell for at least \$500,000 to north of \$1 million, most life rights are offered \$35,000-\$75,000. Thus, many deals get squashed before they get started, because the people who are selling their life story feel slighted by the offer. Sure, there are the occasional seven-figure deals, but those are reserved for stories that wrangle enthusiastic interest from A-list actors, coupled with a major studio that’s willing to spend \$50-\$75 mil-

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<sup>185</sup> Selome Hailu & Ramin Setoodeh, *Magic Johnson’s Next Shot: The NBA Legend on Changing Lakers History, HIV Activism and His Revealing Apple Docuseries*, VARIETY, Apr. 5, 2022, <https://perma.cc/CYC3-329K>. Though there is no indication that Johnson has threatened litigation over HBO’s *Winning Time*, former Lakers coach Jerry West, who is portrayed in the series, has threatened suit. See Check Schilken, *Jerry West: ‘If I have to, I will take this all the way to the Supreme Court’*, LA TIMES, Apr. 26, 2022, <https://www.latimes.com/sports/story/2022-04-26/jerry-west-supreme-court-hbo-winning-time-showtime-lakers>.

<sup>186</sup> Anonymous Interview #5 at 7-8 (noting that even though studios can usually tell stories without permission, they still do life story deals to avoid PR and because they “want to do right by” the subjects).

<sup>187</sup> In rare cases, a subject may grant a producer life story rights for free because they are eager to have their stories told publicly. Anonymous Interview #8 at 8 (noting that even high-profile individuals may assign life story rights with no compensation if they strongly want to have their story told in film).

<sup>188</sup> See Anonymous Interview #1 at 8 (“[T]hey all think[ ] that it’s going to be a life-changing amount of money, and it isn’t.”); Anonymous Interview #3 at 7 (“People have unreasonable expectations in this business. They think, ‘Oh you’re making a movie based on me. I’m never going to have to worry about money for the rest of my life.’”).

lion or more on the production, plus \$25-\$35 million more in [print and advertising.]<sup>189</sup>

The two traditional drivers of price in a life story acquisition have been a subject's preexisting notoriety and whether the medium is film or television,<sup>190</sup> though the increasing reach and prestige of streaming features may be changing this conventional wisdom. It has been rumored that Apple TV+ recently paid upwards of \$25 million to secure rights from NBA superstar Ervin "Magic" Johnson for its series *They Call Me Magic*.<sup>191</sup>

In most cases, the subject of a life story acquisition is paid only when the deal is completed. As noted above, nearly all life story acquisitions are preceded by option agreements, where a producer pays the subject a much smaller amount in exchange for the exclusive right to shop the story to studios or networks. These option fees seldom exceed 10% of the agreed-on price for the subject's life story and may be nominal or even zero.<sup>192</sup>

In addition to up-front payments for the acquisition of life story rights, producers occasionally offer subjects a small percentage of the film's net profits. In theory, this form of "back end" compensation incentivizes subjects to root for the project's success and to cooperate more willingly with the producer. Nevertheless, given the economics of the film industry and the aggressive accounting mechanisms used to compute a film's net profits, few productions actually result in the payment of this form of compensation to subjects.<sup>193</sup>

Why are compensation amounts low, at least as compared to the astronomical dollar values sometimes paid to top actors, directors and studio

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<sup>189</sup> Hammad Zaidi, *3 Things You Need to Know About Acquiring Life Rights*, Going Bionic Column, Mar. 13, 2017, <https://goingbionic.com/2017/03/13/3-things-you-need-to-know-about-acquiring-life-rights/>. See also Anonymous Interview #5 at 5 (most film life story fees are in the range of zero to \$250,000); Anonymous Interview #7 at 14 (stating that most deals are in the \$20,000 to \$250,000 range, though a handful are in the higher six figures).

<sup>190</sup> APPLETON & YANKELEVITZ, *supra* note 112, at 31 ("Generally, purchase prices for life rights in connection with feature films will fall within the range of \$100,000 to \$250,000. For television projects, the range is usually \$25,000 to \$100,000"); Anonymous Interview #6 at 12 (estimating the life rights for a "Hall-mark TV movie" at \$25,000 to \$75,000).

<sup>191</sup> Christian Rivas, *Apple TV+ wins bidding war for Magic Johnson docuseries*, SILVER SCREEN AND ROLL (Nov. 6, 2021), <https://www.silvercreenandroll.com/2021/11/6/22765953/lakers-news-magic-johnson-docuseries-details-apple-tv-plus>.

<sup>192</sup> Anonymous Interview #4 (option price may be as low as "a dollar").

<sup>193</sup> See Anonymous Interview #1 at 9 (making this point by reference to financial practices designed to shortchange performers, a practice known as "Hollywood accounting").

executives? One reason is that a key feature of life story agreements is the subject's waiver of claims against the producer. Even if a subject could win a defamation or right of privacy lawsuit against a major film studio, reputational damages tend to be modest, especially for the majority of docudrama subjects who are not famous. So, at a price point above about a million dollars, studios could be better off making the film and letting the subject sue them.<sup>194</sup>

Another reason for low prices is that most life story deals are for television projects, where budgets are lower than those of feature films. Moreover, even in feature films, stories based on real life, with the possible exception of some war films or *Titanic*, are seldom big-budget productions with massive special effects, expensive computer animation and exotic on-location shoots. As a result, the production's budget to acquire life story rights must remain modest.

## 6. Granularity

Many notable individuals have lived long and interesting lives, including many episodes worthy of dramatization. As a result, life story deals are often limited to a particular portion of a subject's life—their time in college, the military or public office, their investigation (or commission) of a particular crime, or the events leading up to a notable victory or achievement.<sup>195</sup> Periods not covered by the agreement are generally considered off-limits to the producers and may be sold by the subject for use in other projects.

Disputes can arise if agreements are not specific enough in this regard and a subject lives past the period that was originally depicted in a production. For example, when Christine Sizemore sold her story to Twentieth Century-Fox in 1956 for *The Three Faces of Eve*, the obvious subject of interest was her experience with, and treatment for, multiple personality disorder. More than thirty years later, however, Sizemore wrote a book about her post-treatment life and granted an option for its film dramatization to actress Sissy Spacek.<sup>196</sup> Twentieth Century-Fox, however, claimed that it owned rights in the entirety of Sizemore's life and contested Spacek's option.<sup>197</sup>

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<sup>194</sup> As one industry lawyer put it, “[y]ou’re not going to make a movie unless you’re an idiot that results in \$30 million of damages,” or anything close to that amount, so life rights deals seldom approach that level. Anonymous Interview #3 at 7.

<sup>195</sup> See APPLETON & YANKELEVITS, *supra* note 112, at 31.

<sup>196</sup> Rudell, *supra* note 105.

<sup>197</sup> *Id.* It appears that the dispute was eventually settled on undisclosed terms. Lentzner, *supra* note 108, at 627 n.1.



Time periods are not the only variables as to which life story deals can become granular. Like copyrights,<sup>198</sup> life story rights are divisible, so that separate rights can be granted with respect to the production of films, television shows, books, magazine articles, podcasts and merchandise, as well as series, sequels and remakes of the original production.<sup>199</sup> While subdividing life story rights into multiple units for licensing to different entities can help an individual to maximize the return from his or her life story rights, it can also create confusion and disagreement. For example, the press has reported on a dispute between two production companies that sought to create film versions of the life of Richard Williams, the father of tennis stars Serena and Venus Williams. One company putatively acquired the right to produce a film based on Richard Williams's autobiographical book *Black and White: The Way I See It*,<sup>200</sup> while another seemingly acquired life story rights from Williams himself.<sup>201</sup> Such acquisitions of the same stories from multiple sources is not uncommon.<sup>202</sup> All of these examples illustrate the many dimensions of granularity that life story agreements can address.

## 7. Creative Control

As discussed above, life story deals typically require subjects to waive their right to make claims based on the how they are depicted in a film or television show. Some industry insiders stress that the very point of a life story deal is that the studio can make whatever film it wishes about the subject.<sup>203</sup> Nevertheless, against the advice of counsel,<sup>204</sup> producers sometimes give their subjects the right to review or approve these depictions at certain stages during the production. Such approval rights, if granted, usually occur at the stage of the treatment (story outline), selection of screen-

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<sup>198</sup> See 17 U.S.C. § 201(d)(2) (“Any of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by section 106, may be transferred . . . and owned separately.”).

<sup>199</sup> See APPLETON & YANKELEVITS, *supra* note 112, at 31.

<sup>200</sup> Richard Williams, *Black and White: The Way I See It* (2014).

<sup>201</sup> See Ashley Cullins, *Father of Venus and Serena Williams Headed to Court Over Film Adaptation*, HOLLYWOOD REPORTER (Jun. 24, 2020) [www.hollywoodreporter.com/business/business-news/venus-serena-williamss-father-headed-court-life-story-rights-1300118/](http://www.hollywoodreporter.com/business/business-news/venus-serena-williamss-father-headed-court-life-story-rights-1300118/).

<sup>202</sup> See Grunfeld, *supra* note 29, at 516.

<sup>203</sup> Anonymous Interview #7 at 11 (“[Y]ou want to tell your own story, your own version of the story. That’s what screenwriters want.”).

<sup>204</sup> See Rodner, *supra* note 163 (“Many times the subject asks for script approval or some control over how he is portrayed. This is something a producer should try to avoid at all costs.”).

writer, casting of talent, or review of a draft script, but seldom at the final script stage, and never after filming has commenced.<sup>205</sup> Traditionally, such approval rights have only been granted to famous subjects like Hugh Hefner<sup>206</sup> and George M. Cohan,<sup>207</sup> though there appears to be an increasing use of these clauses in recent years.

In lieu of blanket approval rights, an increasing number of life story agreements contain provisions restricting the producer from depicting the subject engaging in particular forms of off-limits behavior, such as conducting illegal or immoral acts, swearing or cursing, or being portrayed in sexual situations.<sup>208</sup> While provisions like these give the subject less artistic and creative control over the project, they are less in tension with producers' desire to make the feature they want.

#### D. Life Story Acquisitions versus Releases and Other Agreements

It is important to distinguish life story agreements from other types of agreements used in the entertainment industry. The first is the simple "appearance" or "depiction" release, in which a subject agrees not to sue the producer on any theory, usually premised on accurately representing the subject.<sup>209</sup> As this latter condition indicates, the simple release is most common for documentary subjects as well as individuals briefly portrayed in docudramas.<sup>210</sup> Given the multiplicity of legal claims that may be brought by even minor characters depicted in a production, E&O insurance carriers often require that a producer at least obtain releases from all living persons recognizably portrayed in a production.<sup>211</sup>

<sup>205</sup> See APPLETON & YANKELEVITS, *supra* note 112, at 32.

<sup>206</sup> *Id.*

<sup>207</sup> AQUINO, *supra* note 86, at 27, 53 (for the 1942 musical film *Yankee Doodle Dandy*, composer George M. Cohan was reportedly granted the right to approve both the script and the actor who would portray him).

<sup>208</sup> Anonymous interview #9, Anonymous interview #10.

<sup>209</sup> See Anonymous Interview #8 at 6-7 (describing the simple "appearance release").

<sup>210</sup> Anonymous Interview #4 at 11-13 (explaining that documentaries often execute simple releases rather than full life story rights agreements with their subjects, and that the same is true with more peripheral characters in docudramas). Studios will also use the simple release to secure the right to portray individuals inadvertently included in any scene shot in a public place, often for no or little consideration. Anonymous Interview #1 at 12 (production assistants will often give people in the background of shots in public venues \$100 in exchange for signing a quick appearance release).

<sup>211</sup> See Grunfeld, *supra* note 29, at 530 (noting that in the docudrama *Kent State*, the producers were required to obtain depiction releases from 85 individuals). See

The life story rights agreement, as we have discussed above,<sup>212</sup> secures the producer substantially more rights.<sup>213</sup> While simple appearance releases are more common for documentaries and life story acquisitions are more common for docudramas,<sup>214</sup> life story rights may be secured for documentaries if the producer wishes to enhance the project by obtaining the subject's exclusivity or cooperation.<sup>215</sup> Finally, participants in reality-television projects sign much more robust agreements that grant the producer the right to use the subject's name and likeness for any purpose and without limitation.<sup>216</sup>

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This Part II offers a solution to the puzzle posed in Part I: Why do studios pay to acquire life story rights if they don't exist? The answer is that life story deals do not convey affirmative property-like interests, but instead comprise complex agreements with a remarkably stable character. This Part has adumbrated the core features of those deals, which comprise a grant of rights, a waiver of claims and covenant not to sue, an exclusivity commitment and an agreement to cooperate with production. In Part III, we turn to the bigger-picture themes raised by this descriptive account.

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*also* notes 138-139, *supra*, and accompanying text (discussing requirements for E&O insurance).

<sup>212</sup> See Part II.C, *supra*.

<sup>213</sup> Some entertainment lawyers also noted an additional category, the "heavy appearance release", that includes a release and some but not all of the features typical of a full life story agreement. See Anonymous Interview #8 at 6 (referring to a "heavy appearance release").

<sup>214</sup> GARON, *supra* note 116, at 307, 314 (discussing releases in the context of documentaries, and observing that life story rights are more relevant for filmmakers "pursing narrative film based on a person's true story").

<sup>215</sup> See Sections II.C.3 and 4, *supra* (discussing cooperation and exclusivity features of life story deals).

<sup>216</sup> Reality television contracts prospectively require contestants to relinquish any control or right to sue over the content that they will participate in creating with the studio. Life story rights deals retrospectively cede to the studios the right to sue for damages arising out of a feature based on their life. See Anonymous Interview #6 at 16-22 (detailing the operation of reality TV agreements). Because these agreements more closely approach the contracts actors sign with studios and are distinct from life story rights, *see id.* (distinguishing life rights deals from reality TV deals and comparing the latter to actor's agreements), we say little about them in this Article.

## III. DECONSTRUCTING LIFE STORY RIGHTS

Life story rights are not formal property interests, but four distinct contractual relations (permission, waiver, exclusivity, and access) that are bundled together under a common label. In this Part, we discuss the twin underlying motivations for this bundling: private ordering and transactional efficiency.

A. *Life Story Rights as Private Ordering — The Interplay of Law and Norms*

We begin this Part with an origin story. Part II described the beginning of life story deals in the Golden Age of Hollywood. But why, precisely, did these early producers seek out and acquire such non-existent rights? To answer this question, we return to the puzzle that gave rise to this article: Why do studios pay for life story rights when such rights don't exist? This puzzle is puzzling, though, only if one makes what Robert Ellickson has called the "legal centralist" assumption that only state-created laws govern our conduct.<sup>217</sup> Our assertion that life story rights do not exist means only that there is no behavioral obligation backed by a state sanction giving individuals a property-like interest in their life stories.<sup>218</sup> But law is not the only source of regulation. Many of the rules that govern our behavior are not found in judicial opinions or statutory codes, but arise spontaneously out of practices that are repeated over time until they form a kind of informal regulation—a social norm—that does not emanate from the state but still affects and shapes our conduct.<sup>219</sup> And of course parties can also use private agreements to reconfigure law's baselines. In this Subpart, we expound on the origin of life story rights as an interaction between these two forms of private ordering: contract and norms.

Over the past several decades, scholars have shown how norms can fill in the "negative spaces" left unprotected by intellectual property law. This work tends to follow a common model: the creative production of some community is unprotected by intellectual property law, and that community reacts by creating an extralegal system of protection for that content. For example, stand-up comedians' jokes are unprotected by copyright because

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<sup>217</sup> Robert Ellickson, *Order Without Law: How Neighbors Settle Disputes* (3d prt. 1994).

<sup>218</sup> See Robert Cooter, *Do Good Laws Make Good Citizens? An Empirical Analysis of Internalized Norms*, 86 VA. L. REV. 1577, 1579 (2000).

<sup>219</sup> See Robert Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643 (1996).

they are told extemporaneously during in-person performances, hence not fixed in any tangible medium of expression.<sup>220</sup> Sprigman and Oliar showed that comedians have reacted to this lacuna in IP law by forging a norm-based system of protection that uses a combination of shaming, exclusion, and even violence to discourage comedians from using one another's jokes.<sup>221</sup>

The institution of securing life story rights initially appears to be another example of this kind of norms system. For one thing, this practice operates in a space left untouched by IP or IP-adjacent law. Law secures no rights in one's life story; life story deals provide an alternative source of protection for the facts of subjects' lives. Also, the setting in which these deals have emerged has all the indicia necessary to give rise to stable norm-based regulation. Ellickson's cornerstone work on norms among cattle ranchers in Shasta County illustrates that norm-based systems arise where three conditions are met. First is the presence of a closely knit group that recognizes and is governed by the norm. Second, and relatedly, repeated interactions over time must allow the norm to become familiar and well-accepted. Third, some mechanism for sanctioning violators must assure that the norm is taken seriously even in the absence of state sanctions.<sup>222</sup>

The entertainment industry that trades in life story rights has several indicia of a close-knit community. First, it possesses a degree of the geographic concentration (if not isolation) that characterized the ranchers that Ellickson studied. While film and television productions today are made globally, the epicenter of the business of entertainment in the United States continues to be Los Angeles. LA is not only the headquarters of the relatively small number of major studios and firms in show business, but it is also where a disproportionate percentage of the human and industrial capital

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<sup>220</sup> 17 U.S.C. 102(a) (copyright vests only in original works of authorship fixed in tangible media of expression).

<sup>221</sup> See Dotan Oliar & Chris Sprigman, *There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 VA. L. REV. 1787 (2008). Other examples and variations abound. The copyrightability of tattoo artists' work is debatable, but in any event it has given rise to a system of community norms to regulate and prevent copying. See Aaron Perzanowski, *Tattoos & IP Norms*, 98 MINN. L. REV. 511 (2013). Norm-based regulation may also arise where IP is effectively but not substantively unavailable, as with roller derby names. See Dave Fagundes, *Talk Derby to Me: Emergent Intellectual Property Norms in Roller Derby Pseudonyms*, 90 TEX. L. REV. 1093 (2012) (showing that derby skaters created a norm-based system of regulation for their skate names because federal trademark registration was too costly).

<sup>222</sup> ELLICKSON, *supra* note 217 at 167.

necessary to produce film and television is located.<sup>223</sup> The industry is also notoriously insular as compared to many other contemporary businesses, so much so that it operates to a large extent by reputational capital and word of mouth.<sup>224</sup> One industry insider told us that there are only a dozen or so law firms in LA that specialize in the industry to the degree that they all know one another and their respective practices, and view outsiders as lacking the requisite industry experience and knowledge to make deals efficiently.<sup>225</sup>

Second, and relatedly, norms arise within close-knit communities only if they are iterated frequently over time. This matters because norms, unlike state-created law, lack an external referent to make their existence and content unambiguous. Through repeated practice, though, norms become “internalized” in actors, so that they are made effective even in the absence of a statute or judicial decision enshrining them.<sup>226</sup> Here, the practice of acquiring life story rights from the subjects of docudramas is the subject of repeat play in several senses. The practice of securing life story rights is as old as the docudrama itself, one that dates back at least as far as the 1940 *Sergeant York* film.<sup>227</sup> In the more than eight intervening decades, it is likely that Hollywood executives have inked thousands of these deals. The insistence on these deals by influential external players, such as insurers and distributors,<sup>228</sup> reinforces the norm. These multiple points of iteration over a long span of time have caused industry insiders to internalize the life story deal as a practice, even though it is not explicitly required by law.

Finally, the enforcement mechanism for life story rights seems obvious: courts could intervene to enforce these agreements as a matter of contract law. Yet, this is not the account that industry insiders tell. In fact, violations of life story agreements are so rare that most interview subjects could not

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<sup>223</sup> Jonathan M. Barnett, *Hollywood Deals: Soft Contracts for Hard Markets*, 64 DUKE L.J. 605, 633 (2015) (“Hollywood exhibits some, but not all, of the characteristics of the close-knit environments in which reputation-based transacting has been most convincingly documented. Hollywood is at best a relatively small world populated by firms and individuals that do business with each other repeatedly: six major studios, three major talent agencies, a handful of mini-major studios, a larger number of independent production companies, a small group of high-value talent, and a much larger group of lower-value talent consisting of tens of thousands of actors.”).

<sup>224</sup> See Gary M. McLaughlin, *Oral Contracts in the Entertainment Industry*, 1 VA. SPORTS & ENT. L.J. 101, 129-31 (2001) (“the entertainment industry shares many of the characteristics of a small, close-knit business community”).

<sup>225</sup> Anonymous Interview #10.

<sup>226</sup> See Cooter, *supra* note 218 at 1577-80 (discussing the phenomenon of norm internalization).

<sup>227</sup> See Part II.A, *supra*.

<sup>228</sup> See Section II.B.3, *supra*.

recall a single instance of a subject flouting them or a claim of breach by either studios or subjects. This absence of state enforcement suggests that enforcement is also a matter of norms rather than law. This norm-based enforcement has two valences. One is endogenous. The entrenched character of life story deals in the entertainment industry means that industry actors have internalized the norm in favor of honoring such deals, and they follow it reflexively. Cooter has shown that most norms systems rely to some extent on internalization, with actors complying due to their own distaste for deviation rather than fear of some external sanction.<sup>229</sup> One industry insider reported that while Hollywood players are thought of as amoral “sharks,” there is some intrinsic sense of morality that leads them to respect norms and agreements, and that this in part explains the industry’s near-perfect rate of compliance with agreements granting life story rights.<sup>230</sup>

Internalization is not the only source of enforcement for life story deals. There are exogenous pressures toward compliance as well. Dealmakers who may otherwise be willing to flout norms are to a large extent deterred by the risk of social sanctions in the form of exclusion from professional relationships. The entertainment industry’s close knit character means that reputational capital is at a premium and exclusion sanctions can be killers.<sup>231</sup> Several industry insiders explained that failing to respect an executed life story deal would brand the violator as untrustworthy and complicate if not end their career.<sup>232</sup> Even more than threats of litigation, studios appear to comply with life story deals because they recognize that if they do not, then (as the old Hollywood shibboleth runs) they’ll never work in that town again.<sup>233</sup>

Subjects of docudramas are not necessarily members of the entertainment community and so may not be constrained by internalization. Interview subjects reported, though, that even when subjects complained to studios about their portrayal, those complaints rarely resulted in litigation.

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<sup>229</sup> See Cooter, *supra* note 219 at 1694 (arguing that the internalized compulsion to comply with norms is equally if not more effective in controlling behavior than the threat of external sanctions for norm violation). See also Dave Fagundes, *The Social Norms of Waiting in Line*, 41 L. & SOC. INQUIRY 1179, 1189 (2017) (citing research showing that people queue more because of internalized norms than externalized threats of sanction).

<sup>230</sup> Anonymous Interview #11 at 13.

<sup>231</sup> Cf. Olliar & Sprigman, *supra* note 221 (comedians who are excluded from comedy clubs due to reputations as “joke thieves” can find their careers derailed).

<sup>232</sup> See, e.g., Anonymous interview #12.

<sup>233</sup> This classic threat can be traced back to strong-armed producers like Louis B. Mayer during Hollywood’s Golden Age. See SCOTT EYMAN, *LION OF HOLLYWOOD: THE LIFE AND LEGEND OF LOUIS B. MAYER* 355 (2005).

Rather, aggrieved subjects almost invariably submit to the *in terrorem* effect of an agreement once studios remind them of the broad language to which they agreed.<sup>234</sup>

The practice of bargaining for life story rights is, however, different in salient ways from these other norms systems. For one thing, life rights deals promise studios packages of amenities beyond just the “grant” of the subject’s life rights. The part of these agreements that is not rooted in IP law thus is not the only part doing real work; on the contrary, many subjects reported that securing cooperation or waiver were significant motivations in landing these deals. Moreover, not all studios secure life story rights before producing docudramas. Estimates vary, but anywhere from 20-50% of life-based films proceed without such a deal.<sup>235</sup> If there were a strong norm in favor of securing life story rights, we would expect the practice to be nearly universal, and for the explanation to sound in terms of expected compliance with social practices rather than pragmatism.

So is the practice of acquiring life story rights a norm-based system? The answer is both yes and no, and depends on which stage of the deal process one looks at. The formation of these deals does not appear to be the product of norms, but rather a business decision made on a cost-benefit basis. This makes sense since the deals are between industry insiders (studios) and outsiders (subjects), so the parties do not operate within the same close-knit community. But with respect to enforcement, norms do significant work. Interviewees reported a surprising absence of breach or even strategic behavior with respect to life story deals, even though rational choice would suggest that larger studios in particular could poach subjects from independents, who lack the capital to recover damages in litigation. The near-perfect compliance with these agreements is a function of strong norms within the entertainment industry holding people in line due to internalized respect for this practice and fear of reputational sanctions.

This discussion illustrates that the question should not be whether this, or any, regulatory system is driven by norms or law. While some may be products almost entirely of one or the other, the institution of life story rights bears features of each. The formation of these deals is more a matter of rearranging the law’s baselines through private agreements due to practical cost-benefit calculations. But the enforcement of these deals involves neither legal sanctions nor their threat. It is instead stitched together by an internal-

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<sup>234</sup> See Anonymous Interview #1 (stating that the *in terrorem* effect of life story rights agreements deters most subjects from following through on threats of suit).

<sup>235</sup> See *supra* note 15 (estimates of percentage of docudramas involving life story acquisitions).



ized sense of right and wrong as well as a fear of being deemed a bad cooperator. Framing the question whether a regulatory system is norm- or law-based wrongly assumes a binary choice between two options. Perhaps the better way to think about the issue is that regulation may contain features of both norms and law, and that the two can work in combination (as here) to supplement each other.

### B. Transactional Efficiency

As noted in the Introduction, the general concept of life story rights is familiar not only to entertainment law experts but to non-experts and even members of the general public. As a result, almost anyone who has been exposed to popular culture and media has a rough notion that there is a practice of selling one's "life story." Yet it is also likely that few non-experts could draft, negotiate, or even understand, the details of a typical life story agreement. This divide is, of course, neither surprising nor unusual. The conceptualization of life story rights as a "thing" arose as a convenient method for labelling a more diffuse and abstract set of contractual relations between parties (i.e., authorization, waiver, access and exclusivity, plus the secondary elements discussed in Part II.C). This bundling of contractual elements under the unitary label of life story rights thus creates a convenient transactional *module* that facilitates transactions, reduces information costs, avoids litigation and serves a valuable signaling function to the market.

#### 1. Modularity, Standardization and Information Costs

Modularity is a concept that is useful across all fields that involve the interaction of components and systems within a whole. Whether a product is a commercial jetliner, a software operating system or a smartphone, its myriad subsystems are often developed independently and assembled to operate with one another through a series of common interfaces.<sup>236</sup> Modularization of this kind goes hand in hand with standardization: while it is beneficial for a product designer to organize a complex system into a series of more manageable subunits, it is even more beneficial for those subunits to be interchangeable and available from any producer that adheres to a common set of protocols. The ability of different manufacturers to produce the components of a complex system enables greater specialization in compo-

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<sup>236</sup> See Henry Smith, *Property as Platform: Coordinating Standards for Technological Innovation*, 9 J. COMPETITION L. & ECON. 1057, 1058 (2013); CARLISS Y. BALDWIN & KIM B. CLARK, DESIGN RULES: THE POWER OF MODULARITY 6, 63-64 (2000).

nent design and manufacture<sup>237</sup> and can result in greater efficiency, reduced costs and improved quality of both the standardized components and overall systems.<sup>238</sup>

Henry Smith has demonstrated that the principles of modularization and standardization can also be applied to legal doctrine, particularly the rules surrounding property. As Smith explains,

To serve as a platform for private interactions, the law of property employs modules and interfaces. By setting boundaries around clumps of interactions (modules) and defining the permitted interface between them, the system can manage the complexity of private interactions. Because interactions take place in one or a few modules and not the system as a whole, modularization permits specialization. For example, an owner can specialize in developing and exploiting information about the asset she owns. Remote parties need not know anything about the owner or her plans; the law of trespass and theft merely direct them to steer clear in a fashion that is simple and easy to comply with.<sup>239</sup>

Smith also observes that the modularization of property rights reduces information costs, as parties need only observe and comprehend the features exhibited by a module as a whole, rather than all of its constituent elements.<sup>240</sup>

The production of a feature film or television series can likewise be conceptualized as an assembly of different modular contractual arrangements with actors, screenwriters, composers, set designers, location managers, distributors, promoters and the like. In his analysis of Hollywood deals, Jonathan Barnett refers to the efficiencies and value enhancement that studios can achieve through “fractionalization” (modularization) of the different functions involved in the production of a motion picture.<sup>241</sup>

When life story rights are conceptualized as a single legal module, rather than a bundle of diverse jural relations, similar efficiencies are

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<sup>237</sup> Smith, *Property as Platform*, *supra* note 236, at 1058; BALDWIN & CLARK, *supra* note 236, at 33.

<sup>238</sup> U.S. Dep’t Just. & Fed. Trade Comm’n, Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition 33 (2007) (“Standards can make products less costly for firms to produce and more valuable to consumers. They can increase innovation, efficiency, and consumer choice; foster public health and safety; and serve as a fundamental building block for international trade.”).

<sup>239</sup> Smith, *Property as Platform*, *supra* note 236, at 1058.

<sup>240</sup> Smith, *Law of Things*, *supra* note 14, at 1708. *See also* Rose, *supra* note 14, at 70–71.

<sup>241</sup> Jonathan M. Barnett, *Why is Everyone Afraid of IP Licensing?*, 30 HARV. J. L. & TECH. 123, 138–41 (2017). *See also* Barnett, *Hollywood Deals*, *supra* note 223.

achieved. Most Americans understand, at a high level, what legal rights they obtain when they rent a car. Because automobile rental contracts are largely standardized, parties can effectuate highly efficient transactions. Rather than worrying about the contractual details, a consumer renting a car can focus primarily on price versus make and model, perhaps giving some attention to the various insurance options offered by the rental company.

Similarly, with life story rights, parties can negotiate a deal with a single price tag, rather than haggle over the price of separate liability releases, access, and exclusivity provisions. Information costs are further reduced because comparisons between prices of comparable life story deals can be made more readily than comparisons of prices for separate deal elements.<sup>242</sup>

Moreover, the establishment of clear contractual rules regarding the use and exploitation of an individual's life story can eliminate the uncertainty created by variations in state law, and among federal judicial circuits, concerning the right of publicity, privacy and defamation, and how these interact with the First Amendment. Transactional efficiency and certainty are thus enhanced.

This is not to say, of course, that life story deals are entirely standardized along the lines of residential mortgages or corporate debentures.<sup>243</sup> In addition to features that vary among even the most standardized contracts (e.g., price and asset description), life story agreements can differ both at to their principal terms (e.g., exceptions to exclusivity, scope of authorization, nature of cooperation)<sup>244</sup> and secondary terms (e.g., degree of creative control). These variations are typically negotiated by experts (lawyers), but subjects can have strong preferences concerning, and even emotional responses to, some of them. Nevertheless, the existence of variations among life story

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<sup>242</sup> E.g., "If Anna got \$X for her life story, then I deserve \$Y for mine."

<sup>243</sup> See Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting (Or "The Economics of Boilerplate")*, 83 VA. L. REV. 713 (1997) (corporate bonds); Joseph M. Perillo, *Neutral Standardizing of Contracts*, 28 PACE L. REV. 179, 184–89 (2008) (numerous standardized contract forms); Anna Gelpern & Mitu Gulati, *Innovation after the Revolution: Foreign Sovereign Bond Contracts Since 2003*, 4 CAP. MKT. L.J. 85 (2009) (sovereign bond contracts). In this paper, we have not attempted a systematic, empirical analysis of life story rights agreements. Such an analysis would be a useful subject of future research.

<sup>244</sup> In exceptional cases, one or more of the four principal elements of life story rights may even be missing. See, e.g., *People v. Corona*, 80 Cal. App. 3d 684, 703 (1978) (criminal defendant grants his attorney, in lieu of fees, "the exclusive and irrevocable literary and dramatic property rights in and to my life story and any part or portion of my life story, and any incidents thereof, both present and future," leading to claims of ineffective representation of counsel).

deals does not mean that life story rights have not been modularized in a manner that is efficiency-enhancing. In the end, despite the differences, industry veterans observe that most life story deals look more similar than not.<sup>245</sup>

## 2. Litigation Avoidance

Litigation imposes costs on productions, including expense, delay and uncertainty. As a result, producers, and insurance carriers have adopted practices intended to reduce the risk that a particular production will be subject to litigation. The acquisition of life story rights from individuals depicted in docudramas is such a practice that can give producers “peace of mind.”<sup>246</sup>

Subjects from whom life story rights are acquired are occasionally upset about their portrayal in docudramas, but they rarely sue. As noted in Subpart III.A, this may be because when irate subjects approach a producer to complain about their depiction, the producer’s lawyers can produce the life story agreement, which clearly shows that the subject gave permission to depict them in any manner, however fictional and unflattering, and that they have given up the right to sue the producer. According to the industry insiders that we interviewed, nearly all subjects drop the issue at this stage without filing a claim<sup>247</sup> presumably due, at least in part, to the language granting the producer the right to fictionalize the subjects’ lives.

Thus, even if, as shown in Part I, legal claims brought by depicted individuals under publicity, privacy, copyright and trademark theories are unlikely to succeed, such claims can delay a production, increase costs and introduce at least some risk that the production itself will be enjoined. Acquiring bundled life story rights increase the efficiency of film and television production by eliminating potentially disruptive litigation risks before they are incurred. In other words, the decision not to acquire life story rights for a particular project involves a gamble by the producer: the gamble could pay off and a project could be released successfully without legal challenge by a subject, as was the case with Mark Zuckerberg (portrayed in *The Social Net-*

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<sup>245</sup> Anonymous Interview #9. Interestingly, the tendency for life story acquisitions to be documented with formal, written agreements runs counter to observations regarding the prevalence of oral and other informal agreements in Hollywood. See, e.g., McLaughlin, *supra* note 224, Barnett, *supra* note 223. One possible reason for this divergence from the trend is that, unlike transactions among Hollywood insiders – producers, directors, studios and talent – life story deals are usually consummated with outsiders who are not part of the community and are unfamiliar or uncomfortable with community norms relating to transactions.

<sup>246</sup> Gardner, *supra* note 23. See also Gibson, *supra* note 159.

<sup>247</sup> E.g., Anonymous Interviews #8, #15.

work) and Queen Elizabeth II (portrayed in *The Crown*). On the other hand, an irate and determined subject like former LA Lakers coach Jerry West (portrayed in *Winning Time*) could bring expensive and disruptive litigation costing far more than the initial acquisition of life story rights might have.<sup>248</sup>

### 3. The Signaling Function of Life Story Acquisitions

As noted in the preceding sections, while life story rights do not exist as recognized property interests, contracting to acquire life story rights facilitates transactional efficiency in the entertainment industry. Another indirect function that life story acquisitions play is a signaling one. Cathy Hwang and Matthew Jennejohn observe that private contracts are intended for multiple audiences beyond the parties and the courts that may be called upon to interpret them.<sup>249</sup> Hwang and Jennejohn focus on the intended influence of contractual arrangements on regulatory authorities,<sup>250</sup> but a wide range of other audiences for the “signaling” function of private contractual arrangements also exists. In the case of transactions involving patent rights, for example, commentators have identified as potential audiences: financial investors, customers, employees and the public.<sup>251</sup>

In a similar vein, life story acquisitions, the general parameters of which are often made public in the trade press, blogs and social media, send various signals to the market. First, they generate positive “buzz” for a project, thus building public interest and, presumably, greater viewership and reviews once it is released. Second, the acquisition of a life story acquisition by a producer signals to other producers that a project covering a particular story is in the works, potentially dissuading others from pursuing a compet-

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<sup>248</sup> See Schilken, *supra* note 185 West’s annoyance at not being paid for his portrayal in *Winning Time* might have been exacerbated by the rumors that Lakers star Magic Johnson was paid upwards of \$25 million for a separate Apple TV+ docuseries. See Rivas, *supra* note 191.

<sup>249</sup> Cathy Hwang & Matthew Jennejohn, *Contractual Depth*, 106 MINN. L. REV. 1267 (2022).

<sup>250</sup> *Id.*

<sup>251</sup> See, e.g., Clarissa Long, *Patent Signals*, 69 U. CHI. L. REV. 625, 626 (2002) (patents convey information about an inventor to the capital markets); Jorge L. Contreras, *Patent Pledges*, 47 ARIZONA ST. L.J. 543, 573–92 (2015) (identifying motives for unilateral pledges of patent rights including attempts to influence product markets, regulators and the public); Clark D. Asay, *The informational effects of patent pledges*, in PATENT PLEDGES: GLOBAL PERSPECTIVES ON PATENT LAW’S PRIVATE ORDERING FRONTIER (Jorge L. Contreras & Meredith Jacob eds., 2017) (analyzing signaling function of patent pledges).

ing project of their own.<sup>252</sup> Finally, a subject's sale of his or her life story to a producer can signal to the public the value and authenticity of the subject's story, potentially leading to interviews, guest appearances, endorsement deals, book contracts and other related gains for the subject.

#### CONCLUSION

We began this article by pointing out that life story rights are a fiction. There is no legally cognizable interest in the events that occur during our lives, however influential, emotional or formative they may be to us. Yet Hollywood has filled this gap with a contractual construct — the life story right. The conceptualization of life story rights in this manner yields transactional efficiencies by reducing information costs, enabling signaling and avoiding costly litigation. Thus, while acquiring life story rights may not be legally necessary, such deals today form an essential feature of the entertainment industry.

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<sup>252</sup> Anonymous Interview #10. This form of signaling can be especially important when multiple sources exist for a particular story, such as the Wilson article telling Anna Sorokin's story that HBO Max optioned in competition with Sorokin's own account sold to Netflix. *See* Part II.B.2.a, *supra*.

## “Baseball Would Certainly Fail”: A History of Sports Leagues’ Hyperbolic Predictions in the 20th Century’s Biggest Cases and the Largely Successful Evolution of Their Arguments

Christopher R. Deubert<sup>1</sup>

### ABSTRACT

*This Article is a contribution to the history of sports law. The Article is the first ever analysis of the arguments made by professional sports leagues and their players and players associations in legal briefs and memoranda filed in the major sports law cases of the 20th century. While there exists considerable literature on the courts’ decisions, the opinions in those cases provide a limited picture of the nature and scope of the parties’ arguments on novel antitrust and labor issues. By obtaining the memoranda from the U.S. National Archives and Records Administration, this Article provides an unprecedented examination of the claims and defenses of the relevant parties, and how those claims and defenses evolved over time.*

*In the earliest cases, Major League Baseball and the National Football League argued that any diminution of the restrictions they had placed on their players would literally lead to the destruction of their leagues and cause grave public harm. When*

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<sup>1</sup> Christopher R. Deubert is Senior Counsel with Constangy, Brooks, Smith & Prophete LLP. This Article was inspired by Jim Quinn, a legendary sports litigator involved in many of the cases discussed herein, with whom I have had the good fortune to work and guest lecture alongside. Jim frequently explained how, in many of these cases, the leagues claimed that reducing or eliminating player-related restrictions would destroy the leagues, only to be proven wrong over time. This Article summarizes the historical record in support of Jim’s attestation. Jim’s account of many of these cases can be found in his book, *Don’t Be Afraid to Win. JIM QUINN, DON’T BE AFRAID TO WIN: HOW FREE AGENCY CHANGED THE BUSINESS OF PRO SPORTS* (Radius Book Group 2019).

*the courts were not persuaded by these “doomsday” arguments, the leagues asserted that the unique nature of the sports industry, in which at least some cooperation among competitors is necessary, required that the restrictions be analyzed under antitrust law’s rule of reason rather than be declared per se illegal. Eventually prevailing on that argument, and with the aid of a law student’s theorizing, in the 1970s the leagues convinced the courts that the restrictions should be exempt from antitrust scrutiny so long as they were the result of collective bargaining with the players unions. The boundaries of that exemption were not clarified until the Supreme Court addressed the issue in 1996. For better and worse, the leagues and unions have been negotiating and litigating accordingly ever since.*

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## INTRODUCTION

In a 1922 brief to the United States Supreme Court in *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs* (“*Federal Baseball*”),<sup>2</sup> the entities today collectively known as Major League Baseball (“MLB”) argued that the reserve clause, the system through which there was no free agency and clubs unilaterally decided player salaries, was “absolutely necessary” to prevent “disastrous results to the sporting public.”<sup>3</sup> Further, MLB said the reserve system was “absolutely essential to the existence of so obviously a wholesome and popular sporting event as the world’s series.”<sup>4</sup>

These arguments proved incorrect. As discussed herein, the reserve system died in the 1970s but not only did MLB and the World Series not suffer the same fate, they thrived in the subsequent decades. The other major American sports leagues — the National Football League (“NFL”), National Basketball Association (“NBA”), and National Hockey League (“NHL”) — all made similar arguments as to the purported essentialness of their player restraint mechanisms in numerous cases in the second half of the 20th century. Those arguments too proved inaccurate.

This Article is the first of its kind to analyze the arguments made by leagues, their players, and players associations in these cases by examining the contents of the legal briefs and memoranda filed therein. While there exists considerable literature on the courts’ decisions in these cases,<sup>5</sup> the

<sup>2</sup> 259 U.S. 200 (1922).

<sup>3</sup> Brief on Behalf of Defendants in Error at 14, *Fed. Baseball Club of Baltimore*, 259 U.S. 200 (1922) (Apr. 4, 1922) (No. 204) [hereinafter *Organized Baseball Brief*].

<sup>4</sup> *Id.* at 72.

<sup>5</sup> See, e.g., William B. Gould IV, *Labor Issues in Professional Sports*, 15 STAN. L. & POL’Y REV. 61 (2004); Derek D. Yu, *The Reconciliation of Antitrust Laws and Labour Laws*

opinions in those cases provide only a small picture of the nature and scope of the parties' arguments. By obtaining the memoranda from the U.S. National Archives and Records Administration, this Article provides an unprecedented examination of the claims and defenses of the relevant parties, and how those claims and defenses evolved over time.

While MLB received an antitrust exemption in *Federal Baseball* that endured for decades, the other leagues were not so fortunate, as determined by the Supreme Court in *Radovich v. NFL*.<sup>6</sup> Then, in the 1970s, all the leagues suffered major losses in cases brought by players challenging the leagues' restrictions on player salaries and movement. These losses occurred despite dire predictions by the leagues that finding in the players' favor would effectively amount to a doomsday for their sports. In fact, the court decisions did not kill the sports as claimed but merely forced the leagues to negotiate in earnest with the players. Consequently, as both litigation and collective bargaining between the leagues and players evolved, so too did the parties' arguments.

Once the leagues accepted legal reality, their arguments and legal record improved. The leagues persuaded courts that the unique nature of sports required some special consideration under antitrust law. More importantly, the leagues were successful in convincing the courts that the primary avenue through which employment disputes with their players should be resolved is through labor law and collective bargaining. This argument was perhaps first articulated by a Yale law student in 1971 in an article repeatedly cited by the parties and courts in considering these issues. Although the Supreme Court finally addressed some of the oft-litigated issues in 1996,<sup>7</sup> the tug of war over antitrust and labor law continues between players and leagues.

This Article examines the evolution of the leagues' arguments from primary source documents. Specifically, this Article proceeds in four Parts, summarizing and analyzing: (I) some of the leagues' failed doomsday arguments; (II) the courts' rejection of *per se* antitrust liability for the leagues'

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*in Professional Sports*, 6 SPORTS L. J. 159 (1999); Jonathan C. Tyras, *Players Versus Owners: Collective Bargaining and Antitrust After Brown v. Pro Football, Inc.*, 1 U. PA. J. LAB. & EMP. L. 297 (1998); Marc J. Yoskowitz, *A Confluence of Labor and Antitrust Law: The Possibility of Union Decertification in the National Basketball Association to Avoid the Bounds of Labor Law and Move into the Realm of Antitrust Law*, 1998 COLUM. BUS. L. REV. 579 (1998); John J. Scura, *The Time Has Come: Ending the Antitrust Non-Enforcement Policy in Professional Sports*, 2 SETON HALL. J. SPORTS L. 151 (1992); Gary R. Roberts, *Sports League Restraints on the Labor Market: The Failure of Stare Decisis*, 47 UNIV. PITT. L. REV. 337 (1986).

<sup>6</sup> 352 U.S. 445 (1957); *see infra*, Section I.e.

<sup>7</sup> *See infra*, Section IV.g.

rules; (III) the development of the non-statutory labor exemption; and (IV) the dispute as to when the non-statutory labor exemption expires.

### I. THE RESERVE CLAUSE IS “ABSOLUTELY ESSENTIAL”

MLB has four historically significant cases. As discussed in the Introduction, *Federal Baseball* presented a challenge to MLB’s reserve clause, discussed in more detail below. The resulting 1922 decision from the Supreme Court granting MLB an exemption from antitrust law was revisited in 1953 in *Toolson v. New York Yankees, Inc.* (“*Toolson*”)<sup>8</sup> and in 1972 in *Flood v. Kuhn* (“*Flood*”).<sup>9</sup> In each case, MLB asserted a doomsday defense and hung on to its antitrust exemption. The reserve clause was finally undone in a 1975 arbitration decision at issue in *Kansas City Royals Baseball Corp. v. MLB Players Ass’n* (“*Kansas City Royals*”).<sup>10</sup>

Understandably, the leagues that sprouted after MLB (*e.g.*, the NFL, NBA, and NHL) copied much of its business model, most notably the reserve clause. Consequently, those leagues equally believed the reserve clause was essential to their operations as best reflected in *Radovich v. NFL*.<sup>11</sup> In hindsight, decades removed from the reserve clause’s constraints, it is clear that the leagues’ arguments were wrong, as this Part explains.

#### *a. Federal Baseball (1922)*

Federal Baseball is an original sin in American sports jurisprudence. The arguments made in that case, and the Supreme Court’s resultant decision, laid the groundwork for all major legal battles between players and leagues. Consequently, it is where we must begin our analysis.

In 1914, the Federal League began play, intending to compete with the National League and American League,<sup>12</sup> by that time jointly operating as “Organized Baseball,” and recognized as the “Major Leagues” for professional baseball,<sup>13</sup> today known as MLB.<sup>14</sup> The Federal League consisted of

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<sup>8</sup> 346 U.S. 356 (1953).

<sup>9</sup> 407 U.S. 258 (1972).

<sup>10</sup> 532 F.2d 615 (8th Cir. 1976).

<sup>11</sup> 352 U.S. at 448.

<sup>12</sup> Brief on Behalf of Plaintiff in Error at 20, *Fed. Baseball Club of Baltimore v. Nat’l League of Pro. Baseball Clubs*, 259 U.S. 200 (Feb. 27, 1922) (No. 204). [hereinafter *Federal Baseball Brief*].

<sup>13</sup> *Id.* at 13.

<sup>14</sup> *Organized Baseball*, BASEBALL REFERENCE (Oct. 10 2021), [https://www.baseball-reference.com/bullpen/Organized\\_Baseball](https://www.baseball-reference.com/bullpen/Organized_Baseball) (“Organized Baseball is the term for Major League Baseball and its associated minor leagues”).

eight clubs: Baltimore; Brooklyn; Buffalo; Chicago; Indianapolis; Kansas City; Pittsburgh; and St. Louis.<sup>15</sup> MLB at the time had 16 clubs.<sup>16</sup>

The Federal League ultimately failed because of what one club, the Federal Baseball Club of Baltimore (“Baltimore”), argued were a series of unlawful agreements among the MLB clubs. Specifically, Baltimore complained about a series of provisions in MLB’s governing document, the “National Agreement,” which: (i) required clubs to include in their player contracts provisions which “enable[d] the club to retain the perpetual right of employment,” known as the “reserve clause”; (ii) prohibited clubs from negotiating with players of another club subject to a reserve clause; and, (iii) prohibited clubs from negotiating with players who have at any time violated the reserve clause, *i.e.*, “blacklist[ing]” them.<sup>17</sup>

The reserve clause is of such significance that it is worth quoting in full:

In consideration of the compensation paid to the party of the second part by the party of the first part as recited in Clause 1 hereof, the party of the second part agrees and obligates himself to contract with and continue in the service of said party of the first part for the succeeding season at a salary to be determined by the parties of such contract.<sup>18</sup>

Importantly, while the clause implies that the player’s salary was to be mutually determined, in practice, a player was “subject to re-employment by the club with whom he ha[d] such contract, *irrespective of whether the compensation or other terms of employment are satisfactory or not[.]*”<sup>19</sup> If the player did not agree to the salary being offered by his club, “his only alternative [was] to quit professional baseball.”<sup>20</sup>

The reserve clause created an “almost insurmountable difficulty” for the Federal League in its efforts to employ high quality baseball players.<sup>21</sup> As explained by Baltimore, “[t]he completeness with which [MLB] dominated these players was manifested by the fear, which they expressed, that if they once entered into the employment of any independent organization, it would mean that they were forever shut out of [MLB].”<sup>22</sup>

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<sup>15</sup> Federal Baseball Brief, *supra* note 12, at 6.

<sup>16</sup> *Id.* at 13.

<sup>17</sup> *Id.* at 31–57.

<sup>18</sup> *Id.* at 45–46.

<sup>19</sup> *Id.* at 53.

<sup>20</sup> *Id.* at 54.

<sup>21</sup> *Id.* at 57.

<sup>22</sup> *Id.*

After two seasons of challenged operations, in December 1915, the Federal League and its member clubs reached an agreement with MLB — known as the “Peace Agreement” — to cease play in exchange for \$50,000 payments and interests in MLB clubs.<sup>23</sup>

Baltimore objected to the Peace Agreement and instead chose to file a lawsuit against MLB, its member clubs, and its former business partners in the Federal League. Baltimore brought suit under the Sherman Antitrust Act (“Sherman Act”),<sup>24</sup> but, at least in its eventual brief to the Supreme Court, did not specify the provision of the Sherman Act it believed was violated. The Sherman Act was passed in 1890<sup>25</sup> and thus when Baltimore initiated its action in or about 1916, the understanding and application of the law was still relatively new. Baltimore phrased its complaint as follows:

first, for damage to its business as a result of the monopoly of the business of providing exhibitions of professional baseball which defendants in error had established and maintained throughout the United States, and a conspiracy on their part to restrain interstate commerce in said business; and, second, for injury sustained by plaintiff in error as a result of a conspiracy on the part of the defendants in error to wreck and destroy, *and the actual wrecking and destruction* of the Federal League, of which plaintiff in error was a constituent member, and the existence of which League was essential to the carrying on of the business of plaintiff in error; this conspiracy being one to monopolize a part of interstate commerce and in restraint thereof.<sup>26</sup>

Today, we can recognize Baltimore to have been raising claims under both Sections 1 and 2 of the Sherman Act. Section 1 of the Sherman Act, as written, prohibits “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States[.]”<sup>27</sup> Section 2 punishes any “person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States[.]”<sup>28</sup> In short, the Sherman Act prohibits anticompetitive conduct that affects interstate commerce, which we shall see was a major issue in *Federal Baseball*.

The reserve clause was central to Baltimore’s lawsuit.<sup>29</sup> Baltimore argued that

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<sup>23</sup> *Id.* at 81–82.

<sup>24</sup> *Id.* at 2.

<sup>25</sup> See 15 U.S.C. § 1-38.

<sup>26</sup> Federal Baseball Brief, *supra* note 12, at 2.

<sup>27</sup> 15 U.S.C. § 1.

<sup>28</sup> 15 U.S.C. § 2.

<sup>29</sup> Federal Baseball Brief, *supra* note 12, at 165–71.

This subjection of all these thousands of players by means of an elaborate system of restrictions upon their liberty of action, which was nothing more *than a system of peonage*, was clearly shown to be, notwithstanding the pretences (sic) under which its real object was sought to be disguised, for the purpose of rendering it impossible for any independent organization to enter the business of providing games of professional baseball in competition with [MLB].<sup>30</sup>

Baltimore declared the reserve clause a “vicious restriction upon ordinary human rights”<sup>31</sup> and argued “[t]here is no more reason for one organization to corral and tie up all the baseball players in the United States than there is for a manufacturer of glass to corral and tie up all of the glassblowers, or a publishing house the printers and engravers, and so on throughout all the branches of industry.”<sup>32</sup>

Of note, Baltimore was not the first party to challenge the reserve clause — star player Nap Lajoie tried approximately 14 years earlier. Lajoie had been a star player for the Philadelphia Phillies of the National League before signing with the Philadelphia Athletics of the new American League prior to the 1901 season.<sup>33</sup> For the Athletics in 1901, Lajoie hit .426, with 232 hits, 48 doubles, 14 home runs, and 125 RBI, all of which led the league.<sup>34</sup>

The Phillies then sought an injunction preventing Lajoie from playing for the Athletics based on the reserve clause.<sup>35</sup> Lajoie argued the contract was unenforceable for a “lack of mutuality,” meaning that the parties’ remedies for a breach were not equal.<sup>36</sup> A trial court found in Lajoie’s favor but the Supreme Court of Pennsylvania reversed and granted the Phillies an injunction in an April 21, 1902 decision.<sup>37</sup>

Notwithstanding the court’s decision, Lajoie signed a contract to play for the Cleveland Bronchos for the 1902 season believing that another state would not honor Pennsylvania’s ruling.<sup>38</sup> Indeed, in an August 16, 1902

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<sup>30</sup> *Id.* at 7-8.

<sup>31</sup> *Id.* at 168.

<sup>32</sup> *Id.* at 165.

<sup>33</sup> C. Paul Rodgers III, *Napoleon Lajoie, Breach of Contract and the Great Baseball War*, 55 SMU L. REV. 325, 327-28 (2002).

<sup>34</sup> *Nap Lajoie*, BASEBALL REFERENCE, <https://www.baseball-reference.com/players/l/lajoia01.shtml> (last visited Jan. 3, 2023).

<sup>35</sup> *Phila. Ball Club v. Lajoie*, 202 Pa. 210, 218-19 (Pa. 1902).

<sup>36</sup> *Id.* at 219.

<sup>37</sup> *See Lajoie*, 202 Pa. 210; C. Paul Rodgers III, *Napoleon Lajoie, Breach of Contract and the Great Baseball War*, 55 SMU L. REV. 325, 327-28 (2002).

