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Preface

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 proud to author the preface to the Winter Issue of Volume 16.

Throughout my time advising JSEL, I have seen the Journal grow each and every year. With each new Board and Issue, I find myself more excited about both the present and future of sports and entertainment law and scholarship. This year is no exception. These pages mark another entry in a legacy of impactful scholarship. I look forward to seeing how this year's editors will continue to advance the exceptional work of the Journal over the coming semester.

In this Winter Issue, JSEL is publishing three fantastic articles:

Professor Mitchell F. Crusto authored *What is Property?: A Libertarian Perspective of Name, Image, and Likeness*. In response to state laws regulating college athletes' monetization of their commercial value, this article grounds name, image, and likeness (NIL) rights in a familiar paradigm: property law. After pointing out deficiencies in current tort-based state NIL regimes, Crusto argues that NIL law should extend beyond college athletes to grant every person the right to monetize their NIL and to be free from exploitation. Consequently, this article argues that grounding NIL in property law, allows for alienation, severability, and licensing.

Professor Kathleen Cullinan authored *Tin Gods, Heroes and One Perfect Rose: A History of the Right of Publicity's Rift with the First Amendment (and the Path to Reconciliation)*. This article chronicles an anomalous line of century-old New York right-of-publicity cases which limited First Amendment protections for fictionalized speech infused with real stories. Through a close review of trial records and historical accounts, Cullinan argues that courts (and the public) have failed to provide a compelling account of the harms wrought by non-defamatory depictions of individuals in expressive works.

Lastly, *Professor Max Stul Oppenheimer* authored *The Artificial Intelligence Solution to the Patent Obviousness Problem*, which proposes using artificial

intelligence (AI) tools to increase objectivity and predictability in patent prosecution. One critical step in the process of obtaining a patent requires showing that the innovation is non-obvious and, therefore, resolving the question of whether someone of ordinary skill would consider it obvious to combine known elements of the prior art. After outlining the challenges in applying the “obviousness” standard for patentability, Oppenheimer elucidates AI’s potential to reduce uncertainty in the patent-decision making process for inventors and examiners alike.

I am grateful to JSEL’s Executive Board for all of their incredible work this year. Specifically, I want to thank the editors-in-chief of Volume 16: Alec Winshel, Trina Sultan, and Maya Sharp. After another wonderful year, I look forward to the Summer 2025 Issue!

—Peter A. Carfagna

Editor's Note

Welcome to Volume 16, Issue 1.

Thank you for taking the time to read the Journal of Sports & Entertainment Law. We hope that you find the following three articles to be as timely and insightful as we do.

This Issue is being published at a moment of change for the Journal and for the industries close to our hearts. Over the last year, the Journal hosted its first-ever elections, welcomed more editors for a single volume than ever before, and oversaw the dramatic expansion of our online presence. Meanwhile, labor strikes and technological advancements are rapidly changing the dynamics of the film and television industries, as collegiate athletics comes to terms with a new financial paradigm in the wake of relaxed restrictions on students' licensing rights and expanding opportunities for movement between schools. These are inflection points, moments that might appear in retrospect as pivotal turning points when our industries either pushed forward or began to fall apart. We hope that the contributions from our community help shape sports and entertainment law for the better.

We would like to extend a note of gratitude to our incredible editing team—whose names you can find on the previous pages—who have dedicated countless hours to this Journal in the midst of their busy academic and personal schedules. The Journal is as strong as its members, and we feel grateful to have such an inspiring group.

We would also like to thank Professor Peter A. Carfagna, our faculty advisor, who continues to be a center of gravity in the Harvard Law School community. His tireless advocacy on behalf of students has single handedly created a curriculum, clinical program, and culture that puts young scholars on the path to meaningful careers in their areas of interest. We also extend our sincerest thanks to the sponsors of Volume 16, Issue 1: Wilson Sonsini, Covington & Burling, Paul, Weiss, Sidley Austin, DLA Piper, Arnold & Porter, and Sullivan & Cromwell. These firms and their attorneys are an integral part of JSEL's mission to support high-quality research and connect law students to the broader legal world. We thank them for their support.

We hope you enjoy the pages that follow.

Sincerely,

Maya Sharp '25, Trina Sultan '25, and Alec Winshel '25
Co-Editors-in-Chief of Volume 16

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

Kathleen Cullinan*

ABSTRACT

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

* JD, Yale Law School, 2012. MJ, University of Maryland, 2005. BA, Reed College, 2002. The author is a First Amendment lawyer working in Los Angeles. Many people shared invaluable thoughts on this essay. The author is particularly indebted to Lee Levine, Kelli Sager, Nathan Siegel, Sam Bayard, Collin Peng-Sue, Jonathan Segal, the editors of the Harvard Journal of Sports and Entertainment Law, and the late, incomparable Bruce Johnson. For everything else it took to reach the finish line, the author gives her deepest thanks to Tara Lignos, Alonzo Wickers, Rory Eastburg, and her parents.

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

INTRODUCTION

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

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

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

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

¹ 210 N.Y. 51, 57–58 (1913).

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

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

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

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

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

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

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

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

⁶ Record on Appeal at 6–10, *Binns v. Vitagraph Co. of Am.*, 210 N.Y. 51 (1913) (hereinafter “*Binns Record*”).

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

⁸ *Id.* at 58.

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

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

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

I. JACK BINNS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁹ See Binns’s Story at 1.

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

²¹ *Id.*

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

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

²⁴ See Binns Record at 141.

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

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

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

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

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

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

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

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

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

³⁰ *See id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁴⁰ Binns Appellant's Br. at 49.

⁴¹ *Dailey v. Superior Ct.*, 112 Cal. 94, 100 (1896).

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

⁴³ Binns Respondent's Br. at 38.

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

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

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

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

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

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

⁴⁵ Binns Appellant’s Br. at 44–45.

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

⁴⁷ *Id.* at 964–65.

⁴⁸ *Id.* 965–66.

⁴⁹ Binns Respondent’s Br. at 28, 32.

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

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

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

⁵⁰ *Id.* at 29–33.

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

⁵² *Id.* at 56–57.

⁵³ *Id.* at 56.

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

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

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

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

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

II. A COMIC BOOK CLOUDS THE PICTURE

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

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

⁵⁸ See, e.g., *id.*

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

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

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

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

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

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

⁶³ See *id.* at 1, 6.

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

⁶⁵ Molony, *supra* note 62, at 1.

⁶⁶ *Id.*

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

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

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

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

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

⁷² See *id.* at 120.

⁷³ See *id.* at 126.

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

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

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

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

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

⁷⁷ See *Molony*, 98 N.Y.S.2d at 124.

⁷⁸ See *id.*

⁷⁹ See *Binns Record* at 80.

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

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

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

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

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

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

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

⁸² Binns Record at 66.

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

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

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

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

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

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

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

⁸⁶ N.Y. CIVIL RIGHTS LAW §§ 50–51.

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

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

⁸⁹ N.Y. CIVIL RIGHTS LAW § 51.

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

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

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

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

⁹² *Binns Record* at 9.

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

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

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

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

⁹³ Campbell, *supra* note 42, at 870.

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

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

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

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

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

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

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

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

⁹⁹ *Id.*

¹⁰⁰ *Id.*

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

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

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

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

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

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

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

¹⁰⁶ See *id.* at 611.

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

¹⁰⁸ Levine & Wermiel, *supra* note 105, at 619–21.

¹⁰⁹ *Id.* at 621.

¹¹⁰ *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹¹⁷ See *id.* at 92, 107, 122.

¹¹⁸ See *id.* at 92.

¹¹⁹ *Id.* at 90.

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

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

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

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

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

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

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

¹²⁴ See cases cited *supra* note 3.

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

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

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

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

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

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

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

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

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

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

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

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

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

¹³² See *id.* at 382.

¹³³ See *id.* at 386–87.

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

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

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

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

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

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

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

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

¹³⁶ *Id.* at 386.

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

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

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

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

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

¹³⁸ Binns Record at 212.

¹³⁹ Binns Respondent’s Br. at 33.

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

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

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

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

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

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

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

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

¹⁴⁴ *Id.*

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

¹⁴⁶ *Id.* at 242, 244.

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

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

A. *Fanciful Dramatization (or Fictionalization)*

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

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

1. Fictionalization as Falsity?

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

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

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

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

¹⁵¹ *Binns Record* at 73–74.

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

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

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

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

¹⁵² *Id.* at 80.

¹⁵³ *See id.* at 71.

¹⁵⁴ *Id.* at 155.

¹⁵⁵ *Id.*

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

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

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

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

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

2. Fictionalization as Reenactment?

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁶⁷ See FIELDING, *supra* note 165, at 40–41.

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

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

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

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

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

¹⁷⁰ See generally RAYMOND FIELDING, *THE MARCH OF TIME* (1978).

¹⁷¹ *Id.* at 336, 338.

¹⁷² *Id.* at 76.

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

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

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

¹⁷⁶ *Id.* at 705.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁸⁰ *Id.* at 235 (Peck, P.J., dissenting).

¹⁸¹ *Lawless v. Lawless*, 187 Va. 511, 517 (1948).

¹⁸² *Lawless*, 187 Va. at 513–14.

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

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

¹⁸⁵ *Lawless*, 187 Va. at 516.

¹⁸⁶ *Id.* at 516–17.

¹⁸⁷ *Sutton*, 98 N.Y.S.2d at 238.

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

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

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

¹⁸⁸ *Id.* at 236.

¹⁸⁹ *Id.* (quotation omitted).

¹⁹⁰ *Id.* at 234.

¹⁹¹ *Id.*

¹⁹² *Id.* at 237.

¹⁹³ *Id.* at 235.

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

¹⁹⁵ *Id.* at 400.

¹⁹⁶ *Id.* at 401.

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

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

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

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

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

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

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

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 378.

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

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

Three years later, the Supreme Court held that the First Amendment required the same treatment of James Hill’s § 51 claim.²⁰⁴ And because *Life*’s article squarely fit within the truth-seeking logic of Category 1, asking the *Sullivan* question in the case made sense: Had the editor known, or should he have known, that the implication of a close link between the play and the real crime was false? If so, a free-speech regime could afford to lose them; if not, if the editor simply was mistaken, then the article had to be immune. Assuming New York courts applied *Sullivan* and set the bar of falsity at “[m]aterial and substantial falsification”—minor errors, too, had to stay in the speech bubble—then the Supreme Court seemed to tell them that they would have addressed the First Amendment problem with § 51.²⁰⁵

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

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

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

²⁰³ *See id.* at 279–80.

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

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

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

²⁰⁷ *See* MILTON J. SHAPIRO, *THE WARREN SPAHN STORY* (1958).

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

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

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

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

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

²⁰⁹ See *Spahn*, 21 N.Y.2d at 127.

²¹⁰ *Id.*

²¹¹ *Id.* at 128.

²¹² *Id.* at 131.

²¹³ *Id.*

²¹⁴ *Id.*

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

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

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

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

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

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

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

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

²¹⁶ See 94 N.Y.2d 436, 446 (2000).

²¹⁷ *Id.* at 442 (internal quotations omitted).

²¹⁸ *Id.* at 446.

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

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

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

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

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

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

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

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

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

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

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

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

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

²²⁵ See *id.*; see also Franklin Record at 52.

²²⁶ See Franklin Record at 5–14 (amended complaint).

²²⁷ See *id.* at 7–8.

²²⁸ *Id.* at 281.

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

²³⁰ *Id.* at 82–83, 166–67; 214.

²³¹ *Id.* at 221.

²³² *Id.* at 283.

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

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

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

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

C. No Connection With the Rescue Story

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

²³³ *Id.* at 43, 59, 76.

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

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

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

²³⁷ Binns Respondent’s Br. at 8.

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

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

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

Q. But what is the question?

A. The question is whether the public should see me smile or not.²³⁹

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

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

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

²³⁸ Binns Record at 71.

²³⁹ *Id.*

²⁴⁰ *Id.* at 72.

²⁴¹ *Id.* at 71.

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

²⁴³ *Id.*

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

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

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

²⁴⁵ *Id.*

²⁴⁶ *Id.*

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

²⁴⁸ *Id.* at 542–43, 555.

²⁴⁹ *Id.* at 544 (emphasis added).

²⁵⁰ *Id.* at 544–46, 556.

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

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

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

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

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

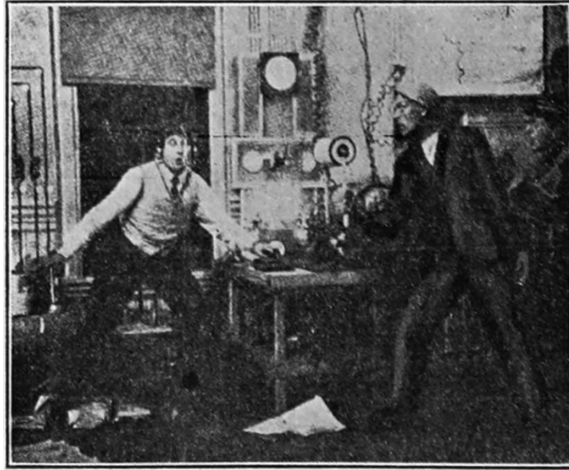
Did Vitagraph try to make audiences believe that *C.Q.D.* was a Category 1 work? Consider the marketplace evidence. The film's full title was "*C.Q.D.*" *Or, Saved by Wireless. A True Story of "The Wreck of the Republic"*—readable perhaps with the emphasis on "True", or on "Story." Vitagraph also

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

²⁵² See *The Crown* (Sony Pictures Television Studios 2016).

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

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



And the circular described the film:

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

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

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

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

²⁵⁵ Binns Record at 177 (emphases added).

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

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

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

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

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

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

²⁵⁷ Binns Record at 156.

²⁵⁸ *Id.* at 154.

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.* at 80.

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

²⁶³ Binns Respondent’s Br. at 23.

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

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

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

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

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

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

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

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

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

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

V. A MODERN ANSWER TO THE *BINNS* QUESTION

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

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

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

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

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

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

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

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

²⁷¹ *Id.* at 718–19 (emphasis added).

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

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

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

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

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

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

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

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

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

²⁷⁵ N.Y. Civ. Rights Law § 51 (2024).

²⁷⁶ *Reed*, 576 U.S. at 171.

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

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

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

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

²⁷⁷ Post & Rothman, *supra* note 4, at 116.

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

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

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

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

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

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

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

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

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

* * *

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

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

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

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

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

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

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

²⁸⁴ Binns Respondent's Br. at 35.

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

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

CONCLUSION

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

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What is Property?: A Libertarian Perspective of Name, Image, and Likeness

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ABSTRACT

Intercollegiate college sports are rapidly changing, reflecting a new legal paradigm.¹ Pursuant to this paradigm, college athletes are now allowed to monetize the commercial value of their names, images, and likenesses, commonly

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¹ This Article is a companion to my articles that examine a person's rights to own and control the attributes of themselves. See Mitchell F. Crusto, *Right of Self*, 79 WASH. & LEE L. REV. 533 (2022) (advancing the position that everyone has an inherent, fundamental right to the attributes of self); Mitchell F. Crusto, *Game of Thrones: Liberty & Eminent Domain*, 76 U. MIA L. REV. 653 (2022) (arguing that the prohibition of college athletes' capitalizing on their NIL is an unconstitutional taking); Mitchell F. Crusto, *Boycott the Games: Show Me the Money!*, 32 J. LEGAL ASPECTS SPORT 153 (2022) (suggesting that the public should consider boycotting college sports to achieve the equitable treatment of college athletes); Mitchell F. Crusto, *Blackness as State Property: Valuing Critical Race Theory*, 57.2 HARV. C.R.-C.L. L. REV. 578 (Fall 2022, officially published Feb. 1, 2023) (utilizing Critical Race Theory to explain how the American legal system has denied Black people, specifically young Black men, the right to acquire property). These articles are components of a broad project to critically analyze the constitutionality of the law's treatment of people and their attributes as property. See generally Mitchell F. Crusto, *Blackness as Property: Sex, Race, Status, and Wealth*, 1 STAN. J.C.R. & C.L. 51 (2005) (focusing on Black

referred to as NIL. Currently, the basis of NIL law is tort law, that is, the right of publicity. However, the right of publicity has limited transferability and severability which arguably impedes adding value of college athletes' NIL. Consequently, this article argues that NIL law would be better grounded in property law, which allows for alienation, severability, and licensing. Such a change would accelerate the paradigm shift by which college athletes share in the wealth of college sports. Notwithstanding, this article's importance goes beyond the rights of college athletes; the issue of whether NIL is property establishes a precedent for whether every person has a property interest in their NIL, capable of monetization and entitled to protection from exploitation.

This Article advances the thesis that NIL law should be based upon private property principles and features to maximize NIL benefits to college athletes. It develops that seminal, normative thesis through three tasks: (1) it analyzes and points out deficiencies in the current NIL law, (2) it proposes a model code solution that society, policymakers, and government should adopt to maximize college athletes' NIL benefits, and (3) it presents several justifications for why the model code is a great idea and defends against critics of the solution. Consequently, this Article concludes that all levels of government should adopt and enact legalization that establishes NIL as the private property of college athletes.

INTRODUCTION

"[E]very man has a 'property' in his own person: this no Body has any Right but to himself."

— John Locke²

"That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the new demands of society."

— Samuel D. Warren & Louis D. Brandeis³

women's struggle for property rights). Please note that some of the content of this Article has appeared in some of the companion articles. © 2024, Mitchell F. Crusto.

² JOHN LOCKE, *TWO TREATISES OF GOVERNMENT*, 116 (Rod Hay ed., McMaster University 1823) (1690).

³ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).

Antitrust laws “should not be a cover for exploitation of the student athletes.”

—Justice Brett Kavanaugh⁴

A. *Players Can’t Get Paid.*

In 2019, Chase Young was the star football player for The Ohio State University Buckeyes.⁵ During his junior season, Mr. Young broke the school’s single-season sack record,⁶ earned a unanimous First-Team All-American nomination,⁷ and received yet another Defensive Player of the Year award.⁸ However, in November 2019, Mr. Young was suspended from play “due to a possible NCAA⁹ issue that the Department of Athletics [was] looking

⁴ Adam Liptak, *Supreme Court Seems Ready to Back Payments to Student-Athletes*, N.Y. TIMES (Apr. 4, 2021), <https://www.nytimes.com/2021/03/31/us/supreme-court-ncaa.html> [<https://perma.cc/MJQ9-B66E>].

⁵ See *Demand That the U.S. Congress Guarantee Fair Pay for College Athletes in Every State*, COLOR OF CHANGE, https://act.colorofchange.org/sign/congress_fairpay?source=coc_main_website [<https://perma.cc/V4GM-U52H>] (last visited Feb. 24, 2022) (reporting several awful stories of the National Collegiate Athletic Association’s (“NCAA”) mistreatment of Black athletes, including Chase Young). Some of this section appears in my companion articles.

⁶ Tom VanHaaren, *Chase Young Sets Buckeyes’ Single-Season Sacks Record*, ESPN (Nov. 23, 2019), https://www.espn.com/college-football/story/_/id/28147511/chase-young-sets-buckeyes-single-season-sacks-record [<https://perma.cc/7DXD-L64E>].

⁷ Wyatt Crosher, *Ohio State’s Chase Young and Jeff Okudah Are Unanimous First-Team All-Americans*, BUCKEYE SPORTS BULL. (Dec. 19, 2019), <https://www.buckeyesports.com/ohio-states-chase-young-and-jeff-okudah-are-unanimous-first-team-all-americans> [<https://perma.cc/K2ZS-CTS8>].

⁸ Among his many awards, Mr. Young was a finalist for the Heisman Trophy. See, e.g., Teddy Greenstein, *Chase Young Is the 2019 Chicago Tribune Silver Football Winner*, CHI. TRIB. (Dec. 6, 2019), <https://www.chicagotribune.com/sports/college/ct-chase-young-ohio-state-silver-football-20191206-imh2o6cs45cpdbj5e7b7sla4zu-story.html> [<https://perma.cc/U5BN-P4D5>].

⁹ See National Collegiate Athletic Association, ENCYC. BRITANNICA (Nov. 15, 2024), <https://www.britannica.com/topic/National-Collegiate-Athletic-Association> [<https://perma.cc/8LF4-GUZQ>] (noting that the NCAA is an organization formed in 1906 that regulates college athletics of its member schools); see also *What Is the NCAA?*, NCAA, <https://www.ncaa.org/sports/2021/2/16/overview.aspx> [<https://perma.cc/K7TL-YCDT>] (last visited June 20, 2024) (reporting that the NCAA was composed of “[m]ore than 500,000 college athletes across all three divisions” who “compete for about 1,100 member schools in all 50 states, the District of Columbia, Puerto Rico and even Canada . . . student-athletes strive to end each season at one of the NCAA’s 90 championships in 24 sports”).

into.”¹⁰ It was later reported that in 2018, Mr. Young had borrowed money from a family friend to purchase an airline ticket for his girlfriend to attend the prestigious Rose Bowl in Pasadena, California.¹¹ By the time Mr. Young was suspended in November 2019, he had already repaid the loan.¹² Despite this, the NCAA claimed that by taking the loan, Mr. Young had violated the NCAA amateurism rules¹³ (hereinafter “rules”) and ultimately suspended him for two games, which likely caused him to lose his bid for the highly-coveted Heisman trophy.¹⁴ Mr. Young’s misfortune illustrates how many college athletes were negatively impacted by the NCAA’s extreme enforcement of its amateurism rules. Another notable, related travesty involved the USC star running back Reggie Bush, who, in 2010, was stripped of his 2005 Heisman Trophy following allegations that his family had accepted cash and living arrangements from a sports agent.¹⁵ On April 24, 2024, following years of legal actions by Bush to clear his name, the Heisman Trust reinstated Reggie Bush’s 2005 Heisman Trophy.¹⁶

¹⁰ Damaris Martino, *Ohio State’s Star Football Player Suspended for Accepting Loan*, CNBC (Nov. 8, 2019), <https://www.cnbc.com/2019/11/08/ohiostates-star-football-player-suspended-for-accepting-loan.html> [https://perma.cc/G5JE-HY2C] (reporting on a statement made by Ohio State’s Associate Athletics Director).

¹¹ Jordan Heck, “Free Chase Young”: *Criticism of the NCAA Trends on Social Media After Ohio State Star’s Suspension*, SPORTING NEWS (Nov. 9, 2019), <https://www.sportingnews.com/us/ncaa-football/news/chase-young-suspension-ohio-state-ncaa/arx41omz2l4719liwyw5ju398> [https://perma.cc/P6R3-7GWV].

¹² *Id.*

¹³ “Amateurism rules” or “eligibility rules” herein refers to the body of NCAA rules under which, *inter alia*, its college athletes were prohibited from receiving funds of any kind related to their play other than scholarships that cover the costs of attending school.

¹⁴ See Bruce Hooley, *Ohio State’s Justin Fields, Chase Young 3-4 in Heisman Voting*, SPORTS ILLUSTRATED (Dec. 14, 2019), <https://www.si.com/college/ohiostate/football/ohio-states-chase-young-justin-fields-watch-burrow-win-heisman> [https://perma.cc/EG6N-PYKW] (reporting that Young lost the Heisman bid to Joe Burrow).

¹⁵ See Shehan Jeyarajah, *How Did Reggie Bush Lose his Heisman Trophy? Answering Key Questions with Ex-USC Star Back Among Award Winners*, CBS SPORTS (Apr. 24, 2024), <https://www.cbssports.com/college-football/news/how-did-reggie-bush-lose-his-heisman-trophy-answering-key-questions-with-ex-usc-star-back-among-award-winners/> [https://perma.cc/LFF6-H4K9].

¹⁶ See David Cobb, *Reggie Bush’s 2005 Heisman Trophy Reinstated as Former USC Trojans Star Wins Long Battle*, CBS SPORTS (Apr. 24, 2024), <https://www.cbssports.com/college-football/news/reggie-bushs-2005-heisman-trophy-reinstated-as-former-usc-trojans-star-wins-long-battle/> [https://perma.cc/TK89-JBF6].

It is essential to place Mr. Young's narrative within the context of the NCAA's amateurism rules.¹⁷ At the time of Mr. Young's alleged violation, under the relevant rules,¹⁸ the NCAA and particularly its member schools, including The Ohio State University, prohibited athletes like Mr. Young from capitalizing on their name, image, and likeness, commonly referred to as NIL.¹⁹ Furthermore, to maintain their amateur status, a student athlete was strictly forbidden from receiving funds or support from sources outside of NCAA member schools. By limiting student compensation and restricting their rights to their NIL, the NCAA and its member schools profit substantially from the billions of dollars from their sports programs, mainly in the form of advertising and television media.²⁰ Notwithstanding the NCAA's prohibition against NIL deals, Mr. Young, an award-winning player, would

¹⁷ See *infra* note 89.

¹⁸ See NCAA DIVISION I MANUAL 64–77 (NCAA, 1998) (setting forth the amateurism and athletics eligibility requirements including: (1) Athletes will lose their amateur status and become ineligible for NCAA play if he or she is compensated for his or her athletic skills in that sport; (2) an NCAA member institution or affiliate is permitted to use the physical appearance, name, and pictures of a student-athlete for both charitable and educational purposes; (3) *a student-athlete will lose his or her ability to participate in NCAA sporting events if he or she either accepts or received payment through commercial advertisement, promotion, or endorsement*)(emphasis added).

¹⁹ “Name, image, and likeness or NIL” herein is defined as laws and regulations relating to college athletes’ right to benefit financially from the use of their name. See generally, Greg Daugherty, *What is NIL? Understanding Name, Image, and Likeness Rules*, INVESTOPEDIA (May 29, 2024), <https://www.investopedia.com/name-image-likeness-8558991> [<https://perma.cc/TWY8-Q3MZ>] (“What, exactly, did the NCAA mean by ‘name, image, and likeness’? While the use of an athlete’s name would seem straightforward, the distinction between ‘image’ and ‘likeness’ is less obvious. To help differentiate it from ‘image’—as in a photograph or recognizable drawing of a particular athlete—USA Volleyball, that sport’s governing body, describes ‘likeness’ as ‘your ‘semblance.’ It elaborates: ‘Think the outline of Michael Jordan on the Jordan brand. Arnold Palmer’s signature on Arizona Iced Tea. Think EA Sports’ popular and profitable video games that depicted former NCAA athletes by using their height, body type, number, and playing style—but never their name or exact image.’” (quoting Michelle Meyer, *An Overview of Name, Image, and Likeness in College Sports*, USA VOLLEYBALL, <https://usavolleyball.org/resource/an-overview-of-name-image-and-likeness-in-college-sports/> [<https://perma.cc/3N7K-8YC3>])); Cole Claybourn, *Name, Image, Likeness: What College Athletes Should Know About NCAA Rules*, US WORLD & NEWS (Feb. 8, 2024), <https://www.usnews.com/education/best-colleges/articles/name-image-likeness-what-college-athletes-should-know-about-ncaa-rules> [<https://perma.cc/N7CC-AHP4>].

²⁰ See *NCAA v. Alston*, 141 S. Ct. 2141, 2150 (2021) (noting how college sports has become a huge economic enterprise).

have likely earned millions of dollars per year in advertising and promotional deals, more than enough to purchase tickets for his friends or family to see him play at the Rose Bowl.

In addition to being denied their NIL rights, the NCAA prohibited its member schools from compensating their athletes for their play, restricting benefits to scholarships. These restrictions meant that athletes, particularly those from economically disadvantaged backgrounds, lacked financial resources to meet their basic needs and faced food insecurity when school cafeterias closed.²¹ In fact, tuition shortfalls amount to thousands of dollars per year with eighty-six percent of NCAA college athletes living below the poverty line. They are usually required to live on campus, attend offseason workouts, and travel to games all over the country.²² These financial pressures, in addition to having to meet both academic as well as athletic challenges, place a tremendous emotional and psychological strain on college athletes,²³ especially African-American young men with disadvantaged backgrounds.²⁴ The NCAA and its member schools have received substantial financial

²¹ Armstrong Williams, *Time to Pay College Athletes*, NEWSMAX (Apr. 9, 2014), <https://www.newsmax.com/ArmstrongWilliams/NCAA-college-athletes-nlr/2014/04/09/id/564508/> [<https://perma.cc/VY9E-XWND>].

²² See *Paying College Athletes—Top 3 Pros and Cons*, PROCON (Jan. 21, 2022), <https://www.procon.org/headlines/paying-college-athletes-top-3-pros-and-cons/> [<https://perma.cc/RH8C-YLXR>] (“Erin McGeoy, a former water polo athlete at George Washington University, explained, ‘a common occurrence was that we would run out of meal money halfway through the semester and that’s when I started to run into troubles of food insecurity.’”).

²³ “College athletes” herein refers to student athletes who participate in intercollegiate competitions. This term includes both NCAA players as well as players who are not governed by the NCAA. Further, this term includes high school athletes as many of them operate pursuant to State NIL law and NCAA rules. Often, States have established separate, similar NIL laws pertaining to high school athletes’ NIL rights. See Greg Daugherty, *What is NIL? Understanding Name, Image, and Likeness Rules*, INVESTOPEDIA (May 29, 2024), <https://www.investopedia.com/name-image-likeness-8558991> [<https://perma.cc/LA6V-VJRU>] (noting that “as of October 2023, at least 30 states and the District of Columbia had such laws on the books” (citing *Tracker: High School NIL*, BUS. OF COLL. SPORTS, <https://businessofcollegesports.com/high-school-nil/> [<https://perma.cc/69WC-FY29>])).

²⁴ See generally, *State Property*, *supra* note 1. Some commentators have likened the NCAA’s exploitation of its players to the enslavement of Black people or of Black labor during the era of Jim Crow. See, e.g., Brandi Collins-Dexter, *NCAA’s Amateurism Rule Exploits Black Athletes as Slave Labor*, ANDSCAPE (Mar. 27, 2018), <https://andscape.com/features/ncaas-amateurism-rule-exploits-black-athletes-as-slave-labor/> [<https://perma.cc/7YDV-6KSC>]; Brando Simeo Starkey, *College Sports Aren’t like Slavery. They’re like Jim Crow*, THE NEW REPUBLIC (Oct. 31, 2014), <https://>

benefits from prohibiting their players from being compensated.²⁵ In fact, one study shows that NCAA college football stars could earn as much as \$2.4 million per year if they were paid equitably for the financial benefits that they bring to the NCAA and its member colleges.²⁶

Fortunately, following several landmark cases, state law amendments, and the NCAA's reformation of its rules,²⁷ college athletes are now entitled to benefit from their NIL. These changes in college athletes' right to benefit from their NIL are revolutionary. However, the NIL law presents a quintessential jurisprudential question: Does existing NIL law optimize the monetization of college athletes' NIL? This Article tackles that question by analyzing how the current NIL law, which is based on the tort of the right of publicity,²⁸ is a

newrepublic.com/article/120071/ncaa-college-sports-arent-slavery-theyre-jim-crow [https://perma.cc/V9N7-647T].

²⁵ See Elliott C. McLaughlin, *California Wants its College Athletes to Get Paid, but the NCAA Is Likely to Put Up Hurdles*, CNN (Oct. 2, 2019), <https://edition.cnn.com/2019/10/01/us/california-sb206-ncaa-fair-pay-to-play-act/index.html> [https://perma.cc/8HAY-3RCY] (“With the signing of California’s Fair Pay to Play Act, Gov. Gavin Newsom ... says the law is about rebalancing a power structure in which NCAA universities receive more than \$14 billion annually and the nonprofit NCAA receives more than \$1 billion, ‘while the actual product, the folks that are putting their lives on the line, putting everyone on the line, are getting nothing.’”).

²⁶ See Tom Huddleston Jr., *College Football Stars Could Be Earning as Much as \$2.4 Million Per Year, Based on NCAA Revenues: Study*, CNBC (Sept. 2, 2020), <https://www.cnbc.com/2020/09/02/howmuch-college-athletes-could-be-earning-study.html> [https://perma.cc/EHD6-XYLZ]; Tommy Beer, *NCAA Athletes Could Make \$2 Million a Year if Paid Equitably, Study Suggests*, FORBES (Sep. 1, 2020), <https://www.forbes.com/sites/tommybeer/2020/09/01/ncaa-athletes-could-make-2-million-a-year-if-paid-equitably-study-suggests/> [https://perma.cc/85UX-QLZT]; AJ Maestas & Jason Belzer, *How Much Is NIL Worth to Student Athletes?*, ATHLETIC DIRECTOR U, <https://athleticdirector.uconn.edu/articles/how-much-is-nil-really-worth-to-student-athletes/> [https://perma.cc/4CDA-PA6U] (last visited Feb. 26, 2022) (“[F]rom a licensing standpoint, the annual NIL value per student-athlete could range from \$1,000–\$10,000, whereas professional athletes garner between \$50,000–\$400,000 for the same group usage licenses When applied to Instagram followers for college athletes from the 2019-2020 school year, annual endorsement revenue estimates would be \$700,000 for LSU’s Joe Burrow, \$440,000 for Alabama’s Tua Tagovailoa, \$390,000 for Oklahoma’s Jalen Hurts, and in the \$5–30K range for less popular athletes.”).

²⁷ See *College Athlete Name, Image, and Likeness Rights Under the Law: 50-State Survey*, JUSTIA (Oct. 2022), <https://www.justia.com/sports-law/college-athlete-name-image-and-likeness-rights-50-state-survey/> [https://perma.cc/GDT4-JVVA].

²⁸ “Right of publicity” herein refers to a right of that prevents the unauthorized commercial use of an individual’s name, likeness, or other recognizable aspects of one’s persona. See *infra* Part I; Legal Information Institute, *Publicity*, CORNELL L.

flawed approach to facilitating benefits for college athletes. Notwithstanding, this Article's importance goes beyond the rights of college athletes. It raises the possibility that every person, not just college athletes, has a property interest in their NIL.

B. Conundrum

Bronny James, Caitlin Clark, Arch Manning, Livvy Dunne, and many other well-known²⁹ and lesser-known college athletes are now benefitting from a paradigm shift in the continued struggle for the rights of college athletes.³⁰ That paradigm shift results from the combination of a series of major court decisions,³¹ changes in various state laws,³² and reformation of the NCAA rules.³³ Today, college athletes are permitted to monetize the use of

SCH., <https://www.law.cornell.edu/wex/publicity> [<https://perma.cc/F88X-U5UC>] (“The state common and statutory law generally protects the right to publicity in the United States. However, not all states recognize the right to publicity. Only about 50% of all states recognize the distinct right to publicity. For the other half of the states, the majority of them recognize the right to publicity under the right of privacy.”); *see generally* J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* (2005). The Restatement Second of Torts recognizes four types of invasions of privacy: intrusion, appropriation of name or likeness, unreasonable publicity, and false light. *See* RESTATEMENT (SECOND) OF TORTS §§ 652A–652I (AM. L. INST. 1977). Under the Restatement’s formulation, the invasion of the right of publicity is most like the unauthorized appropriation of one’s name or likeness. *See* RESTATEMENT (SECOND) OF TORTS § 652C cmts. a, b, illus. 1, 2 (AM. L. INST. 1977).

²⁹ Sean Labar, *Top 10 NIL Earners Include Bryce Young, Olivia Dunne and Three High School Ballers Making Absurd Money*, *OUTKICK* (Jan. 5, 2023), <https://www.outkick.com/10-most-valuable-nil-athletes-bryce-young-livvy-dunne-bronny-james/> [<https://perma.cc/SC2M-HXV7>]; *NIL Valuations & Rankings*, *ON3*, <https://www.on3.com/nil/rankings/> [<https://perma.cc/FV65-P7YD>] (last visited Jun. 20, 2024).

³⁰ *See* Derek Silva, Nathan Kalman-Lamb, & Johanna Mellis, *Beyond NIL: 5 Areas Where the Fight for College Athletes’ Rights Continues*, *GLOBAL SPORTS MATTERS* (Dec. 14, 2021), <https://globalsportmatters.com/culture/2021/12/14/beyond-nil-five-areas-fight-college-athletes-rights/> [<https://perma.cc/H5K9-G24R>].

³¹ *See* *NCAA v. Alston*, 141 S. Ct. 2141 (2021) (holding that the NCAA benefits were too restrictive and that the NCAA is not entitled to protection against antitrust laws); *O’Bannon v. NCAA*, 7 F. Supp. 3d 955 (N.D. Cal. 2014), *aff’d in part, rev’d in part*, 802 F.3d 1049 (9th Cir. 2015), *cert. denied*, 137 S. Ct. 277 (2016) (class action against the NCAA’s restrictions on past and present players’ compensation including the use of their NIL).

³² *See infra* note 136.

³³ Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, *NCAA MEDIA CENTER* (Jun. 30, 2021); <https://www.ncaa.org/news/2021/6/30/>

their NIL.³⁴ Further, in May of 2024, in the antitrust class action *House v. NCAA*, the NCAA agreed to nearly \$2.8 billion to current and former college athletes to compensate them for alleged price fixing of the athletes' NIL.³⁵

The legal battle over NIL rights is principally being fought on the battlefield of college campuses, with college athletes on the frontlines.³⁶ However, the legal nature of NIL is of timely concern for many reasons beyond

ncaa-adopts-interim-name-image-and-likeness-policy.aspx [https://perma.cc/KKV2-QJBV]; *Name, Image and Likeness Policy Question and Answer*, NCAA, https://ncaaorg.s3.amazonaws.com/ncaa/NIL/July2022NIL_DIInterimPolicy.pdf [https://perma.cc/3LDH-VJDT]. In May 2022, the NCAA released guidance regarding collectives, which are separate third-party businesses typically formed by boosters or fans of a specific school to create and support NIL opportunities for the school's athletes, such as public appearances, autograph signings and brand deals, stating that they would be considered "boosters" and are not permitted to be involved in recruiting college athletes. Claybourn, *supra* note 19. On June 27, 2023, the NCAA published an NIL Update Memo providing answers to frequently asked questions when applicable state NIL laws conflict. E-mail from NCAA to NCAA Division I athletics directors, conference commissioners, presidents and chancellors, and administrators, available online at https://mc97gsxn49y6wmpf4p2n764zq7z1.pub.sfmcontent.com/2ezhy1105pc [https://perma.cc/YYQ8-YBSS] (last visited Nov. 16, 2024); see Erin Walsh, *NCAA Says Schools Must Adhere to NIL Rules Regardless of Conflict with State Laws*, BLEACHER REPORT (Jun. 27, 2023), https://bleacherreport.com/articles/10080849-ncaa-says-schools-must-adhere-to-nil-rules-regardless-of-conflict-with-state-laws [https://perma.cc/3YRY-9NQ4]; *Name, Image, Likeness*, NCSA SPORTS, https://www.ncsasports.org/name-image-likeness [https://perma.cc/SUS2-JMEJ] (last visited June 11, 2024). The NCAA does not permit schools to offer student athletes signing bonuses, ongoing compensation, or other financial incentives to attend, nor does it allow students to get paid to play in any capacity.

³⁴ See *infra* note 136138.

³⁵ *House v. NCAA*, 545 F. Supp. 3d 804 (2021) (*In re* College Athlete NIL Litigation). The Plaintiffs alleged that the NCAA and conferences engaged in an "overarching conspiracy" to (a) "fix the amount that student-athletes may be paid for licensing, use, and sale of their names, images, and likeness—at zero; and (b) foreclose student-athletes from the market for licensing, use, and sale of their names, images, and likenesses entirely." Complaint at 7, Class Action Complaint, *House v. NCAA*, No. 4:20-cv-03919 (N.D. Cal. Jun. 15, 2020), ECF No. 1 available at https://www.courtlistener.com/docket/17248915/1/in-re-college-athlete-nil-litigation/ [https://perma.cc/J7DB-2S2V]; see Steve Berkowitz, *NCAA Lawsuit Settlement Agreement Allowing Revenue Sharing with Athletes Faces Unresolved Questions*, USA TODAY (May 25, 2024), https://www.usatoday.com/story/sports/college/2024/05/25/ncaa-lawsuit-settlement-revenue-sharing-legal-questions/73843373007/ [https://perma.cc/RS77-CJDJ].

³⁶ See *NCAA v. Alston*, 141 S. Ct. 2141 (2021).

the debate over the rights and compensation of college athletes.³⁷ NIL law, or the lack thereof, involves the proliferation of social media platforms,³⁸ as well as the expansion of artificial intelligence (“AI”)³⁹ and the development of the metaverse.⁴⁰ Consequently, NIL law should be in everyone’s interest, particularly social influencers and celebrities, as NIL rights arguably belong to everyone, not just college athletes.⁴¹

Despite societal developments that require the protection of NIL and the opportunity to increase personal wealth and the wealth of the nation, NIL law is in its infancy. First and foremost, no federal or state law provides that every person has the legally-protected right to monetize their NIL and to protect it from exploitation.⁴² Second, in states that have enacted NIL laws, they have been mainly limited to college athletes.⁴³ Third, where NIL

³⁷ See *infra* note 97.

³⁸ See Nelson Granados, *The Sports Agent of the NIL Era: A Social Media Savvy Life Coach*, FORBES (May 23, 2023), <https://www.forbes.com/sites/nelsongranados/2023/05/23/the-sports-agent-of-the-nil-era-a-social-media-savvy-life-coach/> [https://perma.cc/9FCV-55H3]; *NIL x Social Media*, STUDENT-ATHLETE INSIGHTS (Oct. 9, 2022), <https://studentathleteinsights.com/blog/name-image-likeness-nil-insider-14> [https://perma.cc/DS77-CJ7U] (“Although brands are continuing to expand how they are activating student-athletes, social media remains the main tactic in nearly 80% of NIL partnerships.”).

³⁹ See Sharoni S. Finkelstein & Alexandra L. Kolsky, *Artificial Intelligence Wants Your Name, Image, and Likeness—Especially if You’re a Celebrity*, VENABLE LLC (May 17, 2023), <https://www.venable.com/insights/publications/2023/05/artificial-intelligence-wants-your-name-image> [https://perma.cc/YE4F-Y49M].

⁴⁰ “Metaverse” herein refers to persistent virtual worlds as well as augmented reality that combines aspects of the digital and physical world. See Eric Ravenscraft, *What Is the Metaverse, Exactly?*, WIRED (Jun. 15, 2023), <https://www.wired.com/story/what-is-the-metaverse/> [perma.cc/9VJW-FLD4].

⁴¹ *Crusto, Right of Self*, *supra* note 1. These unexplored attributes of persona have legal aspects that have been widely undeveloped by our legal system. See, e.g., *Shaw Fam. Archives Ltd. v. CMG Worldwide, Inc.*, 486 F. Supp. 2d 309, 314 (S.D.N.Y. 2007) (stating that neither New York nor California recognized a right of publicity applicable to a decedent); Michael Decker, *Goodbye, Norma Jean: Marilyn Monroe and the Right of Publicity’s Transformation at Death*, 27 CARDOZO ARTS & ENT. L. J. 243, 252 n.69, 253–54 n.77 (2009) (noting that many states now have common law and/or statutory rights of publicity that apply postmortem).

⁴² See Drew Butler, *Comparing State NIL Laws and Proposed Legislation*, ICON SOURCE (July 2022), <https://iconsource.com/blog/nil-laws-comparison/> [https://perma.cc/J9KV-AEVX].

⁴³ *Id.* In fact, many States have enacted neither a right of publicity law nor a NIL law, including laws that specifically benefit college athletes. Mark Farberman, *States That Do Not Have Right of Publicity Statute NIL nor State Common Law Right*, LINKEDIN (Jan. 20, 2024), <https://www.linkedin.com/pulse/>

laws have been enacted, they are founded on the right of publicity and equal protection.⁴⁴

This Article seeks to establish a strong jurisprudential foundation for the development of NIL law. It does so by critiquing the deficiencies of the tortious right of publicity and positing that property law⁴⁵ offers a better jurisprudential basis for NIL law.⁴⁶ To assess the best basis for NIL law, I believe that NIL should achieve two related societal and economic goals: (1) maximizing the value of NIL and the wealth of the person who is entitled to NIL rights and (2) protecting NIL from exploitation. I coin these as the “NIL value proposition” (“NVP”).⁴⁷ These two societal goals of maximizing

states-do-have-right-publicity-statute-nil-nor-state-farbman-phd-hfige/ [https://perma.cc/J8JU-PA2W].

⁴⁴ See Jacob P. East, *What is NIL?: Right of Publicity Law in NCAA Sports*, DARKHORSE (Feb. 1, 2023), <https://darkhorse.law/what-is-nil-right-of-publicity-law-in-ncaa-sports/> [https://perma.cc/UB9N-XT5Q].

⁴⁵ “Property” herein refers to “natural law theory of property” which is the jurisprudential theory by which there are “natural rights” (1) that are fundamental or natural, as derived from God or nature, (2) to which all people are equally entitled, (3) that are inalienable, meaning they cannot be bargained or legislated away from people, and (4) that apply to life, liberty, and property. See *The Natural Law Tradition in Ethics*, STAN. ENCYC. OF PHIL. (May 26, 2019), <https://plato.stanford.edu/entries/natural-law-ethics/> [https://perma.cc/NM4J-G3YR]; see generally JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* (1988); STEPHEN MUNZER, *A THEORY OF PROPERTY I* (1990); MARGARET JANE, *REINTERPRETING PROPERTY* (1993); Will Kenton, *What Are Property Rights and Why Do They Matter?*, INVESTOPEDIA (May 10, 2024), https://www.investopedia.com/terms/p/property_rights.asp [https://perma.cc/PZD7-E45J].

⁴⁶ This Article focuses on the college athletes’ rights to monetize their NIL, comparing the current law based on the tort of the right of publicity versus a suggested law based on property law. The author is keenly aware of the fact that contract law plays a vital role in the exercise of an athlete’s NIL rights. See e.g., Nil Contract Template, US LEGAL, https://www.uslegalforms.com/forms/us-1341022bg/college-athlete-nil-endorsement-agreement?msclkid=d2b54dbdab581b266c492b3252ca050b&utm_source=bing&utm_medium=cpc&utm_campaign=USLF_Branding%20-%20Dynamic&utm_term=uslegalforms&utm_content=USLF_Branding_All_DSA [https://perma.cc/HU6M-XNMM] (last visited July 11, 2024). Further, many other areas of law are vital to the NIL deal, including agency law (the role of sports agents), tax law (the tax liability for NIL income), and estate planning and family law (NIL as marital property, hereditability). See generally DARREN A. HEITNER, *HOW TO PLAY THE GAME: WHAT EVERY SPORTS ATTORNEY NEEDS TO KNOW* (2021) (the go-to source for anyone interested in getting into the field of sports law). Notwithstanding, these important, albeit ancillary matters are not the subject of this Article.

⁴⁷ “NIL value proposition” herein refers to the author’s conceptualization of how NIL might achieve the societal and economic goals increasing the wealth of the person and of the nation and promoting order by discouraging exploitation.

wealth and guarding against exploitation are fundamental to an orderly, lawful society. In order to achieve NVP, I posit that NIL law needs to have several property law features, including (1) alienation or marketability, (2) severability or divisibility, (3) heritability or descendibility, (4) protectability, and (5) justiciability. This Article assesses whether the current NIL law achieves NVP and posits that classifying NIL as a “property” right of the person who is entitled to the NIL rights would facilitate the value proposition that we seek.⁴⁸

C. Roadmap

This Article advances the thesis that NIL law should be based upon and capture private property features to maximize NIL benefits to college athletes. It takes a seminal, normative view of the jurisprudential basis of NIL law relating to college athletes through three tasks: (1) it analyzes and points out the current NIL landscape which is based on the right of publicity; (2) it proposes a model code solution that society, policymakers, and government should adopt to maximize college athletes’ NIL benefits; and (3) it presents several justifications for why the model code is a great idea and defends against critics of the solution. Consequently, this Article concludes that all levels of government should adopt and enact legislation that implements the model, a property-based NIL statute.

In summary, this Article utilizes a libertarian lens⁴⁹ to support the proposition that NIL law relative to college athletes should be grounded on private property principles rather than tort law. Part I next presents an analysis of the current State-based NIL laws and points out the deficiencies in the jurisprudential basis of the NIL law.

⁴⁸ See *infra* Part II.

⁴⁹ “Libertarian lens” herein means to value individual freedom and civil liberties, endorse a free-market economy based on private property, and promote freedom of contract. See *Libertarianism*, STAN. ENCYC. OF PHIL. (Jan. 28, 2019), <https://plato.stanford.edu/entries/libertarianism/> [<https://perma.cc/ML7E-2NUL>]; *Individual Rights*, LIBERTARIANISM (last visited Mar. 23, 2022), <https://www.libertarianism.org/topics/individual-rights> [<https://perma.cc/Q9V2-5ZNF>] (“[L]ibertarian doctrines of individual rights are often cast in terms of a fundamental right of self-ownership.”). This Article reflects libertarianism based on deontological ethics—the theory that all individuals possess certain natural or moral rights, mainly the right of “individual sovereignty” or “self-ownership,” which is a property in one’s person, with possession and control over oneself, as they exercise over the possessions they own. See *infra* Part III; see generally ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 42–43 (2013 ed. 1974) (defending a political theory entrenched in the rights of individuals); DAVID BOAZ, THE LIBERTARIAN MIND 27 (2015); G.A. COHEN, SELF-OWNERSHIP, FREEDOM, AND EQUALITY 15 (1995).

Before getting into the weeds of legal analysis of NIL law, it is helpful to provide a brief explanation of how a college athlete NIL deal works.⁵⁰ Essentially, such a deal is a contract between a player and often a group or “collective” of college donors who agree to compensate a player for their services. These NIL deals typically consist of an endorsement of a service provider, such as a car dealership, or a product, such as a brand of pizza.⁵¹ A high-profile player is typically represented by a seasoned sports agent accompanied by a team of lawyers, accountants, tax professionals, and social media experts.⁵² The amount of money involved in a NIL deal depends on the value a player can bring to influence markets, such as a decision to purchase a certain brand of athletic equipment.⁵³ However, the NCAA rules prohibit a player from receiving any compensation, including from a NIL deal, to play a sport.⁵⁴ Further, the NCAA prohibits the use of a NIL deal to recruit or induce a player to enroll at and play for a given college, although this rule remains controversial.⁵⁵

⁵⁰ See generally Paul Rudder, *Who is the Highest Paid College Athlete? NIL Endorsement Deal Money in NCAA Sports*, AS (Mar. 25, 2024), <https://en.as.com/ncaa/who-is-the-highest-paid-college-athlete-nil-endorsement-deal-money-in-ncaa-sports-n/> [<https://perma.cc/K5NM-G684>].

⁵¹ *Id.* (reporting that the most common ways in which athletes can earn NIL contracts are for direct payments for promotional activities, free or sponsored products in exchange for promotion, free or sponsored services in exchange for promotion, earning affiliate money from social media promotion, becoming an ambassador for a brand or business, or appearing in commercials, ads, and digital content).

⁵² *Id.*

⁵³ College athlete NIL deals greatly vary. Many college athletes do not have an NIL deal because they have no notoriety of value in the marketplace. However, there are nearly half a million college athletes who have NIL deals which average between \$1,000 and \$10,000. On the other end of the spectrum are the high-profile players who are commanding megabucks in NIL money in the millions of dollars. A selective few have national brand endorsement deals such as Bronny James who inked a lucrative contract with Nike while he was a high school student. The highest paid NIL players are high-profile, star football- or basketball-playing young men. Notwithstanding, one major exception is LSU gymnast Livvy Dunne who proves that having a significant social media following can garner substantial NIL deals, with over 11.3 million followers. *Id.*

⁵⁴ However, this past prohibition will likely be superseded by a historic settlement of a class action lawsuit which will effectively permit colleges to pay college athletes to play their sports. See Berkowitz, *supra* 35.

⁵⁵ See Stewart Mandel, *NCAA Recruiting Pay-for-Play is Here, and the Only Surprise is How Fast it Happened*, N.Y. TIMES (Feb. 23, 2024), <https://www.nytimes.com/athletic/5296175/2024/02/23/ncaa-nil-paying-recruits-tennessee-injunction/> [<https://perma.cc/FL4E-8VQX>] (reporting that a federal judge in Tennessee “granted a preliminary injunction that prohibits the NCAA from enforcing its own rules against pay-for-play in recruiting. Effective immediately, name, image and likeness collectives can negotiate deals with recruits without fear of NCAA sanctions.”).

While this Article presents a seminal, normative view of NIL through a libertarian lens, it has greatly benefited from the works of others directly or indirectly related to the issue. A brief mention of some representative scholarship on various, albeit non-exhaustive, related topics include the problem of social cost;⁵⁶ jurisprudential theories of property;⁵⁷ natural rights to property;⁵⁸ foundational principles of property in American history;⁵⁹ constitutional basis of property principles;⁶⁰ principles of equal protection,⁶¹ the expansive scope

⁵⁶ Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960); Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987).

⁵⁷ See generally Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897); ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974); DAVID BOAZ, THE LIBERTARIAN MIND: A MANIFESTO FOR FREEDOM (2015); G.A. COHEN, SELF-OWNERSHIP, FREEDOM, AND EQUALITY (1995); WALDRON, THE RIGHT TO PRIVATE PROPERTY (1988); S. MUNZER, A THEORY OF PROPERTY (1990); MARGARET JANE RADIN, REINTERPRETING PROPERTY (1993).

⁵⁸ See generally Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); *The Natural Law Tradition in Ethics*, STAN. ENCYC. OF PHIL. (May 26, 2019), <https://plato.stanford.edu/entries/natural-law-ethics/> [<https://perma.cc/78ZW-W6GD>]; *Natural Law*, THE FREE DICTIONARY (2022), <https://www.thefreedictionary.com/natural+law> [<https://perma.cc/YB9M-NU3A>].

⁵⁹ See generally Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); A.E. DICK HOWARD, THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA (1968); DAVID J. HOEVELER, CREATING THE AMERICAN MIND: INTELLECT AND POLITICS IN THE COLONIAL COLLEGES (2007); NEIL C. OLSEN, PURSUING HAPPINESS: THE ORGANIZATIONAL CULTURE OF THE CONTINENTAL CONGRESS (2013); JAMES WALSH, EDUCATION OF THE FOUNDING FATHERS OF THE REPUBLIC: SCHOLASTICISM IN THE COLONIAL COLLEGES 35 (1925); BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967) (concluding that the major themes of eighteenth-century libertarianism were realized in written constitutions, bills of rights, and limits on executive and legislative powers, and arguing that the revolutionary rhetoric of liberty and freedom was not simply propagandistic but rather central to how the revolutionaries understood their situation). These ideas and beliefs inspired both the American Revolution and the French Revolution. *Id.* at 200.

⁶⁰ See generally Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972); NORMAN REDLICH, JOHN ATTANASIO, JOEL K. GOLDSTEIN, UNDERSTANDING CONSTITUTIONAL LAW 403–91 (2005) (noting that the Supreme Court has extended fundamental rights to include the right to interstate travel, the right to parent one's children, protection on the high seas from pirates, the right to privacy, and the right to marriage); David Crump, *How Do the Courts Really Discover Unenumerated Fundamental Rights? Cataloguing the Methods of Judicial Alchemy*, 19 HARV. J. L. & PUB. POL'Y 795, 806–16 (1996); JACK P. GREENE, THE CONSTITUTIONAL ORIGINS OF THE AMERICAN REVOLUTION 79 (2011).

⁶¹ See generally Gerald Gunther, *The Supreme Court, 1971 Term Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

of property;⁶² individual rights and federalism;⁶³ property rights and takings,⁶⁴ the role of morality in the law;⁶⁵ the right of self;⁶⁶ the constitutional history of protecting intellectual property;⁶⁷ the right of privacy;⁶⁸ the right of publicity;⁶⁹

⁶² See generally Charles A. Reich, *The New Property*, 73 YALE L. J. 733 (1964).

⁶³ See generally William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954); Mitchell F. Crusto, *The Supreme Court's "New" Federalism: An Anti-Rights Agenda?*, 16 GA. ST. U. L. REV. 517 (2000).

⁶⁴ See generally Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964); Crusto, *Game of Thrones*, *supra* note 1.

⁶⁵ See generally H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

⁶⁶ See generally Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982); Crusto, *Right of Self*, *supra* note 1; Ayn Rand, *Collectivized "Rights"*, in *THE VIRTUE OF SELFISHNESS* 135, 140 (4th ed. 1964) ("Individual rights are not subject to a public vote; a majority has no right to vote away the rights of a minority; the political function of rights is precisely to protect minorities from oppression by majorities (and the smallest minority on earth is the individual.);"); PATRICIA KITCHER, *THE SELF: A HISTORY* (Patricia Kitcher ed., 2021) (exploring the ways in which the concept of an "I" or a "self" has been developed and deployed at different times in the history of Western philosophy); Daniel C. Russell, *Self-Ownership as a Form of Ownership*, in *THE OXFORD HANDBOOK OF FREEDOM* 21, 21–39 (D. Schmidtz & Carmen E. Pavel eds., 2018).

⁶⁷ See generally Wendy J. Gordon, *A Property Right in Self Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L. J. 1533 (1993); *Origins and Scope of the Power*, JUSTIA, <https://law.justia.com/constitution/us/article-1/50-copyrights-and-patents.html#:~:text=As%20to%20patents%2C%20modern%20legislation%20harks%20back%20to,intellectual%20property%20through%20the%20Copyright%20and%20Patent%20Clause> [https://perma.cc/3DK8-89KA] (last visited Nov. 9, 2024).

⁶⁸ See generally Warren & Brandeis, *supra* note 3, at 193; William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960); RICHARD C. TURKINGTON & ANITA L. ALLEN, *PRIVACY LAW: CASES & MATERIALS* (2002). This list does not ignore the ongoing political and constitutional law tensions that include "body autonomy" or "body integrity," as it relates to a woman's freedom of choice; a person's right to deny medical treatment, such as vaccination against COVID-19; and the right of privacy, to name a few. See also REBECCA SKLOOT, *THE IMMORTAL LIFE OF HENRIETTA LACKS* (2010). Also relevant is *Moore v. Regents*, 793 P.2d 479 (Cal. 1990), *cert. denied*, 499 U.S. 544 (1991), a landmark case holding that the plaintiff had no property rights in his discarded cells or rights to any profits made from them. *Id.* at 488–93.

⁶⁹ See generally 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).

the inheritance rights in celebrities' likeness;⁷⁰ the history of the NCAA's amateurism rules; the legal battle over college athletes' rights;⁷¹ the application of antitrust laws to college sports;⁷² the particular negative effect of racism on NIL rights;⁷³ the wealth gap relative to race,⁷⁴ gender,⁷⁵ age,⁷⁶ and class;⁷⁷ the legal

⁷⁰ See, e.g., *Shaw Fam. Archives Ltd. v. CMG Worldwide, Inc.*, 486 F. Supp. 2d 309, 319 (S.D.N.Y. 2007) (holding that the right of publicity cannot be created and transferred post-mortem where that right did not exist at the time of the testator's death); Decker, *supra* note 41, at 252 n.69, 253 n.77 (noting that many states now have common law or statutory rights of publicity that apply postmortem).

⁷¹ See generally Claybourn, *supra* note 19.

⁷² See generally Case Comment, *Sherman Act—Antitrust Law—College Athletics—NCAA v. Alston*, 135 HARV L. REV. 471 (2021), <https://harvardlawreview.org/wp-content/uploads/2021/11/135-Harv.-L.-Rev.-471.pdf> [<https://perma.cc/LYK5-M69D>].

⁷³ See generally Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Crusto, *Blackness as State Property*, *supra* note 1.

⁷⁴ See Vanessa Williamson, *Closing the Racial Wealth Gap Requires Heavy, Progressive Taxation of Wealth*, BROOKINGS (Dec. 9, 2020), <https://www.brookings.edu/articles/closing-the-racial-wealth-gap-requires-heavy-progressive-taxation-of-wealth/> [<https://perma.cc/B25Y-JASG>] (reporting that “the median white household has a net worth 10 times that of the median Black household,” such that “[t]he total racial wealth gap . . . is \$10.14 trillion”). See also Crusto, *Blackness as State Property*, *supra* note 1.

⁷⁵ See generally Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991); Crusto, *Blackness as Property*, *supra* note 1; Elanor Taylor, *Groups and Oppression*, 31 HYPATIA 520, 520–21 (2016) (“Oppression is a form of injustice that occurs when one social group is subordinated while another is privileged, and oppression is maintained by a variety of different mechanisms including social norms, stereotypes and institutional rules.”); LYNN WEBER, *UNDERSTANDING RACE, CLASS, GENDER, AND SEXUALITY: A CONCEPTUAL FRAMEWORK* (2d ed. 2010).

⁷⁶ See, e.g., Annalyn Censky, *Older Americans Are 47 Times Richer than Young*, CNN MONEY (Nov. 28, 2011), https://money.cnn.com/2011/11/07/news/economy/wealth_gap_age/index.htm [<https://perma.cc/2VNZ-S7YX>]; Christopher Ingraham, *The Staggering Millennial Wealth Deficit, in One Chart*, WASH. POST (Dec. 3, 2019), <https://www.washingtonpost.com/business/2019/12/03/precariousness-modern-young-adulthood-one-chart/> [<https://perma.cc/55FW-6WP3>] (“Millennials[] . . . financial situation is relatively dire. They own just 3.2 percent of the nation’s wealth. To catch up to Gen Xers, they’d need to triple their wealth in just four years. To reach boomers, their net worth would need a sevenfold jump.”).

⁷⁷ See generally Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); Mitchell F. Crusto, *Unconscious Classism: Entity Equality for Sole Proprietors*, 11 U. PA.

treatment of virtual assets, cyberspace, and gaming;⁷⁸ the development and nature of college athletes' NIL rights;⁷⁹ taxation of NIL;⁸⁰ the future of college

J. CONST. L. 215 (2009); Mitchell F. Crusto, *Obama's Moral Capitalism: Resuscitating The American Dream*, 63 U. MIAMI L. REV. 1011 (2009). Federal Reserve data indicates that, from 1989 to 2019, wealth became increasingly concentrated in the top 1 percent of the country's wealthiest individuals. Matthew Yglesias, *New Federal Reserve Data Shows How the Rich Have Gotten Richer*, Vox (Jun. 13, 2019), <https://www.vox.com/policy-and-politics/2019/6/13/18661837/inequality-wealth-federal-reserve-distributional-financial-accounts> [["https://perma.cc/QD5D-FK22"](https://perma.cc/QD5D-FK22)] (reporting that the gap between the wealth of the top 10 percent and that of the middle class is over 1,000 percent; that increases another 1,000 percent for the top 1 percent, hence the term "wealth gap."); Craig Garthwaite, Jordan Keener, Matthew J. Notowidigdo, & Nicole F. Ozminkowski, *Who Profits from Amateurism? Rent-Sharing in Modern College Sports* 1–3 (Nat'l Bureau of Econ. Rsch., Working Paper No. 27734, 2020), <https://www.nber.org/papers/w27734> [<https://perma.cc/Y8WY-EYQT>] (demonstrating that revenue generated from collegiate men's football and basketball programs is largely re-invested in the university's athletic department, with less than 7 percent being distributed to athletes given strict limits on academic scholarships and stipends for living expenses).

⁷⁸ See generally David R. Johnson & David Post, *Law and Border: The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996); DAVID J. BELL, BRIAN D. LOADER, NICHOLAS PLEACE, & DOUGHLAS SCHULER, *CYBERCULTURE: THE KEY CONCEPTS* (2004). There is much at stake as technology continues to monetize the "virtual" essence of a person, such as an "avatar" in a fantasy football league that was part of the American and Canadian fantasy sports/gaming industry, which was valued at more than \$7 billion in 2017. See Ashley Rodriguez, *How the \$7 Billion US Fantasy Football Industry Makes Its Money in 2017*, QUARTZ (Sept. 3, 2017), <https://qz.com/1068534/how-the-7-billion-us-fantasy-football-industry-makes-its-money-in-2017> [<https://perma.cc/GJ84-T69N>]; Dora Mekouar, *Why Millions of Americans Spend Billions on this Fantasy*, VOICE OF AM. (Sept. 3, 2019), https://www.voanews.com/a/usa_all-about-america_why-millions-americans-spend-billions-fantasy/6175070.html [<https://perma.cc/PPB3-UX2A>]; see also Monika A. Górska & Lena Marcinoska-Boulangé, *Likeness in Computer Games: Real-Life People*, NEWTECH.LAW (Apr. 8, 2021), <https://newtech.law/en/likenesses-in-computer-games-real-life-people> [<https://perma.cc/N2LF-W2KT>] (reporting on lawsuits wherein famous people sued gaming enterprises for the unauthorized use their avatars, including Juventus footballer Edgar Davids, Gwen Stefani, Lindsay Lohan, Lacy Jonas, and Kierin Kirby).

⁷⁹ See generally Heitner, *supra* note 46.

⁸⁰ See Rebecca Lake, *NIL Deals and Tax Implications: A Guide for College Athletes*, INVESTOPEDIA (May 30, 2024), <https://www.investopedia.com/nil-deals-tax-implications-8599929> [<https://perma.cc/ET7H-U9WA>]; *Student-Athletes Involved in Name Image Likeness (NIL) Agreements Should Be Aware of Their Tax Obligations*, TAXPAYER ADVOCATE SERVICE, <https://www.taxpayeradvocate.irs.gov/news/nta-blog/nta-blog-student-athletes-involved-in-nil-agreements-should-be-aware-of-their-tax-obligations/2023/12/> [<https://perma.cc/3JSP-HPDF>] (last updated Feb. 9, 2024).

sports;⁸¹ and the relationship between college education and intercollegiate sports.⁸² I apologize in advance to the many brilliant scholars, be they alive, dead, or fictitious, whose works I have inadvertently failed to recognize here.

I. CONUNDRUM

A. *History of NIL Law*⁸³

Part I will focus on the problem of relying on the tortious right of publicity as the foundation for NIL law. To provide context to this part, as noted above, most states that have enacted NIL laws have done so in response to the need to protect college athletes from the overreaching of the NCAA's amateurism rules relating to player compensation.⁸⁴ Further, many of those states have stated the basis of the law is "equal protection," that is that college student athletes should have the same right to the right of publicity as college students who are not athletes. With those goals in mind, this part will look at the epicenter of the battle over NIL rights, namely that of college athletes over the NCAA's regulation of the athletes' benefit from their NIL. Consistent with societal goals, the claim of college athletes is that they should personally benefit from the commercial use of their NIL and that they should be protected from exploitation of their NIL.⁸⁵

Consequently, Part I describes how and why various states have enacted laws to provide college athletes the right to capitalize on their NIL.⁸⁶ To be clear, these laws are narrowly focused on college athletes in response to the

⁸¹ David Hale, *What is the Future of College Football? Over 200 Coaches, Players and Administrators Respond*, ESPN (Aug. 1, 2022), https://www.espn.com/college-football/story/_/id/34307234/what-future-college-football-200-coaches-players-administrators-respond [https://perma.cc/57YF-DJRK].

⁸² Gabe Feldman, *Reimagining The Role of Intercollegiate Sports in Higher Education*, ARNOLD VENTURES, <https://athleticdirector.uconn.edu/articles/reimagining-the-role-of-intercollegiate-sports-in-higher-education/> [https://perma.cc/L8T3-VXRN] (last visited Jul. 17, 2024).

⁸³ See *infra* Part III.C.1.

⁸⁴ See *supra* Introduction.

⁸⁵ See David Savage, *Supreme Court Justices See "Exploitation" of College Athletes in NCAA Case*, L.A. TIMES (Mar. 31, 2021), <https://www.latimes.com/politics/story/2021-03-31/supreme-court-ncaa-case> [https://perma.cc/SLG3-H4WQ].

⁸⁶ See *infra* Part I; Ezzat Nsouli & Andrew King, *How US Federal and State Legislatures Have Addressed NIL*, SQUIRE PATTON BOGGS (Jul. 13, 2022), <https://www.sports.legal/2022/07/how-us-federal-and-state-legislatures-have-addressed-nil/> [https://perma.cc/9E5Z-445H].

NCAA's rules that prohibited such benefits to its players.⁸⁷ Caveat: There is no evidence that these targeted laws are meant to apply broadly to establish NIL law for everyone. Notwithstanding, I will analyze the deficiencies of these state NIL statutes to suggest how to fashion a model NIL law that would apply universally, not just to college athletes. This analysis will focus on the NIL law of one state, which is representative of the statutes of the various states that have enacted NIL laws.

As mentioned, the current legal development of NIL law is focused on the rights of college athletes. To understand those laws, one needs a brief history of how and why these laws were enacted, relating to the Fair Pay to Play issue. That requires a further discussion of the NCAA's amateurism rules and its past restraints on players' benefiting from their NIL.⁸⁸

On June 21, 2021, in *NCAA v. Alston*,⁸⁹ the U.S. Supreme Court chipped away at the strict limitations on the NCAA's amateurism rules for college athletes' eligibility to play for member teams.⁹⁰ Specifically, the Court upheld a ruling by the U.S. Court of Appeals for the Ninth Circuit that struck down NCAA caps on student-athlete academic benefits (i.e. reimbursements and pay for academic-related expenses) on antitrust grounds, as those caps violated Section 1 of the Sherman Act.⁹¹ The Sherman Act prohibits activities that restrict interstate commerce and competition for services or products in the marketplace.⁹² Consequently, various states recognized college athletes' right to capitalize on their NIL⁹³ which has created a national marketplace for NIL deals.⁹⁴ In response to these developments, the NCAA adopted new rules that permit college athletes to be compensated for the use of their NIL.⁹⁵ It has been suggested that the future viability of college athletics, particularly

⁸⁷ See *Amateurism*, NCAA, <https://www.ncaa.org/sports/2014/10/6/amateurism.aspx> [<https://perma.cc/FM75-72RA>] (last visited Nov. 16, 2024).

⁸⁸ See *supra* Introduction.

⁸⁹ 141 S. Ct. 2141 (2021).

⁹⁰ *Amateurism*, *supra* note 87.

⁹¹ See *generally* Case Comment, *supra* note 72.

⁹² The Sherman Antitrust Act, 15 U.S.C. §§ 1–7, is a United States antitrust law that prescribes the rules of free competition for those engaged in interstate commerce. See Legal Information Institute, *Sherman Antitrust Act*, CORNELL L. SCH., https://www.law.cornell.edu/wex/sherman_antitrust_act [<https://perma.cc/79ZY-XQS6>] (last visited Apr. 1, 2022).

⁹³ See *infra* note 153.

⁹⁴ See *Tracker: NIL Marketplaces for Student Athletes*, BUS. OF COLL. SPORTS, <https://businessofcollegesports.com/tracker-nil-marketplaces-for-student-athletes/> [<https://perma.cc/B44U-V3L9>] (last updated Feb. 26, 2024).

⁹⁵ See NCAA, *supra* note 33.

football, as well as the financial health of many major colleges will depend on the way that players' NIL deals are regulated.⁹⁶

Currently, the development of NIL law is state-statutorily-based and is narrowly focused on highlighting that college athletes should not be restricted by NCAA rules relative to the players' rights to benefit from their NIL. As the NCAA's continuing regulation and ongoing litigation show, the jury is still out on the final regulation of college athletes' NIL. Notwithstanding the context of the development of college athletes' NIL rights, the fact is those laws are on the books in many states, are being evaluated by other states, and are the source of serious debate over the need for federal law.⁹⁷ What is needed is a critical assessment of the current NIL law, which will be done in the next section.

B. NIL Law Based on a Right of Publicity

As previously mentioned, the source of NIL law is essentially state statutes. Presently, two separate groups of state statutes impact college athletes' rights to their NIL. Several states have enacted NIL laws specifically focused only on the rights of college athletes, seeking to protect college athletes from the overreaching of NCAA amateurism rules. Some of these same states and other states have developed statutory or common right of publicity laws that tangentially protect NIL.⁹⁸ In the states that enacted pro-NIL college athlete laws, they rely on a confluence of a tortious,⁹⁹ right

⁹⁶ The University of Arizona, *AZDC Presents: The Future of College Athletics* (Washington, D.C., Jun. 7–8, 2023), <https://azdc-futureofcollegethletics.com/> [<https://perma.cc/2RKQ-RMY6>]; Hale, *supra* note 81.

⁹⁷ Alcino Donadel, *Minus Federal Oversight, States are Passing their Own Laws on NIL Deals for Student-Athletes*, UNIVERSITY BUS. (Aug. 23, 2023), <https://universitybusiness.com/minus-federal-oversight-states-are-passing-their-own-laws-on-nil-deals-for-student-athletes/> [<https://perma.cc/3D6S-AT2M>] (“The College Athletes Protection & Compensation Act, for example, would establish the College Athletics Corporation (CAC), which would bring oversight to the NIL space and help develop, administer and enforce its uniform guidelines on NIL deals.”).

⁹⁸ See *Tracker: Name, Image and Likeness Legislation by State*, BUS. OF COLL. SPORTS, <https://businessofcollegesports.com/tracker-name-image-and-likeness-legislation-by-state/> [<https://perma.cc/G9LU-MSQ8>] (“In 2023, states began amending their existing NIL laws to allow for more involvement by institutions and prohibit the NCAA from enforcing penalties for protected NIL activities.” However, Alabama repealed their pro-athlete NIL law.) (last updated Jul. 28, 2023).

⁹⁹ See *supra* note 28. The Restatement Second of Torts recognizes four types of invasions of privacy: intrusion, appropriation of name or likeness, unreasonable

of publicity,¹⁰⁰ and equal protection¹⁰¹ rationales.¹⁰² Comparing these state pro-NIL statutes, there is a lack of uniformity, which has resulted in a call for a preemptive federal statute.¹⁰³

On the federal front, there is a void in the law relative to NIL. Federal statutes have long protected certain aspects of intellectual or virtual property. For example, creative literary works such as novels are protected by

publicity, and false light. *See* RESTATEMENT (SECOND) OF TORTS §§ 652A–652I (AM. L. INST. 1977). Under the Restatement’s formulation, the invasion of the right of publicity is most similar to the unauthorized appropriation of one’s name or likeness. *See id.* at § 652C cmts. a, b, illus. 1, 2; Legal Information Institute, *Publicity: An Overview*, CORNELL L. SCH., <https://www.law.cornell.edu/wex/publicity> [<https://perma.cc/6RY9-BPUC>].

¹⁰⁰ *See supra* note 28. Right of publicity gives an individual the exclusive right to license the use of their identity for commercial promotion. In the United States, the right of publicity is largely protected by state common or statutory law. Only about half the states have distinctly recognized a right of publicity. Of these, many do not recognize a right by that name but protect it as part of the Right of Privacy. In other states, the right of publicity is protected through the law of unfair competition. Legal Information Institute, *supra* note 99; *see also* Statutes & Interactive Map, RIGHT OF PUBLICITY, <https://rightofpublicity.com/statutes> [<https://perma.cc/JL6K-PG4M>] (last visited Mar. 1, 2022) (indicating that “a statute is not a prerequisite for the Right of Publicity to be enforceable” as a number of states have an enforceable Right of Publicity by way of common law). *Cf.* *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953) (“This right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures. We think the New York decisions recognize such a right.”).

¹⁰¹ *See* Gunther, *supra* note 61.

¹⁰² However, the State of Illinois comes close to anticipating this Article’s thesis that NIL should be grounded on property law, by assigning property features to the right of publicity. *See* 765 Ill. Comp. Stat. Ann. 1075.

¹⁰³ *See* Mark Roesler and Garrett Hutchinson, *What’s in a Name, Likeness, and Image? The Case for a Federal Right of Publicity Law* (Sept. 16, 2020), https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2020-21/september-october/what-s-in-a-name-likeness-image-case-for-federal-right-of-publicity-law/ [<https://perma.cc/3RRC-B2CH>]. Inconsistency in right of publicity laws can result in unexpected consequences; *see, e.g.*, Eriq Gardner, *Appeals Court Rules Marilyn Monroe’s Persona Belongs to Public, Not Her Estate* (Aug. 31, 2012), <https://www.hollywoodreporter.com/business/business-news/appeals-court-rules-marilyn-monroes-image-public-estate-367160/> [<https://perma.cc/AM86-BB96>] (the 9th Circuit ruling that “at the time of her death, the famous actress was domiciled in New York, not California, and as a result, her estate can’t use California’s publicity rights law to object to a photo licensor and others”).

federal copyright laws.¹⁰⁴ Additionally, creative ideas such as inventions are protected by federal patent laws.¹⁰⁵ However, there is no federal statutory law that expressly provides that people possess a property right in their NIL, and that protects NIL from exploitation.¹⁰⁶ Instead, the protection of a person's NIL must rely on the common law tort of the right of publicity¹⁰⁷ or the constitutional right to privacy.¹⁰⁸ Unfortunately, the right to one's privacy has recently been undermined by the Supreme Court.¹⁰⁹ That leaves us to focus on the tortious right of publicity as the most prominent foundation for the current NIL law.

As previously noted, state pro-NIL law is expressly grounded in the right of publicity, which is based on the right to privacy. Recognizing this fact, before moving forward, we need to briefly summarize the laws protecting a person's privacy rights and how they relate to NIL law. Unfortunately, the law uses the term "right of privacy" in two different, distinct contexts. First, there is the *general* "right to privacy."¹¹⁰ The "right to privacy" is often traced to an 1890 Harvard Law Review article authored by Samuel D. Warren and Louis D. Brandeis.¹¹¹ There, Warren and Brandeis recognized the right to privacy as "a right to be let alone."¹¹² In addition, past Supreme Court cases have found the right to privacy to be fundamental. For example, in *Griswold*

¹⁰⁴ See 17 U.S.C. § 102.

¹⁰⁵ See 35 U.S.C. § 101.

¹⁰⁶ See *id.*

¹⁰⁷ See *supra* note 28.

¹⁰⁸ See generally Legal Information Institute, *supra* note 99 (providing a summary of U.S. Supreme Court decisions recognizing a right to privacy).

¹⁰⁹ See *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 302 (2022) (overturning *Roe v. Wade*, 410 U.S. 113 (1973)). In overturning *Roe v. Wade*, the right to abortion no longer falls under the broader right to privacy.

¹¹⁰ The Supreme Court has recognized the rights to privacy. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (concluding rights guaranteed by the First, Third, Fourth, Fifth, and Ninth Amendments create "zones of privacy").

¹¹¹ See Warren & Brandeis, *supra* note 3, at 193 ("That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection.")

¹¹² *Id.* at 195 ("Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual . . . the right 'to be let alone.'" (quoting Thomas M. Cooley, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 29 (2d ed. 1879))).

v. Connecticut,¹¹³ the Court held that this right prevents states from enacting laws that make it illegal for married couples to use contraception.¹¹⁴ One commentator has identified eight broad categories of constitutional analyses where the Supreme Court has invoked the concept of human dignity rather consistently.¹¹⁵ However, while the right to privacy was the rationale for *Roe v. Wade*,¹¹⁶ the Court has retreated from treating the right as fundamental when applied to access to abortion, when it overturned *Roe* in *Dobbs v. Jackson Women's Health Organization*.¹¹⁷

By comparison, there is what I refer to as the *specific* right of privacy, that is how it applies to the right to sue a person for infringing on unwarranted publicity. As to the basis of private tort action, the right to privacy includes: (1) the right of persons to be free from unwarranted publicity, (2) the right to be free from the unwarranted appropriation of one's personality, (3) the right to publicize one's private affairs without a legitimate public concern, and (4) the right to be free from the wrongful intrusion into one's private activities.¹¹⁸ For example, in 2018, California enacted the California Consumer Privacy Act ("CCPA"), which protects the residents of California and their personal identifying information.¹¹⁹ Further, some state constitutions afford greater privacy protections than does the federal Constitution.¹²⁰

¹¹³ *Griswold*, 381 U.S. at 485–85.