<sup>38</sup> C. Paul Rodgers III, *Napoleon Lajoie, Breach of Contract and the Great Baseball War*, 55 SMU L. REV. 325, 334 (2002).

decision, an Ohio trial court ruled that “the Pennsylvania court had no jurisdiction to issue its order of injunction to control the acts of Lajoie in Ohio” and declared the injunction had no effect.<sup>39</sup> Lajoie thus remained with Cleveland.<sup>40</sup> Of note, the Ohio court referenced the parties arguing about the applicability of the Sherman Act but did not ultimately address the issue.<sup>41</sup>

Consequently, the application of the Sherman Act was a live issue in Baltimore’s lawsuit. A jury found in Baltimore’s favor, awarding the club \$80,000 in damages, trebled to \$240,000 pursuant to the Sherman Act,<sup>42</sup> plus an additional \$24,000 in attorney’s fees.<sup>43</sup> However, the Court of Appeals of the District of Columbia vacated the jury’s award.<sup>44</sup> As described by Baltimore, “[t]he Court of Appeals in its opinion reversing the judgment. . . dealt exclusively with the question of whether or not the business involved in this case in which the parties were engaged was interstate commerce” and “reached the conclusion that it was not.”<sup>45</sup> As a result, Baltimore could not state a claim under the Sherman Act.<sup>46</sup>

Baltimore appealed the court’s decision to the Supreme Court. In a 202-page brief, Baltimore outlined the facts of the case and asserted that MLB was in fact engaged in interstate commerce.<sup>47</sup> Nevertheless, the Supreme Court unanimously, and now infamously, affirmed the Court of Appeals’ decision.<sup>48</sup>

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<sup>39</sup> *Phila. Baseball Club v. Lajoie*, 13 Ohio Dec. 504, 512–13 (Cuyahoga County CP 1902).

<sup>40</sup> See *Nap Lajoie*, Baseball Reference, <https://www.baseball-reference.com/players/l/lajoina01.shtml> (last visited Jan. 3, 2023).

<sup>41</sup> See *Phila. Baseball Club*, 13 Ohio Dec. at 508 (“Much time was occupied by counsel in a discussion of the question as to whether the provisions of . . . the act of May 26, 1890, Sec. 905, Federal Statutes, were applicable to decrees in equity.”)

<sup>42</sup> See 15 U.S.C. § 15(a) (providing that “any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee”).

<sup>43</sup> Federal Baseball Brief, *supra* note 12, at 2.

<sup>44</sup> *Id.* at 3.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 113–14.

<sup>47</sup> *Id.* at 116–57.

<sup>48</sup> *Fed. Baseball Club of Baltimore v. Nat’l League of Pro. Baseball Clubs*, 259 U.S. 200 (1922).

As will be further discussed herein, in time, the Supreme Court's decision in *Federal Baseball* was heavily criticized<sup>49</sup> and recognized by the Supreme Court as "an exception and an anomaly," and "an aberration confined to baseball."<sup>50</sup> Further, the Supreme Court definitively stated in 1972 that "[p]rofessional baseball is a business and it is engaged in interstate commerce."<sup>51</sup>

Early twentieth century jurisprudence on the definition of interstate commerce is not our focus here, however. Instead, we are concerned with the arguments made by MLB and its clubs in defense of the reserve clause.

The defendants made clear in their brief to the Supreme Court that they viewed the reserve clause as "absolutely essential"<sup>52</sup> to their operations:

From the point of view of the club, the reserve clause is absolutely necessary, for otherwise a skillful player developed at the expense of one club would be snapped up by another and the clubs would always be engaged in a competition for players[.] Experience shows the disastrous results to the sporting public, to the clubs and to the players, which have always ensued at times when reservations have not been respected, and there has been unrestrained bidding for players.<sup>53</sup>

Further, the defendants repeatedly claimed that if the reserve clause was eliminated, the World Series would not be possible.<sup>54</sup> In so doing, MLB stressed that the World Series was a "great and popular event"<sup>55</sup> "in which the public takes so wholesome and vital an interest."<sup>56</sup> For these rea-

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<sup>49</sup> Craig Calcaterra, *Happy birthday to baseball's antitrust exemption*, NBC SPORTS (May 29, 2019), <https://mlb.nbcsports.com/2019/05/29/happy-birthday-to-baseballs-antitrust-exemption/> [<https://perma.cc/DW3A-YHL8>].

<sup>50</sup> *Flood v. Kuhn*, 407 U.S. 258, 282 (1972).

<sup>51</sup> *Id.*

<sup>52</sup> Organized Baseball Brief, *supra* note 3, at 72.

<sup>53</sup> *Id.* at 14.

<sup>54</sup> *Id.* at 46 ("the 'World's Series' games cannot be continued at all unless under the restraint of elaborate interleague organizations and the Sherman Act ought not to be so interpreted as to make this great and popular event an impossibility"); *id.* at 70-71 ("The question in the case before the Court is not whether the world's series games can be conducted to greater public advantage if the National Agreement is dissolved, but whether Congress intends that the crowning feature of the national game should be done away with"); *id.* at 72 ("the Sherman Act should not be construed to apply to a combination absolutely essential to the existence of so obviously a wholesome and popular sporting event as the world's series").

<sup>55</sup> *Id.* at 46.

<sup>56</sup> *Id.* at 70.



sons, MLB argued, the Sherman Act “should not be construed to apply” to the reserve clause.<sup>57</sup>

MLB’s arguments sound in a form of public policy but today can also be recognized as an early form of the rule of reason defense in antitrust cases. Recall that Section 1 of the Sherman Act prohibits “every contract, combination . . . or conspiracy [ ] in restraint of trade.”<sup>58</sup> In its seminal 1911 case breaking up the Standard Oil monopoly, the Supreme Court subsequently clarified that only “unreasonable” restraints are illegal.<sup>59</sup>

As is discussed in more detail in Part II, certain practices — such as price fixing, market division, or group boycotts — are considered so pernicious and without any procompetitive justification that they are *per se* illegal, to which there can be no defense.<sup>60</sup> Nevertheless, as discussed in Part II, courts have avoided finding certain practices in the sports industry to be *per se* illegal.

Instead, to assess what is reasonable, courts considering Section 1 cases today (sports and otherwise) generally apply the “rule of reason,” a three-step, burden-shifting framework that provides as follows: (1) the plaintiff must first show that the challenged restraint has a substantial anticompetitive effect; (2) if the plaintiff carries that burden, the defendant must show a procompetitive rationale for the restraint; and, (3) if the defendant satisfies its burden, the plaintiff must show that the procompetitive benefits can be achieved through less restrictive means.<sup>61</sup>

MLB’s arguments in *Federal Baseball* were effectively seeking to establish the second element of the analysis: that the reserve clause served procompetitive purposes. As discussed above, MLB argued that it could not operate without the reserve clause — that permitting players to freely negotiate their place of employment and compensation would be financially ruinous and spell the league’s doom, to the detriment of the adoring public. As articulated by Baltimore, “[i]t is asserted that their gigantic business cannot be carried on except in the way they have conducted it,” “that defendants in error cannot attain their own selfish objects without creating a monopoly, and therefore the law should not be held to condemn this monopoly.”<sup>62</sup>

Baltimore strenuously rejected MLB’s defenses and emphasized that there was no evidentiary support for them in the record:

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<sup>57</sup> *Id.* at 72.

<sup>58</sup> 15 U.S.C. § 1.

<sup>59</sup> *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 87 (1911).

<sup>60</sup> *White Motor Co. v. United States*, 372 U.S. 253, 259, 262 (1963).

<sup>61</sup> *See NCAA v. Alston*, 141 S. Ct. 2141, 2160 (2021).

<sup>62</sup> *Federal Baseball Brief*, *supra* note 12, at 162.

[T]here is not a word in the National Agreement or the Rules and Regulations enacted in pursuance thereof regarding the World's Series. And the contention, we submit with great respect, is not worthy to be taken seriously that the huge combination known as Organized Baseball, with all of its devices for controlling completely the business of baseball and excluding the possibility of all competition therein, can be justified because of the custom of playing a few games of baseball at the end of each season between the pennant-winners of two of those leagues. There is not a line of testimony to support such a contention and it is obviously repugnant to reason. Simply because it is not claimed by plaintiff in error that the playing of the few games of the World's Series, taken by themselves, do not constitute anything illegal, affords no basis for the argument of defendants in error that freedom from wrongdoing with reference to this simple detail of their business furnishes immunity from responsibility for a long series of other illegal acts.

It will be observed that defendants in error see by emphatic assertion and reiteration to establish an identity between their business as they have organized it and the public interest in the sport of baseball. They would have it appear that any interference with any of the practices by which they have controlled for their own great profit the purely business side of the enterprise will affect injuriously the interests of the public in the sport of baseball. There is, however, no shadow of support for such a view, even assuming it to be relevant to the issues of the case. Every fact in the Record establishes that the purging of this business of the sordid interests and motives of those who have heretofore by a succession of palpably illegal practices obtained control over it, will in the end operate most advantageously for the public and everyone connected either in a business way or otherwise with the same.<sup>63</sup>

Despite the fact that the parties used meaningful portions of their enormous briefs to make these arguments, the Supreme Court did not address them. The Supreme Court's three-page opinion focused exclusively on the issue of whether MLB was engaged in interstate commerce and, agreeing with the Court of Appeals that it was not, found it "unnecessary to consider other serious difficulties in the way of the plaintiff's recovery."<sup>64</sup>

Thus was born MLB's exemption from antitrust law, leaving the reasonableness of the reserve clause to be revisited in future litigation.

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<sup>63</sup> Supplement to Brief for Plaintiff in Error, at 3-4, *Fed. Baseball Club of Baltimore v. Nat'l League of Pro. Baseball Clubs*, 259 U.S. 200 (Apr. 11, 1922) (No. 204).

<sup>64</sup> *Fed. Baseball Club of Baltimore*, 259 U.S. at 208.

b. *Toolson* (1953)

In 1949, George Toolson was a minor league pitcher for the Newark Bears, a class AAA minor league baseball team owned and controlled by the New York Yankees.<sup>65</sup> Toolson finished the 1949 season with a 5-5 record and a 4.74 ERA.<sup>66</sup> The Yankees then reassigned Toolson to its class A team in Binghamton, but Toolson refused to report to the club.<sup>67</sup> The National Association of Professional Baseball Leagues, a consortium of the minor leagues,<sup>68</sup> consequently placed Toolson on the ineligible list, effectively blacklisting him from future employment in baseball.<sup>69</sup>

Toolson brought a lawsuit that raised the same arguments made by Baltimore in *Federal Baseball*: that the rules enacted by MLB and its clubs — particularly including the reserve clause — restrained commerce and monopolized professional baseball in violation of the Sherman Act.<sup>70</sup> The United States District Court for the Southern District of California quickly dismissed the case, citing *Federal Baseball* as controlling and noting that the decision had been cited approvingly on multiple occasions by the Supreme Court, Circuit Courts of Appeal, and District Courts.<sup>71</sup> Yet, in one of those cases, Judge Jerome Frank of the Second Circuit, did opine (in *dicta*) that MLB was engaged in interstate commerce and otherwise criticized the reserve clause.<sup>72</sup> Nevertheless, the United States Court of Appeals for the Ninth Circuit affirmed the District Court’s dismissal of Toolson’s case in one sentence.<sup>73</sup>

Contemporaneous with Toolson’s lawsuit, in 1951, the House Antitrust Subcommittee held hearings on baseball’s exemption from the anti-trust laws.<sup>74</sup> As summarized by the Yale Law Journal in 1953, MLB argued

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<sup>65</sup> Petitioner’s Opening Brief on Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit at 10, *Toolson v. N.Y. Yankees*, 346 U.S. 356 (Sept. 16, 1953) (No. 18) [hereinafter *Toolson* Opening Brief].

<sup>66</sup> *George Toolson*, BASEBALL REFERENCE, <https://www.baseball-reference.com/register/player.fcgi?id=toolso001geo> (last visited Jan. 3, 2023).

<sup>67</sup> *Toolson* Opening Brief, *supra* note 65, at 10.

<sup>68</sup> *See id.* at 4 (“Every Minor League is a member of the Defendant National Association of Professional Baseball Leagues.”).

<sup>69</sup> *Id.* at 10.

<sup>70</sup> *Id.* at 5–6.

<sup>71</sup> *Toolson v. N.Y. Yankees*, 101 F. Supp. 93, 93–95 (S.D. Cal. 1951).

<sup>72</sup> *Gardella v. Chandler*, 172 F.2d 402, 403, 409–15 (2d Cir. 1949).

<sup>73</sup> *Toolson v. N.Y. Yankees*, 200 F.2d 198, 199 (9th Cir. 1952).

<sup>74</sup> J. Gordon Hylton, *Why Baseball’s Antitrust Exemption Still Survives*, 9 MARQ. SPORTS L. J. 391, 396 (1999); *Monopsony in Manpower: Organized Baseball Meets the Antitrust Laws*, 62 YALE L. J. 576, 578 (1953).

during those hearings “that baseball, like other team sports, faces problems unique in the realm of business; that the sport demands restraints on economic competition if it is to survive as an amusement industry; and implicitly that the industry merits special consideration under the antitrust laws.”<sup>75</sup> Consequently “friends of the sport in both the Senate and House of Representatives proposed bills” reaffirming baseball’s antitrust exemption and extending it to other sports.<sup>76</sup> No legislation was ultimately passed,<sup>77</sup> leaving it once again up to the Supreme Court to determine the applicability of the antitrust laws to sports.

The Supreme Court first did so by granting Toolson’s petition to hear the case.<sup>78</sup> In his petition, he explained that “[t]hose in control of professional baseball assert that the great American pastime cannot continue” if his lawsuit was successful.<sup>79</sup> He elaborated on this point in his opening brief: “It is argued that baseball requires special consideration under the Anti-Trust Laws, because such a team sport cannot exist in completely free economic competition.”<sup>80</sup>

In its opening brief, MLB made the argument, which still holds today, for why competition between sports teams is different than competition between businesses:

The finest baseball club in the world is valueless as either a sporting or financial proposition unless it has other clubs of approximately equal playing ability with which to compete. Two or three clubs are insufficient. The public would soon tire of seeing only two or three clubs playing each other and would cease patronizing their games.

Hence the necessity of at least six to eight clubs grouped together in a league, and those clubs must be as nearly equally balanced as possible. If the games or pennant race become too one-sided, public interest is lost.

Each club is almost as interested in the financial success of the others in the league as it is in its own success. For instance, it would be only a temporary advantage to Los Angeles and San Francisco if they operated in

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<sup>75</sup> *Monopsony in Manpower: Organized Baseball Meets the Antitrust Laws*, 62 YALE L. J. 576, 614 (1953).

<sup>76</sup> *Id.* at 630.

<sup>77</sup> *Id.*

<sup>78</sup> The Court also agreed to hear two other cases challenging MLB’s antitrust exemption: *Kowalski v. Chandler*, 202 F.2d 413 (6th Cir. 1953) and *Corbett v. Chandler*, 202 F.2d 428 (6th Cir. 1953).

<sup>79</sup> Petition for Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit and Brief in Support Thereof at 13, *Toolson v. N.Y. Yankees*, 346 U.S. 356 (Mar. 7, 1953) (No. 647).

<sup>80</sup> Toolson Opening Brief, *supra* note 65, at 44.

the black and all the other clubs in the Pacific Coast League operated in the red. The losers would soon cease to function. San Francisco and Los Angeles would have no one else with whom to play.<sup>81</sup>

MLB went on to argue that the reserve clause was an essential element of this intra-league system of cooperation and mutual interest, arguing that "the reserve clause and player regulations cannot be considered apart from the unique nature of baseball."<sup>82</sup> While MLB acknowledged that "[i]t would probably be an overstatement to assert that if the *Federal Baseball* case were reversed there would be no more professional baseball," it argued that doing so "would undoubtedly result in the wrecking of the present organization of the game."<sup>83</sup>

Putting aside some of the hyperbole, some of MLB's arguments have proven correct. For example, MLB foresaw that large market teams, *e.g.*, the Yankees and Dodgers, would try to sign many of the game's best players with lucrative contracts:

To excite public interest the baseball game must be a reasonably equal contest and uncertain as to result. This competition on the field can not be maintained if a club is free to induce a Ted Williams, a Stan Musial, and a Roy Campanella to change clubs and thus to build up an overwhelming player superiority.

If at the end of any playing season the players of each club were free to negotiate with any other club in the same or another league, it takes little imagination to foresee that a few of the wealthier clubs would absorb all the star talent, thus unbalancing the playing talent of their own and all other leagues.<sup>84</sup>

Nevertheless, MLB never envisioned that such concerns could be addressed through a collective bargaining agreement with its players.

As in *Federal Baseball*, MLB's arguments in *Toolson* sounded in the second element of the rule of reason analysis, arguing procompetitive justifications for the restraints. The Boston Red Sox submitted an amicus curiae brief to the Supreme Court furthering these arguments:

No realistic appraisal can fail to disclose that unbridled competition as applied to baseball would not be in the public interest. The element that must predominate in the game is competition on the playing field and not

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<sup>81</sup> Brief for Respondents at 56, *Toolson v. N.Y. Yankees*, 346 U.S. 356 (Oct. 2, 1953) (No. 18).

<sup>82</sup> *Id.* at 57.

<sup>83</sup> *Id.* at 66–67.

<sup>84</sup> *Id.* at 66.

in the market place. Actual experience has shown that this is so, for on earlier occasions the Leagues have for brief periods indulged in unrestricted competition. This did not improve conditions, but instead had the opposite effect and produced what was described at the time as “‘disgusting’ revelations of the seamy side of base ball through the contract-juggling tactics of magnates and players, their wrangles in court and press, and their apparent determination to defeat each other regardless of the cost to the game — a pitiless exposition of the commercialism of professional base ball which has driven hundreds of thousands of patrons away from the game and to other sports, all of which are now flourishing as never before, while the greatest sport of all, base ball, is languishing.”<sup>85</sup>

The Red Sox closed their brief by claiming the “unique and anomalous characteristic of the baseball enterprise” and arguing that the Supreme Court should not disturb *Federal Baseball* given its age and that Congress had not addressed the decision.<sup>86</sup>

Indeed, MLB had made this argument in its brief as well, declaring that “where, as here, the precise question was unanimously decided by this Court more than thirty years ago and all of the business interests and practices of those engaged in giving professional baseball exhibitions have been carried on in reliance upon that decision, the remedy, if it be needed, should be left to and formulated by Congress.”<sup>87</sup>

In a single page opinion, the Supreme Court ruled 7-2 in favor of MLB, affirming the lower courts’ decisions.<sup>88</sup> Notably, however, the Supreme Court did not address any of MLB’s procompetitive or policy arguments. Nor did the Court opine on whether MLB was engaged in interstate commerce. Instead, the Supreme Court relied entirely on the argument that addressing this issue was now up to Congress:

Congress has had the [*Federal Baseball*] ruling under consideration but has not seen fit to bring such business under these laws by legislation having prospective effect. The business has thus been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation. The present cases ask us to overrule the prior decision and, with retrospective effect, hold the legislation applicable. We think that if

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<sup>85</sup> Brief for Boston American League Base Ball Company as Amicus Curiae at 14–15, *Toolson v. N.Y. Yankees*, 346 U.S. 356 (Sept. 30, 1953) (No. 18) (quoting Francis C. Richter, *The 1915 Base Ball Season*, REACH OFFICIAL AMERICAN LEAGUE BASE BALL GUIDE, 1916, at 10).

<sup>86</sup> *Id.* at 16.

<sup>87</sup> Brief for Respondents at 64, *Toolson v. N.Y. Yankees*, 346 U.S. 356 (Oct. 2, 1953) (No. 18).

<sup>88</sup> *Toolson*, 346 U.S. at 356.

there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation.<sup>89</sup>

While MLB once again emerged victorious, it had not achieved the victory it wanted. Despite hundreds of pages of briefing on the issue, in neither *Federal Baseball* nor *Toolson* did the Supreme Court endorse MLB's argument that the reserve clause was so essential to the game, and the public's interest in the game, that it merited exemption from the antitrust laws. Because this remained a live issue, future litigation was perhaps inevitable.

*c. Flood (1972)*

Judge Irving Cooper of the United States District Court for the Southern District of New York provided a useful introduction to the Curt Flood case:

On October 8, 1969, Curtis C. Flood, then a major league professional baseball player for the St. Louis Cardinals, was "traded," his contract transferred and assigned to another National League baseball club, the Philadelphia Phillies, as part of a multi-player transaction between the two clubs. At the time of the trade he was thirty-two years old, a veteran of twelve years service with the Cardinals, co-captain of the team, and acknowledged to be a player of exceptional and proven baseball ability. Unhappy and disappointed, Flood was unwilling to play for Philadelphia, but forbidden by his contract and the rules of organized professional baseball from negotiating with any other ball club.

He initiated this action on January 16, 1970 against the twenty-four major league clubs comprising the American and National Leagues of organized baseball, their respective Presidents, and against the Commissioner of Baseball asserting in four separate causes of action that baseball's "reserve system" is unlawful. Briefly stated, the reserve system, commonly referred to as the "reserve clause," consists of a number of baseball rules, regulations and uniform contract terms which together operate to bind a player to a ball club and restrict him to negotiating with that club only.<sup>90</sup>

Judge Cooper denied Flood's motion for a preliminary injunction declaring him a free agent, or, "alternatively permitting him to remain as a player for St. Louis pending a final determination of the merits . . . on the grounds that it would disturb the status quo."<sup>91</sup> The Court did, however, grant Flood's request for an early trial, held from May 19 to June 10,

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<sup>89</sup> *Id.*

<sup>90</sup> *Flood v. Kuhn*, 316 F. Supp. 271, 272 (S.D.N.Y. 1970) *aff'd*, 443 F.2d 264 (2d Cir. 1971), *aff'd*, 407 U.S. 258 (1972).

<sup>91</sup> *Id.* at 273.

1970.<sup>92</sup> Consequently, as Judge Cooper put it, “[f]or the first time in almost fifty years opponents and proponents of the baseball reserve system. . . had to make their case on the merits and support it with proof in a court of law.”<sup>93</sup>

On that point, for the first time, a court expressed support, albeit qualified, for MLB’s arguments that the reserve clause had procompetitive benefits, stating:

Clearly the preponderance of credible proof does not favor elimination of the reserve clause. With the sole exception of plaintiff himself, it shows that even plaintiff’s witnesses do not contend that it is wholly undesirable; in fact they regard substantial portions meritorious. It lends support to our view, expressed at another point in this opinion, that arbitration or negotiation would extract such troublesome fault as may exist in the present system and, preserving its necessary features, fashion the reserve clause so as to satisfy all parties.<sup>94</sup>

Despite substantially agreeing with MLB’s long-held position, the Court nonetheless held that “[e]xisting and, as we see it, controlling law renders unnecessary any determination as to the fairness or reasonableness of this reserve system.”<sup>95</sup> The Court explained that “[s]ince baseball remains exempt from the antitrust laws unless and until the Supreme Court or Congress holds to the contrary, we have no basis for proceeding to the underlying question of whether baseball’s reserve system would or would not be deemed reasonable if it were in fact subject to antitrust regulation.”<sup>96</sup> The Court’s decision, and deference to *Federal Baseball* and *Toolson*, is not surprising, and, in fact, was correct as a matter of law.

The Second Circuit easily dispatched of Flood’s appeal, declaring itself “compelled” to do so based on prior precedent.<sup>97</sup> The court’s opinion was sympathetic to Flood’s “frustrating predicament”<sup>98</sup> and reiterated its past criticism of *Federal Baseball*, particularly salient since the Supreme Court had held that the NFL was subject to antitrust law in 1957:

We freely acknowledge our belief that *Federal Baseball* was not one of Mr. Justice Holmes’ happiest days, that the rationale of *Toolson* is extremely dubious and that, to use the Supreme Court’s own adjectives, the distinc-

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 284.

<sup>94</sup> *Id.* at 276.

<sup>95</sup> *Id.* at 284.

<sup>96</sup> *Id.* at 278.

<sup>97</sup> Flood v. Kuhn, 443 F.2d 264, 265 (2d Cir. 1971).

<sup>98</sup> *Id.* at 268.



tion between baseball and other professional sports is "unrealistic," "inconsistent" and "illogical." *Radovich v. National Football League*, 352 U.S. 445, 452, 77 S. Ct. 390, 1 L. Ed. 2d 456 (1957). . . . However, . . . we continue to believe that the Supreme Court should retain the exclusive privilege of overruling its own decisions, save perhaps when opinions already delivered have created a near certainty that only the occasion is needed for pronouncement of the doom. While we should not fall out of our chairs with surprise at the news that *Federal Baseball* and *Toolson* had been overruled, we are not at all certain the Court is ready to give them a happy despatch [sic].<sup>99</sup>

In deferring to precedent, the Second Circuit side-stepped MLB's arguments on the merits. Nevertheless, Judge Leonard P. Moore penned a concurring opinion far more sympathetic. Judge Moore began his opinion with a nostalgic description of the history of the sport and its best players to, in his words, "put in proper perspective the Supreme Court decision" in *Federal Baseball*.<sup>100</sup> In Judge Moore's view, "the history of organized professional baseball over the last 50 years. . . has shown without Court interference remarkable stability under self-discipline. . . . If baseball is to be damaged by statutory regulation, let the congressman face his constituents the next November and also face the consequences of his baseball voting record."<sup>101</sup> Consequently, and in contradiction of what the other judges on the Second Circuit had previously stated, Moore declared "the soundness of *Federal Baseball* and *Toolson*" "without any reservations or doubts."<sup>102</sup>

The Supreme Court agreed to hear Flood's case and in its brief to the Court, MLB laid out four arguments as to why, in its opinion, the reserve clause was necessary: (a) the need to maintain balanced competition; (b) the preservation of integrity and public confidence; (c) the high costs of player development; and (d) the benefits from economic stability.<sup>103</sup> The claims tracked those MLB had been making for more than fifty years, including that "the reserve system has provided to the public continuously stimulating competition to a degree that would have been impossible without it."<sup>104</sup> MLB once again argued that the reserve clause was essential to the public confidence in the game, and that without it, "baseball would certainly

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<sup>99</sup> *Id.* at 266 (quoting *Salerno v. American League*, 429 F.2d 1003, 1005 (2d Cir. 1970)).

<sup>100</sup> *Id.* at 268–70.

<sup>101</sup> *Id.* at 272.

<sup>102</sup> *Id.*

<sup>103</sup> Brief for Respondents at 6–12, *Flood v. Kuhn*, 407 U.S. 258 (Jan. 31, 1972) (No. 71–32).

<sup>104</sup> *Id.* at 8 n\*.

fail.”<sup>105</sup> In sum, “[t]he importance of the reserve system to baseball — all of baseball — cannot be seriously challenged.”<sup>106</sup>

Publicly, club owners were saying the same thing. Calvin Griffith, the then owner of the Minnesota Twins described the reserve clause as “the salvation of our sport. Without it, we can’t protect our players, there will be no competition.”<sup>107</sup> Elaborating, Griffith said “[e]limination of the reserve clause would destroy our balance. . . . The rich would be domineering.”<sup>108</sup>

Flood responded dramatically:

The reserve clause is an indentured servitude that works upon all professional baseball players through a worldwide blacklist and group boycott. Until this Court brings it within the purposes of the Thirteenth Amendment, which freed Americans from bondage, and the Sherman Act, the charter of our economic liberties, it will continue to be a blight upon our national sport. . . .<sup>109</sup>

It is time to abolish the anomaly that prevents the most skilled of their profession from offering their skills in a reasonably free market. The Court should reverse the decision below and remand for proceedings not inconsistent with its decision.<sup>110</sup>

The Supreme Court ultimately affirmed the lower courts’ decisions and reestablished MLB’s exemption from antitrust laws.<sup>111</sup> The Court did declare that “[p]rofessional baseball is a business and it is engaged in interstate commerce” and that consequently, “[w]ith its reserve system enjoying exemption from the federal antitrust laws, baseball is, in a very distinct sense, an exception and an anomaly. *Federal Baseball* and *Toolson* have become an aberration confined to baseball.”<sup>112</sup> Nevertheless, in light of the fact that “since 1922, baseball, with full and continuing congressional awareness, has been allowed to develop and expand unhindered by federal legislative action,” and “the confusion and retroactivity problems that inevitability

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<sup>105</sup> *Id.* at 8.

<sup>106</sup> *Id.* at 12.

<sup>107</sup> *Lament by Griffith: Rich Teams to Rule if Flood’s Suit Wins*, N.Y. TIMES, Oct. 20, 1971, at 57.

<sup>108</sup> *Id.*

<sup>109</sup> Petitioner’s Reply Brief at 17, *Flood v. Kuhn*, 407 U.S. 258 (Feb. 25, 1972) (No. 71-32).

<sup>110</sup> *Id.* at 18.

<sup>111</sup> *See Flood v. Kuhn*, 407 U.S. 258, 285 (1972).

<sup>112</sup> *Id.* at 282.

would result with a judicial overturning of *Federal Baseball*,"<sup>113</sup> "the remedy, if any is indicated, is for congressional, and not judicial, action."<sup>114</sup>

Notably, in deciding the case on *stare decisis* grounds, the Supreme Court did not engage with MLB's arguments in favor of the reserve clause.

MLB's exemption from antitrust law would last untouched until 1998. That year, Congress passed the Curt Flood Act, which provided that:

the conduct, acts, practices, or agreements of persons in the business of organized professional major league baseball directly relating to or affecting employment of major league baseball players to play baseball at the major league level are subject to the antitrust laws to the same extent such conduct, acts, practices, or agreements would be subject to the antitrust laws if engaged in by persons in any other professional sports business affecting interstate commerce.<sup>115</sup>

The law though did not repeal (but also did not codify) baseball's anti-trust exemption for matters unrelated to the employment of major league baseball players, such as the operation of minor league baseball.<sup>116</sup> The continuance of that exemption is currently the subject of litigation.<sup>117</sup>

*d. Kansas City Royals Baseball Corp. (1976)*

Unable to dismantle the reserve clause under antitrust law, MLB players changed legal tactics, seeking to instead challenge the reserve clause under contract law. The relevant facts are as follows:

For the 1974 season, John A. Messersmith signed a Uniform Player's Contract with the Los Angeles Dodgers, and David A. McNally signed a Uniform Player's Contract with the Montreal Expos. Neither one of those players were able to come to agreement with their respective clubs on contract terms for the 1975 baseball season. As a result, pursuant to paragraph 10(a) of the Uniform Player's Contracts of each player, the respective clubs renewed those contracts for the 1975 baseball season. Neither Mr. Messersmith nor Mr. McNally ever signed a Uniform Player's Contract for the 1975 season, but played for their Clubs under the terms of the 1974

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<sup>113</sup> *Id.* at 283.

<sup>114</sup> *Id.* at 285.

<sup>115</sup> 15 U.S.C. § 26b(a).

<sup>116</sup> 15 U.S.C. § 26b(b).

<sup>117</sup> *See Nostalgic Partners, LLC v. Office of Commissioner of Baseball*, No. 21-cv-10876, 2022 WL 14963876 (S.D.N.Y. Oct. 26, 2022) (granting motion to dismiss antitrust claim brought by former minor league baseball clubs and discussing possibility of review by Supreme Court).

Contracts, as those contracts had been renewed by the Clubs pursuant to paragraph 10(a).<sup>118</sup>

At the conclusion of the 1975 season, the Major League Baseball Players Association (MLBPA) initiated grievances on behalf of the players,<sup>119</sup> “assert[ing] that there was no longer any relation between the respective Clubs and the Players involved, for the reason that the renewal year [under the reserve clause] had expired” and “as such the individual players were free to negotiate for employment with any Major League Baseball Club, and each Major Baseball Club was free to negotiate with them.”<sup>120</sup>

A panel of three arbitrators, in a 2-1 vote, agreed with the players and granted them their requested relief.<sup>121</sup> Before the arbitration hearing took place, MLB and its clubs initiated a lawsuit in a Missouri federal court and sought an injunction, arguing that the issues were not subject to arbitration.<sup>122</sup> The lawsuit was stayed pending the outcome of the arbitration, as the parties stipulated that the arbitration panel could determine whether it had jurisdiction over the dispute,<sup>123</sup> which it ultimately did.<sup>124</sup>

MLB and its owners were outraged by the arbitration decision. Commissioner Bowie Kuhn responded as follows:

I am enormously disturbed by this arbitration decision. It is just inconceivable that after nearly 100 years of developing this system for the overall good of the game, it should be obliterated in this way. It is certainly desirable that the decision should be given a thorough judicial review.<sup>125</sup>

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<sup>118</sup> Brief of Appellee Major League Baseball Players Ass’n at 2-3, *Kansas City Royals Baseball Corp. v. MLB Players Ass’n*, 532 F.2d 615 (8th Cir. Feb. 20, 1976) (No. 76-1115).

<sup>119</sup> The grievances were brought pursuant to the MLB-MLBPA CBA, agreed upon in 1973. *Id.* at 3.

<sup>120</sup> *Id.*

<sup>121</sup> *Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass’n*, 409 F. Supp. 233, 260-61 (W.D. Mo. 1976) (providing arbitration decision in full); *Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass’n*, 532 F.2d 615, 619 n.3 (8th Cir. 1976) (“The arbitration panel’s decision was written by Peter Seitz, the impartial chairman. Marvin Miller, the Players Association’s representative, concurred. John Gaherin, the Club Owners’ representative, dissented.”).

<sup>122</sup> *Kansas City Royals Baseball Corp.*, 532 F.2d at 619.

<sup>123</sup> *Id.*

<sup>124</sup> See *Kansas City Royals Baseball Corp.*, 409 F. Supp. at 260-61 (quoting arbitration decision in which arbitration panel found the grievances to be “within the scope of the provisions of Article X of the Basic Agreement; and, accordingly are within the duty and the power of the Arbitration Panel to arbitrate.”)

<sup>125</sup> Joseph Durso, *Arbitrator Frees 2 Baseball Stars*, N.Y. TIMES, Dec. 24, 1975, at 1.

Similarly, Lee MacPhail, then President of the American League, and Charles Feeney, then President of the National League, said "[t]he decision attacks a fundamental principle which has proved to be the keystone of competitive balance and integrity in professional baseball."<sup>126</sup>

After the arbitration decision, the parties restarted the litigation with MLB requesting the court to vacate the arbitration decision and the MLBPA requesting the court to enforce the arbitration decision.<sup>127</sup> The district court ruled in favor of the players and ordered MLB and its clubs to comply with the arbitration award.<sup>128</sup> In so doing, the court noted derisively that MLB refers to the reserve clause "as the 'core,' or 'heart,' or 'guts' of 'Baseball's career-long player control mechanism,' whatever those words might mean."<sup>129</sup>

MLB appealed to the Eighth Circuit. The principal issue on appeal was whether the parties had agreed to arbitrate grievances such as those brought on behalf of Messersmith and McNally.<sup>130</sup> While MLB's brief focused on this issue,<sup>131</sup> the Eighth Circuit noted that the parties "agree that some form of a reserve system is needed if the integrity of the game is to be preserved and if public confidence in baseball is to be maintained."<sup>132</sup> Nevertheless, the Eighth Circuit determined that the "panel's award drew its essence from the collective bargaining agreement, and that the relief fashioned by the District Court was appropriate."<sup>133</sup>

The *Kansas City Royals* decision marked a historic turning point in baseball labor relations. Within months of the Eighth Circuit's decision, MLB and the MLBPA reached a new collective bargaining agreement which, for the first time ever, provided players with free agency.<sup>134</sup> That agreement granted players the right to be free agents after six years of service,<sup>135</sup> the same rule that is in place today.<sup>136</sup>

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<sup>126</sup> *Id.*

<sup>127</sup> *Kansas City Royals Baseball Corp.*, 532 F.2d at 619.

<sup>128</sup> *Kansas City Royals Baseball Corp.*, 409 F. Supp. at 261.

<sup>129</sup> *Id.* at 245.

<sup>130</sup> *Kansas City Royals Baseball Corp.*, 532 F.2d at 620.

<sup>131</sup> See Appellants' Brief, *Kansas City Royals Baseball Corp.*, 532 F.2d 615 (8th Cir. Feb. 20, 1976) (No. 76-1115).

<sup>132</sup> *Kansas City Royals Baseball Corp.*, 532 F.2d at 632.

<sup>133</sup> *Id.*

<sup>134</sup> GLENN M. WONG, *ESSENTIALS OF SPORTS LAW*, 4th ed., Ex. 11.4 (Praeger 2010).

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

<sup>136</sup> See MLB-MLBPA Basic Agreement 2017-2021, Section XX(B)(1), available at <https://www.mlbplayers.com/cba> ("Following the completion of the term of his Uniform Player's Contract, any Player with 6 or more years of Major League service

*e. Radovich (1957)*

Outside of MLB, the NFL faced a legal threat to its reserve clause in a lawsuit brought by William Radovich. Radovich played for the Detroit Lions of the NFL from 1938-41 and again in 1945, after serving in World War II.<sup>137</sup> In 1946, he requested the Lions to trade him to the Los Angeles Rams so he could be closer to his ill father.<sup>138</sup> When the Lions refused, Radovich signed with the Los Angeles Dons, a club with the All-America Conference, a short-lived competitor to the NFL.<sup>139</sup> Radovich played with the Dons in 1946 and 1947 before trying to sign as a player-coach with the San Francisco Clippers of the Pacific Coast League.<sup>140</sup> At the time, the Pacific Coast League was affiliated with the NFL.<sup>141</sup> The NFL informed the Clippers that Radovich was blacklisted for having broken his contract (and its reserve clause) with the Lions and that any club that signed him would suffer severe penalties.<sup>142</sup> The Clippers consequently did not sign Radovich.<sup>143</sup>

Radovich sued, alleging that the NFL, its member clubs, the Pacific Coast League, and the Clippers, had entered into an illegal “conspiracy to monopolize and control organized professional football in the United States.”<sup>144</sup> In response, the NFL made some of the same arguments MLB had made in its prior cases. As summarized by the Ninth Circuit, according to the NFL, “the business of professional football is dependent on having teams of reasonably comparable strength. The reserve clause which keeps players from being free agents prevents the players from going into the market place seeking annual bidders. Prevention of this tends to prevent the strong from becoming stronger and the weak weaker.”<sup>145</sup>

The United States District Court for the Northern District of California dismissed the case<sup>146</sup> (for which there appears not to have been a written opinion). The Ninth Circuit affirmed the dismissal.<sup>147</sup> In so doing, the

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who has not executed a contract for the next succeeding season shall become a free agent”).

<sup>137</sup> Radovich v. NFL, 231 F.2d 620, 621 (9th Cir. 1956).

<sup>138</sup> Radovich v. NFL, 352 U.S. 445, 448 (1957).

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 446.

<sup>145</sup> Radovich v. NFL, 231 F.2d 620, 622 (9th Cir. 1956).

<sup>146</sup> *See id.* at 622 (“the complaint was dismissed by the district judge”).

<sup>147</sup> *Id.* at 620.

Ninth Circuit briefly engaged with the NFL's antitrust defense, stating that "we doubt that the alleged means, restraint by the reserve clause and its enforcement, is legally sufficient to support, without more, a conclusion that these means were calculated to prejudice the public or unreasonably restrain interstate commerce."<sup>148</sup> Nevertheless, the decision was primarily based on *Toolson*.<sup>149</sup> The Ninth Circuit explained that "it appears reasonable for us to assume that if Congressional indulgence extended to and saved baseball from regulation, then the indulgence extended to other team sports."<sup>150</sup>

In October 1956, the Supreme Court agreed to hear the case.<sup>151</sup> In its briefing to the Supreme Court, the NFL reiterated its argument that the reserve clause was integral to the sport:

It is obvious to the patrons of the sports that the so-called "reserve clause" is essential in order to maintain balance in the player personnel of the various teams and thus assure competition among teams of comparable strength. The device employed is but an option in the player's contract, granting to the club the right of renewal of the agreement for the services of the player. By such device is the public reassured that the player can be interested only in the success of the team to which he is under contract and to which it is likely his future playing days will be devoted. It is an insurance against the bestowal of "favors" upon an opponent team with whom the player may desire future affiliation.<sup>152</sup>

The NFL also did not miss out on a chance to hyperbolically warn the Court of the disastrous results if it were unable to enforce the reserve clause:

[I]f the teams of the National Football League could not lawfully protect their property rights in their players, by the use of their uniform contract, the League might well be utterly destroyed since nothing but chaos would result to the entire organization, built upon the sanctity of player contracts for thirty-five years.<sup>153</sup>

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<sup>148</sup> *Id.* at 623.

<sup>149</sup> *See id.* at 622.

<sup>150</sup> *Id.*

<sup>151</sup> *Radovich v. NFL*, 352 U.S. 818 (1956).

<sup>152</sup> Brief of Respondents NFL, Chicago Cardinals Football Club, Inc., N.Y. Giants Football Club, Inc., Chicago Bears Football Club, Inc., Detroit Football Company and Los Angeles Rams Football Club in Opposition to Petition for a Writ of Certiorari at 9, *Radovich* 352 U.S. 818 (U.S. June 14, 1956) (No. 94).

<sup>153</sup> Brief for Respondents NFL, Chicago Cardinals Football Club, Inc., N.Y. Giants Football Club, Inc., Chicago Bears Football Club, Inc., Detroit Football Company and Los Angeles Rams Football Club at 39–40, *Radovich* 352 U.S. 818 (U.S. Dec. 2, 1956) (No. 94).

Principally though, the NFL argued that there was no basis to treat the NFL any differently from MLB and therefore the NFL should be entitled to the same antitrust exemption that MLB had received through *Federal Baseball* and *Toolson*.<sup>154</sup>

The Supreme Court, in a 6-3 decision, was not persuaded. It held that the antitrust exemption was “specifically limit[ed]” to “the business of organized professional baseball.”<sup>155</sup> According to the Court, “[I]f this ruling is unrealistic, inconsistent, or illogical, it is sufficient to answer” that MLB received its antitrust exemption from a prior Supreme Court case whereas “[n]o other business claiming the coverage of those cases has such an adjudication.”<sup>156</sup> The Supreme Court further articulated that “[a]s long as the Congress continues to acquiesce we should adhere to — but not extend — the interpretation of the [Sherman] Act made in those cases.”<sup>157</sup>

The Court then reversed the dismissal of Radovich’s complaint, but only briefly finding that he had sufficiently stated a claim for relief.<sup>158</sup> The Court did say it found the NFL’s “remaining contentions. . . to be lacking in merit,”<sup>159</sup> but which contentions is unclear. More clearly, the Court stated that “We think that Radovich is entitled to an opportunity to prove his charges. Of course, we express no opinion as to whether or not respondents have, in fact, violated the antitrust laws, leaving that determination to the trial court after all the facts are in.”<sup>160</sup>

*Radovich* thus forced the leagues other than MLB to loosen their player restrictions and come up with new legal defenses, as will be discussed below.

#### f. *The Leagues Were Wrong*

As is discussed in Parts II and III below, during the 1970s all of the leagues continued to make various claims as to the essentialness of their player restrictions and the calamity that would result if those restrictions

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<sup>154</sup> See Brief of Respondents NFL, Chicago Cardinals Football Club, Inc., N.Y. Giants Football Club, Inc., Chicago Bears Football Club, Inc., Detroit Football Company and Los Angeles Rams Football Club in Opposition to Petition for a Writ of Certiorari at 12, *Radovich* 352 U.S. 818 (No. 94) (“It is inconceivable that a decision upon the basis of the facts set forth in the Toolson complaint would be inapplicable to the facts alleged in the Radovich complaint. The only distinguishing feature is that one sport is called ‘baseball’ and the other ‘football’.”).

<sup>155</sup> *Radovich*, 352 U.S. at 451.

<sup>156</sup> *Id.* at 452.

<sup>157</sup> *Id.* at 451.

<sup>158</sup> *Id.* at 453-54.

<sup>159</sup> *Id.* at 454.

<sup>160</sup> *Id.*



were reduced or eliminated. The most hyperbolic claims were made by the NFL in *Mackey*, discussed in Section II.d. As a preview, the NFL argued to the Eighth Circuit that if the Rozelle Rule limiting player movement were eliminated, it would lead to the “destruction” of the NFL, that “many NFL clubs would be bankrupted,” and “great public harm would result.”<sup>161</sup> In fact, the Rozelle Rule was eventually eliminated, and nothing occurred like that which the NFL warned.

Indeed, the leagues’ doomsday prophecies all look quite foolish today. While historical data is generally not available, the current financial situations of each of the leagues demonstrates that they have been extraordinarily lucrative and worthwhile investments. In 2022, the leagues had the following approximate revenue totals: \$18 billion (NFL),<sup>162</sup> \$11 billion (MLB),<sup>163</sup> \$10 billion (NBA),<sup>164</sup> and, \$5.2 billion (NHL).<sup>165</sup> Meanwhile, the average franchise was worth \$4.14 billion in the NFL,<sup>166</sup> \$3 billion in the NBA,<sup>167</sup> \$2.31 billion in MLB,<sup>168</sup> and \$1 billion in the NHL.<sup>169</sup> Further, teams in

<sup>161</sup> *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976); see *infra* Section II.d.

<sup>162</sup> Kurt Badenhausen, *NFL National Revenue Totals a Record \$11 Billion for 2021*, SPORTICO (July 14, 2022), <https://www.sportico.com/leagues/football/2022/nfl-national-revenue-2021-1234682461/> [<https://perma.cc/ZD3F-KNZ4>].

<sup>163</sup> Barry M. Bloom, *MLB Gross Revenue Back to Nearly \$11 Billion*, SPORTICO (Oct. 31, 2022), <https://www.sportico.com/leagues/baseball/2022/mlb-gross-revenue-to-nearly-11-billion-manfred-says-1234693131/> [<https://perma.cc/4X96-B6RH>].

<sup>164</sup> Jabari Young, *NBA projects \$10 billion in revenue as audiences return after Covid, but TV viewership is a big question*, CNBC (Oct. 18, 2021), <https://www.cnbc.com/2021/10/18/nba-2021-2022-season-10-billion-revenue-tv-viewership-rebound.html> [<https://perma.cc/7KY9-GLL5>].

<sup>165</sup> Barry M. Bloom, *NHL Revenues Rebound to \$5.2 Billion on TV Deals and a Full Schedule*, SPORTICO (June 16, 2022), <https://www.sportico.com/leagues/hockey/2022/nhl-revenues-rebound-to-5-2-billion-on-tv-deals-and-a-full-schedule-1234678974/> [<https://perma.cc/N5VV-Y2ZB>].

<sup>166</sup> Kurt Badenhausen, *NFL Team Valuations 2022: Cowboys Rule at \$7.6B As Average Tops \$4B*, SPORTICO (Aug. 1, 2022), <https://www.sportico.com/valuations/teams/2022/nfl-team-valuations-2022-cowboys-1234684184/> [<https://perma.cc/UU6C-8CS7>].

<sup>167</sup> Kurt Badenhausen, *NBA Valuations: Warriors Top \$7.6 Billion as Teams Average \$3 Billion*, SPORTICO (Dec. 13, 2022), <https://www.sportico.com/feature/nba-valuations-average-team-worth-billion-warriors-1234698263/> [<https://perma.cc/3BB2-CNNJ>].

<sup>168</sup> Kurt Badenhausen, *Yankees Lead MLB Valuations at \$7 Billion, Tops Across All Sports*, SPORTICO (Apr. 14, 2022), <https://www.sportico.com/valuations/teams/2022/yankees-red-sox-dodgers-mlb-valuations-1234671197/> [<https://perma.cc/K43L-VJPV>].

the leagues increased by an average of 12 to 19 times their value from 1996 to 2021.<sup>170</sup>

One cannot for certain draw a connection between the loosening of the leagues' rules on players and the substantial financial figures at play today. Nevertheless, it would also not be reasonable to dispute that there is at least some connection. Forcing club owners to compete for players likely also forced them to compete in all areas of the business, including but not limited to sponsorships, broadcasting, tickets, and stadiums. Moreover, clubs compete not just among themselves but also against other forms of entertainment.

Sports leagues and teams have, for the most part, masterfully sourced, developed, and grown revenues in all of these domains. As a result of the players participating in a free market for their services (or relatively free compared to years earlier), the clubs have been forced to create better and more attractive workplaces. In short, over time, the leagues and clubs have developed substantially better products, both on and off-the-field. Such results are one of the goals of antitrust law.<sup>171</sup> The leagues were wrong not only in their legal arguments but also in delaying their embrace of capitalism within sports.

## II. THE LEAGUES' RULES ARE NOT *PER SE* VIOLATIONS OF ANTITRUST LAW

Part I examines arguments by MLB and the NFL that the reserve clause was essential to their operations and consequently should not be disturbed. Also as discussed in that Part, no court ever fully endorsed these views. Consequently, the leagues expanded and honed their defensive arguments. At the same time, antitrust jurisprudence matured, providing fresh angles of scrutiny.

More specifically, in *Federal Baseball*, *Toolson*, *Radovich*, and *Flood*, the leagues effectively argued that the reserve clause was reasonably necessary to

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<sup>169</sup> Kurt Badenhausen, *NHL Valuations 2022: Leafs and Rangers Lead, Average Franchise Worth \$1B*, SPORTICO (Nov. 1, 2022), <https://www.sportico.com/valuations/teams/2022/nhl-valuations-2022-leafs-rangers-average-franchise-worth-1234693094/> [https://perma.cc/GQR6-K7PM].

<sup>170</sup> Lev Akabas, *Cowboys Top Valuations, But Warriors and Pats Have Appreciated More: Data Viz*, SPORTICO (Aug. 11, 2022), <https://www.sportico.com/valuations/teams/2022/sports-team-valuations-history-patriots-warriors-1234685476/> [https://perma.cc/TCA4-VMHG].

<sup>171</sup> See *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 482–83 (2006) (Breyer, J., concurring in part and dissenting in part) (discussing objectives of antitrust law); *Sullivan v. NFL*, 34 F.3d 1091, 1096–97 (1st Cir. 1994) (same).

sustain the leagues' operations. Yet in none of those cases did the parties or the courts specifically identify or engage in what we know today as the "rule of reason" analysis under antitrust law.

Juxtaposed with the rule of reason analysis, the Supreme Court held in 1958 that "[t]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."<sup>172</sup> These practices are considered "*per se*" violations of antitrust law,<sup>173</sup> *i.e.*, violations "standing alone, without reference to additional facts,"<sup>174</sup> and do not require additional analysis.<sup>175</sup> Price fixing, division of markets, group boycotts, and tying arrangements were identified as *per se* antitrust violations.<sup>176</sup>

In the 1960s and early 1970s, the Supreme Court began to clarify the rule of reason analysis and in what situations it should or should not be used. In 1963 and 1967, the court held that vertical territorial limitations imposed by manufacturers on dealers and distributors were not *per se* violations but instead must be evaluated under the rule of reason.<sup>177</sup> Next, in 1967 and 1968, the court found price fixing schemes in two different cases to be *per se* violations.<sup>178</sup> Then, in 1972, the court held that agreement among competitors to allocate territories was a horizontal restraint and *per se* violation.<sup>179</sup> Finally, in 1973, the court held that a utility company with monopoly power committed a *per se* violation of Section 2 of the Sherman Act by refusing to sell power to existing or proposed systems in various cities and towns.<sup>180</sup>

While some of these cases would be overruled in future Supreme Court decisions,<sup>181</sup> the decisions provided a bevy of new legal considerations for teams and players in their ongoing fights about restrictions on player move-

<sup>172</sup> *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958).

<sup>173</sup> *Id.*

<sup>174</sup> *Per se*, Black's Law Dictionary (11th ed. 2019).

<sup>175</sup> *Northern Pac. Ry. Co.*, 356 U.S. at 5.

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

<sup>177</sup> *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 379-81 (1967); *White Motor Co. v. United States*, 372 U.S. 253, 261-64 (1963).

<sup>178</sup> See *Albrecht v. Herald Co.*, 390 U.S. 145, 152-54 (1968); *United States v. Sealy, Inc.*, 388 U.S. 350, 357-58 (1967).

<sup>179</sup> *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 608 (1972).

<sup>180</sup> *Otter Tail Power Co. v. United States*, 410 U.S. 366, 375-81 (1973).

<sup>181</sup> See *State Oil Co. v. Khan*, 522 U.S. 3, 7 (1997) (overruling *Albrecht*, 390 U.S. 145); *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58 (1977) (partially overruling *Arnold, Schwinn & Co.*, 388 U.S. 365).

ment, as discussed below. Over time, the courts began to accept that the normal application of antitrust law to the sports industry did not make sense.

*a. Haywood (1971)*

In 1967, Spencer Haywood graduated from a Detroit high school as an All-American basketball player.<sup>182</sup> In 1968 he led the United States to a gold medal at the Olympics.<sup>183</sup> After one season of college basketball at the University of Detroit, Haywood signed a contract with the Denver Nuggets, then of the competitor American Basketball Association (ABA), in 1969.<sup>184</sup> Haywood was the ABA Rookie of the Year and Most Valuable Player in the 1969–70 season.<sup>185</sup> After a contract dispute with Denver, in December 1970, Haywood signed a six-year contract with the Seattle Supersonics of the NBA.<sup>186</sup> However, at the time, the NBA had a rule that prohibited players from playing in the NBA until at least four years had elapsed since their high school graduation.<sup>187</sup>

In a lawsuit initially brought by Denver in an effort to enforce its contract against Haywood, Haywood crossclaimed against the NBA and its 17 member clubs, alleging the eligibility rule violated Sections 1 and 2 of the Sherman Act.<sup>188</sup> Haywood therefore sought a preliminary injunction against enforcement of the rule.<sup>189</sup>

In response, the NBA argued the eligibility rule and the NBA Draft structure of which it was a part, were essential to the game. As summarized by the court, the NBA argued that “[t]he draft system is designed to maintain the various NBA teams, as nearly as feasible, at roughly equivalent levels of playing ability, so that the games played between league teams shall be as attractive as possible to spectators and others interested in the sport of professional basketball.”<sup>190</sup> It is not clear why, in the NBA’s view, the four-year component of the eligibility rule was integral to the NBA Draft.

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<sup>182</sup> *Denver Rockets v. All-Pro Mgmt., Inc.*, 325 F. Supp. 1049, 1052 (C.D. Cal. 1971).

<sup>183</sup> *Id.*

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

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

<sup>186</sup> *Id.* at 1052–54.

<sup>187</sup> *Id.* at 1055.

<sup>188</sup> *Id.* at 1054.

<sup>189</sup> *Id.* at 1052.

<sup>190</sup> *Id.* at 1056.