¹¹⁴ *Id.*

¹¹⁵ See Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740, 789 (2006) (advocating that the Supreme Court should expressly recognize human dignity as underlying certain constitutional rights).

¹¹⁶ See *Roe v. Wade*, 410 U.S. 113, 154 (1973).

¹¹⁷ See 597 U.S. 215, 302 (2022).

¹¹⁸ RESTATEMENT (SECOND) OF TORTS § 652 (AM. L. INST. 1977).

¹¹⁹ S.B. 1121, 2018 Legis. Serv., Ch. 735 (Cal. 2018).

¹²⁰ Ten states have explicit privacy clauses in their constitutions. See, e.g., ALASKA CONST. art. I, § 22 (amended 1972) ("The right of the people to privacy is recognized and shall not be infringed."); ARIZ. CONST. art. II, § 8 ("No person shall be disturbed in his private affairs, or his home invaded, without due process of law."); CAL. CONST. art. I, § 1 (listing privacy as an inalienable right granted to "all people"); FLA. CONST. art. I, § 23 ("Every natural person has the right to be let alone and free from government intrusion into the person's private life except as otherwise provided herein."); HAW. CONST. art. I, § 6 (recognizing a right to privacy that cannot be infringed "without the showing of a compelling state interest"); ILL. CONST. art. I, § 12 ("Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his . . . privacy . . ."); LA. CONST. art. I, § 5 ("Every person shall be secure . . . against unreasonable . . . invasions of privacy.").

Parallel to the law on privacy rights, the law has developed a private right of action based on the protection of one's "personality rights."¹²¹ Personality rights consist of two types of rights: the right to privacy and the right of publicity.¹²² The right to privacy, which includes protection against misappropriation, is designed to guard individuals' personal rights against emotional distress.¹²³ By comparison, the right of publicity is a right to legal action designed to protect the names and likenesses of celebrities against unauthorized exploitation for commercial purposes.¹²⁴ Critics of the right of publicity argue that the concept has been unevenly applied.¹²⁵ Alex Wyman argues that variations in state laws and the wide variation in their application and interpretation call for a common national standard.¹²⁶ On the other hand, Eric E. Johnson argues that the current doctrine actually embraces at least three different concepts: "the endorsement right, the merchandizing entitlement, and the right against virtual impressment."¹²⁷

In the United States, the right of publicity is based on state law rather than federal law.¹²⁸ As such, recognition of the right varies from state to state.¹²⁹ The rationale underlying the right of publicity in the United States is rooted in a concern for both privacy and economic exploitation.¹³⁰

¹²¹ See generally *Right of Publicity*, INT'L TRADEMARK ASS'N, <https://www.inta.org/topics/right-of-publicity/> [<https://perma.cc/4P8N-D8WB>] (discussing the right against misappropriation of a person's name and likeness).

¹²² Federal appeals court Judge Jerome N. Frank coined the term "the right of publicity" in the case of *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953), which recognized a baseball player's interest in his photograph on a baseball card. *Id.* at 868–69. To date, the right of publicity has been recognized either in state common (judge-made) law or in state statutes, with more than half the states recognizing the right in one form or another.

¹²³ See *supra* note 28.

¹²⁴ John Vile, *Right of Publicity*, THE FIRST AMENDMENT ENCYCLOPEDIA, (July 2, 2024), <https://www.mtsu.edu/first-amendment/article/1011/right-of-publicity> [<https://perma.cc/Z4AJ-FETF>].

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Right of Publicity Statutes & Interactive Map*, RIGHT OF PUBLICITY, <http://right-of-publicity.com/statutes> [<https://perma.cc/LCP5-M99P>] (last visited Feb. 9, 2022). Indiana has one of the strongest right of publicity statutes in the United States, providing recognition of the right for 100 years after death, and protecting not only a person's "name, image and likeness," but also signatures, photographs, gestures, distinctive appearances, and mannerisms. See *id.*

¹³⁰ See *Savage*, *supra* note 85.

A commonly-cited justification for this doctrine from a policy standpoint is the notion of natural rights and the idea that every individual should have a right to control how their right of publicity is commercialized by a third party.¹³¹ The right of publicity is defined as the right of all individuals to control commercial use of their NIL or other identifying aspects of their identities.¹³² In certain contexts, the right of publicity is limited by the First Amendment.¹³³ The right of publicity can be referred to as publicity rights or even personality rights.¹³⁴

Consequently, as of 2023, several, although not all, states have enacted NIL laws that empower college athletes to benefit from the use of their NIL.¹³⁵ While they vary somewhat, they are similar in their limited scope and purpose.¹³⁶ Most states base college athletes' rights to monetize their NIL upon the right of publicity.¹³⁷ However, very few states expressly define or have enacted a statutory right of publicity.¹³⁸ This leads to uncertainty

¹³¹ Often, although certainly not always, the motivation to engage in such commercialization is to help propel sales or visibility for a product or service, which usually amounts to some form of commercial speech, which in turn receives the lowest level of judicial scrutiny. *See* *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 578–79 (1977) (holding that the First and Fourteenth Amendments do not immunize the news media from civil liability when they broadcast a performer's entire act without his consent, and the Constitution does not prevent a state from requiring broadcasters to compensate performers).

¹³² Roesler & Hutchinson, *supra* note 103.

¹³³ *See* Robert C. Post & Jennifer E. Rothman, *The First Amendment and the Right(s) of Publicity*, 130 *YALE L. J.* 86, 86 (Oct. 2020), <https://www.yalelawjournal.org/article/the-first-amendment-and-the-rights-of-publicity> [<https://perma.cc/5JDD-NSFQ>] (“The right of publicity protects persons against unauthorized uses of their identity, most typically their names, images, or voices. The right is in obvious tension with freedom of speech. Yet courts seeking to reconcile the right with the First Amendment have to date produced only a notoriously confused muddle of inconsistent constitutional doctrine. . . . We argue that in any given case the right of publicity is characteristically invoked to protect (one or more) of these four interests: the value of a plaintiff's performance, the commercial value of a plaintiff's identity, the dignity of a plaintiff, or the autonomous personality of a plaintiff.”).

¹³⁴ *See generally* Melville B. Nimmer, *The Right of Publicity*, 19 *LAW & CONTEMP. PROBS.* 203 (1954).

¹³⁵ *See Tracker: Name, Image and Likeness Legislation by State*, *supra* note 98.

¹³⁶ *See* Braly Keller, *NIL Incoming: Comparing State Laws and Proposed Legislation*, *OPENDORSE* (May 23, 2023), <https://biz.opendorse.com/blog/comparing-state-nil-laws-proposed-legislation/> [<https://perma.cc/V8YC-8J9T>].

¹³⁷ *Id.*

¹³⁸ *See Publicity*, *supra* note 28 (“However, not all states recognize the right to publicity. Only about 50% of all states recognize the distinct right to publicity. For the

in exacting how it applied to ensure the NIL rights of college athletes. To critically analyze this approach, this section will assess one state's NIL law, that of the State of Louisiana, to identify its strengths and weaknesses. To be clear, none of these statutes expressly state that they seek to achieve the goal for NIL law that this Article has established as a critical analytical tool.

C. Louisiana's Representative Statute

Following the lead of other States, on July 1, 2021, Louisiana Governor John Bel Edwards signed into law Act No. 479.¹³⁹ The Act empowers Louisiana's intercollegiate athletes¹⁴⁰ ("athlete(s)") to capitalize¹⁴¹ on the use of their own name, image, or likeness ("NIL").¹⁴² It achieves this by prohibiting any rule "that prevents or unduly restricts" any athlete from benefitting from their NIL.¹⁴³ The stated rationale for the new law is equal protection—so that an athlete can enjoy the same NIL rights as any other college (non-athlete) student.¹⁴⁴ In signing the bill into law, Governor Edwards stated, "It is only

other half of the states, the majority of them recognize the right to publicity under the right of privacy.").

¹³⁹ See 2021 La. Act 1305-07 (codified as La. Stat. Ann. §§ 17:3701-3703) (enacting Chapter 30 of Title 17 of the Louisiana Revised Statutes of 1950, to be comprised of R.S. 17:3701 through 3703) (enacted pursuant to Senate Bill 60 which was proposed by State Senator Patrick Connick and was passed with a bipartisan majority), <https://legis.la.gov/legis/ViewDocument.aspx?d=1236588> [<https://perma.cc/FQZ5-PBKE>]

¹⁴⁰ La. Stat. Ann. § 17:3702 (2021) "Intercollegiate athlete," as defined in the Act means "a student enrolled in a postsecondary education institution who participates in an athletic program." For example, the State of Louisiana has thirteen NCAA member schools, with an estimated 4,200 NCAA athletes. See *Louisiana NIL Law for NCAA*, SPRY (Aug. 22, 2022), <https://spry.so/nil-state-guide/louisiana-nil-law-for-ncaa/> [<https://perma.cc/3MHA-R3EC>].

¹⁴¹ See §§ 17:3701, 3703. While the Act does not provide for the nature of the capitalization, it does provide that "[c]ompensation must be commensurate with the market value of the authorized use of the athlete's name, image, or likeness. *Id.* at 2.

¹⁴² See *id.* The Act does not expressly define the terms "name, image, or likeness." See generally Louisiana Revised Statutes, <https://www.legis.la.gov/legis/LawSearch.aspx> [<https://perma.cc/YH62-CZ7N>] (a search of the Louisiana statutes did not locate the definition of those terms in any other section of the Louisiana Revised Statutes).

¹⁴³ § 17:3703B.

¹⁴⁴ § 17:2701 ("An intercollegiate athlete must have an equal opportunity to control and profit from the commercial use of the athlete's name, image, or likeness, and be protected from unauthorized appropriation and commercial exploitation of the athlete's right to publicity, including the athlete's name, image, or likeness.").

fitting that college athletes be able to benefit financially from their hard work and to have more control over their personal NIL, which many organizations and entities have already done for years.¹⁴⁵ Hence, the Act is clearly meant to negate or limit the NCAA and its member schools' amateurism rules, which prohibits a player from benefitting from their NIL,¹⁴⁶ empowering players to capitalize on their NIL and not lose their amateur status.

Notwithstanding leveling the playing field for athletes, there is a practical, business aspect of the Act. College sports is a trillion-dollar industry in the United States,¹⁴⁷ of which the State of Louisiana receives millions every year, both directly and indirectly.¹⁴⁸ Those business benefits do not exist without the labor of student players.¹⁴⁹ As other states such as California and Texas have enacted similar laws, Louisiana cannot afford to sit idle and likely lose its players to other states that aggressively entitle athletes to NIL benefits. Hence, Act 479 has a second, unstated goal, which is to ensure that Louisiana-based colleges and universities remain competitive in the recruitment and retention of players.¹⁵⁰

Consequently, this Part next seeks to answer two questions: (1) Does Act 479 achieve its stated purpose, which is to ensure that collegiate athletes in the State enjoy the same ability to capitalize on their NIL as do college students who are not athletes? (2) Does Act 479 make Louisiana colleges and universities competitive when it comes to recruiting and retaining athletic talent?

¹⁴⁵ See Office of the Governor, *Gov. Edwards Signs Name, Image, and Likeness Bill Allowing College Athletes to Earn Money off of Their Own Name, Image, or Likeness*, L'OBSERVATEUR (Jul. 1, 2021), <https://www.lobserveur.com/2021/07/01/gov-edwards-signs-name-image-and-likeness-bill-allowing-college-athletes-to-earn-money-off-of-their-own-name-image-or-likeness> [https://perma.cc/5C35-NDUG].

¹⁴⁶ See NCAA, *supra* note 33.

¹⁴⁷ See Sara Germano, *Payday for US College Athletes Rattles \$14bn Industry*, FINANCIAL TIMES (Oct. 2, 2021), <https://www.ft.com/content/447c3300-2fd2-4d70-829a-18b3715be498> [https://perma.cc/UV9J-44K2] ("For nearly a century, as US college sports ballooned into a more than \$14bn industry.").

¹⁴⁸ See Victor Skinner, *Louisiana Audits Find Three State University Athletics Programs Are Losing Money*, LAFOURCHE GAZETTE (Feb. 4, 2023), https://www.lafourchegazette.com/local_news/state/louisiana-audits-find-three-state-university-athletics-programs-are-losing-money/article_84755ed0-a498-11ed-bcc0-9fe1a8de3d92.html [https://perma.cc/LQC8-6FDW].

¹⁴⁹ See Dave Wischnowsky, *Wisch: What if College Athletes Went on 'Strike?'* (June 6, 2011), <https://www.cbsnews.com/chicago/news/wisch-what-if-college-athletes-went-on-strike/> [https://perma.cc/5XYX-ME2V].

¹⁵⁰ See S.B. 60, 2021 Leg., Reg. Sess. (La. 2021). The Act's legislative history unveils two goals: equal treatment of athletes and ensuring competitiveness in attracting players.

In answering those two questions, this apart: (1) analyzes the legal context of the enactment of Act 479, (2) describes its pertinent provisions, and (3) outlines some of the legal issues it leaves unanswered. Ultimately, it raises the question: Is Act 479 a touchdown or a fumble when it comes to athletes' NIL?

1. Why Louisiana and Why Now?

Louisiana's athlete NIL law is consistent with a national trend,¹⁵¹ following judicial and legislative developments, which is already having profound and perhaps unexpected consequences.¹⁵² With the enactment of Act 479, Louisiana was at the forefront of states that granted intercollegiate athletes the power to capitalize on their NIL.¹⁵³ Louisiana's athletic programs, particularly LSU, illustrate much of the concerns expressed by the U.S. Supreme Court in *Alston*, particularly Justice Kavanaugh's concurring opinion.¹⁵⁴ As the school brings in huge revenue, especially from football media coverage,¹⁵⁵ the concern is over disparate compensation, where players are treated as

¹⁵¹ See Kristi Dosh, *Trends in Name, Image, and Likeness in the First Few Months*, BUS. OF COLLEGE SPORTS (Oct. 20, 2021), <https://businessofcollegesports.com/name-image-likeness/trends-in-name-image-and-likeness-in-the-first-few-months/> [<https://perma.cc/F772-XCWB>].

¹⁵² See, e.g., Nathaniel Meyersohn, "Adidas' Plan to Take over College Sports: Sign Endorsement Deals with up to 50,000 Student Athletes," CNN BUS. (Mar. 23, 2022), <https://www.cnn.com/2022/03/23/business/adidas-endorsements-ncaa-athletes-nil/index.html> [<https://perma.cc/L3ZL-A4P6>].

¹⁵³ An intercollegiate athlete at a postsecondary education institution may earn compensation for the use of the athlete's name, image, or likeness. See 2021 La. Act 1305-07 (codified as La. Stat. Ann. §§ 17:3701-3703) (enacting Chapter 30 of Title 17).

¹⁵⁴ See *Alston*, 141 S. Ct. at 2166 (Kavanaugh, J., concurring).

¹⁵⁵ See #3 LSU, \$58 million, Top 20 Most Profitable College Football Programs, ATHLETICS SCHOLARSHIPS, <https://www.athleticscholarships.net/profitable-college-football-programs.htm> [<https://perma.cc/4MUG-HJSP>]. See also *LSU Athletics Loses over \$10.5M in 2021 despite football program generating over \$37M*, WBRZ (Jan. 26, 2022), <https://www.wbrz.com/news/lsu-athletics-loses-over-10-5m-in-2021-despite-football-program-generating-over-37m/> [<https://perma.cc/95M7-4FQT>].

amateurs while coaches¹⁵⁶ and athletic directors¹⁵⁷ are being paid as professionals. With the change in the NIL laws, many players are expected to rise from poverty to potentially becoming instant millionaires.¹⁵⁸

Hence, Louisiana enacted Act 479 to be competitive with other states in the recruitment and retention of outstanding athletic talent who might be inclined to play for teams where the players could capitalize on their NIL. We highlight the Louisiana statute because it was at the forefront of granting athletes the power to capitalize on their NIL and it was representative of how other states are protecting athletes' NIL rights.

2. Louisiana's Statutory Provisions

Act No. 479 enacts Chapter 30 of Title 17 of the Louisiana Revised Statutes of 1950, to be comprised of R.S. 1:3701 through 3703. Section 3701 is labeled "Legislative intent," and states, "participation in intercollegiate athletics should not infringe upon an intercollegiate athlete's ability to earn compensation for the athlete's name, image, or likeness."¹⁵⁹ This is followed by the rationale for the new law—"An intercollegiate athlete must have an equal opportunity to control and profit from the commercial use of the athlete's name, image, or likeness, and be protected from unauthorized appropriation and commercial exploitation of the athlete's right to publicity,

¹⁵⁶ See Jordan Cohn, *New LSU Coach Brian Kelly's Contract Worth \$95 million over 10 years*, THE BET WASHINGTON (Nov. 30, 2021), <https://www.audacy.com/the-betwashington/sports/lus-brian-kellys-contract-worth-usd95-million-over-10-years> [<https://perma.cc/C7CS-3735>]. See also Michael Bonnette, *Brian Kelly Named 34th LSU Football Head Coach*, LSUSPORTS (Nov. 30, 2021), <https://lsusports.net/news/2021/11/30/brian-kelly-named-34th-lsu-football-head-coach/> [<https://perma.cc/L9WN-JTJR>].

¹⁵⁷ See David Jacobs, *LSU Athletic Director's Salary Fourth Highest among Public SEC Schools*, BUS. REPORT (Sept. 16, 2021), <https://www.businessreport.com/business/report-lsu-athletic-directors-salary-fourth-highest-among-public-sec-schools> [<https://perma.cc/5XP5-5VEF>].

¹⁵⁸ See *LSU Athletes Begin Announcing Endorsement Deals as Louisiana is Set to Sign NIL Policy from quarterback Myles Brennan to cornerback Derek Stingley, a look at announced endorsements*, SPORTS ILLUSTRATED (July 1, 2021), <https://www.si.com/college/lsu/football/lsu-athletes-announce-nil-endorsements-football> [<https://perma.cc/5UH9-B2ED>].

¹⁵⁹ LA. STAT. ANN. § 17:3701 (2021). Compensation must be commensurate with the market value of the authorized use of the athlete's name, image, or likeness. S.B. 60, 2021 Leg., Reg. Sess. (La. 2021) (enacting Chapter LA. REV. STAT. ANN. § 17:3701-03). However, the legislation does not define market value, and it is difficult to market value a collegiate athlete's NIL.

including the athlete's name, image, or likeness."¹⁶⁰ Section 3702 provides definitions specific to the Act.¹⁶¹

Section 3703 is the heart of the Act and has several component parts. Subsection A(1) states that "[a]n intercollegiate athlete...may earn compensation for the use of the athlete's name, image, or likeness...commensurate with the market value of the authorized use...."¹⁶² Subsection A(2) prohibits a postsecondary education institution or its related parties from providing a current or prospective athlete with compensation for the use of the athlete's NIL.¹⁶³ Subsection B states that "[a] postsecondary education institution shall not adopt or maintain a contract, rule, regulation, standard, or other requirement that prevents or unduly restricts an intercollegiate athlete from earning compensation for the use of the athlete's NIL."¹⁶⁴

3. Unresolved Issues: The Need for a Uniform, Model Act

Act 479 is a great first step forward to enhancing collegiate athletes' compensation and recognizing their inherent right to their NIL. However, the new law creates some issues. Notwithstanding the fact that the Act provides collegiate athletes a source of financial benefit for their NIL, it does not address the broader issue of Pay to Play¹⁶⁵—whether the athletes should be compensated for their play as professionals¹⁶⁶ on the same lucrative basis as their coaches are compensated.¹⁶⁷ To be clear, the following analysis is focused on Act 479 and how Louisiana could develop a model law that would lead the national development of this important area of law.

¹⁶⁰ LA. STAT. ANN. § 17:3701 (2021).

¹⁶¹ LA. STAT. ANN. § 17:3702 (2021).

¹⁶² LA. STAT. ANN. § 17:3703 (2021).

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ See Mandel, *supra* note 55.

¹⁶⁶ See Brennan Thomas, *Pay for Play: Should College Athletes Be Compensated?*, BLEACHER REPORT (Apr. 4, 2011), <https://bleacherreport.com/articles/654808-pay-for-play-should-college-athletes-be-compensated> [<https://perma.cc/QW2W-BT3V>].

¹⁶⁷ See Tom Schad & Steve Berkowitz, *Why College Football is King in Coaching Pay—Even at Blue Blood Basketball Schools*, USA TODAY (Oct. 3, 2023), <https://www.usatoday.com/story/sports/ncaaf/2023/10/03/college-football-coach-pay-is-soaring-even-at-basketball-schools/70924373007> [<https://perma.cc/VDX2-5RZF>].

i. “Internal” Issues Created by the Act’s Provisions

(1) What Constitutes “Unauthorized Appropriation/Exploitation.

In its “Legislative intent” section, the goal of the Act appears straightforward, that is, to ensure that athletes’ participation in college sports does not infringe on an athlete’s ability to earn compensation for their NIL.¹⁶⁸ However, the next sentence contains some modifiers that can be interpreted as meaning that the athlete’s ability to earn such compensation is not absolute. Specifically, the Act states that athletes “must have an *equal opportunity* to control and profit from the commercial use of the athlete’s name, image, or likeness, and *be protected* from *unauthorized appropriation and commercial exploitation* of the athlete’s *right to publicity*, including the athlete’s name, image, or likeness.”¹⁶⁹ This language can reasonably be read to mean that when it comes to an athlete’s actual right to control and profit from their NIL, protection is only from **unauthorized** appropriation and commercial exploitation. Does the Act protect an athlete’s NIL from **authorized** use, such as under the NCAA contract and rules for playing for an NCAA member team? To my knowledge, to date, there are no state NIL laws that require an athlete’s college to pay an athlete for the use of their NIL, such as in the marketing and sales of a college jersey that features a player’s name. However, many colleges, including LSU, Oklahoma, and Penn State are reportedly sharing the proceeds of jersey sales with their athletes.¹⁷⁰ Furthermore, that sentence ends with a reference to an “athlete’s **right to publicity**.” This is also problematic in that the right of publicity is a private tort action to address the unauthorized appropriation and commercialization of a person’s NIL. It is based upon privacy law and arguably does not apply in the case of the NCAA and its member school’s use of its athletes’ NIL, which they do with the express or tacit permission of the athletes themselves.

(2) Who Benefits from the Act, Its Scope.

Section 3702 provides definitions specific to the Act. Of particular concern is to whom the Act applies. The definition of “intercollegiate athlete” is a

¹⁶⁸ See LA. STAT. ANN. § 17:3701 (2021).

¹⁶⁹ *Id.* (emphasis added).

¹⁷⁰ Shehan Jeyarajah, *LSU, Oklahoma Among Schools to Offer Customizable Jerseys with Players Receiving Compensation, Merchandise Sales Have Long Been a Spot of Controversy in the Pre-NIL World*, CBS SPORTS (Feb. 4, 2022), <https://www.cbssports.com/college-football/news/lsu-oklahoma-among-schools-to-offer-customizable-jerseys-with-players-receiving-compensation/> [<https://perma.cc/YMF3-MMRP>].

student enrolled in a postsecondary education institution.¹⁷¹ Does that mean that a high school student is not protected by the Act, even one who intends to be enrolled in a postsecondary education institution? Then, there is the definition of “postsecondary education institution,” which includes “a Louisiana public postsecondary education institution or nonpublic postsecondary institution that receives or disburses any form of student financial assistance, including scholarships or grants.”¹⁷² Does that mean a collegiate athlete who is from Louisiana but plays for a postsecondary school located *outside* the State is not protected by the Act?¹⁷³ Additionally, does it mean that a student who is enrolled in a postsecondary institution located outside the State is not protected while playing within the State? Further, is the Act constitutional as it applies to private and particular religious/faith-based schools?

(3) “Unduly Restricts.”

The Act prohibits any contract, rule, regulation, standard, or other requirement that “prevents or *unduly restricts*” any athlete from benefitting from their NIL.¹⁷⁴ This provision directly challenges the NCAA’s amateurism rules.¹⁷⁵ Upon close examination, this language does not provide an athlete an absolute right to capitalize on their NIL. Furthermore, the Act does not define what rule constitutes one that *unduly restricts* a player’s NIL rights. This equivocal language arguably contradicts the goal of the Act, which is equality with non-athlete students. Non-athlete students enjoy NIL rights without such limitations.

(4) Supersedes the NCAA Rules.

The Act’s intention to provide Louisiana collegiate athletes their NIL rights does not guarantee that it supersedes the authority of the NCAA over its members and its players. However, there is no reason to believe that the State of Louisiana has legal authority over the NCAA. This raises a question of preemption, that is, does the state law preempt the NCAA’s jurisdiction over its members and players? While it appears clear that state law such as Louisiana’s NIL statute would supersede NCAA rules and regulations, the

¹⁷¹ LA. STAT. ANN. § 17:3702 (2021).

¹⁷² *Id.*

¹⁷³ The author is aware of how this question leads to other issues: Whether it be desirable to enact a law with this scope? Might this run into problems with the dormant commerce clause? Thanks to the Harvard editors for pointing this out. However, by intention, this Article does not analyze those tangential issues.

¹⁷⁴ LA. STAT. ANN. § 17:3703 (2021).

¹⁷⁵ See Amateurism, *supra* note 87.

NCAA has stated its position to the contrary.¹⁷⁶ The issue of preemption is intentionally beyond the scope of this Article.

In fact, in *NCAA v. Alston*, Justice Gorsuch, writing for a unanimous Supreme Court, expressly reiterated the authority of the NCAA to regulate its members and players.¹⁷⁷ That is despite the somewhat scathing concurring opinion of Justice Kavanaugh in which he emphasized that “[t]he NCAA is not above the law.”¹⁷⁸ A prime example of the NCAA’s continued supremacy over the state is in the NCAA’s recent regulation stating that its member schools and players cannot use NIL deals as a means to recruit a player and that to do so is a violation of its rules.¹⁷⁹ This virtually destroys the effectiveness of the Act. Moreover, it raises a curious question: Will the State of Louisiana litigate this matter against the NCAA to protect the rights of the players?

(5) Class Legislation Violates the U.S. Constitution.

The Act bestows a benefit on intercollegiate athletes which could be read as “class legislation,” which is legislation that arbitrarily favors or disfavors particular factions.¹⁸⁰ As such, it raises issues of whether it violates the U.S. Constitution’s Equal Protection Clause and jurisprudence prohibiting class

¹⁷⁶ Christina Stylianou & Gregg E. Clifton, *NCAA’s Regulations Attempt To Restrict State Law: The New NIL Battleground*, Blog, LEWIS BRISBOIS (June 29, 2023), <https://lewisbrisbois.com/blog/category/sports-law/ncaas-regulations-attempt-to-restrict-state-law-the-new-nil-battleground> [<https://perma.cc/5SV9-FFKK>] (pointing to an official NCAA statement, “The [NCAA] has been clear and maintains that schools must adhere to NCAA legislation (or policy) when it conflicts with permissive state laws. In other words, if a state law permits certain institutional action and NCAA legislation prohibits the same action, institutions must follow NCAA legislation.”).

¹⁷⁷ See *NCAA v. Alston*, 141 S. Ct. 2141, 2154 (2021).

¹⁷⁸ *Id.* at 2169.

¹⁷⁹ See generally William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954); Mitchell F. Crusto, *The Supreme Court’s “New” Federalism: An Anti-Rights Agenda?* 16 GA. ST. U. L. REV. 517 (2000).

¹⁸⁰ Class Legislation Law and Legal Definition, USLEGAL, <https://definitions.uslegal.com/c/class-legislation/> [<https://perma.cc/YN7U-ZAA2>] (“Class legislation violates equal protection guaranteed through the fourteenth amendment of the U.S. Constitution. An Act enacted in the form of private act for the benefit of certain individual is an example of class legislation.”).

legislation.¹⁸¹ This is ironic because the Louisiana NIL law's justification is to level the playing field. However, it assumes that everyone has a right to capitalize on their NIL, although that right is rarely provided by way of Louisiana's college athlete NIL statute. Fortunately, class legislation analysis is not actively being used by the current Court.¹⁸²

(6) When and How Does the Law Become Operational?¹⁸³

Further, if the Act seeks to create a level playing field for collegiate athletes compared to other college students, the Act requires its implementation to be conditioned on the development of schools' policies.¹⁸⁴ This means that the players are *not* free to enjoy the benefits without further regulation. College students who are not athletes do not have this obstacle when they enjoy NIL opportunities. Further, the NCAA is still in charge of those regulations, which means that its athletes are still encumbered. Therefore, the Act arguably fails to provide athletes the same equal access to this opportunity as non-athletes.

ii. Broader Issues Not Addressed in the Act

In addition to the issues internal to the Act itself, there are several additional, important questions on which the Act is silent: (1) Does the new law apply retroactively to redress past takings of the players' NIL? (2) Will the new law facilitate the players' right to be directly compensated for playing their sports? (3) How does the law apply interstate; that is, will it be

¹⁸¹ See generally David Eliot Bernstein, *Class Legislation, Fundamental Rights, and the Origins of Lochner and Liberty of Contract*, 26 *GEORGE MASON L. REV.* 1023 (2020).

¹⁸² *Id.*

¹⁸³ See LA. STAT. ANN. § 17:3703 (2021). The law became effective on July 1, 2021, however, the Act specifically states that “[e]ach postsecondary education management board shall adopt policies to implement the provisions of this Chapter. No postsecondary education institution shall implement the provisions of this Chapter until such time as the appropriate management board adopts the required policies. Each management board has discretion as to when it adopts policies to implement the provisions of this Chapter.” Does that provision mean that an athlete cannot sign a NIL contract until after their school has established such policies?

¹⁸⁴ See Cody Worsham, *LSU's All-In NIL Event More than 500 Business Leaders Joined LSU's Head Coaches and Administrators for an Unprecedented Night of Education, Collaboration, and Navigation through NIL's Uncharted Waters*, *INSIDE GEAUX TIME* (Feb. 6, 2022), <https://lsusports.net/news/2022/02/06/inside-geaux-time-lsu-all-in-nil-event/> [<https://perma.cc/ND4H-3ESA>].

recognized in states that have not enacted similar legislation? Does the law apply to Louisiana residents who receive NIL compensation in states that have not enacted such laws? (4) Does the Louisiana law take precedence over NCAA rules; that is, does it apply within or outside of the NCAA rules? (5) Are the athletes' NIL rights heritable, subject to the state's succession laws? (6) Can such NIL compensation impact a student's eligibility for Pell grants or government subsidies based on financial need?¹⁸⁵ (7) How does the Act regulate "corruption"?¹⁸⁶ (8) Does the Act mandate that colleges pay college athletes for the use of their NIL when the colleges financially benefit from the use of the players' NIL, outside their athletic activity, such as in college marketing and recruitment? (9) Does the Act set a ceiling for players' rights or it is the floor; that is, can the courts expand the players' rights to include direct compensation from their schools and/or the NCAA for its participation in college sports? (10) Does the Act serve as an unintended obstacle to litigation against the NCAA for its use of players' NIL? (11) In future litigation by players against the NCAA, could courts determine that the players' NIL rights are being respected when, in fact, they continue to be exploited? (12) Is the Act's protection of collegiate athletes' rights to capitalize on their NIL, a property right that is inherent to all Louisiana residents, protected by the Louisiana Constitution, or it is a mere privilege the State is granting to collegiate athletes? (13) Does the Act's recognition of collegiate athletes' NIL rights support an argument that violations of those rights, as well as players' claims for compensation for their labor, constitute governmental takings, subject to just compensation, under the Fifth and Fourteenth Amendments to the U.S. Constitution? (14) Should the Act address the need to protect college athletes from NIL deal exploitation by unscrupulous contracts? (15) Can a college athlete choose the state of choice of their NIL contract or is it tied to the athlete's residency? These unanswered questions evidence the inadequacy of the current NIL laws, which are limited in scope and grounded

¹⁸⁵ Charles R. Johnson, Richard Pianoforte, *What Student Athletes Need to Know About Their NIL Income*, KIPLINGER (Dec. 13, 2023), <https://www.kiplinger.com/personal-finance/nil-income-what-student-athletes-need-to-know> [https://perma.cc/45B4-TGPT] ("If a student athlete's taxable income is considered high, they could receive less aid than they request. ("Income from NIL opportunities must be included in taxable income reported by students on their Free Application for Federal Student Aid (FAFSA) application forms. If a student athlete's taxable income is considered high, they could receive less aid than they request.").

¹⁸⁶ See Ray Waliewski, *NIL, bad for NCAA*, LIONNEWSPAPER (Sept. 27, 2024), <https://www.lionnewspaper.com/opinions/2024/09/27/nil-bad-for-ncaa/> [https://perma.cc/245H-CAYA].

on equal protection in applying the right of publicity. Further, these unanswered questions are not unique to the Louisiana statute; they apply to the NIL law generally. Many of these questions can be addressed by amending NIL laws to recognize the deficiency of grounding NIL law on the tortious right of publicity. That shortcoming will be analyzed next, followed by a statutory proposal that bases NIL law on the law of property.

4. General Conclusion

In conclusion, intercollegiate sports, particularly football, are a significant industry in Louisiana.¹⁸⁷ With the national legal movement to grant collegiate athletes the control and use of their NIL, Louisiana's Act 479 seeks to give athletes that same rights as non-athlete students and seeks to ensure that Louisiana colleges and universities remain competitive in a changing market for sports talent. Louisiana's enactment of Act 479 is in lockstep with the national movement to recognize that collegiate athletes should have the legal right to profit from their NIL. That national movement will likely facilitate a revolution in collegiate athletics, one in which the athletes will be treated, compensated, and recruited as professionals rather than as amateurs. The new law is a positive step in providing those athletes with additional compensation from "new money" sources, that is from endorsements, appearances, and the like. Most importantly, Act 479 has a positive socio-economic impact on Louisiana, by helping to lift players and their families, particularly those from disadvantaged communities, out of poverty. It does so without reducing the profitability of existing revenue that the State and its athletic program are currently receiving.

However, these statutes that support the development of NIL rights fail to address the players' rightful demand to be justly compensated for their labor in playing and preparing to pay for the sports. Nor does it address the prior, arguably wrongful taking of the players' NIL.¹⁸⁸ From the perspective of the players, justice would require that (1) the state quickly facilitate the

¹⁸⁷ LSU Athletics alone has reportedly a \$500 million impact on the Louisiana economy. *LSU Athletics Has \$500 Million Impact on Louisiana Economy, Study Says*, LSU SPORTS (Mar. 13, 2023) <https://lsusports.net/news/2023/03/13/lsu-athletics-has-500-million-impact-on-louisiana-economy-study-says/> [<https://perma.cc/F422-GMYB>] (noting further that "LSU Athletics remains one of the few self-sufficient athletics departments in the country, receiving neither state funding nor student fees").

¹⁸⁸ See Crusto, *Game of Thrones*, *supra* note 1 (analyzing NCAA's restrictions on athletes' NIL as a taking).

stated goal of Act 479, (2) compensate the players for the past takings of their NIL, and (3) pay the players as professionals for their participation in the state's intercollegiate athletic programs, especially those that are operated by the state. Hence, when it comes to just compensation for collegiate athletes, more is not enough.

Louisiana's Act 479 is expected to be a touchdown; however, it appears to be a fumble. In addition to failing to address player demands, there are two reasons it fails to reach the NVP. First, due to the red tape needed to facilitate a college player's ability to capitalize on their NIL, the Act fails to achieve its stated goal, which is to put those players on a level playing field equal to non-athlete college students. Second, compared to the laws enacted by other states, such as Texas, which has expedited a player's signing NIL deals and receiving NIL funds, Louisiana is not competitive and is likely losing out on the recruitment and retention of talent. Perhaps, the state needs to return to the drawing board and consider another playbook to achieve its stated goals. This moment in time presents a special opportunity for the state to take a leadership role by drafting and enacting a model statute that grants and recognizes the inherent property and personal right of *all residents of Louisiana*, including collegiate athletes, to capitalize on their name, image, or likeness, including and beyond a right of publicity. Such a model statute should be adopted as a needed uniform code to protect that right for everyone from exploitation.

D. Right of Publicity is Deficient

As previously noted, NIL law as represented by the Louisiana statute rests on two legal bases: (1) the existence of a right of publicity and (2) equal treatment under the law. That is, in a nutshell, that college athletes have an equal right to the right of publicity as college students who are not athletes. As noted above, I believe that basing college athlete NIL law on the tort of a right of publicity has a major deficiency. Essentially, the tort of a right of publicity is not readily transferable by the athlete to other third parties, which makes it less suitable for NIL deals. After reviewing many NIL deals and studying the literature on NIL, my learned opinion is that there are seven reasons why those deals are hampered by the current NIL law. (1) As the right of publicity is based upon the right of privacy, such right is not assignable to third parties and, therefore, does not support the sale or license of

NIL deals.¹⁸⁹ (2) As the right of publicity is actionable only when there is an *unauthorized* use, it does not envision the “trading” of the use of a person’s NIL for pay for an authorized use.¹⁹⁰ (3) As the right of publicity is based on an invasion of a person’s privacy, it is unlikely that that right would be descendible to that person’s estate upon their death.¹⁹¹ (4) NIL based upon the right of publicity is not severable or divisible which makes licensing of NIL less feasible.¹⁹² (5) The right of publicity is a common law tort and does not exist in every State’s statute which may require litigation to determine its applicability to NIL deals.¹⁹³ (6) Based on tort law, NIL has limited remedies to redress violations. And (7) NIL is based on various state right of privacy laws, and current NIL does not facilitate the monetization of NIL in countries outside the United States in jurisdictions that do not recognize the right of publicity.¹⁹⁴

These deficiencies in the Louisiana NIL law are representative of the states that have enacted pro-college athlete NIL law and compel us to seek a paradigm shift, one that is a more favorable legal classification for NIL law, one that would facilitate the efficient monetization of NIL. A more favorable approach to the development of NIL law will be presented next.

II. “NAME, IMAGE, AND LIKENESS AS PROPERTY” ACT

As previously presented, we are witnessing a paradigm shift in how college athletes are regulated, which is allowing them to financially benefit from their NIL. As described in Part I, this shift represents a revolutionary break from the NCAA amateurism rules that strictly prohibited players from receiving any type of compensation related to their player status. How we treated college athletes is symptomatic of a fundamental flaw in our jurisprudence, in that college athletes were denied the same NIL rights that were available to non-athletes, such as art or music students. The changes to the rights of college athletes are greatly welcome and long overdue. However, as presented in Part I, new state laws favoring NIL rights for college athletes, which are grounded in the tort of the right of publicity, are ill-equipped to support

¹⁸⁹ Kevin L. Vick & Jean-Paul Jassy, *Why a Federal Right of Publicity Statute Is Necessary*, COMMUNICATIONS LAWYER (American Bar Association), Aug. 2011.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

the legal needs and financial goals of NIL deals. The solution to the growing need to protect NIL from exploitation and to increase the value of NIL and thereby enrich the persons who possess the NIL is to categorize NIL as “property”¹⁹⁵ and to codify that in federal or state law. The following provides the essential provisions of such a law and lays out three tenets of a proposed “Name, Image, and Likeness as Property Act” or NAPA for short.

There are three major tenets of the NAPA, which are laid out in its preamble:

Preamble: Everyone, particularly college athletes, enjoy their name, image, and likeness as attributes of their “self”¹⁹⁶ and should be tradable by that person to monetize its value, protected against unauthorized use or intrusion, and should be descendible as a part of their estate when that person dies. These desired outcomes require that we deem or characterize a person’s NIL as their property.

First, whereas, the law has long protected a person’s personal and real property, whereas, federal copyright and patent laws protect the creative property of a person, there is no federal law that protects a person’s NIL; and, whereas, a person seeking protection must rely on the common law tort of a right of publicity.

Second, whereas, with the proliferation of social media, the rise of AI, and the development of the metaverse, a person’s NIL has become a valuable, vulnerable asset that can be monetized and can increase a person’s wealth but, if left unprotected, would become the wealth of a person who exploits another person’s NIL.

Third, whereas, several states have enacted laws that seek to recognize the right of college athletes to capitalize on their NIL and not lose their eligibility to play NCAA college sports, although those laws are particular

¹⁹⁵ “Property” herein refers to “natural law theory of property” which is the jurisprudential theory by which there are “natural rights” (1) that are fundamental or natural, as derived from God or nature, (2) to which all people are equally entitled, (3) that are inalienable, meaning they cannot be bargained or legislated away from people, and (4) that apply to life, liberty, and property.

¹⁹⁶ “Self” herein refers to a person’s attributes or identities, such as the fruits of labor, name, image, likeness, their brand, any other quality or feature regarded as a characteristic or inherent part of someone (both tangible and intangible), and other unequivocal identifiers. Rights that protect the attributes of a person should not be limited to the right of privacy, the right of publicity, and the right to not be enslaved. These rights extend to all mediums such as print, online, cyberspace, and the virtual universe. See Crusto, *Right of Self*, *supra* note 1 (presenting the seminal thesis that everyone is legally entitled to own attributes of their “self” which is coined as “persona”).

to college athletes and are based on the right of publicity; and whereas, property law possesses unique beneficial features that would enhance a person's wealth and protect their NIL from exploitation as well as provides timeworn, proven remedies against abuse. Therefore, we hereby proclaim every person owns a natural property right to their NIL, is entitled to all the attributes of property including alienation, severability, descendability, and is protected by all legal and equitable remedies that inure to property.

This Article is aware of the call for a national, uniform approach to achieving this goal via a federal statute.¹⁹⁷ However, the creation of a federal statute and the issue of federal preemption is beyond the scope of this Article. Further, this Article acknowledges that some critics believe that NIL laws will result in the death of college sports.¹⁹⁸ Consequently, a detailed model "Name, Image, and Likeness as Property Act" follows the main text of this Article. I have drafted the model act with the hopes that government officials and policymakers will adopt it as a standard for reform in this area of law. The justifications for NAPA and responses to its critics are presented next.

III. JUSTIFICATION

We start with a brief overview of where we are and where we are going next. Part I of this Article presented the conundrum of grounding NIL law in the tortious right of publicity and identified the legal issue of how current pro-NIL state law fails to facilitate the maximization of the monetization of NIL's rights. Part II presented NAPA as a statutory solution to this problem, proposing that NIL be viewed as property, particularly the personal property of college athletes, and lays out the tenets of a model statute. Next, this Part III supports the thesis of NIL as property and NAPA by presenting three justifications, that it (1) is based in foundational and constitutional principles, particularly intellectual property; (2) facilitates the aspirations of NIL laws which are to maximize the players' wealth and to protect them from exploitation; and (3) promotes public policy. This discussion concludes with a

¹⁹⁷ See Kristi Dosh, *4 New Federal NIL Bills Have Been Introduced In Congress*, FORBES (July 29, 2023), <https://www.forbes.com/sites/kristidosh/2023/07/29/4-new-federal-nil-bills-that-have-been-introduced-in-congress/> [<https://perma.cc/5H6T-DDFN>].

¹⁹⁸ See Manu Raju, Clare Foran & Morgan Rimmer, *NCAA leaders warn college sports at risk of 'permanent damage' without action from Congress*, CNN (Dec. 3, 2023), <https://www.cnn.com/2023/12/03/politics/ncaa-college-sports-at-risk-nil/index.html> [<https://perma.cc/KT92-RVN7>].

defense against critiques of NIL as property. We begin with the foundational and constitutional argument in support of NIL as property.

A. *Foundational and Constitutional Principles*

Treating NIL as property is baked into our Nation's DNA. It is baked into our foundational and constitutional principles, as will be presented next. In this first argument, I plan to support the proposition that NIL is property by focusing on the foundational and constitutional provisions that promote and protect the private ownership of property. This justification will be in three parts: (1) the right to private property as foundational, (2) the right to private property as constitutional, and (3) the constitutional right to promote and protect intellectual property.

1. Foundational Principles

It is indisputable that the right to private property is a foundational principle that defines the American spirit, our history, and our culture.¹⁹⁹ The American Revolution was fought to defend our belief in the universal and natural right to private property.²⁰⁰ Most importantly, for purposes of this Article, as a corollary to that right, is the position that NIL is both universal and natural and therefore automatically belongs to everyone, including college athletes. As I argue in a companion piece,²⁰¹ the "Right of Self" includes a natural property right²⁰² in one's "self" or "persona," encompassing a person's attributes or identities, such as labor, name, image, likeness, and other

¹⁹⁹ See companion articles, *supra* note 1.

²⁰⁰ EDMUND S. MORGAN, *THE CHALLENGE OF THE AMERICAN REVOLUTION* 54–55 (1976) ("Anyone who studies the Revolution must notice at once the attachment of all articulate Americans to property. 'Liberty and Property' was their cry, not 'Liberty and Democracy.'").

²⁰¹ See Crusto, *Right of Self*, *supra* note 1.

²⁰² "Natural property right" herein refers to the jurisprudential theory by which there are "natural rights" (1) that are fundamental or natural, as derived from God or nature, (2) to which all people are equally entitled, (3) that are inalienable, meaning they cannot be bargained or legislated away from people, and (4) that apply to life, liberty, and property. See, e.g., *The Natural Law Tradition in Ethics*, STAN. ENCYC. OF PHIL. (May 26, 2019), <https://plato.stanford.edu/entries/natural-law-ethics/> [<https://perma.cc/23YV-9W4K>]; *Natural Law*, WEST'S ENCYCLOPEDIA OF AMERICAN LAW (2008), <https://legal-dictionary.thefreedictionary.com/natural+law> [<https://perma.cc/VZJ6-DXMB>].

unequivocal identifiers.²⁰³ The issue of who “controls” or “owns” one’s property is as old as the founding of the Republic. Relative to the exploitation of labor, there was a historic battle over who controlled the property in oneself, particularly the self of enslaved people of African descent.²⁰⁴

A brief legal history of the American Revolution and the establishment of the Republic evidences that private property is a foundational, fundamental right. Following the philosophy of John Locke,²⁰⁵ the Founders clearly adopted the libertarian principles of self-autonomy or the sovereignty of the individual as right-holders, including the right in themselves and a right in their property.²⁰⁶ In 1689, Locke argued in his *Two Treatises of Government* that political society existed for the sake of protecting “property,” which he defined as a person’s “life, liberty, and estate....”²⁰⁷ His words then must have rung in the ears of the Founders: “[E]very man has... ‘property’ in his own ‘person.’ This nobody has any right to but himself.”²⁰⁸ In “A Letter Concerning Toleration,” Locke elaborated on the relationship between libertarianism and the limitations of government when he wrote that the magistrate’s power was limited to preserving a person’s “civil interest,” which he described as

²⁰³ “Attributes” of a person include their labor, their brand, and a quality or feature regarded as a characteristic or inherent part of someone or something, both tangible and intangible, but not limited to the right of privacy, the right of publicity, or the right not to be enslaved, in all mediums such as print, online, cyberspace, and the virtual universe.

²⁰⁴ See Crusto, *Blackness as Property*, *supra* note 1.

²⁰⁵ See LOCKE, *supra* note 2.

²⁰⁶ See *Individual Rights*, *supra* note 49 (noting the idea of “self-ownership” is the focus of most libertarians). See also *Libertarianism*, *supra* note 49 (discussing Robert Nozick’s theory of self-ownership and its relation to libertarianism in Robert Nozick’s 1974 book *Anarchy, State, and Utopia*: “[T]he key libertarian starting point is that individuals have a very stringent (perhaps the most stringent possible) set of rights over their persons, giving them the kind of control over themselves that one has over possessions one holds as private property. This includes (1) control rights over the use of the entity: both a liberty-right to use it and a claim-right that others not use it without one’s consent, (2) rights to transfer these rights to others (by sale, rental, gift, or loan), (3) immunities to the non-consensual loss of these rights, (4) rights to compensation if someone uses the entity without one’s permission, and (5) enforcement rights (including rights of prior restraint if someone is about to violate these rights).”).

²⁰⁷ LOCKE, *supra* note 2, at 141 (“[N]o political society can be, nor subsist, without having... the power to preserve the property...”).

²⁰⁸ See *id.* at 116.

“life, liberty, health, and indolency of body; and the possession of outward things....”²⁰⁹

Additional to Locke’s writings, the Founders were guided by the libertarian principles found in the English common law which identified a right to the natural attributes of self as an inherent natural right, entitled to protection from wrongful governmental infringement—as digested in Blackstone’s Commentaries.²¹⁰ Blackstone noted that the “right of personal security” included “enjoyment of life” and that “[l]ife is an immediate gift of God, a right inherent by nature in every individual.”²¹¹ He also emphasized that the government could not take a person’s life, liberty, or property arbitrarily or without the express warrant of law.²¹²

The Founders’ adoption of their belief in the enjoyment of life, liberty, and the pursuit of happiness as a property right echoes Locke’s view of the universality of natural law and its relationship to property rights. For example, Samuel Adams stated that “[a]mong the Natural Rights of the Colonists [were]... a right to life... liberty... [and] property....”²¹³ Most significantly, the Founders’ belief in the right to privately own property is reflected in the immortal word of the Declaration of Independence: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain *unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.*”²¹⁴ On July 4, 1776, the Declaration was unanimously

²⁰⁹ JOHN LOCKE, A LETTER CONCERNING TOLERATION 6–7 (1689) (“It is the Duty of the Civil Magistrate, by the impartial Execution of equal Laws, to secure unto all the People ... the just Possession of these things belonging to this Life.”).

²¹⁰ See WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 118–20 (1765–1769) (“[T]he rights of persons that are commanded to be observed by the municipal law... are due from every citizen ... and ... belong to him...”).

²¹¹ *Id.* at 125–29 (“The right of personal security consists in a person’s legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation. Life is the immediate gift of God, a right inherent by nature in every individual... This natural life being, as was before observed, the immediate donation of the great creator, cannot legally be disposed of or destroyed by any individual...”).

²¹² *Id.* at 129–30 (“[I]t is enacted by the statute 5 Edw. III. c. 9. that no man shall be forejudged of life or limb, contrary to the great charter and the law of the land: and again, by statute 28 Ed. III. c. 3. that no man shall be put to death, without being brought to answer by due process of law.”).

²¹³ SAMUEL ADAMS, THE RIGHTS OF THE COLONISTS, THE REPORT OF THE COMMITTEE OF CORRESPONDENCE TO THE BOSTON TOWN MEETING (1772), *reprinted in* 7 OLD S. LEAFLETS NO. 173, 417 (1906), <https://history.hanover.edu/texts/adamss.html> [<https://perma.cc/T6S9-KEQR>].

²¹⁴ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added).

adopted by all thirteen colonies.²¹⁵ A movement subsequently developed for constitutional reform, culminating in the Philadelphia Convention of 1787, which adopted the fundamental conception of property as a private right and reached its fruition through the Constitution of 1787.²¹⁶ Both the Constitution of 1787 and Alexander Hamilton's *The Federalist* No. 78 "provided the basis for an inviolable right of property."²¹⁷

Hence, the natural right to private property in oneself is a guiding, foundational principle that continues as a major tenet of our belief system. As it reflects the attributes of a person, NIL is uniquely "natural property," which does not require legislation to exist and be universal. Therefore, our Nation's foundational principles support NAPA's recognition of college athletes' right to their ownership and monetization of their NIL and protection against exploitation.

2. Constitutional Protection of Private Property

In addition to the Founders' belief in the private ownership of the attributes of oneself, the Founders expressly provide for protection of private property in the Bill of Rights' Amendments to the Constitution. In further evidence of the Founders' incorporation of pro-private property principles in the Constitution, the Founders borrowed from various previously established state constitutions that expressly provided for the right to private property.²¹⁸ The Founders deemed this right so fundamental that they thought it unnecessary to repeat it in the U.S. Constitution itself; nonetheless, the Anti-Federalists insisted on the protection of self, leading to the adoption of the Bill of Rights.²¹⁹ While the Constitution did not expressly provide for a *right* of private property, the Fifth Amendment's Due Process Clause comes

²¹⁵ See *Continental Congress*, HISTORY (Sept. 25, 2024), <https://www.history.com/topics/american-revolution/the-continental-congress> [<https://perma.cc/F5D4-6NH4>]. See generally GARRY WILLIS, *INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE 207–17* (1978).

²¹⁶ Alan Freeman & Elizabeth Mensch, *Property, in A COMPANION TO THE AMERICAN REVOLUTION 642* (Jack P. Greene & J.R. Pole eds., 2000).

²¹⁷ *Id.* at 642–43.

²¹⁸ For example, the Pennsylvania Declaration of Rights adopted in 1776 proclaimed "[t]hat all men . . . have certain natural, inherent and inalienable rights, amongst which are, the enjoying and defending life and liberty." PA. CONST. OF 1776, art. I ("That all men are born equally free and independent, and have certain natural, inherent and inalienable rights, amongst which are, the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.")

²¹⁹ U.S. CONST. amends. I–X.

close by stating that “[n]o person shall . . . be deprived of life, liberty, or property . . . nor shall private property be taken for public use, without just compensation.”²²⁰ Further, enacted during Reconstruction, the Fourteenth Amendment expressly provides that States cannot deprive a person of “life, liberty, or property . . . nor deny any person . . . the equal protection of the laws.”²²¹ Moreover, many state constitutions have such a provision today.²²²

Taken together, these Due Process Clauses provide two different types of protection of property against actions by the state and federal governments: (1) procedural due process, which requires that before depriving a person of life, liberty, or property, the government must follow certain procedures;²²³ and (2) substantive due process, which requires that if depriving a person of life, liberty, or property, the government must have sufficient justification.²²⁴ I argue that the “enjoyment of life, liberty, and the pursuit of happiness” should include the enjoyment of financial benefits one can generate using their attributes, including one’s NIL.

While the Bill of Rights focuses primarily on rights that protect individual liberties during criminal investigations and prosecutions, its underlying principles also protect against the government’s abuse of a person’s civil rights or liberties, which I also believe includes protection of a person’s NIL. Most importantly, the Ninth Amendment expressly provides that the enumeration of any rights in the Constitution does not deny or negate other rights reserved by the people.²²⁵ In conjunction, the Tenth Amendment reserves any powers

²²⁰ U.S. CONST. amend. V.

²²¹ U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

²²² *See, e.g.*, VA. CONST. art. I, § 1 (“[A]ll men . . . have certain inherent rights . . . namely, the enjoyment of life and liberty, with the means of acquiring and possessing property . . .”); *id.* art. I, § 11 (“That no person shall be deprived of his life, liberty, or property without due process of law . . .”).

²²³ *See, e.g.*, *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). *See generally* ROBERT L. GLICKSMAN & ROBERT L. LEVY, *ADMINISTRATIVE LAW: AGENCY ACTION IN LEGAL CONTEXT* (2010).

²²⁴ *See, e.g.*, *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992) (explaining that although a literal reading of the due process clause might be understood to regulate the “process” by which the state deprives a person of a protected interest, the Court has read the clause to contain a “substantive component” for more than 134 years).

²²⁵ U.S. CONST. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”). James Madison proposed the Ninth Amendment to ensure that the enumerated rights in the Bill of Rights would not be read to preclude the existence of other

not delegated to the United States by the Constitution, as reserved to the states, or respectively to the people.²²⁶ Moreover, over the years, the Supreme Court has found that there are some fundamental, “unenumerated” rights, some of them within the penumbras of the Constitution, as implied by the Ninth Amendment.²²⁷ Hence, the Ninth and Tenth Amendments, combined with Supreme Court precedents, support the proposition that the Founders believed in three principles of constitutional power: (1) that all rights not transferred to the government, including the right of self, continue to reside with the people; (2) that additional fundamental rights exist outside of the Constitution; and (3) that the rights enumerated in the Constitution are not an exhaustive list of individual rights.

The Constitution’s support for a person’s right to own and control the attributes of themselves is evidenced in the Thirteenth and Fourteenth Amendments. Specifically, the Thirteenth Amendment²²⁸ protects a person’s right to self by expressly prohibiting enslavement, by which a person’s self was the property of another person.²²⁹ Additionally, the Fourteenth Amendment²³⁰ secured citizenship rights of every person who was born in the United States or is a naturalized citizen. What is interesting about those Amendments to the Constitution is the increased scope of protection they provide against abuse of individual rights. While the Bill of Rights pertains to the protection of rights against abuse by the federal government, the Thirteenth and Fourteenth Amendments protect individual rights from abuse by state government and by private actors. That is, the Constitution protects a person whose self is violated by another person who seeks to enslave them.

Therefore, the Constitution recognizes a right to private property and provides protections against governmental and private abuses of that right. This provides constitutional support for the proposition that NIL is private

rights reserved to the people of the United States. Historical Background on Ninth Amendment, LEGAL INFO. INST. AT CORNELL L. SCH., https://www.law.cornell.edu/constitution/ninth_amendment [<https://perma.cc/TF3A-LW2C>].

²²⁶ U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

²²⁷ See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 488 (1964) (“The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments.”).

²²⁸ U.S. CONST. amend. XIII.

²²⁹ See Crusto, *Blackness as Property*, *supra* note 1.

²³⁰ U.S. CONST. amend. XIV.

property. Relative to NIL, if NIL were based on property law, every person's NIL would arguably be protected from both wrongful private and governmental exploitation. Furthermore, the current NIL law based on the right to privacy is in constitutional decline following the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*.²³¹ That decision overturned *Roe v. Wade*,²³² which was grounded on the right to privacy based on the Due Process Clause of the Fourteenth Amendment.²³³ That leads to the discussion of the nation's constitutional recognition of the need to promote and protect intangible forms of property.

3. Constitutional Protection of Intellectual Property²³⁴

Today, a major economic and national security concern is the theft of the nation's intellectual property including identify theft and data exfiltration. On a personal level, imagine the horror if someone were to steal your NIL and then use it for evil, unlawful, or exploitative purposes, including extortion.²³⁵ In this next discussion, I plan to support the proposition that

²³¹ See *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022). On the issue of a broad application of *Dobbs*, Justice Alito's majority opinion (6-3) recognized that the Court's overturning *Roe* might be read broadly, to apply to other areas beyond abortions, and cautioned that "[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion." *Id.* at 221. However, Justice Thomas in his concurring opinion stated that the legal rationale for *Dobbs* could be applied to overturn other major cases, including those that legalized gay marriage, barred the criminalization of consensual homosexual conduct, and protected the rights of married people to have access to contraception. *Id.* at 331-36.

²³² *Roe v. Wade*, 410 U.S. 113 (1973).

²³³ *Id.* at 113, 129.

²³⁴ See generally Frank I. Schechter, *The Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813 (1927); Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989); Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965 (1990); Wendy J. Gordon, *A Property Right in Self Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533 (1993). This discussion was inspired by Loyola Professor Paul S. "Ford" Miller. Thank you for your contribution.

²³⁵ See, e.g., Tim Fang, *San Francisco City Attorney Sues Websites Creating AI-Generated Deepfake Pornography*, CBS (Aug. 15, 2024), <https://www.cbsnews.com/sanfrancisco/news/sf-city-attorney-sues-websites-creating-ai-generated-deepfake-pornography/> [<https://perma.cc/ZEX6-G8E7>] (highlighting the private and public concern over AI-generated deepfake pornographic images of adults and children).

NIL is property by focusing on the Constitution's provisions to protect and promote the private ownership of intellectual property.

While the Founders established private ownership of property as a fundamental principle worthy of governmental protection, they didn't define the word "property." However, I suggest that evidence shows that the Founders adopted an expansive view of private property as the ownership of a person's labor, a thing or idea, or an abstraction of the thing or idea.²³⁶ When considering private property, its ownership, and its governmental protection, I believe that they had three types of property in mind. These were (1) the land and natural resources that they claimed by way of European discovery of native lands and conquest against the Native or European nations,²³⁷ (2) the ownership and domination of all attributes and labor of enslaved people,²³⁸ and (3) the ideas and inventions that are intangible, intellectual property.²³⁹ Here, we are focused on the Founders' constitutional commitment to the ownership, growth, and governmental protection of intellectual property. I believe that such attention to intellectual property supports the constitutional commitment to the concept of NIL as the private property of the person to be promoted and entitled to governmental protection.

Several of our Founders were learned people of science including Benjamin Franklin, one of our greatest inventors.²⁴⁰ They recognized the need to provide national encouragement of and protection for copyrights and patents as the private property of their creator-inventors.²⁴¹ Their concerns are evidenced in the Intellectual Property ("IP") Clause found in Article I of the Constitution.²⁴² Pursuant to that clause in the Constitution, in 1790 the first

²³⁶ See, e.g., JEREMY BENTHAM, *THEORY OF LEGISLATION* 112–13 (R. Hildreth trans., 6th ed. 1890).

²³⁷ See, e.g., *Johnson v. McIntosh*, 21 U.S. 543 (1823).

²³⁸ See Crusto, *Blackness as Property*, *supra* note 1.

²³⁹ See *The Framing and Ratification of the Intellectual Property Clause*, LEGAL INFO. INST. AT CORNELL L. SCH., <https://www.law.cornell.edu/constitution-conan/article-1/section-8/clause-8/the-framing-and-ratification-of-the-intellectual-property-clause> [<https://perma.cc/NR22-SKM9>].

²⁴⁰ See generally WALTER ISAACSON, *BENJAMIN FRANKLIN: AN AMERICAN LIFE* (2003).

²⁴¹ See Kristi Dosh, *4 New Federal NIL Bills Have Been Introduced In Congress*, FORBES (July 29, 2023), <https://www.forbes.com/sites/kristidosh/2023/07/29/4-new-federal-nil-bills-that-have-been-introduced-in-congress/> [<https://perma.cc/5H6T-DDFN>].

²⁴² Article I, Section 8, Clause 8 of the Constitution, also known as the "Patent and Copyright Clause," grants Congress the enumerated power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and

Congress enacted national copyright and patent laws.²⁴³ Since that initial statute, the scope of copyright and patent protection has expanded substantially to include technological developments.²⁴⁴ Further, in support of the proposition that NIL should be the private property of the person at least for and beyond the person's lifetime, the Copyright Extension Act of 1998 expanded an author's copyright to the life of the author plus 70 years, far longer than the 14 years prescribed by the First Copyright Act.²⁴⁵

This argument supports the proposition that NIL is property. However, whether or not it falls under the protection of intellectual property law is beyond the scope of this Article. Notwithstanding, in *Vidal v. Elster*,²⁴⁶ the Supreme Court opined on whether a person could legally register the phrase "Trump too small" as a trademark.²⁴⁷ There, the Court upheld the U.S. Patent and Trade Office's denial of such an unauthorized use of another person's name.²⁴⁸ The Supreme Court held that the "names clause"²⁴⁹ of the Lanham Act trademark law²⁵⁰ did not violate the Free Speech Clause of the First Amendment.²⁵¹ In writing the majority opinion, Justice Thomas noted that "[o]ur country has recognized trademark rights since the founding."²⁵² However, he pointed out that "[r]estrictions on trademarking names have

Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I., § 8, cl. 8.

²⁴³ See EDMUND S. MORGAN, *THE CHALLENGE OF THE AMERICAN REVOLUTION* 54–55 (1976) ("Anyone who studies the Revolution must notice at once the attachment of all articulate Americans to property. 'Liberty and Property' was their cry, not 'Liberty and Democracy.'").

²⁴⁴ *See id.*

²⁴⁵ *See id.*

²⁴⁶ *Vidal v. Elster*, 602 U.S. 286 (2024). This case was brought to my attention by Felicia Caponigri, Visiting Scholar, Chicago-Kent College of Law. Thank you for your contribution.

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ The "names clause," in the Lanham Act prohibits the registration of a trademark that "[c]onsists of or comprises a name . . . identifying a particular living individual except by his written consent," 15 U.S.C. § 1052(c).

²⁵⁰ The Lanham (Trademark) Act, Pub. L. 79–489, 60 Stat. 427 (1946) (codified at 15 U.S.C. § 1051) is the primary federal trademark statute in the United States.

²⁵¹ U.S. CONST., amend. I ("Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances").

²⁵² *Vidal*, 602 U.S. at 296 (citing Beverly W. Pattishall, *The Constitutional Foundations of American Trademark Law*, 78 TRADEMARK REP. 456, 457–59 (1988)).

a long history.”²⁵³ Most important to the proposition that a college athlete’s NIL is property is Justice Thomas’s dicta which explains why the law does and should restrict trademarking another person’s name without that person’s permission:

Such restrictions have historically been grounded in the notion that a person has ownership over his own name, and that he may not be excluded from using that name by another’s trademark. As the Court has explained, “[a] man’s name is his own property, and he has the same right to its use and enjoyment as he has to that of any other species of property.” *Brown Cite Chemical Co. v. Meyer*, 139 U. S. 540, 544 (1891). It is therefore “an elementary principle that every man is entitled to the use of his own name in his own business.” F. Treadway, *Personal Trade-Names*, 6 Yale L. J. 141, 143–144 (1897) (Treadway); see also A. Greeley, *Foreign Patent and Trade-mark Laws* §138, p. 135 (1899) (“The right of any one to place his own name on goods sold by him is recognized as a natural right and cannot be interfered with”). “The notion that people should be able to use their own name to identify their goods or business is deeply rooted in American mores.” B. Partishall, D. Hilliard, & J. Welch, *Trademarks and Unfair Competition* §2.06 (2001).²⁵⁴

The *Vidal* rationale support the supposition that a college athlete’s name, and perhaps image and likeness, should be treated as the natural property of the athlete, entitled to constitutional protections.

In summary, the Founders provided constitutional, federal protections for the forms of intellectual property known at the time, which were copyrights and patents. In the process, they recognized intellectual creation as the property of their creators. The Founders’ protection of early forms of intellectual property should be extended to new forms of intellectual property that have resulted from the internet and social media, namely NIL. Therefore, NIL as property is an extension of the Founders’ recognition of the importance of promoting and protecting the intellectual, albeit intangible, wealth of the nation.

* * *

Hence, both our nation’s foundational and constitutional principles recognize a right to private property and the protection thereof. They clearly support a proposition that NIL is property. That leads this discussion to the

²⁵³ *Id.* at 288 (citing J. McCARTHY, TRADEMARKS AND UNFAIR COMPETITION §13:5 (5th ed. 2023)).

²⁵⁴ *Id.* at 301–02.

second justification which is that NIL as property facilitates the aspirational goals of NIL law.

B. *Facilitates the Aspirations of NIL Law*

I believe that in addition to college athletes, everyone has a right to own and monetize the use of their NIL. As such, NIL is a source of wealth as well as a matter of privacy. As to the privacy side, imagine one morning you receive a text message from your best friend. She tells you a new “character,” who looks and talks just like you, has been added to a popular video game or worse yet, to a pornographic online site.²⁵⁵ Upon investigation, you discover that someone has taken your image and likeness without your permission and has licensed it to a game developer.²⁵⁶ As to the wealth side, imagine you are a leading college athlete and someone is using your NIL without your permission and is collecting millions in royalties which legally belong to you. This leads to a discussion as to what are the expectations of a person, particularly a college athlete, when it comes to NIL law.

This section will argue that when one considers the purpose of NIL law, one would agree that treating NIL as property is the best legal vehicle to achieve that purpose. In my opinion, NIL law should achieve two important societal and economic goals, which I believe coincide with the expectations of a person whose NIL is being used. Those goals are: (1) maximizing the value of NIL and the wealth of the person whose NIL is at hand and (2) protecting NIL from exploitation.²⁵⁷ I coin these as the “NIL value proposition”

²⁵⁵ Juventus footballer Edgar Davids brought a lawsuit against Riot Games Europe Holdings Ltd., stating that a character named Lucian in their League of Legends game infringed Davids’s likeness. Monika A. Górska & Lena Marcinoska-Boulangé, *Likeness in Computer Games: Real-Life People*, NEWTECH.LAW (Apr. 8, 2021), <https://newtech.law/en/articles/likenesses-in-computer-games-real-life-people/> [https://perma.cc/RS3X-BMKP]. Similarly, Booker T. Huffman sued Activision, claiming that the Call of Duty character David “Prophet” Wilkes is based upon a character he appeared as in the early days of his wrestling career named G.I. Bro. Andy Chalk. *Activision Smacks down Pro Wrestler Booker T. in Call of Duty Copyright Lawsuit*, PC GAMER (June 25, 2021), <https://www.pcgamer.com/activision-beats-pro-wrestler-booker-t-in-call-of-duty-copyright-lawsuit/#:~:text=in%20Call%20of%20Duty%20copyright%20lawsuit,-News&text=June%2025%2C%202021-,Booker%20T.,on%20his%20GI%20Bro%20personal> [https://perma.cc/ZW8Q-AW7X].

²⁵⁶ In each of the cases referenced in the above footnote, the game developers used the person’s likeness in their video game without their permission.

²⁵⁷ These two societal goals of maximizing wealth and guarding against exploitation are fundamental to an orderly, lawful society.

(“NVP”).²⁵⁸ In addition to college athletes, classifying NIL as property will benefit a wide range of people, including actors and entertainers, internet influencers, and every person who wishes to protect their NIL from its unauthorized use and to benefit from its authorized use.

Three relatively recent developments compel us to address the legal nature of a person’s interest in their NIL. One such development is the increasing market value of NIL due to the proliferation of social media.²⁵⁹ Another development is a greater recognition of how AI poses a growing threat to a person’s NIL.²⁶⁰ A third development is the rising demand by college athletes,²⁶¹ actors,²⁶² and entertainers²⁶³ for the right to benefit from the use of their NIL and to protect it from exploitation.²⁶⁴ Notwithstanding the societal and economic significance of NIL, there is little current legal analysis of NIL broadly; most discussion of NIL is focused on a singular question: Do college athletes have a right to capitalize on the use of their NIL?²⁶⁵ Most

²⁵⁸ “NIL value proposition” herein refers to the author’s conceptualization of how NIL reflects the expectations of the holders of NIL rights and how NIL might achieve the societal and economic goals increasing the wealth of the person and of the nation and promoting order by discouraging exploitation.

²⁵⁹ See Dan Whateley & Ashley Rodriguez, *How NIL Deals and Brand Sponsorships Are Helping College Athletes Make Money*, BUS. INSIDER (Sept. 19, 2023), <https://www.businessinsider.com/how-college-athletes-are-getting-paid-from-nil-endorsement-deals> [<https://perma.cc/U2D5-C4V6>]

²⁶⁰ See generally Sharoni S. Finkelstein & Alexandra L. Kolsky, *Artificial Intelligence Wants Your Name, Image and Likeness—Especially if You’re a Celebrity*, VENABLE LLP (May 17, 2023), <https://www.venable.com/insights/publications/2023/05/artificial-intelligence-wants-your-name-image> [<https://perma.cc/U7KM-S53A>].

²⁶¹ See Claybourn, *supra* note 19.

²⁶² Actors worry that AI could be able to create digital replicas of their likenesses or that their performances could be digitally altered without payment or approval. See Sophie Lloyd, *SAG-AFTRA Strike Update: Actors Union Ready to Negotiate After Writers Deal*, NEWSWEEK (Sept. 25, 2023), <https://www.newsweek.com/sag-aftra-strike-update-1829456> [<https://perma.cc/6MPZ-F865>]; cf. Leah Asmelash, *These Books are Being Used to Train AI. No One Told the Authors*, CNN STYLE (Oct. 8, 2023), <https://www.cnn.com/2023/10/08/style/ai-books3-authors-nora-roberts-cec> [<https://perma.cc/MKE8-42Y3>].

²⁶³ See Ashley Cullins, *Michael Jackson’s Likeness Valued at \$4.1 Million in Big Tax Court Win for Estate*, HOLLYWOOD REP. (May 3, 2021), <https://www.hollywoodreporter.com/news/general-news/michael-jacksons-likeness-valued-4-1-million-tax-court-4177594/> [<https://perma.cc/G6B3-6VJW>].

²⁶⁴ See *supra* note 47.

²⁶⁵ See Alan Blinder, *College Athletes May Earn Money From Their Fame*, N.C.A.A. Rules, N.Y. TIMES (June 30, 2021), <https://www.nytimes.com/2021/06/30/sports/ncaabasketball/ncaa-nil-rules.html> [<https://perma.cc/49WH-D5PX>].

importantly, the answer to that question will establish the legal basis for everyone who wishes to benefit from the use of their NIL and to protect their NIL from abuse.

This leads to the second point which is to argue that adopting property law as the legal basis of NIL provides an effective means to achieve the goals of NIL law. This is especially true compared to the right of publicity which is based in tort law and the right of privacy. The following are my arguments for each justification for NIL as property. Essentially, property law has time-honored, well-defined, and certain features that severally and combined make it the most powerful tool to achieve NVP. Those features and how they promote the NVP will be presented next. In addition to the foundation and constitutional provisions to protect property, which is discussed above, property has the following attributes that will be briefly discussed below in addition to how property relates to NIL: (1) ownership/title; (2) possession; (3) alienable and transferable by sale, license, contract, or gift; (4) assignable, leasable, and licensable; (5) divisible and subdividable; (6) heritable and descendible by inheritance or will; (7) concurrently-owned; (8) collateral for loans; (9) exclusivity; (10) time-honored, clear, and certain rules; (11) divisible into present and future interests; (12) protected by legal and equitable remedies, (13) can be held in trust; (14) income-generating; (15) insurable; (16) taxable; (17) protected against wrongful, governmental taking, and (18) internationally respected.²⁶⁶ Few of these attributes of NIL as a property right are features of the current law, which treats NIL as a right of publicity. What the reader will discover from the discussion below is that we currently behave as if NIL is property, notwithstanding the fact that the state-statutory NIL deemed it to be grounded in the right of publicity tort. Many of the property features of NIL are essential for effective estate planning and intergenerational wealth transference.

²⁶⁶ See generally RESTATEMENT (THIRD) OF PROP. (AM. L. INST. 2011). These are often referred to as a “bundle of rights” which is a metaphor for the legal components of property; Jane B. Baron, *Rescuing the Bundle-of-Rights Metaphor in Property Law*, 82 U. CIN. L. REV. (2014), <https://scholarship.law.uc.edu/uclr/vol82/iss1/2> [<https://perma.cc/H26V-KZZH>].

1. Ownership and Title

Ownership or title is one of the key aspects of property law.²⁶⁷ Most property ownership is evidenced by a document such as a deed (real property), a registration (car), a certificate (stock), or a passbook or statement (bank account). The intangibility of intellectual property might be evidenced by a copyright or patent document. NIL is different in that there is no government-issued documentation of ownership or title. Like other virtual assets, NIL is the new property. NIL should be seen as one of the many types of digital or virtual assets, a new class of property, that include cryptocurrencies, non-fungible tokens (NFTs), game tokens, and governance tokens.²⁶⁸ “Digital” or “virtual” assets are non-physical and can generate value for the owner. They should be able to transfer ownership through purchase, gifting, or other means of giving the rights to someone else, along with the value the item can bring; and must be discoverable or stored somewhere that it can be found.²⁶⁹ With the development of modern technology, including the expansion of the virtual world or metaverse,²⁷⁰ property interests in attributes of one’s self, such as NIL, have increased in value. One example of the value of NIL is that of the world-famous soccer star Cristiano Ronaldo who has reportedly 545 million

²⁶⁷ *Ownership and Titles: Chain of Title in Property Law*, UNIV. OF PITTSBURGH SCH. OF L. ONLINE BLOG (Apr. 18, 2024), <https://online.law.pitt.edu/blog/understanding-ownership-and-title-in-property-law> [<https://perma.cc/B844-E9UJ>], (“Title is everything in property law. If you hold title to property, you own it. . . . Ownership signifies the legal right to possess and use property.”).

²⁶⁸ See *The Digital Asset: Meaning, Types, and Importance*, INVESTOPEDIA (May 17, 2024), <https://www.investopedia.com/terms/d/digital-asset-framework.asp> [<https://perma.cc/LBU9-3BB7>].

²⁶⁹ *Id.* (explaining that examples of virtual assets include photos, documents, videos, books, audio/music, animations, illustrations, manuscripts, emails and email accounts, logos, metadata, content, social media accounts, gaming accounts, nonfungible tokens, cryptocurrency, tokens, crypto assets, tokenized assets, security tokens, and central bank digital currencies).

²⁷⁰ See generally Deborah Lovich, *What Is the Metaverse and Why Should You Care?*, FORBES (May 11, 2022), <https://www.forbes.com/sites/deborahlovich/2022/05/11/what-is-the-metaverse-and-why-should-you-care/> [<https://perma.cc/SU38-NGCT>] (“The current increase in attention to the Metaverse is partly driven by the very recent ability to fully ‘own’ virtual objects, experiences, or land There are entire metaverse worlds based on this new economy Republic Realm, a company that develops land in the Metaverse, recently paid \$4.3 million for a piece of virtual land in the metaverse-world Sandbox.”).

Instagram followers and commands nearly \$4 million per post!²⁷¹ That does not include the millions of dollars he receives from the sale of t-shirts, trading cards, and other NIL revenue.²⁷² Further, consider the financial value of an avatar in a fantasy football league.²⁷³

Some critics might argue that NIL is not property because it is not recognized by the government as property. My response is that a person's ownership of their NIL exists pursuant to natural law. Further, there are many types of virtual property that are not issued by states or governments. This relatively new asset class has experienced exponential growth: "In November 2021, non-state-issued digital assets reached a combined market capitalization of \$3 trillion, up from approximately \$14 billion in early November 2016."²⁷⁴ Hence, relative to college athletes' NIL, I believe that each player has a natural property right to own and, therefore, have title to their NIL. By comparison, a college athlete can be said to "own" a cause of action under the right of publicity; however, First Amendment considerations restrict the ability to win a claim for a violation of the right of publicity.

2. Possession

It has been said that "possession is nine-tenths of the law" of property.²⁷⁵ However, possession alone is insufficient to entitle a person to ownership.²⁷⁶ Notwithstanding, one feature of property ownership is a right to possess the property.²⁷⁷ Possession of intangible property is a challenging concept,

²⁷¹ See Chris De Silva, *Sport's Highest Earners Per Instagram Post*, WIDE WORLD OF SPORTS, <https://wwos.nine.com.au/news/highest-earning-sports-stars-on-instagram-li-one1-messi-cristiano-ronaldo-virat-kohli/ab1bcaaf-0c00-4779-8c67-227a4079aa7f#22> [<https://perma.cc/36BN-FZYT>].