The court disagreed, finding that the eligibility rule "is a group boycott on the part of the NBA and its teams against otherwise qualified players who come within the terms of said provision, and that it is an arbitrary and unreasonable restraint upon the rights of Haywood and other potential NBA players to contract to play for NBA teams until the happening of an event (*i.e.*, the passage of four years from the graduation of a potential player's high school class) fixed by the NBA without the consent or agreement of such potential player."<sup>191</sup> As a matter of law, the court explained a "group boycott is illegal per se and the reasonableness of it is no defense to its illegality."<sup>192</sup> The court thus enjoined the NBA from enforcing the rule.<sup>193</sup>

Yet, on February 16, 1971, thirteen days after the district court's order, the Ninth Circuit stayed the injunction.<sup>194</sup> The Ninth Circuit's reasoning was only a paragraph long, finding that "on balance the circumstances are such as to call for a stay of injunction pending the National Basketball Association's appeal."<sup>195</sup>

On March 1, 1971, the Supreme Court had the last word. Justice William O. Douglas granted Haywood's application for a stay of the Ninth Circuit's order.<sup>196</sup> In so doing, Douglas reasoned that the district court's decision best preserved the status quo pending final determination of the suit.<sup>197</sup>

Notably, in its memorandum to Justice Douglas, the NBA did not argue that the eligibility rule or the NBA Draft were essential to its business or otherwise legal under antitrust law,<sup>198</sup> even though Haywood and the Sonics argued the opposite in their briefs.<sup>199</sup>

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

<sup>192</sup> *Id.* at 1058.

<sup>193</sup> *Id.* at 1058–59.

<sup>194</sup> *Denver Rockets v. All-Pro Mgmt., Inc.*, 1971 LEXIS 11846 (9th Cir. Feb. 16 1971).

<sup>195</sup> *Id.* at \*1.

<sup>196</sup> *Haywood v. NBA*, 401 U.S. 1204, 1204 (1971).

<sup>197</sup> *Id.* at 1206–07.

<sup>198</sup> See Memorandum of the National Basketball Association in Opposition to the Petition of Spencer Haywood, *Haywood v. Merrill*, 401 U.S. 952 (1971) (No. \_\_\_\_\_), 1971 U.S. S. Ct. Briefs LEXIS 6 (Feb. 26, 1971).

<sup>199</sup> See Statement by Co-Party in Support of Petitioner's Petition for a Writ of Injunction to the United States Court of Appeals for the Ninth Circuit, *Haywood v. Merrill*, 401 U.S. 952 (1971) (No. \_\_\_\_\_) 1971 U.S. S. Ct. Briefs LEXIS 5 (Feb. 22, 1971), at ¶ 2 (Sonics incorporating Haywood's arguments into its brief), ¶¶ 5–7 (arguing that NBA's conduct violates antitrust law).

Haywood and the NBA then settled the case, with the NBA agreeing to allow players who were less than four years removed from high school graduation to enter the NBA if they could demonstrate “financial hardship.”<sup>200</sup> In 1976, the eligibility rule was removed in its entirety, before a new rule was imposed in 2005, requiring players to be one year removed from high school.<sup>201</sup>

*b. Philadelphia World Hockey Club, Inc. (1972)*

In 1972, the legal disputes over player rights reached the NHL. That year, a professional hockey player, John McKenzie, and the World Hockey Association (“WHA”), an NHL competitor, sued the NHL alleging that the NHL’s version of a reserve clause and other activities violated antitrust law.<sup>202</sup>

The district court found that antitrust law did not apply neatly to the sports industry. Rejecting the WHA’s argument that the reserve clause was a *per se* antitrust violation, the court noted that “by the nature of a sports contest, there must always be an adversary.”<sup>203</sup> Moreover,

For maximum customer receptivity and profit it is in the best interest of any club that its opponents not generally be viewed by the public as totally incompetent and utterly unable to compete effectively. For if the latter occurs, thousands of customers will not spend their dollars for tickets to view hundreds of games when the contest seems to present no more of a challenge than an ant confronting an elephant. Thus, if it is not possible to keep the competitive challenge of all teams within some reasonable parameters, some type of intraleague reserve clause or system may be desirable and in fact necessary.<sup>204</sup>

On these grounds, the court declined to find that the reserve clause was a Section 1 violation, deferring a finding on that issue until it could be more fully examined.<sup>205</sup> In support, the court cited the district court’s conclusion in *Flood* “that some type of reserve clause system is desirable and essential

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<sup>200</sup> Christopher R. Deubert, I. Glenn Cohen, & Holly Fernandez Lynch, *Comparing Health-Related Policies and Practices in Sports: The NFL and Other Professional Leagues*, 8 HARV. J. SPORTS & ENT. L. 1, 193 (2017).

<sup>201</sup> *Id.*

<sup>202</sup> *Phila. World Hockey Club, Inc. v. Phila. Hockey Club, Inc.*, 351 F. Supp. 462 (E.D. Pa. 1972).

<sup>203</sup> *Id.* at 503.

<sup>204</sup> *Id.* at 504.

<sup>205</sup> *Id.* at 504.

for the maintenance of a baseball league."<sup>206</sup> The court did not affirmatively discuss the potential application of the rule of reason, but did cite to a Supreme Court case and law review article examining the issue.<sup>207</sup>

Nevertheless, the district court found that the "numerous interlocking agreements NHL has fashioned and shaped over the years to monopolize a hockey player's professional career" were "unreasonable, and in violation of Section 2 of the Sherman Act."<sup>208</sup> Consequently, the district court issued a preliminary injunction enjoining the NHL and its member clubs from enforcing the reserve clause.<sup>209</sup>

In response, the NHL "replac[e]d the perpetual reserve clause with a one year option clause in the standard player's contracts."<sup>210</sup> This system was replaced with a Rozelle Rule-like free agency/compensation system<sup>211</sup> as part of a collective bargaining agreed to in 1976.<sup>212</sup> This new rule would be challenged in *McCourt*, discussed below in Section III.i.

*c. Robertson (1975)*

Oscar Robertson is rightly remembered as one of the best players in NBA history. But his impact on the game off the court was perhaps even more profound. In 1964, Robertson helped lead a 21-minute strike in which the players participating in the NBA All-Star Game refused to take the floor until the owners agreed to provide the players with a pension.<sup>213</sup> Consistent with the leadership role, Robertson became President of the players union, the National Basketball Players Association (NBPA).<sup>214</sup>

In the late 1960s, the recently formed ABA provided a meaningful alternative to the NBA, as players were able to negotiate between the two

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<sup>206</sup> *Id.*

<sup>207</sup> *See id.* at 504 n.28, (citing *Silver v. N.Y. Stock Exchange*, 373 U.S. 341, 348–49 (1963) and *Trade Association Exclusionary Practices: An Affirmative Role for the Rule of Reason*, 66 COLUM. L. REV. 1486 (1966)).

<sup>208</sup> *Id.* at 508.

<sup>209</sup> *Id.* at 519.

<sup>210</sup> Ian Craig Pulver, *A Face Off Between the National Hockey League and the National Hockey League Players' Association: The Goal a More Competitively Balanced League*, 2 MARQ. SPORTS L. J. 39, 47 (1991).

<sup>211</sup> *See* discussion *infra* Section II.d for an explanation of the Rozelle Rule.

<sup>212</sup> Ian Craig Pulver, *A Face Off Between the National Hockey League and the National Hockey League Players' Association: The Goal a More Competitively Balanced League*, 2 MARQ. SPORTS L. J. 39, 47 (1991).

<sup>213</sup> JIM QUINN, *DON'T BE AFRAID TO WIN*, 6-7 (Radius Book Group 2019).

<sup>214</sup> *Id.* at 26.

leagues for higher salaries.<sup>215</sup> Nevertheless, the financial competition was too much for the two leagues and in 1969 they agreed to merge.<sup>216</sup>

The players, led by Robertson, did not want to see an end to the competition between the leagues and sued to stop the merger.<sup>217</sup> On April 17, 1970, the United States District Court for the Southern District of New York granted the players a temporary restraining order against the merger, finding that “[s]uch a merger raises serious questions as to its legality under Sections 1 and 2 of the Sherman Act.”<sup>218</sup> Indeed, the court noted that the “net effect” of the merger “would be to eliminate all competition between them,” which would result in “immediate and irreparable injury” to the players.<sup>219</sup>

The case dragged on for years as the NBA and ABA continued to negotiate a potential merger under the oversight of Congress.<sup>220</sup> When no agreement materialized which was acceptable to the players, the case inched forward.<sup>221</sup>

The case was also notable in terms of the counsel. Several attorneys who would go on to have important careers in sports and the law made their first appearances in such cases. Jim Quinn of Weil, Gotshal & Manges LLP helped represent the players, a role he would inhabit for the next 50 years.<sup>222</sup> Howard Ganz from the law firm now known as Proskauer Rose LLP appeared on behalf of the NBA.<sup>223</sup> Ganz had an illustrious career representing professional sports leagues and teams.<sup>224</sup> Appearing with Ganz from Proskauer were future NBA Commissioner David Stern and Jeff Mishkin, a future attorney at the NBA<sup>225</sup> and long-time leader of the sports law practice at Skadden, Arps, Slate, Meagher & Flom LLP.<sup>226</sup>

<sup>215</sup> *Id.* at 22–24.

<sup>216</sup> *Id.* at 23–24.

<sup>217</sup> *Robertson v. NBA*, 389 F. Supp. 867, 872 (S.D.N.Y. 1975).

<sup>218</sup> *Robertson v. NBA*, 1970 LEXIS 12039, at \*1 (S.D.N.Y. Apr. 17, 1970).

<sup>219</sup> *Id.*

<sup>220</sup> JIM QUINN, DON’T BE AFRAID TO WIN, 28–29 (Radius Book Group 2019); *Robertson*, 389 F. Supp. at 873.

<sup>221</sup> See JIM QUINN, DON’T BE AFRAID TO WIN, 28–48 (Radius Book Group 2019) (discussing the litigation history of the *Robertson* case).

<sup>222</sup> See generally JIM QUINN, DON’T BE AFRAID TO WIN (Radius Book Group 2019) (discussing Quinn’s career in sports and the law).

<sup>223</sup> *Id.* at 31.

<sup>224</sup> *Id.*; *Proskauer Mourns the Passing of Howard Ganz*, PROSKAUER (Jan. 6, 2021), <https://www.proskauer.com/release/proskauer-mourns-the-passing-of-howard-ganz> [<https://perma.cc/F826-YAKB>].

<sup>225</sup> JIM QUINN, DON’T BE AFRAID TO WIN, 31 (Radius Book Group 2019).

<sup>226</sup> Michael McCann & Scott Soshnick, *Longtime NBA Lawyer Mishkin Moving to Arbitration After Skadden Arps*, SPORTICO (Oct. 18, 2021), <https://>



In February 1975, the court issued a lengthy ruling on a variety of issues. In addition to challenging the merger, the players also alleged that the NBA’s reserve clause, uniform contract, college draft, and other policies and practices violated Sections 1 and 2 of the Sherman Act.<sup>227</sup> The court noted that all of these practices “appear to be per se violative of the Sherman Act.”<sup>228</sup> However, citing *Flood*, the court noted that

Some degree of economic cooperation which is inherently anti-competitive may well be essential for the survival of ostensibly competitive professional sports leagues. Without these mechanisms unrestrained price wars for the service of the most proficient players will ensue, or so runs the argument, with the wealthiest teams capturing the top talent and the poorer teams facing demise due to the loss of fans and profit.<sup>229</sup>

While the court did not substantively engage in a rule of reason analysis, it implicitly identified the third element of that analysis — that if the defendant satisfies its burden to show a procompetitive rationale for the restraint, the plaintiff must show that the procompetitive benefits can be achieved through less restrictive means.<sup>230</sup> The court acknowledged that “survival necessitates some restraints,” but that does not mean “that insulation from the reach of the antitrust laws must follow. Less drastic protective measures may be the solution.”<sup>231</sup> In light of the uncertainty on these issues, the court denied the NBA’s motion for summary judgment.

Another significant issue in the court’s decision was whether the NBA’s practices were protected by the non-statutory labor exemption, which will be addressed below in Section III.d.

The court’s decision set the stage for a potential trial. Nevertheless, after approximately 150 depositions in preparation for trial,<sup>232</sup> the parties reached a new collective bargaining agreement which resolved the lawsuit.<sup>233</sup> The players got a form of free agency and \$4,365,000 in damages.<sup>234</sup> Separately, the ABA folded and the NBA absorbed four of its clubs.<sup>235</sup>

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www.sportico.com/law/news/2021/nba-legal-counsel-mishkin-skadden-arps-1234644177/ [https://perma.cc/VGF5-H3DK].

<sup>227</sup> *Robertson v. NBA*, 389 F. Supp. 867, 873–75 (S.D.N.Y. 1975).

<sup>228</sup> *Id.* at 891.

<sup>229</sup> *Id.* at 892.

<sup>230</sup> *See NCAA v. Alston*, 141 S.Ct. 2141, 2160 (2021).

<sup>231</sup> *Robertson*, 389 F. Supp. at 892.

<sup>232</sup> JIM QUINN, DON’T BE AFRAID TO WIN, 37 (Radius Book Group 2019).

<sup>233</sup> *Id.* at 46.

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

<sup>235</sup> *Id.* at 47.

*d. Mackey (1976)*

In December 1975, Judge Earl Larson of the United States District Court for the District of Minnesota addressed head on the issues danced around in *Philadelphia World Hockey Club* and *Robertson*. In the case, a class of current players, led by John Mackey, a Pro Bowl tight end and President of the National Football League Players Association (NFLPA), alleged that the NFL's "Rozelle Rule," in conjunction with the NFL's reserve clause, constituted a *per se* violation of the antitrust laws.<sup>236</sup> The Rozelle Rule, named for NFL Commissioner Pete Rozelle, was a unilaterally imposed rule whereby players could sign with other teams upon the expiration of the contract, but the Commissioner could award players to the club which the player left.<sup>237</sup> The Rule had a chilling effect on player movement, as only four players changed clubs between 1963 and 1973.<sup>238</sup>

After a 55-day trial, the court ruled in the players' favor.<sup>239</sup> The court rejected the NFL's argument that the Rule was not a *per se* violation and therefore needed to be evaluated under the rule of reason.<sup>240</sup> After making a variety of factual findings as to the Rule's restraining effect on player movement and wages, the court declared the "Rule and its related practices constitute a concerted refusal to deal and a group boycott" which is "so clearly contrary to public policy that it is *per se* illegal."<sup>241</sup>

Despite this finding, the court also examined the rule under the rule of reason.<sup>242</sup> Finding the Rule unreasonably broad in its application and duration, and harmful to players, the court also found the Rozelle Rule to be in violation of antitrust law.<sup>243</sup> In so doing, the court rejected the NFL's argument that the Rule was necessary for competitive balance and found that "[e]limination of the Rozelle Rule would have no significant immediate disruptive effect on professional football."<sup>244</sup> Further, the court stated, "[i]f the effects of this decision prove to be too damaging to professional football, assuming justification existed, Congress could possibly grant special treat-

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<sup>236</sup> *Mackey v. NFL*, 407 F. Supp. 1000, 1002–03 (D. Minn. 1975).

<sup>237</sup> *Id.* at 1004.

<sup>238</sup> *Id.* at 1004, 1006–07.

<sup>239</sup> *See Mackey*, 407 F. Supp. at 1000.

<sup>240</sup> *See id.* at 1002 (describing NFL's defense).

<sup>241</sup> *Id.* at 1007.

<sup>242</sup> *Id.* at 1007–08.

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

<sup>244</sup> *Id.* at 1008.

ment to the National Football League based upon its claimed unique status.”<sup>245</sup>

The court also rejected the NFL’s argument that the Rule was exempt from antitrust law due to the non-statutory labor exemption, an important issue on appeal which is discussed in Section III.f.

The Eighth Circuit reversed the district court’s determination that the Rozelle Rule was *per se* illegal, declaring that the “unusual circumstances” of the NFL “render[ ] it inappropriate to declare the Rozelle Rule illegal *per se* without undertaking an inquiry into the purported justifications for the Rule.”<sup>246</sup> The Eighth Circuit elaborated on this point:

the NFL assumes some of the characteristics of a joint venture in that each member club has a stake in the success of the other teams. No one club is interested in driving another team out of business, since if the League fails, no one team can survive. Although businessmen cannot wholly evade the antitrust laws by characterizing their operation as a joint venture, we conclude that the unique nature of the business of professional football renders it inappropriate to mechanically apply *per se* illegality rules here, fashioned in a different context.<sup>247</sup>

In defense of the Rule, the NFL broke out the doomsday arguments:

- Defendants think it fundamentally clear that, without the qualified limitation on NFL player transfer privileges embodied in the Rozelle Rule, the present levels of fan interest in NFL football (and the present levels of club income) could not be maintained, with resultant damage to the interests of fans, cities, municipal stadium authorities, owners, and players alike.<sup>248</sup>
- But if the NFL were compelled to function without player rules capable of preserving team balance, player employment conditions within the NFL would be dramatically altered. Weak teams would lose their more talented players and the more talented players would be attracted to currently winning teams, with their opportunities for postseason money, as well as to cities offering commercial endorsements, greater off-season job opportunities, more attractive climates, and higher payroll potential.<sup>249</sup>
- Witness after witness testified that the elimination of the Rozelle Rule would **destroy** the present levels of competitive balance among the

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

<sup>246</sup> *Mackey v. NFL*, 543 F.2d 606, 618–19 (8th Cir. 1976).

<sup>247</sup> *Id.* at 619.

<sup>248</sup> Brief for Appellants Twenty-Six Member Clubs of the NFL at 15–16, *Mackey*, 543 F.2d 606 (8th Cir. May 3, 1976) (No. 76-1184).

<sup>249</sup> *Id.* at 28.

NFL teams, ultimately leading to a deterioration of the League's income potential for players and clubs alike.<sup>250</sup>

- The Rozelle Rule does not prohibit player-initiated transfers within the NFL; rather, it permits such transfers in a fashion which prevents disruptions and playing field distortions and preserves fan interest in the League's games. In defendants' view, plaintiffs' litigation objectives are not only shortsighted, they are directed at the destruction of the very employment potential which football presently offers to players.<sup>251</sup>
- Simply stated, the thesis of these witnesses was that, if there were no Rozelle Rule, the problems of competitive balance and club survival could be resolved by moving large numbers of NFL franchises into New York and Los Angeles. This impractical suggestion ignores the problems presented by inadequate stadium facilities, problems of television coverage, dilution of fan support and civic allegiances and adverse social effects. And in the course of such realignment, many NFL clubs would be *bankrupted* and the NFL, in its present "nationalized" sense, would be destroyed.<sup>252</sup>
- [A]s defendants abundantly demonstrated at trial, a victory by plaintiffs in this litigation will, in all probability, result in declining fan interest, smaller team squads, reduced player-job opportunities, the loss of franchises by many NFL cities, the loss of municipal stadium tenants, and the reduction of professional football operations nationally. In short, not public benefit, but great public harm would result.<sup>253</sup>

The players responded by calling out the NFL's apocalyptic predictions:

Defendants' argument as to what would happen if there were no Rozelle Rule abounds with speculation and hyperbole. For example, defendant clubs quote in support of their argument Jim Finks' testimony: ". . . What would you have if all of a sudden a club in our league could go in and sign the Pittsburgh Steelers front four . . ." This is obviously hyperbole. It presupposes all four were free agents at the same time and have not come to contract terms with the Steelers. It assumes each is willing to go elsewhere. It assumes that all are willing to go to this one team. It implicitly assumes that the new team is willing to expend unlimited funds to acquire their services. It assumes the Steelers sit idly by. A host of unstated assumptions are contained in the statement, all of which would have to be

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<sup>250</sup> *Id.* (emphasis added).

<sup>251</sup> *Id.* at 30 (emphasis added).

<sup>252</sup> *Id.* at 31 (emphasis added) (citation omitted).

<sup>253</sup> *Id.* at 33 (emphasis added).

true before the hypothetical could become a reality. The defendants' briefs are replete with such conjecture and exaggerated fears.<sup>254</sup>

The Eighth Circuit was not persuaded by the NFL's arguments and affirmed the district court's decision that the Rozelle Rule violated the rule of reason.<sup>255</sup> The court held that:

the asserted need to recoup player development costs cannot justify the restraints of the Rozelle Rule. That expense is an ordinary cost of doing business and is not peculiar to professional football. Moreover, because of its unlimited duration, the Rozelle Rule is far more restrictive than necessary to fulfill that need.<sup>256</sup>

Additionally, while the court acknowledged that "the NFL has a strong and unique interest in maintaining competitive balance among its teams," it determined that the "Rozelle Rule is significantly more restrictive than necessary to serve any legitimate purposes it might have in this regard."<sup>257</sup>

The NFL petitioned the Supreme Court to review the case, focusing almost entirely on the labor exemption issue,<sup>258</sup> but was denied.<sup>259</sup>

In March 1977, five months after the Eighth Circuit's decision, the NFL and NFLPA agreed to a new collective bargaining agreement that replaced the Rozelle Rule with a process by which clubs had the right of first refusal to their own free agents and agreed upon compensation in the event the club lost the player.<sup>260</sup> That system would be challenged in *Powell*, discussed below in Section IV.b.

*e. Kapp (1978)*

At the same time current players were seeking to end the Rozelle Rule in *Mackey*, a former player, Joe Kapp, filed suit seeking damages arising out of the Rozelle Rule.<sup>261</sup> Kapp, a quarterback, played for the New England

<sup>254</sup> Brief for Appellees at 20-21, *Mackey v. NFL*, 543 F.2D 606 (8th Cir. June 1, 1976) (No. 76-1184).

<sup>255</sup> *Mackey*, 543 F.2d at 623.

<sup>256</sup> *Id.* at 621.

<sup>257</sup> *Id.* at 621-22.

<sup>258</sup> See Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, *NFL v. Mackey*, 434 U.S. 801 (Jan. 5, 1977) (No. 76-932).

<sup>259</sup> *Mackey*, 434 U.S. 801.

<sup>260</sup> See Chris Deubert, Glenn M. Wong, & John Howe, *All Four Quarters: A Retrospective and Analysis of the 2011 Collective Bargaining Process and Agreement in the National Football League*, 19 UCLA ENT. L. REV. 1, 8 (2012).

<sup>261</sup> See *Kapp v. NFL*, 390 F. Supp. 73, 75 (N.D. Cal. 1974).

Patriots in 1970 after being traded from the Minnesota Vikings.<sup>262</sup> Kapp and the Patriots were unable to agree to terms for the 1971 season.<sup>263</sup> In his suit, Kapp alleged that the Rozelle Rule and its related regulations prevented him from meaningfully negotiating with other clubs in violation of antitrust law, implying it effectively ended his career.<sup>264</sup>

In a December 1974 decision, the United States District Court for the Northern District of California granted Kapp summary judgment on some of his claims.<sup>265</sup> Citing *Flood* and *Philadelphia World Hockey Club*, the court determined that “the per se rule is inappropriate and inapplicable to sports league activities” given their “unique nature and purpose.”<sup>266</sup> Applying the rule of reason test, the court found that the Rozelle Rule,

imposing restraint virtually unlimited in time and extent, goes far beyond any possible need for fair protection of the interests of the club-employers or the purposes of the NFL and that it imposes upon the player-employees such undue hardship as to be an unreasonable restraint and such a rule is not susceptible of different inferences concerning its reasonableness; it is unreasonable under any legal test and there is no genuine issue about it to require or justify trial.<sup>267</sup>

The court also rejected the NFL’s labor exemption argument as discussed below in Section III.g.

Given that the *Kapp* decision was issued almost exactly a year before the district court’s decision in *Mackey*, it is surprising that the district court in that case did not cite *Kapp*. On the *Mackey* appeal, the Eighth Circuit did cite *Kapp* in support of its antitrust analysis of the Rozelle Rule.<sup>268</sup> Then, on the *Kapp* appeal, the Ninth Circuit cited the Eighth Circuit’s decision in *Mackey* as support for the district court’s decision.<sup>269</sup>

Despite that decision, a jury determined that Kapp could not prove that he had been damaged as a result of the Rozelle Rule.<sup>270</sup>

Both parties appealed. In its appeal, the NFL did not go full doomsday, but did continue to argue the necessity of the Rozelle Rule system:

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<sup>262</sup> *Id.* at 77.

<sup>263</sup> *See id.*

<sup>264</sup> *See id.* at 78.

<sup>265</sup> *Id.* at 86.

<sup>266</sup> *Id.* at 81.

<sup>267</sup> *Id.* at 82.

<sup>268</sup> *See Mackey v. NFL*, 543 F.2d at 616 n.6, 617, 619 (8th Cir. 1976).

<sup>269</sup> *See Kapp v. NFL*, 586 F.2d 644, 646 n.11 (9th Cir. 1978).

<sup>270</sup> *Id.* at 648.

All these rules are designed to give the weaker NFL teams an opportunity to maintain and improve their playing strength, and to handicap the stronger and better situated teams in achieving positions of dominance. The rules assure, to the extent practicable, an equality of playing field strength among the teams in the League that is essential to make NFL football an entertaining and popular "product." The rules thus serve player and club interests alike.<sup>271</sup>

The Ninth Circuit nonetheless rejected Kapp's argument that the instructions to the jury concerning Kapp's damages were improper,<sup>272</sup> and said it was unnecessary to review the district court's decision concerning the reasonableness of the Rozelle Rule.<sup>273</sup> The Supreme Court denied Kapp's petition for review.<sup>274</sup>

*f. Smith (1978)*

There was a final, major NFL antitrust case of the 1970s, but this time, the target was the NFL Draft rather than the Rozelle Rule. James McCoy (Yazoo) Smith, an outstanding defensive back at the University of Oregon, was drafted by the Washington Redskins in the first round of the 1968 NFL Draft.<sup>275</sup> Smith signed a one-year contract with the Redskins for a total of \$50,000.<sup>276</sup> When a neck injury at the end of the season ended Smith's career, he brought a lawsuit alleging that the NFL Draft prevented him from "negotiat[ing] a contract reflecting the free market or true value of his services" in violation of the antitrust laws.<sup>277</sup>

Smith persuaded the United States District Court for the District of Columbia that the Draft was a *per se* violation of the antitrust laws.<sup>278</sup> The court explained as follows:

The essence of the draft is straightforward: the owners of the teams have agreed among themselves that the right to negotiate with each top quality graduating college athlete will be allocated to one team, and that no other team will deal with that person. This outright, undisguised refusal to deal constitutes a group boycott in its classic and most pernicious form, a de-

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<sup>271</sup> Brief for Appellees and Cross-Appellants NFL, Twenty-Five NFL Member Clubs, Rozelle, and Finks at 23, *Kapp*, 586 F.2d 644 (9th Cir. Mar. 11, 1977)(Nos. 76-2849 & 76-2879).

<sup>272</sup> See *Kapp*, 586 F.2d at 648.

<sup>273</sup> See *id.* at 649–50.

<sup>274</sup> *Kapp v. NFL*, 441 U.S. 907 (1979).

<sup>275</sup> *Smith v. Pro-Football*, 420 F.Supp. 738, 740 (D.D.C. 1976).

<sup>276</sup> See *id.*

<sup>277</sup> *Id.* at 740–41.

<sup>278</sup> *Id.* at 744.

vice which has long been condemned as a *per se* violation of the antitrust laws.<sup>279</sup>

The court was also dismissive of the NFL's rule of reason arguments. The NFL argued that the Draft was essential for maintaining competitive balance among the clubs.<sup>280</sup> However, the court said "[t]he evidence on these points was at best equivocal."<sup>281</sup> Moreover, the court stated that the NFL was "unable to produce any credible evidence of a significant correlation between the opportunity to draft early in the draft (i.e., the preferred position) and improvement in team performance."<sup>282</sup>

In light of the court's findings, it found that Smith had been damaged in the amount of \$92,200, which was trebled to \$276,600 pursuant to the Sherman Act.<sup>283</sup>

The Court of Appeals reversed the district court's holding that the NFL Draft was a *per se* violation of antitrust law.<sup>284</sup> The court determined that the *per se* rule is not intended to apply "where, given the peculiar characteristics of an industry, the need for cooperation among participants necessitated some type of concerted refusal to deal, or where the concerted activity manifested no purpose to exclude and in fact worked no exclusion of competitors."<sup>285</sup> Further, the court explained that the Draft "is designed not to insulate the NFL from competition, but to improve the entertainment product by enhancing its teams' competitive equality."<sup>286</sup> Consequently, the Draft should be evaluated under the rule of reason.<sup>287</sup>

Nevertheless, the Court of Appeals affirmed the district court's determination that the Draft constituted an unreasonable restraint of trade because it "virtually eliminates economic competition among buyers for the services of sellers."<sup>288</sup>

The Court of Appeals did, however, remand the case for revised damages calculations.<sup>289</sup> On remand, Smith was determined to have suffered \$4,000 in damages, trebled to \$12,000.<sup>290</sup>

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<sup>279</sup> *Id.*

<sup>280</sup> *Id.* at 745.

<sup>281</sup> *Id.* at 746.

<sup>282</sup> *Id.*

<sup>283</sup> *Id.* at 749.

<sup>284</sup> *See* *Smith v. Pro Football*, 593 F.2d 1173, 1181 (D.C. Cir. 1978).

<sup>285</sup> *Id.* at 1180.

<sup>286</sup> *Id.* at 1179.

<sup>287</sup> *Id.* at 1182.

<sup>288</sup> *Id.* at 1184-85.

<sup>289</sup> *Id.* at 1191.

<sup>290</sup> *Smith v. Pro-Football*, 528 F. Supp. 1266, 1267 (D.D.C. 1981).



### III. THE NON-STATUTORY LABOR EXEMPTION PROTECTS THE LEAGUE'S RULES

As the cases discussed above show, the 1970s was a particularly litigious decade in American sports history. In all the leagues, players by then had formed unions<sup>291</sup> which were working to find their feet against hostile club owners. Moreover, the established leagues faced competition from upstart leagues that provided the players with options and leverage. Consequently, the players were willing to challenge the leagues and their restraints in court.

The leagues were successful in arguing that due to the unique nature of the sports industry, the application of *per se* antitrust analysis was inappropriate. Nevertheless, the leagues were still faced with the challenge of defending their rules on the merits, of which courts were increasingly skeptical.

The leagues thus turned to a new primary argument — that a judicially created non-statutory labor exemption protected their player restraints from antitrust scrutiny. This argument derived out of cases unrelated to the sports industry, but has come to underpin labor relations in sports.

#### *a. The Development of the Non-Statutory Labor Exemption by the Supreme Court and a Law Student*

In 1965, the Supreme Court decided a pair of cases in tandem that would come to have a significant impact on the sports industry.

First, in *Amalgamated Meat Cutters v. Jewel Tea Co.*, (“Jewel Tea”),<sup>292</sup> “9,000 Chicago retailers of fresh meat” and seven unions “representing virtually all butchers in the Chicago area” agreed as part of a collective bargaining agreement that no meat would be sold between 9 am and 6 pm.<sup>293</sup> The retailers subsequently requested that this restriction be relaxed, which the butchers refused.<sup>294</sup> The retailers sued, alleging that the rule was a violation of antitrust law.<sup>295</sup>

The Supreme Court ruled for the unions:

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<sup>291</sup> See Christopher R. Deubert, I. Glenn Cohen, & Holly Fernandez Lynch, *Comparing Health-Related Policies and Practices in Sports: The NFL and Other Professional Leagues*, 8 HARV. J. SPORTS & ENT. L. 1, 30 (2017) (providing dates of formation for each union).

<sup>292</sup> 381 U.S. 676 (1965).

<sup>293</sup> *Id.* at 680.

<sup>294</sup> See *id.* at 680-81.

<sup>295</sup> See *id.* at 681.

the marketing-hours restriction. . . is so intimately related to wages, hours and working conditions that the unions' successful attempt to obtain that provision through bona fide, arm's-length bargaining in pursuit of their own labor union policies, and not at the behest of or in combination with nonlabor groups, falls within the protection of the national labor policy and is therefore exempt from the Sherman Act.<sup>296</sup>

In a similar case decided the same day as *Jewel Tea, United Mine Workers of America v. Pennington* ("Pennington"), the Supreme Court analyzed whether an agreement between the United Mine Workers, a union representing mine workers, and the operators of several mines, which governed the wages and terms and conditions of the miners' employment was exempt from antitrust law:<sup>297</sup>

We think it beyond question that a union may conclude a wage agreement with the multi-employer bargaining unit without violating the antitrust laws and that it may as a matter of its own policy, and not by agreement with all or part of the employers of that unit, seek the same wages from other employers.<sup>298</sup>

The *Jewel Tea* and *Pennington* cases thus established an exemption from antitrust law grounded in labor law and policy which had not previously existed.

In contrast, as explained in *Pennington*, the 1914 Clayton Act (which amended the Sherman Act), specifically declared that the antitrust laws did not apply to unions "instituted for the purposes of mutual help" of its "individual members."<sup>299</sup> Because this exemption was specifically created by statute, it has since become known as the "statutory labor exemption."<sup>300</sup>

Nevertheless, the Supreme Court in *Pennington* acknowledged that the statutory labor exemption did not address "arrangements or agreements between unions and employers."<sup>301</sup> Therefore, the exemption crafted by the Supreme Court in *Jewel Tea* and *Pennington* became known as the "non-statutory labor exemption."<sup>302</sup> In so doing, the Court declared that it was "concerned. . . with harmonizing the Sherman Act with the national policy expressed in the National Labor Relations Act of promoting 'the peaceful

<sup>296</sup> *Id.* at 689-90.

<sup>297</sup> 381 U.S. 657, 669 (1965).

<sup>298</sup> *Id.* at 664.

<sup>299</sup> *See id.* at 661-62; 15 U.S.C. § 17.

<sup>300</sup> *See Brown v. Pro Football*, 518 U.S. 231, 236 (1996) (discussing history of statutory and non-statutory labor exemptions).

<sup>301</sup> *Pennington*, 381 U.S. at 662.

<sup>302</sup> *See Brown*, 518 U.S. at 236 (discussing history of statutory and non-statutory labor exemptions).

settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation.’”<sup>303</sup>

At the time of the *Jewel Tea* and *Pennington* decisions, little thought had been given to the application of these cases to the sports industry. That changed in the early 1970s. First, as will be discussed below, MLB cited the cases in the *Flood* proceedings. Second, in 1971, Ralph Winter, then a professor at Yale Law School, and his student and future professor, Michael Jacobs, published an article in the Yale Law Journal on the issue that would become influential in sports and the law.<sup>304</sup> The article, entitled *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, examined the intersection of antitrust and labor law amid two ongoing legal situations in sports: the *Flood* case (which will be discussed below) and the proposed merger between the NBA and its upstart competitor, the ABA.

The background of the article is interesting. Jacobs began his third year at Yale in the fall of 1970.<sup>305</sup> The *Flood* case had just been decided in the Southern District of New York that summer and was now being briefed on appeal to the Second Circuit.<sup>306</sup> That academic year, Yale held a moot court competition that chose the *Flood* case as its subject.<sup>307</sup> Jacobs had taken antitrust and labor law courses, the latter from Winter, and thus began to formulate an argument that player restraints could not be challenged in court if negotiated with a union.<sup>308</sup> Jacobs won the moot court competition and then approached Winter about turning his work into an article.<sup>309</sup> Winter agreed, added his expert thoughts to Jacobs’ work, and the article was published in November 1971,<sup>310</sup> weeks before Flood submitted his opening brief to the Supreme Court.<sup>311</sup>

<sup>303</sup> *Pennington*, 381 U.S. at 665 (quoting *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 211 (1964)).

<sup>304</sup> Michael S. Jacobs & Ralph K. Winter, Jr., *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L. J. 1 (1971).

<sup>305</sup> Interview with Michael S. Jacobs, Emeritus Distinguished Professor of Law, DePaul Coll. of Law (Sept. 2, 2022).

<sup>306</sup> See *Flood v. Kuhn*, 316 F. Supp. 271 (S.D.N.Y. 1970) (dated August 12, 1970); *Flood v. Kuhn*, 443 F.2d 264 (2d Cir. 1971) (listing argument date as January 27, 1971, which would have necessitated briefing during the final months of 1970).

<sup>307</sup> Interview with Michael S. Jacobs, Emeritus Distinguished Professor of Law, DePaul Coll. of Law (Sept. 2, 2022).

<sup>308</sup> *Id.*

<sup>309</sup> *Id.*

<sup>310</sup> See Michael S. Jacobs & Ralph K. Winters, Jr., *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L. J. 1 (1971).

<sup>311</sup> See Brief for Petitioner, *Flood v. Kuhn*, 407 U.S. 258 (1972) (Dec. 17, 1971) (No. 71-32).

In the article, Jacobs and Winter expressed that “the debate over the merits of individual challenges to the reserve clause have taken insufficient account of a recent development with far reaching consequences.”<sup>312</sup> The relevant recent development was that “[t]he terms and conditions of employment of professional athletes in baseball, basketball and football are no longer governed solely by individual contracts but have been supplanted in part by collective bargaining between the leagues and player unions.”<sup>313</sup> As a result, Jacobs and Winter argued, “national labor policy, rather than anti-trust law, is the principal and pre-eminent legal force shaping employment relationships in professional sports.”<sup>314</sup> Further, the authors analyzed the *Jewel Tea* and *Pennington* decisions and noted that “[e]ach of these cases involved the antitrust liability, or labor law exemption, of employers as well as unions for activities engaged in as a result of collective bargaining.”<sup>315</sup>

In short, Jacobs and Winter argued that what is now known as the non-statutory labor exemption, created in the 1965 Supreme Court cases, should be applied to the sports industry and provide antitrust protection for player restraints created by the leagues and their clubs. In their words, “in those sports where players’ unions are recognized,” “the reserve or option clause is not properly an antitrust issue *when raised by a player in a unit with an exclusive collective bargaining representative.*”<sup>316</sup> Further, the authors explained that “[c]ollective bargaining seeks to order labor markets through a system of countervailing power. . . . If such a structure is to be protected by law, then logically the antitrust claims between employers and employees must be extinguished.”<sup>317</sup> As to the *Flood* case to soon be heard by the Supreme Court, Jacobs and Winter argued that “the defendants have an absolute defense on the merits, grounded in labor law.”<sup>318</sup>

After writing the article, Jacobs essentially forgot about it.<sup>319</sup> He clerked in a federal court and then entered private practice at a large law firm.<sup>320</sup> Only when Jacobs eventually sought to become a professor himself, did he learn that the article had been influential in sports and the law,<sup>321</sup> as

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<sup>312</sup> Michael S. Jacobs & Ralph K. Winters, Jr., *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L. J. 1, 6 (1971).

<sup>313</sup> *Id.*

<sup>314</sup> *Id.*

<sup>315</sup> *Id.* at 26.

<sup>316</sup> *Id.* at 27 (second emphasis added).

<sup>317</sup> *Id.* at 22.

<sup>318</sup> *Id.* at 29.

<sup>319</sup> Interview with Michael S. Jacobs, Emeritus Distinguished Professor of Law, DePaul Coll. of Law (Sept. 2, 2022).

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

will be discussed below. Jacobs went on to have a distinguished academic career as a professor at DePaul College of Law, specializing in antitrust law in industries other than sports.<sup>322</sup>

As for Winter, in 1982, he became a Judge of the United States Court of Appeals for the Second Circuit, where he served until 2000.<sup>323</sup> He died in 2020, leaving behind a monumental legal legacy,<sup>324</sup> including some opinions discussed below.

Jacobs said that he never consulted with any of the sports leagues after writing the article (though he turned down a chance to interview with the NFL).<sup>325</sup> Consequently, it seems likely that the leagues developed their non-statutory labor exemption arguments in parallel to Jacobs, a circumstance with which Jacobs agrees.<sup>326</sup> Nevertheless, as will be discussed below, Jacobs' work was prescient in many ways and would be cited as persuasive authority in many of the biggest cases in sports and the law.<sup>327</sup>

#### b. *Flood* (1972)

While the *Flood* litigation focused primarily on MLB's antitrust exemption, it was also the first time that a sports league made the non-statutory

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<sup>322</sup> Michael S. Jacobs, DEPAUL COLL. OF LAW, <https://law.depaul.edu/faculty-and-staff/faculty-a-z/Pages/michael-jacobs.aspx> [<https://perma.cc/3ULJ-L2K6>].

<sup>323</sup> Clay Risen, *Ralph K. Winter Jr., a Top Conservative Judicial Mind, Dies at 85*, N.Y. TIMES (Dec. 18, 2020), <https://www.nytimes.com/2020/12/18/us/ralph-k-winter-jr-dead.html>; *Yale Law School Mourns the Death of Judge Ralph K. Winter '60*, YALE L. SCH. (Dec. 8, 2020), <https://law.yale.edu/yls-today/news/yale-law-school-mourns-death-judge-ralph-k-winter-60> [<https://perma.cc/YF7H-4BNJ>].

<sup>324</sup> Risen, *supra* note 323; *Yale Law School Mourns the Death of Judge Ralph K. Winter '60*, *supra* note 323.

<sup>325</sup> Interview with Michael S. Jacobs, Emeritus Distinguished Professor of Law, DePaul Coll. of Law (Sept. 2, 2022).

<sup>326</sup> *Id.*

<sup>327</sup> In total, the article has been cited in 15 reported case decisions involving sports and the law, including twice by the Supreme Court. See *Brown v. Pro Football, Inc.*, 116 S.Ct. 2116, 2126 (1996); *Flood v. Kuhn*, 92 S.Ct. 2099, 2113 (1972); *Clarett v. NFL*, 369 F.3d 124, 140 (2d Cir. 1996); *Wood v. NBA*, 809 F.2d 954, 958 (2d Cir. 1987); *McCourt v. Cal. Sports, Inc.*, 600 F.2d 1193, 1197 (6th Cir. 1979); *White v. NFL*, 585 F.3d 1129, 1137 (8th Cir. 2009); *Powell v. NFL*, 930 F.2d 1293, 1303 (8th Cir. 1989); *Kapp v. NFL*, 390 F. Supp. 738, 743 (D.D.C. 1976); *Clarett v. NFL*, 306 F. Supp. 2d 379, 393 (S.D.N.Y. 2004); *NBA v. Williams*, 857 F. Supp. 1069, 1077 (S.D.N.Y. 1994); *Robertson v. NBA*, 389 F. Supp. 867, 884 (S.D.N.Y. 1975); *Davis v. Pro Basketball, Inc.*, 381 F. Supp. 1, 5 (S.D.N.Y. 1974); *Chuy v. Phila. Eagles*, 407 F. Supp. 717, 721 (E.D. Pa. 1976); *Phila. World Hockey Club, Inc. v. Phila. Hockey Club, Inc.*, 351 F. Supp. 462, 499 (E.D. Pa. 1972).

tory labor exemption argument, or, as MLB called it at the time, the “Labor Antitrust Exemption.”<sup>328</sup> MLB argued at the district court that, pursuant to *Jewel Tea*, the reserve clause was exempt from antitrust law because it was a mandatory subject of collective bargaining.<sup>329</sup> By that time, MLB players had formed the MLBPA, and the parties had agreed to a 1966 collective bargaining agreement that addressed a range of issues related to player pay, benefits, and conditions of employment.<sup>330</sup> Nevertheless, the parties had not reached an agreement concerning the reserve clause.<sup>331</sup> The district court consequently expressed “doubt” that the clause was exempt from antitrust law but declared it “need not reach this difficult question” in light of the court’s deference to *Toolson*.<sup>332</sup>

The Second Circuit reached the same decision, holding that because it had affirmed the district court’s decision based on MLB’s antitrust exemption, it was “unnecessary” to consider MLB’s argument that “federal labor policy exempts the reserve system” from judicial scrutiny.<sup>333</sup>

MLB renewed the argument before the Supreme Court, arguing that the “reserve clause is fundamentally a labor-management dispute.”<sup>334</sup> Moreover, it alleged that the MLBPA’s direction of and financial support for *Flood’s* case constituted a “perversion of the antitrust laws.”<sup>335</sup> Instead, MLB asserted that “the goal of federal labor policy is the settlement of employer-employee disputes through the process of collective bargaining.”<sup>336</sup>

Like the courts before it, the Supreme Court found it “unnecessary” to address MLB’s argument.<sup>337</sup> However, in a footnote, the Court cited the Jacobs and Winter article as “suggesting present-day irrelevancy of the antitrust issue,”<sup>338</sup> even though MLB had not cited the article in its brief.

Justice Thurgood Marshall gave the issue greater consideration. In a dissenting opinion joined by Justice William J. Brennan, Justice Marshall argued that *Federal Baseball* and *Toolson* should be overturned.<sup>339</sup> Nevertheless, Justice Marshall acknowledged that even if those cases were overturned,

<sup>328</sup> *Flood v. Kuhn*, 316 F. Supp. 271, 278 (S.D.N.Y. 1970).

<sup>329</sup> *Id.*

<sup>330</sup> *See id.* at 283.

<sup>331</sup> *See id.*

<sup>332</sup> *Id.*

<sup>333</sup> *Flood v. Kuhn*, 443 F.2d 264, 268 (2d Cir. 1971).

<sup>334</sup> *See* Brief for Respondents, *Flood v. Kuhn*, 407 U.S. 258 (1972) (No. 71-32, 45).

<sup>335</sup> *Id.* at 47.

<sup>336</sup> *Id.*

<sup>337</sup> *Flood v. Kuhn*, 407 U.S. 258, 285 (1972).

<sup>338</sup> *Id.* at n.22.

<sup>339</sup> *Flood v. Kuhn*, 407 U.S. 258, 288-93 (1972) (Marshall, J., dissenting).

it would "not mean that [Flood] would necessarily prevail."<sup>340</sup> In summarizing the "interrelationship between the antitrust laws and labor laws," the Justice identified two principles of law: (1) "'benefits to organized labor cannot be utilized as a cat's paw to pull employers' chestnuts out of the antitrust fires,'"<sup>341</sup> and (2) "the very nature of a collective-bargaining agreement mandates that the parties be able to 'restrain' trade to a greater degree than management could do unilaterally."<sup>342</sup> Nevertheless, Justice Marshall noted that prior cases had examined "union-management agreements that work to the detriment of management's competitors" while *Flood* concerned a restraint (the reserve system) that "works to the detriment of labor."<sup>343</sup>

Justice Marshall did not believe the issue had been given due consideration. Indeed, he quoted from the Jacobs and Winter article in recognizing that the courts had declined to resolve this issue: "[t]he labor law issues have been in the corners of the case. . . moving in and out of the shadows like an uninvited guest at a party whom one can't decide either to embrace or expel."<sup>344</sup> Consequently, the Justice would have remanded the case for consideration as to whether *Flood* could have stated an antitrust claim "despite the collective-bargaining agreement."<sup>345</sup>

As for his opinions on the matter, Justice Marshall offered that "the question arises as to whether there would be any exemption from the antitrust laws" if, as *Flood* argued, "the reserve system was thrust upon the players by the owners and that the recently formed players' union ha[d] not had time to modify or eradicate it."<sup>346</sup>

*c. Philadelphia World Hockey Club, Inc. (1972)*

Two months after the Supreme Court decided *Flood*, a different sports league got a chance to make the non-statutory labor exemption argument in response to a challenge of its reserve clause. As discussed in Section II.b, in *Philadelphia World Hockey Club, Inc.*, the Eastern District of Pennsylvania found that the NHL's reserve clause likely violated antitrust law and therefore issued an injunction against its continued practice.

<sup>340</sup> *Id.* at 293.

<sup>341</sup> *Id.* at 294 (quoting *United States v. Women's Sportswear Manufacturers Ass'n*, 336 U.S. 460, 464 (1949)).

<sup>342</sup> *Flood v. Kuhn*, 407 U.S. 258, 294 (1972) (Marshall, J., dissenting).

<sup>343</sup> *Id.*

<sup>344</sup> *Id.* (quoting Michael S. Jacobs & Ralph K. Winters, Jr., *Antitrust Principles and Collective Bargaining By Athletes: Of Superstars in Peonage*, 81 *YALE L. J.* 1, 22 (1971)).

<sup>345</sup> *Flood v. Kuhn*, 407 U.S. 258, 296 (1972) (Marshall, J., dissenting).

<sup>346</sup> *Id.* at 295.

In so doing, the district court rejected the NHL's argument that the reserve clause was exempt from antitrust law because of the "labor exemption."<sup>347</sup> As an initial matter, the court was unable to "definitively conclude that the National Labor Relations Board ha[d] actually certified the [NHL] Players' Association as the approved collective bargaining representative."<sup>348</sup> Even assuming it had, the court found that there was no evidence that the reserve clause "was ever a subject of serious, intensive, arm's-length collective bargaining."<sup>349</sup> Consequently, "[t]o grant the National Hockey League an exemption in this proceeding would undermine and thwart the policies which have evolved over the years in disposing of labor-management and anti-trust disputes."<sup>350</sup>

Of note, the court did cite the Jacobs and Winter article for the proposition that even if the reserve clause had been negotiated with the union, the upstart WHA looking to compete with the NHL might still have an antitrust claim.<sup>351</sup>

*d. Robertson (1975)*

As discussed in Section II.c, in *Robertson*, NBA players alleged that the NBA's reserve clause, uniform contract, college draft, and other policies and practices violated Sections 1 and 2 of the Sherman Act.<sup>352</sup> In denying the NBA's motion for summary judgment, the court rejected the NBA's argument that its rules were protected from antitrust scrutiny pursuant to a "labor exemption."<sup>353</sup>

Citing *Jewel Tea* and *Pennington*, the NBA argued for a two-part test to determine whether restraints on the labor market are subject to antitrust law: "(1) Are the challenged practices directed against non-parties to the relationship; if they are not, then (2) are they mandatory subjects of collective bargaining? If the answer to No. 1 is no, and to No. 2 yes, then the practices are immune[.]"<sup>354</sup>

The court's analysis of the issue reveals the nascent status of the non-statutory labor exemption. The court reviewed at length the history of the

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<sup>347</sup> *Phila. World Hockey Club, Inc. v. Phila. Hockey Club, Inc.*, 351 F. Supp. 462, 496-500 (E.D. Pa. 1972).

<sup>348</sup> *Id.* at 497.

<sup>349</sup> *Id.* at 499.

<sup>350</sup> *Id.* at 500.

<sup>351</sup> *See id.* at 499.

<sup>352</sup> *See Robertson v. NBA*, 389 F. Supp. 867, 873-75 (S.D.N.Y. 1975).

<sup>353</sup> *Id.* at 884.

<sup>354</sup> *Id.* at 886.



statutory labor exemption which “was created for the benefit of unions.”<sup>355</sup> In reviewing the Supreme Court’s analysis of the issue, the court determined that “[n]o mention was made of labor exemption for employers.”<sup>356</sup> Thus, at that time, only one exemption from the antitrust laws was definitively recognized by the courts. The court did not view the non-statutory labor exemption as a separate, judicially created exemption. As we will see below, the court’s view did not hold up over time.

Relatedly, the court rejected the NBA’s argument that the restrictions at issue in the litigation were mandatory subjects of bargaining.<sup>357</sup> This opinion too would be considered incorrect today. Mandatory subjects of bargaining are those which affect wages, the terms and conditions of employment.<sup>358</sup> In the sports context, there is no doubt that the standard player contract, the draft, and free agency restrictions materially affect the terms and conditions of employments and therefore are mandatory subjects of bargaining.<sup>359</sup>

*e. Connell (1975)*

The *Robertson* Court’s confusion about the nature of the non-statutory exemption was clarified by the Supreme Court’s June 1975 decision in *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local Union No. 100* (“*Connell*”).<sup>360</sup> At issue in *Connell* was an agreement between a union and a general contractor in which the general contractor agreed to hire only subcontractors with whom the union had entered into a multi-employer collective bargaining agreement.<sup>361</sup> The general contractor did not employ any employees represented by the union or covered by the collective bargaining agreement and only signed the agreement with the union after picketing outside one of its construction sites.<sup>362</sup>

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<sup>355</sup> *Id.* (citing *Allen Bradley Co. v. Local Union No. 3, Int’l Brotherhood of Elec. Workers*, 325 U.S. 797 (1945)).

<sup>356</sup> *Id.* at 887.

<sup>357</sup> *Id.* at 889-90.

<sup>358</sup> 29 U.S.C. § 158(d).

<sup>359</sup> *See, e.g., Brown v. Pro Football, Inc.*, 518 U.S. 231, 238 (1996) (describing player wage restriction as a “mandatory subject of bargaining”); *Clarett v. NFL*, 369 F.3d 124, 139 (2d Cir. 2004) (describing league’s eligibility rules for the draft as a mandatory subject of bargaining); *Powell v. NFL*, 930 F.2d 1293, 1296 (8th Cir. 1989) (describing NFL’s free agency and contract rules as “mandatory subjects of bargaining”).

<sup>360</sup> 421 U.S. 616 (1975).

<sup>361</sup> *See id.* at 619–21.

<sup>362</sup> *See id.*

The general contractor sued, alleging that the agreement was a violation of antitrust laws.<sup>363</sup> The Supreme Court reversed earlier dismissals in favor of the union, holding that the agreement at issue, “which is outside the context of a collective-bargaining relationship and not restricted to a particular jobsite, but which nonetheless obligates Connell to subcontract work only to firms that have a contract with Local 100, may be the basis of a federal antitrust suit because it has a potential for restraining competition in the business market in ways that would not follow naturally from elimination of competition over wages and working conditions.”<sup>364</sup>

Significantly for our purposes, the Court also clarified that there are two antitrust exemptions at play. First, the Court reiterated that the Clayton Act and Norris-LaGuardia Act “declare that labor unions are not combinations or conspiracies in restraint of trade, and exempt specific union activities, including secondary picketing and boycotts, from the operation of the antitrust laws.”<sup>365</sup> Next, the Court explained that “a proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets requires that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions.”<sup>366</sup> With that, the phrase “non-statutory labor exemption” was born.

*f. Mackey (1976)*

In the year after *Connell*, the phrase non-statutory exemption was used in three reported case decisions.<sup>367</sup> Then, in 1976, the newly refined concept was applied to the world of sports in a significant way. As explained in Section II.d, in *Mackey*, NFL players alleged that the NFL’s Rozelle Rule, in conjunction with the NFL’s reserve clause, violated antitrust laws. The players prevailed in a bench trial,<sup>368</sup> a decision affirmed by the Eighth Circuit.<sup>369</sup>

At both levels, the NFL raised the non-statutory labor exemption as a defense. The district court’s decision, issued in December 1975, tracked

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<sup>363</sup> See *id.*

<sup>364</sup> See *id.* at 635.

<sup>365</sup> *Id.* at 621–22.

<sup>366</sup> *Id.* at 622.