²⁷² Riccardo Zazzini, *Cashing in on the Beautiful Game: Ronaldo's Net Worth Breaks the Bank*, HIGHSNOBIETY (Oct. 8, 2023), <https://www.highsnobiety.com/p/cristiano-ronaldo-net-worth/> [<https://perma.cc/B8SR-YPCZ>] ("As of 2023, Forbes estimates [Ronaldo's] net worth at a cool \$500 million, making him one of the wealthiest athletes in the world.").

²⁷³ Mekouar, *supra* note 78, reporting that, in 2019, the fantasy sports industry was worth over \$7 billion).

²⁷⁴ Exec. Order No. 14067, 87 Fed. Reg. 14143 (Mar. 9, 2022).

²⁷⁵ *Possession is Nine Points of the Law and Legal Definition*, US LEGAL, <https://definitions.uslegal.com/p/possession-is-nine-points-of-the-law/> [<https://perma.cc/B2XZ-674K>].

²⁷⁶ See *supra* note 195.

²⁷⁷ See Thomas W. Merrill, *Ownership and Possession*, in LAW AND ECONOMICS OF POSSESSION 9, 18–19 (Yun-chien Chang, ed., 2015) ("I would go further, and

although one would presume that the owner of intangible or virtual assets such as NIL would belong to the person whose NIL is at issue. Hence, a college athlete arguably has both ownership (or title), to their NIL, as well as the right to possess their NIL. By comparison, a college athlete may “possess” a cause of action under the right of publicity; however, possession is personal to the player whose NIL seeks protection. The law of finders does not apply to the right of publicity. Hence, college athlete NIL law has nothing that provides anyone a right of possession in the right of publicity.

3. Alienable and Transferable, by Sale, License, Contract, or Gift

Property is alienable which means it can be freely transferred to others.²⁷⁸ All private property is presumed to be alienable as it may be conveyed by one party to another.²⁷⁹ Such a transfer can be gratuitous such as by gift or will,²⁸⁰ or can be for consideration such as by sale, license, or contract.²⁸¹ The fact that

contend that modern legal systems also protect possession, at least in some circumstances, without regard to ownership or perhaps even in opposition to ownership The law of finders provides a particularly striking illustration. . . . The finder is not regarded as the owner. Nevertheless, the law regards the finder-as-possessor as having significant rights independent of the owner. . . . The finder, for example, is protected by both criminal law and tort law against unwanted takings of the object by a third party (*Armory v. Delamirie* [1722] 1 Stra. 505). This is a clear instance of the law protecting possession independently of ownership.”)

²⁷⁸ See *Alienable*, LEGAL INFO. INST., AT CORNELL L. SCH., <https://www.law.cornell.edu/wex/alienable#:~:text=Alienable%20means%20transferable.%20An%20interest%20in%20property%20is,law%2C%20or%20statutory%20restriction%20on%20it%20states%20otherwise> [https://perma.cc/6SF2-4SFL].

²⁷⁹ *Id.* (“[U]nless some contractual, common law, or statutory restriction on it states otherwise.”).

²⁸⁰ Stephen R. Munzer, *Gratuitous Transfers*, in *A THEORY OF PROPERTY* 380, 380–418 (1990), <https://www.cambridge.org/core/books/abs/theory-of-property/gratuitous-transfers/AE0BB654213165CC5A3A2AF075413E1C#> [https://perma.cc/8U9P-XYFJ] (“Gratuitous transfers fall into two groups: transfers from a living person and transfers from the estate of a person who has died. The former group (*inter vivos* transfers) consists mainly of gifts. The latter group (transfers at death) divides. If the deceased person made a valid will, the transfers are called devises in the case of real property and bequests in the case of personal property. If that person has no valid will, the transfers occur by intestate succession. In all cases of the latter group, the things received may be called inheritances. For simplicity’s sake, the term ‘bequests’ will be used for all transfers by will.”).

²⁸¹ See James Chen, *Conveyance: Property Transfer Examples and FAQs*, INVESTOPE-
DIA (Nov. 6, 2022), <https://www.investopedia.com/terms/c/conveyance.asp> [https://

property is alienable and can be licensed from the owner to one, or many, third parties is an invaluable feature of property law.²⁸² It allows the property owner to transfer all or some of their property interest to third parties, usually in consideration of revenue for the use of the property.²⁸³ These transfers can be severable or divided into lesser property units.²⁸⁴ They can be extended for different lengths of time such as a short period or a longer period.²⁸⁵ They can be irrevocable or revocable.²⁸⁶ As a result, NIL as property allows a person to license their NIL to as many persons as there is a market. By comparison, a college athlete can be said to “license” the right of publicity; however, the right is personal to the player and may not be enforceable by a third-party licensee without the player’s participation in the claim of misappropriation.

4. Assignable, Leasable, and Licensable

As noted above, property is assignable, which means it can be leased or licensed to others.²⁸⁷ One example of an assignment is the leasing of the remaining three months of a one-year lease, which is like a sublease. Most NIL deals involve the licensing of a college athlete’s NIL, to endorse a product or service in return for monetary compensation. This permits the athlete to monetize their NIL. For example, Bronny James might license the limited use of his image to promote Nike shoes. The license might be exclusive to Nike or may be non-exclusive. Hence, NIL as property, which can be licensed, is a great vehicle for achieving the NVP.

By comparison, as previously presented, the current NIL law relative to college athletes rests on a right of publicity, which gives a person a legal claim against a person who wrongfully expropriates a person’s NIL in violation of their right to privacy. Tort law places many limitations on the right

perma.cc/9BEK-9RNT] (“The term conveyance refers to the act of transferring property from one party to another. The term is commonly used in real estate transactions when buyers and sellers transfer ownership of land, building, or home. This is done using an instrument of conveyance—a legal document such as a contract, lease, title, or deed.”).

²⁸² Andrew Bloomenthal, *Licensing Agreement: Definition, Example, Types, and Benefits*, INVESTOPEDIA (Mar. 21, 2024), <https://www.investopedia.com/terms/l/licensing-agreement.asp> [https://perma.cc/PZ63-4JJG].

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ See *Alienable*, supra note 278.

of publicity. One limitation on the right of publicity is that it is not generally alienable from the person whose privacy a third person expropriates.²⁸⁸ Tort actions are generally personal and non-assignable.²⁸⁹ That means that one cannot purchase a right of publicity. This has two negative effects on the value of NIL. First, it devalues NIL. Second, it makes NIL non-transferable. Of course, one might question, if NIL is based in tort law, which is non-transferable, how can college athletes negotiate NIL deals? The answer is that despite the statutory tort basis for NIL rights, NIL is a natural property right, which automatically belongs to all people, including college athletes.²⁹⁰ Hence, there is nothing in the college athlete NIL law that provides for the ability to lease a players' NIL.

5. Divisible and Subdividable

As property is divisible, one can sub-divide or license it to many users.²⁹¹ College athletes can divide their NIL into sublease or sub-licenses to permit a third party the right to create and possibly sell copies of the players' image on products, such as t-shirts for profit, for which an athlete might receive a royalty payment.²⁹² This property feature can increase the value of a college athlete's NIL by permitting non-exclusivity arrangements with third parties such as brand endorsements with shoe manufacturers, food producers, and car dealerships. By comparison, there is nothing in the college athlete NIL law that provides for the ability to divide or subdivide the right of publicity.

²⁸⁸ See *Lugosi v. Universal Pictures*, 603 P.2d 425, 431 (Cal. 1979).

²⁸⁹ See *Murphy v. Allstate Ins. Co.*, 553 P.2d 584, 587 (Cal. 1976).

²⁹⁰ See *Crusto, Right of Self*, *supra* note at 604.

²⁹¹ Divisibility of intellectual property such as NIL has not been formally recognized in the law. Divisibility and assignability of easements in gross was the subject of *Miller v. Lutheran Conf. & Camp Ass'n*, 200 A. 646 (Pa. 1938) (holding that easements in gross could be divided but must be controlled by consensus of all owners).

²⁹² See Mark Seavy, *The New Challenges for NIL*, LICENSING INTERNATIONAL (Mar. 11, 2024), <https://licensinginternational.org/news/the-new-obstacles-for-nil/> [<https://perma.cc/X5W9-B9C8>] (“With the transient nature of the transfer portal and how quickly athletes turn over, NIL does not have great selling power as a standalone. The licensing should focus on co-branded products for the market.”).

6. Heritable and Descendible, by Inheritance or Will

Property generally survives its owner and transfers to the owner's estate at death.²⁹³ This means that a person's property, which is deemed as their estate, can be transferred to other living people or organizations after the property owner dies.²⁹⁴ This is achieved by will or via the law of inheritance.²⁹⁵ Currently, it is unclear whether a college athlete's NIL is descendible to their heirs or named beneficiaries in their will.²⁹⁶ That is because, as was previously noted, the NIL law is silent on the matter.²⁹⁷ When one examines related case law that deals with the descendibility of the likeness of celebrities, commentators have noted the deficiency that exists in viewing the right of publicity as a privacy right rather than as a property right.²⁹⁸ By comparison, a college athlete operating under NIL laws, which expressly provide for their protection,

²⁹³ See Ward Williams, *Inheritance Laws by State*, INVESTOPEDIA (Dec. 28, 2023), <https://www.investopedia.com/inheritance-laws-by-state-5113616> [https://perma.cc/VBA7-S37P]; Julia Kagan, *Last Will and Testament: Definition, Types, and How to Write One*, INVESTOPEDIA (June 12, 2024), <https://www.investopedia.com/terms/l/last-will-and-testament.asp> [https://perma.cc/RWC9-ERFF]; cf., David Horton, *In-descendibility*, 102 CALIF. L. REV. 543, 543 (Dec. 22, 2013).

²⁹⁴ See Williams, *supra* note 293.

²⁹⁵ *Id.*

²⁹⁶ See *supra* Part I.

²⁹⁷ *Id.*

²⁹⁸ See generally Joshua L. Simmons & Miranda D. Means, *Split Personality: Constructing a Coherent Right of Publicity Statute*, 10 LANDSLIDE, no. 5, May/June 2018, https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2017-18/may-june/split-personality/?login [https://perma.cc/8YCV-9D43] (“Over the past few years, a number of states have considered new or revised statutes that would protect the right of publicity. For example, last year the New York State legislature considered Assembly Bill A08155, which would, at least nominally, transform New York’s right of publicity from a privacy right, codified in Civil Rights Law article 5, to a property right. By transitioning from an inalienable personal right to an alienable property right, New York would make the right of publicity transferable and descendible.”); Eric E. Johnson, *Disentangling the Right of Publicity*, 111 Nw. U. L. REV. 891, 908 (2017) (“Beyond the inefficiency, however, there is a larger and more important problem with the negative way in which right-of-publicity doctrine is structured: it leads to bad law.”); Susan G. Bluer, *California Extends the Rights of Publicity to Heirs: A Shift from Privacy to Property and Copyright Principles*, 7 HASTINGS COMM. & ENT. L.J. 575 (1985), https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=1171&context=hastings_comm_ent_law_journal [https://perma.cc/JU2A-VEYC]; Vicky Gerl Neumeyer, *The Right of Publicity and its Descendibility*, 7 U. MIA. ENT. & SPORTS L. REV. 287 (1990), <http://repository.law.miami.edu/umeslr/vol7/iss2/5> [https://perma.cc/45LE-KGFL].

does not provide for descendibility. Some states, such as Texas, have a general NIL law that expressly provides for descendibility under the right of publicity;²⁹⁹ however, not all states do so.

7. Concurrently Owned

Property can be concurrently owned, which means two or more persons can enjoy the benefits and share the burdens of ownership at the same time.³⁰⁰ This feature of property law, usually as tenants in common or joint tenants, is invaluable for family-oriented wealth sharing and estate planning.³⁰¹ It would be equally valuable for college athletes to have the power to title their NIL deals with others, such as their parents or a spouse, as tenants in common or joint tenants with right of survivorship. There are related issues as to whether NIL deals (or income, royalties, etc. from NIL) are marital property or community property, which might require some advance planning such as a pre-nuptial agreement.³⁰² Caveat: Should a player choose to share their NIL rights with another person, perhaps as marital property if the player gets married or as a gift to a parent, that player is agreeing to share control over their NIL.³⁰³ For example, if Olivia Dunne were to get married in Louisiana, which is a community property state, the income from an NIL deal inked after the marriage would be shared with her new spouse, unless they sign a pre-nuptial agreement to opt out of the community property regime.³⁰⁴ Whenever

²⁹⁹ Callie Baker, *Misappropriation and Right of Publicity*, TEXAS MUSIC OFFICE (Sept. 2011) (citing Tex. Prop. Code Ann. § 26.013 (Vernon 1987)), https://gov.texas.gov/music/page/misappropriation_and_right_of_publicity [<https://perma.cc/2SGW-FTQE>] (“A person who illegally uses the deceased individual’s name, voice, signature, or likeness is liable to the person who owns the property right for the amount of damages that result of the unauthorized use or \$2,500, whichever is greater; the amount of any profits from the unauthorized use that are attributable to that use; punitive damages; and reasonable attorney’s fees and court costs.”).

³⁰⁰ See James Chen, *Tenancy In Common (TIC): How It Works and Other Forms of Joint Tenancy*, INVESTOPEDIA, https://www.investopedia.com/terms/t/tenancy_in_common.asp [<https://perma.cc/J4QP-R3KJ>].

³⁰¹ See *id.*

³⁰² See generally MP McQueen, *What Is Marital Property (Common Law vs. Community States)?* INVESTOPEDIA, <https://www.investopedia.com/terms/m/maritalproperty.asp> [<https://perma.cc/6P7L-BAN8>].

³⁰³ See James Chen, *What Is Joint Tenancy in Property Ownership?*, INVESTOPEDIA, <https://www.investopedia.com/terms/j/joint-tenancy.asp> [<https://perma.cc/ZTK6-VZYF>].

³⁰⁴ *Louisiana’s Community Property Law*, Louisiana Office of the Attorney General (citing La. Civ. Code art. 2334), <https://www.ag.state.la.us/Files/Shared/>

a person voluntarily grants another person a share of their property rights, that action opens the door to increased exploitation of college athletes/social media influencers/celebrities. That is, there is a danger in spouses and parents owning the right to a player's NIL. Consequently, if a player anticipates sharing their NIL rights with another person, they should seek legal counsel before doing so. By comparison, a college athlete operating under NIL laws grounded in the right of publicity is not generally permitted to co-own a tortious cause of action, so there is nothing in the college athlete NIL law that provides for the ability to co-own NIL.

8. Collateral for Loans

Property can be used as collateral for securing a loan.³⁰⁵ The most common example of this is a mortgage with a loan that is secured both by a personal obligation to pay and a lien on real property as collateral.³⁰⁶ In addition to mortgages against real property, other forms of property including securities, such as stocks and bonds, can be used as collateral to secure loans.³⁰⁷ Viewing NIL as property would facilitate a college athlete's ability to borrow money from lenders using their NIL deal(s) as collateral. This feature would be beneficial to a college athlete as it allows for liquidity and immediate cash while the athlete awaits royalties or payments on their NIL deal. By comparison, there is nothing in the college athlete NIL law that provides for the ability to use NIL as collateral.

9. Exclusivity

Property law provides an owner the right to exclude unauthorized or unlawful use, or occupancy by others.³⁰⁸ For example, a person might

Documents/MatrimonialRegimesandCovenantMarriageBooklet.pdf [https://perma.cc/9P9R-53T2].

³⁰⁵ Kiah Treece, *What Is a Collateral Loan and How Can I Get One?*, FORBES (July 18, 2023), <https://www.forbes.com/advisor/personal-loans/loans-with-collateral/> [https://perma.cc/9DTL-WAPB].

³⁰⁶ *See id.*

³⁰⁷ *See id.*

³⁰⁸ *See generally* James Y. Stern, *The Essential Structure of Property Law*, 115 MICH. L. REV. 1167 (2017), <https://repository.law.umich.edu/mlr/vol115/iss7/2> [https://perma.cc/QGU4-2CY8].

misappropriate a player's image and use it in a video game.³⁰⁹ While an innocent third-party user might not be liable for the misuse, the thief might be liable to the extent of the harm to the player.³¹⁰ That right of exclusivity is protected by both civil and criminal laws.³¹¹ Adding exclusivity to NIL is essential to protect it from unauthorized use or exploitation. This feature of property law would also protect third parties who contract with college athletes to endorse their brands. Without selective exclusivity, NIL would have diminished value. By comparison, there is nothing in the college athlete NIL law that provides for exclusivity.

10. Time-Honored, Clear, and Certain Rules

Further, property law rules are well-established, crystal clear, and universal.³¹² By comparison, a right of publicity is relatively new, not universally enacted in state law, and not expressly provided in federal statutes.³¹³ As a new form of property, NIL joins other virtual assets in increasing the wealth of the nation and of its people individual. Viewing NIL as property would add to the stability and certainty of this new form of wealth for college athletes. By comparison, right of publicity statutes provide for specific, limited remedies, including statutory monetary damages or actual damages; injunctive relief; an award of the profits the infringer received from the use; or (in some states) punitive damages for willful violations that they have sustained actual losses to recover damages.³¹⁴

³⁰⁹ See, e.g., *Keller v. Elec. Arts Inc. (In re Nat'l Collegiate Athletics Ass'n Student-Athlete Name & Likeness Licensing Litig.)*, 724 F.3d 1268 (9th Cir. 2013) (Keller was the starting quarterback for Arizona State University before transferring to the University of Nebraska. He filed a class action suit alleging a violation of his right of publicity under California law against Electronic Arts, a video game developer who created an NCAA football game that included a player with similar characteristics to Keller.).

³¹⁰ See *id.*

³¹¹ See JOHN G. SPRANKLING, *The Right to Exclude*, THE INTERNATIONAL LAW OF PROPERTY (2014).

³¹² See *id.*

³¹³ See John R. Vile, *Right of Publicity*, FREE SPEECH CTR. (Aug. 11, 2023), <https://firstamendment.mtsu.edu/article/right-of-publicity/> [<https://perma.cc/59ZN-F5Q2>].

³¹⁴ See, e.g., Ohio Rev. Code § 2741.07, Damages in civil action to enforce publicity right, <https://casetext.com/statute/ohio-revised-code/title-27-courts-general-provisions-special-remedies/chapter-2741-right-of-publicity-in-individuals-persona/section-274107-damages-in-civil-action-to-enforce-publicity-right> [<https://perma.cc/XMH2-ZC9A>]. See generally *Publicity Rights Under State Laws, Remedies for*

11. Divisible into Present and Future Interests

Tort actions are limited in application by both the statutes of limitations and, arguably, the death of the NIL owner.³¹⁵ This feature of property law facilitates estate planning by allowing a property owner to effectively plan on the transfer of the future interest in their property.³¹⁶ In viewing NIL as property, a college athlete can transfer to others or retain now or in the future a life estate or a future interest in their NIL. By comparison, there is nothing in the college athlete NIL law that provides for the divisibility into present and future interests.

12. Protected by Legal and Equitable Remedies

Property has well-established and universally followed legal and equitable remedies that protect its owners.³¹⁷ Unlike tort law, property law has over the centuries developed unique legal and equitable remedies that provide NIL property owners very comprehensive, effective protection of their rights.³¹⁸ Those remedies include declaratory judgment; compensatory, punitive, and liquidated damages; temporary restraining orders and injunctions; and constructive trusts.³¹⁹ To treat NIL as property would facilitate the application of property-law remedies to protect college athletes from exploitation. By comparison, there is nothing in the college athlete NIL law that provides for any remedies, although the state's right of publicity law likely provides for legal and equitable remedies.

Misappropriation of Publicity Rights, JUSTIA, <https://www.justia.com/entertainment-law/publicity-rights/> [<https://perma.cc/K4TY-EV7D>]; Neal H. Klausner & Sara L. Edelman, *Expert Q&A on Right of Publicity Claims*, PRAC. L., J., https://www.dglaw.com/wp-content/uploads/2021/09/Klausner_Edelman_Expert_QnA_Right_of_Publicity.pdf [<https://perma.cc/2UN8-AAU3>].

³¹⁵ See generally LEGAL INFO. INST., *Future Interest*, CORNELL L. SCH., https://www.law.cornell.edu/wex/future_interest [<https://perma.cc/V9TW-5SMC>].

³¹⁶ *Id.*

³¹⁷ See generally F.H. LAWSON, *REMEDIES OF ENGLISH LAW* (1972).

³¹⁸ *Id.*

³¹⁹ *Id.*

13. Can be Held in Trust

Property can be held in a trust.³²⁰ Trust law provides an invaluable tool particularly for estate planning.³²¹ One aspect of a trust relative to NIL deals is for a college athlete to transfer title/ownership of an asset such as an NIL contract while granting a life estate interest in some or all of the income from an NIL deal to the player for life (or to someone else, such as the player's mother), while providing for the ownership in the future interest in the income to other beneficiaries. By comparison, there is nothing in the college athlete NIL law that provides for the ability to hold a players' NIL in a trust.

14. Income-Generating

Property can generate income.³²² College athletes have several ways to capture NIL income, including a range of endorsement deals from appearing in advertisements to creating online content like YouTube videos, TikToks, podcasts, or other outlets.³²³ NIL deals can also involve autograph signings; public appearances and speaking engagements; hosting sports camps and training clinics for aspiring athletes; and partnering with local businesses for promotions, appearances, endorsements or joint marketing initiatives.³²⁴ By comparison, there is nothing in the college athlete NIL law that provides for the ability to monetize a players' NIL.

15. Insurable

Property can be insured against loss.³²⁵ Real estate insurance is commonly used to guard against various types of risks including hazard, flood,

³²⁰ See generally LEGAL INFO. INST., *Trust*, CORNELL L. SCH., <https://www.law.cornell.edu/wex/trust> [<https://perma.cc/6B2W-ZC37>].

³²¹ *Id.*

³²² See generally Julia Kagan, *Income Property: What it is, How it Works, Pros and Cons*, INVESTOPEDIA, (May 22, 2022), https://www.investopedia.com/terms/i/income_property.asp [<https://perma.cc/QDS9-W7PJ>].

³²³ Richard Pianoforte, *For Student Athletes, NIL Means Visibility, Income—and Taxes*, FIDUCIARY TR. INT'L (Aug. 2, 2024), <https://www.fiduciarytrust.com/insights/article-detail/for-student-athletes-nil-means-visibility-income---and-taxes> [<https://perma.cc/2QFH-PSHU>].

³²⁴ *Id.*

³²⁵ See, e.g., Alexandra Twin, *Property Insurance: Definition and How Coverage Works*, INVESTOPEDIA (July 18, 2024), <https://www.investopedia.com/terms/p/property-insurance.asp> [<https://perma.cc/CRE2-JF72>].

liability, and title.³²⁶ Similarly, viewing NIL as property, there are many types of risk in NIL deals that should be insured.³²⁷ For example, as NIL deals are often contingent on the personal performance of a college athlete, life insurance would be an important means of hedging against the risk of a player's premature death.³²⁸ By comparison, there is nothing in the college athlete NIL law that provides for the insurability of a players' NIL.

16. Taxable

Property is taxable in several ways, including the income it produces, its ownership (such as real property which is often taxed annually by local governments), and its capital appreciation (upon sale).³²⁹ Relative to taxing NIL, any money, goods, property, or services that a student receives (both monetary and non-monetary) from NIL-related activities must be reported on their federal, state, and local tax returns and is taxed as ordinary income.³³⁰

³²⁶ *Id.*

³²⁷ See generally *The Risks of NIL: What Student-Athletes Need to Watch Out For*, COURO (July 14, 2024), <https://www.couro.io/insights/the-risks-of-nil-what-student-athletes-need-to-watch-out-for> [<https://perma.cc/877A-8FR5>].

³²⁸ See generally Amy Fontinelle, *Life Insurance: What it is, How it Works, and How to Buy a Policy*, INVESTOPEDIA (Sept. 17, 2024), <https://www.investopedia.com/terms/l/lifeinsurance.asp> [<https://perma.cc/3X6U-JF7K>].

³²⁹ See generally Julia Kagan, *Property Tax: Definition, What it's Used for, and How it's Calculated*, INVESTOPEDIA (June 25, 2024), <https://www.investopedia.com/terms/p/propertytax.asp> [<https://perma.cc/29AS-M6NY>]; Carlos J. Hornbrook, *Student Athletes Need to Know the Potential Tax Implications of the Name, Image, Likeness Rules in College Football*, 42 ABA TAX TIMES 11 (June 11, 2023), <https://www.americanbar.org/groups/taxation/resources/tax-times/archive/student-athletes-potential-tax-implications-name-image-likeness-rules/> [<https://perma.cc/96ZQ-AZT9>].

³³⁰ See 26 U.S.C.S. § 64; Rebecca Lake, *NIL Deals and Tax Implications: A Guide for College Athletes*, INVESTOPEDIA (May 30, 2024) <https://www.investopedia.com/nil-deals-tax-implications-8599929> [<https://perma.cc/CB7X-6CJH>]; *Student-Athletes Involved in Name Image Likeness (NIL) Agreements Should Be Aware of Their Tax Obligations*, TAXPAYER ADVOC. SERV. (Dec. 7, 2023), <https://www.taxpayeradvocate.irs.gov/news/nta-blog/nta-blog-student-athletes-involved-in-nil-agreements-should-be-aware-of-their-tax-obligations/2023/12/> [<https://perma.cc/8FAQ-ZZ9Z>] (Explaining that such reportable "income" include free products or services that an athlete receives in exchange for endorsing a brand or business; fees earned through student-focused activities, such as signing autographs or making promotional appearances; compensation from brand ambassadorship or sponsorship deals, including brand marketing conducted on social media channels; fees paid for public speaking engagements; money earned from appearances in televised advertisements; ad revenue generated through a YouTube channel, blog, or podcast that the student

This taxation of NIL income likely applies at the state and local levels as well.³³¹ Furthermore, it is possible for the IRS to view NIL as property for which there could be taxation for capital gains for its appreciated value.³³² Additionally, if NIL is a part of a player's estate when they die, the value of the NIL could be subject to federal and state estate taxes.³³³ There are many nuances to the taxation and financial impacts of college athletes' NIL deals, including "the jock tax," self-employment taxes, in-kind compensation, deductions and expenses, estimated tax payments, impact on financial aid, and working with NIL collectives.³³⁴ There are other related tax issues, such as dependency status for a minor athlete's parents' tax returns and the need to file in various states when sponsorship deals involve working in multiple states.³³⁵ Consequently, the tax burden on players' NIL is a huge consideration when deciding whether treating NIL in this way enriches college athletes. Of course, even after paying the taxes owed on their NIL deals, players will still net a financial benefit over what they were allowed to make before the change in the law. Prior to the change, they were not allowed to accept any money for their NIL.

owns; royalties or fees earned through a licensing or merchandising agreement; and licensing via non-fungible tokens (NFTs)).

³³¹ See *How Do State and Local Individual Income Taxes Work?*, TAX POL'Y CTR., <https://www.taxpolicycenter.org/briefing-book/how-do-state-and-local-individual-income-taxes-work> [<https://perma.cc/TA7F-WLYY>].

³³² See generally The Investopedia Team, *Can You Realize Capital Gains on Intangible Property?*, INVESTOPEDIA (Aug. 23, 2022), <https://www.investopedia.com/ask/answers/032715/can-you-realize-capital-gains-intangible-property.asp> [<https://perma.cc/A3QK-YYBD>].

³³³ See generally Raquel Sportel, *Intellectual Property Assets in Estate Planning*, PORTERWRIGHT (July 7, 2022), <https://www.porterwright.com/media/intellectual-property-assets-in-estate-planning/> [<https://perma.cc/T7DM-DDQC>].

³³⁴ See, e.g., VA. CONST. art. I, § 1 ("[A]ll men . . . have certain inherent rights . . . namely, the enjoyment of life and liberty, with the means of acquiring and possessing property . . ."); *id.* art. I, § 11 ("That no person shall be deprived of his life, liberty, or property without due process of law . . .").

³³⁵ *Name, Image, Likeness and the Tax Implications of Paying College Athletes*, H&R BLOCK, <https://www.hrblock.com/tax-center/income/nil-student-athletes/> [perma.cc/V956-VA2W]; See Katharina Reekmans, *A Parent's Guide to NIL: Navigating Your College Athlete's Taxes*, INTUITTURBOTAX (Jun. 13, 2024) <https://blog.turbotax.intuit.com/self-employed/a-parents-guide-to-nil-navigating-your-college-athletes-taxes-53889/> [<https://perma.cc/BN3R-XRTL>].

There is another interesting aspect of the revolution which allows players to monetize their NIL. NIL provides a new source of tax revenue.³³⁶ In the past, NIL collectives have applied for and received tax-exempt status from the IRS.³³⁷ A collective is usually a group of boosters who organize to provide NIL deals to highly sought-after players to encourage them to play for a particular college.³³⁸ However, in June 2023, the IRS Office of Chief Counsel explained that many organizations that develop paid NIL opportunities for student-athletes are *not* eligible for tax-exempt status under IRC § 501(c)(3) “because the private benefits they provide to student-athletes are not incidental both qualitatively and quantitatively to any exempt purpose furthered by that activity.”³³⁹ This will likely change how NIL agreements are structured and the status or type of institutions they contract with going forward.³⁴⁰ That means that some of the revenue that would have gone to the NCAA and its school members — all of whom are tax exempt, non-profit entities — would now become taxable. Hence, whereas boosters/collectives who contributed directly to a college or university’s athletic program would have received a tax deduction as a charitable donation, those same boosters who form cooperatives to help recruit players via NIL deals have been instructed by the IRS that those NIL funds are not tax deductible.³⁴¹

³³⁶ See Memorandum from the Off. of Chief Couns. of the Internal Revenue Serv. to the Dir. of EO Rulings & Agreements (May 23, 2023), <https://www.irs.gov/pub/lanoa/am-2023-004-508v.pdf> [perma.cc/W62U-4EDS].

³³⁷ *Name, Image, and Likeness (NIL) Collectives*, TAXPAYER ADVOCATE SERVICE (Mar. 7, 2023), <https://www.taxpayeradvocate.irs.gov/get-help/general/nil/nil-collectives/> [perma.cc/HC5J-S37M].

³³⁸ See generally David Ubben & Tess DeMeyer, *What is NIL, How has it Changed College Sports and Why are Schools under Investigation?*, THE ATHLETIC (Feb. 2, 2024), <https://www.nytimes.com/athletic/5245564/2024/02/02/nil-explained-ncaa-name-image-likeness-investigation/> [perma.cc/9V28-JLFE] (“Collectives are organizations that fundraise via large and small donors with the intent to direct that money to a school’s athletes through NIL deals One of the NCAA’s first pieces of official NIL guidance, sent to schools in May 2022, stated that collectives count as boosters and are subject to the same, long-applied recruiting rules. In short, collectives cannot be involved in recruiting, and they can’t entice a recruit to sign with a particular school with the promise of payment.”).

³³⁹ Memorandum from the Off. Of Chief Couns., *supra* note 336.

³⁴⁰ See Kristi Dosh, *4 New Federal NIL Bills Have Been Introduced In Congress*, FORBES (July 29, 2023), <https://www.forbes.com/sites/kristidosh/2023/07/29/4-new-federal-nil-bills-that-have-been-introduced-in-congress/> [https://perma.cc/5H6T-DDFN].

³⁴¹ *Id.*

This feature can provide important revenue to operate governmental functions. This includes taxation of the ownership (property tax), on the revenue (income tax), on the appreciation (capital gains), on the sale (capital gains), or on the death of the owner (estate tax). In the future, the government may tax other aspects of NIL, such as its appreciated value. State and local governments are challenged to determine how NIL, a new virtual asset, should be taxed.³⁴² Another interesting question is whether a person's interest in their NIL could be transferred to a tax-deferred retirement account such as a self-directed Individual Retirement Account.³⁴³ Clearly, a college athlete who has a NIL deal(s) needs access to competent law advisors. By comparison, there is nothing in the college athlete NIL law that provides for how the government will or should tax a player's NIL.

17. Protected against Wrongful, Governmental Taking

As previously noted, the Fifth and Fourteenth Amendments protect property owners from wrongful governmental takings.³⁴⁴ This applies to both tangible and intangible property.³⁴⁵ I have argued in a separate article that the past NIL restrictions prohibiting college athletes from monetizing their NIL was a wrongful taking that requires just compensation.³⁴⁶ By comparison, there is nothing in the college athlete NIL law that provides for the compensation for past, present, or future governmental taking of a player's NIL.

³⁴² For example, relative to cryptocurrencies, such as Bitcoin, the IRS views them as property, which trigger tax events when used as payment or cashed in. "When you realize a gain—that is, sell, exchange, or use crypto that has increased in value—you owe taxes on that gain." Joe Liebkind, *Cryptocurrency Taxes: How They Work and What Gets Taxed*, INVESTOPEDIA, <https://www.investopedia.com/tech/taxes-and-crypto/> [<https://perma.cc/BTX5-UNXK>].

³⁴³ See Hornbrook, *supra* note 329.

³⁴⁴ See Crusto, *Game of Thrones*, *supra* note 1.

³⁴⁵ See Hosick, *supra* note 33.

³⁴⁶ See Crusto, *Game of Thrones*, *supra* note 1.

18. Respected Internationally³⁴⁷

Private property law is recognized in many, although not all, countries throughout the world, which makes NIL an international asset.³⁴⁸ Both common law and civil law jurisdictions throughout the world speak the language of private property.³⁴⁹ Many NIL contracts involve international business transactions, as many corporations are based overseas and not in the United States.³⁵⁰ Further, many college athletes are international, that is, not U.S. citizens, which raises other issues of eligibility to participate in NIL deals.³⁵¹ Consequently, it is essential for NIL laws to be based on property law principles, rather than on the right of publicity. By comparison, there is nothing in the college athlete NIL law that provides for a state's NIL law to be allowable in other states or in other countries, making enforcement in other jurisdictions problematic.

* * *

Hence, when it comes to facilitating the aspirational goals of NIL law—to promote and protect college athletes' wealth creation—viewing NIL as the personal property of the athletes is the best approach. This clearly provides support for the proposition that NIL is property, which leads to the third piece of support for the proposition that NIL is property: that it promotes public policy. This third leg of support is discussed next.

³⁴⁷ See generally Alix C. Heugas, *Protecting Image Rights in the Face of Digitalization: A United States and European Analysis*, J. WORLD INTELL. PROP. (2021), <https://onlinelibrary.wiley.com/doi/full/10.1111/jwip.12194?msocid=1f662fa8658e6ce135a53fc6618e6af0> [perma.cc/TSV9-EFMY].

³⁴⁸ See Ursula Kriebaum & August Reinisch, *Property, Right to, International Protection*, MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW [MPIL], OXFORD PUBLIC INTERNATIONAL LAW, https://deicl.univie.ac.at/fileadmin/user_upload/i_deicl/VR/VR_Personal/Reinisch/Publikationen/Propertyright_int_protec.pdf [https://perma.cc/D3MG-8AM2].

³⁴⁹ *Id.*

³⁵⁰ See generally DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS: PROBLEMS, CASES, AND MATERIALS (6th ed. 2022).

³⁵¹ Madeline Myers, *How Can International Athletes Get NIL Deals? Here's How to Do It Safely*, BUS. COLL. SPORTS (Mar. 16, 2023), <https://businessofcollegesports.com/name-image-likeness/how-can-international-athletes-get-nil-deals-heres-how-to-do-it-safely/> [perma.cc/N47C-NW6C].

C. Promotes Public Policy

In this third argument, I plan to support the proposition that NIL is property by focusing on how such a legal designation promotes public policy. Next, I argue that NIL as property promotes three public policies: (1) it reinvigorates antitrust principles that prohibit the unfair monopolization of goods or services, (2) it enriches college athletes and establishes a precedent for the proposition that every person should own and benefit from their NIL, which would increase the wealth of the nation, and (3) it remedies wealth inequities particularly between younger and older Americans. Let's first put this public policy discussion into context. As previously noted, college sports are experiencing a seismic transformation following the legal responses to historical inequities related to college athletes' NIL rights. This transformation involves numerous matters directly or indirectly related to NIL. These include the "fair pay to play,"³⁵² transfer portal,³⁵³ collectives,³⁵⁴ the conference realignment,³⁵⁵

³⁵² See Mandel, *supra* note 55. This refers to the players' demand to be compensated by their college for their labor as players.

³⁵³ "Transfer portal" herein refers to a NCAA-permitted process by which a college player can seek opportunities to play for a school other than the one they are attending. This is achieved when a student enters their name into a database that is available to other programs and coaches elsewhere. See Greg Johnson, *What the NCAA Transfer Portal Is . . . and What It Isn't*, NCAA (Oct. 8, 2019), <https://www.ncaa.org/news/2023/2/8/media-center-what-the-ncaa-transfer-portal-is-and-what-it-isn-t> [perma.cc/WD25-LJAE]; On3 Staff Report, *What is the NCAA Transfer Portal? Everything You Need to Know*, ON3 (Nov. 9, 2023), <https://www.on3.com/transfer-portal/news/ncaa-transfer-portal-everything-you-need-to-know/> [perma.cc/J3TK-N5QX].

³⁵⁴ "Collectives" herein refers to groups of college supporters who pool funds from a wide range of donors to help facilitate NIL opportunities for student-athletes to monetize their brands. Pete Nakos, *What are NIL Collectives and How do they Operate?*, ON3 (July 6, 2022), <https://www.on3.com/nil/news/what-are-nil-collectives-and-how-do-they-operate/> [https://perma.cc/V39N-EN4M].

³⁵⁵ "Conference realignment" herein refers to the movement of college teams from one NCAA conference to another to obtain better TV deals. See Robert Read, *College Football Realignment: Explaining New-Look Conferences*, NEWSWEEK (Sept. 1, 2023), <https://www.newsweek.com/college-football-realignment-explaining-new-look-conferences-1824055> [perma.cc/YGZ7-63CF]; Pat Forde, *Everyone Is to Blame for Slowly Killing College Sports*, SPORTS ILLUSTRATED (Mar. 20, 2024), <https://www.si.com/college/2024/03/20/everyone-is-to-blame-for-slowly-killing-college-sports> [perma.cc/2R9X-97YR].

players as employees,³⁵⁶ unionization of players,³⁵⁷ federalization,³⁵⁸ and corruption.³⁵⁹ These matters, while vital to understanding the demands that college sports are facing today, are outside the scope of this article.

1. Reinvigorates Antitrust Principles Protecting Free Markets in Property

The first public policy argument in support of treating NIL as property is a judicial reawakening of protective, federal antitrust law principles, by holding the NCAA is not exempt from the federal antitrust laws that

³⁵⁶ “Players as employees” herein refers to the legal movement to have college athletes be categorized as employees of their colleges entitling them to the benefits attended to that designation. See Memorandum from Jennifer Abruzzo, Nat’l Lab. Rels. Bd. Gen. Couns., on Employee Status of Players at Academic Institutions (Sept. 29, 2021), <https://www.nlrb.gov/news-outreach/news-story/nlrb-general-counsel-jennifer-abruzzo-issues-memo-on-employee-status-of> [<https://perma.cc/AR88-YEAJ>]; Ben Nuckols, *NCAA Head Warns that 95% of Student Athletes Face Extinction if Colleges Actually Have to Pay Them as Employees*, FORTUNE (Feb. 24, 2024), <https://fortune.com/2024/02/24/ncaa-college-sports-employees-student-athletes-charlie-baker-interview/> [<https://perma.cc/LQ6K-5JW9>]. See also Maryclaire Dale, *US Appeals Court Says Some NCAA Athletes May Qualify as Employees under Federal Wage-and-Hour Laws*, ASSOCIATED PRESS (July 11, 2024), https://apnews.com/article/ncaa-athletes-pay-employees-lawsuit-e8471184e47a9f806e480d7317ee4ed9?utm_source=Sailthru&utm_medium=email&utm_campaign=Issue:%202024-07-15%20Higher%20Ed%20Dive%20%5Bissue:63872%5D&utm_term=Higher%20Ed%20Dive [<https://perma.cc/PZ6P-5MNR>].

³⁵⁷ “Unionization” herein refers to the movement to treat college athletes as employees of their colleges and to organize them pursuant to labor laws. Ross Dellenger, *The Next Frontier in College Sports: The Unionization of College Athletes*, SPORTS ILLUSTRATED (Sept. 29, 2021), <https://www.si.com/college/2021/09/30/nlrb-advisory-opens-next-frontier-college-sports-unionization> [<https://perma.cc/T2KY-NQMR>].

³⁵⁸ “Federalization” herein refers to the NCAA and its members-led efforts to have Congress enact federal legislation that will preempt state NIL laws. See Steve Berkowitz, *Senators Hopeful of Passing Broad College Sports Legislation Addressing NCAA Issues this Year*, USA TODAY (June 14, 2024), <https://www.usatoday.com/story/sports/college/2024/06/13/ncaa-legislation-college-sports-richard-blumenthal-cory-booker/74091381007/> [<https://perma.cc/DJ7T-UKP4>].

³⁵⁹ “Corruption” herein refers to illegal activities that influence college athletes’ decisions, such as to which college to attend. See Guy Lawson, *The Death of College Sports Will Be Fast and Furious: The Scandal That Could Kill the NCAA*, ROLLING STONE (Mar. 24, 2024), <https://www.rollingstone.com/culture/culture-commentary/ncaa-college-sports-corruption-scandal-1234993227/> [<https://perma.cc/4FDT-97UE>]; GUY LAWSON, HOT DOG MONEY: INSIDE THE BIGGEST SCANDAL IN THE HISTORY OF COLLEGE SPORTS (2024).

prohibits unreasonable restrictions on interstate commerce and competition in the marketplace. As discussed next, in a series of groundbreaking decisions, the federal courts have applied federal antitrust laws to assess whether the NCAA has unduly restricted college athletes' right to compensation, including their NIL rights. While the court decisions do not expressly refer to the players' NIL rights, the plaintiffs' claims expressly sought remedies for the unlawful restraints of players' NIL rights. Hence, this first policy argument is that the court has inferred that NIL is the property of the players and is entitled to federal antitrust considerations.

The sea change in college sports is being fueled by three groundbreaking lawsuits that have successfully challenged the NCAA's claim of a broad exemption from antitrust laws as applied to its former prohibition on players' rights to their NIL. For newcomers to the issue of NIL and college sports, one might ask: What is its relationship to antitrust law? Oddly enough, the answer is: A huge relationship. However, we must digress to provide some context before moving forward.

What are these antitrust principles that are driving the changes in college sports? To effectively explore this reawakening phenomenon would take another law review article; so, I apologize in advance to those antitrust scholars who will find this analysis somewhat superficial. Here's the rub. The Sherman Act prohibits, *inter alia*, activities that restrict interstate commerce and competition in the marketplace.³⁶⁰ The NCAA had taken the position that they were broadly exempted from the antitrust law. However, in three court rulings, *O'Bannon*,³⁶¹

³⁶⁰ Sherman Antitrust Act, 15 U.S.C. §§ 1–7, is a United States antitrust law that prescribes the rules of free competition for those engaged in interstate commerce. See LEGAL INFO. INST., *Sherman Antitrust Act*, CORNELL L. SCH. (Apr. 1, 2022), https://www.law.cornell.edu/wex/sherman_antitrust_act [<https://perma.cc/2AUL-F5YM>].

³⁶¹ *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955 (N.D. Cal. 2014), *aff'd in part, rev'd in part, vacated in part*, 802 F.3d 1049 (9th Cir. 2015). See also Thaddeus Kennedy, *NCAA and an Antitrust Exemption: The Death of College Athletes' Rights*, HARV. J. OF SPORTS & ENT. L. (Aug. 31, 2020) ("In *NCAA v. Board of Regents*, 468 U.S. 85 (1984), the Supreme Court established that even if the NCAA's amateurism rules are presumed to be competitive, they are not to be exempt from antitrust scrutiny. Justice Stevens wrote, 'While as the guardian of an important American tradition, the NCAA's motives must be accorded a respectful presumption of validity, it is nevertheless well settled that good motives will not validate an otherwise anticompetitive practice.' *Id.* at 101 n.23. Even under the assumption that NCAA regulations are beneficial to student-athletes and are helpful in preserving the model of college sports, NCAA policies cannot be automatically deemed lawful. They must be proven to serve a legitimate procompetitive purpose. This sentiment has been long upheld by federal courts.").

Alston,³⁶² and *House*,³⁶³ the courts have stripped the NCAA's broad antitrust protection relative to its amateurism rule that denied players the right to benefit from their NIL. As previously mentioned, the latest outcome is a nearly \$2.8 billion settlement in which the NCAA and its member colleges have agreed to pay past and current athletes.³⁶⁴ As previously discussed, these federal cases were accompanied by various state enactments of pro-NIL laws.³⁶⁵ Let's review these pivotal cases.

In 2014, in a landmark class-action lawsuit *O'Bannon v. NCAA*,³⁶⁶ numerous college athletes claimed that the NCAA and its colleges were reaping the profits off their names and likenesses, in violation of the Sherman Act and federal antitrust law.³⁶⁷ As previously mentioned, the NCAA argued that it enjoys a broad exemption from the antitrust laws.³⁶⁸ To the contrary, the district court ruled in part for the plaintiffs. Consequently, the NCAA agreed to allow student-athletes to receive full scholarships for academics considering the use of the students' names and likenesses.³⁶⁹ While college athletes received some benefits from the *O'Bannon* decision, courts still failed to recognize the students' property rights in their NIL or their labor rights. As a result, players continued to challenge the fairness of the NCAA's compensation and amateurism rules.

Following the *O'Bannon* decision, in 2019, several former NCAA players filed several lawsuits in federal court, which were consolidated under *NCAA v. Alston*,³⁷⁰ challenging the NCAA restrictions on educational compensation for athletes.³⁷¹ In March of 2019, a federal judge ruled that the NCAA restrictions on "non-cash education-related benefits" violated antitrust law under the Sherman Act.³⁷² The court required the NCAA to allow for certain types of academic benefits beyond the previously-established full

³⁶² See Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141 (2021).

³⁶³ See *House v. Nat'l Collegiate Athletic Ass'n*, 545 F. Supp. 3d 804 (2021).

³⁶⁴ *Id.*

³⁶⁵ See discussion *supra* Part I.

³⁶⁶ See *O'Bannon*, 7 F. Supp. 3d at 955.

³⁶⁷ *Id.* at 963.

³⁶⁸ See *id.*

³⁶⁹ See Hosick, *supra* note 33; Michael McCann, *Why the NCAA Lost its Latest Landmark Case in the Battle Over What Schools Can Offer Athletes*, SPORTS ILLUSTRATED (Mar. 8, 2019), <https://www.si.com/college/2019/03/09/ncaa-antitrust-lawsuit-claudia-wilken-alston-jenkins> [https://perma.cc/5FJH-RDKA].

³⁷⁰ See *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-In-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058, 1065 (N.D. Cal. 2019).

³⁷¹ *Id.* at 1062.

³⁷² *Id.* at 1110.

scholarships from *O'Bannon*, such as for “computers, science equipment, musical instruments, and other tangible items not included in the cost of attendance calculation but nonetheless related to the pursuit of academic studies.”³⁷³ Moreover, the district court in *Alston* barred the NCAA from preventing athletes from receiving “post-eligibility scholarships to complete undergraduate or graduate degrees at any school; scholarships to attend vocational school; tutoring; expenses related to studying abroad that are not included in the cost of attendance calculation; and paid post-eligibility internships.”³⁷⁴ However, the court held that the conferences within the NCAA may still limit cash or cash-equivalent awards for academic purposes.³⁷⁵ The court based the decision on the large compensation discrepancy amongst the NCAA and the students.³⁷⁶ The NCAA appealed to the U.S. Ninth Circuit.³⁷⁷

As previously discussed, in response to pending litigation and public opinion in favor of players having control over their NIL,³⁷⁸ California passed the Fair Pay to Play Act (S.B. 206), which permits athletes to capitalize on their NIL for sponsorships and endorsements, free from the NCAA rules.³⁷⁹ The new law also prohibits universities from implementing rules that prohibit

³⁷³ *Id.* at 1088.

³⁷⁴ *Id.*

³⁷⁵ *Id.*

³⁷⁶ *Id.* at 1089.

³⁷⁷ *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955 (N.D. Cal. 2014), *aff'd in part, rev'd in part, vacated in part*, 802 F.3d 1049 (9th Cir. 2015).

³⁷⁸ Michael T. Nietzel, *Americans Now Overwhelmingly Support College Athletes Earning Endorsement and Sponsorship Money*, FORBES (Feb. 11, 2020), <https://www.forbes.com/sites/michaelt Nietzel/2020/02/11/americans-now-overwhelmingly-support-college-athletes-earning-endorsement-and-sponsorship-money/> [<https://perma.cc/E3SW-YUUY>].

³⁷⁹ S.B. 206, 2019 Cal. Legis. Serv. Ch. 383 (“[Under S.B. 206] an athletic association, conference, or other group or organization with authority over intercollegiate athletics, including, but not limited to, the National Collegiate Athletic Association, shall not prevent a student of a postsecondary educational institution participating in intercollegiate athletics from earning compensation as a result of the use of the student’s name, image, or likeness.”); *see also Governor Newsom Signs SB 206, Taking on Long-Standing Power Imbalance in College Sports*, OFF. OF GOVERNOR GAVIN NEWSOM (Sept. 30, 2019), <https://www.gov.ca.gov/2019/09/30/governor-newsom-signs-sb-206-taking-on-long-standing-power-imbalance-in-college-sports/> [<https://perma.cc/P7R3-SFCX>]; Gregg E. Clifton & Nicholas A. Plinio, *New Jersey Grants Name, Image, Likeness Rights to Collegiate Student Athletes*, JACKSONLEWIS (Sept. 15, 2020), <https://www.collegeandprosportslaw.com/uncategorized/new-jersey-grants-name-image-likeness-rights-to-collegiate-student-athletes/> [<https://perma.cc/C39G-YVAP>].

student-athletes from earning compensation or denying scholarships to athletes who choose to market their NIL.³⁸⁰ S.B. 206 does not require universities to pay student-athletes themselves; as a result, the net cost to the NCAA and its collegiate members would be zero, since all compensation is paid for by third-party endorsers.³⁸¹ The law seems to be based on an equal protection argument that, relative to benefiting from their NIL, NCAA schools cannot treat athletes differently from other college students.³⁸² For example, a film major who doesn't play a varsity sport is permitted to generate income making YouTube videos, but a film major who is also an intercollegiate athlete may not.³⁸³

Returning to *Alston*, in May of 2020, the Ninth Circuit upheld the district court's decisions.³⁸⁴ It noted that the NCAA had a necessary interest in "preserving amateurism and thus improving consumer choice by maintaining a distinction between college and professional sports."³⁸⁵ Notwithstanding, the Ninth Circuit agreed with the district court's finding that the NCAA practices relative to some specific restrictions violated antitrust law.³⁸⁶ Judge Smith penned a concurrence and noted that the NCAA's treatment of its players is "not the result of free market competition. To the contrary, it is the result of a cartel of buyers acting in concert to artificially depress the price that sellers could otherwise receive for their services. Our antitrust laws were originally meant to prohibit exactly this sort of distortion."³⁸⁷ Subsequently, the NCAA started a review of its policies related to players' compensation for NIL,³⁸⁸ while it appealed the case to the U.S. Supreme Court.

On March 31, 2021, the Supreme Court heard arguments in *NCAA v. Alston*.³⁸⁹ The centerpiece of this case was the antitrust protection under

³⁸⁰ See S.B. 206, *supra* note 379.

³⁸¹ *Id.*

³⁸² See Billy Witz, *A State Skirmish Over N.C.A.A. Amateurism Rules Has Quickly Become a National Battle*, N.Y. TIMES (Dec. 28, 2020), <https://www.nytimes.com/2020/12/28/sports/ncaa-amateurism-rules.html> [<https://perma.cc/PP74-83TF>].

³⁸³ *Id.*

³⁸⁴ *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-In-Aid Cap Antitrust Litig.*, 958 F.3d 1239, 1244 (9th Cir. 2020).

³⁸⁵ See *NCAA v. Alston*, 141 S. Ct. 2141 (2021).

³⁸⁶ *Id.*

³⁸⁷ *Id.* at 1267 (Smith, J., concurring).

³⁸⁸ See Hosick, *supra* note 33.

³⁸⁹ See *Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141 (2021).

NCAA v. Board of Regents,³⁹⁰ as it relates to the NCAA's eligibility standards and compensation.³⁹¹ In *Alston*, the plaintiffs claimed the NCAA's rules violate the Sherman Act, which prohibits contracts, combinations, or conspiracies "in restraint of trade or commerce."³⁹² The Court noted that courts have interpreted the Sherman Act's prohibition on restraints of trade to prohibit only restraints that are "undue."³⁹³ The Court further noted that courts assess whether a restraint is undue using the "rule of reason" standard,³⁹⁴ which requires a fact-finding of market power and structure to decide what a restraint's actual effect is on competition.³⁹⁵ In response to the plaintiff's antitrust allegations, the NCAA argued that its business should enjoy a special exception that excludes it from antitrust law or at least be given special leeway under antitrust law.³⁹⁶ On this issue, the Court sided with the college athlete plaintiffs, stating that college sports is a trade and, therefore, cannot unduly restrain athletes from the marketplace.³⁹⁷

However, the Court relented in its attack of the NCAA. On the one hand, it affirmed the district court's findings of undue restraints in certain NCAA rules limiting the education-related benefits schools otherwise could make available to student-athletes, including paid internships, post-graduate scholarships, tutoring, or education abroad.³⁹⁸ But, on the other hand, the Court failed to rule on certain other NCAA rules limiting players'

³⁹⁰ *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85 101, 119–20 (1984) (invalidating NCAA's restrictive television licensing scheme under rule of reason standard but noting that college sports is "an industry in which horizontal restraints on competition are essential if the product is to be available at all").

³⁹¹ See generally Robert Barnes & Rick Maese, *Supreme Court Will Hear NCAA Dispute Over Compensation for Student-Athletes*, WASH. POST (Dec. 16, 2020), https://www.washingtonpost.com/politics/courts_law/supreme-court-ncaa/2020/12/16/90f20dbc-3fa9-11eb-8db8-395dedaaa036_story.html [<https://perma.cc/D9BC-AJH7>] (reporting that the NCAA oversees rules related to student athletes that play in their athletics programs, which, inter alia, limit the type of compensation that the school could give to student athletes as to distinguish college athletics from professional sports, disallowing "non-cash education-related benefits" such as scholarships and internships so that there is no apparent "pay to play" aspects).

³⁹² *Alston*, 414 S. Ct at 2151 (quoting 15 U.S.C. § 1).

³⁹³ *Id.* (quoting *Ohio v. Am. Express Co.*, 585 U.S. 529, 539 (2018)).

³⁹⁴ *Id.* (quoting *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006)).

³⁹⁵ *Id.* (quoting *Ohio v. Am. Express Co.*, 585 U.S. 529, 541 (2018)).

³⁹⁶ *Id.* at 2159.

³⁹⁷ *Id.*

³⁹⁸ *Id.* at 2164.

education-related benefits.³⁹⁹ Moreover, the Court expressly stated that it is *not* an undue restraint for the NCAA, or conferences within it, to define what those educational benefits are,⁴⁰⁰ leaving the restrictions on amateur status partially undisturbed. Hence, Justice Gorsuch, writing for a unanimous Court, affirmed the lower court's injunction against the NCAA's restrictions on players' compensation.⁴⁰¹ However, the Court explicitly stated that since the student athletes did not renew their "across-the board challenge to the NCAA's compensation restrictions,"⁴⁰² the Court's review was limited to "those restrictions now enjoined."⁴⁰³

The most significant take away from the *Alston* case is that the Court advised the NCAA that it could *not* use the federal antitrust laws as a justification for its rules regulating players' compensation.⁴⁰⁴ In a concurring opinion, Justice Kavanaugh was more direct in attacking the NCAA's undue control over its players' rights, emphasizing that "the NCAA's current compensation regime raises serious questions under the antitrust laws."⁴⁰⁵ While the *Alston* decision is regarded as a landmark decision that supports the right for student-athletes to profit from their NIL, the Court's *Alston* decision did *not* expressly answer the question of whether college athletes are legally entitled to their NIL, and, if so, its legal basis. Rather, the Court appeared to guide the NCAA's behavior letting them know that its prohibition of players' NIL would be difficult to defend against in the courts.

Continuing to test the boundaries of the NCAA's restrictions on its players' NIL rights, in 2020, in *House v. NCAA*,⁴⁰⁶ some NCAA athletes filed a lawsuit against the NCAA.⁴⁰⁷ They were seeking \$1.4 billion in damages representing the NIL revenue they could have earned if it had been allowed during their enrollment.⁴⁰⁸ In 2021, U.S. District Judge Claudia Wilken ruled that potentially thousands of NCAA athletes could be grouped into a class that may potentially have been harmed.⁴⁰⁹ Under antitrust law, damages

³⁹⁹ *Id.* at 2147.

⁴⁰⁰ *Id.* at 2165.

⁴⁰¹ *Id.* at 2151.

⁴⁰² *Id.* at 2151.

⁴⁰³ *Id.* at 2154, 2162–63 (holding that the district court's injunction did not invite future courts to "micromanage" the NCAA, but rather constituted a permissible antitrust remedy).

⁴⁰⁴ *Id.* at 2165.

⁴⁰⁵ *Id.* at 2168 (Kavanaugh, J., concurring).

⁴⁰⁶ See *House v. Nat'l Collegiate Athletic Ass'n*, 545 F. Supp. 3d 804 (2021).

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.*

would be tripled if the NCAA lost, resulting in a \$4.2 billion dollar exposure.⁴¹⁰ As in the other two cases, the plaintiffs' claimed that the NCAA rules have constituted and continue to constitute an undue restraint on their ability to monetize their NIL.⁴¹¹

As is sometimes the case, a Supreme Court decision's impact goes beyond the specific holding of the case.⁴¹² This is true about the Supreme Court's decision in *Alston*. Alexander Hamilton once stated that the Supreme Court is the "weakest" branch of government.⁴¹³ As detailed above, the Court has the power to change industries through judicial review. Relative to NIL, federal courts—particularly the Supreme Court—have reinvigorated federal antitrust law to facilitate college athletes to enjoy a legal right to monetize their NIL. The Court in the *O'Bannon* case ruled in favor of the plaintiff-athletes and found that the NCAA had violated antitrust law in its restraints on athletes' participation in the NIL market. Most importantly, the Supreme Court in *Alston* rejected the NCAA's claim of broad exemption from the federal antitrust laws. Consequently, the federal court in *Brown* approved a settlement against the NCAA for damages to the players resulting from alleged antitrust violations. However, the federal court decisions failed to provide direction as to the jurisprudential basis for players' NIL rights, whether based on tort law or on property law.

My read of these decisions supports the proposition that NIL is property. In assessing the antitrust aspect of NCAA regulations of college athletes, it appears the courts were treating the players' NIL as a property or a product that should be allowed to benefit from free market forces unrestrained by the NCAA's prohibition of the players' right, and against the substantial monopolistic largess of the NCAA and its member colleges. In each of the three cases cited, the plaintiffs sought to redress the NCAA's unreasonable restraints on players', both past and present, compensation. In particular, they pointed out how the NCAA's amateurism rules effectively monopolized the players' property interest in their NIL. They argued that such anticompetitive behavior violated the federal antitrust laws. As the Sherman Act protects interstate commerce of goods and services, it would apply to NIL as *property* goods. Specifically, one might ask how the NCAA's amateurism rules restrict the marketability of players' NIL. Perhaps, it is obvious. By prohibiting its

⁴¹⁰ *Id.*

⁴¹¹ *Id.*

⁴¹² See generally *Supreme Court—Leading Cases: NCAA v. Alston*, 135 HARV. L. REV. 471 (Nov. 10, 2021) (analyzing the antitrust aspects of the majority decision).

⁴¹³ See THE FEDERALIST NO. 78 (Alexander Hamilton).

players from monetizing their NIL, the NCAA and its member schools have been and would be the sole source of access to the players' NIL. The NCAA's control over the labor pool of college athletes' compensation is a perfect example of a monopsony, which is a market condition in which there is only one buyer, the monopsonist.⁴¹⁴ As a result, the players are forced to play for what little they are granted in the form of scholarships. By comparison, one wonders whether the Sherman Act has or would apply to a cause of action in the form of a right of publicity. Hence, by agreeing that such anti-competitive behavior is subject to judicial scrutiny, the federal court effectively recognized the players' property rights to their NIL.

That takes us back to the argument in support of this article's statutory solution. That is these three groundbreaking decisions have resurrected somewhat dormant antitrust law to take down a major economic and political force in American life, the NCAA.⁴¹⁵ Such a reinvigorated antitrust principles support the proposition that NIL is property that qualifies for antitrust protection. Federal protection of college athletes' NIL rights to access national markets takes us to the next public policy argument in support of NIL as property: That it enhances personal and national wealth.

2. Enhances Personal and National Wealth

The following presents the second argument that viewing NIL as property is good public policy, which is because such a designation enhances personal wealth of college athletes and other people and thereby increases the wealth of the nation. NIL should be seen as one of the many types of digital or virtual assets, a new class of property, that include cryptocurrencies, non-fungible tokens (NFTs), game tokens, and governance tokens.⁴¹⁶ "Digital" or "virtual" assets are non-physical, can generate value for the owner; should be able to transfer ownership through purchase, gifting, or other means of giving the rights to someone else, along with the value the item can bring; and must be discoverable or stored somewhere that it can be found.⁴¹⁷ This relatively

⁴¹⁴ See Julie Young, *Monopsony: Definition, Causes, Objections, and Example*, INVESTOPEDIA (May 1, 2024), <https://www.investopedia.com/terms/m/monopsony.asp> [<https://perma.cc/LC73-UCS5>].

⁴¹⁵ Related to this legal issue but separate and still in litigation is whether the NCAA and its members violated the labor rights of its players.

⁴¹⁶ See *supra* Part III.B; *supra* note 268.

⁴¹⁷ *Id.* (Noting that examples of virtual assets include photos, documents, videos, books, audio and music, animations, illustrations, manuscripts, emails and email accounts, logos, metadata, content, social media accounts, gaming accounts,

new asset class has experienced exponential growth: “In November 2021, non-state issued digital assets reached a combined market capitalization of \$3 trillion, up from approximately \$14 billion in early November 2016.”⁴¹⁸

As a new form of property, college athletes’ NIL is a great potential and real source of wealth. As previously noted, one study shows that NCAA college football stars could earn as much as \$2.4 million per year if they were paid equitably for the financial benefits that they bring to the NCAA and its member colleges.⁴¹⁹ The top fifteen NIL college athletes’ deals range from \$6.2 million for Bronny James, followed by Livvy Dunne at \$3.3 million at the higher end to Quinn Ewers, Hansel Enmanuel, and Bryce James each tied at \$1.2 million.⁴²⁰ NIL deals are predicted to gross revenue of over \$1 billion per year.⁴²¹ With the development of modern technology, including the expansion of the virtual or metaverse,⁴²² property interests in attributes of college athletes’ NIL will likely continue to increase in value.⁴²³ For example,

nonfungible tokens, cryptocurrency, tokens, crypto assets, tokenized assets, security tokens, and central bank digital currencies).

⁴¹⁸ Exec. Order No. 14067, *supra* note 274.

⁴¹⁹ See ProCon.org, *supra* note 22.

⁴²⁰ Ross Kelly, *Top 15 Student Athletes Who Make the Most NIL Money*, STADIUM TALK (Apr. 24, 2024), <https://www.stadiumtalk.com/s/student-athletes-nil-money-lbbab05a452c410d> [<https://perma.cc/74KJ-E79F>].

⁴²¹ Kori Hale, *How NIL Diversity Is Driving The Market Up To \$1.1 Billion*, FORBES (Mar. 10, 2023), <https://www.forbes.com/sites/korihale/2023/03/10/how-nil-diversity-is-driving-the-market-up-to-11-billion/> [<https://perma.cc/784N-H6NZ>] (explaining that the top 100 college athletes are estimated to earn about \$1 billion per year in NIL revenue).

⁴²² “Metaverse,” herein, refers to the virtual environment of the internet and anything associated with the Internet and the diverse Internet culture. See generally DAVID BELL ET AL., CYBERCULTURE: THE KEY CONCEPTS 41–43 (2004).

⁴²³ A person’s property interest in themselves is not limited to name, image, and likeness, but includes less visible attributes of an individual, such as their DNA, which, with medical technology such as gene splicing and stem cell development, raises legal issues over the ownership rights of a voluntary or involuntary donor. For example, the “HeLa cell line” is among the most important scientific discoveries of the last century and was established in 1951 from a tumor taken from Henrietta Lacks. See REBECCA SKLOOT, THE IMMORTAL LIFE OF HENRIETTA LACKS 51–52 (2010); see also *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479, 480 (1990) (holding that Moore had no property rights to his discarded cells or to any profits made from them; however, that the research physician had an obligation to reveal his financial interest in the materials that were harvested from Moore, who could thus bring a claim for any injury that he sustained by the physician’s failure to disclose his interests).

consider the financial value of an avatar in a fantasy football league.⁴²⁴ Despite its financial worth as a virtual asset, NIL rights⁴²⁵ have yet to be explored or truly valued or properly treated as property. Further, college athletes' NIL is on the forefront of a likely explosion in society's legal recognition of the value of the NIL of every person.⁴²⁶ Hence, viewing NIL as property will enhance the personal wealth of college athletes, and every person, thereby greatly increasing the wealth of the nation. The newfound NIL wealth will enhance the personal wealth of the players, notwithstanding the tax burden as discussed previously. The NIL wealth increases the wealth of the nation directly in the form of increased taxes, as well as in the form of increased commerce that results from NIL endorsed products and services. That leads to the third argument in favor of viewing NIL as property: That it redresses wealth inequity.

3. Remedies Wealth Inequality

Third, viewing NIL as property addresses wealth inequity between the young and the old in this country.⁴²⁷ Relative to such inequity, NIL is especially valuable to younger Americans, both college athletes and non-college athletes. This inequity results from a conscious and unconscious transfer of

⁴²⁴ The nature of property interests in one's persona are still being developed. There is much at stake as technology continues to monetize the "virtual" essence of a person. See Mekouar, *supra* note 78 (reporting that, in 2019, the fantasy sports industry was worth over \$7 billion).

⁴²⁵ These unexplored attributes of persona have legal aspects that have been widely undeveloped by our legal system. See, e.g., *Shaw Fam. Archives Ltd. v. CMG Worldwide, Inc.*, 486 F. Supp. 2d 309, 314 (S.D.N.Y. 2007) (holding that neither New York nor California has a right of publicity applicable to a decedent); Decker, *supra* note 41, at 252 n. 69, 253–54 n.77 (2009) (noting that many states now have common law and/or statutory rights of publicity that apply postmortem).

⁴²⁶ See Crusto, *Right of Self*, *supra* note 1.

⁴²⁷ See Matthew Yglesias, *New Federal Reserve Data Shows How the Rich Have Gotten Richer*, Vox (June 13, 2019), <https://www.vox.com/policy-and-politics/2019/6/13/18661837/inequality-wealth-federal-reserve-distributional-financial-accounts> [<https://perma.cc/FY39-PMU5>] ("[T]he rich have gotten richer and inequality has grown[.]") In fact, the Federal Reserve data indicates that from 1989 to 2019, wealth became increasingly concentrated in the top 1% and top 10% and that the gap between the wealth of the top 10% and that of the middle class is over 1,000%; and increases another 1,000% as compared to the top 1%, hence the term "wealth gap.").

wealth from young people,⁴²⁸ of both their nonvirtual and virtual selves,⁴²⁹ to upper-class, white adults.⁴³⁰ I refer to this wealth transferal phenomenon as “intergenerational wealth displacement.”⁴³¹ One example of a nonvirtual, inequitable transfer of wealth is the high debt load that many students pay for college, graduate, and professional schools and its subsequent negative impact on their quality of life.⁴³² As such, rights to one’s NIL are of particular

⁴²⁸ See Christopher Ingraham, *The Staggering Millennial Wealth Deficit, in One Chart*, WASH. POST (Dec. 3, 2019), <https://www.washingtonpost.com/business/2019/12/03/precariousness-modern-young-adulthood-one-chart/> [<https://perma.cc/ZRF4-WVVP>] (“[Millennials’] financial situation is relatively dire. They own just 3.2 percent of the nation’s wealth. To catch up to Gen Xers, they’d need to triple their wealth in just four years. To reach boomers, their net worth would need a sevenfold jump.”).

⁴²⁹ This “exploitation” includes the lawful and unlawful commercial use of virtual or digital images, data, and information, referred to as “personally identifiable information,” usually by big business or government. See Handbook on European Data Protection Law, E.U. AGENCY FOR FUNDAMENTAL RTS., 29–31 (2018), https://fra.europa.eu/sites/default/files/frauploads/fra-coe-edps-2018-handbook-data-protection_en.pdf [<https://perma.cc/S4AF-SAF7>] (protecting data rights among EU Member States for individuals, strengthening mandated data protection requirements, and imposing significant legal responsibilities on entities handling personal data). No similar protections exist in U.S. law, except for the State of California’s California Consumer Privacy Act (CCPA). See Office of the Attorney General, *California Consumer Privacy Act (CCPA) Fact Sheet*, CAL. DEP’T OF JUST. (2019), https://www.oag.ca.gov/system/files/attachments/press_releases/CCPA%20Fact%20Sheet%20%2800000002%29.pdf [<https://perma.cc/GLK6-BWWJ>].

⁴³⁰ Parenthetically, this article will also shine light on the unconscious cause of systemic racism. That focus is explored in *Blackness as State Property*. Crusto, *supra* note 1. “Systemic racism,” or “institutional racism,” for purposes of this Article, refers to the conscious and unconscious institutionalization of and the continuation of the oppression of Black people. See STOKELY CARMICHAEL & CHARLES V. HAMILTON, *BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA* 4 (1992 ed. 1967) (“[Institutional racism] originates in the operation of established and respected forces in the society, and thus receives far less public condemnation than [individual racism].”).

⁴³¹ “Intergenerational wealth displacement” herein is defined as legal and illegal, conscious and unconscious, transfer of wealth from younger Americans, particularly those from disadvantaged communities, to adults, particularly wealthy, senior, white males, as one dynamic that resulted in an aged-related wealth gap. Households headed by people aged sixty-five or older are forty-seven times wealthier than households where the median age is thirty-five years or younger. See Annalyn Censky, *Older Americans Are 47 Times Richer than Young*, CNN MONEY (Nov. 28, 2011), https://money.cnn.com/2011/11/07/news/economy/wealth_gap_age/index.htm [<https://perma.cc/F6YR-L577>].

⁴³² *Id.* (“Some of those trends come hand in hand with more young people attending college, which can be a double-edged sword. While those college credentials

interest to millennials, Generation Z, and Generation Alpha who are currently living off the fruits of their persona, due to the proliferation of social media. For example, a nineteen-year-old influencer Josh Richards made nearly a thousand dollars a minute as a TikTok star.⁴³³ As social influencers and brand ambassadors, NIL as property provides college athletes and other young people the opportunity to earn well-needed wealth. Consequently, the NCAA athletes' controversy should be public concern because it further highlights the need to address wealth inequity, particularly at the intersection of age, race, gender, and class.⁴³⁴

Hence, I believe that there is a void in the development of civil liberties that will redress wealth inequities. This requires a transformational development in our understanding of our rights. Such a development could promote the growth of new markets for virtual assets such as NIL generated through the often-virtual world of the metaverse.⁴³⁵

Therefore, for the three reasons presents, NIL is foundational, NIL is facilitated by property law principles and public policy, and NIL should be viewed as property. This leads to a brief discussion of critiques against the NAPA legislation which would view NIL as the property of college athletes, which will be discussed next.

could lead to income gains for many young people down the road, surging tuition costs are also leaving them burdened by more student loans than prior generations.”).

⁴³³ See Jade Scipioni, *Here's How Many Social Media Followers You Need to Make \$100,000*, CNBC (Apr. 30, 2021), <https://www.cnbc.com/2021/04/30/how-much-money-you-can-make-off-social-media-following-calculator.html> [https://perma.cc/CT9J-KHNK]; Raktim Sharma, *How Do Influencers Make Money on Instagram?*, YAHOO! FIN. (Mar. 31, 2021), <https://ca.sports.yahoo.com/news/how-do-influencers-make-money-through-instagram-083707019.html> [https://perma.cc/T6J7-52NQ] (discussing how influencers use their NIL as branding to influence marketing, promotional, and affiliate deals).

⁴³⁴ See, e.g., Vanessa Williamson, *Closing the Racial Wealth Gap Requires Heavy, Progressive Taxation of Wealth*, BROOKINGS (Dec. 9, 2020), <https://www.brookings.edu/research/closing-the-racial-wealth-gap-requires-heavy-progressive-taxation-of-wealth/> [https://perma.cc/UR4D-HDCC] (“The median white household has a net worth [ten] times that of the median Black household The total racial wealth gap, therefore, is \$10.14 trillion.”).

⁴³⁵ See Timir Chheda, *Intellectual Property Implications in a Virtual Reality Environment*, 4 J. MARSHALL REV. OF INTEL. PROP. L. 483, 483, 507 (2005) (predicting a future that we now live in and calling on lawmakers to adjust the laws with the changes in technology).

D. Response to Critics

Notwithstanding these strong arguments supporting the conception of NIL as property, I recognize there are critics of this perspective. Those critiques include (1) that NIL as property would open the floodgates of litigation and (2) that NIL as property would create a slippery slope with negative consequences, particularly the death of college sports. Next, I present two such critiques and briefly respond to each of them. I will show that those critiques are insufficient to overcome the benefits of viewing NIL as property.

1. Opens the Floodgates

Critics might argue that if NIL were property, it would open the floodgates to litigation against the NCAA and its member colleges. These critics have a valid point. The Supreme Court's decision in *Alston* has encouraged, rather than discouraged, more litigation against the NCAA and the apparent inequities in the application of some of its rules.⁴³⁶ Having lost many battles in the federal courts, the NCAA has turned to Congress to seek control over the Association's players and to preempt state NIL laws.⁴³⁷

To these critics, I say that while NIL has not expressly been classified as property, it is *de facto* property. That is, each day, in commerce, we treat NIL as property. Clearly, college athletes are contracting NIL deals which are meant to function as the property of the athletes. Furthermore, NIL deals are not limited to college athletes. They are utilized by entertainers, social influencers, musicians, and professional athletes to name some of the most notable NIL dealers. Anyone of any stature in society can negotiate an NIL deal. When we do, we enjoy the benefits and are obligated to the burdens of

⁴³⁶ See *supra* Part I.

⁴³⁷ See, e.g., Manu Raju, Clare Foran, & Morgan Rimmer, *NCAA Leaders Warn College Sports at Risk of 'Permanent Damage' without Action from Congress*, CNN POLITICS (Dec. 3, 2023), <https://www.cnn.com/2023/12/03/politics/ncaa-college-sports-at-risk-nil/index.html> [<https://perma.cc/2TJM-AK37>]; Alex Anderson, *The Contest for Collegiate NIL Rights: How the Protect the Ball Act May Insulate the NCAA*, JD SUPRA (July 15, 2024), <https://www.jdsupra.com/legalnews/the-contest-for-collegiate-nil-rights-9671614/> [<https://perma.cc/8QNL-Q9FZ>] (“Two-dozen federal bills concerning NIL and athletics governance have been introduced in recent years. Only one has made it out of committee—the Protecting Student Athletes’ Economic Freedom Act. That bill would preclude student-athletes from being designated as employees. Even if the Act was passed by the House of Representatives, at this time, it lacks the necessary bipartisan support to clear the Senate and be signed into law.”).

NIL being treated as property. Consequently, I would respond to the critics that as a matter of Equal Protection, college athletes should be entitled to enjoy the benefits of NIL as property as well as the legal protections afforded thereof. Hence, the fact that lawsuits are being filed to recognize and ensure the rights of college athletes is a poor excuse to negate those rights.

2. Slippery Slope

Somewhat related to the above-discussed floodgates critique, some critics might argue that treating NIL as property would create a slippery slope with negative consequences, particularly the death of college sports.⁴³⁸ In response, I argue that some of these critics are being disingenuous here. I believe that they are not against the concept of NIL as property, rather, they are against who owns and controls the players' NIL. I believe that they would like to put the NIL genie back into the bottle which was owned and controlled by the NCAA, to the detriment of the players. Their view of a slippery slope is, in fact, a revolution on players' rights which I believe will enhance and grow college sports both financially and in popularity as the public's confidence in the fairness of those sports are restored.⁴³⁹

* * *

Part III supports the normative claim that we should enact the NAPA to facilitate and accelerate the monetization of college athletes' names, images, and likenesses. It posits that such a legislative initiative should apply universally and particularly in states that have enacted NIL protections promotive of the NIL rights of college athletes. Further, such an initiative should be retroactive. Hence, for the reasons discussed above, I conclude that classifying NIL as property is highly justified by the unique features of property law that serve to achieve the legal and economic goals of NIL law. Relative to the NIL rights of college athletes, I believe that viewing college athletes' NIL rights as

⁴³⁸ *See id.*

⁴³⁹ *See* Jay Bilas, *Why NIL Has Been Good for College Sports . . . and the Hurdles that Remain*, ESPN (June 29, 2022), https://www.espn.com/college-sports/story/_/id/34161311/why-nil-good-college-sports-hurdles-remain [<https://perma.cc/VXP3-PW8A>] (listing several "positives" that have resulted from NIL laws, including (1) "[a] wide swath of athletes are making money; (2) [w]omen's college athletes are benefiting; (3) [q]uestions about sources of money to athletes have mostly ended; (4) [m]ore athletes seem to be opting to stay in school; (5) [t]alent might be more spread out—not concentrated; and (5) NIL helps athletes with financial literacy.").

property provides the best means of protecting players from being unfairly exploited and enhancing their ability to acquire wealth. This is especially fair if one considers that despite pending litigation, college athletes are still not compensated for their play.⁴⁴⁰

CONCLUSION

When it comes to providing college athletes a right to monetize the use of their names, images, and likenesses, the current law is conflicted. On the one hand, many states and the NCAA have recognized the players' equal rights to legal protection from unauthorized use of their NIL. On the other hand, the current pro-NIL laws restrict the true benefits that should be available to college athletes by grounding those laws on a right of publicity which fails to achieve many of the attractive features of property law. This conundrum raises a quintessential jurisprudential flaw in our legal system: The right of publicity is tort law which by its nature has limited assignability and marketability. Whereas property law, by comparison, would provide NIL law proven benefits including assignability, licensing, alienation, divisibility, and heritability.

Consequently, this Article posits that classifying NIL as property is the best legal classification to achieve two important societal and economic goals: (1) NIL as property facilitates the monetization of NIL and enriches college athletes, and (2) NIL as property provides an established legal regime to protect NIL from exploitation. Adopting a property-law approach to NIL law would facilitate a true paradigm shift in the rights of college athletes, as well as that of non-college athletes including the everyday person who would also benefit from a pro-property view of NIL law.