<sup>367</sup> See *Pac. Maritime Ass’n v. Fed. Maritime Comm’n*, 543 F.2d 395, 402 (D.C. Cir. 1976); *Adams, Ray and Rosenberg v. William Morris Agency, Inc.*, 411 F. Supp. 403, 406 (C.D. Cal. 1976); *Ackerman-Chillingworth, Div. of Marsh & McLennan, Inc. v. Pac. Elec. Contractors Ass’n*, 405 F. Supp. 99, 112 (D. Haw. 1975).

<sup>368</sup> See *Mackey v. NFL*, 407 F. Supp. 1000 (D. Minn. 1975).

<sup>369</sup> See *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976).

that of the *Robertson* court, holding that "[t]he exemption extends only to labor or union activities, and not to the activities of employers."<sup>370</sup> The court's decision was primarily concerned with the findings of fact and thus analyzed minimal case law with no reference to the Supreme Court's recent decision in *Connell*.

On appeal, the NFL spent approximately 35 pages of its 75-page brief arguing that its practices were protected by the non-statutory labor exemption.<sup>371</sup> In a footnote, the NFL described the "labor exemption" as "less a defense than a legal, policy and practical recognition that, in regulating labor-management relationships, antitrust rights are unavailable to employees and employers as against the other party."<sup>372</sup> According to the NFL, "[t]he labor laws also give recognition to the fact that there is inherent conflict between labor and management and that this conflict can best be reconciled by the parties themselves—through a give-and-take process over the entire range of issues between them."<sup>373</sup> In making its arguments, the NFL quoted at length from *Jewel Tea*<sup>374</sup> and cited the Jacobs and Winter article three times.<sup>375</sup>

In response, the players predictably argued that the labor exemption protected only the activities of labor.<sup>376</sup> In support, the players quoted the court's decision in *Robertson* at length.<sup>377</sup> Further, the players sought to distinguish *Jewel Tea* by arguing that in that case, "unlike the instant case, the union sought the restriction and obtained it in pursuit of its own policies."<sup>378</sup> According to the players, "[t]here is no immunity for an employer's illegal practices simply because it gets the union to acquiesce in them."<sup>379</sup>

However, after making this argument for ten pages, the players, quoting the Supreme Court in *Jewel Tea*, acknowledged that the labor exemption defense may be available to the NFL if it could show that the Rozelle Rule was "so intimately related to wages, hours and working conditions that the union's successful attempt to obtain that provision [was] through arm's-

<sup>370</sup> *Mackey*, 407 F. Supp. at 1008.

<sup>371</sup> See Brief for Appellants at 40–75, *Mackey*, 543 F.2d 606 (8th Cir. 1976) (No. 76-1184).

<sup>372</sup> *Id.* at 41 n.24.

<sup>373</sup> *Id.* at 63.

<sup>374</sup> *Id.* at 58–60.

<sup>375</sup> *Id.* at 43 n.27, 57 n.37, 73 n.50.

<sup>376</sup> See Brief for Appellees at 29–40, *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976) (No. 76-1184).

<sup>377</sup> *Id.* at 32–34.

<sup>378</sup> *Id.* at 35.

<sup>379</sup> *Id.* at 36.

length bargaining in pursuit of their own labor union policies, and not at the behest of or in combination with nonlabor groups.”<sup>380</sup>

The Eighth Circuit was thus prepared to, and did, comprehensively analyze the non-statutory exemption issue. The court disagreed with the players’ argument “that only employee groups are entitled to the labor exemption.”<sup>381</sup> According to the court, “[s]ince the basis of the nonstatutory labor exemption is the national policy favoring collective bargaining, and since the exemption extends to agreements, the benefits of the exemption logically extend to both parties to the agreement.”<sup>382</sup> With that, the Eighth Circuit introduced the term “non-statutory labor exemption” to the world of sports and the law.

The court went on to outline three factors in evaluating whether the non-statutory labor exemption applied: (1) “the restraint on trade primarily affects only the parties to the collective bargaining relationship”; (2) “the agreement sought to be exempted concerns a mandatory subject of collective bargaining”; and (3) “the agreement sought to be exempted is the product of bona fide arm’s-length bargaining.”<sup>383</sup>

Applying these factors to the present case, the court found that “there was no bona fide arm’s-length bargaining over the Rozelle Rule.”<sup>384</sup> Consequently, the non-statutory labor exemption did not apply, and the court affirmed the district court’s judgment in favor of the players.<sup>385</sup>

The NFL petitioned the Supreme Court to review the case, focusing almost entirely on the labor exemption issue,<sup>386</sup> but was denied.<sup>387</sup>

Finally, the *Mackey* case is notable for its counsel. The NFL was represented in the case by multiple firms, including Covington & Burling in Washington, D.C. Among the Covington attorneys representing the NFL was Paul Tagliabue,<sup>388</sup> who would go on to serve as Commissioner of the NFL from 1989 to 2006.<sup>389</sup>

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<sup>380</sup> *Id.* at 40 (quoting *Meat Cutters v. Jewel Tea*, 381 U.S. 676, 689–90 (1965)).

<sup>381</sup> *Mackey v. NFL*, 543 F.2d 606, 612 (8th Cir. 1976).

<sup>382</sup> *Id.*

<sup>383</sup> *Id.* at 614.

<sup>384</sup> *Id.* at 616.

<sup>385</sup> *Id.* at 616, 623.

<sup>386</sup> See Petition for Writ of Certiorari, *NFL v. Mackey*, 434 U.S. 801 (1977) (No. 76-932).

<sup>387</sup> See *Mackey*, 434 U.S. 801.

<sup>388</sup> *Mackey v. NFL*, 543 F.2d 606, 609 (8th Cir. 1976).

<sup>389</sup> See *City of Oakland v. Oakland Raiders*, 83 Cal. App. 5th 458, 465 (Cal. Ct. App. 2022) (describing Tagliabue as having “served as League Commissioner from 1989 to 2006”).

g. *Kapp* (1978)

As discussed in Section II.e, former quarterback Joe Kapp pursued a lengthy lawsuit against the NFL alleging that the Rozelle Rule and its related regulations prevented him from meaningfully negotiating with other clubs in violation of the antitrust laws, effectively ending his career.<sup>390</sup> Despite prevailing on his arguments that the Rozelle Rule violated antitrust law, a jury determined that Kapp could not prove that he had been damaged as a result of the rule.<sup>391</sup> The Ninth Circuit affirmed.<sup>392</sup>

As to the non-statutory labor exemption, the district court acknowledged a “problem” as to “the extent to which collective bargaining may immunize union-employer agreements in professional sports league activities from the antitrust laws.”<sup>393</sup> In recognizing this question, the court cited to the Jacobs and Winter article.<sup>394</sup> Nevertheless, the court held that in the instant case, no such exemption could possibly apply because “the record shows that there was no such collective bargaining contract.”<sup>395</sup> This was because the allegedly wrongful conduct against Kapp occurred “between January and May 28, 1971,” after the expiration of the prior collective bargaining agreement and before a new one was executed June 17, 1971.<sup>396</sup>

Having prevailed at trial, the NFL did not raise the non-statutory labor exemption argument during Kapp’s appeal to the Ninth Circuit.<sup>397</sup> The court however noted the NFL’s argument that the collective bargaining agreements between the NFL and NFLPA “could have placed the rules outside the coverage of the antitrust laws under the labor exemption,” citing *Jewel Tea*.<sup>398</sup> Additionally, in a footnote, the court noted the Eighth Circuit’s holding in *Mackey* that the labor exemption did not apply.<sup>399</sup> Nevertheless, the issue was not ripe for the Ninth Circuit’s adjudication.<sup>400</sup>

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<sup>390</sup> See *id.* at 78.

<sup>391</sup> See *Kapp v. NFL*, 586 F.2d 644, 648 (9th Cir. 1978).

<sup>392</sup> See *id.* at 649-50.

<sup>393</sup> *Kapp v. NFL*, 390 F. Supp. 73, 85 (N.D. Cal. 1974).

<sup>394</sup> *Id.*

<sup>395</sup> *Id.*

<sup>396</sup> *Id.* at 85–86.

<sup>397</sup> See Defendants’ Answer to Plaintiff’s Petition for Rehearing, *Kapp v. NFL*, 586 F.2d 644 (9th Cir. 1978) (Nos. 76-2849, 76-2878, 76-2879); Brief for Appellee and Cross-Appellant, *Kapp*, 586 F.2d 644 (Nos. 76-2849, 76-2878).

<sup>398</sup> *Kapp v. NFL*, 586 F.2d 644, 646 (9th Cir. 1978).

<sup>399</sup> *Id.* at 646 n.1.

<sup>400</sup> See *id.*

*b. Smith (1978)*

About a month before the Eighth Circuit's helpful analysis in *Mackey*, the United States District Court for the District of Columbia evaluated the NFL's argument that the NFL draft, at issue in *Smith*, was exempt from antitrust law "by virtue of the so-called 'labor law exemption'."<sup>401</sup> Citing *Jewel Tea*, *Pennington*, and *Connell*, the court noted that "the precise contours" of the doctrine "are neither clear nor entirely coherent."<sup>402</sup> Consequently, the court undertook an extensive analysis of the matter.<sup>403</sup>

The court ultimately identified several factors in evaluating the potential application of the non-statutory labor exemption: (1) "a scheme advantageous to employers and otherwise in violation of the antitrust laws cannot under any circumstances come within the exemption unless and until it becomes part of a collective bargaining agreement negotiated by a union in its own self-interest";<sup>404</sup> (2) the restraint at issue must arise out of "an agreement on mandatory subjects of bargaining";<sup>405</sup> (3) the restraint must "have been arrived at as a result of genuine, arms-length bargaining, and not have been 'thrust upon' a weak players union by the owners";<sup>406</sup> and, (4) the restraint must not be designed to work "to the disadvantage of the competitors of the employers."<sup>407</sup>

These factors substantially track those outlined by the Eighth Circuit in *Mackey* a month later.<sup>408</sup> Indeed, the Eighth Circuit cited *Smith* in constructing its factors for the same analysis.<sup>409</sup>

The *Smith* court's actual application of the factors identified to the facts of the case was limited. *Smith* challenged the NFL Draft, which occurred for him in January 1968.<sup>410</sup> The first NFL-NFLPA collective bargaining

<sup>401</sup> *Smith v. Pro-Football*, 420 F. Supp. 738, 741–744 (D.D.C. 1976).

<sup>402</sup> *Id.* at 741–42.

<sup>403</sup> *See id.* at 741–744 (analyzing existence and potential application of non-statutory labor exemption).

<sup>404</sup> *Id.* at 742.

<sup>405</sup> *Id.* at 742–43.

<sup>406</sup> *Id.* at 743 (quoting *Flood v. Kuhn*, 407 U.S. 258, 288, 295 (1972) (Marshall, J., dissenting)).

<sup>407</sup> *Id.* at 743.

<sup>408</sup> *See Mackey v. NFL*, 543 F.2d 606, 614 (8th Cir. 1976) (providing three factors in evaluating whether the non-statutory labor exemption applied: (1) "the restraint on trade primarily affects only the parties to the collective bargaining relationship"; (2) "the agreement sought to be exempted concerns a mandatory subject of collective bargaining"; and (3) "the agreement sought to be exempted is the product of bona fide arm's-length bargaining.")

<sup>409</sup> *See id.*

<sup>410</sup> *Smith v. Pro-Football*, 420 F. Supp. 738, 742 (D.D.C. 1976).

agreement was not executed until March 5, 1968.<sup>411</sup> Consequently, in the court's view, Smith's "cause of action accrued before the exemption could under any view of the law have been considered operative."<sup>412</sup>

While the NFL appealed various parts of the district court's decision, it did not appeal the court's determination that the non-statutory labor exemption did not apply.<sup>413</sup> Consequently, the District of Columbia Circuit declined to review the issue.<sup>414</sup>

*i. McCourt (1979)*

In 1978 and 1979, the NHL had the opportunity to avail itself of the caselaw that had developed during the decade. In this case, the NHL was defending By-Law Section 9A, which required that a club signing a player as a free agent provide compensation to the club from which the player came.<sup>415</sup> The rule was effectively the NHL's version of the Rozelle Rule.<sup>416</sup> After the 1977-78 season, in accordance with By-Law Section 9A, an arbitrator assigned Dale McCourt, a promising young player for the Detroit Red Wings, to the Los Angeles Kings as compensation for the Red Wings having signed Rogatien Vachon, the Kings' star goalie.<sup>417</sup>

McCourt sued, alleging that the By-Law and the related reserve system were violations of antitrust law.<sup>418</sup> The Eastern District of Michigan found that the By-Law was essentially identical to the Rozelle Rule that the Eighth Circuit had determined unreasonably restrained trade in *Mackey*.<sup>419</sup> The NHL resorted to doomsday arguments in response, claiming that "by-law 9A is necessary to maintain economic solvency of all the teams in the league and to maintain employment opportunities for players."<sup>420</sup> Without the rule, the NHL argued, "the less affluent clubs and those clubs located in less desirable cities would not be able to retain good hockey players."<sup>421</sup> The court was unpersuaded, finding that "[t]he goals sought by the League, if real rather than imagined, can be advanced by less restrictive means."<sup>422</sup>

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<sup>411</sup> *Id.*

<sup>412</sup> *Id.*

<sup>413</sup> *Smith v. Pro-Football*, 593 F.2d 1173, 1177 n.11 (D.C. Cir. 1978).

<sup>414</sup> *Id.*

<sup>415</sup> *McCourt v. Cal. Sports, Inc.*, 600 F.2d 1193, 1194-95 (6th Cir. 1979).

<sup>416</sup> *Id.*

<sup>417</sup> *Id.* at 1195-96.

<sup>418</sup> *Id.*

<sup>419</sup> *McCourt v. Cal. Sports, Inc.*, 460 F. Supp. 904, 907, 909 (E.D. Mich. 1978).

<sup>420</sup> *Id.* at 909.

<sup>421</sup> *Id.*

<sup>422</sup> *Id.* at 910.

The NHL also argued that By-Law 9A was protected by the non-statutory labor exemption.<sup>423</sup> Although the By-Law was unilaterally incorporated into the standard player contract in 1974,<sup>424</sup> it had been incorporated into a collective bargaining agreement agreed to in May 1976, with retroactive effect to September 15, 1975.<sup>425</sup> Nevertheless, the court held that, “[l]ike the Eighth Circuit Court of Appeals in *Mackey*, . . . we find that the mere inclusion of bylaw 9A in the collective bargaining agreement cannot serve to immunize it from antitrust sanctions. The evidence offered at the hearing persuades us that the parties did not collectively bargain for bylaw 9A.”<sup>426</sup> Instead, the NHL had made clear in the negotiations that By-Law 9A was non-negotiable.<sup>427</sup>

Having denied the NHL’s arguments, in a September 28, 1978 ruling, the court granted McCourt’s request for a preliminary injunction preventing enforcement of the arbitrator’s award.<sup>428</sup>

The parties agreed to an expedited appeal process.<sup>429</sup> The parties filed their appellate briefs on October 13, 1978, about two weeks after the district court’s ruling.<sup>430</sup> Interestingly, the Kings and NHL were represented by separate counsel. The Kings filed a brief which substantively addressed only three issues: (1) whether McCourt had suffered an antitrust injury sufficient to give him standing; (2) whether McCourt had satisfied the elements necessary to be awarded injunctive relief; and (3) whether McCourt’s \$10,000 bond was too low.<sup>431</sup> Yet, the brief did identify as additional issues the application of the non-statutory labor exemption and the reasonableness of By-Law 9A under the antitrust laws.<sup>432</sup> These issues were likely addressed in the NHL’s brief, but research has not uncovered a copy of that

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<sup>423</sup> *Id.*

<sup>424</sup> *Id.* at 906.

<sup>425</sup> *Id.* at 911.

<sup>426</sup> *Id.*

<sup>427</sup> *Id.*

<sup>428</sup> *Id.* at 906, 912.

<sup>429</sup> Plaintiff-Appellee’s Brief on Appeal at 2–3, *McCourt v. Cal Sports, Inc.*, 600 F.2d 1193 (6th Cir. 1979) (6th Cir. Oct. 13, 1978) (No. 78-1462).

<sup>430</sup> See Brief for Defendants-Appellants California Sports, Incorporated, and the Los Angeles Kings, Inc., *McCourt*, 600 F.2d 1193 (6th Cir. Oct. 13, 1978) (No. 78-1462); Plaintiff-Appellee’s Brief on Appeal, *McCourt*, 600 F.2d 1193 (6th Cir. Oct. 13, 1978) (No. 78-1462).

<sup>431</sup> See Brief for Defendants-Appellants California Sports, Incorporated, and the Los Angeles Kings, Inc. at i–ii, *McCourt*, 600 F.2d 1193 (6th Cir. Oct. 13, 1978) (No. 78-1462).

<sup>432</sup> *Id.* at 1–2.



brief.<sup>433</sup> Indeed, the NHL's reply brief focused on the application of the non-statutory labor exemption.<sup>434</sup>

Regardless, the Kings continued the doomsday arguments in its appellate brief, arguing that fans would "suffer" if By-Law 9A were unenforceable.<sup>435</sup> According to the Kings, in such an outcome, "[o]nly the teams with the wealthiest owners willing to spend money (some are owned by conglomerates) will be able to afford superstar players [and] [t]hus, existing teams who cannot stay competitive will be forced out of business."<sup>436</sup>

On appeal, the Sixth Circuit focused on the potential application of the non-statutory labor exemption.<sup>437</sup> At the outset, the court held that the Eighth Circuit's decision in *Mackey* had set out the "proper standards" for analyzing this issue.<sup>438</sup> Nevertheless, the court disagreed with the district court that By-Law 9A was not "the product of bona fide arm's length bargaining."<sup>439</sup> In considering that the NHL had refused to negotiate By-Law 9A, the Sixth Circuit explained that

nothing in the labor law compels either party negotiating over mandatory subjects of collective bargaining to yield on its initial bargaining position. Good faith bargaining is all that is required. That the position of one party on an issue prevails unchanged does not mandate the conclusion that there was no collective bargaining over the issue.<sup>440</sup>

In fact, the players had "developed an alternate reserve system and secured tentative agreement from the owner and player representatives, only to have the proposal rejected by the players."<sup>441</sup> Moreover, in the agreement, both parties obtained the right to opt-out if there was a fundamental alteration to the reserve system, specifically if the NHL and World Hockey

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<sup>433</sup> The NHL's reply brief references having filed an opening brief. See Reply Brief of Appellant National Hockey League at 5,7, *McCourt*, 600 F.2d 1193 (6th Cir. Oct. 17, 1978) (No. 78-1463).

<sup>434</sup> See Reply Brief of Appellant National Hockey League at 3–8, *McCourt*, 600 F.2d 1193 (6th Cir. Oct. 17, 1978) (No. 78-1463).

<sup>435</sup> Brief for Defendants-Appellants California Sports, Incorporated, and the Los Angeles Kings, Inc. at 53, *McCourt*, 600 F.2d 1193 (6th Cir. Oct. 13, 1978) (No. 78-1462).

<sup>436</sup> *Id.*

<sup>437</sup> See *McCourt*, 600 F.2d at 1197–1203.

<sup>438</sup> *Id.* at 1198.

<sup>439</sup> *Id.* at 1198–1200.

<sup>440</sup> *Id.* at 1200.

<sup>441</sup> *Id.* at 1202.

Association merged or if the system was invalidated by the courts.<sup>442</sup> For these reasons, the Sixth Circuit concluded

that the inclusion of the reserve system in the collective bargaining agreement was the product of good faith, arm's-length bargaining, and that what the trial court saw as a failure to negotiate was in fact simply the failure to succeed, after the most intensive negotiations, in keeping an unwanted provision out of the contract.<sup>443</sup>

The court thus held that By-Law 9A was protected by the non-statutory labor exemption, vacated the injunction, and remanded the matter for entry of judgment in favor of the Kings and NHL.<sup>444</sup>

#### IV. THE NON-STATUTORY LABOR EXEMPTION SURVIVES IMPASSE

By the close of the 1970s, it was clear that a non-statutory labor exemption could protect at least some of the player-related restraints that sports leagues and teams wished to enact. Litigation in the 1980s and 1990s would thus focus on the scope of the exemption.

##### *a. Bridgeman (1987)*

As discussed in Section II.c, one of the outcomes of the *Robertson* litigation was a new collective bargaining agreement between the NBPA and NBA. The parties subsequently negotiated additional collective bargaining agreements, including the introduction of a salary cap in 1983.<sup>445</sup> The 1983 agreement expired after the 1986–87 season, at which point the parties engaged in prolonged discussions about the continued existence of the salary cap, the draft, and clubs' right of first refusal as to free agent players.<sup>446</sup>

After the parties were unable to reach a deal prior to an agreed upon October 1, 1987 deadline, a contingent of current and former NBA players, led by NBPA President Junior Bridgeman, sued the NBA alleging that the NBA's restrictions were antitrust violations.<sup>447</sup> Before and after the initiation of the litigation, the NBA continued to operate under the 1983 agreement, which included provisions governing the practices at issue.<sup>448</sup>

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<sup>442</sup> *Id.*

<sup>443</sup> *Id.* at 1203.

<sup>444</sup> *Id.*

<sup>445</sup> *Bridgeman v. NBA*, 675 F. Supp. 960, 962–63 (D.N.J. 1987).

<sup>446</sup> *Id.* at 963.

<sup>447</sup> *Id.* at 961.

<sup>448</sup> *Id.* at 963.

The NBA responded by asserting that the restrictions were protected by the non-statutory labor exemption.<sup>449</sup> According to the NBA, the anti-trust immunity from the exemption "should continue after expiration of the agreement as long as the league continues to apply without modification the player restrictions that were included in the agreement."<sup>450</sup> The players argued that the exemption only applied so long as there was a collective bargaining agreement.<sup>451</sup>

In a December 29, 1987 opinion, the District Court for the District of New Jersey observed that the question at hand was an issue of first impression: does the exemption apply "where the challenged provisions were included in a collective bargaining agreement that is no longer in effect[?]"<sup>452</sup> The court ruled that it does, for some period of time. In examining this question, the court determined it necessary to examine "the policies underlying the labor exemption."<sup>453</sup> At its core, the court found that the exemption "encourages substantive, good faith bargaining."<sup>454</sup> For this reason, the court rejected the players' argument that the exemption ends "the instant a collective bargaining agreement expires" as well as the NBA's argument that the "exemption should continue indefinitely after an agreement expires so long as the employer maintains the status quo by not imposing any new restraints."<sup>455</sup> The court reasoned that either rule would discourage the parties from engaging in good faith negotiations.<sup>456</sup>

Alternatively, the players argued that the exemption expired at "impasse," *i.e.*, a deadlock in the negotiations.<sup>457</sup> The court found this argument plausible, noting that if an employer bargains with a union to impasse, it can then "make 'unilateral changes that are reasonably comprehended within his pre[-]impasse proposals.'"<sup>458</sup> However, the court found this rule was not sufficiently responsive to the "unique intersection of labor law and antitrust law."<sup>459</sup>

The court, drawing on the test set forth in *Mackey*, thus set forth a more complicated rule:

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<sup>449</sup> *Id.* at 962.

<sup>450</sup> *Id.* at 964–65.

<sup>451</sup> *Id.* at 964.

<sup>452</sup> *Id.* at 965.

<sup>453</sup> *Id.*

<sup>454</sup> *Id.*

<sup>455</sup> *Id.* at 965–66.

<sup>456</sup> *Id.*

<sup>457</sup> *Id.* at 966.

<sup>458</sup> *Id.*, (quoting *Taft Broadcasting Co.*, 163 N.L.R.B. 475, 476 (1967)).

<sup>459</sup> *Bridgeman*, 675 F. Supp. at 967.

the exemption for a particular practice survives only as long as the employer continues to impose that restriction unchanged, and reasonably believes that the practice or a close variant of it will be incorporated in the next collective bargaining agreement. When the employer no longer has such a reasonable belief, it is then unilaterally imposing the restriction on its employees, and the restraint can no longer be deemed the product of arm's-length negotiation between the union and the employer.<sup>460</sup>

In the instant case, disputed facts prevented a determination as to whether the exemption applied, and thus the court denied the parties' competing motions for summary judgment.<sup>461</sup>

In April 1988, four months after the court's decision, the parties agreed to a new collective bargaining agreement which eliminated the right of first refusal as to certain veteran free agents and reduced the NBA draft from seven to two rounds.<sup>462</sup>

Of note, the players were represented by Jim Quinn of Weil, Gotshal & Manges LLP and the league was represented by Jeff Mishkin of Proskauer.<sup>463</sup> Also on the briefs in the case was Gary Bettman, a former Proskauer associate and then NBA attorney who became Commissioner of the NHL in 1993.<sup>464</sup>

*b. Powell (1989)*

Between 1987 and 1993, the NFL and its players engaged in a torrent of litigation concerning the application of the non-statutory labor exemption. While the litigation ultimately resulted in an overhauled collective bargaining whose principles continue to this day,<sup>465</sup> the relevant legal question eventually required resolution by the Supreme Court.

A collective bargaining agreement expired after the 1986 season, *i.e.*, after the 1987 Super Bowl.<sup>466</sup> The players went on strike for 23 days during

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<sup>460</sup> *Id.* at 967.

<sup>461</sup> *Id.*

<sup>462</sup> Glenn M. Wong, *ESSENTIALS OF SPORTS LAW*, 4th ed., Ex. 11.5 (Praeger 2010).

<sup>463</sup> *Bridgeman*, 675 F. Supp. at 961.

<sup>464</sup> *See id.*; E.M. Swift, *Gary Bettman*, *SPORTS ILLUSTRATED* (Feb. 15, 1993), <https://vault.si.com/vault/1993/02/15/gary-bettman> [https://perma.cc/63VD-985T].

<sup>465</sup> *See* Chris Deubert, Glenn M. Wong, & John Howe, *All Four Quarters: A Retrospective and Analysis of the 2011 Collective Bargaining Process and Agreement in the National Football League*, 19 *UCLA ENT. L. REV.* 1, 11-12 (2012) (discussing history of litigation in NFL in context of 2011 collective bargaining negotiations).

<sup>466</sup> *Id.* at 9.

the 1987 season, during which time the NFL used replacement players.<sup>467</sup> The players ended their strike and instead, led by New York Jets lineman and NFLPA President Marvin Powell, filed a class action lawsuit challenging the right of first refusal/compensation system that had existed since the 1977 collective bargaining agreement,<sup>468</sup> agreed to shortly after *Mackey*.

The case turned on the application of the non-statutory labor exemption. Like the NBA players in *Bridgeman*, the NFL players claimed that because the collective bargaining agreement had "expired, no labor exemption from the antitrust laws shields the player restraints from antitrust scrutiny."<sup>469</sup> In response, the NFL asserted two defenses: (1) that the "challenged restraints are entitled to absolute immunity because they are subjects of mandatory bargaining affecting only parties to the employment relationship"; and (2) that a "'survival doctrine' provides the challenged restraints continued protection from the antitrust laws for an indefinite period following expiration of the collective bargaining agreement."<sup>470</sup>

Judge David S. Doty of the United States District Court for the District of Minnesota quickly disposed of the NFL's first argument, noting that "[t]he nonstatutory labor exemption has never been applied to shield league-imposed player restraints merely because such restraints are subjects of mandatory collective bargaining."<sup>471</sup>

Citing the *Bridgeman* decision issued a month earlier, the court did, however, agree with the NFL that non-statutory labor exemption must "survive" expiration of the collective bargaining agreement.<sup>472</sup> Doing so, the court reasoned, helps "to provide the parties with a stable environment in which to negotiate a new collective bargaining agreement."<sup>473</sup> The court, however, rejected the *Bridgeman* standard for determining when the exemption expires. According to Judge Doty, that decision's focus on "an employer's 'reasonable belief' that a practice will be incorporated into a new agreement," "encourage[es] employees to exhibit steadfast, uncompromising adherence to stated terms. . . subvert[ing] the strong federal labor law interest in promoting the collective bargaining process."<sup>474</sup>

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<sup>467</sup> *Id.*

<sup>468</sup> *Powell v. NFL*, 678 F. Supp. 777, 778 (D. Minn. 1988).

<sup>469</sup> *Id.* at 781–782.

<sup>470</sup> *Id.* at 782.

<sup>471</sup> *Id.* at 783.

<sup>472</sup> *Id.* at 785.

<sup>473</sup> *Id.*

<sup>474</sup> *Id.* at 787.

The court also rejected the NFL's argument that the exemption "survives indefinitely" as "part of the status quo."<sup>475</sup> The court noted that "in the usual context, following expiration of a collective bargaining agreement, lawful provisions relating to wages, hours and terms and conditions of employment continue in effect only until 'impasse.' 'Impasse' merely signifies a stalemate in negotiations, and is not equivalent to termination of the collective bargaining relationship." According to Judge Doty, the NFL's "proposed standards would lead to the anomalous result that illegal provisions exempted from antitrust scrutiny would continue in force longer than lawful terms and conditions."<sup>476</sup>

The court thus crafted its own standard, holding that a labor exemption relating to a mandatory bargaining subject survives expiration of the collective bargaining agreement until the parties reach *impasse as to that issue*; thereafter, the term or condition is no longer immune from scrutiny under the antitrust laws, and the employer runs the risk that continued imposition of the condition will subject the employer to liability.<sup>477</sup>

Further, the court explained that to determine whether *impasse* had been reached, "[t]he test is simply whether, following intense, good faith negotiations, the parties have exhausted the prospects of concluding an agreement."<sup>478</sup> "No *impasse* can occur until there appears no realistic possibility that continuing discussions concerning the provision at issue would be fruitful."<sup>479</sup> Once *impasse* is reached with respect to certain provisions, "those provisions will lose their immunity and further imposition of those conditions may result in antitrust liability."<sup>480</sup>

As to the instant dispute, it was unclear whether *impasse* had been reached, and the court thus stayed determination of the parties' competing motions for summary judgment.<sup>481</sup>

The players immediately took the position that the parties were already at *impasse*, a position supported by the National Labor Relations Board.<sup>482</sup> The players then renewed their motion for summary judgment on that issue, which the court granted in June 1988.<sup>483</sup> The court, however, declined to

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<sup>475</sup> *Id.*

<sup>476</sup> *Id.* at 788.

<sup>477</sup> *Id.*

<sup>478</sup> *Id.*

<sup>479</sup> *Id.*

<sup>480</sup> *Id.* at 789.

<sup>481</sup> *Id.*

<sup>482</sup> *Powell v. NFL*, 930 F.2d 1293, 1296 (8th Cir. 1989).

<sup>483</sup> *See Powell v. NFL*, 690 F.Supp. 812, 814 (D. Minn. 1988); Brief of Defendants-Appellants National Football League and Twenty-Eight NFL Member Clubs at

grant the players' request for injunctive relief, finding that the Norris-La-Guardia Act deprived the court of that ability.<sup>484</sup>

The NFL, represented by Tagliabue and future NFL General Counsel Jeff Pash,<sup>485</sup> both then of Covington & Burling, appealed. Its argument was bold:

the Federal labor laws exclusively control where, as here, the challenged "restraint" relates to a mandatory subject of collective bargaining, the "restraint" has been developed and implemented through the lawful observance of the collective bargaining process, the employees are represented by a union vested with collective bargaining authority, and the "restraint" affects only a labor market involving the parties to the collective bargaining relationship. In these circumstances, recourse to the Sherman Act by one of the bargaining parties is inherently incompatible with the purposes and operation of the Federal labor laws, and the Sherman Act therefore has no application to this dispute.<sup>486</sup>

While the NFL acknowledged that it is subject to the antitrust laws in the labor market, where there was a collective bargaining relationship, the NFL argued that labor law was the exclusive standard by which the parties' conduct should be evaluated.<sup>487</sup> Of note, the NFL cited to the Jacobs and Winter article four times in its appeal brief,<sup>488</sup> which was all the more relevant since Winter had since become a judge on the Second Circuit and had recently written an opinion denying a recent NBA draftee's antitrust attacks on the draft and salary cap in *Wood v. National Basketball Ass'n*.<sup>489</sup>

Finally, the NFL attacked Judge Doty's impasse standard, arguing that it was "destructive of collective bargaining."<sup>490</sup> In support, the NFL claimed that "[e]ver since [the NFLPA] learned the litigation advantages of

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4, *Powell v. NFL*, 930 F.2d 1293 (8th Cir. Apr. 3, 1989) (No. 89-5091) ("In June 1988, Judge Doty found that the parties had by then reached an impasse in their bargaining on the 'free agency' issue.").

<sup>484</sup> *Powell v. NFL*, 690 F. Supp. 812, 815–17 (D. Minn. 1988).

<sup>485</sup> See *Jeffrey Pash, Exec VP/General Counsel, Natl Football League*, BLOOMBERG, <https://www.bloomberg.com/profile/person/1844864> [<https://perma.cc/5EF6-QCFS>].

<sup>486</sup> Brief of Defendants-Appellants National Football League and Twenty-Eight NFL Member Clubs at 5, *Powell v. NFL*, 930 F.2d 1293 (8th Cir. Apr. 3, 1989) (No. 89-5091).

<sup>487</sup> *Id.* at 16–42.

<sup>488</sup> See *id.* at 25, 27, 32, 40.

<sup>489</sup> *Wood v. NBA*, 809 F.2d 954 (2d Cir. 1987).

<sup>490</sup> Brief of Defendants-Appellants National Football League and Twenty-Eight NFL Member Clubs at 43, *Powell v. NFL*, 930 F.2d 1293 (8th Cir. Apr. 3, 1989) (No. 89-5091).

'impasse' on the present free agency issue, it has resolutely refused to bargaining meaningfully."<sup>491</sup> Instead of setting a point at which the non-statutory labor exemption expired, the NFL argued again that "[i]f employers exceed their labor law rights in implementing terms at impasse, the full range of labor law rights and remedies is available to unions."<sup>492</sup>

In response, the players argued that the NFL was effectively asking the Eighth Circuit to overrule its decision 12 years earlier in *Mackey*, despite its now widespread acceptance in analyzing the non-statutory labor exemption in sports.<sup>493</sup> Whereas the NFL was arguing for a broad exemption indefinite in duration, the players argued that the *Mackey* "decision makes it clear that the question is *when* the labor exemption ends, *not whether* it ends."<sup>494</sup> The players asserted that if the NFL's position were to prevail, "no independent union would ever enter into a collective bargaining agreement because management would be free, upon expiration of that agreement, to unilaterally implement onerous terms in perpetuity."<sup>495</sup>

The players identified the Jacobs and Winter article as the introduction of the argument that the labor laws should be the exclusive method by which disputes between leagues and unions should be resolved, and that the leagues should, where there is such a collective bargaining relationship, be exempt from antitrust laws.<sup>496</sup> However, the players argued that "not one" court had "adopted Judge Winter's point of view," not even Winter himself in *Wood*.<sup>497</sup>

Finally, the players defended Judge Doty's holding that the non-statutory labor exemption expired at impasse, arguing that it provided

both parties to the bargaining relationship. . . strong incentives to avoid impasse. On the one hand, the employees and their union will seek to avoid unilateral implementation of undesirable terms and conditions of employment. On the other hand, the impasse standard gives employers strong incentive to avoid impasse, which subjects them to antitrust liability.<sup>498</sup>

In reply, the NFL clarified that its argument was

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<sup>491</sup> *Id.* at 47–48.

<sup>492</sup> *Id.* at 44–45.

<sup>493</sup> Brief of Appellees at 20, *Powell v. NFL*, 930 F.2d 1293 (8th Cir. Apr. 24, 1989) (No. 89-5091).

<sup>494</sup> *Id.*

<sup>495</sup> *Id.* at 21.

<sup>496</sup> *Id.* at 43–44.

<sup>497</sup> *Id.*

<sup>498</sup> *Id.* at 33.



That the Federal labor laws exclusively control and that the Sherman Act has no application where, as here, (1) a challenged "restraint" relates to a mandatory subject of collective bargaining, (2) the "restraint" has been developed and implemented through the lawful observance of an on-going collective bargaining process, (3) the affected employees are represented by a union vested with collective bargaining authority under the labor laws, and (4) the "restraint" affects only a labor market involving the parties to the collective bargaining relationship.<sup>499</sup>

In a November 1, 1989 decision, a panel of the Eighth Circuit, by a 2-1 vote, reversed Judge Doty's decisions establishing (1) impasse as the point at which the non-statutory labor exemption applied and (2) that the exemption no longer applied to the instant case.<sup>500</sup> In so doing, the Eighth Circuit substantially adopted the NFL's position, reasoning that "the collective bargaining process, under the supervision of the National Labor Relations Board," is the proper "method for resolution of labor disputes."<sup>501</sup> The court noted that "labor law provides a comprehensive array of remedies to management and union, even after impasse," including "economic force," *i.e.*, strikes and lockouts, and bringing claims to the National Labor Relations Board.<sup>502</sup> Citing *Jacobs and Winter*, the Eighth Circuit held that to permit the players' claims would "be inconsistent with federal labor policy."<sup>503</sup>

Limiting its opinion to the "present lawsuit," the court declined to "look into the future and pick a termination point for the labor exemption."<sup>504</sup> The closest the court came to identifying a standard was its explanation that "the nonstatutory labor exemption protects agreements conceived in an ongoing collective bargaining relationship from challenges under the antitrust laws."<sup>505</sup>

This ambiguity was attacked by judges in dissent. First, Judge Gerald Heaney, the lone dissenting vote on the panel, stated that he agreed with Judge Doty's determination "that the exemption ends when the parties have reached an impasse in negotiations."<sup>506</sup> Judge Heaney further argued that the "practical effect of the majority's opinion," is that the non-statutory

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<sup>499</sup> Reply Brief of Defendants-Appellants National Football League and Twenty-Eight NFL Member Clubs at 3, *Powell v. NFL*, 930 F.2d 1293 (8th Cir. May 3, 1989) (No. 89-5091).

<sup>500</sup> *Powell v. NFL*, 930 F.2d 1293, 1302-04 (8th Cir. 1989).

<sup>501</sup> *Id.* at 1302.

<sup>502</sup> *Id.* at 1302-03.

<sup>503</sup> *Id.* at 1303.

<sup>504</sup> *Id.*

<sup>505</sup> *Id.*

<sup>506</sup> *Id.* at 1305.

labor exemption would continue “indefinitely,” or “until the bargaining relationship is terminated either by an NLRB decertification proceeding or by abandonment of bargaining rights by the union.”<sup>507</sup>

Chief Judge Donald Lay, the author of *Mackey*, writing in dissent from the Court’s decision not to rehear the case en banc, supported Judge Heaney’s analysis.<sup>508</sup> According to Judge Lay, the court’s decision “leads to the ineluctable result of union decertification in order to invoke rights to which the players are clearly entitled under the antitrust laws.”<sup>509</sup>

Heaney’s and Lay’s dissents thus provided the players with the necessary roadmap to continue their legal challenges. On November 6, 1989, five days after the Eighth Circuit’s ruling, the NFLPA notified the NFL that it was no longer authorized to bargain on behalf of NFL players.<sup>510</sup> That decision led to the next stage of litigation, discussed further below. That same week, Tagliabue replaced the retired Pete Rozelle as NFL Commissioner.<sup>511</sup>

At the same time, the players sought review of the Eighth Circuit’s decision from the Supreme Court.<sup>512</sup> According to the players, the court’s decision “presents a direct conflict with the principles enunciated by [the Supreme] Court in creating and interpreting the non-statutory labor exemption.”<sup>513</sup> They argued that the Eighth Circuit’s decision “permitted the non-statutory labor exemption to be used as a sword for unilaterally imposed employer restraints, without union agreement.”<sup>514</sup> In so doing, the court failed to heed the Supreme Court’s guidance that antitrust exemptions should be narrowly construed, the players argued.<sup>515</sup>

Representing the players in their petition were Jim Quinn, Jeffrey Kessler, and Bruce Meyer of Weil Gotshal. Kessler went on to become the leading attorney for athletes, professional and amateur, and their unions.<sup>516</sup>

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<sup>507</sup> *Id.*

<sup>508</sup> *Id.* at 1308–10.

<sup>509</sup> *Id.* at 1309–10.

<sup>510</sup> Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit at 9, *Powell v. NFL*, 498 U.S. 1040 (1991) (Mar. 12, 1990) (No. 89-1421).

<sup>511</sup> See Quinn, *supra* note 1 at 176.

<sup>512</sup> See *id.* at 169-70.

<sup>513</sup> Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit at 10, *Powell*, 498 U.S. 1040 (Mar. 12, 1990) (No. 89-1421).

<sup>514</sup> *Id.* at 15.

<sup>515</sup> *Id.* at 17–21.

<sup>516</sup> See Daniel Kaplan, *Jeffrey Kessler, maybe the most prominent sports labor lawyer ever, finally argues before the Supreme Court*, THE ATHLETIC (Mar. 29, 2021), <https://theathletic.com/2479522/2021/03/29/jeffrey-kessler-maybe-the-most-prominent->

Meyer, after a distinguished career at Weil Gotshal, eventually worked in-house for both the NHLPA and MLBPA.<sup>517</sup> Quinn, who had been counsel to the NBA players in *Bridgeman*, had also served as an expert in the *Powell* case at the trial level.<sup>518</sup>

The United States and nine states filed separate amicus briefs in support of the players.<sup>519</sup> The federal government argued that the Eighth Circuit’s “formulation of the nonstatutory labor exemption was. . . overly expansive.”<sup>520</sup> According to the government, “[n]either the text nor the history of the NLRA fairly suggests that Congress implicitly intended broadly to deprive unionized workers of the antitrust laws’ protection from employer-imposed restraints on competition in the labor market.”<sup>521</sup> Moreover, the Eighth Circuit had crafted an exemption which was more appropriately the province of Congress.<sup>522</sup> The states agreed, and added their concerns that the decision would negatively affect their “interest in stable labor-management relations and in collective bargaining.”<sup>523</sup>

The amicus briefs present interesting politics. The United States’ brief was principally authored by Kenneth W. Starr, the then-Solicitor General in the Reagan administration and renowned conservative attorney.<sup>524</sup> Similarly, among the states supporting the players were Louisiana, Mississippi,

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sports-labor-lawyer-ever-finally-argues-before-the-supreme-court/?redirected=1 [https://perma.cc/Q3BT-TF7C].

<sup>517</sup> Bruce Meyer promoted to deputy executive director of Major League Baseball Players Association, ESPN (July 6, 2022), [https://www.espn.com/mlb/story/\\_id/34201917/bruce-meyer-promoted-deputy-executive-director-major-league-baseball-players-association](https://www.espn.com/mlb/story/_id/34201917/bruce-meyer-promoted-deputy-executive-director-major-league-baseball-players-association) [https://perma.cc/T9W6-VB2L].

<sup>518</sup> Quinn, *supra* note 1 at 168.

<sup>519</sup> See Brief for the United States as Amicus Curiae, *Powell v. NFL*, 498 U.S. 1040 (1991) (Dec. 10, 1990) (No. 89-1421); Brief of New York, Arizona, Hawaii, Louisiana, Michigan, Mississippi, Texas, Utah, and Wyoming as Amici Curiae on Behalf of Petitioners for a Writ of Certiorari, *Powell v. NFL*, 498 U.S. 1040 (1991) (May 8, 1990) (No. 89-1421).

<sup>520</sup> Brief for the United States as Amicus Curiae at 10, *Powell v. NFL*, 498 U.S. 1040 (1991) (Dec. 10, 1990) (No. 89-1421).

<sup>521</sup> *Id.* at 13.

<sup>522</sup> *Id.* at 13–14.

<sup>523</sup> Brief of New York, Arizona, Hawaii, Louisiana, Michigan, Mississippi, Texas, Utah, and Wyoming as Amici Curiae on Behalf of Petitioners for a Writ of Certiorari at 15, *Powell v. NFL*, 498 U.S. 1040 (1991) (May 8, 1990) (No. 89-1421).

<sup>524</sup> Peter Baker, *Ken Starr, Independent Counsel in Clinton Investigation, Dies at 76*, N.Y. TIMES, Sept. 13, 2022, <https://www.nytimes.com/2022/09/13/us/politics/ken-starr-dead.html>; See also Quinn, *supra* note 1 at 174 (discussing persuading Starr to support the players’ petition).

Texas, Utah, and Wyoming, none of which today would be considered progressive defenders of employee rights.<sup>525</sup>

The NFL argued that the petition was premature, as “substantial issues” remained to be decided by the lower courts.<sup>526</sup> Moreover, by forcing the parties to the negotiating table, the NFL asserted that the Eighth Circuit’s decision “implements. . . labor law policy.”<sup>527</sup>

Despite the weighty issues at play, in January 1991, the Supreme Court denied certiorari without explanation, with Justices White and Blackmun disagreeing.<sup>528</sup>

While the *Powell* appeal pended, the parties continued to litigate and maneuver. As mentioned above, after the Eighth Circuit’s decision, the NFLPA, by a majority vote of its player members, abandoned its status as the collective bargaining representative of the players, including by changing its constitution to prohibit collective bargaining and filing appropriate documentation with the Department of Labor and Internal Revenue Service.<sup>529</sup> The NFLPA morphed into a “voluntary professional association.”<sup>530</sup> Based on those actions, the players sought partial summary judgment declaring that the non-statutory labor exemption no longer protected the NFL.<sup>531</sup>

In a May 1991 decision, Judge Doty agreed.<sup>532</sup> While the NFL argued that the NFLPA was required to seek decertification from the NLRB, the court held that since “a majority of players ha[d] voted to end collective bargaining. . . [t]he NFLPA. . . may no longer bargain on the players’ behalf [and] [t]hus, there is no need for the NLRB to decertify the NFLPA.”<sup>533</sup> Quoting from the Eighth Circuit’s decision, Judge Doty found that there was “no ‘ongoing collective bargaining relationship,’” and the non-statutory labor exemption therefore had ended.<sup>534</sup>

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<sup>525</sup> See Brad Dress, *Here are the 50 legislatures ranked from most to least conservative*, THE HILL (Dec. 6, 2022), <https://thehill.com/homenews/state-watch/3763498-here-are-the-50-legislatures-ranked-from-most-to-least-conservative/> [<https://perma.cc/9LKT-2UN7>].

<sup>526</sup> Brief for Respondents in Opposition at 8–11, *Powell v. NFL*, 498 U.S. 1040 (1991) (May 8, 1990) (No. 89-1421).

<sup>527</sup> *Id.* at 17–19.

<sup>528</sup> *Powell v. NFL*, 498 U.S. 1040 (1991).

<sup>529</sup> *Powell v. NFL*, 764 F. Supp. 1351, 1354 (D. Minn. 1991).

<sup>530</sup> *Id.*

<sup>531</sup> *Id.*

<sup>532</sup> *Id.* at 1358–59.

<sup>533</sup> *Id.* at 1358.

<sup>534</sup> *Id.* at 1359 (quoting *Powell v. NFL*, 888 F.2d 559, 568 (8th Cir. 1989)).

c. *McNeil* (1992)

After disclaiming the NFLPA as their bargaining representative, in April 1990, eight NFL players, led by the aptly named Freeman McNeil,<sup>535</sup> filed a lawsuit seeking an injunction and related damages arising out of the NFL’s recently implemented “Plan B” free agency system and wage scale, alleging they violated the antitrust laws.<sup>536</sup> Plan B free agency permitted clubs to designate 36 players who would be subject to the right of first refusal/compensation system after each season.<sup>537</sup> Undesignated players became unrestricted free agents.<sup>538</sup>

On the back of Judge Doty’s determination that the non-statutory labor exemption no longer applied, the players sought summary judgment, which the NFL opposed with its own motion for summary judgment.<sup>539</sup>

Perhaps as evidence of the scorched earth nature of the litigation, the parties made arguments which appear unreasonable today, and likely did at the time as well.

First, the players asserted that “there is now sufficient judicial experience to warrant the application of the *per se* rule” to the NFL’s regulations.<sup>540</sup> However, as discussed in Part II, by the end of the 1970s, the courts had definitively established that the *per se* analysis was inappropriate in the sports context. Judge Doty reminded the players of this fact, supported by the Supreme Court’s refusal, in 1984, to apply *per se* analysis in *National Collegiate Athletic Ass’n v. Board of Regents of University of Oklahoma* (“*Board of Regents*”).<sup>541</sup>

Second, the NFL argued that its “twenty-eight member clubs. . . function as a single economic entity” and are therefore “incapable of conspiring” in violation of Section 1 of the Sherman Act.<sup>542</sup> The NFL’s argument was based on the Supreme Court’s 1984 decision in *Copperweld Corp. v. Independence Tube Corp.* (“*Copperweld*”), in which the Court held that a parent corporation and its wholly owned subsidiary were not legally capable of

<sup>535</sup> See Quinn, *supra* note 1, at 168 (discussing decision to name McNeil as the lead plaintiff).

<sup>536</sup> *McNeil v. NFL*, 790 F.Supp. 871, 875–76 (D. Minn. 1992).

<sup>537</sup> Chris Deubert, Glenn M. Wong, & John Howe, *All Four Quarters: A Retrospective and Analysis of the 2011 Collective Bargaining Process and Agreement in the National Football League*, 19 UCLA ENT. L. REV. 1, 11 (2012).

<sup>538</sup> *Id.*

<sup>539</sup> *McNeil*, 790 F.Supp. at 875–76. .

<sup>540</sup> *Id.* at 896.

<sup>541</sup> See *id.* at 897 (citing *NCAA v. Board of Regents of Univ. of Ok.*, 468 U.S. 85, 101 (1984)).

<sup>542</sup> *McNeil*, 790 F.Supp. at 878. .

conspiring for purposes of Section 1.<sup>543</sup> The NFL had first made this argument earlier that year concerning a challenge to its team relocation rules, but the Ninth Circuit was unpersuaded.<sup>544</sup> Yet, with the intervening Supreme Court decision, Judge Doty described the NFL as “contend[ing] that *Copperweld* overrules a vast body of Supreme Court and lower court decisions that have held that arrangements between separate economic entities engaged in a joint venture, including teams in professional sports leagues, are subject to scrutiny under the Sherman Act.”<sup>545</sup> The court rejected the NFL’s argument as “irreconcilable” with *Board of Regents*.<sup>546</sup> Nevertheless, the single-entity defense would linger over sports antitrust analysis until the Supreme Court’s unanimous decision against the NFL in 2010 on that issue.<sup>547</sup>

Aside from these failed arguments, in an April 1992 decision, the court found sufficient “evidence of a threat of antitrust injury” to deny the NFL’s motion for summary judgment.<sup>548</sup> Thus, the players had the chance at trial to seek antitrust damages arising out the NFL’s player movement restrictions.<sup>549</sup>

Only two weeks prior to the court’s decision, Judge Doty dismissed a separate case brought by the NFL and its clubs against the NFLPA, alleging that it had violated antitrust law by conspiring with NFL player agents to “fix, raise and/or maintain compensation paid to NFL players.”<sup>550</sup> Ordinarily, the NFLPA would have been immune from such allegations pursuant to the statutory labor exemption. However, such protection was not available since the NFLPA had disclaimed its status as the bargaining representative of NFL players. Nevertheless, the court found the NFL’s allegations insufficiently vague to sustain a claim.<sup>551</sup>

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<sup>543</sup> 467 U.S. 752, 771 (1984).

<sup>544</sup> See *L.A. Mem’l Coliseum Comm’n v. NFL*, 726 F.2d 1381, 1387–90 (9th Cir. 1984).

<sup>545</sup> *McNeil*, 790 F.Supp. at 880.

<sup>546</sup> *Id.*

<sup>547</sup> See Gabriel Feldman, *The Puzzling Persistence of the Single-Entity Argument for Sports Leagues: American Needle and the Supreme Court’s Opportunity to Reject a Flawed Defense*, 2009 WIS. L. REV. 835 (2009) (analyzing history and flaws of single-entity argument); *Am. Needle, Inc. v. NFL*, 560 U.S. 183 (2010) (unanimously holding that NFL could not avail itself of single-entity defense in licensing of intellectual property).

<sup>548</sup> *McNeil*, 790 F.Supp. at 878.

<sup>549</sup> See *id.* at 884 (discussing scope of damages claim).

<sup>550</sup> *Five Smiths, Inc. v. NFL Players Ass’n*, 788 F. Supp. 1042, 1044 (D. Minn. 1992).

<sup>551</sup> *Id.* at 1048.

The parties engaged in an extensive trial during the summer of 1992.<sup>552</sup> In his closing presentation to the jury, the NFL's counsel brought out the doomsday argument: "If you find the rules don't fit, you might be taking a decision which is going to affect a whole lot of people, including these players. You might be bringing my words to truth, which is that you will destroy professional sports."<sup>553</sup>

The jury was apparently unmoved, issuing a verdict in the players' favor.<sup>554</sup> The jury found that the NFL's Plan B system had a "substantially harmful effect on competition in the relevant market for the services of professional football players," and that Plan B "significantly contribute[d] to 'competitive balance' in the NFL, but also that Plan B was "more restrictive than necessary to achieve the objective of establishing or maintaining competitive balance in the NFL."<sup>555</sup> Having failed to satisfy that final prong, the NFL could not prevail under a rule of reason analysis.<sup>556</sup> The jury awarded damages ranging between \$50,000 and \$240,000 for four players and declined to award damages to the other four players.<sup>557</sup> These amounts were then trebled pursuant to antitrust law.<sup>558</sup>

*d. Jackson (1992)*

On September 14, 1992, four days after the jury's verdict in *McNeil*, the Miami Dolphins' Keith Jackson and nine other players filed a lawsuit seeking injunctive relief preventing the implementation of the Plan B free agency system.<sup>559</sup> In a September 24 decision, Judge Duty granted the players' request for a temporary restraining order.<sup>560</sup> The court determined that the issue raised in the case was "identical to that raised in the *McNeil* litigation" and that the NFL was therefore "collaterally estopped from relitigating the legality of the Plan B rules."<sup>561</sup>

<sup>552</sup> See QUINN, *supra* note 1 (discussing the history and events of the trial); Jackson v. NFL, 802 F. Supp. 226, 228 n.2 (D. Minn. 1992) (providing trial timeline).

<sup>553</sup> *Id.* at 203.

<sup>554</sup> *McNeil v. NFL*, 90-cv-476, 1992 WL 315292 (D. Minn. Sept. 10, 1992).

<sup>555</sup> *Id.* at \*1.

<sup>556</sup> See *infra* Section I.a (discussing elements of the rule of reason analysis).

<sup>557</sup> *McNeil v. NFL*, 90-cv-476, 1992 WL 315292, at \*1 (D. Minn. Sept. 10, 1992).

<sup>558</sup> Quinn, *supra* note 1 at 207.

<sup>559</sup> Jackson v. NFL, 802 F. Supp. 226, 228 (D. Minn. 1992).