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⁴⁴⁰ See Sports Illustrated Editorial, *College Athletes Still Aren't Being Paid Salaries*, SPORTS ILLUSTRATED (Dec. 20, 2022), <https://www.si.com/college/2022/12/20/stories-of-the-year-college-athletes-pay> [<https://perma.cc/2JPF-VQCA>].

APPENDIX: THE “NAME, IMAGE, AND LIKENESS AS PROPERTY”
ACT (“NAPA”)⁴⁴¹

As noted in Part II of this Article, the following is the proposed model Act that the government, courts, and policymakers should adopt to provide, promote, and protect the rights of intercollegiate college athletes to monetize their names, images, and likenesses by treating NIL as the personal property of the athletes.

A. Preamble

College athletes own, possess, enjoy, and control an inherent private property right in attributes of their “self”⁴⁴² which is referred to herein as “persona.”⁴⁴³ One aspect of persona is a person’s name, image, and likeness (NIL). NIL should be tradable by the person of whom the NIL exists. The goal of NIL law should be to maximize the wealth of its owner, facilitate that person to monetize its value, and protect against unauthorized use or intrusion. As such, NIL should enjoy all the attributes and features of private property. These features include (1) ownership/title; (2) possession; (3) alienable/transferable, by sale, license, contract, or gift; (4) assignable/

⁴⁴¹ This draft model statute benefits from the State of Illinois’s NIL statute which assigns many property attributes to the right of publicity. *See* 765 ILCS 1075 (West 2024), <https://law.justia.com/codes/illinois/chapter-765/act-765-ilcs-1075/> [<https://perma.cc/8GPC-SLU2>]. *See also* Ark. Code Ann. § 4-75-1104 (West 2024), <https://casetext.com/statute/arkansas-code-of-1987/title-4-business-and-commercial-law/subtitle-6-business-practices/chapter-75-unfair-practices/subchapter-11-frank-broyles-publicity-rights-protection-act-of-2016/section-4-75-1104-property-right-in-use-of-name-voice-signature-photograph-or-likeness-prior-consent> [<https://perma.cc/AX87-SPRN>] (“An individual has a property right in the commercial use by any medium in any manner without the individual’s prior consent of: (1) The individual’s name, voice, signature, photograph, or likeness; and (2) Any combination of the individual’s name, voice, signature, photograph, or likeness[.] (b) The property right provided under subsection (a) of this section: (1) Is freely transferable, assignable, licensable, and descendible, in whole or in part, by contract or by a trust, testamentary disposition, or other instrument executed before or after August 22, 2016[.]”). This statute was brought to my attention by W. Taylor Farr, Attorney Advisor for the Clerk’s Office of the United State Court of Appeals for the Eighth Circuit and Adjunct Professor at the University of Arkansas School of Law. Thank you for your contribution.

⁴⁴² *See* Crusto, *Right of Self*, *supra* note 1.

⁴⁴³ *Id.*

lease/license; (5) divisible/subdivide; (6) heritable/descendible, by inheritance or will; (7) concurrently-owned; (8) collateral for loans; (9) exclusivity; (10) time-honored, clear, and certain rules; (11) divisible into present and future interests; (12) protected by legal and equitable remedies, (13) can be held in trust; (14) income-generating; (15) insurable; (16) taxable; (17) protected against wrongful, governmental taking, and (18) respected-internationally.⁴⁴⁴

The “Name, Image, and Likeness” Act (“NAPA”) is the proposed code that would guide government and policymakers to recognize NIL as the personal property of college athletes, with all the features or attributes of natural property. Additionally, NAPA provides all the legal and equitable remedies for the wrongful exploitation of NIL rights. This Act recognizes that the right to private property is one of the cornerstones of our democracy. It is a fundamental belief of the Founders and is embodied in both the Declaration of Independence and the Bill of Rights. Additionally, this Act recognizes that the *natural* rights theory of property, as embodied in the Declaration of Independence and the U.S. Constitution, embraces the fundamental principle that we are all endowed with certain natural or God-given rights that are inalienable. Despite its abuse in the ownership of people of African descent, the fundamental right of private property was reiterated and expanded in the Reconstruction Amendments. In accordance with the Ninth Amendment to the U.S. Constitution, all rights not expressly superseded by the federal or state governments are reserved to the people. Furthermore, in the Fifth Amendment, the Founders indirectly recognized the importance of private property when they expressly prohibited its taking from the federal government (later applied to state governments via the Fourteenth Amendment) by limiting takings to limited public purpose and only with just compensation.

Tangentially, this Act seeks to protect college athletes, particularly those especially vulnerable such as African-Americans from disadvantaged communities, protect from exploitation of NIL by granting property-based legal and equitable remedies to victims of such exploitation. Those remedies shall include injunctive relief and constructive trusts, as well as compensatory and punitive damages, including private, governmental, and governmental-sponsored expropriation. Finally, this Act seeks to remedy past, present, and future expropriation of college athletes’ NIL by providing remedial solutions to the past exploitation and expropriation of the virtual aspects of self, by intentionally providing compensation and reparations for past and current exploitation, such as that of NCAA college athletes, through the establishment of a Victims’ Compensation Fund. It is expected that this Act will guide

⁴⁴⁴ See *supra* Part III.B.

society, corporations, and government to avoid needless, costly litigation. This change will deliver both justice and peace of mind for college athletes who need to protect their NIL from past, present, and future wrongful expropriation and who are entitled to maximize the value of their NIL.

B. Provisions

Whereas, college athletes' right of ownership and right to control their NIL as their personal property is fundamental and should be constitutionally protected against direct and indirect private, industry, and governmental exploitation of self;

Whereas, the federal government, via its non-profit status granted to the National Collegiate Athletic Association ("NCAA"), has taken and continues to expropriate the rights of college athletes without impunity and without just compensation;

Whereas, State governments, particularly those NCAA members, have and continue to receive huge direct and indirect revenue and other benefits from their wrongful taking of college athletes' rights;

Whereas, the NCAA's amateurism rule has diminished the value of attributes of college athletes, by monopolizing its development in an anti-competitive environment;

Whereas, recently, the U.S. Supreme Court in a unanimous decision, signaled to the NCAA that the growing view that its amateurism rules are unfair and needs to be remedied;

Whereas, several States have passed legislation seeking to protect college athletes' NIL rights;

Whereas, those pro-NIL State laws are grounded on the right of publicity and equal protection, which are inadequate to achieve the proper goals of NIL;

Whereas, the proper goals of NIL are to maximize the wealth of college athletes and to protect them from exploitation;

Whereas, while NIL rights represent millions of dollars in potential compensation to a selective few, high profile NCAA college athletes, the NCAA and its members will continue to keep and continue to generate billions of dollars from the labor of its athletes;

Whereas, the current discussion about easing the restrictions on NCAA college athletes' NIL fails to ensure the property rights of those athletes, as they represent privileges under the control of the NCAA;

Whereas, the legal analysis of the NCAA's amateurism rules focuses on questions of antitrust rules, athlete compensation, and equal treatment compared to non-athlete college students. While these legal lenses are important, they fail to provide college athletes, many of whom are racial minorities from

underprivileged communities, ownership of property rights and any meaningful remedies for their mistreatment and inferior status;

Whereas, those analytical lenses fail to create an effective, transformative narrative that would free college athletes, some of whom are legal minors, from economic exploitation and the lack of human dignity they suffer (and have suffered) by being treated as the property of the NCAA and its member schools.

Whereas, even in the face of reform, college athletes are left seeking a handout from their exploiters, rather than being empowered by a constitutional right to own and control their NIL;

Whereas, without a property rights-based analysis of relationships between parties, the powerful are consciously or unconsciously allowed to exploit political and economic underdogs in our society, particularly Black people. The benefits that the underdogs receive are “privileges” granted to them by the powerful, and not rights guaranteed to them by the Constitution;

Whereas, the law has long protected a person’s personal and real property, whereas, federal copyright and patent laws protect the creative property of a person, there is no federal law that protects a person’s NIL; and whereas a person seeking protection must rely on the common law tort of a right of publicity;

Whereas, with the proliferation of social media, the rise of AI, and the development of the metaverse, a person’s NIL has become a valuable, vulnerable asset that can be monetized and can increase a person’s wealth while, if left unprotected, would become the wealth of a person who exploits another person’s NIL;

Whereas, several States have enacted laws that seek to recognize the right of college athletes to capitalize on their NIL and not lose their eligibility to play NCAA college sports, although those laws are particular to college athletes and as based on the right of publicity; and whereas, property law possesses unique beneficial features that would enhance a person’s wealth and protect their NIL from exploitation as well as provides timeworn, proven remedies against abuse.

THEREFORE, IT IS HEREBY PRONOUNCED that NAPA provides the following:

- (1) NAPA recognizes that the natural rights theory of property, as embodied in the Declaration of Independence and in the Constitution, embraces the fundamental principle that college athletes are all endowed with certain natural or God-given rights to their NIL which is inalienable.

- (2) NAPA's primary goals are to maximize the wealth of college athletes and to end private, industry, and governmental exploitation of the NIL property right of college athletes, by banning their authority to so, and by granting those being exploited with special legal and equitable remedies including the use of injunctive relief and constructive trusts, to protect the owners for the present and future wrongful taking of NIL.
- (3) NAPA seeks to remedy past, present, and future expropriation of the NIL of college athletes by intentionally providing compensation and reparations of the past and current takings of college athletes' NIL rights.
- (4) All levels and branches of government, to the highest extent of their powers and authorities, are hereby mandated to abolish all direct or indirect expropriation of college athletes' NIL. This mandate is self-evident and does not require supplemental action other than the immediate endeavors needed to facilitate these requisites.
- (5) The Justice Department is hereby authorized to investigate alleged incidents of such expropriations.
- (6) NAPA shall be subject to strict judicial scrutiny. The legal standard for assessing liability shall be whether the government or its agents are, or have taken, college athletes' NIL puts the burden on the government as a fiduciary of those property rights.
- (7) Any such past expropriation, exploitation, use, and infringement on college athletes' NIL shall be enjoined from the adoption of this Act, and that such abuses be retroactively compensated to the full extent of the current market value of the abuse.⁴⁴⁵

HENCE, the “Name, Image, and Likeness as Property” Act provides and hereby proclaims that college athletes own a natural property right to their NIL, is entitled to all the attributes of property including alienation, divisibility, descendability, and is protected by all legal and equitable remedies that inure to property, and directs that all federal, state, and local laws recognize and protect NIL as private property of college athletes.

⁴⁴⁵ See generally *House v. NCAA*, 545 F. Supp. 3d 804 (2021) (grappling with how to apportion the collection from the NCAA and its members and the distribution of compensation for violating past and present players' NIL rights).

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The Artificial Intelligence Solution to the Patent Obviousness Problem

Max Stul Oppenheimer*

ABSTRACT

Seeking a patent requires surrendering trade secrets. The decision whether to seek patent protection or maintain a trade secret is a pivotal one for innovators. A critical impediment to a rational decision lies in uncertainty as to whether a patent will be granted once the trade secret has been surrendered, and a particular source of uncertainty arises because of the unpredictability of the application of the “obviousness” standard for patentability. This Article explores the history and application of obviousness determinations and proposes the use of artificial intelligence to increase objectivity and predictability into this critical phase of patent prosecution. After outlining the relationship between trade secrets and patents, and the history and challenges of determining obviousness, it proposes using AI tools to reduce subjectivity (and, in particular, hindsight bias), speed patent prosecution, and thereby reduce the uncertainty of the trade secret/patent decision-making process. It also demonstrates the feasibility of applying AI through an experiment. Finally, it addresses potential legal and ethical issues associated with AI’s role in patent examination and outlines the requirements for integrating an AI system into the patent prosecution process.

INTRODUCTION

Patents are offered as an incentive to surrender trade secrets. While trade secrets have no fixed term and do not protect against independent duplication

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of the innovation, patents offer innovators a guaranteed fixed term of protection against the use of their innovations. Patents require the surrender of trade secrets, so an innovator must choose either one form of protection or the other. Which of these forms of protection is “better” depends on many factors, some of which are unpredictable. One critical unpredictable factor is whether a patent is available or not. Because most patent applications are published (and therefore destroy the trade secret) before there is a determination that a patent will be granted, the innovator’s decision must include a prediction as to whether there will be a patent or not—if not, then the trade secret will have been given up and nothing received in return.

Among the hurdles which a patent application must clear are two that require comparing the innovation to the prior art. Prior art is defined in 35 U.S.C. §102. Although detailed, the definition primarily encompasses things which were publicly available, through sources other than the innovator, before the innovator filed an application for the patent.¹ If a prior art reference exactly discloses the innovation, the innovation is not patentable because it is not novel; this is a comparatively straightforward determination. The more difficult hurdle is showing that the innovation is non-obvious. That requires resolving the question of whether someone of ordinary skill in the field would consider it obvious to combine known elements of the prior art to achieve the innovation.

Obviousness is the most common reason for rejecting claims in a patent application.² Making obviousness determinations more objective and predictable would make it easier for an innovator to decide whether to give up trade secrets in pursuit of patents and would be welcomed by innovators. The indeterminacy of non-obviousness has been described a critical challenge in

¹ 35 U.S.C. § 102(a) provides: “NOVELTY; PRIOR ART. A person shall be entitled to a patent unless (1) the claimed invention was patented, described in a printed publication, or in public use, on sale, or otherwise available to the public before the effective filing date of the claimed invention; or (2) the claimed invention was described in a patent issued under section 151, or in an application for patent published or deemed published under section 122(b), in which the patent or application, as the case may be, names another inventor and was effectively filed before the effective filing date of the claimed invention.” Subsections (b) through (d) provide certain exceptions and clarifications.

² The USPTO provides a tool for analyzing performance statistics, available at <https://developer.uspto.gov/visualization/agency-trends-rejections-office-actions-patent-applications>. Using this tool, the statistics for the year ending on February 1, 2024 show that the USPTO rejected 3,150,675 claims. Of those rejections, the most frequent basis for rejection (39%) was obviousness; the next most frequent basis for rejections was lack of enablement (24%).

patent law that has engendered a “suite of ills for the patent system and technological innovation” by sometimes rewarding the mundane and forcing true innovators to face a “patent minefield.”³ The Federal Circuit has attempted to provide rules for making that determination, but the Supreme Court has rejected them, leaving patent applicants (and the U. S. Patent Office and the courts) with the challenging task of determining whether a hypothetical person of ordinary skill would have considered the innovation obvious.

This Article proposes using artificial intelligence (“AI”) as a tool for introducing objectivity and predictability into the process. Section I describes the relationship between trade secrets and patents, the choice faced by innovators, and the role of obviousness in making that choice; it then traces the historical development and role of the obviousness concept in patent law. Section II describes the practical problems in making obviousness determinations. Section III explains how features of the patent prosecution system exacerbate the problems created by the unpredictability of obviousness determinations. Section IV proposes the use of AI tools to reduce the degree of subjectivity involved in making these determinations, thereby improving predictability and making the patent bargain fairer. Section V describes an experiment showing the feasibility of using AI tools. Section VI identifies issues that are presented by the proposed AI solution and how they can be addressed.

I. TRADE SECRETS, THE PATENT SYSTEM, AND THE ROLE OF OBVIOUSNESS

A. *The Trade Secret/Patent Exchange*

All innovation begins as a trade secret. A trade secret is an intellectual property right⁴ automatically created upon the development of valuable information that is not generally known, provided that the developer of the information takes reasonable steps to maintain its secrecy.⁵ Well-known examples

³ Gregory Mandel, *The Non-Obvious Problem: How the Indeterminate Nonobviousness Standard Produces Excessive Patent Grants*, 42 U.C. DAVIS L. REV. 57, 127, 59 (2008).

⁴ In *Ruckelshaus v. Monsanto Co.*, the Court held that trade secrets were property rights within the meaning of the Fifth Amendment, and that disclosure of a trade secret by the government constituted a taking. 467 U.S. 986, 1016 (1984).

⁵ The Uniform Trade Secrets Act defines a trade secret as “information . . . that: (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts

of products protected as trade secrets include the formula for Coca-Cola and the “secret herbs and spices” used in Kentucky Fried Chicken. Ownership of trade secret gives its owner the power to prevent misappropriation—a defined term of art which basically covers disclosure or use of a trade secret that has been obtained from the owner by improper means. As long as the requirements for trade secrecy are met, a trade secret may be maintained indefinitely, and competitors may be prevented from misappropriating the trade secret information to compete.⁶ Thus, at least in theory, a trade secret could last forever. However, it can also be destroyed by factors beyond the owner’s control. For example, a competitor might independently learn the secret and disclose it. Public disclosure destroys trade secrets,⁷ and most states recognize reverse engineering of a publicly sold product as beyond the protection of trade secret law.⁸

The patent system is specifically designed to destroy trade secrets. It offers an exchange of a patent for disclosure of trade secrets. While the owner of a trade secret can prevent misappropriation for as long as the trade secret is maintained, the owner of a patent can prevent infringement⁹ (which is generally defined as the manufacture, use, sale, or importation of a product

that are reasonable under the circumstances to maintain its secrecy.” UNIF. TRADE SECRETS ACT § 1(4) (Nat. Conf. of Comm’r on Unif. State Laws 1985). Defining innovation as something that has value satisfies the “economic value” part of the definition. It also meets the “not generally known” and “reasonable efforts to maintain secrecy” requirements of the second part of the definition because at the moment of innovation the innovator has told no one and the innovation exists only in the innovator’s mind. *Id.*

⁶ *Id.* The requirements for maintaining a trade secret are that valuable confidential information is not publicly known and that the owner is taking reasonable steps to maintain its confidentiality. *Id.*

⁷ UNIF. TRADE SECRETS ACT § 1 cmt. (Nat. Conf. of Comm’r on Unif. State Laws 1985).

⁸ See, e.g., *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 476 (1974). The Uniform Trade Secrets Act prohibits acquisition of trade secrets by improper means. Misappropriation may be enjoined or give rise to damages. UNIF. TRADE SECRETS ACT §§ (2)(a), (3) (Nat. Conf. of Comm’r on Unif. State Laws 1985). Misappropriation is defined as “acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means.” *Id.* § 1(2)(i).

⁹ Patent infringement gives rise to damages, which are to be no less than a reasonable royalty, and the possibility of an injunction. 35 U.S.C. §§ 283, 284. The Supreme Court has held, however, that even in patent cases, a court must apply traditional equitable factors in deciding whether it is appropriate to issue an injunction. *eBay, Inc., v. MercExchange, LLC*, 547 U.S. 388, 394 (2006).

incorporating a patented invention)¹⁰ for a period beginning on the date the patent is issued¹¹ and ending twenty years after the date the patent application was filed.¹² Patent infringement gives rise to damages which are to be no less than a reasonable royalty¹³ and the possibility of an injunction¹⁴ and attorney fees in certain cases.¹⁵

Thus, trade secret rights depend on whether the alleged infringer obtained the information from the trade secret owner while patent rights do not. Patents are enforceable even against those who independently discover the same innovation. Anyone who independently discovers a trade secret is free to disclose it and thereby destroy it—disclosure by an independent discoverer is not misappropriation, and publication means the information is no longer “not generally known.” The term of a trade secret is therefore beyond the owner’s control. Patents are, by definition, disclosed by the government, which destroys any trade secrets contained in the patent, but disclosure does

¹⁰ 35 U.S.C. § 271. There are also provisions prohibiting inducing infringement (knowingly supplying a material component especially adapted for use in infringing), *id.* § 271(c), supplying substantial portions of a patented invention to induce the combination into the patented invention, *id.* § 271(f), or carrying out a patented process outside the United States, then importing the product into the United States, *id.* § 271(g).

¹¹ *Id.* § 154(a)(2).

¹² The patent expires twenty years after the date the earliest application was filed (i.e., if there are a series of related patent applications, referred to as “continuing applications,” the term is measured from the date the first in the series was filed) and is subject to adjustment in certain circumstances related to delays in processing by the USPTO. *Id.*

¹³ 35 U.S.C. § 284. Although the statute specifies that damages be “no less” than a reasonable royalty, in practice damages rarely exceed what is determined to be a reasonable royalty. See *Third Wave Tech., Inc. v. Stratagene Corp.*, 405 F. Supp. 2d 991, 1011 (W.D. Wis. 2005) (explaining that under § 284, courts “imagine a negotiation between the patentee and infringer taking place at the moment the infringement began” which “is an approach that experts have employed for decades in patent cases.”).

¹⁴ The language of the statute regarding injunctions is permissive, not mandatory: “Courts may grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent, on such terms as the court deems reasonable.” 35 U.S.C. § 283. However, since a patent is, by definition, unique, *id.* § 102, it might seem by analogy to real property law that injunctions should always be issued because damages would never provide a complete remedy for infringement. The Supreme Court has held, however, that even in patent cases, a court must apply the traditional equitable four-factor test in deciding whether it is appropriate to issue an injunction. *eBay, Inc., v. MercExchange, LLC*, 547 U.S. 388 (2006).

¹⁵ 35 U.S.C. § 285.

not destroy patent rights.¹⁶ A patent has a fixed, but guaranteed, expiration date.¹⁷ Thus, trade secrets and patents differ both in duration and scope.

The authority for a federal patent system is found in Article I, Section 8 of the Constitution, which grants Congress the power to “promote progress” by granting monopolies for a limited-time.¹⁸ Title 35 of the U.S. Code reflects Congress’ decision as to how to exercise that authority.¹⁹ Because the constitutional goal is to promote progress, patents²⁰ require the surrender of trade secrets in return for the possibility²¹ of a government-granted, limited-term

¹⁶ Under the first-to-file system, a second inventor can destroy the first inventor’s right to a patent by disclosing the invention before the first inventor discloses the invention (and files an application within a year from the disclosure) or files a patent application. *Id.* § 102. The first inventor can minimize or eliminate this risk by filing promptly.

¹⁷ *Id.* § 154 (subject to the owner’s payment of periodic maintenance fees).

¹⁸ U.S. CONST. art. I, § 8, cl. 8 (“[Congress shall have Power t]o Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”). For a detailed history of the clause, see Edward C. Walterscheid, *To Promote the Progress of Science and Useful Arts: The Background and Origin of the Intellectual Property Clause of the United States Constitution*, 2 J. INTELL. PROP. L. 1 (1994).

¹⁹ 35 U.S.C. § 101.

²⁰ There are three types of patents issued by the United States: utility patents, design patents, and plant patents. Of these, the largest category—and the category which most people mean when referring to a “patent”—is the utility patent. The term “patent” is used in this Article to refer to utility patents.

²¹ Before the American Inventors Protection Act (“AIPA”), patent applications were confidential until a patent was issued, so there was an exchange of patent rights for the surrender of trade secret rights. The AIPA provided that any application filed on or after November 29, 2000, would be published 18 months after filing unless it qualified for an exemption. Under current law, most patent applications are published 18 months after filing, whether a patent has been granted or not, and all patents are published. 35 U.S.C. § 154. The requirement of 35 U.S.C. § 112(a)—that “the specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains . . . to make and use the same[.]”—precludes maintaining trade secrecy. Therefore, under current law, trade secrets must be surrendered before the applicant knows whether a patent will be granted in return or not. For statistics on the number of patents issued within the 18-month period of non-publication, and other dilemmas facing patent applicants, see Max Stul Oppenheimer, *The Innovator’s Dilemma*, 4 AM. U. BUS. L. REV. 371, 381–82 (2015); Max Stul Oppenheimer, *Rethinking Compact Patent Prosecution*, 25 ALB. L.J. SCI. & TECH. 257, 268 (2015).

monopoly²² over the manufacture, use, importation, sale, or offer for sale of an innovation.²³ This disclosure is thought to benefit society—and therefore justify granting a limited-term monopoly—because disclosure provides ideas for further research to a larger pool of researchers.²⁴ In *United States v. Dubilier Condenser Corp.*, the Supreme Court noted that an inventor “may keep his invention secret and reap its fruits indefinitely. In consideration of its disclosure and the consequent benefit to the community, the patent is granted. . . . [U]pon the expiration of that period, the knowledge of the invention inures to the people, who are thus enabled without restriction to practice it and profit by its use.”²⁵ This statement was accurate when the *Dubilier* case was decided in 1933 and would still be accurate if an innovator could file an application for patent²⁶ and maintain the trade secret until the application for patent was approved. In that case, the innovator could make an informed choice—keep the trade secret, with all its risks and benefits or give up the trade secret and accept in its stead a patent, with all its risks and benefits.²⁷

²² An economist would view a patent as a monopoly because it gives its owner the exclusive rights to make, use, sell, offer to sell, or import the patented invention. 35 U.S.C. § 154(a)(1). Violation of any of these rights is infringement and gives rise to damages and (subject to equitable considerations) injunctions. *Id.* § 283; *eBay, Inc., v. MercExchange, LLC*, 547 U.S. 388 (2006). The Supreme Court, however, does not: “Though often so characterized a patent is not, accurately speaking, a monopoly, for it is not created by the executive authority at the expense and to the prejudice of all the community except the grantee of the patent. The term ‘monopoly’ connotes the giving of an exclusive privilege for buying, selling, working, or using a thing which the public freely enjoyed prior to the grant. Thus, a monopoly takes something from the people. An inventor deprives the public of nothing which it enjoyed before his discovery, but gives something of value to the community by adding to the sum of human knowledge.” *United States v. Dubilier Condenser Corp.*, 289 U.S. 178, 186 (1933) (footnote omitted) (citation omitted).

²³ 35 U.S.C. § 154(a)(2).

²⁴ *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 485 (1974); Peter Lee, *Patents, Paradigm Shifts and Progress in Biomedical Science*, 114 *YALE L.J.* 659, 686–90 (2004) (arguing that patents promote hypothesis generation).

²⁵ *Dubilier*, 289 U.S. at 186–87.

²⁶ Patent applications are filed with, and examined by, the USPTO, an administrative agency subject to the Administrative Procedure Act. 5 U.S.C. §§ 701, 703. The USPTO has adopted notice and comment regulations in Title 37 of the Code of Federal Regulations. It has also adopted guidance for its patent examiners in the Manual of Patent Examining Procedure (“MPEP”).

²⁷ A trade secret lasts as long as it meets the definition of being valuable information, not generally known, subject to reasonable efforts to maintain its secrecy. A patent generally lasts less than 20 years. A trade secret prevents misappropriation, which generally involves improper means; a patent prevents manufacture, use, sale, offer

Unfortunately, the current system no longer provides the innovator with that choice. Changes in the patent statute, coupled with the backlog of pending patent applications and the speed at which the United States Patent and Trademark Office (“USPTO”) works, have resulted in patent applications being made public before there has been a decision on patentability. The result is that innovators must give up their trade secrets, not knowing whether they will get anything in return. The delay in decision by the USPTO might be acceptable—or at least more tolerable—if the outcome of the USPTO review were predictable.

A rational innovator deciding whether to give up trade secrets would want to know what was being offered in exchange. Because the decision generally must be made before a patent is issued, part of the innovator’s decision-making process requires a prediction: whether a patent will be issued for their innovation and, if so, the scope of protection.

B. Predicting Patentability

While trade secret rights arise automatically as soon as the statutory definition is met,²⁸ patent rights do not exist until a review²⁹ by the USPTO determines that the claimed invention:

- (1) is statutory subject matter;³⁰

for sale, or importation of a product incorporating a patented invention regardless of whether the infringer used improper means to learn the innovation. Thus, while a trade secret might last longer than a patent, it also might be destroyed sooner (for example, if another party independently discovered it and made it public) and it could not be enforced against an independent developer of the same trade secret. A patent has a guaranteed term and can be enforced against an independent developer, but it also has a fixed expiration date. The patent system therefore provides motivation for holders of patent-eligible trade secrets to disclose them (and therefore surrender protection under trade secret law) in exchange for rights which are broader in scope but potentially shorter in duration. A patent has a fixed, but guaranteed, expiration date, 35 U.S.C. § 154 (subject to the owner’s payment of periodic maintenance fees), while the term of a trade secret is uncertain and depends on events beyond the owner’s control, UNIF. TRADE SECRETS ACT § 1 (Nat. Conf. of Comm’r on Unif. State Laws 1985). For more detail, see Oppenheimer, *The Innovator’s Dilemma*, *supra* note 21.

²⁸ Note 5, *supra*.

²⁹ 35 U.S.C. § 131.

³⁰ Statutory subject matter consists of machines, manufactures, compositions of matter and processes, *id.* § 101, and only those categories. *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 483 (1974) (“[N]o patent is available for a discovery, however

- (2) is useful;³¹
- (3) is novel;³²
- (4) is not obvious to a hypothetical person of ordinary skill in the field;³³
- (5) is described well enough that those in the field can make and use the invention;³⁴ and
- (6) is defined well enough to apprise the public of what is covered by the patent.³⁵

The process of USPTO review, known as patent prosecution, begins with an applicant filing a written application.³⁶ If any of the claims are determined to comply with the statutory requirements, a patent may be issued covering those claims³⁷ and granting the patent owner the right to stop others from making, using, selling, or offering to sell products incorporating the claims during the term of the patent.³⁸

Two hurdles which a patent application must clear require comparing the claims to the prior art: the application must show that the innovation is novel under 35 U.S.C. § 102 and that it is not obvious under 35 U.S.C. § 103.³⁹ If a prior art reference discloses exactly what is asserted in a patent

useful, novel, and nonobvious, unless it falls within one of the express categories of patentable subject matter of 35 U.S.C. § 101[.]”). Certain types of inventions have been held unpatentable even though they fall within the literal terms of the statute. “Phenomena of nature, though just discovered, mental processes, and abstract intellectual concepts are not patentable, as they are the basic tools of scientific and technological work.” *Gottschalk v. Benson*, 409 U.S. 63, 67 (1972). “[Laws of nature] are part of the storehouse of knowledge. . . free to all men and reserved exclusively to none.” *Funk Bros. Seed Co. v. Kalo Inoculant Co.*, 333 U.S. 127, 130 (1948).

³¹ 35 U.S.C. § 101. The USPTO interprets § 101 to require that the claimed invention have a “specific, substantial, and credible” use. MPEP § 2107 (9th ed. Rev. 1, Jan. 2024).

³² 35 U.S.C. §§ 101, 102.

³³ *Id.* § 103.

³⁴ *Id.* § 112.

³⁵ *Id.*

³⁶ *Id.* § 111(a)(1).

³⁷ Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent thereof, subject to the conditions and requirements of this title. *Id.* §§ 101, 151.

³⁸ Possible infringement remedies include injunctions, *id.* § 283, damages, *id.* § 284, and attorney fees, *id.* § 285.

³⁹ Many of the earlier cases refer to activity prior to the date of invention as prior art. As amended by the America Invents Act (“AIA”), novelty and obviousness are

claim, the reference is said to “anticipate” the claim and makes it unpatentable because it is not novel.⁴⁰ That is a comparatively straightforward determination,⁴¹ and easy to justify: if the public already has access to the invention, there is no need to grant a monopoly to get disclosure.⁴²

The analysis and justification become more difficult if the claim is not anticipated but can be duplicated by combining two or more prior art references. The mere fact that something is novel does not mean that the public could not have access to it if the public wanted access. Many things are instantly obvious and are just as instantly rejected as impractical, uneconomical, or unmarketable.⁴³ The complication is explained in *KSR Int'l Co. v. Teleflex Inc.*:

[A] patent composed of several elements is not proved obvious merely by demonstrating that each of its elements was, independently, known in the prior art. . . . [I]nventions in most, if not all, instances rely upon building blocks long since uncovered, and claimed discoveries almost of necessity will be combinations of what, in some sense, is already known . . . Granting patent protection to advances that would occur in the ordinary course without real innovation retards progress[.]⁴⁴

The Supreme Court has recognized the need for “uniformity and definiteness,”⁴⁵ but drawing the line has shown itself to be difficult.⁴⁶

now measured as of the effective filing date of the patent application (under 35 U.S.C. § 122, the “effective filing date” of an application may be earlier than the actual filing date if the application claims priority from an earlier application) rather than as of the date of invention.

⁴⁰ 35 U.S.C. § 102

⁴¹ An anticipating reference “must bear within its four corners adequate directions for the practice of the patent invalidated.” *Dewey & Almy Chem. Co. v. Mimex Co.*, 124 F.2d 986, 989 (2d Cir. 1942). See also *Lincoln Stores, Inc. v. Nashua Mfg. Co.*, 157 F.2d 154, 159–60 (1st Cir. 1946); *Gordon Form Lathe Co. v. Walcott Mach. Co.*, 32 F.2d 55, 58 (6th Cir. 1929). Therefore, to defeat patentability because of lack of novelty, there must be one single reference that discloses each and every element of the claimed invention.

⁴² See *Bonito Boats, Inc. v. Thunder Craft Boats*, 489 U.S. 141 (1989) (holding that Congress cannot remove information from the public domain because removal would thwart the constitutional mandate to promote the progress of science and the useful arts); see also *Miller v. Eagle Mfg. Co.*, 151 U.S. 186, 197 (1894) (holding that if two identical inventions are claimed, it is proper to reject them as not novel).

⁴³ Think “peanut butter/anchovy ice cream” or “diamond automobile bumpers.”

⁴⁴ 550 U.S. 398, 418–19 (2007).

⁴⁵ *Graham v. John Deere*, 383 U.S. 1, 18 (1965).

⁴⁶ Anticipation is a question of fact, subject to review under the clearly erroneous standard. *Tyler Refrigeration v. Kysor Indus. Corp.*, 777 F.2d 687, 690 (Fed. Cir. 1985).

Attempts by the Federal Circuit to provide guidance and predictability have been rejected by the Supreme Court,⁴⁷ leaving the vague statutory standard of whether a hypothetical person of ordinary skill in the art would have considered the innovation obvious.⁴⁸ As a result, a major source of uncertainty is whether the USPTO will consider an innovation obvious—and therefore unpatentable. Obviousness is the most common reason for rejecting claims in a patent application, accounting for nearly 40% of all rejections in 2023.⁴⁹

II. PURPOSE AND HISTORY OF THE OBVIOUSNESS BAR TO PATENTABILITY

A central tenet of patent law is that patents should not withdraw anything from the public domain. The prior art requirements of the statute⁵⁰ further the Constitutional requirement that the patent statute “promote progress”: if the public already had access to the technology, then there would be no progress-promoting benefit to granting a patent and therefore no reason to give a monopoly in the technology.

The novelty requirement, set by Section 102 of the current statute, has been a requirement since the first patent statute was passed in 1793. As currently written, 35 U.S.C. § 102 provides (with certain exceptions):

- (a) NOVELTY; PRIORART.—A person shall be entitled to a patent unless—
(1) the claimed invention was patented, described in a printed publication, or in public use, on sale, or otherwise available to the public before the effective filing date of the claimed invention.⁵¹

A literal reading of the requirement might suggest that any change, however minor, to existing technology would be patentable. As Thomas Jefferson recognized, that would lead to patenting changes that were not genuinely innovative: “[A] change of material should not give title to a patent. [A]s the making a ploughshare of cast rather than of wrought iron; a [c]omb of iron, instead of horn, or of ivory . . . [A] mere change of form should give no

⁴⁷ See, e.g., *KSR*, 550 U.S. at 398 (rejecting the Federal Circuit’s requirement that references can be combined to establish obviousness only if the prior art contains some teaching, suggestion, or motivation to combine them).

⁴⁸ 35 U.S.C. § 103.

⁴⁹ In a 12-month period ending on February 1, 2024, the USPTO rejected 3,150,675 claims. Of those rejections, 39% were based on obviousness. See *supra* note 2.

⁵⁰ 35 U.S.C §§ 102, 103.

⁵¹ 35 U.S.C. § 102(a)(1).

right to a patent[] as a high-quartered shoe, instead of a low one[,] a round hat, instead of a three-square[,] or a square bucket instead of a round one.”⁵² While some of Jefferson’s examples might actually satisfy the requirements of the statute,⁵³ the concern is certainly well-founded. As early as 1851, cases interpreted novelty to require something more than a minor variation.⁵⁴

The Supreme Court addressed the issue in *Hotchkiss v. Greenwood*, where the innovation involved cabinet knobs made of a different material than previously available.⁵⁵ The statute at the time did not have a non-obviousness requirement—it only required that to be patentable the innovation must be “new.”⁵⁶ The innovator argued that by providing a familiar product made of a new material, that standard was met.⁵⁷ The Supreme Court held that such a minor change did not meet the standards of patentability.⁵⁸ This remained the judicial approach to the meaning of novelty under a statute that denied patents to innovations that were not “new” but did not explicitly deny patents to applications involving minor changes that were technically new but not innovative.⁵⁹

It was not until the major revision of the patent statute in 1952 that non-obviousness became a statutory requirement. This requirement is now reflected in 35 U.S.C. § 103, which precludes granting a patent if “the differences between the claimed invention and the prior art are such that the claimed invention as a whole would have been obvious . . . to a person having ordinary skill in the art to which the claimed invention pertains.”⁶⁰

⁵² Thomas Jefferson, *Thomas Jefferson to Isaac McPherson, 13 August 1813*, FOUNDERS ONLINE, National Archives, <https://founders.archives.gov/documents/Jefferson/03-06-02-0322> [<https://perma.cc/5SWT-UWBH>] (footnotes omitted).

⁵³ The first person to produce a square bucket might well have had to overcome different technological challenges than the manufacturer of round buckets, and a square bucket might well serve purposes that round buckets could not.

⁵⁴ See, e.g., *Hotchkiss v. Greenwood*, 52 U.S. 248 (1851).

⁵⁵ *Id.* at 265.

⁵⁶ *Id.* at 260–61.

⁵⁷ *Id.* at 264.

⁵⁸ *Id.* at 267.

⁵⁹ In 1950, the Supreme Court held that a “patent for a combination which only unites old elements with no change in their respective functions . . . obviously withdraws what already is known into the field of its monopoly and diminishes the resources available to skillful men” and therefore would not meet what was then the novelty standard of the statute. *Great Atl. & Pac. Tea Co. v. Supermarket Equip. Corp.*, 340 U.S. 147, 152 (1950).

⁶⁰ Pre-AIA 35 U.S.C. § 103(b) provided special rules for biotechnological processes; subsection (c) provided special rules for certain commonly-owned or -funded innovations.

Courts have adopted the fiction that the hypothetical person may have only ordinary skill but has extraordinary resources—with a presumption of complete knowledge of the prior art.⁶¹

The meaning of this new section of the statute was challenged shortly after its adoption. In *Graham v. John Deere*,⁶² the Court held that the addition of Section 103 to the statute did not change the analysis, but rather codified the *Hotchkiss* approach.⁶³ The Court also explained the proper process for determining obviousness:

Under § 103, the scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved. Against this background, the obviousness or nonobviousness of the subject matter is determined. Such secondary considerations as commercial success, long felt but unsolved needs, failure of others, etc., might be utilized to give light to the circumstances surrounding the origin of the subject matter sought to be patented. As indicia of obviousness or nonobviousness, these inquiries may have relevancy.⁶⁴

While a faithful catalog of the statutory requirements, it should be apparent that the Court's explanation of the standard for determining obviousness involves a high degree of subjectivity and judgment. The final step in the *Graham* approach is "the obviousness or nonobviousness of the subject matter is determined," offering no guidance as to how that determination is made.⁶⁵

In an effort to bring more predictability to the obviousness analysis, the Federal Circuit⁶⁶ introduced a "teaching, suggestion, or motivation" test for

⁶¹ *In re Winslow*, 365 F.2d 1017, 1020 (C.C.P.A. 1965).

⁶² 383 U.S. 1 (1966).