<sup>560</sup> *Id.*

<sup>561</sup> *Id.* at 230.

e. *White* (1993)

Next, on September 21, 1992, eleven days after the jury's verdict in *McNeil*, NFL players filed a class action lawsuit against the NFL seeking injunctive relief and antitrust damages for the NFL's Plan B free agency system, the NFL Draft, and the NFL player contract.<sup>562</sup> The lead plaintiff in the lawsuit was the well-respected and future Hall of Fame defensive end Reggie White.<sup>563</sup> After the *McNeil* loss, the *White* case presented the NFL and its clubs with the possibility of hundreds of millions of dollars in damages, after trebling, due to the restrictive policies it had imposed since the expiration of the 1982 collective bargaining agreement in 1987.<sup>564</sup>

Finally, more than five years after the initiation of the *Powell* litigation, the parties agreed to end the litigation. On January 6, 1993, the parties reached a Stipulation and Settlement Agreement (SSA), approved in final form by Judge Doty in August 1993, resolving the *White* case.<sup>565</sup> The SSA included a \$195 million payout to the players.<sup>566</sup> The NFLPA recertified as the official bargaining representative of the players as part of the SSA<sup>567</sup> and the SSA became, in sum and substance, the new collective bargaining agreement between the NFL and players.<sup>568</sup> Judge Doty retained jurisdiction over the SSA and the collective bargaining agreement—an arrangement that would prove controversial in future years.<sup>569</sup>

The SSA was a monumental and long-overdue resolution to years of litigation and labor strife. Furthermore, the 1993 collective bargaining agreement was a groundbreaking agreement that set the framework for every subsequent NFL-NFLPA agreement.<sup>570</sup> The players gained the right to unrestricted free agency for the first time in exchange for a hard salary cap.<sup>571</sup> Players could become unrestricted free agents after five years of experience

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<sup>562</sup> *White v. NFL*, 822 F. Supp. 1389, 1394 (D. Minn. 1993).

<sup>563</sup> *Reggie White*, PRO FOOTBALL HALL OF FAME, <https://www.profootballhof.com/players/reggie-white/> (last visited Jan. 5, 2023).

<sup>564</sup> Chris Deubert, Glenn M. Wong, & John Howe, *All Four Quarters: A Retrospective and Analysis of the 2011 Collective Bargaining Process and Agreement in the National Football League*, 19 UCLA ENT. L. REV. 1, 11 (2012); See also QUINN, *supra* note 1, at 209–11 (discussing damages prospects for NFL clubs after the *McNeil* verdict).

<sup>565</sup> *White v. NFL*, 836 F. Supp. 1458, 1462, 1468 (D. Minn. 1993).

<sup>566</sup> Quinn, 1 at 220.

<sup>567</sup> *Id.* at 225.

<sup>568</sup> Deubert, Wong, & Howe, *supra* note 564, at 12.

<sup>569</sup> See *id.* at 12 (discussing the NFL's efforts to remove Judge Doty's oversight).

<sup>570</sup> *Id.*

<sup>571</sup> *Id.*



and clubs' payrolls were limited to a range of 62 percent to 64 percent of certain revenues depending on the year.<sup>572</sup>

*f. Williams (1995)*

Although the NFL and NFLPA were finally able to reach a new collective bargaining agreement, the parties in each of the other major sports leagues were not. The 1994 MLB season was cut short in August due to a player strike<sup>573</sup> and the NHL imposed a lockout on its players, threatening the 1994-95 season.<sup>574</sup> In the NBA, the league and union were unable to reach a new agreement after the 1993-94 season.<sup>575</sup> The NBA players, likely emboldened by the recent success of NFL players, demanded the elimination of the draft, right-of-first-refusal system, and salary cap, all of which had been agreed to in prior collective bargaining agreements.<sup>576</sup>

This time, the league struck first.<sup>577</sup> The NBA filed a lawsuit seeking a declaration that its continued implementation of those practices would not violate antitrust laws.<sup>578</sup> The Southern District of New York framed the issue at hand as whether the non-statutory labor exemption continued after the expiration of the collective bargaining agreement, and, if so, "for what length of time."<sup>579</sup> The court noted that courts had reached different opinions on this issue in *Bridgeman, Powell, and Brown* (discussed below).<sup>580</sup>

Using the Jacobs and Winter article as a guide in evaluating how to account for the different policies underlying labor and antitrust laws, the court determined that the *Powell* standard was the right one: "[a]ntitrust immunity exists as long as a collective bargaining relationship exists."<sup>581</sup> The court consequently granted the NBA the declaration it sought and noted that the players, like those in the NFL post-*Powell*, are free to decertify the NBPA as its collective bargaining agent if it wishes to pursue antitrust relief.<sup>582</sup>

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<sup>572</sup> *Id.*

<sup>573</sup> See, e.g., William B. Gould IV, *Labor Issues in Professional Sports: Reflections on Baseball, Labor, and Antitrust Law*, 15 STAN. L. & POL'Y REV. 61, 73-74 (2004).

<sup>574</sup> Jordan I. Kobritz & Jeffrey F. Levine, *Don Febr Leads the NHLPA: Does the NHL Have Anything to Fear?* 11 VA. SPORTS & ENT. L. J. 178, 191 (2011).

<sup>575</sup> NBA v. Williams, 857 F. Supp. 1069, 1072 (S.D.N.Y. 1994).

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

<sup>577</sup> See Quinn, *supra* note 1 at 259-60 (discussing NBA's decision to file first).

<sup>578</sup> NBA v. Williams, 857 F. Supp. 1069, 1071 (S.D.N.Y. 1994).

<sup>579</sup> *Id.* at 1074.

<sup>580</sup> *Id.*

<sup>581</sup> *Id.* at 1078 (citing *Powell v. NFL*, 930 F.2d 1293, 1303-04 (8th Cir. 1989)).

<sup>582</sup> *Id.*

While the parties agreed to begin the 1994-95 season without a collective bargaining agreement, the players appealed.<sup>583</sup> The case was assigned to a panel including Judge Winter. Contrary to popular belief, the panel assignments on Courts of Appeals are not random,<sup>584</sup> and thus it is possible that he was purposefully assigned to this case. In a January 1995 opinion authored by Judge Winter, the Second Circuit affirmed the district court's decision.<sup>585</sup> The opinion, perhaps not surprisingly, tracked the article Judge Winter co-authored 24 years earlier arguing that labor law — and not antitrust law — should be the framework through which collective bargaining disputes are resolved.<sup>586</sup> The Second Circuit “agree[d]” with the Eighth Circuit’s decision in *Powell* “that the nonstatutory labor exemption precluded an antitrust challenge to various terms and conditions of employment implemented after impasse[.]”<sup>587</sup> More specifically, in the court’s view, employers can “maintain the *status quo* after expiration of the agreement. . . without fear of antitrust sanctions.”<sup>588</sup>

On June 24, 1996, the Supreme Court denied the players’ petition for review,<sup>589</sup> four days after issuing its decision in *Brown v. Pro Football, Inc.*,<sup>590</sup> which addressed the same issues raised in *Williams*, as discussed below.

g. *Brown* (1996)

The Supreme Court’s decision not to review the Eighth Circuit’s decision in *Powell* left open for final determination when the non-statutory labor exemption expired. While the *Williams* petition was pending, the Supreme Court received a similar petition from NFL players, led by Antony Brown, concerning the same issue.<sup>591</sup> In December 1995, the Court granted Brown’s petition.<sup>592</sup>

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<sup>583</sup> Quinn, *supra* note 1 at 260.

<sup>584</sup> See Marin K. Levy, *Panel Assignment in the Federal Courts of Appeals*, 103 CORNELL L. REV. 65 (2017).

<sup>585</sup> *NBA v. Williams*, 45 F.3d 684 (2d Cir. 1995).

<sup>586</sup> See *id.* at 688–93.

<sup>587</sup> *Id.* at 692–93.

<sup>588</sup> *Id.* at 693.

<sup>589</sup> *Williams v. NBA*, 518 U.S. 1016, 1016 (1996).

<sup>590</sup> 518 U.S. 231 (1996).

<sup>591</sup> See Brief for Petitioners at 12, 45, *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996) (Jan. 19, 1996) (No. 95-388) 1996 WL 19034 (stating that *Brown* petition for certiorari had been filed on September 11, 1995 and that *Williams* petition was pending).

<sup>592</sup> *Id.*

The case had an extensive factual and procedural history. In 1989, NFL clubs passed a resolution creating six player-developmental or practice squads.<sup>593</sup> The clubs agreed that these players would be paid a fixed salary of \$1,000 per week.<sup>594</sup> The players sued, alleging that the uniform wage provision violated Section 1 of the Sherman Act.<sup>595</sup>

In defense, the NFL argued that “the antitrust laws do not apply to wage-fixing restraints imposed by employer groups on employees.”<sup>596</sup> In support of its claim, the NFL cited Section 6 of the Clayton Act, which states: “[t]he labor of a human being is not a commodity or article of commerce.”<sup>597</sup>

In a March 1992 decision, the District Court for the District of Columbia disagreed with the NFL’s “selective[ ] reading” of the provision, noting that

[i]t is readily apparent that Congress, in enacting § 6, was concerned with the right of labor and similar organizations to continue engaging in [activities which otherwise would be considered antitrust violations], including the right to strike, not with the right of employers to band together for joint action in fixing the wages to be paid by each employer.<sup>598</sup>

The players also argued that the restraint was a *per se* violation.<sup>599</sup> Citing *Smith* and *Board of Regents*, the court noted that “the NFL is a joint venture in which the individual clubs are not competitors in an economic sense” and that there are “procompetitive purposes” for the NFL’s rule. Consequently, the *per se* analysis was inappropriate.<sup>600</sup>

Under the rule of reason, the NFL argued that the wage restrictions were necessary to “promote[ ] competitive balance in the league.”<sup>601</sup> Nevertheless, the court found this argument substantially the same as that rejected by the District of Columbia Court of Appeals in *Smith*.<sup>602</sup> Consequently, the court granted the players summary judgment.<sup>603</sup>

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<sup>593</sup> *Brown v. Pro Football, Inc.*, 90-cv-1071, 1992 WL 88039, at \*1 (D.D.C. Mar. 10, 1992).

<sup>594</sup> *Id.*

<sup>595</sup> *Id.* at \*4.

<sup>596</sup> *Id.* at \*4.

<sup>597</sup> *Id.* (citing 15 U.S.C. § 17)

<sup>598</sup> *Brown*, 90-cv-1071, 1992 WL 88039, at \*5.

<sup>599</sup> *Id.* at \*6.

<sup>600</sup> *Id.* at \*6-8.

<sup>601</sup> *Id.* at \*8.

<sup>602</sup> *Id.*

<sup>603</sup> *Id.* at \*1.

At a subsequent trial, the court awarded the players \$30,349,642 in damages and enjoined the NFL from setting a uniform salary for any class of players.<sup>604</sup>

On appeal, the Court of Appeals expanded on the facts and issues at hand. Per the court's telling, the practice squad salaries were imposed unilaterally only after the NFL had bargained to impasse on the issue with the NFLPA.<sup>605</sup> The court then proceeded through an extensive history of the non-statutory labor exemption.<sup>606</sup> Citing *Powell*, *Bridgeman*, and various law review articles, the court noted that "judges and commentators. . . cannot agree on any point at which the exemption must expire in order to properly accommodate federal labor policy."<sup>607</sup> Nevertheless, citing *Powell* and *Williams* (issued only two months earlier), the court found "a clear trend in favor of shielding the collective bargaining process in its entirety."<sup>608</sup>

The Circuit Court thus reversed the district court's decision and held that the non-statutory labor exemption protected the NFL's wage structure.<sup>609</sup> Citing *Jacobs* and *Winter*, the court concluded that "when federal labor policy collides with federal antitrust policy in a labor market organized around a collective bargaining relationship, antitrust policy must give way."<sup>610</sup>

As to the duration of the exemption, the court held that "the nonstatutory labor exemption waives antitrust liability for restraints on competition imposed through the collective bargaining process, so long as such restraints operate primarily in a labor market characterized by collective bargaining."<sup>611</sup> This standard substantially matched the *Powell* court's determination that the exemption survives so long as there was "an ongoing collective bargaining relationship."<sup>612</sup> Consequently, as the dissent noted in *Powell* and the district court in *Williams*, the Circuit Court in *Brown* noted that "[i]f employees wish to seek the protections of the Sherman Act, they may forego unionization or even decertify their unions."<sup>613</sup>

In their brief to the Supreme Court, the players noted that the "case present[ed] a much-anticipated opportunity for the Court to clarify the limi-

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<sup>604</sup> *Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1044 (D.C. Cir. 1995).

<sup>605</sup> *Id.* at 1044.

<sup>606</sup> *See id.* at 1048-53.

<sup>607</sup> *Id.* at 1052.

<sup>608</sup> *Id.* at 1053.

<sup>609</sup> *Id.* at 1056-58.

<sup>610</sup> *Id.* at 1056.

<sup>611</sup> *Id.*

<sup>612</sup> *Powell v. NFL*, 930 F.2d 1293, 1303 (8th Cir. 1989).

<sup>613</sup> *Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1057 (D.C. Cir. 1995).

tations of the so-called 'nonstatutory labor exemption' to the antitrust laws."<sup>614</sup> In the players' view, the Circuit Court's opinion "represent[ed] a bold and unrestrained expansion of what was once a carefully limited judge-made exemption from the antitrust laws."<sup>615</sup> Further, the players argued that the court's decision, combined with those in *Powell* and *Williams* "cut the judge-made exemption loose from its required mooring in employer-employee agreement."<sup>616</sup> In so doing, the players claimed that the courts had failed to give the Sherman Act its required effect<sup>617</sup> and threatened to provide all sports leagues with the same type of "aberrational" antitrust immunity enjoyed by MLB.<sup>618</sup> Instead, the players argued, the nonstatutory labor exemption should end with the expiration of a collective bargaining agreement.<sup>619</sup>

The NFLPA, NHLPA, MLBPA, and NBPA filed an amicus brief in support of the players.<sup>620</sup> The unions argued that

The real life experience of amici and their members demonstrates the severe and adverse consequences to antitrust and labor law policies which directly flow from such an overbroad antitrust exemption. When employers in professional team sports have claimed to be shielded from antitrust scrutiny for their unilateral imposition of labor market restraints, the result has been lockouts, strikes, and union decertifications. . . . By contrast, when the antitrust laws have been properly applied to unionized labor markets in professional team sports, history shows that collective bargaining has been successful and resulted in compromises of employer and employee interests which resulted in labor peace.<sup>621</sup>

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<sup>614</sup> Brief for Petitioners at 9, *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996) (Jan. 19, 1996) (No. 95-388).

<sup>615</sup> *Id.* at 30.

<sup>616</sup> *Id.* at 44.

<sup>617</sup> *Id.* at 45-51.

<sup>618</sup> *Id.* at 80 (citing *Flood v. Kuhn*, 407 U.S. 258, 282 (1982)).

<sup>619</sup> Brief for Petitioners at 81-86, *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996) (No. 95-388).

<sup>620</sup> Motion of the National Hockey League Players Association, National Football League Players Association, Major League Baseball Players Association and National Basketball Players Association for Leave to File Brief as Amici Curiae and Brief Amici Curiae in Support of Petitioners, *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996) (Jan. 19, 1996) (No. 95-388).

<sup>621</sup> *Id.* at 8-9.

The players were also supported by the federal government.<sup>622</sup> The government argued that the Court of Appeals had extended the non-statutory labor exemption “far beyond its proper scope.”<sup>623</sup> Further, the government asserted, “[b]ecause of the fundamental importance to national economic policy of the Sherman Act, antitrust exemptions must be narrowly construed.”<sup>624</sup> The government said the exemption should expire at impasse.<sup>625</sup> Finally, “[i]n rejecting an impasse standard and holding that employees must decertify their union to pursue remedies under the Sherman Act, the court of appeals has inappropriately required employees to choose between two sets of statutory rights afforded to them by Congress.”<sup>626</sup>

The NFL responded by again asserting the preeminence of the labor laws:

Congress has created a comprehensive system of collective bargaining as the exclusive means of determining terms and conditions of employment in unionized industries. That system, which affords employees and employers a balanced array of economic weapons, has as its cornerstone the complete exclusion of the government, including antitrust courts, from any substantive role in the bargaining process.<sup>627</sup>

To the NFL, the government’s sole role should be “to the extent necessary to ensure compliance with the parties’ obligation to negotiate in good faith.”<sup>628</sup> The NFL pointed to the history of litigation in the NFL and NBA as evidence of the government’s involvement in “the collective bargaining process in a manner inconsistent” with the goals of the NLRA.<sup>629</sup>

The NFL further argued that the players’ position that the exemption expired with the collective bargaining agreement would make multi-employer bargaining “unworkable.”<sup>630</sup> The clubs would, by virtue of their obligation to bargain in good faith, be “in an untenable position—required to continue joint discussions, yet facing potential allegations, from employees eager to seek a bargaining advantage, that each joint meeting is evidence

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<sup>622</sup> See Brief for the United States and Federal Trade Commission as Amici Curiae Supporting Petitioners, *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996) (Jan. 19, 1996) (No. 95-388).

<sup>623</sup> *Id.* at 11.

<sup>624</sup> *Id.*

<sup>625</sup> *Id.* at 12.

<sup>626</sup> *Id.*

<sup>627</sup> Brief for Respondents at 18, *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996) (Feb. 16, 1996) (No. 95-388).

<sup>628</sup> *Id.* at 21.

<sup>629</sup> *Id.* at 51–52.

<sup>630</sup> *Id.* at 73.

of a *per se* antitrust violation.”<sup>631</sup> Further, the NFL claimed that this position, “if adopted by the Court, would inevitably cause chaos, if not a complete shutdown of league operations, upon the expiration of every collective bargaining agreement.”<sup>632</sup>

In other parts of its brief, the NFL claimed that “the antitrust laws simply do not apply to pure labor-market restraints — those that do not adversely affect competition in any product market,”<sup>633</sup> and was insistent on its right to unilaterally implement its good faith bargaining proposal at impasse.<sup>634</sup> The NBA, MLB, and NHL filed separate briefs supporting the NFL.<sup>635</sup>

The Supreme Court’s opinion was a win for the leagues. The court concurred in the leagues’ long-standing argument that “[t]he labor laws gives the [National Labor Relations] Board, not antitrust courts, primary responsibility for policing the collective-bargaining process.”<sup>636</sup> The court held that the non-statutory labor exemption must survive impasse because “to permit antitrust liability here threatens to introduce instability and uncertainty into the collective-bargaining process, for antitrust law often forbids or discourages the kinds of joint discussions and behavior that the collective-bargaining process invites or requires.”<sup>637</sup> To adopt an “impasse-related rule,” the court said, “creates an exemption that can evaporate in the middle of the bargaining process.”<sup>638</sup>

The Supreme Court established a loose four-pronged test, holding that the non-statutory labor exemption applies where the challenged conduct:

- 1) Took place during and immediately after a collective bargaining negotiation;
- 2) Grew out of, and was directly related to, the lawful operation of the bargaining process;

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<sup>631</sup> *Id.* at 74.

<sup>632</sup> *Id.* at 78–79.

<sup>633</sup> *Id.* at 19.

<sup>634</sup> *Id.* at 64–73.

<sup>635</sup> See Brief of the National Basketball Association as Amicus Curiae in Support of Respondents, *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996) (Feb. 16, 1996) (No. 95-388); Brief of Amici Curiae Office of the Commissioner of Baseball and Major League Baseball Players Relations Committee, Inc. in Support of Respondents, *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996) (Feb. 16, 1996) (No. 95-388); Brief of the National Hockey League as Amicus Curiae in Support of Respondents, *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996) (Feb. 16, 1996) (No. 95-388).

<sup>636</sup> *Brown v. Pro Football, Inc.*, 518 U.S. 231, 242 (1996).

<sup>637</sup> *Id.*

<sup>638</sup> *Id.* at 246.

- 3) Involved a matter that the parties were required to negotiate collectively; and
- 4) Concerned only the parties to the collective bargaining relationship.<sup>639</sup>

The Court characterized this exemption as being narrower than that outlined by the Court of Appeals.<sup>640</sup> Interestingly, the Court never mentioned *Powell*, *Williams*, or *Mackey*, nor discussed the standards articulated in those cases.

In another loss for the players, the Court declined to decide where the non-statutory exemption ceased to apply,<sup>641</sup> instead limiting its analysis to finding that it did apply to the facts in *Brown*.<sup>642</sup> Further, the Court, unlike prior courts, did not address or implicitly endorse the idea that the exemption ends if a union decertifies. This issue thus remains live.<sup>643</sup>

Perhaps coming full circle, the Supreme Court cited Jacobs and Winter's article in general support of its position that sports should be subject to the same legal "framework in which bargaining is to take place" as any other industry.<sup>644</sup> Moreover, as the lone dissenter, Justice Stevens identified the article as that which "first advanced the expansive view of the nonstatutory labor exemption that the Court appears now to endorse."<sup>645</sup>

#### CONCLUSION

Having lost at the Supreme Court in *Brown*, the NFL players were nonetheless substantially right in their prediction as to what would be the result of the broad exemption the league was seeking: "labor relations in football may be relegated to a disruptive pattern of bargaining, impasse, decertification, antitrust litigation and settlement, repeated again and again with each contract cycle."<sup>646</sup> In 2011, amid stalled negotiations on a new collective bargaining agreement, both the NFLPA<sup>647</sup> and NBPA<sup>648</sup> decerti-

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<sup>639</sup> *Id.* at 250.

<sup>640</sup> *Id.* at 235.

<sup>641</sup> *Id.* at 250.

<sup>642</sup> *Id.* at 235.

<sup>643</sup> See *Brady v. NFL*, 644 F.3d 661, 667 (8th Cir. 2011) (NFL arguing that NFLPA disclaimer prior to antitrust lawsuit was a "sham" that should not be given legal effect).

<sup>644</sup> *Brown v. Pro Football, Inc.*, 518 U.S. 231, 249 (1996).

<sup>645</sup> *Id.* at 262 (Stevens, J., dissenting).

<sup>646</sup> Brief for Petitioners at 77-78, *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996) (Jan. 19, 1996) (No. 95-388).

<sup>647</sup> See Chris Deubert, Glenn M. Wong, & John Howe, *All Four Quarters: A Retrospective and Analysis of the 2011 Collective Bargaining Process and Agreement in the Na-*



fied or disclaimed their status as the bargaining representative on behalf of their players and filed antitrust lawsuits. The next year, the NHLPA considered decertifying,<sup>649</sup> before reaching a new collective bargaining agreement with the NHL.<sup>650</sup>

Less successful were the leagues' predictions that altering or eliminating their player-related restrictions would destroy the leagues. Lawyers, in the cause of their clients, are prone to hyperbole. And sports, with its emotional connections, might seem like a natural place to favor the heart over the mind.<sup>651</sup> Nevertheless, after an egregious error in 1922, the courts determined that sports too must comply with antitrust law and have their claims scrutinized.

Once the leagues accepted this reality, they made substantial progress in the courtroom and on their respective fields of play. By accepting (or being forced to accept) the unionization of their players, the leagues eventually gained a durable exemption from the antitrust laws while also making the players partners in the leagues' success. Whether causative or correlative, the leagues have since thrived, continuously breaking revenue and franchise-valuation records. In many respects, it is unfortunate that it took such a volume of litigation to get to the relationship under which the parties operate today. This Article provides the history of that litigation so that perhaps the parties can learn from it in considering future legal battles.

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*tional Football League*, 19 UCLA ENT. L. REV. 1, 22, 27 (2012); *Brady v. NFL*, 644 F.3d 661, 667 (8th Cir. 2011).

<sup>648</sup> Kemper C. Powell, *Beyond Brady and Anthony: The Contemporary Role of Antitrust Law in the Collective Bargaining Process*, 14 TEX. REV. ENT. & SPORTS L. 147, 147 (2013).

<sup>649</sup> *Id.* at 148.

<sup>650</sup> Patrick Rishe, *NHL Owners, Players Score New CBA Saving the 2012-13 Hockey Season*, FORBES (Jan. 6, 2013), <https://www.forbes.com/sites/prishe/2013/01/06/nhl-owners-players-score-new-cba-saving-the-2012-13-hockey-season/?sh=3d316fd65385>.

<sup>651</sup> See *Flood v. Kuhn*, 407 U.S. 258, 260–64 (1972) (providing nostalgic history of baseball's place in American culture).



## NOT Playing at a Theater Near You: Deceptive Movie Trailers and the First Amendment

Dr. Joel Timmer\*

*Abstract:* On December 20, 2022, in what appears to be a first, a court determined that a studio may face legal liability for deceptive advertising for including an actress and a scene in a trailer promoting a movie, when neither was in the actual movie. Some have suggested that such an action might be barred by the First Amendment, based on the Supreme Court's suggestion in the 1983 case *Bolger v. Youngs Drug Products Corp.*, that advertising for fully protected speech products, such as movies, may be entitled to the same level of protection as the products themselves, instead of the lower level of protection accorded to commercial speech. The Supreme Court has never made clear the limits of the applicability of this observation. Examining the cases cited by the Court to support this statement, as well as Supreme Court commercial speech cases involving protected speech since that time, this article concludes that the application of this observation should be limited to commercial speech involving religious and charitable solicitation. The Court has not given any indication that this observation should be extended to cases involving commercial speech for entertainment products. Thus, movie studios may face liability for deceptive movie trailers.

### I. INTRODUCTION

Imagine seeing a trailer for a movie featuring one of your favorite actors. Based on this, you excitedly decide to rent and watch the movie. As you finish the movie, you are disappointed to realize that your favorite actor did not appear in the film at all. This is similar to what happened to two

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individuals who rented the movie *Yesterday* after viewing a trailer for the film that featured the actress Ana De Armas.<sup>1</sup> De Armas, however, does not actually appear in the film. These two individuals decided to take action, filing a class action lawsuit seeking \$5 million in damages against Universal, the film's distributor, for false advertising, among other things.

On December 20, 2022, the U.S. District Court for the Central District of California ruled against Universal's motion to dismiss the case, allowing the case to proceed. This appears to be the first time a court has held that studios may be held liable for movie trailers that deceptively represent the promoted movie's content to audiences.<sup>2</sup> As both the court and the parties to the case acknowledge, this case implicates the First Amendment.<sup>3</sup>

Movies are creative, expressive works that are fully protected by the First Amendment.<sup>4</sup> Advertising, or commercial speech, which can include trailers, generally receives a lesser level of First Amendment protection.<sup>5</sup> The Supreme Court, however, has indicated that advertisements for products consisting of fully protected speech may also be entitled to full First Amendment protection.<sup>6</sup> The issues involved here, then, are whether movie trailers are entitled to full First Amendment protection due to the fact that they advertise products entitled to that level of protection. Or, do trailers constitute commercial speech, meaning they are entitled to a lesser degree of protection?

This article examines these issues. In Part II, the article reviews the court's 2022 opinion in *Woulfe v. Universal*, including details about the film *Yesterday* and the trailer for it. Part III examines what commercial speech is and how speech is determined to be commercial. It also examines the reasons why commercial speech is provided with less than full First Amendment protection. Part IV goes on to consider a suggestion by the Supreme Court

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<sup>1</sup> YESTERDAY (Universal Pictures 2019).

<sup>2</sup> Defendant's Supplemental Brief Regarding Application of the First Amendment to Plaintiffs' Second Amended Complaint (Oct. 10, 2022), at 6, *Woulfe v. Universal City Studios LLC*, No. 2:22-cv-00459-SVW-AGR (C.D. Cal Dec. 20, 2022) [hereinafter Def.'s Suppl. Br. (Oct. 10, 2022)]. "Plaintiffs have not cited, and Universal has not found, a single case holding that a motion picture trailer constitutes an implied affirmative representation that every actor, song, or scene in a trailer will appear in the final movie. Plaintiffs' theory is . . . unprecedented."

<sup>3</sup> See *Woulfe v. Universal City Studios LLC*, No. 2:22-cv-00459-SVW-AGR, 2022 WL 18216089, at \*28–32 (C.D. Cal Dec. 20, 2022) [hereinafter *Woulfe Court Order*].

<sup>4</sup> *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501–02 (1951).

<sup>5</sup> See *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561–62 (1980).

<sup>6</sup> *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 67 n.14 (1983).

in *Bolger v. Youngs Drug Products*, that commercial speech which advertises products that are fully protected by the First Amendment might likewise be entitled to full First Amendment protection.<sup>7</sup> While the Court has never explained the limits of the applicability of this statement, this article considers whether advertising for movies should be entitled to full First Amendment protection, as movies themselves are entitled to full protection.

Examining relevant Supreme Court precedents, this article concludes that the Court has limited the applicability of this suggestion to cases involving government restrictions on commercial speech involving religious and charitable solicitation. In these cases, the Court has determined that the speech at issue is fully protected, because solicitation of funds to support the causes in these cases is so “inextricably intertwined” with the commercial speech the government is trying to regulate, to make it impractical to apply different standards to different components of the same speech.<sup>8</sup> Limiting the Court’s statement that commercial speech involving protected First Amendment activities may be entitled to full protection to cases of religious and charitable solicitation means that advertising for movies should not categorically receive that same level of protection. In Part V, this article then returns to *Woulfe v. Universal*, to examine how the First Amendment issues were addressed in that case. Finally, Part VI of the article concludes with some observations on the implications of the *Woulfe* court’s decision.

## II. *WOULFE V. UNIVERSAL: THE CASE OVER THE YESTERDAY TRAILER*

In *Woulfe v. Universal City Studios*,<sup>9</sup> plaintiffs Conor Woulfe and Peter Michael Rosza brought a class action complaint against Universal Pictures over the 2019 film *Yesterday* and the advertising campaign intended to promote that film, alleging that the advertising was false, deceptive, and misleading.<sup>10</sup> At the heart of the plaintiffs’ complaint was a trailer for the film which each plaintiff viewed prior to paying \$3.99 to rent and view the film on Amazon.com. According to plaintiffs, that trailer “promoted Ana De Armas as an actress that would appear in the film,” which persuaded the plaintiffs to rent the film.<sup>11</sup> After watching the film, however, the plaintiffs

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<sup>7</sup> *Id.*

<sup>8</sup> See *infra* notes 104–141 and accompanying text.

<sup>9</sup> *Woulfe v. Universal City Studios LLC*, No. 2:22-cv-00459-SVW-AGR, 2022 WL 18216089 (C.D. Cal. Dec. 20, 2022).

<sup>10</sup> See Plaintiff’s Second Amended Class Action Complaint (June 7, 2022), at 1, *Woulfe v. Universal City Studios LLC*, No. 2:22-cv-00459-SVW-AGR (C.D. Cal. Dec. 20, 2022) [hereinafter Pls. 2d Am. Compl.].

<sup>11</sup> See *id.* at 2–3.

discovered that De Armas does not in fact appear in the film.<sup>12</sup> Because the trailer led the plaintiffs to believe that De Armas would appear in the film, they alleged that Universal's marketing of the film was false, deceptive, and misleading. The pair is seeking \$5 million in the class action lawsuit.<sup>13</sup>

Plaintiffs described the film *Yesterday* as being about "failed musician Jack Malik who hits his head during a blackout only to wake up to discover that the world's knowledge of The Beatles has been erased. Taking advantage of this opportunity, the protagonist Malik, played by actor Himesh Patel, adopts The Beatles' songs as his own, quickly becoming world famous."<sup>14</sup> De Armas was a cast member in the film, and did shoot scenes for the film which were ultimately not included in the final film. De Armas played the character Roxanne, a well-known actress who meets the protagonist Malik when they both appear on a late-night talk show.

The scene at issue depicted De Armas' talk show appearance, during which, the show's host "first suggests that Malik write a song about Roxanne," then tells Malik to simply write a song about "something."<sup>15</sup> Malik's response is to play the Beatles' song "Something," which he does while sitting next to Roxanne, gazing at her.<sup>16</sup> Roxanne appears charmed by the song, and there is a romantic connection between Roxanne and Malik which leads to the two embracing.<sup>17</sup> Meanwhile, Malik's longtime, hometown friend Ellie, the film's female lead "played by the relative unknown actress Lily James," watches this at home and "is visibly upset that she might lose Malik to Roxanne."<sup>18</sup> Dialogue in the trailer also suggests that Ellie is concerned that Malik is distracted by his newfound fame and glamor of actress Roxanne.<sup>19</sup>

The scene featuring De Armas was cut from the final version of the film, resulting in De Armas not being in the version of the film released to the public.<sup>20</sup> Nor was the well-known Beatles' song "Something" included in the final film.<sup>21</sup> Both, however, were included in the trailer released to

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<sup>12</sup> See *id.* at 2–3.

<sup>13</sup> See Agence France-Presse, *Movie fans can sue over misleading trailer, US judge rules*, THE GUARDIAN (Dec. 23, 2022, 23:07 EST), <https://www.theguardian.com/film/2022/dec/24/movie-fans-can-sue-over-misleading-trailer-us-judge-rules> [<https://perma.cc/K546-L6HZ>].

<sup>14</sup> Pls. 2d Am. Compl., *supra* note 10, at 13.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 13–14.

<sup>20</sup> *Id.* at 15.

<sup>21</sup> *Id.* at 15–16.

promote the film.<sup>22</sup> *Yesterday* director Danny Boyle called De Armas' portrayal of Roxanne in the original film cut "brilliant" and "radiant."<sup>23</sup> Boyle also called the scene one of his favorites from the original cut of the film, and that Malik playing the song "Something" in response to the talk show's request that he write and play "something" on the spot was a delightful joke.<sup>24</sup> Ana De Armas' character Roxanne was intended to be a third point in a love triangle, coming between the romance between Malik and Ellie.<sup>25</sup> As for why the scene was cut, screenwriter Richard Curtis explained the audience was invested in the relationship between Ellie and Malik, and did not like the fact that Malik's "eyes even strayed."<sup>26</sup> While the scene was among the director's and one of the screenwriters' favorites in the film, it was cut for the sake of the story.<sup>27</sup>

According to the plaintiffs, De Armas represented the most recognizable actor among the film's cast, and her appearance in the trailer was a key factor in their decisions to rent the film.<sup>28</sup> De Armas has appeared in such high-profile films as *Blade Runner 2049*, *War Dogs*, and as the female lead in the James Bond film *No Time to Die*.<sup>29</sup> Additionally, she was nominated for a Golden Globe for Best Actress in a Comedy or Musical for her performance in the film *Knives Out*.<sup>30</sup> Otherwise, plaintiffs allege, the two stars of the film, Himesh Patel and Lily James were largely unknown prior to the film's release, with *Yesterday* being Patel's first film credit.<sup>31</sup>

The plaintiffs argued that "because none of the *Yesterday* film leads were famous, [Universal] could not rely on their fame to promote the movie to entice viewership."<sup>32</sup> On the other hand, De Armas is a well-known movie star, who "is a viewership draw by herself."<sup>33</sup> Plaintiffs allege that Universal included De Armas' scenes in the trailer "to maximize ticket and movie sales and rentals," and that including the scene featuring De Armas,

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<sup>22</sup> *Id.* at 15.

<sup>23</sup> *Id.* at 14.

<sup>24</sup> *Id.*

<sup>25</sup> Mike Reyes, *Yesterday Cut An Entire Character From The Film That Would Have Changed The Plot*, CINEMA BLEND (June 26, 2019), <https://www.cinemablend.com/news/2475654/yesterday-cut-an-entire-character-from-the-film-that-would-have-changed-the-plot> [https://perma.cc/VM34-D8FU].

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Pls. 2d Am. Compl., *supra* note 10, at 15, 54.

<sup>29</sup> *Id.* at 12.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 14.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 15.

which “was described by director Boyle as fantastic” was also included “to entice viewership and thereby boost movie sales and rentals.”<sup>34</sup> Plaintiffs alleged that Universal “knew and indeed intended that consumers would rely on the content of the *Yesterday* movie trailers when making decisions whether to pay for purchasing or viewing the film,” believing that “consumers would be enticed by [De Armas’] appearance and scenes to pay for the movie.”<sup>35</sup> In addition, plaintiffs alleged that Universal “used Ana De Armas and the omitted scene elements to make the movie *Yesterday* appear more appealing than it actually was.”<sup>36</sup>

According to District Judge Stephen V. Wilson’s opinion deciding the case, “at the center of this case is the question of whether Universal made some actionable misrepresentation of the movie by including the scene in the trailer that ultimately did not appear in the movie.”<sup>37</sup> Although plaintiffs alleged that Universal’s actions violated a number of different laws, Judge Wilson noted that a commonality shared by many of those laws is that they applied the “reasonable consumer standard.”<sup>38</sup> This standard requires plaintiffs to show that “the alleged misrepresentation is ‘likely to deceive’ the consumer.”<sup>39</sup> This requires “more than a mere possibility that the advertisement might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner.”<sup>40</sup> Instead, it must be “probable that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled.”<sup>41</sup> Judge Wilson found that plaintiffs had met their burden to plausibly allege that reasonable consumers could be misled by the trailer to believe that De Armas and the scene featuring her would be in the movie.<sup>42</sup> The court found this to be the case even though the trailer did not affirmatively state that De Armas would appear in the movie, as the court found that “[e]ven an implied assertion may be sufficient to deceive a reasonable consumer.”<sup>43</sup> Here, the court observed that the representation that plaintiffs alleged Universal made by featuring De Armas in the trailer, while “not express,” could still

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

<sup>35</sup> *Id.* at 19.

<sup>36</sup> *Id.* at 27.

<sup>37</sup> *Woulfe v. Universal City Studios LLC*, No. 2:22-cv-00459-SVW-AGR, 2022 WL 18216089, at \*9–10 (C.D. Cal Dec. 20, 2022).

<sup>38</sup> *Id.* at \*10 (citation omitted).

<sup>39</sup> *Id.* (quoting *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 508 (2003)).

<sup>40</sup> *Id.* (quoting *Lavie*, 105 Cal. App. 4th at 508).

<sup>41</sup> *Id.* (quoting *Lavie*, 105 Cal. App. 4th at 508).

<sup>42</sup> *Id.* at \*11 (citing *Lavie*, 105 Cal. App. 4th at 508).

<sup>43</sup> *Id.* (citations omitted).



“be viewed as ‘a specific measurable claim, capable of being proved false . . . or of being reasonably interpreted as a statement of objective fact.’”<sup>44</sup>

The Court had taken judicial notice of the fact that “some trailers include scenes that do not appear in the final movie,”<sup>45</sup> which Universal argued contributed to making the plaintiffs’ interpretation of the trailer “implausible.”<sup>46</sup> While the court called this a “close question,” the court found that plaintiffs had made sufficient allegations to support their claim. First, they alleged that “[m]ovie trailers are understood by movie viewers and consumers to convey what actors will appear in the advertised film.”<sup>47</sup> In addition, plaintiffs alleged that De Armas is a “famous” actress who has starred in several films and who has a large social media following.<sup>48</sup> Plaintiffs had also pointed to statements by other viewers of the trailer stating that they had expected to see De Armas in the film.<sup>49</sup>

Further, despite De Armas only appearing in the trailer for 15 seconds, the court found it “plausible that a consumer could interpret De Armas’ appearance as more than de minimis [sic]. In the scene that De Armas appears in, she is sung to by the main character, is the only person in view for several seconds, and embraces the main character.”<sup>50</sup> Furthermore, the trailer shows Ellie, the main love interest, becoming visibly upset as she watches this. The court noted that Universal has recognized that this scene conveyed “a key part of the overall story arc in the trailer: [the protagonist’s] meteoric rise to fame and how it undoes the life he knew.”<sup>51</sup> The implication of all this for the court was that “De Armas could be viewed as more than a fleeting background extra, and as a character that viewers would expect to see in the movie.”<sup>52</sup>

Universal posited “a host of ‘what if’ scenarios” contending that if the court allowed the plaintiffs suit to proceed, that “Plaintiffs could assert that they were led to believe that De Armas would appear for a certain amount of time, occupy a specific role, or receive a speaking role.”<sup>53</sup> The thrust of

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<sup>44</sup> *Id.* at \*12 (quoting *Vitt v. Apple Computer Inc.*, 469 Fed.Appx. 605, 607 (9th Cir. 2012)).

<sup>45</sup> *Woulfe v. Universal City Studios LLC*, No. 2:22-cv-00459-SVW-AGR, 2022 WL 18216089, at \*12 (C.D. Cal Dec. 20, 2022).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at \*13 (citations omitted).

<sup>48</sup> *Id.* (citations omitted).

<sup>49</sup> *Id.* (citations omitted). While the court found this to be “weak evidence,” it nevertheless contributed to the plausibility of the plaintiffs’ claim. *Id.*

<sup>50</sup> *Id.* (citations omitted).

<sup>51</sup> *Id.* (alteration in original) (citations omitted).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at \*14.

Universal's argument here was that "permitting Plaintiffs to move forward with this theory 'would open the floodgates to claims like these, where answers depend on purely subjective judgements.'" <sup>54</sup> The court, however, was unpersuaded by this, noting that these types of claims would be limited by the reasonable consumer test, which "requires a probability that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled."<sup>55</sup> Here, the court specified that its "holding is limited to representations as to whether an actress or scene is in the movie, and nothing else."<sup>56</sup>

One final argument advanced by Universal was that applying consumer protection laws to the *Yesterday* trailer would violate the First Amendment.<sup>57</sup> This argument was significant enough for the court to order supplemental briefings on the First Amendment issues implicated by the case.<sup>58</sup> In the end, a significant portion of the district court's opinion deals with First Amendment issues, which will be discussed later in this article.<sup>59</sup> The treatment of commercial speech for entertainment products is complicated by the fact that "the Supreme Court has yet to rule definitively on whether advertisements and promotions for . . . protected speech should be accorded the same degree of First Amendment protection as the products themselves, or whether this type of advertising should instead be treated as ordinary commercial speech, the regulation of which is subject to a lower standard of judicial review."<sup>60</sup> In other words, the issue is "whether the First Amendment fully protects entertainment advertising, or if entertainment advertising is instead considered commercial speech, subject to greater government regulation as well as charges of deceptive advertising."<sup>61</sup>

### III. COMMERCIAL SPEECH AND THE FIRST AMENDMENT

In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,<sup>62</sup> the U.S. Supreme Court described commercial speech as "expression

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<sup>54</sup> *Id.* (citation omitted).

<sup>55</sup> *Id.* (quoting *Kasky v. Nike, Inc.* 27 Cal.4th 939, 951 (2002)).

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

<sup>57</sup> *Id.* at \*28.

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

<sup>59</sup> *Id.* at \*28–32.

<sup>60</sup> Tara Kole, *Advertising Entertainment: Can Government Regulate the Advertising of Fully-Protected Speech Consistent with the First Amendment?*, 9 UCLA ENT. L. REV. 315, 319 (2002).

<sup>61</sup> *Id.* at 326.

<sup>62</sup> 447 U.S. 557 (1980).

related solely to the economic interests of the speaker and its audience.”<sup>63</sup> Commercial speech has also been described by the Court as “speech which does no more than propose a commercial transaction.”<sup>64</sup> According to the *Central Hudson* Court, commercial speech “not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information.”<sup>65</sup> The Court elaborated on the valuable function of commercial speech in a subsequent case:

Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.<sup>66</sup>

As a result of *Central Hudson*, commercial speech is protected by the First Amendment.<sup>67</sup> However, the Court has observed that commercial speech varies from other types of speech in significant ways, such that “a different degree of [First Amendment] protection is necessary [for commercial speech] to insure that the flow of truthful and legitimate commercial information is unimpaired.”<sup>68</sup> As a result, the Court has determined that commercial speech receives a lesser degree of protection than fully protected speech.<sup>69</sup>

The Court in *Central Hudson* pointed to two features of commercial speech that allow for greater government regulation of it than noncommercial speech. First, advertisers “have extensive knowledge of both the market and their products,” making them “well situated to evaluate the accuracy of

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<sup>63</sup> *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of New York*, 447 U.S. 557, 561 (1980) (citing *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762 (1976); *Bates v. State Bar of Arizona*, 433 U.S. 350, 363–364 (1977); *Friedman v. Rogers*, 440 U.S. 1, 11 (1979)).

<sup>64</sup> *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 66 (1983) (citing *Virginia Pharmacy Bd.*, 425 U.S. at 761–62) (quotations omitted).

<sup>65</sup> *Cent. Hudson*, 447 U.S. at 561–62.

<sup>66</sup> *Virginia Pharmacy Bd.*, 425 U.S. at 765.

<sup>67</sup> *Cent. Hudson*, 447 U.S. at 561 (citing *Virginia Pharmacy Bd.*, 425 U.S. at 761–62).

<sup>68</sup> *Virginia Pharmacy Bd.*, 425 U.S. at 771 n.24 (1976) (citation and quotations omitted).

<sup>69</sup> *Cent. Hudson*, 447 U.S. at 562–63 (citing *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 456–457 (1978)).

their messages. . . .”<sup>70</sup> Because of this, the truth of commercial speech “may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else.”<sup>71</sup> Second, because commercial speech promotes the speaker’s own “economic self-interest,” it is “a hardy breed of expression that is not ‘particularly susceptible to being crushed by overbroad regulation.’”<sup>72</sup> Because businesses rely on advertising to help make a profit, it “may be more durable than other kinds” of speech and be unlikely to be “chilled by proper regulation and forgone entirely.”<sup>73</sup> Thus, “the greater objectivity and hardiness of commercial speech . . . may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker.”<sup>74</sup>

In a concurring opinion in *Rubin v. Coors Brewing Co.*, Justice Stevens offered another justification for allowing greater government regulation of commercial speech: “namely, commercial speech’s potential to mislead.”<sup>75</sup> For Justice Stevens, commercial speech could be treated differently under the First Amendment to help “avoid[ ] deception and protect[ ] the consumer from inaccurate or incomplete information in a realm in which the accuracy of speech is generally ascertainable by the speaker.”<sup>76</sup> He explained:

Not only does regulation of inaccurate commercial speech exclude little truthful speech from the market, but false or misleading speech in the commercial realm also lacks the value that sometimes inheres in false or misleading political speech. Transaction-driven speech usually does not touch on a subject of public debate, and thus misleading statements in that context are unlikely to engender the beneficial public discourse that flows from political controversy. Moreover, the consequences of false commercial speech can be particularly severe: Investors may lose their savings, and consumers may purchase products that are more dangerous than they believe or that do not work as advertised. Finally, because commercial speech often occurs in the place of sale, consumers may respond to the

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<sup>70</sup> *Cent. Hudson*, 447 U.S. at 564 n.6 (citing *Bates v. State Bar of Arizona*, 433 U.S. 350, 381 (1977)).

<sup>71</sup> *Virginia Pharmacy Bd.*, 425 U.S. at 771 n.24.

<sup>72</sup> *Cent. Hudson*, 447 U.S. at 564 n.6 (citing *Bates*, 433 U.S. at 381).

<sup>73</sup> *Virginia Pharmacy Bd.*, 425 U.S. at 771 n.24.

<sup>74</sup> *Id.*

<sup>75</sup> *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 494 (1994) (Stevens, J., concurring) (citing *Virginia Pharmacy Bd.*, 425 U.S. at 771–772; *Bates*, 433 U.S. at 383–84; *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 81–83 (1983) (Stevens, J., concurring in judgment)).

<sup>76</sup> *Rubin*, 514 U.S. at 492–93 (Stevens, J., concurring).

falsehood before there is time for more speech and considered reflection to minimize the risks of being misled.<sup>77</sup>

Thus, “[a]lthough some false and misleading statements are entitled to First Amendment protection in the political realm, the special character of commercial expression justifies restrictions on misleading speech that would not be tolerated elsewhere.”<sup>78</sup> As Justice Stewart explained:

In contrast to the press, which must often attempt to assemble the true facts from sketchy and sometimes conflicting sources under the pressure of publication deadlines, the commercial advertiser generally knows the product or service he seeks to sell and is in a position to verify the accuracy of his factual representations before he disseminates them. The advertiser’s access to the truth about his product and its price substantially eliminates any danger that government regulation of false or misleading price or product advertising will chill accurate and nondeceptive commercial expression. There is, therefore, little need to sanction “some falsehood in order to protect speech that matters.”<sup>79</sup>

The *Central Hudson* court observed that the reason for granting commercial speech First Amendment protection “is based on the informational function of advertising.”<sup>80</sup> Accordingly restricting or prohibiting inaccurate commercial speech does not raise First Amendment issues,<sup>81</sup> meaning “the government can “regulate commercial speech to ensure that it is not false, deceptive, or misleading[.]”<sup>82</sup> However, where commercial speech “is neither misleading nor related to unlawful activity,” it is protected by the First Amendment.<sup>83</sup> The *Central Hudson* court then laid out a four-part test for determining if government regulation of commercial speech is constitutional. First, the commercial speech at issue “must concern lawful activity and not be misleading.” Second, the government interest to be served by the

<sup>77</sup> *Id.* at 496 (1994) (Stevens, J., concurring) (citing *Ohralik v. Ohio State Bar Ass’n.*, 436 U.S. 447, 457–458 (1978) (distinguishing in-person attorney solicitation of clients from written solicitation)).

<sup>78</sup> *Rubin*, 514 U.S. at 495 (Stevens, J., concurring) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)).

<sup>79</sup> *Virginia Pharmacy Bd.*, 425 U.S. at 777–778 (Stewart, J., concurring) (quoting *Gertz*, 418 U.S. at 341).

<sup>80</sup> *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of New York*, 447 U.S. 557, 563 (1980) (citing *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978)).

<sup>81</sup> *Cent. Hudson*, 447 U.S. at 563.

<sup>82</sup> *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 432 (1993) (Blackmun, J., concurring) (citing *Virginia Pharmacy Bd.*, 425 U.S. at 771–72).

<sup>83</sup> *Cent. Hudson*, 447 U.S. at 564.

regulation must be substantial. Third, the government regulation must directly advance that governmental interest. Fourth, the regulation must be no “more extensive than is necessary to serve that interest.”<sup>84</sup> This is known as the *Central Hudson* test for the constitutionality of government restrictions on commercial speech.

How exactly is speech determined to be commercial? In a subsequent case, *Bolger v. Youngs Drug Products Corp.*,<sup>85</sup> the Supreme Court laid out some factors to help determine when speech could be classified as commercial.<sup>86</sup> At issue in *Bolger* was a federal law which “prohibit[ed] the mailing of unsolicited advertisements for contraceptives.”<sup>87</sup> Youngs Drug Products, which made and sold contraceptives, challenged the law as it was seeking to mail unsolicited pamphlets to the public including information about its products, as well as about the availability and desirability of contraceptives in general.<sup>88</sup>

In determining the validity of the government restriction at issue, the Court first considered whether Youngs’ mailings constituted commercial speech. In doing so, it observed that just because the pamphlets were “conceded to be advertisements clearly does not compel the conclusion that they are commercial speech.”<sup>89</sup> Similarly, the pamphlets’ “reference to a specific product does not by itself render the pamphlets commercial speech.”<sup>90</sup> Lastly, “the fact that Youngs has an economic motivation for mailing the pamphlets” was “insufficient by itself” to conclude they constituted commercial speech.<sup>91</sup> However, the combination of all three of these characteris-

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<sup>84</sup> *Id.* at 566.

<sup>85</sup> 463 U.S. 60 (1983).

<sup>86</sup> *Id.* at 66.

<sup>87</sup> *Id.* at 61.

<sup>88</sup> *Id.* at 62.

<sup>89</sup> *Id.* at 66 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 265–266 (1964)).

<sup>90</sup> *Bolger*, 463 U.S. at 66 (citing *Associated Students for Univ. of Cal. at Riverside v. Attorney General*, 368 F.Supp. 11, 24 (C.D. Cal. 1973)).

<sup>91</sup> *Bolger*, 463 U.S. at 67 (citing *Bigelow v. Virginia*, 421 U.S. 809, 818 (1975); *Ginzburg v. United States*, 383 U.S. 463, 474 (1966); *Thornhill v. Alabama*, 310 U.S. 88 (1940)). “The third *Bolger* factor . . . asks whether the speaker acted *primarily* out of economic motivation, not simply whether the speaker had *any* economic motivation.” *Ariix, LLC v. NutriSearch Corp.*, 985 F.3d 1107, 1116 (9th Cir. 2021) (citing *Procter & Gamble Co. v. Amway*, 242 F.3d 539, 552–53 (5th Cir. 2001) (“The question whether an economic motive existed is more than a question whether there was an economic incentive for the speaker to make the speech; the *Bolger* test also requires that the speaker acted substantially out of economic motivation.”) (emphasis in original)). In addition, “economic motivation is not limited simply to the expectation of a direct commercial transaction with consumers. . . .

tics provided strong support for concluding that they were “properly characterized as commercial speech.”<sup>92</sup> The Court came to this conclusion about Youngs’ pamphlets despite “the fact that they contain discussions of important public issues such as venereal disease and family planning.”<sup>93</sup> The Court made it clear that advertising which includes information that “‘links a product to a current public debate’ is not thereby entitled to the constitutional protection afforded noncommercial speech.”<sup>94</sup>

However, the *Bolger* court did state in a footnote that “a different conclusion may be appropriate in a case where the pamphlet advertises an activity itself protected by the First Amendment,” so that the advertisement would be entitled to the same level of First Amendment protection as non-commercial speech.<sup>95</sup> That could mean movie advertising is entitled to full First Amendment protection as artistic expression (which includes movies) is clearly protected by the First Amendment. As one court has observed:

First Amendment guarantees of freedom of speech and expression extend to all artistic and literary expression, whether in music, concerts, plays, pictures or books. . . . Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee.<sup>96</sup>

Similarly, in an oft-cited passage, the Supreme Court recognized in the 1951 case of *Burstyn v. Wilson* that movies communicated ideas and were deserving of full First Amendment protection:

It cannot be doubted that motion pictures 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 a political or social doctrine to the subtle shaping of thought which characterizes all political expression. The importance of motion pictures as an organ of public opinion

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Importantly, the type of economic motivation is not the focus; rather, the crux is on whether the speaker had an adequate economic motivation so that the economic benefit was the primary purpose for speaking.” *Ariix*, 985 F.3d at 1117.

<sup>92</sup> *Bolger*, 463 U.S. at 67.

<sup>93</sup> *Id.* at 67–68.

<sup>94</sup> *Id.* at 68 (citing *Central Hudson Gas & Electric Corp. v. Public Service Comm’n of New York*, 447 U.S. 557, 563, n. 5 (1980)).

<sup>95</sup> *Bolger*, 463 U.S. at 67 n.14 (1983) (citing *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (advertisement for religious book cannot be regulated as commercial speech); *Jamison v. Texas*, 318 U.S. 413 (1943)).

<sup>96</sup> *McCullum v. CBS, Inc.*, 202 Cal. App. 3d 989, 999 (Cal. Ct. App. 1988) (internal quotations and citations omitted).

is not lessened by the fact that they are designed to entertain as well as to inform.<sup>97</sup>

Does the *Bolger* court's observation about advertising for fully protected First Amendment activities maybe being entitled to full First Amendment protection as well apply to trailers and other film advertising? The Supreme Court has never explicitly elaborated on the meaning and applicability of this observation, and the Court has never directly addressed the question of whether advertising for movies and other fully protected entertainment is entitled to full First Amendment protection. Lower courts that have considered the issue have ruled both ways: some have ruled that commercial speech should be fully protected in these circumstances,<sup>98</sup> while other have ruled that it should not.<sup>99</sup> That question is considered in the next section of this article, primarily by examining the cases cited in the *Bolger* footnote to support the Court's assertion, as well as Supreme Court cases since that time which have dealt with commercial speech restrictions involving protected First Amendment activities. Discussed first is a Ninth Circuit case which also considered the cases cited in the *Bolger* footnote.<sup>100</sup>

#### IV. THE MEANING OF THE *BOLGER* FOOTNOTE ABOUT FULL PROTECTION FOR COMMERCIAL SPEECH

The Ninth Circuit Court of Appeals considered the question of the appropriate level of First Amendment protection for advertising of protected entertainment products in *Charles v. City of Los Angeles*.<sup>101</sup> At issue in that case was a billboard proposed to be publicly displayed by Wayne Charles and Fort Self Storage (Appellants) advertising the television program "E! News," which depicted the show's logo and pictures of the show's hosts,

<sup>97</sup> *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952).

<sup>98</sup> *See, e.g.*, *Lacoff v. Buena Vista Publ'g, Inc.*, 705 N.Y.S.2d 183, 186–187 (N.Y. Sup. Ct. 2000); *Montana v. San Jose Mercury News, Inc.*, 34 Cal. App. 4th 790 (1995); *Guglielmi v. Spelling-Goldberg Prods.*, 25 Cal. 3d 860 (1979); *Page v. Something Weird Video*, 960 F. Supp. 1438 (C.D. Cal. 1996); *Cher v. Forum Int'l, Ltd.*, 692 F.2d 634 (9th Cir. 1982), cert. denied, 462 U.S. 1120 (1983).

<sup>99</sup> *See, e.g.*, *Serova v. Sony Music Entertainment*, 13 Cal. 5th 859, 515 P.3d 1 (2022); *Keimer v. Buena Vista Books, Inc.*, 75 Cal.App.4th 1220 (1999) (holding that the identical advertisements as those in *Lacoff* constituted commercial speech); *Charles v. City of Los Angeles*, 697 F.3d 1146, 1153 (9th Cir. 2012); *Rezec v. Sony Pictures Ent., Inc.*, 116 Cal.App.4th 135 (Cal. Ct. App. 2004).

<sup>100</sup> Those cases are *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) and *Jamison v. Texas*, 318 U.S. 413 (1943).

<sup>101</sup> *Charles v. City of Los Angeles*, 697 F.3d 1146, 1151 (9th Cir. 2012).



Ryan Seacrest and Giuliana Rancic.<sup>102</sup> The City of Los Angeles classified the sign as commercial, which subjected it to far more extensive regulation than if it had been classified as noncommercial.<sup>103</sup> Appellants challenged this determination, arguing that signs displaying content for entertainment products should be treated as noncommercial speech.<sup>104</sup> The issue for the Ninth Circuit Court of Appeals in this case was thus, “whether truthful advertisements for expressive works protected by the First Amendment are inherently noncommercial in nature.”<sup>105</sup> The court observed that commercial speech had more limited protection, and was subject to greater government regulation than noncommercial speech.<sup>106</sup> The court further observed that “in many areas ‘the boundary between commercial and noncommercial speech has yet to be clearly delineated.’”<sup>107</sup>

Applying the *Bolger* factors discussed above, the Court first determined that the sign at issue did in fact constitute commercial speech.<sup>108</sup> Appellants then argued that advertisements for entertainment products “*always* go beyond a bare proposal for a commercial transaction because they also ‘promote the ideas, expression, and content contained in the works and thus they are too entitled to full First Amendment protection.’”<sup>109</sup> To support this position, Appellants pointed to the *Bolger* Court’s statement that advertising for protected First Amendment activities may also be entitled to that same level of protection.<sup>110</sup> The court, after examining the cases cited by the *Bolger* court to support its observation, *Murdock v. Pennsylvania*<sup>111</sup> and *Jamison v. Texas*,<sup>112</sup> concluded that Appellant’s interpretation of that statement was incorrect.<sup>113</sup> The court observed that the cited cases concerned religious speech, and explained that in both cases, “the Court overturned the convictions of Jehovah’s Witnesses who had been prosecuted for religious speech that solicited donations, sometimes in exchange for religious texts. While

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<sup>102</sup> *Id.* at 1150.

<sup>103</sup> *Id.* at 1149.

<sup>104</sup> *Id.* at 1150.

<sup>105</sup> *Id.* at 1151.

<sup>106</sup> *Id.* (quoting and citing Fla. Bar v. Went For It, Inc., 515 U.S. 618, 623, (1995) (internal quotation marks and alterations omitted)).

<sup>107</sup> *Charles*, 697 F.3d at 1151 (citing Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180, 1184 (9th Cir. 2001)).

<sup>108</sup> *Charles*, 697 F.3d at 1151–52 (quotations omitted).

<sup>109</sup> *Id.* at 1152 (quotations omitted) (emphasis in original).

<sup>110</sup> *Id.* at 1152 (quoting and citing *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 67 n.14 (1983)).

<sup>111</sup> 319 U.S. 105 (1943).

<sup>112</sup> 318 U.S. 413 (1943).

<sup>113</sup> *Charles*, 697 F.3d at 1152–53.

the religious speech at issue in both cases bore some of the hallmarks of commercial speech, it was also unquestionably part of a protected religious activity.”<sup>114</sup>

At issue in *Murdock v. Pennsylvania* was a Jeannette, Pennsylvania city ordinance that required those engaging in solicitation in the city to obtain a license from the city and pay fees to the city.<sup>115</sup> The law was challenged by Jehovah’s Witnesses, who had gone door to door in the city “distributing literature and soliciting people to ‘purchase’ certain religious books and pamphlets.”<sup>116</sup> As part of these activities, the Jehovah’s Witnesses also played a record espousing their religious views.<sup>117</sup> The Jehovah’s Witnesses were arrested for engaging in these activities without first obtaining a license.<sup>118</sup> The *Murdock* court observed:

The hand distribution of religious tracts is an age-old form of missionary evangelism — as old as the history of printing presses. It has been a potent force in various religious movements down through the years. This form of evangelism is utilized today on a large scale by various religious sects whose colporteurs carry the Gospel to thousands upon thousands of homes and seek through personal visitations to win adherents to their faith. It is more than preaching; it is more than distribution of religious literature. It is a combination of both. Its purpose is as evangelical as the revival meeting. This form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits. It has the same claim to protection as the more orthodox and conventional exercises of religion. It also has the same claim as the others to the guarantees of freedom of speech and freedom of the press.<sup>119</sup>

The *Murdock* court went on to observe that despite the fact that religious literature was “sold” by the Jehovah’s Witnesses it “does not transform evangelism into a commercial enterprise. If it did, then the passing of the collection plate in church would make the church service a commercial project. The constitutional rights of those spreading their religious beliefs through the spoken and printed word are not to be gauged by standards governing retailers or wholesalers of books.”<sup>120</sup> This led the Court to the conclusion that the Jehovah’s Witnesses were engaged in a religious venture, rather than a commercial one.<sup>121</sup> To support this conclusion, the *Murdock*

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<sup>114</sup> *Id.* at 1152.

<sup>115</sup> 319 U.S. 105, 106 (1943).

<sup>116</sup> *Id.* at 106--07.

<sup>117</sup> *Id.* at 107.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 108--09.

<sup>120</sup> *Id.* at 111.

<sup>121</sup> *Id.*

court also pointed to a decision by the Iowa Supreme Court that described the same “selling activities” by members of Jehovah’s Witnesses as being “‘merely incidental and collateral’ to their ‘main object which was to preach and publicize the doctrines of their order.’”<sup>122</sup> The Court found that conclusion applicable to the case at hand.<sup>123</sup>

The Ninth Circuit in *Charles* also looked to the Supreme Court’s holding in *Jamison v. Texas*,<sup>124</sup> observing that in that case, “the Court drew a similar distinction between purely commercial handbills and handbills that were distributed as part of one’s religious pursuits[.]”<sup>125</sup> In that case, Jamison, also a member of Jehovah’s Witnesses, was charged with violating a Dallas, Texas ordinance that prohibited the distribution of handbills on city streets.<sup>126</sup> The contents of the handbill included an invitation to attend a gathering in a city park to hear a public address by a leader of Jehovah’s Witnesses on the topic of “Peace, Can It Last.”<sup>127</sup> The handbill also contained a description of “two books which explained the Jehovah’s Witnesses’ interpretation of the Bible and set out their religious views,” which were offered for a 25-cent contribution.<sup>128</sup>

The city argued that the handbill’s containing the offer of the books for sale made the city’s prohibition on the distribution of handbills permissible. The Court disagreed.<sup>129</sup> The Court acknowledged that the government “can prohibit the use of the streets for the distribution of purely commercial leaflets, even though such leaflets may have ‘a civic appeal, or a moral platitude’ appended.”<sup>130</sup> However, the government “may not prohibit the distribution of handbills in the pursuit of a clearly religious activity merely because the handbills invite the purchase of books for the improved understanding of the religion or because the handbills seek in a lawful fashion to promote the raising of funds for religious purposes.”<sup>131</sup>

After its examination of these two cases, the Ninth Circuit in *Charles* explained that:

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<sup>122</sup> *Murdock*, 319 U.S. at 112 (citing *State v. Mead*, 230 Iowa 1217, 300 N. W. 523, 524 (1941)).

<sup>123</sup> *Id.*

<sup>124</sup> 318 U.S. 413 (1943).

<sup>125</sup> *Charles v. City of L.A.*, 697 F.3d 1146, 1153 (9th Cir. 2012).

<sup>126</sup> *Jamison*, 318 U.S. at, 413.

<sup>127</sup> *Id.* at 414.

<sup>128</sup> *Id.* at 414–15.

<sup>129</sup> *Id.* at 416.

<sup>130</sup> *Id.* at 417 (1943) (citing *Valentine v. Chrestensen*, 316 U.S. 52, 55 (1942)).

<sup>131</sup> *Jamison*, 318 U.S. at 417.

In both decisions, the Court drew a sharp contrast between the actions of ordinary, commercial booksellers and the activities of Jehovah's Witnesses, who distribute literature as part of a religious mandate of evangelism. In neither case did the Court imply that ordinary advertisements for books were themselves noncommercial; indeed, the cases suggest the opposite conclusion.<sup>132</sup>

The *Charles* court concluded that “[f]airly read in combination with the decisions it cites, footnote 14 in *Bolger* provides no support for Appellants’ position” that entertainment advertising should be entitled to the same full First Amendment protection as the entertainment products themselves.<sup>133</sup>

The Supreme Court has never explicitly explained or elaborated on the meaning of its statement in footnote 14 of *Bolger*. Since the time of that decision, however, there have been instances in which the Court has found what would otherwise be considered commercial speech to be fully protected. In these cases, the court relied on the fact that the speech-concerned activities themselves were fully protected by the First Amendment. Significantly for the present question, those cases have been limited to government attempts to regulate charitable solicitation, and it has justified the application of full First Amendment protection to charitable solicitation by the fact that the commercial speech and fully protected speech in those cases were so “inextricably intertwined,” that it would be impractical to try to separate the different types of speech from each other to apply different First Amendment standards to them. Those cases are examined next.

Inextricable intertwining was found by the Court in *Village of Schaumburg v. Citizens for a Better Environment*.<sup>134</sup> At issue in that case was validity “of a municipal ordinance prohibiting the solicitation of contributions by charitable organizations that do not use at least 75 percent of their receipts for ‘charitable purposes,’ those purposes being defined to exclude solicitation expenses, salaries, overhead, and other administrative expenses.”<sup>135</sup> Challenging the regulation was *Citizens for a Better Environment* (CBE), a non-profit organization with “the purpose of promoting ‘the protection of the environment.’”<sup>136</sup> To help achieve its purpose, CBE employed canvassers who went door-to-door “to distribute literature on environmental topics and answer questions of an environmental nature when posed; solicit contributions to financially support the organization and its programs; [and] receive grievances and complaints of an environmental nature regarding

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<sup>132</sup> *Charles v. City of L.A.*, 697 F.3d 1146, 1153 (9th Cir. 2012).

<sup>133</sup> *Id.*

<sup>134</sup> 444 U.S. 620 (1980).

<sup>135</sup> *Id.* at 622.

<sup>136</sup> *Id.* at 624.

which CBE may afford assistance in the evaluation and redress of these grievances and complaints.”<sup>137</sup>

The Court discussed prior cases involving government restrictions on the charitable solicitation of funds,<sup>138</sup> which led the Court to the following conclusion:

Prior authorities . . . clearly establish that charitable appeals for funds, on the street or door to door, involve a variety of speech interests – communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes – that are within the protection of the First Amendment. Soliciting financial support is undoubtedly subject to reasonable regulation but the latter must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease.<sup>139</sup>

To the *Schaumburg* Court, it was “clear” that “charitable solicitations in residential neighborhoods are within the protections of the First Amendment.”<sup>140</sup> Treating the speech addressed by the regulation as fully protected,<sup>141</sup> the Court found the regulations to be “constitutionally overbroad.”<sup>142</sup>

The Court came to a similar conclusion in another case involving government restrictions on charitable solicitation, *Riley v. Federation of the Blind of North Carolina*.<sup>143</sup> At issue in that case was a law that, *inter alia*, limited the fees professional fundraisers could earn for soliciting charitable donations.<sup>144</sup> The Court observed that prior precedents had established that fundraising was fully protected by the First Amendment.<sup>145</sup> The state argued that even so, the challenged portion of its law “regulates only commercial speech because it relates only to the professional fundraiser’s profit from the solicited contribution.”<sup>146</sup> The state argued that because of this, the Court

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<sup>137</sup> *Id.* at 625.

<sup>138</sup> *Id.* at 628–32.

<sup>139</sup> *Id.* at 632.

<sup>140</sup> *Id.* at 633.

<sup>141</sup> *Id.* at 637. (citing *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620 (1976); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978)).

<sup>142</sup> *Schaumburg*, 444 U.S. at 620.

<sup>143</sup> 487 U.S. 781 (1988).

<sup>144</sup> *Id.* at 794.

<sup>145</sup> *Id.* at 787–89.

<sup>146</sup> *Id.* at 795.

should apply its “more deferential commercial speech principles” to the law at issue.<sup>147</sup>

The *Riley* court’s conclusion analysis on this point is similar to that in the *Murdock* and *Jamison* cases involving religious solicitation just discussed. The *Riley* court observed that “solicitation is characteristically intertwined with informative and perhaps persuasive speech[.]”<sup>148</sup> The Court likewise observed that, “where the solicitation is combined with the advocacy and dissemination of information, the charity reaps a substantial benefit from the act of solicitation itself.”<sup>149</sup> The Court went on to find the fully protected and commercial speech elements here to be “inextricably intertwined,” leading it to treat the entire speech as fully protected.<sup>150</sup> The justification for this was that “where, as here, the component parts of a single speech are inextricably intertwined, we cannot parcel out the speech, applying one test to one phrase and another test to another phrase. Such an endeavor would be both artificial and impractical. Therefore, we apply our test for fully protected expression.”<sup>151</sup>

What the Court seems to be saying is that the purpose of the religious or charitable solicitation is greater than simply raising money. In the act of seeking financial support for their causes, these speakers are also spreading the word about those causes in the hopes of persuading others to them. Even when the speakers are unsuccessful at raising money, they might still be successful in gaining support for their causes through the impact and persuasiveness of their speech. As the Court has observed, “charities often are combining solicitation with dissemination of information, discussion, and advocacy of public issues, an activity clearly protected by the First Amendment[.]”<sup>152</sup>

Nowhere in Supreme Court opinions is there any indication that there should be a categorical rule that advertising or commercial speech for activities protected by the First Amendment should be automatically entitled to the same full First Amendment protection as the underlying activities. The Court in *Bolger* only said that there *may* be such situations.<sup>153</sup> As has been

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<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 796 (1988) (quoting and citing *Schaumburg*, 444 U.S. at 632).

<sup>149</sup> *Riley*, 487 U.S. at 798 (1988) (citing *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 963 (1984); *Schaumburg*, 444 U.S. at 635).

<sup>150</sup> *Riley*, 487 U.S. at 796

<sup>151</sup> *Id.*

<sup>152</sup> *Secretary of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 961 (1984).

<sup>153</sup> *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 67 n.14 (1983) (citing *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (advertisement for religious book cannot be regulated as commercial speech); *Jamison v. Texas*, 318 U.S. 413 (1943)).

discussed, the only situations where the Court has actually come to this conclusion have involved cases of religious or charitable solicitation. The Court has never come to this conclusion in a case involving advertising of entertainment products, such as movies, despite their being protected by the First Amendment.

At least one court has recognized a significant problem with a rule that entertainment advertising should categorically receive full First Amendment protection. In *Rezec v. Sony Pictures Entertainment*, Sony was accused, *inter alia*, of false advertising for creating a fake film reviewer and attributing laudatory reviews about Sony films to the fake reviewer in the advertising for those films.<sup>154</sup> Sony argued that “because the films themselves are noncommercial speech, so are the advertisements.”<sup>155</sup> The court rejected this argument, observing that “[u]nder Sony’s absolutist approach, every film advertisement, no matter how false, would be outside the scope of consumer protection laws.”<sup>156</sup>

Instead, commercial speech for protected entertainment products should only receive full protection when inextricable intertwining exists. In fact, it seems that the principle described in the *Bolger* footnote has evolved into the “inextricable intertwining” test. As the Ninth Circuit observed, “In neither [*Murdock* or *Jamison*] did the Court imply that ordinary advertisements for books were themselves noncommercial; indeed, the cases suggest the opposite conclusion.”<sup>157</sup> While the speech involving religious solicitation in those cases included commercial elements, the Court did not separate out those elements, but rather considered the entire speech—including both the noncommercial and commercial elements—to be fully protected.<sup>158</sup> While the Court did not use the term “inextricable intertwining” in these early cases, that seems to be the concept on which the Court based its decisions.

However, the Supreme Court (and seemingly lower courts for that matter) has not provided explicit tests or factors to help determine when commercial and fully protected speech are inextricably intertwined. The Court has stated that inextricable intertwining is present when courts “cannot parcel out the speech, applying one test to one phrase and another test to another phrase,” as this would “be both artificial and impractical.”<sup>159</sup> Alternatively, “the two components of speech can be easily separated, [meaning]

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<sup>154</sup> 116 Cal.App.4th 135 (Cal. Ct. App. 2004).

<sup>155</sup> *Riley*, 487 U.S. at 142.

<sup>156</sup> *Id.*

<sup>157</sup> *Charles v. City of Los Angeles*, 697 F.3d 1146, 1153 (9th Cir. 2012).

<sup>158</sup> *Jamison*, 318 U.S. at 416-17; *Murdock*, 319 U.S. at 108-13.

<sup>159</sup> *Riley*, 487 U.S. at 796.

they are not ‘inextricably intertwined.’”<sup>160</sup> A more descriptive, but not any more helpful formulation of the test that has been offered by the courts is that “[i]f ‘[n]o law of man or of nature makes it impossible’ to present the noncommercial aspects of the speech without the commercial aspects, then the noncommercial speech is not inextricably intertwined with the commercial speech.”<sup>161</sup> Thus, courts will simply examine the speech at issue to determine whether or not the commercial and noncommercial elements are inextricably intertwined.

Having considered the First Amendment issues and standards involved in the advertising of movies generally, the article now returns to the *Yesterday* trailer lawsuit to examine Judge Wilson’s ruling on the First Amendment issues implicated in that case.

#### V. JUDGE WILSON’S RULING ON THE FIRST AMENDMENT ISSUES IN THE *YESTERDAY* CASE

Defending itself against allegations of deceptive advertising in *Woulfe v. Universal*, Universal argued that its trailer for *Yesterday* did not constitute commercial speech because the trailer went beyond simply proposing a commercial transaction by promoting the movie’s availability.<sup>162</sup> Universal argued that it was significant that the trailer did not contain “price and quantity information, which is within the core notion of commercial speech.”<sup>163</sup> The *Yesterday* trailer, Universal argued, including the segment featuring Ana De Armas, is an “artistic, expressive work in its own right” that “uses images, music, and dialogue to convey in just three minutes the story arc and themes of the feature film to which it relates.”<sup>164</sup> As a result, Universal argued, the trailer “bears all the hallmarks of noncommercial

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<sup>160</sup> Hunt v. City of Los Angeles, 638 F.3d 703, 715 (9th Cir. 2010).

<sup>161</sup> Ariix, LLC v. NutriSearch Corp., 985 F.3d 1107, 1119 (9th Cir. 2021) (citing Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 474-75, (1989) (finding that the home economics elements of Tupperware sales presentations were not inextricably intertwined with the sales pitches done in campus dormitories)).

<sup>162</sup> Def.’s Reply in Supp. of Def.’s Suppl. Br. Regarding Application of the First Amendment to Pls.’ 2d Am. Compl. (Oct. 20, 2022), at 1, *Woulfe v. Universal City Studios LLC*, No 2:22-cv-00459-SVW-AGR, 2022 WL 18216089, at \*14 (C.D. Cal Dec. 20, 2022) (citing *Mattel, Inc. v. MCA Recs., Inc.*, 296 F.3d 894, 906 (9th Cir. 2002) (quoting *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1184 (9th Cir. 2001) [hereinafter Def.’s Oct. 20 Reply])).

<sup>163</sup> Def.’s Oct. 20 Reply, *supra* note 1, at 1 (citing *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 422 (1993) (quoting *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983) (quotations omitted))).

<sup>164</sup> Def.’s Oct. 20 Reply, *supra* note 1, at 1.



speech’”<sup>165</sup> The court disagreed that this resulted in the trailer’s being non-commercial: “If that were the case, almost any commercial for a product that chooses to entice consumers by telling a story would be considered a non-commercial work.”<sup>166</sup> Acknowledging that there was some creativity in the trailer, the court concluded that “this creativity does not outweigh the commercial nature of [the] trailer. At its core, a trailer is an advertisement designed to sell a movie by providing consumers with a preview of the movie.”<sup>167</sup>

The court then applied the *Bolger* factors to determine that the trailer is commercial speech. First, the plaintiffs had plausibly alleged that the trailer is an advertisement, as it was “used to advertise the movie and solicit purchases and rentals of the movie[.]”<sup>168</sup> The trailer also referred to a specific product: the movie *Yesterday*.<sup>169</sup> Finally, the plaintiffs had sufficiently alleged that “Universal had ‘an adequate economic motivation so that the economic benefit was the primary purpose for speaking,’”<sup>170</sup> namely enticing consumers to pay to view or purchase the film.<sup>171</sup>

Universal argued that the plaintiffs could not show that the primary reason the particular scene featuring De Armas was included in the trailer “was for economic, as opposed to artistic, reasons.”<sup>172</sup> The court’s response to this was that “Universal’s frame of reference is too narrow. The commercial speech in question is not the specific segment in question, but the trailer *as a whole*. Viewed in this light, it is a reasonable inference that the trailer as a whole was made for the primary purpose of selling tickets, copies, and rentals of the movie.”<sup>173</sup> As a result, the court concluded that “[p]laintiffs have plausibly pled that the trailer is commercial speech.”<sup>174</sup>

However, this did “not end the Court’s inquiry,” as the court noted that “[c]ommercial speech can lose its commercial character when it is ‘in-

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<sup>165</sup> *Woulfe v. Universal City Studios LLC*, No. 2:22-cv-00459-SVW-AGR, 2022 WL 18216089, at \*19 (C.D. Cal Dec. 20, 2022) (citation omitted).

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* (citations omitted).

<sup>169</sup> *Id.* at 19.

<sup>170</sup> *Id.* at 20 (citing *Ariix, LLC v. NutriSearch Corp.*, 985 F.3d 1107, 1117 (9th Cir. 2021)).

<sup>171</sup> *Id.* at 230 (citation omitted).

<sup>172</sup> *Id.* (citation omitted).

<sup>173</sup> *Id.* (citing *Charles v. City of Los Angeles*, 697 F.3d 1146, 1151 (9th Cir. 2012) (emphasis in original)).

<sup>174</sup> *Id.* (citing *Incarcerated Ent., LLC v. Warner Bros. Pictures*, 261 F. Supp. 3d 1220, 1228 (M.D. Fla. 2017); *Charles*, 697 F.3d at 1151 (9th Cir. 2012)).

extricably intertwined' with fully protected speech."<sup>175</sup> However, if it is not impossible to separate the noncommercial elements of the speech from the commercial elements, then there is no inextricable intertwining.<sup>176</sup> The court observed that "the 'inextricably intertwined' test operates as a narrow exception to the general principle that speech meeting the *Bolger* factors will be treated as commercial speech."<sup>177</sup>

One argument advanced by Universal to support a finding of inextricable intertwining was the "expressive elements" in the scene featuring De Armas "are interwoven with the rest of the expressive story the trailer tells and are not 'easily separable' without undermining the continuity of the story that the rest of the trailer tells."<sup>178</sup> The court rejected this argument, again explaining that for purposes of this analysis, the court's focus was on the trailer as a whole, rather than the individual scenes that comprised the trailer. Because the trailer as a whole constituted commercial speech, so did the individual scenes within it, leading the court to find that "the fact that the [scene featuring De Armas] (commercial speech) is inextricably intertwined with the rest of the trailer (commercial speech) does not result in the conclusion that commercial speech and non-commercial speech are inextricably intertwined."<sup>179</sup>

Universal also argued the trailer "is entwined with protected speech" because it "reflects the content of the movie, which is 'plainly entitled to full First Amendment protection.'"<sup>180</sup> The court was not persuaded that the trailer's using scenes from the movie meant that there was inextricable intertwining here. The court observed that "[w]hile the scenes from the movie would be non-commercial expressive speech when used as part of the movie, when these scenes are used in the context of the trailer, they become commercial speech."<sup>181</sup> The court thus distinguished scenes in the movie itself from the same scenes appearing in a trailer for the film. According to the court, those scenes would be fully protected in the movie, but receive less protection when appearing in the trailer. To the court, the trailer could be

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<sup>175</sup> *Id.* (citing *Ariix*, 985 F.3d at 1119).

<sup>176</sup> *Id.* (citing *Ariix*, 985 F.3d at 1119) (internal quotation omitted).

<sup>177</sup> *Id.* (citing *Dex Media W., Inc. v City of Seattle*, 696 F.3d 952, 958 (9th Cir. 2012)).

<sup>178</sup> Def.'s Oct. 20 Reply, *supra* note 1, at 2 (citing *Ariix*, 985 F.3d at 1119).

<sup>179</sup> *Woulfe v. Universal City Studios LLC*, No. 2:22-cv-00459-SVW-AGR, 2022 WL 18216089, at \*31 (C.D. Cal Dec. 20, 2022).

<sup>180</sup> Def.'s Oct. 20 Reply, *supra* note 1, at 2 (citing *Forsyth v. Motion Picture Ass'n of Am., Inc.*, No. 16-cv-00935-RS, 2016 WL 6650059, at \*3 (N.D. Cal. Nov. 10, 2016)).

<sup>181</sup> *Woulfe*, 2022 WL 18216089, at \*20 (citing *Zauderer v. Off. of Disciplinary Couns. Of Supreme Ct. of Ohio*, 471 U.S. 626, 637 fn.7 (1985)).

easily separated from the movie, meaning the two are not inextricably intertwined, despite the fact that the trailer contained much of the same content as the movie.

To support the conclusion that speech that is fully protected in one context may lose that protection when it appears in a commercial context, the court cited the Supreme Court's holding in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*.<sup>182</sup> In that case, the Court observed that a lawyer's advertising contained "statements regarding the legal rights of persons injured by the Dalkon Shield [contraceptive device] that, in another context, would be fully protected speech." Despite this fact, the advertisement was still considered to be commercial speech.<sup>183</sup>

Universal then argued that applying consumer protection laws to the trailer would violate the First Amendment.<sup>184</sup> The court, however, found the First Amendment to be inapplicable here, "because Plaintiffs have sufficiently alleged that the trailer is false, commercial speech."<sup>185</sup> The court observed that "while commercial speech is generally subject to intermediate scrutiny, the Constitution affords no protection to false or misleading commercial speech."<sup>186</sup> As the Supreme Court stated in *Zauderer*, the government is "free to prevent the dissemination of commercial speech that is false, deceptive, or misleading[.]"<sup>187</sup>

In sum, using the *Bolger* factors, the court found that the *Yesterday* trailer constituted commercial speech, which is subject to less heightened First Amendment scrutiny than is applicable to fully protected speech, such as the movie itself.<sup>188</sup> Further, the trailer and the movie were determined not to be inextricably intertwined, even though much of the same content was found in both. This was due to the fact that the trailer existed independently of the movie, so the two could be separated, with different First Amendment standards applied to each.<sup>189</sup> Finally, because the trailer was plausibly alleged to be deceptive, this removed the trailer from even the more limited

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<sup>182</sup> *Id.* (citing *Zauderer*, 471 U.S. at 637 fn.7 ("Appellant's advertising contains statements regarding the legal rights of persons injured by the Dalkon Shield that, in another context, would be fully protected speech. That this is so does not alter the status of the advertisements as commercial speech.")).

<sup>183</sup> *Zauderer*, 471 U.S. at 638.

<sup>184</sup> *Woulfe v. Universal City Studios LLC*, No. 2:22-cv-00459-SVW-AGR, 2022 WL 18216089, at \*18 (C.D. Cal Dec. 20, 2022).

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

<sup>186</sup> *Id.* (citing *First Resort, Inc. v. Herrera*, 860 F3d 1263, 1271 (9th Cir. 2017)).

<sup>187</sup> *Zauderer*, 471 U.S. at 6387 fn.7 (citing *Friedman v. Rogers*, 440 U.S. 1 (1979)).

<sup>188</sup> *Woulfe*, 2022 WL 18216089, at \*19–20.

<sup>189</sup> *Id.* at \*20.

First Amendment protections provided to commercial speech.<sup>190</sup> However, this ruling did not mean that Universal was liable for deceptive advertising here; it only meant that the plaintiffs could proceed with their lawsuit.<sup>191</sup> The question of whether Universal is liable here is yet to be determined.

## VI. IMPLICATIONS OF THE RULING

Judge Wilson's holding correctly applied First Amendment principles to the case. Courts have come to different conclusions on the issue of whether commercial speech for products protected by the First Amendment should also be granted full First Amendment protection,<sup>192</sup> as suggested by the Court in *Bolger*.<sup>193</sup> However, the foregoing examination of relevant Supreme Court cases demonstrates that the Court has not in fact created a categorical rule on these issues. Instead, that principle has been limited by the Court to cases involving religious and charitable solicitation.<sup>194</sup> The Court has never specifically suggested that it should apply to cases involving advertising of artistic expression or entertainment. Thus, Judge Wilson was correct to allow this case to proceed.<sup>195</sup>

In *Woulfe*, Universal argued that if Judge Wilson allowed the case to proceed, it could open the floodgates to all sorts of complaints by consumers who believed that movie trailers did not accurately represent the films they promoted. Universal argued that if it were held liable here, "a trailer would be stripped of full First Amendment protection and subject to burdensome litigation anytime a viewer claimed to be disappointed with whether and how much of any person or scene they saw in the trailer was in the final film, whether the movie fit into the kind of genre they claimed to expect; or any of an unlimited number of disappointments a viewer could claim."<sup>196</sup> Universal argued that a holding for the plaintiffs in this case would "open the floodgates to claims [whose] answers depend purely on subjective judgments about what representations a trailer purportedly makes, or how or

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<sup>190</sup> *Id.* at \*19.

<sup>191</sup> *Id.* at \*21.

<sup>192</sup> See *supra*, notes 98–99 and accompanying text.

<sup>193</sup> *Bolger*, 463 U.S. at 67–68 n.14 (1983).

<sup>194</sup> See *supra*, notes 101–7 and accompanying text.

<sup>195</sup> "The case will now proceed to discovery and a motion for class certification." Gene Maddaus, *Ana de Armas Fans' Lawsuit Puts Studios at Risk Over Deceptive Trailers*, VARIETY (Dec. 21, 2022 2:13pm PT), <https://variety.com/2022/film/news/ana-de-armas-yesterday-false-advertising-1235467419/> [<https://perma.cc/P22P-HZEL>]. Lawyers are scheduled to "convene again for the case on" April 3, 2023. See France-Presse, *supra* note 13.

<sup>196</sup> Def.'s Suppl. Br. (Oct. 10, 2022)], *supra* note 2, at 6–7.

when it makes them.”<sup>197</sup> The court was “not convinced” by this argument, pointing out that such lawsuits would be limited by the “reasonable consumer test[,] which ‘requires a probability that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled.’”<sup>198</sup>

As the *Woulfe* court observed, deceptive advertising laws provide elements to help limit liability in situations like those posited by Universal. Federal laws against deceptive advertising are enforced by the Federal Trade Commission (FTC or Commission). The Federal Trade Commission Act (FTCA) prohibits unfair and deceptive trade practices that affect commerce.<sup>199</sup> The law gives the FTC the authority to investigate and take action against deceptive trade acts and practices.<sup>200</sup> However, “private plaintiffs cannot sue under the FTCA – they must allege a violation under a similar state law.”<sup>201</sup> Notably, every state has laws against deceptive trade practices under which consumers may file suit.<sup>202</sup> In fact, in *Woulfe*, the plaintiffs alleged the *Yesterday* trailer violated both California’s and Maryland’s laws against deceptive trade practices.<sup>203</sup>

Furthermore, many states have adopted the Federal Trade Commission’s rules on deceptive advertising as their own laws, which are referred to as “Little FTC Acts.”<sup>204</sup> These state laws “often expand on the FTCA and

<sup>197</sup> Def.’s Req. for Notice of Mots. (May 5, 2022), at 15, *Woulfe v. Universal City Studios LLC*, No. 2:22-cv-00459-SVW-AGR, 2022 WL 18216089, at \*9 (C.D. Cal Dec. 20, 2022).

<sup>198</sup> *Woulfe*, 2022 WL 18216089, at \*14 (citing *Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 951 (Cal. 2002)).

<sup>199</sup> 15 U.S.C. § 45(a) (2023).

<sup>200</sup> 15 U.S.C. § 45(a)(2) & (b) (2023); see also Federal Trade Commission, FTC Policy Statement on Deception (Oct. 14, 1983), [https://www.ftc.gov/system/files/documents/public\\_statements/410531/831014deceptionstmt.pdf](https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf) [<https://perma.cc/YDK8-TFPA>].

<sup>201</sup> Elad Botwin, *Deception Unknown: A Hard Look at Deceptive Trade Practices in the Video Game Industry*, 32 LOY. CONSUMER L. REV. 115, 128 (2019).

<sup>202</sup> *Id.* at 137 (citing CAROLYN L. CARTER, CONSUMER PROTECTION IN THE STATES: A 50-STATE REPORT ON UNFAIR AND DECEPTIVE ACTS AND PRACTICES STATUTES (2009), available at [https://www.nclc.org/wp-content/uploads/2022/09/UDAP\\_rpt.pdf](https://www.nclc.org/wp-content/uploads/2022/09/UDAP_rpt.pdf) [<https://perma.cc/2XGK-V6H5>]).

<sup>203</sup> *Woulfe v. Universal City Studios LLC*, No. 2:22-cv-00459-SVW-AGR, 2022 WL 18216089, at \*3 (C.D. Cal Dec. 20, 2022).

<sup>204</sup> Botwin, *supra* note 2010, at 137 (citing Justin Hakala, *Follow-On State Actions Based on the FTC’s Enforcement of Section 5*, WAYNE STATE UNIV. LAW SCH., WORKING PAPER GRP., (Oct. 9, 2008), [https://www.ftc.gov/sites/default/files/documents/public\\_comments/section-5-workshop-537633-0002/537633-00002.pdf](https://www.ftc.gov/sites/default/files/documents/public_comments/section-5-workshop-537633-0002/537633-00002.pdf) [<https://perma.cc/U9US-XRMM>]).

add in private causes of action, allowing individuals and organizations to file suit for deceptive trade practices.”<sup>205</sup> In addition, “[i]n most states, state courts and federal courts in the jurisdiction have either followed or adopted the FTC’s standards for deceptive trade practices.”<sup>206</sup> For this reason, the FTC’s rules on deceptive trade practices will be discussed to illustrate how those rules limit the claims that plaintiffs could successfully make against allegedly deceptive trailers.

The FTCA declares deceptive trade practices to be unlawful.<sup>207</sup> The law defines a “false advertisement” as one which is “misleading in a material respect.”<sup>208</sup> In determining whether an ad is misleading, the law directs the FTC to take into account “representations made or suggested by” an ad, as well as “the extent to which the advertisement fails to reveal” material facts.<sup>209</sup> The issue for the Commission “is whether the act or practice is likely to mislead, rather than whether it causes actual deception.”<sup>210</sup> However, the FTC generally does “not pursue cases involving obviously exaggerated or puffing representations, i.e., those that the ordinary consumers do not take seriously.”<sup>211</sup>

To determine if false or deceptive advertising has occurred, the FTC considers three primary elements.<sup>212</sup> For there to be a finding of deceptive advertising, there must first “be a representation, omission or practice that is likely to mislead the consumer.”<sup>213</sup> In considering this, the FTC will examine the “entire advertisement, transaction or course of dealing.”<sup>214</sup> Deception can occur not only when a material misrepresentation is made or when inaccurate information is provided, but also when material information is omitted, “the disclosure of which is necessary to prevent the claim, practice, or sale from being misleading.”<sup>215</sup>

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<sup>205</sup> Botwin, *supra* note 2010, at 137 (2019) (citing Hakala, *supra* note 193; CARTER, *supra* note 191).

<sup>206</sup> Botwin, *supra* note 190, at 137 (2019) (citing Zlotnick v. Premier Sales Grp., Inc., 480 F.3d 1281, 1284 (11th Cir. 2007) (quoting PNR, Inc. v. Beacon Prop. Mgmt., Inc., 842 So. 2d 773, 777 (Fla. 2003)).

<sup>207</sup> 15 U.S.C. § 45(a) (2023); *see also* F.T.C. Policy Statement, *supra* note 189.

<sup>208</sup> 15 U.S.C. § 55(a)(1) (2023); *see also* F.T.C. Policy Statement, *supra* note 189, at 1.

<sup>209</sup> 15 U.S.C. § 55(a)(1) (2023); *see also* F.T.C. Policy Statement, *supra* note 189, at 1.

<sup>210</sup> F.T.C. Policy Statement, *supra* note 189, at 2.

<sup>211</sup> *Id.* at 4.

<sup>212</sup> *Id.* at 1.

<sup>213</sup> *Id.* (emphasis omitted).

<sup>214</sup> *Id.* at 2.

<sup>215</sup> *Id.*

Second, the challenged representation or practice is examined “from the perspective of a consumer acting reasonably in the circumstances,” or when the practice is directed to a particular group, then from the perspective of that particular group.<sup>216</sup> The practice “must be likely to mislead reasonable consumers under the circumstances.”<sup>217</sup> Because the consumer’s reaction must be reasonable, businesses are not liable for every interpretation or reaction consumers may have.<sup>218</sup> However, to be reasonable, the consumer’s “interpretation or reaction does not have to be the only one. When a seller’s representation conveys more than one meaning to reasonable consumers, one of which is false, the seller is liable for the misleading interpretation.”<sup>219</sup>

The third requirement is that “the representation, omission, or practice must be a ‘material’ one.”<sup>220</sup> To be material, a representation or practice must be “one which is likely to affect a consumer’s choice of or conduct regarding a product. In other words, it is information that is important to consumers.”<sup>221</sup> Omitted information is material when the “seller knew, or should have known, that an ordinary consumer would need omitted information to evaluate the product or service, or that the claim was false[.]”<sup>222</sup> Materiality can also be found “when evidence exists that a seller intended to make an implied claim[.]”<sup>223</sup> Significantly, a determination that a practice is material “is also a finding that injury is likely to exist. . . . Injury exists if consumers would have chosen differently but for the deception. If different choices are likely, the claim is material, and injury is likely as well. Thus, injury and materiality are different names for the same concept.”<sup>224</sup>

Thus, businesses can be liable for deceptive advertising if their advertising contains a material “representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer’s detriment.”<sup>225</sup> These standards help ensure that the subjective interpretation of a trailer by one person, or even a group of people, will not, by itself, be enough to subject a movie studio to liability for deceptive advertis-

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<sup>216</sup> *Id.* at 1 (emphasis omitted).

<sup>217</sup> *Id.* at 2.

<sup>218</sup> *Id.* at 3.

<sup>219</sup> *Id.* (citations omitted).

<sup>220</sup> *Id.* at 1 (emphasis omitted).

<sup>221</sup> *Id.* at 5.

<sup>222</sup> *Id.* (citation omitted).

<sup>223</sup> *Id.* (citation omitted).

<sup>224</sup> *Id.* at 6.

<sup>225</sup> *Id.* at 2.

ing. Another case in which a movie trailer was alleged to be deceptive helps illustrate this.

In *Deming v. CH Novi LLC*,<sup>226</sup> plaintiff Deming argued that the trailer and other advertising for the 2011 film *Drive* “falsely promoted it as ‘a chase, race, or high speed action driving film,’ similar to *The Fast and the Furious* and that the preview failed to reveal that the film includes ‘many segments of slow paced, interpersonal drama,’ and is ‘an extremely graphically violent film.’”<sup>227</sup> To evaluate Deming’s claim, the court reviewed the trailer and the film, finding the trailer not to be “particularly inconsistent with the content of the film,” and that “[e]very scene displayed in the preview also appeared in the film.”<sup>228</sup> The court found that in addition to the racing scenes depicted in the trailer, the trailer also contained “several scenes with the main character and his neighbor and love interest, indicating that their relationship is a focus of the film.”<sup>229</sup> There were also “several scenes of graphic violence[.]”<sup>230</sup> Ruling against Deming, the court found that “contrary to plaintiff’s assertions, the trailer did not represent the movie to be solely about car racing and most of the scenes in the trailer do not show driving or racing scenes. Furthermore, any affirmative representations the trailer made about being a racing movie were not inaccurate; the movie does contain driving scenes.”<sup>231</sup>

Here, the plaintiff alleged that a trailer was deceptive because she believed the trailer falsely emphasized certain elements of the film as being more prominent in the film than they actually were. While the court did not apply the standards for deceptive advertising discussed above, the thrust of the court’s comparison of the contents of the trailer and the film was that the plaintiff’s interpretation of the trailer was not reasonable. As the court’s holding in this case shows, one person’s subjective interpretation of a trailer will not, by itself, be sufficient to subject a studio to liability for deceptive advertising.

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<sup>226</sup> No. 309989, 2013 WL 5629814 (Mich. Ct. App. Oct. 15, 2013).

<sup>227</sup> *Id.* at 2.

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

<sup>229</sup> *Id.*

<sup>230</sup> *Id.* These included “a scene where the main character smashes a man’s face into the wall of an elevator, another where he repeatedly kicks a man lying on the ground, and third in which he holds a man on the ground and raises a hammer to smash the man’s forehead.” *Id.*

<sup>231</sup> *Id.* Plaintiff Deming further alleged that the film was anti-Semitic, and that the trailer was misleading for excluding any reference to the film’s anti-Semitic nature. The court rejected this as well, finding no support for the plaintiff’s allegation in the film or the trailer. *Id.* at 3.



There are some additional limitations that courts should consider in determining whether movie trailers are deceptive. First, a movie studio should not be liable for deceptive advertising simply because a trailer contains or depicts elements that are not included in the actual film. Returning to the FTC's deceptive advertising elements,<sup>232</sup> there should only be liability if such a trailer would mislead a reasonable consumer about the film's content, and if the misleading representation or omission in the trailer is a material one. For it to be material, it must lead the consumer to make a different choice than if the trailer had not included the misleading representation or omission. This appears to be the case in *Woulfe*, as plaintiffs alleged it was Ana De Armas' scene in the *Yesterday* trailer that persuaded them to rent and watch the movie.<sup>233</sup>

There is another reason that it would not be fair or just to automatically hold studios liable for trailers that include significant elements that turn out not to be present in the final film. That is because “[t]railers are often released well before the final film is finished,” due to the necessity to create and stimulate interest and excitement for films well before their release dates.<sup>234</sup> Since this may be before the final film is complete, a trailer when it is created may accurately promote elements intended to be included in the film. However, in the process of finalizing the film, some of those elements may be cut from the film for artistic or creative reasons, or even for other reasons.<sup>235</sup> Thus, “[t]he necessity to advertise a movie with a long lead time is going to mean there’s always a risk that moments used in the trailer will not end up in the finished film.”<sup>236</sup>

In fact, that appears to be the situation in the present case. The scene featuring De Armas was shot with the intention of including it in the final film, and in fact, was included in an early version of the film shown to test audiences.<sup>237</sup> However, as discussed previously, the scene distracted test audiences from the main romantic story arc in the film, and audiences didn't appreciate the complication that De Armas' character created for that

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<sup>232</sup> See *supra*, notes 212–225 and accompanying text.

<sup>233</sup> Def.'s Suppl. Br. (Oct. 10, 2022), *supra* note 2, at 2–3.

<sup>234</sup> Eric Vespe, *New Ruling Declares Studios Potentially Liable For 'Deceptive' Movie Trailers*, SLASH FILM (Dec. 21, 2022 9:40 PM EST) <https://www.slashfilm.com/1146027/new-ruling-declares-studios-potentially-liable-for-deceptive-movie-trailers/> [<https://perma.cc/VSZ9-ELA9>].

<sup>235</sup> See, e.g., *Missing Trailer Scenes*, TV TROPES, <https://tvtropes.org/pmwiki/pmwiki.php/Main/MissingTrailerScene> [<https://perma.cc/B2A5-ENB5>].

<sup>236</sup> Vespe, *supra* note 223.

<sup>237</sup> Def.'s Suppl. Br. (Oct. 10, 2022), *supra* note 2, at 7 (“the Segment was part of a scene that was ‘shot for inclusion in’ the movie”).

storyline. As a result, producers decided to cut the scene.<sup>238</sup> Thus, the trailer appears to have accurately represented the film at one point, although not the film's final version. While it is beyond the scope of this paper to detail how courts should handle situations such as this, where and when a consumer views a trailer for a film should be a factor in determining whether a consumer is reasonably misled by a trailer that inaccurately reflects a movie's content. The mere existence of such a trailer should not give rise to liability, as trailers released by studios well in advance of a film's release can have a perpetual life online and on social media, when the trailer is shared and reposted by others.

Instead, the focus should be on the role of the studio in providing the trailer at a particular time and in a particular location. For example, the studio should generally not be liable for releasing what turns out to be an inaccurate trailer in material aspects well in advance of the release of the actual film. But if, for example, it were to use that trailer to advertise that film on television or in theaters while the film is playing in theaters, then that could be a more appropriate basis for imposing liability. The same conclusion could be appropriate if that trailer is made available for consumers at the point of purchase for buying or renting a copy of the film. As a studio would be authorizing the outlet that sells or rents copies of the movie to do so, it should also be able to authorize the advertising content that would accompany the film at the point of sale. This is how the plaintiffs in *Woulfe* came to view the allegedly deceptive trailer for *Yesterday*, as it was available for them to view on Amazon, where they rented the film after viewing the trailer.<sup>239</sup>

Finally, one option for studios to protect themselves when releasing trailers before a film has been finalized is to simply disclose that fact in the trailer, although they may be reluctant to do so for artistic reasons or to avoid distracting viewers with a disclaimer while trying to sell them on a film. Videogame makers, whose product also requires long lead times to develop, and whose final products may have differences from how the games were previously advertised, have used this approach.<sup>240</sup> Once again, FTC deceptive advertising rules provide some guidance here. Disclaimers must be

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<sup>238</sup> *Id.* (The scene “was not included in the movie’s final cut because . . . that scene and the particular storyline that it was a part of (Jack developing a relationship with the character Ms. de Armas portrayed) did not fit the creators’ ultimate vision for what they wanted to see in the final film.”)

<sup>239</sup> *Woulfe v. Universal City Studios LLC*, No. 2:22-cv-00459-SVW-AGR, 2022 WL 18216089, at \*3 (C.D. Cal Dec. 20, 2022).

<sup>240</sup> *Vespe*, *supra* note 223.

“legible and understandable.”<sup>241</sup> They may not prevent a finding of deceptive advertising when they are in fine print or when consumers’ attention is otherwise directed away from the disclaimers, for example.<sup>242</sup>

In conclusion, the court’s December 20, 2022, ruling in *Woulfe v. Universal* is significant because it appears to be the first in which a court allowed a lawsuit to proceed in which consumers allege that a movie trailer is misleading for containing elements which are not in the movie itself.<sup>243</sup> Whether Universal is liable here has yet to be determined at the time of this writing. The lawsuit does raise the question of what level of First Amendment protection to be accorded to commercial speech, such as a trailer, that promotes protected First Amendment products, like movies.<sup>244</sup> Due to the Supreme Court’s suggestion in its *Bolger* footnote that full protection for commercial speech may be appropriate in this situation, this has been somewhat of an open question.<sup>245</sup> An examination of the cases cited by the Court to support this assertion,<sup>246</sup> as well as the Court’s commercial speech cases involving protected First Amendment activities since *Bolger* was decided,<sup>247</sup> leads to the conclusion that the Court only meant that full protection should only be afforded to commercial speech when it involves religious and charitable solicitation. It does not appear that the court intended full protection to categorically be applied to commercial speech involving entertainment products. Regardless of the ultimate outcome in *Woulfe v. Universal*, the court was correct in that case to hold that the First Amendment did not automatically protect Universal from liability for its allegedly deceptive trailer.<sup>248</sup>

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<sup>241</sup> F.T.C. Policy Statement, *supra* note 189, at 4.

<sup>242</sup> *Id.*

<sup>243</sup> *Woulfe*, 2022 WL 18216089.

<sup>244</sup> *Id.* at 28.

<sup>245</sup> *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 67 n.14 (1983).

<sup>246</sup> *See supra*, notes 110–133 and accompanying text.

<sup>247</sup> *See supra*, notes 134–1587 and accompanying text.

<sup>248</sup> *Woulfe*, 2022 WL 18216089, at \*32.



## Destroying Defamation

Leslie Y. Garfield Tenzer\*<sup>1</sup>

### ABSTRACT

*Fake News is destroying defamation. The recent proliferation of rushed journalism, online conspiracy theories that almost every news story is, in fact, “Fake News,” have created a desert of veracity. Widespread public skepticism about even the most mainstream Internet reporting means plaintiffs will have difficulty convincing jurors that third parties believed any reported statement to be true. Without such proof, it is almost impossible for a plaintiff to prove the elements of defamation.*

*To establish defamation, a plaintiff must show defendant published an assertion of fact that is false and damages the plaintiff’s reputation. Hyperbolic language or other indications that a statement was not meant to be taken seriously are not actionable. Today’s understanding that everything on the Internet is susceptible to manipulation is destroying defamation.*

*This article explains the unforeseen consequence of labeling news as “fake.” This article begins with a historical review of Fake News, concluding with an understanding of the phenomenon in its current iteration. It follows with a discussion of the tort of defamation. It explores the uniqueness of proving online statements as libel or slander. This article illustrates how plaintiffs bringing defamation claims for Internet statements will have difficulty persuading a judge that the message was factual and not merely hyperbole. Even if the judge finds a statement to be fact, allowing the*

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*issue to move to the jury, a plaintiff in today's Fake News climate is unlikely to convince a jury that a reasonable person would find the statement defamatory. The abundance of fake news, the media's rush to publish, and external attacks on credible journalism have created a heightened sense of questionable reporting among members of society. The potential for defamatory harm is minimal when the veracity of any news story is questionable. This paper argues that the presence of Fake News is a blight on this cause of action that threatens to destroy the tort of defamation.*

## I. INTRODUCTION

Fake News is destroying defamation. The recent proliferation of rushed journalism, online conspiracy theories that almost every news story is in fact "Fake News," have created a desert of veracity. Widespread public skepticism about even the most mainstream Internet reporting means plaintiffs will have difficulty convincing jurors that third parties believed any reported statement to be true. Without such proof, it is almost impossible for a plaintiff to prove the elements of defamation.

To establish defamation, a plaintiff must show that a defendant published an assertion of fact that is false and damages the plaintiff's reputation.<sup>2</sup> The proof required differs depending on the status of the plaintiff. When a public figure sues individuals or media for defamation, they must prove that the defendant made a false statement knowing it was false, or with a reckless disregard for whether it was true.<sup>3</sup> Statements made regarding those who do not have a public presence are actionable upon showing that the statement was false.<sup>4</sup> In either instance, the plaintiff must prove that the defendant's comments were a statement and not an opinion.

The fact/opinion dichotomy has been troublesome for centuries.<sup>5</sup> The Supreme Court, when faced with this issue, acknowledged that hyperbolic

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<sup>2</sup> See *id.* Restatement (Second) of Torts § 577 cmt. a (Am. L. Inst. 1965). ("Any act by which the defamatory matter is intentionally or negligently communicated to a third person is a publication."); see also *Reese v. Barton Healthcare Systems*, 693 F.Supp.2d 1170, 1189 ("Publication, which may be written or oral, is defined as a communication to some third person who understands both the defamatory meaning of the statement and its application to the person to whom reference is made.").

<sup>3</sup> See generally *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (holding that public officials cannot recover damages for defamation without proving that the defendant made the statement with actual malice).

<sup>4</sup> See generally *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (holding that private figures do not need to prove actual malice to recover compensatory damages).