⁶³ "In *Graham v. John Deere Co. of Kansas City* . . . the Court set out a framework for applying the statutory language of § 103, language itself based on the logic of the earlier decision in *Hotchkiss v. Greenwood* . . . and its progeny." *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 406 (2007).

⁶⁴ *Graham*, 383 U.S. at 17–18.

⁶⁵ *Id.* at 17.

⁶⁶ The Federal Circuit was, itself, created in order to bring greater consistency and predictability to the interpretation of the patent statute. *See, e.g.*, Pauline Newman, *The Federal Circuit: Judicial Stability or Judicial Activism?*, 42 AM. U. L. REV. 683, 687 (1993) ("A centralized court would be expected to apply a more consistent interpretation of the complex provisions of the patent statute. With a consistent nationwide application of the law, I would hope for and expect a greatly enhanced degree of predictability of the outcome of patent litigation."); statement of Chief Judge of U.S. Court of Customs and Patent Appeals, *id.* at 246 ("[T]he consolidation concept

obviousness. Under that test, a determination of obviousness required that the prior art contain some teaching, suggestion, or motivation to combine a prior art in the manner executed by the invention.⁶⁷

In *KSR v. Teleflex*,⁶⁸ the Supreme Court rejected the Federal Circuit's attempt to make the analysis more objective. *Teleflex* involved the validity of a patent issued to Steven Engelgau for an automobile pedal.⁶⁹ The pedal was adjustable and had a sensor mounted on the pedal support that detected the pedal's position and transmitted it to a computer which controlled the car's throttle.⁷⁰ Adjustable brake pedals, sensors mounted on pedal support, and computer-controlled throttles all existed, but they had not been combined before.⁷¹ The USPTO concluded that the claimed invention was not obvious and was therefore patentable.⁷² When Engelgau's assignee attempted to enforce the patent, it was challenged as invalid because of its obviousness.⁷³ The district court concluded that industry dynamics would have inevitably led to the combination of features, making it obvious and therefore not patentable.⁷⁴ The Federal Circuit reversed, applying a requirement that the prior art contain some "teaching, suggestion, or motivation" to combine pre-existing components: the "TSM" test. Under that test, the Federal Circuit held that the district court failed to make "findings as to the specific understanding or principle within the knowledge of a skilled artisan that would have motivated one with no knowledge of [the] invention . . . to attach an electronic control to the support bracket[.]"⁷⁵

The Supreme Court reversed, finding the invention obvious and rejecting the Federal Circuit's TSM test:

The obviousness analysis cannot be confined by a formalistic conception of the words teaching, suggestion, and motivation, or by overemphasis on the importance of published articles and the explicit content of issued

would increase clarity and reliability of the law . . . there is a crying need for definitive uniform judicial interpretation of the national law of patents[.]").

⁶⁷ *In re Kahn*, 441 F.3d 977, 986 (Fed. Cir. 2006).

⁶⁸ *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398 (2007).

⁶⁹ Adjustable Pedal Assembly with Electronic Throttle Control, U.S. Patent Application No. 09/643,422. The application was a continuation of Application 09/236,975, meaning that it was treated as though it had been filed on January 26, 1999 and the issue of obviousness which ultimately reached the Supreme Court in *KSR v. Teleflex* would be measured as of that date.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² U.S. Patent No. 6,237,565 (filed May 29, 2001).

⁷³ An issued patent is presumed valid, but the presumption is rebuttable. *See* 35 U.S.C. § 282.

⁷⁴ *Teleflex Inc. v. KSR Int'l*, 298 F. Supp. 2d 581, 596 (E.D. Mich. 2003).

⁷⁵ *Teleflex Inc. v. KSR Int'l Co.*, 119 F. App'x 282, 288 (Fed. Cir. 2005).

patents. . . . Granting patent protection to advances that would occur in the ordinary course without real innovation retards progress and may, in the case of patents combining previously known elements, deprive prior inventions of their value or utility.⁷⁶

Thus, there are two avenues for denying a patent application based on the prior art: lack of novelty, meaning that the claimed invention is disclosed in a single source; and obviousness, meaning that someone of ordinary skill would have thought it obvious to combine what is disclosed in multiple prior art sources.

Determining novelty is a relatively simple exercise because it only involves comparing the claimed innovation with a single piece of prior art and determining if all the elements of the claimed invention are disclosed by the prior art—an objective exercise.

Determining obviousness⁷⁷ not only greatly expands the universe of comparison (allowing the combination of any number of prior art references) but also introduces a subjective element to the analysis, requiring an answer to the question of whether a hypothetical person of ordinary skill in the art would consider it obvious to combine those references to arrive at the claimed innovation. In addition to the increased complexity, this introduces practical problems in making the obviousness determination.

III. THE PRACTICAL PROBLEMS OF 103: PREDICTABILITY AND OBJECTIVITY

It should be clear from the above that applying the obviousness requirement is a complex exercise requiring subjectivity. Of the *Graham* factors, the first two—determining the prior art and the differences between the

⁷⁶ *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 403 (2007).

⁷⁷ The current statutory standard of obviousness, revised since the *Graham* decision to reflect the change from first-to-invent to first-to-file, provides:

A patent for a claimed invention may not be obtained, notwithstanding that the claimed invention is not identically disclosed as set forth in section 102, if the differences between the claimed invention and the prior art are such that the claimed invention as a whole would have been obvious before the effective filing date of the claimed invention to a person having ordinary skill in the art to which the claimed invention pertains.

35 U.S.C. § 103. Other than the change from “before the invention” to “before the effective filing date” the language is unchanged from the version analyzed in *Graham*, and the decision process set forth in *Graham* is the same. *KSR Int'l Co.*, 550 U.S. at 398.

innovation and the prior art—are usually straightforward. There may be a difference of opinion as to the third factor (the level of ordinary skill in the pertinent art, or even as to what the “pertinent art” is) but again this is usually a straightforward decision.⁷⁸

The subjectivity arises in applying the fourth factor: “Against this background, the obviousness or nonobviousness of the subject matter is determined.”⁷⁹ The determination is made from the viewpoint of a hypothetical person of ordinary skill in the field, assumed to have complete knowledge of the prior art. However, that is not the person making the decision. The USPTO does not have a staff of people with ordinary skill in various fields; it has a corps of patent examiners, and those examiners are tasked with concluding what such a hypothetical person would think.⁸⁰ Patent examiners are not typically attorneys, but rather are people with training in the particular field of technology that they examine.

In reaching that conclusion, the examiner is at a serious disadvantage:⁸¹ one of the requirements of a patent application is that it teach someone of ordinary skill in the art how to make and use the invention.⁸² Therefore, in deciding whether someone of ordinary skill would consider the innovation obvious, the decision-maker has just been told—in terms and with sufficient detail that someone of ordinary skill would understand—exactly how to combine the prior art to achieve the innovation.

The USPTO is, of course, aware of the dangers of this potential hindsight bias, and it has taken the steps it can to prevent it. The statute itself says that obviousness is to be determined “as of the effective filing date of

⁷⁸ For example, issues that could have been raised in the *Graham* case would include whether the pertinent art was plow manufacturing or farming, and the related issue of whether the level of skill was a degree in engineering or years of plowing fields. See *Graham*, 383 U.S. 1.

⁷⁹ *Id.* at 17.

⁸⁰ *Classes Arranged by Art Unit*, U.S. PAT. & TRADEMARK OFF. (Nov. 2022), <https://www.uspto.gov/sites/default/files/documents/caau.pdf> [<https://perma.cc/VQ26-YCZ5>] (stating that patent examination is conducted within art units and each art unit characterized by the type of technology it reviews. When an application is filed, one of the early steps taken by the USPTO is to classify the field of the application so that it can be sent to an examiner within an appropriate art unit).

⁸¹ Or advantage, depending on viewpoint.

⁸² See 35 U.S.C. § 112(a) (requiring that the application “shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains . . . to make and use the same . . .”).

the application”⁸³ which precludes using the application itself to supply the rationale for combining prior art to reach a conclusion of obviousness. In addition, the USPTO’s instructions to its examiners reinforce this constraint.⁸⁴

Notwithstanding these protections, they are difficult instructions to carry out and it would not be irrational to question their effectiveness. The problem is similar to that faced in jury trials when there is a sustained objection to the admissibility of testimony. The standard approach is to “cure” the problem with a jury instruction.⁸⁵ There is an “almost invariable assumption of the law that jurors follow their instructions.”⁸⁶ The assumption is not, however, based on reality. The rule that juries are presumed to follow their instructions is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable, practical accommodation of the interests of the state and the defendant in the criminal justice process.⁸⁷ The effectiveness of such an instruction is, in fact, openly questioned: in *Bruton v. United States*,⁸⁸ the Court held that a jury instruction was insufficient to protect a co-defendant when the other co-defendant’s confession, naming the first co-defendant as a participant, was admitted.⁸⁹ As Learned Hand observed, asking a jury to disregard what it has heard is a

⁸³ See 35 U.S.C. § 103.

⁸⁴ MPEP § 2141.01(III) (9th ed. Rev. 1, Jan. 2024) (“The pre-AIA 35 U.S.C. 103(a) requirement ‘at the time the invention was made’ is to avoid impermissible hindsight. Likewise, the AIA 35 U.S.C. § 103 requirement ‘before the effective filing date of the claimed invention’ serves the same purpose.”). MPEP is the USPTO’s internal manual of instructions for the patent prosecution process and contains instructions to examiners as to how to handle applications. The Federal Circuit requires that a finding of obviousness must be supported by an explanation. See *In re Stepan Co.*, 868 F.3d 1342 (Fed. Cir. 2017) (citing *In re Lee*, 277 F.3d 1338, 1346 (Fed. Cir. 2002), a pre-*KSR* decision) (“The agency tribunal must make findings of relevant facts, and present its reasoning in sufficient detail that the court may conduct meaningful review of the agency action”).

⁸⁵ The alternative is to declare a mistrial, but that is an expensive option, both in terms of cost and of delay.

⁸⁶ *Richardson v. Marsh*, 481 U.S. 200, 206 (1987) (citing *Francis v. Franklin*, 471 U.S. 307, 325 n.9 (1985)). Justice Scalia lists several examples of evidence that can be admitted so long as the jury is instructed accordingly. *Id.* at 207.

⁸⁷ See *id.* at 211.

⁸⁸ 391 U.S. 123, 137 (1968).

⁸⁹ When two defendants are tried together, the Confrontation Clause precludes admission of the confession of one defendant against the other unless the confessing defendant takes the stand. *Pointer v. Texas*, 380 U.S. 400, 407 (1965).

“recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody’s else.”⁹⁰

In patent prosecution, the patent examiner is the jury, and the patent application that the examiner is supposed to review is the inadmissible evidence.⁹¹ Judges are human and even judges, experts on admissibility, have difficulty ignoring information even when instructed to do so.⁹² Patent examiners are human, too. Perhaps the answer is that “a defendant is entitled to a fair trial but not a perfect one”⁹³ and likewise a patent applicant is entitled to a fair review but not a perfect one. If, however, there is a tool that provides a fairer review, particularly one at a reasonable cost, that tool should be used.

The importance of the subjectivity and hindsight problems is magnified by another aspect of the current patent system: delay. By design, the patent system requires the surrender of trade secrets in exchange for a patent.⁹⁴ When a patent is issued, the patent and the correspondence between the applicant and the USPTO are published. That publication, of course, will destroy any trade secrets contained in those documents because they are now public.⁹⁵ The trade secret will be lost, but at the same time, the innovator will receive a patent.

In most cases, however, the current structure of the statute requires that an innovator make the decision to surrender the trade secret before knowing that a patent will be granted in exchange. The statute requires that an applicant for a patent must file a written application that provides sufficient detail to teach those of ordinary skill in the field how to make and use the innovation.⁹⁶ In other words, the application will need to disclose any trade secrets involved in the innovation. Filing the application itself does not destroy the trade secrets because patent applications are initially maintained in confidence.

⁹⁰ Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932). The caselaw skepticism is supported by studies from the field of psychology. See, e.g., William C. Thompson, Geoffrey T. Fong, & D. L. Rosenhan, *Inadmissible Evidence and Juror Verdicts*, 40 J. PERS. & SOC. PSYCH. 453 (1981) (finding that juries appear to be influenced by information they were told to ignore); Andrew J. Wistrich, Chris Guthrie, & Jeffrey J. Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251 (2005) (finding that in most instances judges appear to be influenced by information they were told to ignore).

⁹¹ It is inadmissible for the purposes of determining obviousness.

⁹² Wistrich et al., *supra* note 90, at 1323.

⁹³ Lutwak v. United States, 344 U.S. 604, 619 (1953).

⁹⁴ See note 21, *supra*.

⁹⁵ See note 7, *supra*.

⁹⁶ See 35 U.S.C. §§ 111–112.

The statute requires, however, that applications be published eighteen months after filing.⁹⁷ Given delays, patent applications are rarely resolved by this date, meaning their patent application will likely be published.⁹⁸ This publication destroys any trade secrets contained in the application by making them generally known.⁹⁹ The inventor therefore must make a choice before eighteen months from filing the application. For this reason, pendency becomes important. If patent applications were resolved as either patentable or not within eighteen months, predictability would not matter. The innovator would know if a patent were unavailable and, if so, could abandon the application, thereby avoiding publication and maintaining the trade secrets.

There are two pendency periods of interest: “first action pendency,” the time from the filing of a complete patent application until a patent examiner substantively reviews the application and issues a first action regarding patentability, and “disposition pendency,” the time from filing until the application is disposed of, either by allowance and issue as a patent or by abandonment.¹⁰⁰ Ideally, the applicant would like a final disposition within 18 months in order to make an informed choice. The applicant would then know exactly what is being offered in exchange for the trade secret. But even a first action can be extremely helpful in evaluating the prospects for the ultimate allowance of the application.¹⁰¹

The USPTO measures both average first action pendency and disposition pendency. While it holds a long-term strategic goal of disposing of

⁹⁷ Generally, applications are published eighteen months after their priority date. 35 U.S.C. § 122(b). An applicant can avoid pre-grant publication, but in order to do so must agree that the application will not be filed in any country which publishes applications before the grant of a patent, including under the Patent Cooperation Treaty. 35 U.S.C. § 122(b)(2); 37 C.F.R. § 1.213 (2024); MPEP § 1122 (9th ed. Rev. 1, Jan. 2024). In other words, the applicant must, in effect, not seek patent protection in any other economically important country.

⁹⁸ The USPTO’s most recent data indicates that the average pendency is over two years. *Patents Pendency Data September 2024*, U.S. PAT. & TRADEMARK OFF. (last visited Nov. 18, 2024), <https://www.uspto.gov/dashboard/patents/pendency.html> [<https://perma.cc/2DAB-M2FW>].

⁹⁹ Allowing publication would also destroy the trade secret as it fails to make reasonable efforts to maintain its secrecy.

¹⁰⁰ *Patents Pendency Data September 2024*, U.S. PAT. & TRADEMARK OFF. (last visited Nov. 18, 2024), <https://www.uspto.gov/dashboard/patents/pendency.html> [<https://perma.cc/FR5U-ADUF>].

¹⁰¹ The first action is rarely the end of prosecution, but it does provide insight into how the USPTO views the application. Under a policy known as “compact prosecution,” examiners are directed to raise all known issues in the first office action. See Max Stul Oppenheimer, *Rethinking Compact Patent Prosecution*, note 21, *supra*.

applications within 18 months of filing,¹⁰² the most recent data indicates that the USPTO is far from achieving that goal. In September 2024, the average time to first action was 19.9 months and the average time to disposition, not including subsequent applications, was 26.3 months.¹⁰³

The combination of the subjectivity of the process and the delay of the decision beyond the point where the applicant can still preserve trade secrets makes the decision to pursue patent protection a risky one—counter to the constitutional purpose of promoting progress by motivating disclosure.¹⁰⁴ If the risk of disclosure without compensation increases, the incentive to disclose decreases, and those who have the option¹⁰⁵ of commercializing their innovation while maintaining trade secrets will be more likely to maintain trade secrets rather than seek patents.¹⁰⁶

A. How Artificial Intelligence May Help

Recent advances in AI have been dramatic. There have been reports of AI models producing passing answers to bar exam questions,¹⁰⁷ passing the

¹⁰² See U.S. PAT. & TRADEMARK OFF., THE 21ST CENTURY STRATEGIC PLAN 10 (2003).

¹⁰³ *Patents Pendancy Data September 2024*, U.S. PAT. & TRADEMARK OFF. (last visited Nov. 18, 2024), <https://www.uspto.gov/dashboard/patents/pendency.html> [<https://perma.cc/FR5U-ADUF>].

¹⁰⁴ Public disclosure is thought to be of greater benefit to society than trade secrets because it provides information to a wider variety of people who can learn from the invention and build on it. Patents only prevent manufacture, use, sale, offer for sale, and importation, not learning or discussion. Once the patent term expires, there are no restrictions on the public. “[T]he primary purpose of our patent laws is not the creation of private fortunes for the owners of patents, but is ‘to promote the progress of science and useful arts’” *Motion Picture Pats. Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 511 (1917); *Graham v. John Deere Co.*, 383 U.S. 1, 5 (1966); *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 427 (2007).

¹⁰⁵ See *supra* note 6 for limitations on the ability to commercialize an innovation without surrendering trade secrets.

¹⁰⁶ There is also an argument, that does not appear to have been raised in any case, that requiring disclosure before determining that a patent will be available would be an uncompensated taking, inconsistent with the Fifth Amendment. A response might be that the compensation is the opportunity to seek a patent rather than the patent itself.

¹⁰⁷ Pablo Arredondo, *GPT-4 Passes the Bar Exam: What That Means for Artificial Intelligence Tools in the Legal Profession*, STAN. SLS BLOGS (Apr. 19, 2023), <https://law.stanford.edu/2023/04/19/gpt-4-passes-the-bar-exam-what-that-means-for-artificial-intelligence-tools-in-the-legal-industry/> [<https://perma.cc/D7U4-WNMZ>];

Certified Public Accountant exam,¹⁰⁸ and passing academic exams in several disciplines.¹⁰⁹ The “large language models” that make such results possible are applications of neural networks trained on vast amounts of data.¹¹⁰

The USPTO attempted to use AI to assist its patent examiners in identifying relevant prior art but abandoned the project in 2020 after concluding that only computer scientists could use it profitably.¹¹¹ Yet four years is a long time at this point in the development of AI, and if AI could power an engine to make obviousness determinations with an accuracy rate comparable to that currently achieved by examiners,¹¹² it would be a significant step toward solving the basic problems posed above.

First, AI could solve the key challenge for examiners that is noted above: hindsight bias. The statute requires that applicants provide an explanation of how to make and use the innovation they seek to patent.¹¹³ Thus, the same person who must decide whether an innovation is obvious has already been given an explanation of exactly how the innovation is produced and used. A good explanation should make the innovation obvious,¹¹⁴ posing the risk of hindsight bias. The statute (and the internal guidance for examiners) requires

Karen Sloan, *Bar Exam Score Shows AI Can Keep Up With ‘Human Lawyers,’ Researchers Say*, REUTERS (Mar. 15, 2023), <https://www.reuters.com/technology/bar-exam-score-shows-ai-can-keep-up-with-human-lawyers-researchers-say-2023-03-15/> [https://perma.cc/TA44-DJPH].

¹⁰⁸ David Jolly, *ChatGPT4 Passes the CPA Exam, But It’s Not Yet an Accountant*, BLOOMBERG LAW (May 22, 2023), <https://news.bloomberglaw.com/artificial-intelligence/chatgpt4-passes-the-cpa-exam-but-its-not-yet-an-accountant> [https://perma.cc/4D55-VUYM].

¹⁰⁹ Samantha Murphy Kelly, *ChatGPT Passes Exams From Law and Business Schools*, CNN BUSINESS (Jan. 26, 2023), <https://www.cnn.com/2023/01/26/tech/chatgpt-passes-exams/index.html> [https://perma.cc/NVL2-L5K7].

¹¹⁰ For a detailed explanation of how neural networks, in general, and ChatGPT, in particular, work, see Stephen Wolfram, *What Is ChatGPT Doing . . . and Why Does It Work?*, STEPHEN WOLFRAM WRITINGS (February 14, 2023), [writings.stephenwolfram.com/2023/02/what-is-chatgpt-doing-and-why-does-it-work](https://www.stephenwolfram.com/2023/02/what-is-chatgpt-doing-and-why-does-it-work) [https://perma.cc/3GGV-ZYC6].

¹¹¹ Dani Kass, *AI Offers “Substantial” Pros at USPTO, But Not Without Risks*, LAW360 (Feb. 18, 2020), <https://www.law360.com/articles/1244928/ai-offers-substantial-pros-at-uspto-but-not-without-risks> [https://perma.cc/72HT-KKBX].

¹¹² One measure of “correctness” of decisions would be the proportion of judicial decisions reversing the determination of obviousness by the USPTO. It would certainly be an imperfect measure, as the great majority of decisions are never challenged in court. Should those decisions count as “correct”?

¹¹³ 35 U.S.C. § 112(a).

¹¹⁴ *Id.* The statute explicitly requires that the application teach a person of ordinary skill in the field how to make and use the inventions.

that the examiner, in determining obviousness, ignore what the applicant has taught in the application.¹¹⁵ That is clearly a difficult task for a human: as the Court recognized in *Bruton*, it is difficult for someone to fully ignore information they have just received.

In an AI system, hindsight bias could be reduced in one of two ways. The strongest protection against hindsight bias could be achieved by omitting the application from the data set supplied to the AI—something that cannot be done with a human examiner. If the patent application were not included in the data, the AI could not be guided by it and could not be biased to find obviousness based on what the applicant had provided. If that approach posed problems, an alternative approach would be to provide the application as part of the AI's data set, but instruct the AI not to use the application in reaching a conclusion as to obviousness. This is the same instruction given to examiners, but the advantage of the AI in this situation would be the absence of any machine bias and the absence of an understandable human difficulty in ignoring what one already knows.

An AI-based determination could also provide greater predictability—and at an earlier stage—than a determination made by an examiner. This could be achieved straightforwardly by the USPTO providing applicants access to the AI assessing an invention's obviousness. After all, the goal of the USPTO is not to defeat applicants, but to reach the correct result. The process could be made completely transparent without impairing the USPTO's objectives.¹¹⁶ In fact, there would be benefits to allowing applicants to test their application against the USPTO "obviousness engine" even before the application was filed.¹¹⁷

Although providing applicants access to the AI system might risk allowing applicants to "draft around" the rejection, that option already exists in the system. If an application is rejected, the applicant is permitted to respond

¹¹⁵ MPEP § 2141.01 (9th ed. Rev. 1, Jan. 2024).

¹¹⁶ The USPTO publishes its instructions to examiners on how to conduct examinations, including its legal positions and justifications, in MPEP (9th ed. Rev. 1, Jan. 2024), available online at <https://www.uspto.gov/web/offices/pac/mpep/index.html> [<https://perma.cc/6F4B-Z45X>].

¹¹⁷ One reason for the pendency problem is the backlog of applications the USPTO faces. If a potential applicant could determine ahead of time that its application would likely be rejected as obvious—and especially if the applicant found the reasoning convincing—they might withdraw their application. At scale, this would reduce the number of applications and therefore the USPTO workload.

by arguing that the rejection is improper or by amending the claims to avoid the rejection.¹¹⁸

Finally, AI could speed up the application process and thereby reduce the length of application pendency by providing assistance to the examiners. It could at least provide a first draft of a decision on one aspect of the application, the obviousness determination.

In order to be a suitable tool, however, the AI system would need to satisfy the following criteria:

1. It would need to follow predefined, objectively correct, rules.
2. It would need to be constrained to consider only legally permissible prior art.
3. Its conclusion would need to be testable on appeal—it would need to document its analysis.

In theory, it would seem that these criteria could be met by current AI models. The rules can be extracted from Supreme Court cases. The prior art can be determined in the same fashion as it currently is: during prosecution of a patent application the applicant is required to disclose any known prior art,¹¹⁹ and a patent examiner conducts an independent review of the application to determine prior art.¹²⁰ The AI tool could be given the appropriate cut-off date,¹²¹ instructed to consider the prior art produced by the applicant and the examiner, but to exclude any prior art dated after the effective date of the application. The application itself could be excluded from the data provided to the AI engine, or the AI engine could be instructed to exclude the patent application itself from the prior art and from its reasoning, thereby eliminating hindsight bias. Finally, the prompt given to the AI tool could include instructions to explain its reasoning.

To probe the feasibility of an AI-based solution, a representative experiment based on the *Graham v. John Deere* case¹²² was conducted using the ITUS model:¹²³ the author submitted the prior art as described by the courts,

¹¹⁸ See MPEP § 714 (9th ed. Rev. 1, Jan. 2024).

¹¹⁹ 37 C.F.R. § 1.56 (2023); MPEP § 2001 (9th ed. Rev. 1, Jan. 2024).

¹²⁰ For an overview of the patent application examination process, see Oppenheimer, *Rethinking Compact*, *supra* note 21.

¹²¹ Under current law, the appropriate cutoff date is known: the effective filing date of the patent application under consideration. See 35 U.S.C. §§ 102–03.

¹²² *Graham v. John Deere*, 383 U.S. 1 (1965).

¹²³ ITUS AI, available at [itus.ai \[https://perma.cc/PFD2-5ZF9\]](https://perma.cc/PFD2-5ZF9) (last visited Dec. 3, 2024).

the text of the patent application, and instructions to determine whether the invention is obvious.¹²⁴ The AI model responded that it “leaned to” a determination of obviousness.

B. Issues

The experiment indicates that use of AI to tackle one of the thorniest problems in patent practice is feasible. It also leaves a number of issues that would need to be resolved in order to create the level of public confidence in the system necessary for its acceptance. One reaction might be: “If you give it the same facts as the Court had, and give it the rule the Court applied, of course it will reach the same result that the Court reached.” But that is exactly what would make AI a valuable addition to the patenting process—reaching a predictable result that is consistent with the law.

It would, however, be reasonable to observe that the experiment, as designed, avoided a number of problems that would arise in general application: agreement on necessary training of the engine, including formulation of the applicable rules; agreement on the appropriate data and how to get permission to use it; agreement on the appropriate prompt; agreement on how to interpret the output of the inquiry; and confidentiality of the system, both as to data and results. These are certainly issues that apply generally to AI engines, but in the context of using an AI engine to make obviousness determinations in patent prosecution, most if not all of them should pose no technological problem other than finding the funding.

The problem of funding, of course, should not be dismissed. The system would need not only a set of rules but also a huge data set—at a minimum, every issued U.S. Patent, every published patent application and a wide

¹²⁴ The prompt, in part, read:

Obviousness is determined by applying a set of rules to a claim and prior art. Here are the rules you are to use for determining whether a claim is obvious: 1. the scope and content of the prior art are to be determined; 2. differences between the prior art and the claim are to be ascertained; 3. and the level of ordinary skill in the pertinent art resolved. 4. Against this background, the obviousness or nonobviousness of the subject matter is determined. 5. The claim is obvious if the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious to a person having ordinary skill in the art to which said subject matter pertains.[.] 6. if the claim simply arranges old elements with each performing the same function it had been known to perform and yields no more than one would expect from such an arrangement, the combination is obvious.

variety of scientific articles (many of which are copyrighted). The USPTO already has much of this, but there would still be licenses to be negotiated and the ongoing job of continuing to update the data. The USPTO, given its responsibility for the subject matter, seems the appropriate organization to take on this task: it has an annual budget for fiscal year 2023 of \$4.25 billion, anticipates a profit of \$100 million,¹²⁵ and already possesses a large internal database of prior art, including all issued U.S. Patents.¹²⁶ That does not mean that other organizations would be precluded. In the future, if the USPTO made its engine (including its databases) available to the public,¹²⁷ it would be logical for practitioners to use it—but some practitioners and innovators might choose to develop their own special-purpose tools as well.¹²⁸ It is certainly possible that some private tools might be better than the USPTO's at predicting judicial decisions, but that is not the objective of this proposal—the objective is to make the USPTO's decision-making more transparent and more predictable. There would need to be agreement on what rules the AI should follow. In the experiment described in section above, the Supreme Court rules were used. While that would seem to be the correct set of rules, others might be proposed.

Choice of the prior art data set could be thought of as a larger issue. AI has progressed to the point that it has attracted academic attention and

¹²⁵ *Fiscal Year 2023: The President's Budget and Congressional Justification*, U.S. PAT. & TRADEMARK OFF. (March 2022), <https://www.commerce.gov/sites/default/files/2022-03/FY2023-USPTO-Congressional-Budget-Submission.pdf> [<https://perma.cc/M3VJ-4HWT>].

¹²⁶ PATENT PUBLIC SEARCH, <https://www.uspto.gov/patents/search/patent-public-search> [<https://perma.cc/3FMG-7VNJ>] (last visited Nov. 19, 2024). It also has access to pending patent applications, but only those that had been published could be made publicly available. The USPTO has a process for deferring prosecution of a patent application if it is aware of a pending application that would make the application unpatentable, but it cannot act on that knowledge to reject the application until the potentially problematic application has been published or issued. MPEP § 2146.03(a) (9th ed. Rev. 1, Jan. 2024).

¹²⁷ As discussed at note 113, *supra*, there is no apparent reason not to make it publicly available, and in fact there would appear to be some benefits to doing so.

¹²⁸ In a 2023 article, Professor Freilich reported several examples of privately funded efforts to use machine-assisted tools for evaluation of patent positions. Janet Freilich, *Patents' New Saliency*, 109 VA. L. REV. 595, 611–28 (2023). Yet Professor Freilich also noted that “fully automated anticipation and obviousness analyses are still not possible.” *Id.* at 643.

discussion of its potential role in the legal world.¹²⁹ Early versions¹³⁰ have gained acceptance as tools that can automate fundamental tasks to provide raw materials for lawyers, but concerns have been raised over inserting machines into the actual legal decision-making process.¹³¹ One sensible suggestion has been to introduce AI in steps,¹³² for example by starting with employing it to create first drafts for review by attorneys or judges,¹³³ then expanding its role “as society becomes more accustomed to AI and more willing to trust machine-made decisions.”¹³⁴ In the view of the USPTO:

A proper search is the mainstay of the U.S. Patent system. It usually takes years of training to fully develop the skills required to ascertain a proper search strategy after analyzing an application. The examiner must be trained in the art of analyzing the scope of the claims and searching.¹³⁵

The proposal, though, is not to eliminate the examiner’s search, but only to produce the analysis based on that search. Current patent practice produces the list of prior art considered in a patent application from two sources: first, the applicant is required to disclose to the USPTO any relevant prior art known to the applicant, and, second, the examiner assigned to the application is instructed to carry out an independent search. Neither of these procedures should be changed. Because of the judicial fiction adopted in *In re Winslow*¹³⁶ that the hypothetical person of ordinary skill in the field

¹²⁹ See, e.g., Eugene Volokh, *Chief Justice Robots*, 68 DUKE L. J. 1137 (2019); Peter K. Yu, *Artificial Intelligence, the Law-Machine Interface, and Fair Use Automation*, 72 ALA. L. REV. 187 (2020); Ray Worthy Campbell, *Artificial Intelligence in the Courtroom: The Delivery of Justice in the Age of Machine Learning*, 18 COLO. TECH. J. 323 (2020).

¹³⁰ Examples of widely accepted machine-based tools are Westlaw and Lexis research tools and their predecessor, the Air Force’s “Project Lite” (in use since 1962). Richard C. Davis, *LET THERE BE LITE*, 8 JURIMETRICS 118 (1966). “By actual use of the LITE system, we have found that a computer can do a better job of library research than we humans.” *Id.* at 118.

¹³¹ Campbell catalogs several concerns: the need for large volumes of data and the conflict that poses with privacy, the possibility of bias in the data, the inability of AI to adapt to changed conditions. Campbell, *supra* note 129, at 328–329.

¹³² Yu, *supra* note 129, at 220–221.

¹³³ Volokh, *supra* note 129, at 1151.

¹³⁴ Yu, *supra* note 129, at 220.

¹³⁵ U.S. PAT. & TRADEMARK OFF., AUTOMATED FINANCIAL OR MANAGEMENT DATA PROCESSING METHODS (BUSINESS METHODS) 14, <https://www.uspto.gov/sites/default/files/web/menu/busmethp/whitepaper.pdf> [<https://perma.cc/TFN3-MPHX>].

¹³⁶ 365 F.2d 1017, 1021 (C.C.P.A. 1965). *In re Winslow* was decided by the Court of Customs and Patent Appeals, the predecessor of the United States Court of Appeals for the Federal Circuit. Its decisions are binding on the Federal Circuit. *South Corp. v. United States*, 690 F.2d 1368, 1369 (Fed. Cir. 1982).

is presumed to have complete knowledge of all relevant prior art, neither the applicant nor the examiner should have a veto over what the other proposes for consideration. Therefore, there should be no dispute as to the data set—anything proposed by either the applicant or the examiner would be included, subject to the instruction that anything subsequent to the effective filing date ought to be excluded, as required by the statute.

Another issue of general concern in the AI world is whether potential bias is introduced by choices made concerning the content of the training dataset. That concern is easily met here: in patent prosecution, both the USPTO and the applicant are allowed to introduce whatever data they want into the process.¹³⁷ The standard for admissible data is information that was “available to the public”¹³⁸ as of the date the application for patent was filed.¹³⁹

A point that might require resolution is the identity of the “person having ordinary skill in the art,” and two issues that flow from that. The first issue is what elements of the prior art data set that individual would use; the second issue is how sophisticated the analysis of the prior art could be in determining whether the patent application’s claims were obvious. Although using AI does not introduce a new issue, it may present situations in which there must be a preliminary step before utilizing AI. The statutory standard is that obviousness is measured by a hypothetical person of ordinary skill in the relevant field. The human examiner is not the hypothetical person of ordinary skill; that person is hypothetical. The examiner is tasked with trying to construct such a person and divine whether that person would deem a particular innovation obvious or not. Since the hypothetical person must be constructed, it is hard to see an argument that that construction—or at least the first draft of that construction—could not be carried out by a machine.

Under the current system, the obviousness determination made by the (human) patent examiner is prepared in writing and subject to review, first by the applicant for patent, then by an internal USPTO review board and ultimately by courts.¹⁴⁰ AI is capable of producing a written analysis, which should be subject to the same system of review.

A critical decision, and that preliminary step, concerns the prompt to give the AI machine. It could be as simple as just the following: a quotation from the most recent Supreme Court formulation of the legal standard,

¹³⁷ See, e.g., MPEP § 2129 (9th ed. Rev. 1, Jan. 2024).

¹³⁸ 35 U.S.C. § 102.

¹³⁹ Technically, the relevant date is the application’s “effective filing date” but that date can be no later than the date of the actual filing. 35 U.S.C. § 102.

¹⁴⁰ MPEP § 2141 (9th ed. Rev. 1, Jan. 2024).

the relevant prior art, the claimed invention, an instruction to exclude any prior art from after the patent application date, and a prompt to determine obviousness written in the style of a patent examiner and including reasons. Modifications would undoubtedly be suggested as the system was used, and decisions as to what modifications should be adopted could be made following the process required by the Administrative Procedure Act. However, this style of prompt would not only provide an answer—obvious or not obvious—to the ultimate question but would also provide a chain of reasoning. This reasoning could then be examined by an appellate body in case of a challenge to the prompt or the result.

One technological problem that would need to be overcome is the current ineffectiveness of AI in extracting information from images (which can be prior art). That did not matter in the actual experiment because the conclusion was that the invention was obvious; images could only provide further evidence supporting that conclusion or provide no further evidence, in which case the conclusion would still be that the innovation was obvious. Had the conclusion been that the invention was not obvious, then adding information based on the drawings in the prior art might have made a difference.¹⁴¹ Therefore, in practical application, allowances will need to be made—either through technological advance or through human intervention—to account for non-textual prior art. Even so, certain domains have recently witnessed significant progress in AI's ability to analyze images.¹⁴²

Finally, it may be objected that the AI engine is not a person. Yet, AI is well-suited to obviousness determinations in part because the patent process does not demand qualities inherent in a human. For example, one might object to an AI engine on the basis that it cannot testify. This objection has two aspects, one of which is easily answered: patent examiners do not ordinarily testify either. USPTO employees are prohibited from testifying without the approval of the agency's general counsel,¹⁴³ which may be granted "in extraordinary situations, when the interest of justice requires."¹⁴⁴ They may only

¹⁴¹ It might be that there were no written documents that would establish the obviousness of the claimed invention, but that access to an image would do so. On the other hand, if written documents established obviousness, there would be no need to look for images. Once obviousness is established, the invention is not patentable—there are not degrees of obviousness. *See* 35 U.S.C. § 103.

¹⁴² *See* Luís Pinto-Coelho, *How Artificial Intelligence Is Shaping Medical Imaging Technology: A Survey of Innovations and Applications*, 10 *BIOENGINEERING* 1435, 1435 (2023).

¹⁴³ *See* 37 C.F.R. § 104.22(b) (2024).

¹⁴⁴ *Id.* § 104.3.

testify to facts of which they have personal knowledge and may not provide expert testimony.¹⁴⁵

Another aspect is that the USPTO has taken the position, sustained so far in court,¹⁴⁶ that AI cannot be an inventor because only humans can invent. But that premise does not suggest that AI cannot be used for analysis. Even if one accepted the soundness of the USPTO's position with respect to invention, which is beyond the scope of this Article, AI is not being called on to invent.¹⁴⁷ The role of the examiner and applicant in prosecuting a patent application would not change. As in the current system, when a claim is rejected, the applicant would have the right to present arguments to attempt to change the decision. As with the current system, an examiner's final decision would still be appealable, first to the USPTO's internal review board and ultimately to the courts. The use of AI would therefore pose no more problem than allowing a police officer to use a radar gun to issue a ticket.

These are problems that could be overcome in the development of the details of the AI engine and decisions as to how it would be used and who would have access to it. Making the USPTO AI tool publicly available would seem to offer the greatest insight into the likelihood that a patent application would be granted, and therefore the greatest reduction in uncertainty for applicants. If the USPTO did not make its tool publicly available, it is likely that private companies would fill the gap. Even if the USPTO did make it available, there would be value in proprietary systems with features that differed from those at the USPTO. Competition among systems should lead to better systems—the theory behind the Constitution's intellectual property clause. However, even if none of this happened—if the USPTO developed a system but kept it confidential and no private systems were developed—that of itself should result in faster prosecution and the possibility of reaching decisions on patentability before the applicant needed to surrender trade secrets. The potential for reducing one of the major sources of uncertainty in patent prosecution, and the resulting encouragement of giving up trade secrets by applying for patents, should further the constitutional goal of promoting progress and make the effort worthwhile.

¹⁴⁵ *Id.* § 104.23(a)(1).

¹⁴⁶ *Thaler v. Vidal*, 43 F.4th 1207 (Fed. Cir. 2022).

¹⁴⁷ The point does, however, raise the interesting philosophical question (beyond the scope of this Article) of whether one that cannot invent can make judgements as to invention.

CONCLUSION

The decision whether to seek patent protection or maintain an innovation as a trade secret is a critical one, with implications for both innovators and the constitutional goal of promoting innovation. The requirement that an innovation be more than an “obvious” advance over the prior art is challenging, and the outcome of the determination is difficult to predict, notwithstanding two Supreme Court decisions discussing the standard. AI offers a promising solution, largely by reducing the risk of hindsight bias while speeding up the examination process. As with all AI implementations, there will be challenges, although the patent examination process itself contains several safeguards that mitigate these challenges. Following the standards suggested in this Article, the integration of AI into the patent examination process has the potential to provide a faster and more predictable outcome, to the benefit of patent applicants and the public in general.