<sup>5</sup> See Rodney W. Ott, *Fact and Opinion in Defamation: Recognizing the Formative Power of Context*, 58 *FORDHAM L. REV.* 761, 761 (1990).

language or other indications that a statement was not meant to be taken seriously are not actionable.<sup>6</sup> Generally, judges, not fact finders, are tasked with deciding whether a potentially defamatory statement is a fact or an opinion.<sup>7</sup> However, where the statement is ambiguous, the determination of whether a statement is fact or opinion is left to the jury.<sup>8</sup> Today, courts tend to label statements on the Internet as opinions rather than facts, given the general understanding that such statements often reflect hyperbole rather than the kind of contemplative, edited thought that had been the hallmark of print media.<sup>9</sup>

Once the judge labels the defendant's words as fact, a jury is responsible for assessing whether the publication of that fact caused harm.<sup>10</sup> Proving

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<sup>6</sup> See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 2 (noting "protection for statements that cannot reasonably be interpreted as stating actual facts about an individual. . . provid[ing] assurance that public debate will not suffer for lack of imaginative expression or the rhetorical hyperbole which has traditionally added much to the discourse of our Nation.") (internal quotation marks omitted).

<sup>7</sup> See *Price v. Viking Penguin, Inc.*, 881 F.2d 1426, 432 (8th Cir. 1989), *cert. denied*, 110 S. Ct. 757 (1990) ("At the outset, we must also consider whether the challenged statements are opinion and therefore absolutely protected . . . . This is a question of law."); *Ollman v. Evans.*, 750 F.2d 970, 978 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985) ("In formulating this analysis, we agree with the overwhelming weight of post-*Gertz* authority that the distinction between opinion and fact is a matter of law."); *Rinaldi v Holt, Rinehart & Winston*, 366 N.E.2d 1299, (1977), *cert. denied*, 434 US 969 (1977) ("Whether a particular statement constitutes fact or opinion is a question of law."); *Michel v. NYP Holding, Inc.*, 816 F.3d 686, 698 (11th Cir. 2016); *Rinsley v. Brandt*, 700 F.2d 1304, 1309 (10th Cir.1983).

<sup>8</sup> See, e.g., *Flowers v. Carville*, 310 F.3d 1118, 1128 (9th Cir. 2002) ("[I]f a statement is 'susceptible of different constructions, one of which is defamatory, resolution of the ambiguity is a question of fact for the jury.'" (quoting *Posadas v. City of Reno*, 851 P.2d 438, 442 (Nev. 1993)); *Hi-Tech Pharmaceuticals, Inc. v. Cohen* 277 F. Supp. 3d 236, 244 ("The determination whether a statement is one of fact or opinion is generally considered a question of law, at least where the statement unambiguously constitutes either fact or opinion. Where the statements at issue could have been understood by the average reader in either sense, however, the issue must be left to the jury's determination." (internal quotation marks and citations omitted)).

<sup>9</sup> See, e.g., *Sandals Resorts Intern. Ltd. v. Google Inc.*, 925 N.Y.S.2d 407, 415 (N.Y. App. Div. 2011); *Kaufman v. Islamic Soc. of Arlington.*, 291 S.W.3d 130, 146–47 (Tex. App. 2009); *Doe v. Cahill*, 885 A.2d 451, 467 (Del. 2005); *Bauer v. Brinkman.*, 954 N.W.2d 778, 4 (Iowa Ct. App. 2020); *Rollins Ranches, LLC v. Watson.*, No. 0:18-cv-03278-SAL, 2021 WL 5355650, at \*10 (D.S.C. Nov. 17, 2021).

<sup>10</sup> See *McLaughlin v. Rosanio, Bailets & Talamo, Inc.*, 751 A.2d 1066, 1071 (N.J. Super. Ct. App. Div. 2000).

harm, however, is problematic in the Fake News Era. The widespread public skepticism about even the most mainstream Internet reporting means plaintiffs will have difficulty convincing jurors that third parties actually believed any reported statement to be true. Without such proof, it is almost impossible for a plaintiff to prove the kind of harm necessary to bring a successful defamation claim.

This article examines the unforeseen consequence of Fake News as it relates to proving defamation. Part I explores the rise of Fake News, concluding with an understanding of fake news in its current iteration.<sup>11</sup> Part II presents an overview of defamation.<sup>12</sup> This section traces the history of defamation, including three relevant Supreme Court decisions and surveys how courts resolve challenged internet posts and comments.<sup>13</sup> Part III measures the likelihood of a plaintiff's success when bringing a defamation case in the era of Fake News.<sup>14</sup> This section acknowledges that plaintiffs bringing defamation claims for Internet statements will first have difficulty persuading a judge that the message was factual, and not an opinion.<sup>15</sup> Even where the issue does make it to a jury, a plaintiff in today's Fake News climate is unlikely to succeed. The abundance of fake news, the media's rush to publish, and external attacks on credible journalism has created a problematization of truth among members of society. The potential for defamatory harm is minimal when the veracity of every news story is questioned. Ultimately, this paper argues that the presence of Fake News is a blight on this cause of action, which, like the credibility of present-day news organizations, threatens to erode defamation to the point of irrelevance.

## II. FAKE NEWS

Fake News journalism is not new. Newspapers have published false stories since the days of the printing press.<sup>16</sup> In the mid-1700s, seditious posters posted fake news concerning King George's ill health to destabilize England's government.<sup>17</sup> Since the mid-1800's newspapers and other media

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<sup>11</sup> See discussion *infra* Part I.

<sup>12</sup> See discussion *infra* Part II.

<sup>13</sup> See discussion *infra* Part II.

<sup>14</sup> See discussion *infra* Part III.

<sup>15</sup> See discussion *infra* Part III.

<sup>16</sup> See *A Brief History of Fake News*, CTR. FOR INFO. TECH. AND SOC'Y AT UC SANTA BARBARA, <https://perma.cc/D9JW-RZT9> (last visited Mar. 5, 2023) ("False and distorted news material isn't exactly a new thing. It's been a part of media history long before social media, since the invention of the printing press.").

<sup>17</sup> Barbara J. Starman, *The Social Historian*, available at <https://perma.cc/D9JW-RZT9> Historians trace false news stories back to 13 BCE. See WILLIAM



outlets have relied on fake news to sell their journalistic efforts.<sup>18</sup> In 1835, *The New York Sun*, published “The Great Moon Hoax,” a news article asserting that an alien civilization lived on the moon.<sup>19</sup> The story catapulted the paper to its status as the leading media outlet of its time.<sup>20</sup>

Fake News refers to any journalistic story that knowingly and intentionally includes untrue factual statements.<sup>21</sup> It is fabricated content that mimics news media information.<sup>22</sup> Oxford English Dictionary defines the term as a verb, meaning “to discredit media reports regarded as partisan or untrustworthy.”<sup>23</sup> Under this definition, fake news means an untruthful story.

Today, many speak of Fake News as a noun. During the 2016 election, then-presidential candidate, Donald Trump, elevated and transformed the term into its current iteration with a series of Tweets criticizing mainstream media outlets by labeling their stories as ‘Fake News.’<sup>24</sup> In tweets such as, “Wow, so many Fake News stories today. No matter what I do or say, they will not write or speak truth. The Fake News Media is out of control!”

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WEIR, HISTORY’S GREATEST LIES: THE STARTLING TRUTHS BEHIND WORLD EVENTS OUR HISTORY BOOKS GOT WRONG, 28–41 (Fair Winds Press 2009) (examining lies and myths that have persisted throughout history and exposing the true story).

<sup>18</sup> See *supra* A Brief History of Fake News, (noting the emergence of “yellow journalism” during the Spanish-American War).

<sup>19</sup> See *id.*

<sup>20</sup> See *id.*

<sup>21</sup> *Fake News*, OXFORD ENG. DICTIONARY (3d ed. 2019) (defining fake news as “news that conveys or incorporates false, fabricated, or deliberately misleading information. . .”). Fake news is broadly defined. Media outlets including The Onion News Paper and The Daily Show intentionally publish fake news as parodies. See Brief for The Onion as Amici Curiae Supporting Petitioner, *Novak v. City of Parma, Ohio, et al.*, 932 F.3d 421 (6th Cir. 2019) (No. 22-293) (urging the Court to hear *Novak v. City of Parma*, which challenges prosecution for publishing a Facebook page parodying the Parma Police Department website). This article contemplates news that is not published with the intention of falsity or parody.

<sup>22</sup> See A Brief History of Fake News, *supra* note 15.

<sup>23</sup> *Fake News*, *supra* note 21.

<sup>24</sup> See Chris Cillizza, *Here’s Donald Trump’s Most Lasting, Damaging Legacy*, CNN (Aug. 30, 2021, 7:06 PM), <https://perma.cc/C7S3-3VWY> (last visited Mar. 5, 2023). Trump labeled “fake news” as the reporting of uncomplimentary things that seemed distracting or insignificant, and especially reports that portrayed him in a negative light instead of highlighting successes that he thought should have been made more prominent. See Jane E. Kirtley, *Getting to the Truth: Fake News, Libel Laws, and “Enemies of the American People”*, A.B.A., <https://perma.cc/C7S3-3VWY> (last visited Sept. 23, 2022) (“[Trump has applied the label of fake news to virtually any media—the “failing” New York Times, NBC, ABC, CBS, CNN, among others—he disagrees with or doesn’t like.”).

Trump used the term to dismiss stories that did not, in his opinion, serve him.<sup>25</sup>

“Pizzagate,” one of the most well-known present-day Fake News stories, illustrates the potential hazards of Fake News.<sup>26</sup> During the 2016 United States presidential election, users of 4chan, an Internet forum known for its extreme content, began speculating that former First Lady, Secretary of State, and presidential candidate Hillary Clinton, together with other prominent Democratic political figures, was coordinating a child trafficking ring out of Comet Ping Pong, a Washington, DC pizzeria.<sup>27</sup> Edgar Madison Welch, a 28-year-old man, read the story, which was widely circulated on Facebook, and drove from his hometown of Salisbury, North Carolina to Comet Ping Pong with an assault weapon and a rifle.<sup>28</sup> Welch, a self-described vigilante, shot open a locked door at Comet Ping Pong pizzeria with his AR-15.<sup>29</sup> Welch acted in response to a “news” story he read on Facebook

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<sup>25</sup> See Chris Cillizza, *Donald Trump just accidentally revealed something very important about his ‘fake news’ attacks*, CNN (May 9, 2018, 10:50 AM), <https://perma.cc/AHN4-ZUEP> (“The point can be summed up in these two words from Trump: ‘negative (Fake).’ To Trump, those words mean the same thing. Negative news coverage is fake news. Fake news is negative news coverage.”). Interestingly enough, Trump claimed that he “coined the term Fake News.” See Michael Schaub, *Trump’s Claim to Have Come Up With the Term ‘Fake News’ is Fake News*, Merriam-Webster Dictionary Says, L.A. TIMES (Oct. 9, 2017), <https://perma.cc/72TB-9LSP>. He did not. See *id.* In response to the suggestion that he did, @merriam-webster.com tweeted: “Our research traces ‘fake news’ back to at least 1890. But we won’t be adding the term to the dictionary. . .yet.” See *id.*; see also Merriam-Webster (@MerriamWebster), TWITTER (Oct. 8, 2017, 10:42 AM).

<sup>26</sup> Michael E. Miller, *Pizzagate’s Violent Legacy*, WASH. POST, (Feb. 16, 2021), <https://perma.cc/R7DE-MSPZ> (“Pizzagate was an early warning of how misinformation can lead to violence.”).

<sup>27</sup> See Kate Samuelson, *What to Know About Pizzagate, the Fake News Story With Real Consequences*, TIME, (Dec. 5, 2016, 12:08 PM), <https://time.com/4590255/pizzagate-fake-news-what-to-know/>.

<sup>28</sup> See Press Release, USADC, North Carolina Man Sentenced to Four-Year Prison Term For Armed Assault at Northwest Washington Pizza Restaurant (Jun. 22, 2017), <https://perma.cc/A4Q3-ZK3N>.

<sup>29</sup> See *id.* Welch was arrested and pled guilty. Sentenced to 4 years in prison and had to pay \$5,744 in restitution for property damage he caused during the incident. See *id.* Fake news stories have persisted throughout the past decade. There have been claims that Senator Ted Cruz is the Zodiac Killer since early 2013. See Jack Moore, *More Evidence Ted Cruz Might be the Zodiac Killer*, GQ (Mar. 17, 2016) <https://perma.cc/75D6-YBT6>. There were reports that people casted votes for the gorilla that was killed at the Cincinnati Zoo, Harambe, in the presidential election. See Doug Criss, *No, Harambe Didn’t Get 11,000 Votes for President*, CNN (Nov. 10,

A Colorado study published in the Human Condition report declared that “Facebook is a central conduit for the transfer of Fake News.”<sup>30</sup> While the most prevalent, Facebook is not the only vehicle for the dissemination of fake news.<sup>31</sup> Twitter is another channel by which fake news is spread. A study by three MIT scholars found that false news stories spread faster on Twitter than true stories, with the former being 70% more likely to be retweeted than the latter.<sup>32</sup> Statista, a statistics portal, found that, as of 2020, almost 40% of those polled had accidentally shared fake news stories.<sup>33</sup>

Sometimes verifiable news spawns such overwhelming Fake News response that it shifts the conversation to a point where accurate reporting is ancillary. Consider the recent defamation trial in which actor Johnny Depp, sued model, Amber Heard, alleging that she defamed him in a 2018 Washington Post op-ed.<sup>34</sup> The trial played out concurrently in the courtroom and

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2016, 1:44 PM), <https://perma.cc/X473-L8SW>. One of the most popular stories circulated in 2019 was that representative Alexandria Ocasio-Cortez (AOC) proposed a nationwide ban to motorcycles. See Samantha Putterman, *Says Alexandria Ocasio-Cortez is proposing a “nationwide motorcycle ban.”* POLITIFACT (Jun. 28, 2019), <https://perma.cc/N6DE-2CKN>. While many fake news stories are about politicians, there are many fake news stories circulating that are not. In October of 2014, the National Reporter published an article claiming that the town of Purdon, Texas had been quarantined after a local family tested positive for Ebola. See Nsikan Akpan, *The Very Real Consequences of Fake News Stories and Why Your Brain Can’t Ignore Them*, PBS, (Dec. 5, 2016, 6:06 PM), <https://perma.cc/DF92-MJTW>. The story was shared 330,000 times on Facebook, despite the story being satire because satire began resembling legitimate news sources. See *id.*

<sup>30</sup> Toby Hopp et al, *Why Do People Share Ideologically Extreme, False, and Misleading Content on Social Media? A Self-Report and Trace Data-Based Analysis of Countermedia Content Dissemination on Facebook and Twitter*, 46 HUMAN COMMUNICATIONS 357, 378 (2020).

<sup>31</sup> The Colorado study suggested that more fake news is spread on Facebook as opposed to Twitter. See *id.* at 377. Further, the type of news shared among the platforms is different. There is a positive correlation between the sharing of fake news on Facebook and ideological extremity. See *id.* at 370. Further, the less a person trusts mainstream news media, the more likely they are to share a fake news story on Facebook. See *id.* at 371. Individuals who share fake news on Twitter, however, are more likely to have less social trust. See *id.* at 370-71.

<sup>32</sup> See Soroush Vosoughi et al., *The Spread of True and False News Online*, 359 SCIENCE 1146, 1149 (2018).

<sup>33</sup> See *Share of people who have ever accidentally shared fake news or information on social media in the United States as of December 2020*, STATISTA, <https://perma.cc/6PTZ-W9T4> (last visited Mar. 5, 2023). Between 5-10% were unsure whether they had ever shared a false story. See *id.*

<sup>34</sup> Depp v. Heard, CL-2019 02911(Cir. Ct. Fairfax Co. March 1, 2019). See, Depp v. Heard CL—2019 02911(Cir. Ct. Fairfax Co. Aug. 10, 2019)(counter-

on social media platforms.<sup>35</sup> During the trial, an unusually large number of “Fake News” reports circulated across social media platforms, particularly TikTok, Twitter, and YouTube, attacking Ms. Heard at a disproportionality larger rate than Mr. Depp.<sup>36</sup> Prior to the jury verdict, and with acknowledgement to the vitriolic “reports” legal commentators seemed to agree that Ms. Heard had presented a strong case and was likely to win “despite the strong social media presence against her.”<sup>37</sup> Ms. Heard, however, lost at trial.<sup>38</sup> And while there is no proof that the intensity of these social media

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claim by Amber Heard). See, e.g., Amber Heard, Opinion, *Amber Heard: I Spoke Up Against Sexual Violence – And Faced Our Culture’s Wrath. That Has To Change.*, WASH. POST (Dec. 18, 2018, 5:59 P.M.), [https://www.washingtonpost.com/opinions/ive-seen-how-institutions-protect-men-accused-of-abuse-heres-what-we-can-do/2018/12/18/71fd876a-02ed-11e9-b5df-5d3874f1ac36\\_story.html](https://www.washingtonpost.com/opinions/ive-seen-how-institutions-protect-men-accused-of-abuse-heres-what-we-can-do/2018/12/18/71fd876a-02ed-11e9-b5df-5d3874f1ac36_story.html). Heard countersued. See Kallhan Rosenblatt, *Jhonny Depp and Amber Heard Defamation Trial: Summary and Timeline*, NBC NEWS (Apr. 17, 2022, 3:13 P.M.), <https://www.nbcnews.com/pop-culture/pop-culture-news/johnny-depp-amber-heard-defamation-trial-summary-timeline-rcna26136>.

<sup>35</sup> See, e.g., Danielle Braff, *How Social Media Hijacked the Depp v. Heard Defamation Trial*, 108 ABA J. 24 (2022); Anne Marie Tomchak, *Amber Heard Has Called Out the ‘Unfair’ Role of Social Media in the Defamation Case—Here’s How Algorithms Shaped Our Views During the Trial*, GLAMOUR (June 15, 2022), <https://www.glamourmagazine.co.uk/article/johnny-depp-amber-heard-trial-social-media-algorithms>; Neal Rothschild & Sara Fischer, *America More Interested in Depp-Heard Trial than Abortion*, AXIOS (May 17, 2022), <https://bit.ly/3P44ovg> [<https://perma.cc/CR58-HWM9>] (“The defamation trial between actors and former spouses Johnny Depp and Amber Heard quickly amassed more online attention than some of the country’s biggest and most pressing news stories, including the leaked Supreme Court decision and Russia’s war in Ukraine.”); Julia Jacobs, *Amber Heard: I “Stand by Every Word” of Testimony in the Defamation Trial*, N.Y. TIMES, (June 14, 2022) <https://www.nytimes.com/2022/06/14/movies/amber-heard-today-show.html> (acknowledging the immense negative chatter during the trial).

<sup>36</sup> See e.g., Manasa Narayan, *The Daily Wire Spent Thousands of Dollars Promoting Anti-Amber Heard Propoganda*, VICE (May 19, 2022), <https://www.vice.com/en/article/3ab3yk/daily-wire-amber-heard-johnny-depp>; James Creedon, *Truth or Fake: Fake news from the Johnny Depp-Amber Heard Defamation Trial*, FRANCE 24 (May 15, 2018), <https://www.france24.com/en/tv-shows/truth-or-fake/20220518-fake-news-from-the-johnny-depp-amber-heard-defamation-trial>.

<sup>37</sup> Anastasia Tsioulcas & Ayesha Rascoe, *On Social Media, Johnny Depp is Winning Public Sympathy Over Amber Heard*, NPR LAW (May 23 2022), <https://www.npr.org/2022/05/23/1100685712/on-social-media-johnny-depp-is-winning-public-sympathy-over-amber-heard>.

<sup>38</sup> Julia Jacobs & Adam Bednar, *Johnny Depp Jury Finds That Amber Heard Defamed Him in Op-Ed*, N.Y. TIMES (June 1, 2022), <https://www.nytimes.com/2022/06/01/arts/depp-heard-trial.html>.

Fake News stories impacted the jury, the way many learned about the trial points to an area of online influencing that goes beyond ‘disinformation’.

Social media is not the only culprit for the spread of false news stories. Consider the Great Canada Hoax. In May 2021, hundreds of news agencies, including The New York Times,<sup>39</sup> NPR,<sup>40</sup> The Vancouver Sun, and The Washington Post,<sup>41</sup> reported the discovery of a mass grave of indigenous children in Canada. The story created a media frenzy. According to the reports, which were made via print, broadcast, and social media, ground penetrating radar had uncovered the remains of 215 school-age children at a former Residential School for Indigenous Children.<sup>42</sup> In fact, this event never happened. Academics and journalists debunked the story the following year.<sup>43</sup>

The mistrust caused by the phenomenon of Fake News goes hand-in-hand with partisan politics.<sup>44</sup> A 2020 Pew Research Center study revealed that partisan polarization in the use and trust of media sources has widened over the past five years.<sup>45</sup> The 2020 study compared user trust with a similar study it had conducted in 2015 and found that Republicans have grown increasingly alienated from most of the more established news sources, while Democrats’ confidence in those sources remains stable, and, in some cases,

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<sup>39</sup> See Ian Austen, ‘Horrible History’: Mass Grave of Indigenous Children Reported in Canada, N.Y. TIMES (May 28, 2021), <https://perma.cc/53VE-757W>.

<sup>40</sup> See *More Graves Found at New Site, Canadian Indigenous Group Says*, NPR, (July 1, 2021, 8:15 AM), <https://perma.cc/44VD-AJ6K>.

<sup>41</sup> See Amanda Coletta, *Remains of 215 Indigenous Children Discovered at Former Canadian Residential School Site*, WASH. POST (May 28, 2021, 1:19 PM), <https://perma.cc/Y4DQ-754K>.

<sup>42</sup> See Austen, *supra* note 36.

<sup>43</sup> See Dana Kennedy, ‘Biggest Fake News Story in Canada’: Kamloops Mass Grave Debunked by Academics, N.Y. POST, (May 22, 2022, 7:20 AM), <https://perma.cc/UJ5J-QZU7>.

<sup>44</sup> See *Fake News*, *supra* note 21 (noting that the current iteration of fake news targets stories, “which serve a particular political or ideological purpose”). A 2014 report from the Pew Research Center demonstrates that the number of Americans who express consistently conservative or consistently liberal opinions has doubled over the past two decades from 10% to 21%. See *Political Polarization in the American Public*, PEW RSCH. CTR. (June 12, 2014), <https://perma.cc/UJ5J-QZU7>. Additionally, the study noted that partisan animosity has also increased. See *id.* In each political party, the number of people with a highly negative view of the opposing party has more than doubled since 1994. See *id.* “Most of these intense partisans believe the opposing party’s policies ‘are so misguided that they threaten the nation’s well-being.’” See *id.*

<sup>45</sup> See Mark Jurkowitz et al., *U.S. Media Polarization and the 2020 Election: A Nation Divided*, PEW RSCH. CTR. (Jan. 24, 2020), <https://perma.cc/H8VX-R2U6>.

has strengthened.<sup>46</sup> Of the 36 news sources the report asked about, Republicans mistrusted 24.<sup>47</sup> Democrats, however, tended to trust more sources.<sup>48</sup>

Fake News is a bi-partisan problem.<sup>49</sup> People from all sides of the political spectrum agree that Fake News is bad for democracy.<sup>50</sup> According to the Pew findings, 64% of those surveyed believe Fake News presents a risk of reading fabricated stories.<sup>51</sup> The potential for false information leaves

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<sup>46</sup> See *id.* (“Overall, Republicans and Republican-leaning independents view many heavily relied on sources across a range of platforms as untrustworthy. At the same time, Democrats and independents who lean Democratic see most of those sources as credible and rely on them to a far greater degree. . .”).

<sup>47</sup> See Amy Mitchell et al., *Political Polarization & Media Habits*, PEW RSCH. CTR. (Oct. 21, 2014), <https://perma.cc/Y565-DQHY>.

<sup>48</sup> See *id.* (“[T]hose with consistently liberal views. . . [e]xpress more trust than distrust of 28 of the 23 news outlets in the survey.”). When considering trustworthiness, 65% of Republicans put their trust in Fox News. See Jurkowitz, *supra* note 42 (noting that after Fox, ABC earns the next level of trust, with 33% of republicans). CNN is the news source for Democrats, with 67% of Democrats trusting the media outlet.

<sup>49</sup> See Amelia Tate, *Fake News is a Problem for the Left, Too*, THE NEW STATESMAN (Feb. 11, 2017), <https://perma.cc/8W3R-CV5L>.

<sup>50</sup> See *id.* In 2020, The Pew Research Center, spurred by the 2016 election and Covid-19 pandemic, conducted another study on how American’s navigated fake news in our society. See Amy Mitchell et al., *How Americans Navigated the News in 2020: A Tumultuous Year in Review*, PEW RSCH. CTR. 1 (Feb. 22, 2021), <https://perma.cc/5TBQ-VN4L>. The report found that news consumers who consistently turned only to outlets with right-leaning audiences were more likely to hear about and believe in certain fake news claims. See *id.* at 21. The study also found “made-up news and misinformation have become labels applied to pieces of news and information that do not fit into people’s preferred worldview or narrative – regardless of whether the information was actually made up.” *Id.* The Pew Report suggested a strong bias based on political persuasion. According to the report, 60% of U.S. adults overall said they felt made-up news had a major impact on the outcome of the 2016 election, and an additional 26% said it had a minor impact. See *id.* at 22. Republicans were more likely than Democrats to say it had a major impact (69% vs. 54%). See *id.* In addition, nearly three-quarters of U.S. adults overall (72%) said they had come across at least “some” election news that seemed completely made up, though far fewer – 18% – felt the made-up news they saw was aimed directly at them. See *id.* Democrats who relied on only news outlets with left-leaning audiences were the most likely group (67%) to say that voter fraud has not been a problem associated with mail-in ballots. See *id.* However, the percentage decreased to 43% when compared to democrats who relied on some of these sources but also others. See *id.* Democrats who didn’t rely on any of the major news outlets with left-leaning audiences expressed greater uncertainty on this issue than other Democrats at 32%. See *id.*

<sup>51</sup> See Michael Barthel et al., *Many Americans Believe Fake News is Sowing Confusion*, PEW RSCH. CTR. (Dec. 15, 2016), <https://perma.cc/E77U-NYPV>; see also *AllSides Media*

readers with an unsettled feeling. The threat of Fake News, arguably, dilutes readers' trust in whether what they read about someone is actually true.

Fake News is not only problematic where politics is concerned. Data proves that misinformation and false narratives have proliferated when it comes to Covid-19 stories.<sup>52</sup> Facebook users shared a video over 27,000 times proclaiming the Covid-19 vaccine contains a tracking microchip that will be injected into those receiving the inoculation.<sup>53</sup> Others assert Sino-phobic and anti-Semitic theories, asserting that the disease was a bioweapon created by disenfranchised groups.<sup>54</sup>

Fake News, in its current iteration, is polarizing, provocative, and problematic.<sup>55</sup> In 2017, Tim Berners-Lee, credited as one of the World Wide Webs creators, sees Fake News, both the journalistic stories and the label, as a disturbing trend that could destroy the Internet.<sup>56</sup> He cites social media's prevalence and the increasing trend among journalists to circulate news stories they don't realize are false as issues creating the threat.<sup>57</sup> Whether one circulates a false news article, or a label designating an accurate story as false, the specter of Fake News creates and widens a credibility gap among readers, leaving them questioning everything they read.

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*Bias Chart*, ALLSIDES, <https://perma.cc/G8R7-T28G> (last visited Oct. 2, 2022) (noting the ratings bias of social media organizations).

<sup>52</sup> See, e.g., *Misinformation Accompanies U.S. Expansion of Boosters*, FIRST DRAFT, (Nov. 22, 2021), <https://perma.cc/G4LM-7TWZ> ("As the United States is poised to roll out its Covid-19 vaccine booster program for all adults, misleading information on social media around this latest development is likely to become the focal point of the next round of vaccine misinformation."); Raymond Biesinger, *Fake News and Distrust of Science Could Lead to Global Epidemics*, WIRED (Sept. 1, 2018, 8:00 AM), <https://perma.cc/8K4V-QDHL>, (observing in 2018 that distrust in the news could result in a worldwide pandemic).

<sup>53</sup> Reuters Staff, *Fact check: RFID microchips will not be injected with the COVID-19 vaccine, altered video features Bill and Melinda Gates and Jack Ma*, December 4, 2020 at <https://perma.cc/D4BT-FN2X>.

<sup>54</sup> ADL, *Coronavirus: Prominent Conspiracies*, <https://perma.cc/QV7R-UPA4>.

<sup>55</sup> See Shelley Hepworth, *Tracking Trump-Era Assault on Press Norms*, COLUM. JOURNALISM REV. (May 25, 2017), <https://www.cjr.org/watchdog/tracking-trump-assault-press-freedom-media-attack.php> ("The fear among some press freedom experts is that even small incidents can erode the media's power to do its job, and create a trickle-down effect in which Trump's words embolden others at the state and local levels.").

<sup>56</sup> See *World Wide Web Creator Tim Berners-Lee Targets Fake News*, BBC, (Mar. 12, 2017), <https://www.bbc.com/news/technology-39246810>.

<sup>57</sup> See *id.*

### III. DEFAMATION

Truth is at the core of every defamation cause of action. For a plaintiff that means proving that the reader believed a false statement to be true enough to change their opinion of the plaintiff in a way that caused the plaintiff economic or emotional harm.<sup>58</sup> For a defendant, that means using truth as a defense.<sup>59</sup> However, proving the truth is problematic in a society conditioned to question the veracity of any post or news story by this Fake News era. The shadow of Fake News that permeates most reports dilutes the likelihood that third parties will unequivocally believe the falsehood spoken against a plaintiff.

#### A. *The Elements of Defamation*

The Restatement (Second) of Torts defines defamation as “an unprivileged false and defamatory statement concerning another.”<sup>60</sup> The tort provides a remedy for those who suffer reputational or emotional damage from a third-party communication.<sup>61</sup> At its core, “communication is defamatory if it so harms the reputation of another as to lower them in the estimation of the community or to deter a third person from associating or dealing with them.”<sup>62</sup>

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<sup>58</sup> See *Ringler Assocs. Inc. v. Maryland Cas. Co.*, 80 Cal.Rptr.2d 136, 149 (Cal. Ct. App. 2000) (“In all cases of alleged defamation, whether libel or slander, the truth of the offensive statements or communications is a complete defense against civil liability.” (quoting *Smith v. Maldonado*, 85 Cal.Rptr.2d 397, 403 (Cal. Ct. App. 1999))).

<sup>59</sup> See Peter B. Kutner, *What is Truth?: True Suspects and False Defamation*, 19 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 1, 4 (2008) (“It is fundamental to the common law of defamation that truth is a complete defense to liability. There is no liability for publication of matter that is found to be true in its defamatory meaning or meanings.”).

<sup>60</sup> RESTATEMENT (SECOND) OF TORTS § 558 (AM. L. INST. 1977). To create liability for defamation there must be:

- (a) a false and defamatory statement concerning another;
- (b) an unprivileged publication to a third party;
- (c) fault amounting at least to negligence on the part of the publisher [with respect to the act of publication]; and
- (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

<sup>61</sup> See *id.* §§ 621-22.

<sup>62</sup> *Id.* § 559.



Historically, courts divided defamation into libel, which is written, and slander,<sup>63</sup> which is spoken. The difference between the actions for slander and libel is predicated on the notion that slander is spoken and therefore fleeting, soon forgotten and therefore less likely to permanently injure.<sup>64</sup> Libel is more contemplative and, therefore, according to Justice Cardozo, “deliberate and more malicious, more capable of circulation in distant places, and consequently more likely to be permanently injurious.”<sup>65</sup>

Where defamatory posts are concerned, American courts have taken a normative approach to the libel/slander distinction on the Internet. As a general rule, Internet postings that injure one’s reputation are libel, in large part because they appear on computer screens.<sup>66</sup> Posts made on Twitter, Facebook, Snapchat, and other platforms are representations “to the eye.”<sup>67</sup> Although they may be easily deleted and modified, these posts are much more fixed than the spoken word because individuals may preserve messages just by printing them. As the California Supreme Court observed, “the only difference between the publications [on Internet chat boards] and traditionally libelous publications is the defendants’ choice to disseminate the writings electronically.”<sup>68</sup>

Courts are not as decided as to whether challenged videos, as opposed to a post, constitute libel or slander. The Iowa Supreme Court has focused on the video as a fixed medium.<sup>69</sup> For this reason, it ruled that videos fall under the libel category of defamation.<sup>70</sup> In contrast, a Ninth Circuit district court allowed a slander challenge to proceed against a defendant who posted potentially defamatory videos on a city’s official social media channel.<sup>71</sup>

Many courts, however, have chosen to discard the libel/slander distinction where videos are concerned, instead considering whether the posted content is defamatory without assigning the wrongful social media torts to one of the tort’s subsets. In *Gilmore v. Jones*, a case in which the plaintiff

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<sup>63</sup> See Leslie Y. Garfield Tenzer, as Leslie Yalof Garfield, *The Death of Slander*, 35 Colum. J.L. & Arts 17, 19 (2011).

<sup>64</sup> See *id.*

<sup>65</sup> *Tonini v. Cevasco*, 46 P. 103, 104 (Cal. 1896). See also *id.* at 23.

<sup>66</sup> See *Varian Med. Sys., Inc. v. Delfino*, 6 Cal. Rptr. 3d 325 (Cal. Ct. App. 2003), *rev’d*, 106 P.3d 958 (Cal. 2005) (noting that Internet postings are classified as libel); see also Garfield, *supra* note 67, at 29 (discussing the opinion in *Varian* and noting that it was one of the first cases to consider how Internet communication should be treated).

<sup>67</sup> See Garfield, *supra* note 60, at 29.

<sup>68</sup> See *id.* at 29–30 (citing *Varian Med. Sys., Inc.*, 6 Cal. Rptr. 3d at 343).

<sup>69</sup> *Hoffman v. Clark*, 975 N.W.2d 656 (Iowa. 2022).

<sup>70</sup> *Id.*

<sup>71</sup> *Nicita v. Holladay*, 2021 WL 8363204.

charged radio host Alex Jones with posting social media videos accusing the plaintiff of joining a “deep state” coup, the District Court for the Western District of Virginia ruled that the plaintiff stated a defamation claim against the defendant.<sup>72</sup> The Nevada Supreme Court considered whether videos posted on a video-sharing website constitutes defamation without acknowledging the libel/slander distinction.<sup>73</sup>

Although libel is sometimes considered the more serious wrong because of its permanence, both libel and slander create a defamation cause of action proof of which grants plaintiffs a remedy.<sup>74</sup> Defendants, however, can claim truth as a complete defense to either type of defamation. A statement need not be absolutely true in every detail to protect a defendant from liability.<sup>75</sup> In *Curtis Publishing Co. v. Butts*, the Supreme Court ruled that so long as the defendant can show that it “substantially portrayed”<sup>76</sup> the truth in an article, a libel suit could not stand.<sup>77</sup> Substantial truth overlooks minor inaccuracies and focuses upon the meaning conveyed by a published statement. Under this rationale, a mother lost her libel suit against the Chicago Sun-Times, after the paper had reported that she had kidnapped her child, because kidnapping was substantially similar to the type of crime for which she could be charged.<sup>78</sup> A weapons manufacturer lost its claim against a national news reporter who had suggested the manufacturer sold “high pow-

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<sup>72</sup> *Gilmore v. Jones*, 370 F.Supp. 630 (W.D. Va. 2019). *See also* *McKnight v. McNight*, 2021 WL 2020077 (considering whether the father’s post of a video on his social media account in which he falsely accused his daughter of having sex with a relative constitutes defamation).

<sup>73</sup> *Smith v. Zilverberg*, 481 P.3d 1222 (Nev. 2021). *See* *Spero v. Vestal Cent. Sch. Dist.*, 427 F. Supp. 3d 294 (N.D.N.Y. 2019) (failing to distinguish between libel and slander when considering whether a snapchat post was defamatory.)

<sup>74</sup> *Lent v. Huntoon*, 470 A.2d 1162 (Vt. 1983). *See*, Lisa A. Pruitt, *Her Own Good Name: Two Centuries of Talk about Chastity*, 63 Md. L. Rev. 401 (2004). At common law, libel and slander per se presumed that harm flowed from defamatory comments. In such cases, a court could award damages without any proof of actual harm to reputation. Unlike libel and slander per se, pure slander required that plaintiff prove that actual harm resulted from the impact of the slander on his or her reputation. *See generally*, L. ELDREDGE, *THE LAW OF DEFAMATION* § 3 (1978).

<sup>75</sup> *See* *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222 (7th Cir. 1993); *Smith v. Des Moines Pub. Sch.*, 259 F.3d 942, 156 (8th Cir. 2001); *Hildebrant v. Meredith Corp.*, 63 F. Supp. 3d 732 (E.D. Mich. 2014).

<sup>76</sup> *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 138 (1967).

<sup>77</sup> *See id.* at 155.

<sup>78</sup> *Harrison v. Chicago Sun-Times, Inc.*, 793 N.E.2d 760 (Ill. App. 2003).

ered” weapons.<sup>79</sup> In fact, the manufacturer sold the ingredients to make weapons, which were only effective once the consumer mixed them together.<sup>80</sup> The plaintiff-manufacturer claimed the report was false and defamatory for suggesting it sold fully capable weaponry, including bombs.<sup>81</sup> The court rejected the plaintiff’s claim, holding that the fact that the ingredients could be combined to create a deadly hazard made the article “substantially true,” providing the defendant with a defense.<sup>82</sup>

If truth is a publisher’s defense to a defamation claim, the First Amendment is its shield. For more than half a century, the Supreme Court has recognized certain First Amendment protections apply to those who publish false statements about another. In *New York Times v. Sullivan*, the Supreme Court reversed an Alabama Supreme Court decision upholding a defamation claim filed by Montgomery Police Commissioner, L.B. Sullivan, and two other public officials.<sup>83</sup> Sullivan, then Commissioner of the Montgomery Public Safety Commission sued The Times for mistakes appearing in a civil rights advertisement entitled “Heed Their Rising Voices.” The advertisement protested the the Montgomery Police Department’s treatment of Rev. Martin Luther King Jr.<sup>84</sup> Sullivan was not named in the advertisement, but argued that its criticism of the actions of the police hurt his reputation because it was his duty to supervise the police department.<sup>85</sup> The Alabama judge instructed the jury that the statements were libelous *per se*, meaning that the jury only needed to find that the statements were made of and concerning Sullivan to hold the Times liable.<sup>86</sup> The Times defended the claim arguing that the paper did not reference Sullivan by name and therefore it was unclear to whom the advertisement, which included certain falsities, pertained.<sup>87</sup> The lower court rejected this argument and a jury awarded Sullivan \$500,000 in damages.<sup>88</sup> A unanimous Court reversed, holding that the advertisement’s inaccuracies did not remove its First Amendment pro-

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<sup>79</sup> See *Tannerite Sports, LLC v. NBCUniversal News Grp.*, 864 F.3d 236, 240 (2nd Cir. 2017).

<sup>80</sup> See *id.* at 241.

<sup>81</sup> See *id.*

<sup>82</sup> See *id.* at 243–44.

<sup>83</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 292 (1964).

<sup>84</sup> See *id.* 256

<sup>85</sup> See *id.* at 258.

<sup>86</sup> See *id.* at 262

<sup>87</sup> See *id.* at 287–88.

<sup>88</sup> See *id.* at 256.

tections.<sup>89</sup> The Constitution, they found, affords journalists some leeway in their publishing decisions, thereby allowing immunity from publishing some negligent misstatements.<sup>90</sup> Further, the “debate on public issues should be uninhibited, robust and wide-open.”<sup>91</sup>

The Supreme Court made clear that the balance between one’s First Amendment right and an individual’s right against defamation tips in favor of free speech.<sup>92</sup> Writing for the majority, Justice Brennan opined that in a world of journalistic deadlines, which sometimes makes it impossible to guarantee absolute truth, even libel must receive some constitutional protection to avoid paralyzing the press; any other conclusion would “shackle the First Amendment.”<sup>93</sup> To protect open debate, the Court held that public figures alleging defamation must prove that the offending statements were made with “actual malice” – that is, with knowledge that the statement “was false or with reckless disregard of whether it was false or not.”<sup>94</sup> By

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<sup>89</sup> See *id.* at 271–72 (“[E]rroneous statement is inevitable in free debate, and that it must be protected if the freedoms of express are to have the breathing space that they need to survive.”) (internal quotation marks omitted).

<sup>90</sup> See *id.* at 272.

<sup>91</sup> See *id.* at 270.

<sup>92</sup> See *id.* at 272 (“The interest of the public here outweighs the interest of appellant or any other individual.”).

<sup>93</sup> *Id.* at 266.

<sup>94</sup> *Id.* at 280. The standard may be high. For example, a federal district court in Georgia wavered in determining whether Cardi B., a Grammy award-winning rapper with nearly 17 million YouTube subscribers, 18 million Twitter followers, and 94.8 million Instagram followers, was a public or a limited purpose public person. See *Almánzar v. Kebe*, 2021 WL 5027798, at \*6–7 (N.D. Ga. 2021). In *Almánzar v. Kebe*, the court held that it didn’t matter whether plaintiff Cardi B. was a limited or all-purpose public figure because she is able to establish that the defendant acted with actual malice. See *id.* at \*7. Plaintiff won \$2.5 million in damages in a defamation action against YouTuber Tasha K, when the jury found Tasha K acted with actual malice in calling Cardi B. a “prostitute” and stating that she had “Herpes.” See Jury Verdict, *Almánzar v. Kebe*, 2022 WL 863033 (N.D. Ga. 2022). However, because the malice standard is a high burden, it can also be a powerful defense for a defendant. For example, in *McKee v. Cosby* the plaintiff, an actress who had accused renowned actor William Cosby of rape also sued Cosby for defamation after a letter Cosby’s attorney wrote attacking the plaintiff’s credibility was published in the Daily News. See *McKee v. Cosby*, 847 F.3d 54, 58 (1st Cir. 2017). On appeal the plaintiff asserted her dispute with Cosby was “purely a matter of private concern.” *Id.* at 62. The plaintiff then, relying on the Supreme Court’s decision in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, asserted she only needed to plead that Cosby acted with negligent intent toward her. See *id.* In his defense, Cosby asserted the plaintiff was a limited purpose public figure because she was an actress with a 50-year acting career who had sought attention from his public sexual scandal. See *id.* at 61. Therefore, any libel he may be guilty of had to have been done maliciously.

raising the “intent” threshold for those publishing articles about public persons, the Court guaranteed journalists wide latitude in reporting. The opinion identified two rationales for heightening the burden for public figures. First is the importance of preserving the “national commitment to the principle that debate on public issues should be uninhibited.”<sup>95</sup> Second is the fact that public figures enjoy “equal if not greater access than most private citizens to media of communication.”<sup>96</sup>

*New York Times Co. v. Sullivan* clearly articulated the meaning of “actual malice” for purposes of defamation.<sup>97</sup> Public persons suing for defamation must prove that the defendant acted with actual knowledge that the published statement is false or published with a reckless disregard for the truth.<sup>98</sup> The case, however, failed to define “public figures.” It also left open the question of whether the “actual malice” standard also applied to private citizens. Its failure to clarify the meaning of public person, as the Court perceived it ten years after *Sullivan*, led to the “general problem of

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*See id.* The Appellate Court agreed with Cosby. *See id.* at 62. It held the plaintiff by thrusting herself into the “forefront” of Cosby’s sexual controversy and coming forward with her rape accusations became a limited purpose public figure with the burden of having to plausibly plead with either “‘knowledge’ that there was a false or ‘reckless disregard’ for their truth or falsity.” *See id.* A standard, she ultimately could not meet.

The line between a limited purpose public figure and a private person is hazy at best. Social media has become a platform for private individuals to garner attention and transform that attention into on-line public careers. In *Flynn v. Cable News Network*, the plaintiffs sued CNN when the news network displayed an image of the plaintiff captioned with a graphic alleging the plaintiff was a QAnon follower. *See Flynn v. Cable News Network, Inc.*, 2021 WL 6290046, 1 (S.D.N.Y. 2022). CNN argued the plaintiff, an individual employed at a seafood factory who had never held public office or a civic position, but who owned a popular Twitter account was a public person because of their “substantial social media following.” *Id.* at \*11. The court disagreed, holding that although the plaintiff had a significant following, they did not use their twitter account to specifically gain access to the media or to gain celebrity status, therefore they were a private individual entitled to their first amendment rights. *See id.* at 12. As such, the plaintiff only needed to claim CNN acted with negligence. *See id.*

<sup>95</sup> *See id.* at 270. This rationale, which was heavily discussed by Justice Brennan in the majority, “reflects a theory of the First Amendment grounded in democratic self-governance.” *See* Thomas E. Kadri & Kate Klonick, *Facebook v. Sullivan: Public Figures and Newsworthiness in Online Speech*, 93 S. CAL. L. REV. 37, 44 (2019). The focus is the notion that the public, as the electorate, needs to have all the necessary information to engage in self-government. *See id.*

<sup>96</sup> *See Id.* 305–06 (Goldberg, J., concurring).

<sup>97</sup> *Id.* at 280.

<sup>98</sup> *See id.*

reconciling the law of defamation with the First Amendment.”<sup>99</sup> In *Gertz v. Robert Welch, Inc.*, the Court took up this public figure/private figure distinction and held that those who do not fall into the category of a public person or public official need only demonstrate that the defendant acted negligently.<sup>100</sup>

*Gertz* concerned an attorney, Elmer Gertz, who had been hired in a civil case to represent the family of a boy killed by Richard Nuccio, a police officer.<sup>101</sup> A year after the family retained Gertz, a right-wing magazine, John Birch Society, published an article that included a reference to Gertz as a “communist-frontier,” “Leninist,” and participant in Marxist Activities, all of which were highly objectionable at the time.<sup>102</sup> None of these statements were true, and Gertz sued the publishing company that produced the magazine for defamation, arguing that the article had injured his reputation as a lawyer.<sup>103</sup> The lower courts applied the actual malice standard set out in *Sullivan*. The Supreme Court reversed, ruling that Gertz was not a public person, relieving him of *Sullivan’s* higher burden of proof.<sup>104</sup> According to the Court, ordinary citizens should be allowed more protection from libelous statements than individuals in the public eye.<sup>105</sup> Public officials had more resources available to them to counter false statements, while private citizens did not have that advantage.<sup>106</sup> Further, public officials have voluntarily exposed themselves to a greater risk of defamatory statements being made regarding them, but private citizens have not.<sup>107</sup>

The *Gertz* standard defines a public person as one who “invite[s] attention and comment.”<sup>108</sup> The Court acknowledged that this could take several forms. Those who assume roles of special prominence in society are public persons.<sup>109</sup> Those who hold government office are also considered public

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<sup>99</sup> See *id.* at 333.

<sup>100</sup> See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346 (1974) (holding that private figures do not need to prove actual malice to recover compensatory damages).

<sup>101</sup> See *id.* at 325.

<sup>102</sup> *Id.* at 326.

<sup>103</sup> See *id.* at 326–27.

<sup>104</sup> See *id.* at 352.

<sup>105</sup> See *id.* at 343–44.

<sup>106</sup> See *Gertz*, 418 U.S. at 344.

<sup>107</sup> See *id.* at 350 (“In short, the private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury.”).

<sup>108</sup> *Id.* at 345

<sup>109</sup> See *id.*

figures for purposes of proving defamation.<sup>110</sup> Finally, there are instances in which a person is not so prominent that they are easily known, but rather they “thrust themselves to the forefront” of controversies to influence the resolution of the issues involved.<sup>111</sup> Thus, some persons are deemed public figures for all purposes,<sup>112</sup> whereas others are considered a limited public person. However, both must prove malice.<sup>113</sup> When a plaintiff is not a public figure for all purposes, courts must look to the nature and extent of the plaintiff’s participation in the particular controversy giving rise to the defamation to determine whether to impose the additional burden of proving actual malice.<sup>114</sup>

In addition to wrestling with the public-private distinction, the *Gertz* opinion also weighed in on the opinion-fact distinction. Observers suggested that the Court’s dicta suggested a constitutional privilege for opinion.<sup>115</sup> In 1990, the Supreme Court announced the limits of *Gertz*’s decision as it related to the opinion-fact distinction.<sup>116</sup> That year, the court considered whether a newspaper’s opinions enjoyed constitutional protection.<sup>117</sup> The case stemmed from a newspaper article about Michael Milkovich, a high school wrestling coach.<sup>118</sup> Milkovich testified at a hearing concerning a fight that had occurred at a wrestling match between rival schools.<sup>119</sup> Reporter Theodore Diadiun published an article in a local newspaper about the fight and subsequent hearings writing, “anyone who attended the meet. . . knows in his heart that Milkovich. . . lied at the hearing.”<sup>120</sup>

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<sup>110</sup> See *id.* at 344.

<sup>111</sup> See *id.* at 345.

<sup>112</sup> See *id.*

<sup>113</sup> See *id.*

<sup>114</sup> See *id.* at 352.

<sup>115</sup> See *id.* at 339–40 (“Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.”).

<sup>116</sup> See *supra* notes 75–106 and accompanying text. However, the Supreme Court did decide other defamation cases during this time. See, e.g., *Curtis Publishing Co. v. Butts* 388 U.S. 130 (1967) (holding that public officials asserting a defamation claim must show actual malice); *Rosenblatt v. Baer*, 383 U.S. 75 (1966) (holding that government officials have to prove actual malice); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971) (holding that the actual malice standard applies to private individuals if the matter involved is a discussion of public interest).

<sup>117</sup> See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 3 (1990).

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

<sup>119</sup> See *id.*

<sup>120</sup> *Id.* at 5.

Milkovich sued Diadiun for libel, and Diadiun defended on the ground that the statement in the article was his opinion.<sup>121</sup> The Court considered whether a reasonable factfinder could conclude that Diadiun's authored piece implied an assertion of fact that Milkovich had perjured himself.<sup>122</sup> Analyzing this question, the Supreme Court emphasized that Diadiun's failure to use "loose, figurative, or hyperbolic language" and the article's "general tenor" would indicate to a reader that Diadiun "was seriously maintaining that [Milkovich] committed the crime of perjury."<sup>123</sup> The Court further concluded that Diadiun's perjury claim could be proved true or false based on a comparison of Milkovich's testimony before the athletics association and his testimony before the Court.<sup>124</sup> The Court concluded that Milkovich had stated a claim against Diadiun because Diadiun's statement purporting that Milkovich had committed perjury was not opinion.<sup>125</sup> Further, the Court declined to recognize a "wholesale defamation exemption for anything that might be labeled 'opinion,'"<sup>126</sup> noting that "expressions of 'opinion' may often imply an assertion of objective fact."<sup>127</sup> The Court, instead, recognized constitutional protection from a defamation claim for "imaginative expression" and "loose, figurative, [and] hyperbolic language."<sup>128</sup>

Critics of the *Milkovich* decision observe that it failed to leave guidance or a bright line test to discern the difference between opinion and fact.<sup>129</sup> There is a consensus among both state and lower federal courts that the crucial difference between statements of fact and opinion is whether a reasonable person "would be likely to understand it as an expression of the speaker's or writer's opinion, or as a statement of existing fact."<sup>130</sup> How-

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<sup>121</sup> See *id.* at 3.

<sup>122</sup> See *id.* at 21.

<sup>123</sup> See *id.* at 21.

<sup>124</sup> *Id.*

<sup>125</sup> See *id.* ("[T]he connotation that petitioner committed perjury is sufficiently factual to be susceptible of being proved true or false.")

<sup>126</sup> *Id.* at 18.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 20–21.

<sup>129</sup> See, e.g., Seth P. Robert, *Post-Milkovich Defamation: Is Everyone Still Entitled to Their Opinion?*, 65 ST. JOHN'S L. REV. 1105, 1108 (1991) (noting that the Supreme Court found that "no bright line exists between fact and opinion.").

<sup>130</sup> *Schwartz v. American College of Emergency Physicians*, 215 F.3d 1140, 1146 (10th Cir. 2000) (citing New Mexico law) (there are a ton of cases that say this – will make this a string cite)



ever, “loose, hyperbolic language and its general tenor” remain unactionable per the Supreme Court.<sup>131</sup>

Lower courts agree that the question of whether a statement is opinion or fact is one for the judge and not the jury.<sup>132</sup> The Constitution protects expressions of opinion and, thus, the trial judge must act as a gate keeper for the defendant’s constitutional rights. Some courts, however, will send the question to the jury if the statement is ambiguous enough that it could be interpreted as fact.<sup>133</sup>

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<sup>131</sup> *Seaton v. TripAdvisor*, 728 F.3d 592, 594-595 (6th Cir. 2013) (including hotel in list of 2011 Dirtiest Hotels not actionable as a statement of fact).

<sup>132</sup> *See, e.g., Bindrim v. Mitchell*, 155 Cal. Rptr. 29, 39, *cert. denied*, 444 U.S. 984 (1979) (“Where the statements are unambiguously fact or opinion, . . . the court determines as a matter of law whether the statements are fact or opinion.”); *Handberg v. Goldberg*, 831 S.E.2d 700, (Va. 2019) (“[W]hether an alleged defamatory statement is one of fact or opinion is a question of law to be resolved by the trial court.”) (quoting *Tharpe v. Saunders*, 737 S.E.2d 890 (2013)); *Hyland v. Raytheon Technical Services Co.*, 670 S.E.2d 746 (2009) (“Expressions of opinion, however, are constitutionally protected and are not actionable as defamation. Therefore, before submitting a defamation claim to a jury, a trial judge must determine as a matter of law whether the allegedly defamatory statements contain provably false factual statements or are merely statements of opinion.”).

<sup>133</sup> *See Slaughter v. Friedman*, 649 P.2d 886 (1982); *Aldoupolis v. Globe Newspaper Co.*, 500 N.E.2d 794, (1986); *Nevada Independent Broadcasting Corp. v. Allen*, 664 P.2d 337 (1983); *see also Marchiondo v. Brown*, 649 P.2d 462, 472 (1982) (“Where statements are unambiguously fact or opinion, the court determines as matter of law whether statements are fact or opinion. However, where alleged defamatory remark could be determined either as fact or opinion, and the court cannot say as matter of law that statements were not understood as fact, there is triable issue of fact for jury.”).

For an example of jury instructions, see *Jury Instructions, Atzen v. Atzen*, No. LACL127382, 2014 WL 7208822 (Iowa Dist. Oct. 16, 2014) (“Defendant claims that statements were her opinion. Opinion is absolutely protected under the First Amendment To determine whether a statement is opinion or a statement of fact you may consider the following factors: (1) the precision and specificity of the statement or whether it is indefinite and ambiguous; (2) whether the statement can be objectively proved or disproved; (3) The literary context or social context in which the statement was made. This factor focuses on the category of the statement, the style of writing, and the intended audience. . . . If you find the statements were defendant’s opinion, defendant is not liable.”).

In *Branda v. Sanford*, the Supreme Court of Nevada reversed finding that the allegedly defamatory statements regarding the plaintiff being a “bitch” were susceptible to more than one construction and the trial court erred in not allowing the jury to resolve the ambiguity. *See Branda v. Sanford*, 637 P.2d 1223, 1225 (Nev. 1981). The court found that the words did “not exist in isolation” and that “where ‘bitch’ has been modified by ‘low-lived’ and ‘whoring’ that is “at least susceptible of a defamatory construction.” *Id.* at 1226.

Although the Court decided *Sullivan*, *Gertz* and *Milkovich* prior to today's online culture, these holdings continue to govern.<sup>134</sup> Those who have placed themselves in the public eye must prove that the defendant acted with malice. Ordinary citizens need not prove this higher intent level. Plaintiffs bringing a defamation claim must show that the published content was fact not opinion. And in any event, the statement must be false.

The element of fact versus opinion is the most problematic for many of today's plaintiffs considering the characteristics of Internet posts, which are often unreflective thoughts and unedited, spontaneous statements. Those charged with determining whether the challenged language is fact or opinion tend to recognize Internet posts as hyperbole or personal rants, and therefore not meeting the fact element of defamation. Judges are more likely to rule that a defendant's speech is opinion rather than fact.<sup>135</sup> Consequently, plaintiffs find it more difficult to sustain a defamation cause of action when the alleged defamatory statement appears online, rather than in print.

### B. Online Defamation

Online statements typically do not possess the hallmarks of traditional defamatory remarks, which include editing and thoughtfulness. Those who post online tend to do so in a quick, non-reflective, and passing nature. Reporters no longer take the time to compose a report, instead, they rush to Twitter. This brisk, and often thoughtless, "writing" differs from the reflective, reviewed, and contemplated untruthful publications that generally supported defamation claims.<sup>136</sup>

While courts are clear that online defamation is libel and not slander,<sup>137</sup> they are less clear in their judgments on whether language published online is categorically opinion rather than fact. The trend among New York courts is to view the culture of Internet communications as distinct from that of print media.<sup>138</sup> Unlike the reflective, highly edited content that characterizes books, magazines and newspapers, the Internet "encourage[s] free-

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<sup>134</sup> *But see* *Berisha v. Lawson*, 973 F.3d 1304, *cert. denied*, 141 S. Ct. 2424, 2429 (2021) (Gorsuch, J., dissenting) (calling into question the relevance of actual malice in the Internet age).

<sup>135</sup> *See e.g.*, *DeFrancesco v. Brooks*, 2022 WL 17975047 (Pa. Sup. Ct. 2022); *Anick v. Bonsante*, 2022 WL 17574578 (Minn. Ct. App. 2022); *Golan v. Daily News, L.P.*, 175 N.Y.S.3d 871 (N.Y. Sup. Ct. 2022).

<sup>136</sup> *See supra* at notes 65–67.

<sup>137</sup> *See supra* notes 67–72 and accompanying text.

<sup>138</sup> *See Sandals Resort Int'l. Ltd. v. Google, Inc.*, 925 N.Y.S.2d 407, 415 (N.Y. App. Div. 2011).

wheeling, anything-goes writing style.”<sup>139</sup> In *Bauer v. Brinkman*, an Iowa court found that a statement labeling the defendant a “slum lord” in the comments section of a Facebook post was hyperbole and opinion.<sup>140</sup> Conversely, a Delaware court found calling a defendant a “slum lord” was sufficient to sustain a defamation suit when the words appeared in a news article.<sup>141</sup> As in *Bauer*, many courts have concluded that reasonable readers would not consider on-line statements factual in the way they would if the same statement appeared in traditional print.<sup>142</sup>

### 1. The Intent of a Casual “Poster”

When considering a statement’s legal potency, courts will look to the context in which the challenged language appears. In *Boulger v. Woods*, for example, a district court for the Southern District of Ohio found that Twitter’s limitation of 140 characters left a publisher with “insufficient [space] to surround . . . thought[s] with context and nuance.”<sup>143</sup> *Boulger* concerned a tweet that the actor James Woods posted about Trump rally attendee Portia Boulger.<sup>144</sup> Woods’ post accompanied the picture of the attendee with the caption, “So-called #Trump ‘Nazi’ is a #BernieSanders agitator/operative?”<sup>145</sup> Boulger received hundreds of harassing messages because of the tweet and sued Woods for defamation.<sup>146</sup> The court granted Woods’ motion to dismiss noting that the “nature of a tweet” did not lend itself to the single interpretation of the statement as defamatory.<sup>147</sup>

A musical promotion company lost its defamation claim against famed singer Mariah Carey for her tweet that read, “Devastated my shows in Chile,

<sup>139</sup> See *id.* (holding the content and tone of the defendant’s alleged slanderous e-mail was opinionative in nature akin to an on-line message board).

<sup>140</sup> See *Bauer v. Brinkman*, 958 N.W.2d 194, 197 (Iowa 2021).

<sup>141</sup> See *Rumunno v. Cawley*, 705 A.2d 1029, 1031 (Del. Sup. 1997) (holding defendant’s use of the word “slumlord” at a community meeting could be interpreted as a factual defamatory statement due to the written context in which it appeared).

<sup>142</sup> See, e.g., *id.*; *Kaufman v. Islamic Soc’y. of Arlington*, 291 S.W. 3d 130 (Tex. Ct. App. 2009); *Doe v. Cahill*, 885 A.2d 451, 467 (Del. 2005); *Bauer v. Brinkman*, No. 20-0563, 2020 WL 7021558, at \*4 (Iowa Ct. App. Nov. 20, 2020); *Rollins Ranches, LLC v. Watson*, No. 0:18-cv-03278-SAL, 2021 WL 5355650, at \*10 (D.S.C. Nov. 17, 2021).

<sup>143</sup> *Boulger v. Woods*, 306 D. Supp. 3d 985, 1002 (S.D. Ohio 2018).

<sup>144</sup> See *id.* at 997.

<sup>145</sup> See *id.* at 999 (holding it was unclear whether the social media context of the defendant’s tweet indicated it was an fact or opinion).

<sup>146</sup> See *id.* at 990.

<sup>147</sup> See *id.* at 1002.

Argentina & Brazil had to be canceled. My fans deserve better than how some of these promoters treated them.”<sup>148</sup> The tweet was linked to an E! Entertainment report that suggested the South American arm of her tour had been canceled due to promoter negligence.<sup>149</sup> Promoters argued that the tweet suggested they were unfit to promote future concerts and, as a result, the tweet had caused them harm.<sup>150</sup> The appellate court looked to the context of the comment and concluded that Carey’s tweet was opinion.<sup>151</sup> What Carey’s fans “deserve” and whether they “deserve better” than how some promoters “treated them” is conjectural and vague. “[It] may mean different things to different people, and [is] not capable of being proven true or false because of [its] subjective, relative meaning.”<sup>152</sup> The court determined that Carey’s tweet was an expression of her “abstract desire” that her fans deserved to attend her concerts.<sup>153</sup>

In *Jacobus v. Trump*, a New York state trial court observed that courts have consistently interpreted words in online forums as opinions rather than fact.<sup>154</sup> That case concerned a tweet then-candidate Donald Trump posted about a political strategist, suggesting the strategist begged the candidate for a job.<sup>155</sup> The court found the false statement of fact that the plaintiff “begged us for a job” was not actionable, since it was posted in a space where the reader would anticipate audience would reasonably anticipate the use of “epithets, fiery rhetoric or hyperbole.”<sup>156</sup> Following this same reasoning, a federal district court in California ruled, and the Ninth Circuit agreed, that adult film actress Stormy Daniels could not sustain a successful defamation claim against former President Trump for a tweet he posted about her.<sup>157</sup> In that tweet, Trump claimed Daniels lied about a warning she received to stay away from Trump.<sup>158</sup> The court ruled that Trump’s tweet,

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<sup>148</sup> See *Rumunno v. Cawley*, 705 A.2d 1029, 1031 (Del. Sup. 1997) (holding defendant’s use of the word “slumlord” at a community meeting could be interpreted as a factual defamatory statement due to the written context in which it appeared).

<sup>149</sup> See *id.* at 31.

<sup>150</sup> See *id.*

<sup>151</sup> See *id.* at 37

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

<sup>153</sup> *Id.* at 38.

<sup>154</sup> See *Jacobus v. Trump*, 51 N.Y.S.3d 330, 339 (NY Sup. Ct. 2017).

<sup>155</sup> *Id.* Trump. Posted “@cherijacobus begged us for a job. We said no and she went hostile. A real dummy!”

<sup>156</sup> *Id.* at 340.

<sup>157</sup> See *Clifford v. Trump*, 339 F. Supp. 3d 915, 926–27 (C.D. Cal. 2018), *aff’d*, 818 Fed. Appx. 746, 747 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 1377 (2021).

<sup>158</sup> See *id.* at 926.

“A sketch years later about a nonexistent man. A total con job, playing the Fake News Media for Fools (but they know!)”<sup>159</sup> constituted rhetorical hyperbole and was not actionable as defamation.<sup>160</sup> Tweets, many courts have found, convey an opinion and not a fact to the reasonable reader.<sup>161</sup> The same is thought of content posted to Facebook. In *Mucerino v. Martin*, a District Court for the Middle District of Tennessee ruled that “the vague nature of Facebook post[s] and the lack of any extenuating context. . . proved fatal to plaintiff’s claims for defamation.”<sup>162</sup>

In *Ganske v. Mensch*, a case in the Southern District of New York, the court ruled against a journalist who sued an Internet blogger for defamation.<sup>163</sup> The plaintiff argued that he had suffered harm to his reputation and lost his employment when the defendant’s tweet accused him of being “xenophobic.”<sup>164</sup> The court first considered the platform on which the statement was made, in this case Twitter.<sup>165</sup> Similarly to *Boulger*, the New York district court held that Twitter is an informal forum of opinions and that no reader would conclude that the defendant’s tweet was factual.<sup>166</sup> Furthermore, the court held that “xenophobic,” in the context of the disputed tweet, could not be verified and thus was a “classic opinion that amounts to an ‘epithet[ ], fiery rhetoric, [and] hyperbole.’”<sup>167</sup> Despite the defendant linking the tweet to the plaintiff’s employer (the AP), which resulted in the plaintiff’s loss of employment, the statement was held to be a non-defamatory opinion, in large part, because it was posted on Twitter.<sup>168</sup>

<sup>159</sup> *Id.* at 922 n.3.

<sup>160</sup> *See id.* at 926.

<sup>161</sup> *See, e.g., Id., Mirage Entertainment, Inc. v. FEG Entretenimientos S.A.*, 326 F. Supp.3d 26, 32 (S.D.N.Y. 2018); *Sandals Resorts Int. Ltd v. Google, Inc.* 86 A.D.3d 32, 42-43 (2011) (“so-called social media, such as Facebook and Twitter, is increasingly deemed to attract less credence to allegedly defamatory remarks than other context); *Garfield, supra* note 60, at 19.

<sup>162</sup> *See Mucerino v. Martin*, No. 3:21-cv-00284, 2021 WL 558637 (M.D. Tenn. Nov. 20, 2021) (dismissing developer’s claim against homeowner who posted statements on Facebook regarding developer’s faulty business practices including that the developer ‘intends to file for bankruptcy’ and no plans to fix (estate problems) and plans to move out of state.’”).

<sup>163</sup> *See Granske v. Mensch*, 480 F. Supp. 3d 542, 545 (S.D.N.Y. 2020).

<sup>164</sup> *See id.* at 553 (finding the defendant’s tweet was hyperbole).

<sup>165</sup> *Id.* at 552.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 553. (quoting *600 West 115th St. Corp. v. Von Gutfeld*, 603 N.E.2d 930 (1992))

<sup>168</sup> *See id.* (noting that statements made in the context of an Internet forum are more likely to be found to be opinion due to the “generally informal and unedited nature of these communications”).

When made in the context of online reviews, posters enjoy an elevated level of exclusion from the threat of defamation claims. Reviews posted on Yelp are almost categorically opinion.<sup>169</sup> In *Woodbridge Structured Funding, LLC v. Pissed Consumer*, a New York trial court ruled that disgruntled words that appeared in the context of an online complaint website required dismissal of plaintiff's defamation claim.<sup>170</sup> A hotel owner was unsuccessful in his defamation suit against TripAdvisor, which placed his hotel on its list of Dirtiest Hotels.<sup>171</sup> Readers, the court held, could not reasonably conclude that the websites list was asserting a fact.<sup>172</sup>

The same is true for comments made in chat rooms.<sup>173</sup> A New York Supreme Court ruled that, under the First Amendment, "protected opinions" and "matters of public interest" based on an honest opinion enjoy First Amendment protection.<sup>174</sup> Congress has gone so far as to protect individuals' right to post criticisms and potentially defamatory comments about companies: The Consumer Review Fairness Act (CRFA) provides immunity to individuals who share comments about a business's products, services, or conduct, in any forum, including social media.<sup>175</sup>

Courts consider Internet and social media posts conjecture and vague, resulting in judges designating these posts as opinions rather than facts. In

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<sup>169</sup> See *Glasser v. Berzner*, No. SACV 21-661, 2021 WL 4352809 at \*3 (C.D. Cal. June 23, 2021) (reviewing of a jazz club on Yelp led to a defamation action); See also *Levin v. Abramson*, No. 18-cv-1723, 2020 WL 2494649 (N.D. Ill. May 15, 2020) (reviewing of a law firm on Yelp led to a defamation action). *But see*, *Lowell v. Wright*, 512 P.3d 403, 409 (Or. 2022) ("The Supreme Court has not abolished the media/non media distinction in the context of defamation actions.").

<sup>170</sup> *Matter of Woodbridge Structured Funding, LLC. V. Pissed Consumer*, 6 N.Y.S.3d 2, 2 (N.Y. App. Div. 1st Dep't. 2015) (denying claim against individual who posted statements stating that defendant "lies to their clients" and will "forget about you and . . . all the promises they made to you.").

<sup>171</sup> *Seaton v. TripAdvisor LLC*, 728 F.3d 592, 594 (6th Cir. 2013).

<sup>172</sup> *Id.* at 599–600.

<sup>173</sup> See, e.g., *Doe v. Cahill*, 884 A.2d 451, 465 (Del. 2005) ("Blogs and chat rooms tend to be vehicles for the expression of opinions; by their very nature, they are not a source of facts or data upon which a reasonable person would rely."); *Marczeski v. Law*, 122 F.Supp.2d 315, 327 (D. Conn. 2000).

<sup>174</sup> U.S. CONST. amend. I; See also *Yelp Lawsuit Defamation – Questions Answered*, YELP, <https://donotpay.com/learn/yelp-lawsuit-defamation/> (last visited Oct. 5, 2022) (Yelp is not classified as a publisher, so they are not legally liable for reviews posted by third parties who use their services under the communications decency act of 1996).

<sup>175</sup> The Consumer Review Fairness Act of 2016, 15 U.S.C. § 15(b); See also *Consumer Review Fairness Act: What Businesses Need to Know*, F.T.C., <https://www.ftc.gov/business-guidance/resources/consumer-review-fairness-act-what-businesses-need-know> (last visited Oct. 3, 2022).

so doing, judges preclude juries from considering the plaintiffs' defamation claims. Today's general trend toward immediate, online speech has led to a sharp decline in jury awards for defamation claims.<sup>176</sup> As Justice Gorsuch recently observed, "[s]tatistics show that the number of trials involving defamation. . . claims has declined dramatically over the past few decades . . . . [T]hose rare plaintiffs able to secure a favorable jury verdict often have their awards reversed on appeal."<sup>177</sup>

## 2. The Reporter's Prerogative

Present-day online journalism has led courts to define a contextual difference from traditional print or broadcast. Reporters no longer take the time to compose their reports; instead, they rush to Twitter. Journalists race to get a story out ahead of their competitors, leaving them without time to confirm their facts.<sup>178</sup> The idea of rushing to get the story out has contributed to the Fake News phenomenon. For example, immediately after news broke regarding the 2021 shootings at Sandy Hook elementary school, CNN reported that the shooter was Ryan Lanza, a 24-year-old living in Hoboken, N.J.<sup>179</sup> Other reputable news agencies including the N.Y. Times and Fox News reported the same facts, some outlets posted Ryan Lanza's picture on their website.<sup>180</sup> In fact, the shooter was Adam Lanza, Ryan's brother. The incident prompted these organizations to admit their "rush to publish" prompted their journalism error.<sup>181</sup>

<sup>176</sup> See *Berisha v. Lawson*, 141 S. Ct. 2424, 2426 (2021) (Thomas, J., dissenting); see also *infra* notes 176–80 and accompanying text.

<sup>177</sup> *Id.* at 2428.

<sup>178</sup> See, e.g., Jack Murtha, *In a Rush to be First, Mets Reporter Tweets too Soon*, COLUM. JOURNALISM REV. (Aug. 4, 2015), [https://www.cjr.org/analysis/baseball\\_insiders\\_called\\_it\\_one.php](https://www.cjr.org/analysis/baseball_insiders_called_it_one.php) (noting that a journalist tweeted too soon that a trade between the New York Mets and Milwaukee Brewers had gone through, and the deal ended up falling through).

<sup>179</sup> See Rebecca Greenfield, *How the Interent Got the Wrong Lanza*, THE ATLANTIC (Dec. 14, 2012), <https://www.theatlantic.com/national/archive/2012/12/adam-lanza-ryan-lanza-facebook-profile/320458/>.

<sup>180</sup> See Kashmir Hill, *Blaming The Wrong Lanza: How the Media Got it Wrong in Newtown*, FORBES (Dec. 17, 2012), <https://www.forbes.com/sites/kashmirhill/2012/12/17/blaming-the-wrong-lanza-how-media-got-it-wrong-in-newtown/?sh=5a8b268d7601>.

<sup>181</sup> See, e.g., Margaret Sullivan, *"Getting it First or Getting it Right?"*, N.Y. TIMES (Dec. 22, 2012) <https://www.nytimes.com/2012/12/23/public-editor/getting-it-first-or-getting-it-right.html> ("But on the first day, The Times reported on its Web site that the gunman was Ryan Lanza, attributing that information to other news

In 2022, former vice-presidential candidate Sarah Palin sued the New York Times for publishing an opinion piece that she claimed defamed her.<sup>182</sup> The author of the piece “facing a tough and self-imposed deadline” made a late-day post that alleged that the former Alaskan governor’s political action committee was somehow connected to a shooting that had made national headlines.<sup>183</sup> Palin sued the Times arguing that the post was an example of the “lamestream media” getting its facts wrong.<sup>184</sup> Both the jury and trial judge rejected Palin’s claim, finding the reporting an honest mistake.<sup>185</sup> Further, in *Clark v. Viacom International Inc.*, the Sixth Circuit ruled in favor of online news sites that wrongly stated the reasons for the dismissal of two American Idol contestants.<sup>186</sup> In *Fairbanks v. Roller*, the District Court for the District of Columbia ruled that a journalist’s retweet of an allegedly defamatory photo lacked the level of intent necessary to sustain a defamation claim since the journalist posted the photo to continue public debate on the matter.<sup>187</sup>

Even Supreme Court Justices have recognized the relative lack of responsible reporting in the iInternet age as it relates to defamation. In *Berisha v. Lawson*, Justices Thomas and Gorsuch questioned the implications of contemporary publications in the context of Fake News and journalistic integrity.<sup>188</sup> Citing the need to revisit *Sullivan’s* actual malice standard, Justice Gorsuch observed that “publishing without investigation, fact-checking, or

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organizations. It was actually his brother, Adam Lanza. Mistakes don’t get much worse.”).

<sup>182</sup> See David Folkenfilk, *Sarah Palin Loses Defamation Case Against ‘The New York Times’*, NPR (Feb. 15, 2022, 3:14 PM), <https://www.npr.org/2022/02/15/1080804339/nyt-sarah-palin-loses-lawsuit>.

<sup>183</sup> See *id.*

<sup>184</sup> See *id.*

<sup>185</sup> See *id.*

<sup>186</sup> See *Clark v. Viacom International Inc.*, 618 Fed. Appx. 495, 511 (6th Cir. 2015).

<sup>187</sup> See *Fairbanks v. Roller*, 314 F.Supp.3d 85, 93 (D.D.C. 2018) (holding that plaintiff journalist did not act with actual malice in publishing a photo depicting defendant making a hand gesture with caption “just two people doing a white power hand gesture” on social media because there was public debate about whether the specific hand gesture meant ‘okay,’ or whether it was a symbol of the white power movement, and given the social media posts, including those from activist herself, it could have been concluded that Plaintiff “intended her photo and hand gesture to provoke, or troll, people like [defendant]—whether because gesture was actually offensive or because they would think it was offensive.”).

<sup>188</sup> See *Berisha v. Lawson*, 973 F.3d 1304, *cert. denied*, 141 S. Ct. 2424 (2021) (denying certiorari on the issue of whether plaintiff was a public figure).



editing” has become the norm for today’s online journalists.<sup>189</sup> Justice Gorsuch further noted that “business incentives fostered by our new media world” stack the deck “against those with traditional (and expensive) journalistic standards.”<sup>190</sup> Citing several Fake News reports, including Pizzagate, Justice Thomas noted the proliferation of falsehoods in online reporting and the real harm these lies can create.<sup>191</sup>

The Internet has exacerbated the lack of accuracy in the world of journalistic deadlines, a problem about which Justice Brennan raised concern in *Sullivan*.<sup>192</sup> Today’s readers tolerate journalists’ mistakes in exchange for instant reporting. This kind of forgiveness plays into the narrative of acceptable misinformation. Consequently, stories with potentially defamatory misinformation lose their potency because of readers’ tacit understanding that, in a rush to publish, journalists forgo their responsibility to ensure that every fact in a story is accurate.

Case law suggests a presumption against finding Internet posts defamatory. Courts have described internet forums as informal forums of opinion. Opinions, according to the Supreme Court, are not actionable as defamation.

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<sup>189</sup> See *Berisha* 141 S. Ct. at 2428 (Gorsuch, J., dissenting) (emphasis omitted); see also *id.* at 2427 (“No doubt, this new media world has many virtues—not least the access it affords those who seek information about and the opportunity to debate public affairs. At the same time, some reports suggest that our new media environment also facilitates the spread of disinformation.”).

<sup>190</sup> See *id.*

<sup>191</sup> See *id.* at 2425 (Thomas J., dissenting) (“The lack of historical support for this Court’s actual-malice requirement is reason enough to take a second look at the Court’s doctrine. Our reconsideration is all the more needed because of the doctrine’s real-world effects. Public figure or private, lies impose real harm. Take, for instance, the shooting at a pizza shop rumored to be ‘the home of a Satanic child sex abuse ring involving top Democrats such as Hillary Clinton,’ Kennedy, ‘Pizzagate’ Gunman Sentenced to 4 Years in Prison, NPR (June 22, 2017), [www.npr.org/section/thetwo-way/2017/06/22/533941689/pizzagate-gunman-sentenced-to-4-years-in-prison](http://www.npr.org/section/thetwo-way/2017/06/22/533941689/pizzagate-gunman-sentenced-to-4-years-in-prison). Or consider how online posts falsely labeling someone as ‘a thief, a fraudster, and a pedophile’ can spark the need to set up a home-security system. Hill, A Vast Web of Vengeance, N. Y. TIMES (Jan. 30, 2021), [www.nytimes.com/2021/01/30/technology/change-my-google-results.html](http://www.nytimes.com/2021/01/30/technology/change-my-google-results.html). Or think of those who have had job opportunities withdrawn over false accusations of racism or anti-Semitism. See, e.g., Wemple, Bloomberg Law Tried To Suppress Its Erroneous Labor Dept. Story, WASHINGTON POST (Sept. 6, 2019), [www.washingtonpost.com/opinions/2019/09/06/bloomberg-lawtried-suppress-its-erroneous-labor-dept-story](http://www.washingtonpost.com/opinions/2019/09/06/bloomberg-lawtried-suppress-its-erroneous-labor-dept-story). Or read about Kathrine McKee—surely this Court should not remove a woman’s right to defend her reputation in court simply because she accuses a powerful man of rape.” (citation omitted)).

<sup>192</sup> See *supra* notes 76–81 and accompanying text.

Even statements that look like fact are immune from liability.<sup>193</sup> Courts have denied defamation challenges to Yelp and TripAdvisor reviews, finding the statements protected opinions and matters of public interest.<sup>194</sup>

Potentially defamatory journalist posts enjoy a level of protection when their stories appear on the internet. In at least three instances, a judge ruled in favor of journalists that posted incorrect, and potentially defamatory content, noting that the instantaneous demands of their audience justify misstating online content, even if the content is potentially defamatory.<sup>195</sup>

In his dissent in *United States v. Ressam*, Justice Breyer observed, “[N]owhere. . . can words alone explain every nuance of their intended application. Context matters.”<sup>196</sup> The trier of fact must consider the general context of the statement when deciding whether words are defamatory.<sup>197</sup> Defamation, in the context of the Internet, is very hard to prove.

#### IV. DEFAMATION’S SLIPPERY SLOPE TOWARD OBSOLESCENCE

The Internet has eroded defamation to its barest bones. Courts tend to treat thoughtless tweets and reflexive posts as libel rather than slander, even though they lack the kind of contemplative reflection that was historically a hallmark of libel at common law.<sup>198</sup> Those seeking redress for allegedly defamatory social media content are less likely to prevail than those with the same type of claims through traditional media outlets.<sup>199</sup> Although the elements of defamation remain the same regardless of whether the statements

<sup>193</sup> See *supra* at notes 142–144.

<sup>194</sup> See *supra* at notes 171–174.

<sup>195</sup> See *Palin v. N.Y. Times Co.*, 588 F. Supp. 3d 375, 408–10 (S.D.N.Y. 2022); *Clark v. Viacom Int’l Inc.*, 618 Fed. Appx. 495, 511 (6th Cir. 2015); *Fairbanks v. Roller*, 314 F. Supp. 3d 85, 83 (D.D.C. 2018).

<sup>196</sup> *United States v. Ressam*, 533 U.S. 272, 283 (2008) (Breyer, J., dissenting); see also *Stanton v. Metro Corp.*, 438 F.3d 119, 125 (1st Cir. 2006) (“[W]e must examine the article in its totality in the context in which it was uttered or published and consider all words used, not merely a particular phrase or sentence”) (citing *Amrak Productions, Inc. v. Morton*, 410 F.3d 69, 73 (1st Cir. 2005) (internal quotation marks omitted); *Hogan v. Winder*, 762 F.3d 1096, 1106 (10th Cir. 2014) (quoting *O’Connor v. Burningham*, 165 P.3d 1214, 1222 (Utah 2007)) (“[D]efamatory meaning is a matter of context. ‘A reviewing court can, and must, conduct a context-driven assessment of the alleged defamatory statement and reason an independent conclusion about the statement’s susceptibility to a defamatory interpretation.’”).

<sup>197</sup> See, e.g., *Boulger v. Woods*, 306 D. Supp.3d 985, 1001 (S.D. Ohio 2018)

<sup>198</sup> See *Garfield*, *supra* note 60, at 29.

<sup>199</sup> See generally section III.B1.

are made online or in print, “Internet plaintiffs” have a *de facto* higher hurdle to jump in order to prevail on their claims.<sup>200</sup>

Because the factuality of a statement is a question of law, a plaintiff must first convince a judge that the offending statement is fact and not opinion.<sup>201</sup> In most instances, courts find that Internet and social media statements are hyperbole or opinion.<sup>202</sup> If a plaintiff succeeds in persuading the judge, then the issue of whether the statement defamed the plaintiff heads to the jury.<sup>203</sup> A jury faced with a defamation claim must determine whether the statement of fact harmed the defendant’s reputation or livelihood to the extent that it caused the plaintiff to incur damages.<sup>204</sup> The prevalence of Fake News creates another layer of difficulty for the Internet plaintiff, who must convince the jury that the statement was true.

Traditionally, newsrooms and journalists were institutions one turned to for objective reality. Today, the Fake News label has destroyed journalistic credibility. Indeed, it has destroyed the credibility of most things posted on the Internet.<sup>205</sup> Consequently, few believe what they read on the Internet to be true. If most do not believe the statement is true, they cannot find that it caused reputational harm.

#### A. *A Slow and Steady Erosion*

Since the 1960s, the judiciary has limited plaintiffs’ ability to succeed in defamation claims. The decisions in *Sullivan* and *Gertz* increased the difficulty for public figures, and those with limited public figure status, to succeed by requiring them to prove actual malice against a defendant, a

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<sup>200</sup> See, e.g., *Sandals Resort Int’l. Ltd. v. Google, Inc.*, 925 N.Y.S.2d 407, 415 (N.Y. App. Div. 2011); *Kaufman v. Islamic Soc’y. of Arlington*, 291 S.W. 3d 130 (Tex. Ct. App. 2009); *Doe v. Cahill*, 885 A.2d 451, 467 (Del. 2005); *Bauer v. Brinkman*, No. 20-0563, 2020 WL 7021558, at \*4 (Iowa Ct. App. Nov. 20, 2020); *Rollins Ranches, LLC v. Watson*, No. 0:18-cv-03278-SAL, 2021 WL 5355650, at \*10 (D.S.C. Nov. 17, 2021).

<sup>201</sup> See *Price v. Viking Penguin, inc.*, 881 F.2d 1426, 432 (8th Cir. 1989), *cert denied*, 110 S. Ct. 757 (1990); *Ollman v. Evans*, 750 F.2d 970, 978 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985); *Michel v. NYP Holding, Inc.*, 816 F.3d 686, 698 (11th Cir. 2016).

<sup>202</sup> See *supra* notes 120–35 and accompanying text.

<sup>203</sup> See RESTATEMENT (SECOND) OF TORTS § 558 (AM. L. INST. 1977).

<sup>204</sup> See generally *New York Times Company v. L.B. Sullivan*, 376 U.S. 254 (1964); See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, (1974); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 3 (1990).

<sup>205</sup> See *supra* at note 57.

standard higher than the mere negligence standard allowed for individuals who are not of community interest.<sup>206</sup>

The rise of Internet use, particularly social media, presents plaintiffs with yet another hurdle.<sup>207</sup> The malice standard differentiated public and private plaintiffs, however, both shared the responsibility of proving that the challenged statement was a fact, not an opinion, a question decided as a matter of law by the judge.<sup>208</sup> As *Boulger, Jacobus, Ganske* and other cases illustrate, judges have tended to find that statements made on the Internet are opinions and not facts.<sup>209</sup> Courts have characterized these statements as hyperbole, attitude, or posturing.<sup>210</sup> Even where the statements seem more likely to appear as facts, courts look to their context, ruling often that statements made on the Internet are rarely meant to be factual.<sup>211</sup>

Regardless of where in the procedural process plaintiffs fall short, the evidence is clear that the combined effect of Supreme Court limitations on proof and the increased belief that social media posts are mostly opinion has limited the plaintiff's ability to succeed in a defamation claim.

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<sup>206</sup> See generally *New York Times Company v. L.B. Sullivan*, 376 U.S. 254 (1964); *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 3 (1990).

<sup>207</sup> Defamation lawsuits are on the decline generally. In *Berisha v. Lawson*, 141 S.Ct. 2424 (Memorandum 2021), Justice Gorsuch wrote that “[s]tatistics show that the number of trials involving defamation. . . claims has declined dramatically over the past few decades. . . [T]hose rare plaintiffs able to secure a favorable jury verdict often have their awards reversed on appeal.” *Id.* at 2426. In the 1980s, there were, on average, 27 per year; in 2017, there were 3. See David A. Logan, *Rescuing Our Democracy by Rethinking* *New York Times Co. v. Sullivan*, OHIO ST. L.J., 759, 808–10 (2020) (surveying data from the Media Law Resource Center). Four decades ago, defamation actions were brought against media companies with relative frequency; there were over 27 federal defamation trials in the 1980s; in 2017 there were three. See *Berisha*, 141 S. Ct. at 2428 (Thomas, J., dissenting). Michael Norwick, writing for the Media Law Center, suggests that this statistic is due in large part to defendants’ ability to succeed on their motions to dismiss. See Logan, *supra* note, note 179, at 808–10. (citing MLRC 2018 Report on Trials and Damages (“MLRC 2018 Report”)); see also Michael Norwick, *Chapter 3: The Empirical Reality of Contemporary Libel Litigation*, in *NEW YORK TIMES v. SULLIVAN: THE CASE FOR PRESERVING AN ESSENTIAL PRECEDENT*, MEDIA L. RESOURCE CTR. (Mar. 2022), [https://medialaw.org/chapter-3-the-empirical-reality-ofcontemporary-libel-litigation/#\\_ftn3ZQW](https://medialaw.org/chapter-3-the-empirical-reality-ofcontemporary-libel-litigation/#_ftn3ZQW).

<sup>208</sup> See *supra* at notes 62–64.

<sup>209</sup> See generally *Boulger v. Woods*, 306 D. Supp.3d 985 (S.D. Ohio 2018); *Jacobus v. Trump*, 51 N.Y.S.3d 330 (NY Sup. Ct. 2017); *Granske v. Mensch*, 480 F.Supp.3d 542 (S.D.N.Y. 2020).

<sup>210</sup> See *supra*, notes 124–35 and accompanying text.

<sup>211</sup> See *supra*, notes 136–61 and accompanying text.

*B. Destroying Defamation*

If the Supreme Court and social media have eroded defamation, Fake News has destroyed it. Today, convincing a jury that a false statement purporting to be fact has defamed a plaintiff is difficult given the dual issues of society's objective mistrust of the media and the understanding that information on the Internet is generally opinion, not fact. Fake News sows confusion and makes it almost impossible for jurors to believe that any statement has the level of credibility necessary to cause harm.<sup>212</sup>

To be clear, in some instances fake news is so intolerable that a jury will, in fact, find for the plaintiffs. A Connecticut jury found conspiracy theorist Alex Jones liable for defamation based on his assertion that the government had faked the Sandy Hook shootings.<sup>213</sup> But often, plaintiffs are unsuccessful where the challenged language is conflated with untruths. Fox News successfully defended itself against a lawsuit claiming that it had aired false and deceptive content about the coronavirus,<sup>214</sup> even though its reporting was, in fact, untrue.<sup>215</sup> In a similar case, a federal judge dismissed a defamation case against Fox News for Tucker Carlson's report that the plaintiff had extorted then President Donald Trump. In reaching its conclusion, the judge observed that Carlson's comments were rhetorical hyperbole and that the reasonable viewer "'arrive[s] with the appropriate amount of skept-

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<sup>212</sup> *But see*, Lafferty v. Jones, 246 A.3d 429 (Conn. 2020), *cert. denied*, 141 S. Ct. 2467 (2021) (holding defendant Alex Jones responsible for defamation based on "fake news" that parents lied about the Sandy Hook shooting).

<sup>213</sup> *See* Cecilia Lenzen, *Jury Awards Parents of Sandy Hook Shooting Victim \$4.1 Million in Defamation Case Against Alex Jones*, TEX. TRIB. (Aug. 4, 2022, 4:00 PM), <https://www.texastribune.org/2022/08/04/alex-jones-sandy-hook-trial/>.

<sup>214</sup> *See* Wash. League for Increased Transparency & Ethics v. Fox, No. 81412-1, 2021 WL 3910574 at \*1 (Wash. Ct. App. Aug. 30, 2021) (dismissing claim against Fox news despite having published fake news regarding the Covid-19); *see also* Christine Hauser, *Alex Jones Retracts Chobani Claims to Resolve Lawsuit*, N.Y. TIMES (May 17, 2017), <https://www.nytimes.com/2017/05/17/us/alex-jones-chobani-lawsuit.html> (retracting comments that Chobani's Idaho factory "was connected to the 2016 sexual assault of a child and a rise in tuberculosis cases.").

<sup>215</sup> *See* Wash. League for Increased Transparency & Ethics, 2021 WL 3910574 at \*3 ("[Plaintiff]. . . argues that Fox's statements regarding the coronavirus and the disease it causes, COVID-19, made during a global pandemic, are not protected because they are false. We reject this contention because the challenged statements implicate matters of public concern and thereby fall squarely within First Amendment protections.").

ticism.’”<sup>216</sup> Reports of media success in defending against defamation claims further fuels media mistrust.

The current polarization caused by identity politics is furthering the about the tendency for Americans to mistrust the media. Sarah Palin announced that the goal of her recent defamation case against The New York Times was to reveal that the “lamestream media” publishes “fake news.”<sup>217</sup> Because of the “Big Lie,” a story about the legitimacy of the 2020 Presidential election that continues to dominate the news, one in three voters believe the election was stolen.<sup>218</sup> Misinformation and false narratives have proliferated when it comes to Covid-19 stories.<sup>219</sup> Pew Research Center studies reveal the high degree to which individuals mistrust the news. According to the Center, 71% of American journalists and 50% of U.S. adults say that fake news is a very big problem.<sup>220</sup> An article in the *Journal of Communications Inquiry* noted that most teens reject journalistic objectivity.<sup>221</sup>

If jurors believe that no reasonable person could credit a challenged statement as true, they cannot find that the statement the plaintiff asserts is

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<sup>216</sup> *McDougal v. Fox News Network, LLC*, 489 F.Supp.3d 174, 184 (S.D.N.Y. 2020) (quoting *600 West 115th St. Corp. v. Von Gutfeld*, 603 N.E.2d 930, 936 (N.Y. 1992)).

<sup>217</sup> See Folkenflik, *supra* note 172.

<sup>218</sup> See, e.g., *Misinformation Accompanies U.S. Expansion of Boosters*, FIRST DRAFT (Nov. 22, 2021), <https://firstdraftnews.org/articles/misinformation-accompanies-us-expansion-of-boosters/> (“As the United States is poised to roll out its Covid-19 vaccine booster program for all adults, misleading information on social media around this latest development is likely to become the focal point of the next round of vaccine misinformation.”); Raymond Biesinger, *Fake News and Distrust of Science Could Lead to Global Epidemics*, WIRED (Sept. 1, 2018, 8:00 AM), <https://www.wired.co.uk/article/how-fake-news-could-lead-to-epidemics> (observing in 2018 that distrust in the news could result in a worldwide pandemic).

<sup>219</sup> See, e.g., *Misinformation Accompanies U.S. Expansion of Boosters*, FIRST DRAFT (Nov. 22, 2021), <https://firstdraftnews.org/articles/misinformation-accompanies-us-expansion-of-boosters/> (“As the United States is poised to roll out its Covid-19 vaccine booster program for all adults, misleading information on social media around this latest development is likely to become the focal point of the next round of vaccine misinformation.”); Raymond Biesinger, *Fake News and Distrust of Science Could Lead to Global Epidemics*, WIRED (Sept. 1, 2018, 8:00 AM), <https://www.wired.co.uk/article/how-fake-news-could-lead-to-epidemics> (observing in 2018 that distrust in the news could result in a worldwide pandemic).

<sup>220</sup> See Jeffrey Gottfried et al., *Journalists Sense Turmoil in Their Industry Amid Continued Passion for Their Work*, PEW RSCH. CTR. (June 14, 2022), <https://www.pewresearch.org/journalism/2022/06/14/journalists-highly-concerned-about-misinformation-future-of-press-freedoms/>.

<sup>221</sup> See generally Regina Marchi, *With Facebook, Blogs, and Fake News, Teens Reject Journalistic ‘Objectivity’*, 36 J. COMM’N INQUIRY 246, 256 (2012).

defamatory caused harm. An essential element of defamation is that the defendant's remarks damaged the plaintiff's reputation. The large number of people who believe news is fake, the media's rush to publish, and external attacks on credible journalism have created a problematization of truth among members of society. The potential for defamatory harm is minimal when every news story is questionable. Ultimately, this paper argues that the presence of Fake News is a blight on the tort of defamation and, like the credibility of present-day news organizations, will erode it to the point of irrelevance.

## V. CONCLUSION

Fake News is destroying defamation claims. The purpose of defamation is to compensate people for damage to their reputations caused by statements that were untrue. Plaintiffs must demonstrate that they were hurt by a false statement which was accepted as true. The insidious infiltration of Fake News labels on traditional journalistic efforts has meant that jurors are unlikely to find that members of society believe a false statement to be true in a way that sufficiently caused harm to the plaintiff. The present-day mockery of objective truth has further eroded the ancient tort of defamation.





## BOOK REVIEW

### Understanding Sports Law

Understanding Sports Law. By Timothy Davis and N. Jeremi Duru. Carolina Academic Press. 2023. \$55.

*Reviewed by Nick Noonan.*

Sports law comprises a duality. It entails both the application of various general legal concepts to the relationships emerging from and in sports, and a substantive legal doctrine with its own rules, decisions, and legislation. Law students, lawyers, and practitioners each approach the study of sports law with varying levels of knowledge resulting from this duality. Most will be familiar with the general legal concepts — contracts, torts, and constitutional law — from early in their legal education and may also have some grasp of more specialized concepts, such as antitrust and labor law. At the same time, few will be acutely familiar with the unique and specialized application of these concepts to the relationships that exist within sports. This relative few may have taken advanced courses in sports law or have practice or teaching experience in the area. As such, an effective sports law text must be accessible to its general readership — providing a useful overview of key concepts and contentious issues — while delivering something of value to the experienced, by way of both provocative and challenging questions and new insights. Timothy Davis and N. Jeremi Duru's *Understanding Sports Law*<sup>1</sup> recognizes and addresses this duality by providing a textbook useful for students, practitioners, and law professors alike.

The book successfully navigates both foundational and advanced areas of sports law in a way that is accessible to all, but thought-provoking for even the well-versed. While many sports law texts focus on one or a few discrete topics within the area, this book effectively takes on a near-exhaustive consideration of sports law in its full breadth, ranging from

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<sup>1</sup> Timothy Davis & N. Jeremi Duru, *Understanding Sports Law* (2023).

amateur sport to professional sport, sports governance to historical and contemporary social issues in sport including gender and racial inequality, and everything in between. This is no small feat, yet the authors accomplish it deftly. This breadth is one of the book's greatest strengths. Sports law, both in teaching and in practice, often focuses on either amateur or professional sports; on social issues in sports, or on governance of sports leagues; on representing a sports team, or representing athletes. As such, expertise among practitioners and professors is often diffuse. This book provides a broad yet detailed overview that enables all readers to develop a detailed and reasonably comprehensive understanding of sports law and all that this broad field entails, including areas that are often marginalized in sports law scholarship such as the history of women's sports leagues and gender inequality in professional sports.

*Understanding Sports Law* is divided into six parts, each focusing on a separate piece of the sports law puzzle, such as amateur athletics, sport and society, professional sports leagues, professional athletes, health and safety, and intellectual property. This organization can be thought of as tracking an athlete's career from amateur to professional. In the authors' words, "the material is organized according to the level of sports participation."<sup>2</sup> This gives the reader insight into the journey underlying the sporting experience for athletes and those along for the ride. It begins with a consideration of legal issues in high school athletics before moving on to college athletics and the Olympics. It then offers wide-ranging discussions of the legal and social issues pertaining to coaching, gender and sex discrimination, and racial discrimination. The book is mindful of the fact that some substantive and societal issues transcend the level of sports participation and thereby require a chapter of their own. Further, the decision to place these discussions before the chapters on professional sporting leagues demonstrates an awareness of the growing need for amateur athletes, as well as their professional counterparts, to be aware of and grapple with their position as athletes in society. The text provides thoughtful consideration of these critical topics and will serve as a useful aid for students, practitioners, and academics to wrestle with them in the context of sports.

Each chapter of the book gives a broad overview of the past, present, and future of the area and its legal issues. Most begin with an accessible introduction to the topic or entity. The authors then discuss relevant legal issues and open policy questions, presenting intriguing questions and offering helpful suggestions as to where answers may lie. Where applicable, the authors engage in a detailed discussion of relevant case law. For instance,

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<sup>2</sup> *Id.* at xix.

in Chapter 2, “Legal Issues in College Athletics,” the authors provide a thorough examination of the development of antitrust law as it pertains to the NCAA. They trace the case law from *NCAA v. Board of Regents*, 468 U.S. 85 (1984), which held that the NCAA’s proposed television plan was a restraint on open competition and trade and thus violated the Sherman and Clayton Antitrust Acts, to the landmark *O’Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015), which along with *Alston v. NCAA*, 141 S. Ct. 2141 (2021) has recently revolutionized NCAA-athlete relations by finding that the NCAA’s profiting from the likeness and namesake of college athletes, as well as their restrictions on providing college athletes with non-cash compensation for academic purposes, were contrary to antitrust laws. They also discuss the ongoing *House v. NCAA* litigation in California, which — among many other things — seeks damages for college athletes who were unable to profit from name, image, and likeness (NIL) prior to its permissibility in 2021, as well as to examine the NCAA’s restrictions on the use of NIL as a recruiting tool. These cases are fundamentally about NIL compensation for college athletes, a burgeoning area that is rife with policy considerations. On this topic, a reader may be left wanting more from the book, as the discussion primarily focuses on providing a to-the-point summary of the legal questions and holdings of these cases and the legislative responses to them. One could imagine a broader discussion of NIL that goes beyond these core cases and engages with the complex legal and normative debates surrounding NIL rights for college athletes. This is touched on somewhat in Chapter 12, “Intellectual Property Issues in Sport,” but not robustly enough to do more than whet a reader’s appetite. This is not to say that the authors shy away from policy discussions, taking positions, or making predictions. They occasionally do so, and much to the reader’s benefit. For instance, the concluding section of Chapter 12 deals with the “technological cat and mouse game” of sports broadcast infringement.<sup>3</sup> In informing the reader of the past and present landscape and the potential future direction of this area, the authors usefully draw on case law and provide commentary on the implications of further developments in this area. For instance, they note the challenges involved in applying copyright law as technology develops, particularly in the context of broadcasts, which is exacerbated by the Supreme Court’s recent polarization on the issue.

Among the greatest strengths of this work is the authors’ ability to teach law in general through the lens of sports law. Readers who have not been exposed to various specialized sub-areas of law will gain an

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<sup>3</sup> *Id.* at 450.

appreciation for, and understanding of, them by seeing how they work in the sports context.

Chapter 1, titled “Legal Issues in Interscholastic (High School) Athletics,” is an illustrative example. Perhaps to the surprise of readers, eligibility rules in high school athletics provide an instructive exploration of judicial deference. Rules of the relevant Interscholastic Athletic Association, or High School Athletic Association, as the case may be, prohibit the transfer and recruiting of athletes; bar the participation of athletes over a certain age or in their fifth year of high school; and set standards for academic eligibility and good conduct.<sup>4</sup> These rules are oft-challenged, and Davis and Duru use them to demonstrate the importance of a judicially deferential approach to constitutional challenges. They point to the example of *Isabella v. Arrowhead Union High School District*, 323 F. Supp 3d 1052 (E.D. Wis. 2018), where an athlete was caught hosting a gathering with classmates where alcohol was served and was suspended from four soccer games by her school. The athlete brought multiple constitutional challenges, which were dismissed by the district court on the principle that the court should defer to the school’s “classification or construction of its own rules . . . so long as they were not so irrational or arbitrary as to shock the conscience.”<sup>5</sup>

The authors also explore judicial deference in sport through *Art Gaines Baseball Camp, Inc. v. Houston*, 500 S.W. 2d 735 (Mo. Ct. App. 1973), which dealt with a rule that athletes who attended a sport-specific camp for more than two weeks during the summer were ineligible in the following year. Again, the court invoked judicial deference in determining that “we . . . entrust the control and supervision of the extracurricular activities” within a school to the school itself, that “members are in the most advantageous position to appreciate the regulations under which they must act to achieve desired goals,” and accordingly that courts should not interfere as long as the regulations are reasonable and do not infringe on the law or public policy.<sup>6</sup> To those well-versed in administrative law, these may seem like rather obvious instances of judicial deference as a foundational piece of judicial review. Yet, many readers of this book may not be administrative law experts — at least, not yet — and therefore the book serves as a useful tool for introducing such readers to this fundamental aspect of the law and how it plays out in the context of sports.

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<sup>4</sup> *Id.* at 10.

<sup>5</sup> *Id.* at 11.

<sup>6</sup> *Id.* at 11-12.

This is similarly the case in Chapter 8, titled “Labor Law, Labor Relations and Collective Bargaining.” Labor law is an immense field with complex jurisprudence. But sports law provides a useful context for novices to become acquainted with it and for experts to gain an appreciation of how it applies to sports. Professional sports teams are employers, and the athletes who play for them are their employees. This statement may seem self-evident, but for Davis and Duru, it is the jumping-off point for a rich discussion of employer and employee rights in the sporting context. The history of the National Labor Relations Board (NLRB)’s treatment of professional sports leagues provides readers with a useful example of jurisdiction and applying federal law to interstate activity.

Of particular interest to the sports fan may be the discussion of players’ freedom of movement. The authors provide a compelling history of free agency, trades, and their pre-cursors, which date back at least a century to *Philadelphia Ball Club, Ltd. v. Lajoie*, 202 Pa. 210 (Pa. 1902), where a baseball player was prevented from transferring to a different team in the same city (Philadelphia) by the MLB’s ‘reserve clause,’ which effectively barred player movement. This system largely stripped players of their freedom of movement, becoming the standard for many years and effectively creating what the authors view as an anti-competitive market for athletes that capped player salaries. In Davis and Duru’s estimation, this was only solved once players turned to antitrust law — as was the case in most sports leagues — or, in the unique circumstances of the MLB, contract law.<sup>7</sup>

The authors argue that the most robust tool for professional athletes to use in labor relations is their respective league’s collective bargaining agreements. They highlight that these have been key to establishing the existing framework that affords players a great deal of freedom of movement under both free agency and trades. Though not discussed in the book, the trials and tribulations of MLB players throughout the 20th century as they struggled to attain greater autonomy over their careers presents a striking contrast to the 21st century, when so-called ‘super teams’ (in the NBA and NFL, among other leagues) are formed with increasing regularity, composed of elite players who can essentially force their way onto (and off of) teams at will. The chapter would have been enhanced with some discussion of this recent development, and a comparison of the MLB’s history with labor relations to that of other leagues (for instance, the 1993 Reggie White free agency saga in the NFL) would have further enhanced the reader’s takeaways from this section.

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<sup>7</sup> This was because the MLB had a longstanding antitrust exemption, as highlighted by the authors both in Chapter 8 and elsewhere in the book.

Perhaps the book's strongest exploration of broader legal and social issues through the lens of sports is Chapter 6's analysis of "Race and Racial Discrimination Issues in Sports." This wide-ranging chapter presents an overview of the racially discriminatory structures in American law and society followed by tools available today to challenge racial discrimination in sports, with particular attention to college athletics. The chapter concludes by addressing recent controversies over the continued use of Native American names and mascots in sports and their legal implications. The authors provide a comprehensive history of race-based exclusion in sports that confronts the painful history of racism at all levels of American athletics and how it continues today. This deft and nuanced treatment is perhaps no surprise, given the authors's background as scholars of race in sports. A revealing aspect of this history that the authors emphasize is that the exclusion of Black athletes from sports was not just a result of segregationist laws but of so-called "gentlemen's agreements" between league officials to exclude Black players. As the authors note, informal exclusion drove Black jockeys, baseball players, and other athletes out of their respective leagues. This informal exclusion was driven by league votes, rules, and customary hiring practices as well as physical and verbal abuse of Black athletes by players, fans, media, and executives.<sup>8</sup> This widespread social and customary exclusion became ingrained in sports culture. While discriminatory legal structures may be changed by legislatures and courts, racist social norms and gentlemen's agreements proved harder to eradicate. However, in the authors' view, these norms gradually did change, bringing desegregation in sport as with many other areas of American society over the course of the twentieth century. The authors suggest that at least part of this change in sports was borne of self-interest, as teams realized they were forsaking a potential competitive advantage by cutting out a portion of their prospective talent pool.<sup>9</sup>

After tracing the social history of racism in sport, Davis and Duru examine the legal mechanisms available for challenging racial discrimination in sport, Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.) and 42 U.S.C. § 1981, under which individuals subjected to racial discrimination can sue the perpetrator. The authors incisively argue that the unique features of professional sports leagues have made racial discrimination suits on these grounds a largely ineffective remedy. Specifically, the insularity of leagues often means that lawsuits seen by teams as disrupting league stability render the litigant a pariah from the

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<sup>8</sup> *Id.* at 191.

<sup>9</sup> *Id.* at 193.

league, hampering their job prospects with all of the league's teams. The authors draw on examples across the NFL and NBA, including former Miami Dolphins head coach Brian Flores who brought a racial discrimination lawsuit against the NFL in 2022. These examples prove useful, but a reader may be disappointed by this chapter's omission of the most prominent racial justice advocate in professional sports today, Colin Kaepernick. Though Kaepernick's exclusion from the NFL resulted from his protests against racial injustice, rather than, at least ostensibly, directly from Kaepernick's race, the collusion of NFL teams to exclude him from playing in the league stands as a chilling example of why those in professional sports leagues fear bringing discrimination complaints against the league, and discussing it would have further enhanced the authors' examination of racism and sports. More generally, the authors explain the legal standards of disparate treatment and disparate impact that determine whether a racial discrimination plaintiff can succeed by showing she has experienced discriminatory effects (disparate impact) or whether she needs to also show the defendant had discriminatory intent (disparate treatment). Needing to show disparate treatment, which is required to bring a claim under § 1981 but not Title VII, often creates an insurmountable hurdle for plaintiffs that leads their claims to be dismissed at summary judgment.<sup>10</sup>

These discussions provide readers a deeper understanding of the racial dynamics that underlie professional sports and why their improvement seems to be lagging behind. In the broader context of the book, Chapter 6's discussion of race in sport serves as an apt microcosm. The book provides a detailed yet accessible overview that strives to provide readers with both the foundation and higher-level analysis of what shapes sports law today. Much the same, Chapter 6 is fundamentally concerned with providing readers an understanding of how and why race and racial discrimination issues in sports came to be. The current problems it carefully details — ranging from racial discrimination toward coaching staff and players, to disproportionality in college admissions, to offensive names and mascots — are inextricably linked to the history from which they arose. A reader comes away from reading this book well-informed that, while sports bodies and institutions have made progress toward racial equality from the days of segregation, the world of sports — like the country — still has a long way to go. Davis and Duru demonstrate that the legacy of segregation that persists through gentlemen's agreements and racial exclusion continue to be felt, and the only way forward is to meaningfully grapple with them.

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<sup>10</sup> *Id.* at 198.

*Understanding Sports Law* is a valuable addition to the sports law literature. It provides an accessible yet comprehensive overview of the vast areas of law that sports implicate, organized in a manner that promotes a holistic understanding of each area of sports law. At the same time, it uses sports law as an example — a teaching tool — to educate readers about the law more broadly through its many intersections with sports. The book is an informative and readable resource that may be relied on by students, professors, and practitioners alike as a primary or supplementary sports law text.